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DISCURSIVE CONSTRUCTIONS OF MMOG_s AND SOME IMPLICATIONS FOR POLICY AND REGULATION

Abstract

This paper examines how the production of interactive, co-creative software such as multiplayer online games differs from conventional media production, and how stakeholders employ different discursive constructions to understand those environments. The convergence of forms and functions, and the emergence of new structures that cross pre-existent regulatory and policy boundaries, mean that the discourses adopted to describe these environments and enact regulation and control need to be examined for the particular interests they represent. The paper canvasses six different discourses about online social software such as games, and briefly discusses the implications of each for areas such as intellectual property, classification, governance, data privacy, creative industries and global cross-jurisdictional infrastructures.

Introduction

Massively multiplayer online games (MMOGs) represent a new form of media that requires a fresh approach to policy and regulation. There are two major differences from offline ‘conventional’ media that have an impact across a range of policy areas. The first is that these games enable, and often require, user-created content as part of their makeup. This has implications not just for classification of content, but also for many other areas, from ownership of intellectual property to sustaining innovative business models. The second difference is that online interactive media enable social interaction between users, users and publishers, and users and business more generally. This raises new issues pertaining to governance, risk, consumer protection and privacy. This churn of issues represents the convergence of many spheres of policy and regulation. The challenge is to develop coherent policy that crosses formerly well-defined boundaries between consumption and production, and between social, cultural and economic policy. In this article, I use MMOGs as a specific example, but many of the issues raised pertain more broadly to social interactive internet environments such as social networking sites (SNSs), virtual worlds such as *Second Life* and content upload sites like Flickr and YouTube. Throughout this article, there are aspects of the discussion that are specific to MMOGs and aspects more widely applicable in an era where user-generated content (both social and material) has become a predominant part of internet business models.

Massively multiplayer online games are persistent, usually three-dimensional, virtual worlds in which users can engage with game content and other players, and other players' content, in a shared social environment. They are increasingly popular, with the most successful Western MMOG to date being *World of Warcraft*, which claims somewhere over 10 million active subscribers worldwide (Blizzard, 2008). Players spend many hours inside the virtual game environments, and often establish strong social ties with other players and experience much of their sense of community and social life within the game. MMOGs are very successful media applications in their ability to engage and retain users, and to be commercially viable.

MMOGs make a useful case study of online participatory media, their interactive and social capabilities and the implications for policy and regulation. Users are active participants who not only consume but produce content through their interaction. Whether that content is ephemeral and social, or more material and persistent, it means that the developers and publishers can no longer be considered the sole creators of content. Thus the model for production and consumption shifts from a traditional linear shape (see Figure 1) with easily accessed 'bottlenecks' to apply regulation, to a networked production model (see Figure 2) with a much more challenging shape for regulators and policy-makers. In the linear model, the text is a *finished product*, distributed by the publisher under particular conditions to the consumer. Derivative texts created by consumers do not alter the original text itself. Government has convenient 'bottlenecks' along the production line where they can implement regulation. Legal processes articulate well-established relationships, and embody institutional regimes such as classification, copyright and licensing. There is a temporal dimension: the production comes before the consumption; the text precedes the audience. The network production model represents the contributions to production of an MMOG by various stakeholders. The boundary of the 'text' is permeable, with some aspects occurring outside the domain of the game. Production is undertaken by a range of people, both amateur and professional, and occurs in a continuous fashion, meaning the 'text' is never finished. Content can be ephemeral (social) or persistent. The often-unruly practices of some of the producers in this model, and the altered temporal dimension, disrupt the institutional regimes of classification, intellectual property, licensing, and areas of media, cultural and social policy.

This new network production model raises issues for control of content, user behaviour and corporate behaviour not previously encountered by regulators of media. Engagement in the network is predicated on click-through contractual agreements, and this shift to private contractual relations between users and publishers is significant. Different MMOGs allow for more or less user-created content — in some, the predominant form is social or ephemeral, whereas in others mods, user interface mods and varying amounts of artwork or code can be added to the game, or be generated in the game, by users. Thus, in the discussion that follows, some categories of analysis have more bearing than others with reference to particular games or interactive environments.

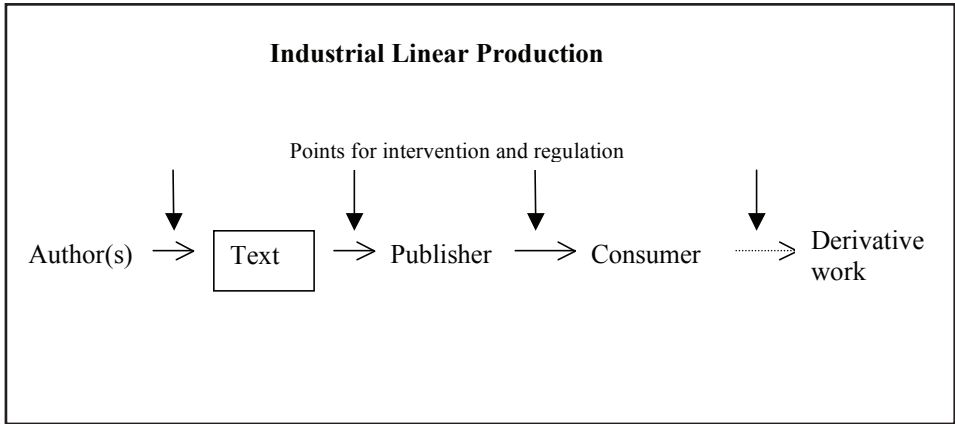


Figure 1: Linear production model

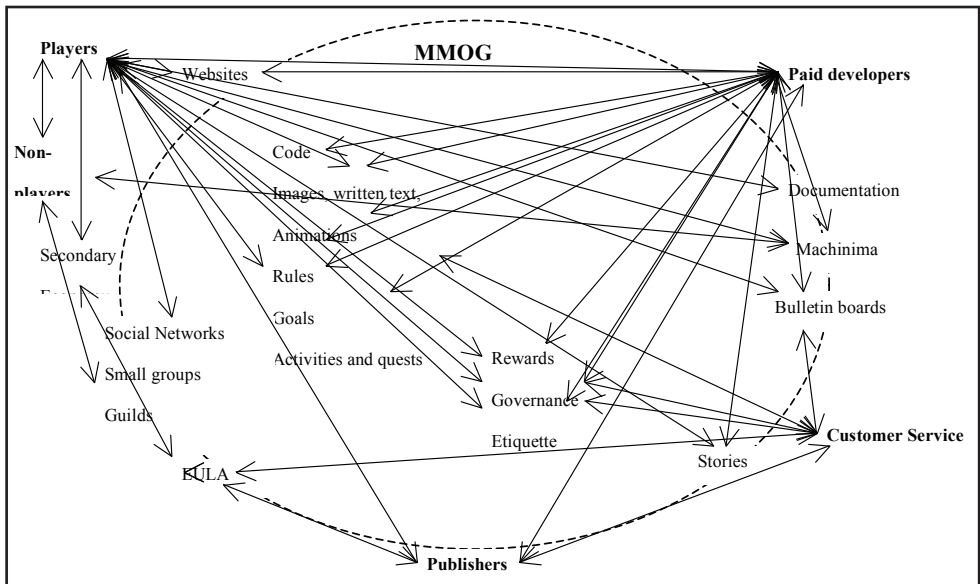


Figure 2: Networked production model

The framework I use to explore these regulation and policy issues is based on work done by Lastowka (2009), who identifies three broad approaches to MMOGs that have emerged in academic writing over the past five years. I will start with his initial three areas (adding some issues of my own to them) and add a further three that are also relevant. It is pertinent to identify the various discursive constructions of MMOGs available, as each tends to map on to a particular set of concerns associated with different policy silos.

The first discourse frames the MMOG as a text. In this, it adheres to a fairly traditional view of media and implies policy and regulation areas of intellectual property, classification and free speech. The second discourse frames the MMOG as a game. The policy implications are found in the idea of separate jurisdiction and, as Lastowka points out, sports law is a salient comparator. The third discourse frames MMOGs as communities. Lastowka uses a legal perspective to frame the concept of community. I would add that there are implications for social and cultural inclusion, access and participation.

The fourth discourse frames the MMOG as data and raises issues pertaining to privacy and data protection, surveillance and the aggregation of data. The fifth discourse understands MMOGs as creative industries using networked production — sites of digital content creation and innovative business models, implementing innovative ‘social network markets’ (Potts et al., 2008), and a source of both economic and social value to the broader economy. It implies a set of labour relations which are still very much in an emergent, unstable and ill-defined state. The final discourse considers MMOGs as global media, operating in transnational environments which present many cross-jurisdictional challenges for users, regulators and policy-makers.

MMOGs as texts

Viewing an online game as a piece of text is a problematic, if convenient, approach. Although many aspects of an online game are textual, as demonstrated in Figure 2, online games far exceed the boundaries of other textual media forms such as books, films or television programs (although some reality TV programs incorporate aspects of participatory media). Thus the code, the story world of the game and the rules and constraints/affordances of the game comprise a significant textual component, but there are many aspects of the game that exceed this description. It is important not to minimise the enormous amount of work that goes into the construction of an MMOG platform, but it must be understood as only part of the assemblage that makes up the MMOG. Many of the outcomes of player engagements are emergent, unpredictable and generative rather than closed and finished (Juil, 2002; Humphreys, 2005). Post-launch, it becomes an ongoing networked piece of creative endeavour as the users populate and play within it. As a textual form, it differs from the standard texts with which most media policy deals. Authorial control is dissipated and textual format varies from persistent to ephemeral. While the audiences of the more conventional ‘non-interactive’ texts have always been active interpreters and make their own meanings from such

texts, MMOGs require input from users that can change the text itself, often in unexpected ways. One user's experience and input may significantly alter another user's experience.

In the United States at least,¹ understanding an MMOG as a text puts it within the bounds of laws pertaining to copyright and free speech. As copyrighted material, it allows the designers/publishers to control both reproduction and distribution; as speech, to take haven in the first amendment laws which 'prohibit the state (and notably not private actors) from imposing restraints on speech activities' (Lastowka, 2009). Designers and publishers in particular have a vested interest in treating the MMOG as text in an effort to retain control of the environment. This elides the role of users in content creation and the mutable character of the text.

For regulators, treating the MMOG as a text has several other implications. First, classification regimes operate on the assumption that the text is a finished entity that can be assessed before release into circulation. The social nature of online games and the always unfinished nature of the 'text' mean that such classification will always be inadequate (see Brand and Finn, this issue). Different countries take different attitudes toward social or 'ephemeral' content. Australian legislators recently passed the *Communications Legislation Amendment (Content Services) Act 2007*, which sees an increased responsibility placed on content service providers to regulate ephemeral and live content. In the United Kingdom, a recent Ofcom report instead emphasised the role of users in managing their own risks through increased literacy (Marsden et al., 2006: 121).

Second, understanding the MMOG as a text rather than a social environment puts it into a category of 'product', which then falls within the regulatory ambit of intellectual property and market exchange (see Suzor, this issue). While some aspects of MMOGs are suited to this, those aspects that constitute MMOGs as a service make the categorisation of it as 'product' problematic (Herman et al., 2006). It reflects the shift seen in trade agreements where 'culture' is reconstituted as 'product'. This reframing of culture discursively constructs something like an MMOG as an object of exchange rather than as an environment of cultural and social engagements. Previous policy directed to cultural ends, such as the quarantining of cultural policy from trade agreement strictures, is gradually eroded (Frow, 2000). The ownership of IP in persistent content created by users is another big area of contestation.

MMOGs as games

To approach MMOGs as games implies a mobilisation of different policy directions. Games, according to conventional game theory, are not so much narratives as experiential environments with sets of rules and goals. The function of the rules is to delineate a separate game world where some everyday rules and regulations or codes are suspended and a different set is implemented within the game boundaries. By consensus, some everyday rules don't apply. Huizinga (1950) referred to this as the 'magic circle' of the game. This approach implies a separate jurisdiction. Thus what happens within a game world should not be subject to the laws that

govern the world outside of the game world. Much as some would like to institute the magic circle principle (see, for instance, Bartle, 2004), in fact there is often a crossover between the 'real' world and the game world (see Figure 2) and it is difficult to draw a hard and fast boundary between them (Farley, 2000).

In Lastowka's (2009) discussion of this approach, he draws an analogy with sport and the ways in which the law deals with sports jurisdiction. Thus some laws apply within sports regardless of their separate rule structure, while some are less applicable. Players consent to a different set of rules in taking to the field and this is taken into account when real-world law adjudicates in conflicts from the sporting arena. But the sports field is never an entirely separate jurisdiction. The magic circle is a fiction that is convenient for the purpose of implementing a game but should be understood as only a partial description of the reality of gaming practice.

Of key interest here, too, is the relationship of real-world money to game money. Virtual worlds such as *Second Life* have in-game currency with a direct exchange rate for US dollars. As such, in-world monetary gains which are then converted to real-world cash are subject to taxation law, as are other internet monetary transactions. The area of 'illegal' secondary economies associated with games like *World of Warcraft*, where the trading of game items and game money is banned by the publishers but where there is nonetheless a thriving market of close to a billion US dollars per annum (Salzer, 2004), is a challenge for regulators.

The MMOG-as-game discourse also introduces a rationale for the implementation of private law and private policing. This is taking industry self-regulation to its logical end. In instituting separate rules, games and sports also institute private referees. MMOG publishers regulate the communities inside the games and sometimes attempt to regulate those communities in their outside-the-game environments such as guild websites, fan fiction and machinima sites (Taylor, 2002). The publisher's private referees are not subject to the strictures of accountability that keep public 'referees' from the excesses of power (Joh, 2004; Kozlovski, 2005). Contractual law is the key legal mechanism within this scenario, as End User Licence Agreements (EULAs) organise the rights and obligations within the game world and in relation to the publisher (see Clapperton, this issue). EULAs usually establish a diminished set of rights for game citizens (Jankowich, 2006), in which the publisher gains almost total control over the game space and there are very few avenues of redress for players who feel they have been poorly or unjustly treated.

Even though publishers and some players may argue for separate jurisdiction, ultimately the relationship between the players and publishers is governed by a contractual mechanism of state-backed regulation. Where conflict arises between player and publisher, it is to the state-backed legal system that each turns for adjudication and enforcement of rights or contracts. Again, the 'magic circle' is shown to be partial and undermined by the actual practices of stakeholders seeking redress through external sources.

MMOGs as communities

The intensely social character of MMOGs means that they must be considered, at least in part, as platforms that service a multiplicity of communities. While there are shaping constraints and affordances authored into the game worlds by developers and designers via rules and graphics and goals (see Drennan, this issue), the communities within games are neither peripheral to their functioning, nor necessarily short term. Many players belong to guilds, within which they socialise for years on end. The relationships they create and maintain within the game are significant — both to them and economically to the publisher. The communities are not uniform in makeup and vary according to game genre and history.

Lastowka (2009) mounts a legal argument about the lack of status of online communities as legal entities, saying they are not formally constituted as such (in the way that incorporated associations, unions or nations are). But beyond the legal interpretation of community lie many other issues that pertain to a discursive understanding of MMOGs as communities.

As populations become more connected to online environments and participation escalates, these environments can increasingly be understood as places where people derive and build social and cultural capital. Much as television or film have served a function of providing common cultural ground for populations and have become part of how we develop identities (associating ourselves with particular shows over others, demonstrating particular taste affinities, developing shared understandings, and so on), so too online environments may become part of a mechanism of social and cultural inclusion. Building social and cultural capital through participation in particular MMOGs or social networking sites such as MySpace or Facebook implies a number of access issues.

Cultural policy has attempted in the past to engineer a particular form of public sphere where material is accessible to widespread populations through mass media. What is cultural policy to be in an era of mass private spaces? Governments have been willing to intervene in media content production, legislating for local content quotas, using anti-siphoning policies to ensure particular culturally important events are widely accessible, and so on. Will new cultural policy be aimed at generating and facilitating access to local platforms and games development where users can contribute locally relevant content?

In terms of social policy, if the barrier of access to infrastructure is removed, and broadband is available universally in Australia, there is little problem with access to existing commercial MMOGs and social networking sites. But this social participation and cultural capital may be built within proprietary spaces, and thus become subject to the rules as laid out by EULAs and Terms of Service contracts. As these spaces take on the characteristics of quasi-publics — perhaps similar to shopping malls and gated communities — legal or policy interventions which limit the powers of corporate owners may be appropriate. MMOG EULAs and Terms of Service regularly include terms which allow the publisher to exclude players for ‘any or no reason’, to change the terms of service without notice or notification and various other terms which set the balance firmly in favour of

the publisher (Humphreys, 2005). Although the imperative for a game world to establish a set of altered rules to operate under should always be borne in mind, the terms of EULAs often exceed what is necessary for the smooth functioning of the game world.

Is the cost of participation to be that people must accede to terms and conditions they regard as objectionable? Is there a role for the state here to curb the worst excesses of contractual agreements on behalf of their citizens? In Australia, there exist at both national and state levels laws against unfair contracts. While there is a tendency for courts to look mainly at procedural unfairness rather than at the substantive aspects of contracts, this is less so when standard-form contracts are used in which the user has no option to negotiate terms, and in which there is an uneven level of bargaining power such that the user is disadvantaged by the contract (Clapperton and Corones, 2007). This is the case with MMOGs. While there are a wide range of existing laws which have the potential to apply, issues of jurisdiction and enforcement can make their application problematic, and thus far we have seen little inclination on the part of governments to intervene.

MMOGs as data

Data mining is performed by the publishers of MMOGs as a key resource for their economic survival. Viewing the MMOGs as data implies a policy or regulatory response from a privacy perspective. Profiling of players is in some ways a necessary part of understanding and governing the population within a game world (Humphreys, 2008). All governance strategies are to some extent dependent on knowing the population that is to be governed (Rose, 1999; Foucault, 1994; Dean, 1999). Thus, as community managers, publishers need to gather information to understand the communities inside their platforms. Profiling is also used as a key tool in marketing strategies (see Andrejevic, this issue). The access in MMOGs and social networking sites to unprecedented levels of information about the behaviour of individuals, the ability to target them and the ability to aggregate data across platforms is new and warrants both attention and a consideration of the privacy issues involved. There may be advantages to having the highly targeted marketing that results from data mining, but the aggregation of personal information across applications, and the decontextualisation of that data, represent a loss of control over personal data and are a diminishment of people's right to privacy. One of Facebook's recent experiments introduced a 'shopping feed' called *Beacon* to the site, which made public the purchases users had made elsewhere in online shopping expeditions. It had to be halted after user outcry at the disruption to their privacy. But Facebook's ability to do so was a demonstration of the potentials of aggregated data.

Some of the MMOG publishers use spyware in their games. *World of Warcraft*, for instance, installs a program called *Warden* which accesses data from a player's CPU and web browser history. Players accede to having the spyware installed on their computers when they accede to the EULA. Publishers have access to information not only from within the game world that they own and run, but also

to all the other programs a user is running and the websites that the user visits. These applications fall well outside any ‘magic circle’ that might be drawn around the game environment. The publisher’s rationale for using spyware is to monitor trading at ‘illegal’ sites that sell game items in the secondary economy and to monitor player use of third-party software that gives them unfair advantages in the game. However, the access this gives publishers to data for profiling should not be under-estimated. It should also be noted that many players are unaware that the spyware is installed as part of the EULA agreement — many do not read these dense, long and incomprehensible documents (see Suzor, this issue) before playing.

The US law in particular has been concerned, historically, to constrain and limit the powers of the state to intervene in the lives of individuals and that legal fiction, the ‘corporation as individual’. It may be time to consider whether the shift of so many functions of control and government to the private, corporate sphere warrants a closer look at the transparency of processes and the accountability of those wielding power in the private sphere.

MMOGs as creative industries and production networks

Understanding MMOGs, and computer games and social networking sites more generally, as part of the creative industries that can drive much of the innovation and growth in global economies (Cunningham, 2006) points to their role in creating more widespread advantage to economies through multiplier effects. The computer games industry has driven many aspects of innovation in the digital economy. In a trickle-down effect, these innovations are passed on to other, more prosaic and yet essential areas of the economy (Kline et al., 2003: 173). This applies not only to the technological advances but also to the innovations in social network markets generated through games. Regulatory environments developed around games need to be cognisant of this value to the broader economy. Concern about content should be tempered with the understanding that games have innovative value. Thus far, federal government policy initiatives to support the digital content industry have been weak and local games industry support has mostly been state based. Failing to encourage what has become a major source of entertainment and culture for many people in order to protect or focus on existent industries will result in the stifling of an industry whose innovations will have many flow-on effects for the broader economy as well as cultural dividends.

The role of the players as innovators and risk-takers is no small part of the structure of the industry, and should not be overlooked (see Banks, this issue). As the global game publishing industry consolidates and the cost of development rises, R&D and testing are increasingly outsourced to the modding communities that spring up around games (Postigo, 2008). Although modding is less a feature of MMOGs such as *EverQuest* and *World of Warcraft*, it is a key aspect of virtual worlds such as *Second Life* and ‘massively single player games’ such as the recently released *Spore*, which relies on user-generated content being shared between players who nonetheless remain in single-player environments. The

immediate regulatory implications for labour relations are difficult to assess, but the new production processes will give rise to contentious issues for regulators in the future between professionals and amateurs. This will also play out as ownership of co-created content becomes more important.

Player-created content is also, in part, social; it should therefore be understood as a key area from which financial gains are made by the publisher. It should not be ignored when considering where value is generated in an online environment. Publishers rely on the strength of social networks for player retention. This is part of a much broader phenomenon found in the 'new economy'. Immaterial labour (Hardt and Negri, 2000), along with intellectual, creative and affective 'work', is now entwined with global economics in new and intensified ways. Thus, in a space like an MMOG where the value produced is derived from both financial and social economies, a new set of 'labour' relations is emerging. Labour relations in an industrial model of production are subject to a reasonably settled regulatory environment, in terms of rights and obligations and some basic minimum standards. Production economies based in social exchange behave very differently with different expectations embodied through different productive behaviours and rules (Benkler, 2006). Thus, in a social production economy, mechanisms of gift exchange, social status and social obligation come into play, along with the intrinsic rewards of creativity or the pleasures of contributing to community. This mixed economy of 'social network markets' is an emergent form (Banks and Humphreys, 2008). What obligations exist for various stakeholders?

As people's social identity, community and 'productive affect' are subject to the private laws of EULAs (Crawford, 2004), some kinds of obligations might reasonably be expected from the publisher in relation to its labouring constituents. Some minimum standards might be set in terms of accountability or transparency in decisions that relate to access — standards based in the social rather than financial economy. The End User Licence Agreement contract might be regarded as a new 'labour' contract, the mechanism through which some minimum 'employment' standards are set, either by state or industry self-regulation or co-regulation. If industry wishes to make a profit from social relationships and networks, the immaterial labour within those networks should not be regarded as a free resource. Rather, some duty of care towards it could be mandated.

Although players may not regard their participation as labour, the point of framing it in such a way is to bring to the surface the ways in which economic relations of production are entwined with social networks. This emergent structure of production is still very fluid, and practices within it are unsettled and diverse. Yet it merits some attention to ensure the rights of consumer/producers. It is also clear this issue pertains more widely to other socially interactive internet environments such as Facebook and YouTube, which also rely on user-generated content and social networks generated or conducted through their platforms. It is not yet clear what kind of policy responses will prove the most urgent in these settings, or how responses can be managed in such complex, cross-jurisdictional environments.

MMOGs as global media

MMOGs raise many issues about how to formulate policy in an environment that spans multiple jurisdictions. Many EULAs nominate a jurisdiction in which any disputes will be heard. Although the convenience for the publisher of seeking dispute resolution in one, consistent jurisdiction is clear, the disadvantages to the global consumer are also obvious (Scott, 2004). However, there have recently been challenges to the terms of EULAs with respect to jurisdiction for dispute resolution and arbitration. A US court found that the cost to the gamer (or in this case the user of *Second Life*) to pursue an action in the Californian courts as demanded by the Terms of Service contract, or to submit to arbitration under Californian law, would be prohibitive and place him at a disadvantage (*Bragg v Linden*, 2007). This was regarded as a procedural unfairness in the contract, and the court was thus prepared to rule against the term of the contract.

Aside from differing legal frameworks, there are many differing cultural standards that are also at issue in cross-jurisdictional social software. Some countries are prepared to tolerate high levels of violence in their media, but are very intolerant of sexual references and vice versa. National legislatures may codify a set of regulations, but their implementation is difficult, particularly when they apply only to content and services hosted within their own jurisdictions. A pragmatic approach might be to insist on something like ‘sharding’ for games — where different servers have different classifications. The same game can be experienced at different age levels or for different countries by ensuring players are directed to age- or culture-appropriate shards (servers), each of which is held to different standards. This could take away one of the most stimulating aspects of online play and interaction — the capacity to interact with people all over the world.

Further, if an onerous system of regulation is introduced, in a global economy transnational media corporations may choose to exit from particular national locations and markets rather than shoulder the burden of regulation to which they are not subject elsewhere. Industry exit power is the issue here. This is particularly an issue for small countries like Australia, which represent small markets for the publishers. Offshoring services is an option taken up by content providers wishing to avoid particular regulatory regimes.

Conclusion

The foregoing race through some key issues arising from participatory media environments such as MMOGs has elided the details of many — and doubtless omitted other issues altogether. My purpose has been to draw attention to where some of the shifts in structure have occurred with the advent of social, interactive platforms and user-generated content (which are exemplified by MMOGs) and to gesture toward the range of policy and regulation issues unsettled by the changes. The networked production of media such as MMOGs highlights the need to approach such media not merely as texts, but more as dynamic sets

of relations and processes. As much service as product, and involving amateur and professional labour and management of community as much as intellectual property, they imply the need for coordinating and regulating institutions that are capable of flexibility and responsiveness to change. The sedimented fixity of current institutions — copyright, classification, industrial labour relations, the national boundaries of policy-makers — causes them to struggle in the face of these challenges. Moves to force this new genre of participatory media into the strictures of old conventions seem unwise, yet the power and influence wielded by established media interests mean policy and regulation continue for the most part to act to preserve the old rather than facilitate the new. The interests of users, now participators and producers, need to be thought about alongside those of corporate publishers, not only in terms of their access to cultural and social capital, but in terms of what their rights, risks and obligations might reasonably be in such a system. While the market may settle some issues, interventions may be needed to prevent excesses of power, particularly in the new contractual environments.

Note

- 1 Even though national laws pertaining to free speech and cultural/political vary, in such globalised applications US law often matters. Most MMOGs to date operate out of the United States, where the discourse of free speech dominates and operates to keep government regulation to a minimum.

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