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PRODUCTIVE USERS, INTELLECTUAL PROPERTY AND GOVERNANCE: THE CHALLENGES OF COMPUTER GAMES

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ABSTRACT

Computer games present challenges to intellectual property regimes that will become more widespread as interactive media, with their active, creative and productive users become more common. This paper explores how production has moved from linear to networked and recursive models, involving users as producers in a variety of ways. It suggests that intellectual property and copyright law are based on linear models unsuited to these new forms. The paper further explores the definition of content in the context of social software such as Massively Multi-user Online Games and raises issues pertaining to community governance by publishers, who have moved beyond their traditional role as managers of property rights and into the role of managers of communities.

INTRODUCTION

An enormous amount of discussion, debate and legal action has been generated by the advent of digital distribution networks. The intellectual property in media products has been a key focus, as the management of rights and distribution has become increasingly complex in the digital environment. Copying is a source of anxiety, and, in the efforts to lock down intellectual property, has led to the absurdity of criminalising the behaviour of twelve year olds accessing their favourite songs and

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sharing them with their friends. The re-use or 'remix' of digital content¹ has produced further anxiety and generated much discussion about the 'enclosure of the commons'.²

As a related development of these arguments, this article pursues three main themes. First, that in some of the most successful interactive online environments, much of the content is produced by the 'consumer', rather than the author/developer/publisher, and this raises interesting questions for managing intellectual property and licencing rights. Second, much of what is produced in these environments is collaborative, social and ongoing, and as such presents challenges for a copyright system which is modelled on the idea of a singular author and a 'fixed expression of an idea' or finished text. Third, that some of the most successful digital media products, and in this article Massively Multi-user Online Games (MMOGs) are used as an example, are best thought of as both a media product entailing intellectual property and licencing arrangements, and a service, involving contractual arrangements pertaining to governance and entailing community management. These hybrid products require a new perspective.

Intellectual property is not, on its own, adequate to the task of understanding and managing such media products. Indeed much of what is produced in these applications is difficult to conceptualise as property at all. Any attempt to understand interactive social environments solely in terms of intellectual property serves to erase the importance of the relational networks generated within and around such products,

¹ Lawrence Lessig, *Free culture: how big media uses technology and the law to lock down culture and control creativity*. (2004)

² Lawrence Lessig, *The future of ideas: the fate of the commons in a connected world* (2001), Yochai Benkler, 'The Political Economy of Commons' (2003) IV (3) *Upgrade*, Yochai Benkler, 'Freedom of the commons: Towards a political economy of information.' (2003) 52 *Duke Law Journal* 1245, James Boyle, 'Fencing off Ideas: Enclosure & The Disappearance of the Public Domain' (2002) (Spring) *Daedalus* 13, John Frow, 'Public Domain and the New World Order in Knowledge' (2000) 10 (2) *Social Semiotics* 173, Rosemary J Coombe, 'Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research' in Austin Sarat (ed), *Companion Guide to Law and Society* (2003)

and the issues that arise around the proper governance and management of such communities. As Lastowka and Hunter point out:

[t]hough virtual worlds may be games now, they are rapidly becoming as significant as real-world places where people interact, shop, sell, and work. As society and law begin to develop within virtual worlds, we need to have a better understanding of the interaction of the laws of the virtual worlds with the law of this world.³

COMPUTER GAMES

It is important to think beyond the stereotypes of computer games as mindless, addictive shoot-em-ups played by adolescent boys with no social skills who eventually emerge from their isolated bedrooms to carry out high school massacres. Computer games are more usefully thought of as successful interactive applications, with an annual industry turnover bigger than Hollywood box office⁴ and a broad demographic appeal (average age of players is 29 years old, up to 43% of players are female⁵). There are many genres of computer games – the first person shooter comprises only one segment of a much broader market (*Barbie Fashion Designer* outsold the first person shooter game *Quake*⁶) – and various platforms for delivery, as well as single-player and multi-player modalities. This paper will not deal with the proprietary platforms such as Playstation, xBox and Nintendo, although as these platforms begin to involve more powerful processors and connect to the Internet for multi-user games, they will become interesting sites for the negotiation of rights and community management as well. This paper focuses on computer (rather than console) games and in the latter sections, on Massively Multi-user Online Games (MMOGs).

³ Gregory Lastowka and Dan Hunter 'The laws of virtual worlds' *California Law Review* 92 (2004) 1.

⁴ James Newman, *Videogames* (2004) 3.

⁵ Jo Bryce and Jason Rutter, 'Killing like a girl: gendered gaming and girl gamers' visibility' (Paper presented at the Computer Games and Digital Cultures, Tampere Finland, 6-8 June 2002) 244.

⁶ Henry Jenkins, 'Games, the new lively art' in John Hartley (ed), *Creative Industries* (2003) 312.

Single player games often implement a reasonably straight forward business model where the point of sale is the only contact between publisher and consumer. The game is a finished product and issues around digital rights management are similar to many other media products, such as music files or movies. There are, however, more innovative business models that have arisen out of the 'hardcore' gamers' culture of hacking and modifying games. These models move into to the realm of *distributed production* networks which incorporate the 'consumers' as co-creators of content. As explored by Herz, Pearce and Banks,⁷ some games developers and publishers have sought to harness the activities of player communities who want to create their own material for their favourite games. Thus some computer games are released with tools for content creation by the players, as will be discussed in the section on 'consumers as producers' below.

MMOGs implement yet another business model – one that is subscription based and requires ongoing contact and relationship building between the publisher and the player base. Initial contact is through the point of sale, but a monthly subscription is then paid by the player to retain access to the virtual world in which the game is played. These virtual worlds are three dimensional, persistent,⁸ graphical spaces where players are represented by avatars. They range in themes, styles, goals and rules, but importantly their success relies on the development of strong community ties inside the game. In a single player game, the player will play until they have mastered the game and reached the end, then move on to the next game. In a subscription based MMOG, it is important to keep players playing well beyond the point where they have mastered the game. There is no end to these games, and content

⁷ J.C Herz, 'Harnessing the Hive: How online games drive networked innovation' (2002) 20 (9) *Release 1.0 1*, Celia Pearce, 'Emergent authorship: the next interactive revolution' (2002) 26 (1) *Computers and graphics* 21-29, John Banks, 'Gamers as co-creators: enlisting the virtual audience - a report from the net face' in Mark Balnaves, Tom O'Regan and Jason Sternberg (eds), *Mobilising the Audience* (2002) 188, John Banks, 'Negotiating Participatory Culture in the New Media Environment: Auran and the Trainz Online Community - An (Im)possible Relation' (Paper presented at the Digital Arts Conference, Melbourne, 20-23 May 2003).

⁸ Persistent worlds run whether the player is logged in or not, rather than being 'instanced' games that are only generated when players choose to play a match together. Thus action is taking place even when a particular player is not in the world.

is developed and added on an ongoing basis. The appeal to players (and the element relied on by publishers who want revenue from continuing subscriptions) is that the games are social. Strong communities form inside these games, and much of the engagement for players is generated by the other players inside the game. Thus players may subscribe to games for four or five years if they have a strong enough in-game community. Often they will play for 20 or more hours a week.⁹ In this model, the commercial success of the game can be directly linked to the social relationships of the players, thus representing a newly intensified connection between peoples' personal lives and relationships and economic outcomes for publishers.

CONSUMERS AS PRODUCERS

Games are, by their very nature, their very structure, interactive. They require meaningful input from the player in order to progress. This sets them apart from other media that take a more conventional form – music, books or film, for instance. More conventional media *can* be taken up and reused or remixed, but they don't *require* of their audiences any meaningful input in the way that games do. This is not to suggest audiences of more conventional media are passive – they are always active interpreters of the texts they encounter.¹⁰ But computer games imply an active audience of a different order – an audience that wants to *do* things with the product. Different games require different levels of input – from those where players are unable to influence or change the trajectories through the game, to those where players create a variety of pathways, activities and outcomes for themselves and sometimes for others as well.

Computer games also have a long history of generating fan communities where the more 'hardcore' players have developed new objects to be imported into the game, new 'skins' that make characters or objects in the game look different, new AI

⁹ Stephen Kline and Avery Arlidge, *Online Gaming as emergent social media: a survey.*, Media Analysis Laboratory, Simon Fraser University (2002) <<http://www.sfu.ca/media-lab/onlinegaming/>> at 10 November 2002.

¹⁰ See for instance M. Balnaves, T. O'Regan & J. Sternberg (eds.), (2002) *Mobilising the Audience*. Brisbane: UQ Press for a discussion of active media reception.

(artificial intelligence) characters to play against inside a game, and even new games using game engines from existing games.¹¹ These players are known as ‘modders’ (for the modifications they make). Of course some groups have also been known to reverse engineer code in order to cheat and also to illegally copy games – their creativity is not always aligned with the law.

There are a number of attitudes developers and publishers can take toward the creative activities of players. At one extreme, they can seek to shut down the mod communities and pursue the modders using legal remedies. However there are more nuanced responses that have emerged which seek to harness the innovative and creative capacities of mod communities in a variety of ways. As discussed by this author elsewhere,¹² developers and publishers¹³ have implemented systems where a game has been released with tools for creating content for the game. This has by now become a reasonably common practice, with *The Sims* being the most well known of the successful games using this model. According to Herz,¹⁴ 90% of the content for this very popular and successful game is created by the users. However banal one might consider a game focused on suburban life and the accumulation of domestic goods, the game tapped into a rich vein with the players. Hundreds of websites sprang up, trading items players had made for importing into the game.

Similarly Banks¹⁵ has described how the Brisbane games developer Auran developed a train simulation game which is now mostly reliant on its player-creators for content. Teams of player-creators all over the world develop models of their favourite local trains and rolling stock, as well as track layouts that simulate their local railway systems. Auran facilitates the creation of this content and provides the mechanisms

¹¹ The hugely successful strategy game *CounterStrike* was made by a group of fans using the game engine from *HalfLife*. *CounterStrike* went on to win industry and player awards.

¹² Sal Humphreys, Brian Fitzgerald, John Banks, Nic Suzor, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' (2005) (114) *Media International Australia* 16.

¹³ Developers are sometimes the publishers, and sometimes owned by publishing companies, and sometimes separate from publishers, depending on the company.

¹⁴ J.C Herz, above n 7, 90.

¹⁵ Banks, above n 7.

for trading such items, and for uploading them into the game. They provide support for the player-creator teams – through offering technical advice and community facilitation. Auran and EA (Electronic Arts, publishers of *The Sims*) have not released their source code for the platform. So they retain this code as their intellectual property. What the player-creators are generally creating is new artwork for the games, not new code.

The difference between EA and Auran is that EA do not allow players to commercialise their creations. EA and many other publishers or developers (for instance Infogrames, publishers of *NeverWinter Nights*, another game with a very active content creation community) allow the creation of content by players, but disallow commercialisation of that content. Sometimes publishers claim ‘irrevocable royalty free rights to distribute’ player created content for their own commercial benefit.¹⁶ Auran and more recently Linden Labs,¹⁷ the publishers of the multi-user online world *Second Life*, occupy a rare position in their decision to allow players or users to own and commercialise (if they should choose to) the content they create. These are innovative business models and represent an interesting shift in thinking. Rather than seeing all the value in their media product as being bound up in the intellectual property they have developed in the game, they know that at least some, and possibly quite a large proportion, of the value in their product lies in the services they provide to the players and player-creators. In a context where there is so much anxiety about retaining and protecting the rights to intellectual property, the attitude that the value may lie elsewhere in the product requires a major reorientation of thinking and priorities.¹⁸ It is a shift that may be seen to encourage innovation rather than stifle it – an accusation often levelled at the strengthening of intellectual property laws.

¹⁶ Humphreys *et al* above n 11, 24.

¹⁷ Cory Ondrejka, ‘Escaping the Gilded Cage: User Created Content and Building the Metaverse’ (2004) 49 *New York Law School Law Review* 81.

¹⁸ See for instance Jeremy Rifkin, *The Age of Access* (2000) for an extended discussion on the shift of value from ownership to access.

There are some decided advantages, of course, in harnessing the innovative and creative capacities of users into the product. The player base is like a large pool of creative talent – an R&D lab – which can be used to improve the profitability and robustness of the media product. In some senses it is a model which utilises ‘free labour’ to develop the product.¹⁹ The ethics of ownership and rights become complicated in this environment. Some players create new content for the sheer love of it. Often these players are happy to share their work with others for no cost, but would like attribution for their efforts. Others wish to capitalise on their work and distribute it as ‘payware’ rather than ‘shareware’. Others see content development as a pathway into the industry and professional work. Negotiating the rights for player created content, given this variety of imperatives can be an awkward process. The creative commons licencing system, with its different kinds of licences, suggests itself as a possible solution for the player-creators struggling to negotiate the rights for their works.

Creative commons licencing is only a solution for those games where players are allowed to claim their creations as their own. For many others the Terms of Service or the End User Licence Agreement of the game they create content for may preclude them from exercising any rights at all in relation to their content.

COLLABORATIVE SOCIAL PRODUCTS AND THE CONCEPT OF PROPERTY

The games discussed in the previous section – Auran’s *Trainz* and EA’s *The Sims* are both single player games. The communities of content creators that grew up around the games existed outside the games rather than inside. MMOGs are multi-player games that create communities inside the games as well as outside. Players log into a

¹⁹ Discussion on the issue of labour in the digital network, and the use of volunteer and free labour of the users can be found in Tiziana Terranova, 'Free labor: producing culture for the digital economy' (2000) 18 (2) *Social Text* 33, Andrew Ross, 'The mental labor problem' (2000) 18 (2) *Social Text* 1, Hector Postigo, 'Emerging Sources of Labor on the Internet: The Case of America Online Volunteers' (2003)48 *International Review of Social History Special Supplement11: Labor History of the Information Revolution* 205.

shared virtual world environment and interact within it, rather than on web pages and forums outside the game, as is the case with single player games.

Many of the massively multi-player online games don't have the facility that allows players to upload their own objects and artwork into the game. There are some straightforward practical reasons for this. In a persistent dynamic world, which may host up to 10 000 players on a single server, and run 50 servers or more, ensuring the smooth technical running of a server becomes much more difficult if new, player created objects need to be constantly integrated into the world, not only for that player but for every other player on that server as well. *Second Life*, which is a persistent world (but not a game – it is an environment but lacks the goals and built in rewards and rules of a game), allows users to create their own objects in the world. This is the exception rather than the rule for persistent virtual worlds. *Second Life Terms of Service* are such that the players own the intellectual property in their creations, and Linden Labs, the publishers, have implemented Creative Commons licencing for their users in an effort to enable smooth interchange of objects between players. Linden Labs are very clear that they see the main source of innovation and creativity in their world as emanating from the users.²⁰

Whether players and users are given the right to own the in-game objects, and whether the objects are created by the players or the developers, a secondary market has sprung up on the internet in which these items are traded for real money.²¹ Their status as property is not really under dispute any longer. Hunter and Lastowka assert that '...no obvious reason exists prohibiting the recognition of legal interests in

²⁰ Cory Ondrejka, above n 15.

²¹ For extended discussion of secondary economies arising from online games see Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, (2001) California State University; CESifo (Center for Economic Studies and Ifo Institute for Economic Research, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828> at 12 May 2002, and also a description by the cyberculture commentator Julian Dibbell of a year spent earning a living by becoming a day trader in games items, <http://www.juliandibbell.com/playmoney/2004_04_01_playmoney_archive.html#108209506356337766> at 14 December 2004.

intangible virtual properties.’²² The issue then becomes what kind of access or exclusions are agreed to in relation to those objects by users/players and developers/publishers through Terms of Service or End User Licence Agreements. One option is for the publishers to claim all rights of ownership in the objects, and the rights to exploit the value in those objects. Implementing Creative Commons licencing is another. Or, as Yochai Benkler suggests, a further option is to implement the GNU Free Documentation licencing that effectively creates no exclusions at all.²³

What I want to address now is the idea that content is more than the coded objects and artwork in these environments. The idea that Benkler raises, and which I want to explore further here, is that it is not the digital objects that we should be focusing on. Referring to these online virtual worlds Benkler says: ‘... it is a form of social software, mediating a social relation among individuals...’.²⁴ Benkler’s attempt to shift the debate away from who should own the virtual spoon or sword offers an opportunity to begin to understand online interactive environments as more than intellectual property.

When a player logs into an MMOG such as *EverQuest* (the largest of the Western world MMOGs with up to 450 000 subscribers²⁵) what he or she engages with is much more than what the developer has created. The world and the objects in it have indeed been coded by the developers. But game play is made not purely through engagement with these things. Game play happens through engaging with both the world and its objects and with other players. Solo play is not much fun in these games, although it is possible. However MMOGs tend to be structured to actively reward social play and discourage solo play. *EverQuest* is not a game where you can

²² Dan Hunter and Gregory Lastowka, 'Virtual Crimes' (2004) 49 (1) *New York Law School Law Review* 294.

²³ Yochai Benkler, 'There is no spoon' (Paper presented at State of Play 2, Law and Virtual Worlds, New York, November 2004)

²⁴ *ibid*, 1.

²⁵ Nicholas Yee, 'The Norrathian Scrolls', Version 2.5 <<http://www.nickyee.com/eqt/report.html>> at 23 May 2002. In South Korea MMOGs attract an even larger subscriber base. *Lineage* has over 3 million subscribers with a further 1 million in Taiwan J.C Herz, 'The Bandwidth Capital of the World,' in *Wired*, 2002 <http://www.wired.com/wired/archive/10.08/korea_pr.html> at 4 August 2003.

fight other players. The idea is to team up with other people and fight computer generated opponents. For instance more experience or reward points are given to players who fight in full groups of six. Most computer generated opponents after the early levels of the game are impossible to kill through solo play. Indeed, in the high level game, 'raids' involving over 70 players and lasting for extended numbers of hours are not uncommon. The game rules and the game engine code both work to structure social play as the norm in these games.

Thus while some of the engagement for a player may come from mastering skills inside the game, to a greater or lesser extent, the other source of engagement comes from interacting with other players. The contention of this paper is that what constitutes content in the game is only partially created by the developer. Even in games where players cannot make their own objects for the game, they are still creating game play and content that other players engage with. There are a number of implications that arise from thinking about content in this way.

Firstly, it requires rethinking the model of production from the more conventional linear structure: a chain of events that begins with an author (or team of people who assign their rights in some way through negotiation of contracts), who creates and finishes a text, which is published and distributed by a publisher to an audience under particular conditions of copyright. The MMOG product is not finished by the 'author'. It continues to develop after publication. Furthermore, after publication the content is created by both the paid developers and the unpaid labour of the players. Rather than linear, the production model is recursive, or networked. Rather than a single author (or developer team known as author) there are multiple authors.

Thus secondly, a networked production model brings into question the idealist conception of the Romantic author upon which much copyright is based. How does intellectual property law articulate with collaborative social production? Is it an appropriate form of law to be applying in this context? The complexity of intersecting interests and rights in an environment that embodies social as well as property elements, production as well as distribution issues raises serious challenges to the paradigm of intellectual property. Rather than accepting the key terms of the debate, which tend towards arguments about who should own the intellectual property

in particular works, it may be more pertinent to ask: should some things be owned at all?

These are issues that have been explored in relation to indigenous, oral and folklore cultures. Solutions for protecting the collectively held rights of those cultures have tended to entail the introduction of new mechanisms for understanding them as property. But when social relations and processes become subject to a property regime they are reified – what was fluid becomes fixed, what was process becomes a ‘thing’, a commodity. Coombe points to the ways in which copyright or IP law freezes

into categories what Native peoples find flowing in relationships that do not separate texts from ongoing creativity production, or ongoing creativity from social relationships ...²⁶

Engagements with property law produce particular effects and kinds of truths about the medium in question. Invoking property law can preclude other understandings and shape practices in particular ways.

In current contexts, it seems almost inevitable that intellectual property should be the lens through which this multi-user online medium is viewed. Intellectual property shapes the institutional practices surrounding it. But as Frow points out,²⁷ the teleological assumptions that accompany arguments of inevitability need not be accepted. Institutional practices (for instance of the publishing industries) are the result of a historic series of strategic moves made by the stakeholders, and represent the enactment of particular power relations. These can be countered in equally specific and strategic ways. The framing of all issues pertaining to this area as property issues closes down other debates that might be had. As Coombe suggests:

once all questions of authorship, originality, use, and access to ideas and expressions become framed in terms of property rights, discussion simply

²⁶ Rosemary J Coombe quoted in Joost Smiers, 'The abolition of copyrights: better for artists, Third World countries and the public domain' in Ruth Towse (ed), *Copyright in the cultural industries* (2002)128.

²⁷ John Frow, 'Public Domain and the New World Order in Knowledge' (2000) 10 (2) *Social Semiotics* 174.

seems to end and maximum protection seems ordained; how can one argue in favour of theft?²⁸

If one looks at what constitutes content in an MMOG environment, and understands it as being social interactions as well as bits and bytes of code, then it seems that questions about authorship and property may not be the right questions to be asking.

THE PUBLICATION/SERVICE HYBRID

It may be more apt to consider these environments as social software, and then to look at the conditions of access and exclusion implemented through the choices made by the developers and publishers in their End User Licence Agreements and Terms Of Service. While these terms relate in part to ownership of content, they also relate to the governance of the social environment by the publisher. The right to determine what conditions of governance will exist in a particular game world are premised on ownership of that world by the publisher or developer. While it may seem a bit peripheral to be concerned about the terms and conditions of the use of a piece of leisure activity software:

we increasingly live in a world in which opting out of technological systems is becoming more and more difficult ... and yet participation within them pushes us to accept structures we might oppose.²⁹

As we come to conduct more of our lives online, we will inevitably be engaged in interactions that take place in proprietary spaces. The conditions that pertain to those spaces are often determined by the Terms Of Service or End User Licence Agreement contracts. So far, those contracts seem to be one-sided, and to involve the waiving of various rights (for instance around freedom of speech, and freedom of association). It is perhaps time to focus a little less on intellectual property and the corporate urge to lock everything including the virtual spoon down, and a little more on the implications for the conduct of our social and community lives. The content in MMOGs and other interactive online environments is often communally or collaboratively created by a range of people that may not be the paid developers of the

²⁸ Rosemary J Coombe, above n 2, 3 alluding to an argument put forward by Vaidhyanathan.

²⁹ T.L. Taylor, "Whose Game Is This Anyway?": Negotiating Corporate Ownership in a Virtual World' (Paper presented at the Computer Games and Digital Cultures, Tampere, Finland, June 6-8)233.

product, and may continue to be added to well after the time of publication. This is not something the linear model of production that copyright, and intellectual property more generally, is designed to deal with.

The value of affect, of social and emotional investment and its relationship to economics is not easily articulated. Developers and publishers know that the social relationships and the emotional investments of players are the key to a successful MMOG. Businesses know about and utilise affect and cultural production as part of their economic strategies.³⁰ Communities and social networks can create 'site stickiness' on the Internet. Brand loyalty is a result of an affective process of creating and harnessing desire in consumers. The economic value of affect in the networked, knowledge economy is huge. The intangible nature of affect makes its commodification hard to measure. In a discussion of property, and intellectual property in this context, affect is often ignored or erased – it has no place in a discourse of property. However, rather than ignore it, it may be time to broaden the range of discussion that occurs around interactive media products to encompass the role of affect. Does utilising affect for commercial gain come with any obligations or systems of accountability?

The role of the publisher has changed dramatically. No longer is it the just the manager of a piece of intellectual property – organising its distribution and rights management. Now it is a community manager as well. The creation of subscription based virtual game worlds has generated the creation of communities. How are these communities to be managed? Do game participants hold all the rights of an ordinary offline citizen – the right to the same protections and freedoms? Is a publisher under any obligation to treat the game world community fairly? For instance, in the End User Licence Agreement players accept in order to play *EverQuest*, Sony Online Entertainment reserve the right to ban players' accounts (and therefore access to the game) on a number of grounds, including if the player plays 'against the spirit of the game'. Such a catchall term in effect gives Sony Online Entertainment the right to terminate the service for pretty much any reason it wants. There is no system for

³⁰ See for instance Kylie Jarrett, 'Labour of love' (2003) 39 (4) *Journal of Sociology* 335 on e-commerce and the value of affect.

appealing such a decision. This is the case with many other games and online environments, including various AOL, EA and MSN services.

[I]t is disturbing to learn that online intermediaries (the companies who create online spaces – currently, games, but in the future, private internets) now have “ownership” of online identities. These providers may not be very accountable or transparent, and their rules may be effectively unreviewable by any terrestrial court or legislature. This means online intermediaries will be handing out “law”, whether we like it or not. Online intermediaries are a different source of law than those we are used to (such as courts and legislatures).³¹

Although it is clear that publishers need to be able to ban players from their games if they are causing disruption and interfering with the enjoyment of other players in the game – and there are players who are known as ‘griefers’ who do just that³² – there is no guarantee that all publisher decisions on this will be fair or right.

A private online intermediary has no particular legal requirement to be neutral as to viewpoints or actions of users. Courts will defer to extraordinarily broad (and ever-changing) terms of service for these online worlds. So the law of identity online is private, contractual law. The use of force online – the removal of identity – has been handed over to private parties.³³

In 2004, in another of Sony Online Entertainment’s games, *Star Wars Galaxies*, a player ‘duped’ an item multiple times (duping is where a player exploits a bug in the code to duplicate an item illegally). The market in the game was flooded with this item and the game economy was under some threat from these actions. Rather than track the source of the duping, the customer service team banned many players because they had these items in their inventory. There was no way for players to know that the items were duped – they looked and behaved exactly as the legitimate items did and they had bought the items legitimately in the marketplace. Thus many players who had done nothing more than buy what they presumed to be a legitimate item for

³¹ Susan P Crawford, 'Who's in charge of who I am?: Identity and law online' (2004) 49 (1) *New York Law School Law Review* 219

³² See for instance Chek Yang Foo, 'Redefining Grief Play' (2004) (Paper presented at the Other Players, IT University of Copenhagen, 6-8 December).

³³ Crawford, above n 30, 221

sale in the market, found their accounts banned. While Sony Online Entertainment eventually reinstated most of these accounts, they weren't actually obliged to.³⁴

In current neo-liberal discourses of the empowered consumer in the marketplace, the consumer is seen as endowed with agency and the ability to make choices between products. A particular attitude towards an event such as the one outlined above is that the player can just move on to another product. If a player doesn't like the style of governance in a game they should change games.³⁵ To a certain extent this is possible. However the role of affect comes into play here in significant ways. As discussed, players create communities within MMOGs. This entails often significant investments of time and affect. And once embedded into a community, once many of a players' friends are to be found within a game, then the cost of leaving the game is very high. Building friendships is a time consuming process. Accruing social status, constructing networks, building reputation, are all activities that players invest time and affect in. The high switching costs for the player mean they are not 'free agents', able to move through the market at will. Changing games is not like changing your brand of jeans. Their agency and mobility is constrained by the affective elements of their investment in the game. And let us be completely clear about the fact that the investment of the players in this way is directly economically beneficial to the publishers. It is the networks and communities that keep players subscriptions rolling in year after year.

There are two key things of interest here. The first is that the affective and time investments of players create part of the content of the game – they are co-creators of the game with the paid developers. As such, it is limiting to conceptualise players as consumers. They not only consume, they also produce. As what they produce gives

³⁴ For player commentary on this event see:

<http://intrepid.galaxyforums.com/index.php?showtopic=7190&st=0>

<http://www.warbucket.com/ibforums/index.php?act=ST&f=23&t=17655> (accessed 2/9/2004)

³⁵ Players can also publicly denounce the game management on bulletin boards and in other public discussion fora, and in the process damage the reputation of the game and hence its economic base. Whether this has much of an impact on a game where the player base can be up to several million is debatable. Certainly game management teams need to be aware of their public reputation, and to some extent this may shape and constrain their actions toward player populations.

them a sense of ownership in the game (and at the very least a sense that they own their own identities online), and constrains to some extent their ability to leave, a discourse of consumerism which locates their power as residing in their 'exit power', fails to adequately encompass what is at stake. Thus the discourse of the players as consumers erases their role as producers. And we should not fail to notice that their productivity is very profitable to the publishers.

Second, because affect and social networks and communities are intangible, and not properly thought of as property, they are erased from discourses which frame these media products as intellectual property like any other media property. Interactivity and networking – the two key aspects that differentiate 'new media' from more conventional media thus raise serious challenges to such discourses. These characteristics highlight that in a new media environment, with actively productive users, what is produced bears little resemblance to the products dealt with by intellectual property law. Not only is the structure no longer linear, the authorship multiple, and the product never 'fixed' like a conventional text, but the nature of networked collaborative environments is such that communities and social relations are central to the product. The legal rights of people participating in proprietary worlds accessed through contracts need to be considered. The terms of the contracts currently are manifestly one-sided and seem to diminish participants' access to administrative justice at the very least.

In another recent example, a player in the *Sims Online* game (an online multi-player version of *The Sims* published by EA) was banned after publishing an article in his game newspaper, the *Alphaville Herald*.³⁶ This newspaper covered community news inside the game and in this instance reported on teenage girls who were doing cybersex for money inside the game – a virtual teen prostitution ring, in effect. The player who published the article was banned, but there was no attempt to constrain the

³⁶ For accounts of this event see Mark Ward, 'The Dark Side of Digital Utopia', *BBC News*, 22/12/2003, <<http://news.bbc.co.uk/2/hi/technology/3334923.stm>> at 22 January 2004, Farhad Manjoo, 'Raking muck in "The Sims Online" What happens when a virtual newspaper covering virtual events runs afoul of a real corporation?' *Salon.com*, 12/12/2003, <http://www.salon.com/tech/feature/2003/12/12/sims_online_newspaper/index_np.html> at 22 January 2004.

behaviours reported on. Thus the publishers were not concerned with intervening in player behaviour in-game, but were concerned that it might be bad publicity if more widely known about. As damage to their reputation might affect their economic position, their response was one related to the bottom line. This highlights the publisher's ability to restrain both freedom of speech and freedom of association (of the news reporter player who can no longer access his community). It represents a clash between commercial and citizen interests.

For the player the loss of access to a game can represent a loss of community, of social networks, of access to friends and long-term relationships. The publisher, in effect, owns part of the network that a community relies on to communicate with itself. It could be construed that it owns the online identity of the person. To dismiss this issue as being about the risks one takes in joining any community – that a player shoulders that risk and it is not the responsibility of the publisher, is a sleight of hand. The publishers work hard to embed community values and social relationships into the game in order to maximise profitability but then seek to dismiss the importance of these things when it is time to be held accountable for management of them. The contract may operate to erase a group member's right to be treated fairly and equitably. If a patron is ejected from a sports club there are various grounds for appeal against discrimination through the courts (depending on jurisdiction). But if the End User Licence Agreement of a game can waive those rights, then the system of justice we expect as citizens can be undermined. As yet this seems to be untested in courts. Juridical/political citizenship involves a particular organisation of rights in relation to a range of objects and processes. We can see how the contracts in MMOGs reorganise those rights as private property rights and citizen rights and expectations of justice are transformed into consumer rights.

Generally citizen rights are aimed at constraining the power of the state against the individual, particularly in the US. They are less directed at the relationships between citizens.³⁷ Protections from intrusions by corporations are not the point of citizen rights. The relationship of the corporation to the player is seen more as one of citizen

³⁷ Horizontal effects of citizen rights are not completely unheard of but they do not constitute the main thrust or intent of citizen rights.

to citizen. However, as proprietary spheres come to resemble public commons in their function, and corporations start to wield state-like power in their proprietary worlds, it may be time to rethink who should be targeted by regulation. Is there a role here for regulation and policy to be created to protect players, to ensure some minimum standards of accountability from publishers in their relationship to players? I raise this not just as an issue for game worlds, but for the implications it holds for broader applications. As we increasingly conduct parts of our lives inside corporately owned mediated worlds, what kinds of assurances do we have about terms of access to those proprietary worlds? Should we be aiming not just for assurances about privacy (a common source of concern in the consumer rights discourse), but also fairness in relation to access? US debate on these issues is often framed by a cultural obsession with limiting the powers of government in relation to citizens, rather than acknowledging there may be any role for government in protecting the rights of citizens. Thus US debate is remarkably consistent in advocating for market-based solutions or relying on the marketplace to constrain corporate behaviour.³⁸ However it is not at all clear that the marketplace is up to the job, or holds the interests of citizens as anything other than a by-product of economic transactions. Looking to the marketplace is not an inevitable trajectory on which we must embark. Other solutions may suggest themselves if we were to have the debate about possible roles for government and legislation in this area.

Publishers of MMOGs may protest that they only wish to create fun games with healthy communities, that their interests coincide with those of the players and that the introduction of mechanisms of publisher accountability will be cumbersome and intrusive on what should, after all, be just a piece of fun. If what we are looking at is part of a much broader trend in which our relationships and communities are structured into business practices,³⁹ it is necessary to consider what forms of protections might be appropriate. Perhaps the answer is none. Whether, or what form of, government regulation is called for in this situation is obviously a political question. Free market libertarians might insist that consumer agency in the

³⁸ For instance Crawford, above n 30, and comments made by Professor Lessig at the 'Open content Licencing' conference held at QUT Law School, Jan 18-19.

³⁹ Tiziana Terranova, above n 17, 36.

marketplace is enough to ensure the publishers are reasonably constrained in their management of communities. But the issue of access is one that exceeds the regulations pertaining to ownership and distribution of intellectual property. In this highly social media environment, terms of access, more than terms of ownership, are what may become the key area of contention.

I raise these issues, not through a conviction that a particular course of action ought to be taken in relation to them. It is more that the discourses of the consumer and of intellectual property that I have identified as dominant in structuring understanding of these digital interactive environments make it hard to even raise these issues as important or in need of debate.

Publishers have moved from the business of managing the rights and distribution of finished texts to a more complex process of publishing texts that continue to develop through a recursive production cycle, and which involve social and community management. The issues that arise can be seen to coincide with other long-running debates over the intersection of contract law and citizen rights. Intellectual property law, appropriate for other publication industry products, serves to construct particular understandings of an MMOG that deny or minimise the aspects of MMOGs that are new and hybrid. While some may think it is not terribly important whether a person loses their access to *EverQuest* through an unfair decision on the part of Sony Online Entertainment, when seen as a microcosm of the broader trend it may start to matter what powers the corporation has over the 'gated community' it owns and runs.

CONCLUSION

Creative Commons licencing is a form of easy to understand licencing arrangements which make it simpler for grassroots innovators and content creators to control the rights in their creations. In the area of computer games Creative Commons licencing may prove a useful tool for content creators, if they are granted any rights at all in the code, objects and artwork they create for games. However Creative Commons, and much of the current debate around intellectual property and copyright, cannot address the complexity of the new media hybrid applications. Massively Multi-user Online

Games generate a set of challenges to intellectual property regimes that represent the inevitable clash between a new form and old institutional practices. Collaborative and ongoing authorship, across a paid and unpaid workforce, of a text that is performative and never finished presents the first challenge to the linear-based model of production on which copyright is founded. Social networking and the role of affect in production and profitability raises a second set of questions pertaining to governance and the accountability of publishers. Such issues move well beyond the scope of intellectual property and indicate that it is time to reconsider the nature of media products in interactive digital spaces. Peoples' work and leisure lives are conducted more and more frequently in proprietary online spaces. The conditions of access to those spaces is as important an issue to explore as the practices surrounding the property rights pertaining to what is produced inside those spaces.