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## Law and the Emotive Avatar

Llewellyn J. Gibbons

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# Law and the Emotive Avatar

*Llewellyn Joseph Gibbons\**

## ABSTRACT

*The barriers between fantasy and reality in virtual worlds are becoming increasingly permeable. There is a rhetorical need among some legal scholars to distinguish between a law of virtual worlds or concepts of net-sovereignty and the so-called real world. These metaphorical distinctions are unhelpful and confuse the issues as to exactly what is being regulated. A more productive line of analysis is to consider the avatar as an extension of the individual or an agent of the individual in virtual spaces and then to shift the focus of analysis away from the avatar and back to the individual because it is the potential negative effects that virtual behavior may have on real-world individuals that the law seeks to regulate.*

*This leads to a question of when virtual behavior should be punished. This Article examines some conceptions of computer-mediated communication (CMC) or non-verbal communication (NVC) to suggest that this area of research is useful in understanding the nature of the relationship between the individual and the avatar. Together CMC and NVC are useful tools to understand a human-avatar relationship. An evaluation of the quality of this human-avatar relationship is essential when determining whether virtual harm done*

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to an avatar has a sufficient nexus with the real-world individual so that the law should intervene either criminally or civilly.

This Article then discusses the personhood rationale to protect property rights and the tort of negligent infliction of emotional distress as two possible legal theories that are dependent on the quality of the relationship and as two real-world legal theories that are potentially applicable in virtual worlds depending on the nexus between the individual and avatar. This inevitably leads to the question of when a virtual injury to the emotive avatar in a virtual world should be legally sanctioned. This Article suggests that the law of the real world should be modeled on the existing body of law governing real-world games as one possible model. Private law-making, such as terms of service agreements, end user licenses, and private agreements among players, either explicitly stated or expressed as social norms, should provide the law governing the relationship among avatars and consent by their human principles for the injuries received while immersed in a virtual world. These private agreements may be also used to criminalize extreme behavior in virtual spaces by novel uses of existing laws such as the Computer Fraud and Abuse Act. Consequently, there is already a relatively complete and evolving body of law governing virtual world conduct and its effects in the real world.

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Wizard of Oz: [speaking in a booming voice into microphone] I am the great and powerful. . . [then, realizing that it is useless to continue his masquerade, moves away from microphone, speaks in a normal voice] . . . Wizard of Oz.<sup>1</sup>

The law and its scholars are fond of fetishes and artificial distinctions that often serve little purpose. Since the advent of the Internet, some scholars have attempted to create the trope of an idyllic utopia called cyberspace where there is no law—a libertarian utopia where individuals exist in a state of nature and self-enforcing customs replace traditional legal institutions.<sup>2</sup> In the early days of text-based virtual fantasy worlds—for example, multi-user dungeons (MUDS)<sup>3</sup>— even the most dedicated denizen of cyberspace could not confuse real and virtual worlds. Over time, however, virtual worlds have slowly evolved from text-based fantasy worlds to virtual fantasy worlds to social virtual worlds that emulate the visual, auditory, and tactile experiences of the real world. The psychological and physical barriers segregating an individual’s mundane, day-to-day reality from her fantastical virtual life are becoming increasingly permeable. Thus, there are two possible legal regimes to protect the legitimate expectations of individuals interacting in virtual spaces that could apply in relation to virtual worlds: first, a *sui generis* body of law (a so-called law of the avatar) may be developed to regulate behavior in virtual spaces;<sup>4</sup> second, human conduct in virtual spaces may be regulated under existing general principles of law. This Article advocates taking up the latter option.

The trope of using terminology such as virtual worlds, virtual spaces, and cyberspace hides the fundamental reality that “there is no there there.”<sup>5</sup> Instead, legal regulation of virtual spaces must pierce

1. IMDb Quotes, <http://www.imdb.com/title/tt0032138/quotes> (last visited Apr. 29, 2009).

2. Cf. Dmitry N. Feofanov, *Luna Law: The Libertarian Vision In Heinlein's The Moon Is A Harsh Mistress*, 63 TENN. L. REV. 71, 72 (1995).

3. See MUD – Wikipedia, <http://en.wikipedia.org/wiki/MUD> (last visited Apr. 8, 2009) (describing text-based fantasy worlds).

4. The *sui generis* law of cyberspace debate took place in the early days of the Internet, and the law of the horse argument lost. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996); see also Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (discussing the *sui generis* nature of cyberspace and what it means to us).

5. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (Cooper Square Publishers, Inc. 1971); Another commentator in this volume describes this artificial distinction between the real world and the game world as a *magical circle* designed to protect the game world “from outside influences—law, real-world economics, real-world money, and the like. The thrust of the magic circle metaphor is that actions that occur within virtual worlds are not real, and thus cannot be sanctioned using real-world law.” Joshua A.T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823, 824-25 (2009).

the conceit of the virtual world and the law must strip the mask away from the avatar to reveal the individual behind the curtain. Everything but that individual is chimerical, merely light and magic. The relationship between the avatar (or virtual persona) and the individual is critical, but ultimately it is the individual who should be the focus of the law. While all people are created equal and are entitled to equal protection of the law, the same cannot be said for avatars, and not all—or perhaps any—avatars are entitled to the same rights and protections.<sup>6</sup> The true nature and extent of this individual-avatar relationship must influence the creation or legal recognition of property rights, civil rights, and criminal sanctions for misbehavior in virtual spaces.

First, this Article will examine some theories of non-verbal communication (NVC) and the relationship between the avatar and the individual, including a discussion of reasons why this relationship is legally significant. It will then examine the nature of human nature in virtual spaces by briefly reviewing the computer-mediated communications (CMC) literature before proceeding to an analysis of how this scientific knowledge of human and virtual interaction may better inform our understanding of legal relationships between the individual and the avatar in cyberspace. Finally, this Article will recommend that future laws focus on the individual and the impact of her behavior in the real world rather than the false conceit of a separate virtual entity created by a sui generis law of virtual worlds.

## I. REAL PEOPLE, VIRTUAL SPACES

There is support in the NVC and CMC literature to show a significant nexus between the individual and the avatar. This relationship is sufficiently strong that the law should recognize, protect, and perhaps one day encourage it. Both NVC and CMC research provide evidence that the nexus of the individual and the avatar is more than just the individual's claim of a significant connection.<sup>7</sup> In fact, individual non-verbal behavior demonstrates that

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6. The question of whether avatars have rights—usually as an extension of player rights—has long been a topic of discussion. See, e.g., F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 51-54 (2004); Raph Koster's Homepage: Declaring the Rights of Players, <http://www.raphkoster.com/gaming/playerrights.shtml> (last visited Apr. 8, 2009) (declaring the Rights of Avatars in 2000).

7. See Marc Fabri et al., *The Emotional Avatar: Non-Verbal Communication Between Inhabitants of Collaborative Virtual Environments*, in GESTURE-BASED COMMUNICATION IN HUMAN-COMPUTER INTERACTION 269-73 (Annelies Braffort et al. eds., 1999); see also Elhuyar Fundazioa, *Avatars as Communicators of Emotions*, E! SCIENCE NEWS, July 9, 2008, <http://esciencenews.com/articles/2008/07/09/avatars>

a special connection exists between the avatar and the individual. In the real world, individuals communicate using words and subtle non-verbal cues that are understood culturally. In most cases, the meaning of verbal communication is best understood in context through social understandings of the accompanying NVC.<sup>8</sup> In virtual worlds, as well as in the real world, NVC reflects the individual's relationship with his or her environment.

NVC serves at least six functions that are relevant in determining the individual's relationship to virtual spaces: "(1) structuring and regulating interaction; (2) creating and managing identities; (3) communicating emotions; (4) defining and managing relationships; (5) influencing others; and (6) deceiving others."<sup>9</sup> NVC "acts" include kinesis, vocalics (or paralanguage), physical appearance, haptics, proxemics, chronemics, and artifacts.<sup>10</sup> NVC provides an essential context that either reinforces or negates verbal behavior. Frequently, individuals may not even be aware that their words and NVCs are inconsistent. In real space, one makes a factual determination of the strength and quality of the emotional connection between an individual and an object in the real world through that individual's behavior as exhibited and understood in a larger social context: a congruence of verbal and non-verbal behaviors signals that one may trust the speaker, whereas incongruence signals deception. The statement, "This is the best present ever," coupled with a smile and hug, communicates one message, but the same statement, coupled with the folded arms and a scowl, communicates the contrary message—that it is in fact not a very good gift at all. Because it is often unconscious, the non-verbal behavior is generally viewed as providing a more accurate insight into an individual's emotional status if there is conflict between the verbal behavior and the non-verbal behavior.<sup>11</sup> Like individuals in the real world, avatars interact

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.communicators.emotions; *Virtual World, Real Anger*, IREPORT, <http://www.ireport.com/docs/DOC-126256> (last visited Apr. 8, 2009).

8. This Article will not significantly discuss verbal expression since differences between verbal communication in the real world and verbal communication in either audio or text in a virtual world are not relevant for the purposes of this Article.

9. Walid A. Afifi, *Nonverbal Communication*, in EXPLAINING COMMUNICATION: CONTEMPORARY THEORIES AND EXEMPLARS 39, 48 (Bryan B. Whaley & Wendy Samter eds., 2007) (renumbered differently from the original source).

10. *Id.* at 40. This list is not exhaustive. There are also occulesics, environmental details, and olfactics ("smellavision"). See John T. Masterson, III, *Nonverbal Communication in Text Based Virtual Realities* 10 (1996) (unpublished M.A. thesis, University of Montana), available at <http://www.johnmasterson.com/thesis/>.

11. See V. Vinayagamoothy et al., *Building Expression into Virtual Characters*, EUROGRAPHICS, \*4 (2006), available at [www.cs.ucl.ac.uk/staff/M.Gillies/expressivevirtualcharacters.pdf](http://www.cs.ucl.ac.uk/staff/M.Gillies/expressivevirtualcharacters.pdf).

socially in virtual space using text, audio, and visual modalities.<sup>12</sup> In order to determine whether the nexus between an avatar and the individual is strong enough for the avatar to serve as a proxy for the individual, one must first understand the “reality” of virtual worlds and how to evaluate that strength.

### A. Proxemics

Proxemics, the study of personal space and how individuals behave when their subjective personal space is violated,<sup>13</sup> most clearly supports the contention that virtual space is a subjective extension of physical space. In the physical world, “[c]laiming a space for oneself means injecting one’s sense of identity or selfhood into a place.”<sup>14</sup> In general, the changes in physical position or distance that are exhibited in the real world are mimicked in virtual worlds.<sup>15</sup> The difference is that, in virtual worlds, individuals use avatars to claim personal space.<sup>16</sup> Otherwise, concepts of personal space in the real world readily map into virtual space and the invisible zones of personal space that surround avatars and are recognized by other avatars. For example, communicating avatars maintain distinct virtual personal space<sup>17</sup> and when an avatar’s virtual personal space is violated, the individual experiences discomfort from this violation in the real world.<sup>18</sup> One study showed that individuals from many different cultures reacted with a sense of discomfort when other avatars violated their avatar’s quantum of virtual personal space.<sup>19</sup> Interestingly, the desired quantum of virtual personal space roughly

12. Maurizio de Pascale et al., *Bringing Haptics to Second Life for Visually Impaired People*, in HAPTICS: PERCEPTION, DEVICES, AND SCENARIOS 896-905, 897 (Manuel Ferre et al. eds, 2008).

13. See ZDENEK SALZMANN, LANGUAGE, CULTURE, AND SOCIETY: AN INTRODUCTION TO LINGUISTIC ANTHROPOLOGY 249-50 (3d ed. 2004).

14. STELLA TING-TOOMEY, COMMUNICATING ACROSS CULTURES 128 (1999).

15. See generally NICOLAS NOVA, SOCIO-COGNITIVE FUNCTIONS OF SPACE IN COLLABORATIVE SETTINGS: A LITERATURE REVIEW ABOUT SPACE, COGNITION AND COLLABORATION, ECOLE POLYTECHNIQUE FEDERAL DE LAUSANNE (Sept. 2003), available at [http://tecfa.unige.ch/~nova/CRAFT\\_report1.pdf](http://tecfa.unige.ch/~nova/CRAFT_report1.pdf).

16. Dean H. Krikorian et al., *Isn't That Spatial?: Distance and Communication in a 2-D Virtual Environment*, 5(4) J. COMPUTER-MEDIATED COMM. (2000), available at <http://jcmc.indiana.edu/vol5/issue4/krikorian.html>.

17. PHILLIP JEFFREY & GLORIA MARK, CONSTRUCTING SOCIAL SPACES IN VIRTUAL ENVIRONMENTS: A STUDY OF NAVIGATION AND INTERACTION, SWED. INST. OF COMPUTER SCIENCE \*\*3-4 (1998), available at <http://www.ece.ubc.ca/~phillipj/papers/ConstructingSocialSpaces.pdf>.

18. *Id.*

19. *Id.*

corresponded to the cultural norm for social space in the real world.<sup>20</sup> This concept of space is reflected in other ways, as well: for instance, when a new avatar is accepted into a group discussion, the other avatars turn so as to “face” the new group member.<sup>21</sup> Avatar positioning is also used to signal a desire for privacy. Avatars seeking to speak privately often signal this desire for private communication by separating themselves from the group to engage in private communications.<sup>22</sup> Additionally, although it is technically feasible for avatars to pass through other avatars, this behavior is considered rude and occurs infrequently.<sup>23</sup> Similarly, individuals who find themselves attracted to each other—or at least to each other’s avatars—narrow the virtual distance between avatars for greater intimacy.<sup>24</sup> This instinctive awareness of space suggests that the avatar is an extension of the individual: the avatar’s virtual experiences have an emotional effect on the individual, and the individual’s social and cultural norms affect the avatar’s behavior. Thus, the avatar is more than merely an arbitrary symbolic representation of the individual, but rather an extension of that individual.

### B. Chronemics

Chronemics is the study of the effect of time in the context of NVC.<sup>25</sup> Time is a critical factor in human communications; the ability to manage and understand objective and subjective time cues can reflect social status and social norms.<sup>26</sup> There are two primary social constructs regarding the use of time: Monochronic time schedule (M-

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20. *Id.* at \*4.

21. *Id.* at \*3.

22. *Id.* The change in position is unnecessary because individuals could communicate privately with equal convenience, either as a member of the group or slightly apart. *Id.* at \*5.

23. *Id.* at \*\*6-7.

24. Krikorian, *supra* note 16.

25. Nonverbal Communication – Wikipedia, [http://en.wikipedia.org/wiki/Non-verbal\\_communication#Chronemics](http://en.wikipedia.org/wiki/Non-verbal_communication#Chronemics) (last visited Apr. 8, 2009).

26. See Judee K. Burgoon et al., *Nonverbal Influence*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 445-73, 457 (James Price Dillard & Michael Pfau eds., 2002); Judee K. Burgoon & Aaron E. Bacue, *Nonverbal Communication Skills*, in HANDBOOK OF COMMUNICATION AND SOCIAL INTERACTION SKILLS 203 (John O. Greene & Brant R. Burlison eds., 2003); Elaine W. J. Ng & Benjamin H. Detenber, *The Impact of Synchronicity and Civility in Online Political Discussions on Perceptions and Intentions to Participate*, 10(4) J. COMPUTER-MEDIATED COMM. (2005), available at <http://jcmc.indiana.edu/vol10/issue3/ng.html>.

time), and Polychronic time schedule (P-time).<sup>27</sup> M-time is often associated with North America and Northern Europe; in these cultures time is very important and punctuality is valued.<sup>28</sup> P-time is often associated with South America and Southern Europe, where time and punctuality is secondary to personal relationships.<sup>29</sup> As in the real world, time and the perception of time can be manipulated in virtual spaces. This manipulation includes early or delayed responses to signal emotions, or invoking a certain response in the recipient (such as impatience at a delayed response). Short response times may be interpreted as “non-verbal cues of interpersonal closeness, immediacy, care, presence, and even submissiveness.”<sup>30</sup> The time of day that a message was sent is also significant. Messages time-stamped as sent at night were viewed as more intimate when sent between friends but as over stepping bounds when related to work matters.<sup>31</sup> The apparent passage of time may be altered by changing time cues or by changing the rate of movement within the virtual world—for example, speeding up or slowing down apparent motion. Finally, longer and more frequent messages tended to increase the receiver’s exposure to the virtual presence of the sender and resulted in increased familiarity and interpersonal closeness with the sender.<sup>32</sup> The CMC/NVC experience with chromemics is roughly comparable to our common experiential understanding of the chronemics in the real-world.

### C. Haptics

Haptics is “the science of simulating sensory perceptions like pressure, texture, temperature, vibration and movements like poking, squeezing, sticking, [and] heaving.”<sup>33</sup> While there has been no significant exploration of tactile-based interaction in virtual space,<sup>34</sup> haptics can permit users to physically interact with virtual worlds:<sup>35</sup>

Using haptic technology, the computer communicates sensations through a haptic interface—a stick, scalpel, racket or pen that is connected to force-exerting motors.

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27. Nonverbal Communication – Wikipedia, *supra* note 25.

28. *Id.*

29. *Id.*

30. RICH LING AND SCOTT W. CAMPBELL, THE RECONSTRUCTION OF SPACE AND TIME: MOBILE COMMUNICATION PRACTICES 113 (Transaction Publishers, 2008).

31. *Id.* at 114.

32. *Id.*

33. Shri Alok Tiwari et al., Haptics Technology, *available at* [http://kanpurdehat.nic.in/papers/Paper\\_Haptics\\_technology-final.doc](http://kanpurdehat.nic.in/papers/Paper_Haptics_technology-final.doc).

34. de Pascale, *supra* note 12, at 897.

35. Tiwari et al., *supra* note 33, at \*1.

Haptic interfaces can communicate with the contours of a sculpture, and they can apply pressure to help in sculpting. By coordinating the forces that are exerted on one's handle, probe, stylus or fingertips, you can make it feel as though one is touching something physical.<sup>36</sup>

Haptic technology already exists in a rudimentary manner. For example, some steering wheels and joysticks for video games allow users to feel artificial bumps in the road or the vibrations from a gun.<sup>37</sup> Medical schools use haptic technology to simulate medical procedures for training purposes, and airlines use haptics for training pilots.<sup>38</sup> Whether haptics in virtual worlds is practical in terms of consumer costs and computing network costs is an open question, but some preliminary research suggests that it is or will be in the near future. For example, one research team created a process that permitted blindfolded users to navigate their avatars in a crowded virtual world.<sup>39</sup> Users were able to detect and reach a group of avatars, and, more importantly at this early stage of technological development, most users found the process of locating avatars using a haptic device to be easy and were generally satisfied with the experience.<sup>40</sup> Thus, haptics create a clear physical connection between the avatar and the individual. If an avatar hits another and the individual behind the assaulted avatar "feels" the effect through a mechanical device, then that blow should be treated as if the individual had struck the other individual in the real world.

#### D. Kinesics

In the real world, kinesics includes all forms of body movement with the exception of physical contact.<sup>41</sup> This is instrumental in creating avatars that more accurately mimic the range of human emotions and convey them through NVC to other virtual world participants.<sup>42</sup> Kinesics began in the earliest days of text-based CMC with emotive expressions (or emoticons) such as the smiley and frown faces ":-)" and ":(," paralinguistic cues to bracketed communication such

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36. *Id.*

37. *Id.*

38. See Jyoti Shah & Ara Darzi, *Simulation and Skill Assessment*, INT'L WORKSHOP ON MED. IMAGING & TECH. PROC. (2001).

39. de Pascale, *supra* note 12, at 903.

40. *Id.* at 904.

41. Afifi, *supra* note 9, at 40.

42. Tomi Kujanpää & Tony Manninen, *Supporting Visual Elements of Non-Verbal Communication in Computer Game Avatars*, in PROCEEDINGS OF LEVEL UP - DIGITAL GAMES RESEARCH CONFERENCE 220-233 (M. Copier & J. Raessens eds., 2003), available at [http://ludocraft oulu.fi/publications/DGRC\\_2003\\_NVC\\_Avatars.pdf](http://ludocraft oulu.fi/publications/DGRC_2003_NVC_Avatars.pdf).

as <nodding in agreement>, to acronyms such as “ROFL” (rolling on the floor laughing). These emoticons were used to temper message contained in the text or to add richness to the communication. Some of the features of *Second Life* permit avatars to “clap, bow, dance, play rock paper scissors, and [to fall] down.”<sup>43</sup> Avatars are also equipped with gender-specific kinesics body movements and *Second Life* contains pose balls, short programs that allow the avatar to assume different body movements.<sup>44</sup> Candor requires that one acknowledge, that individuals in virtual worlds have explored a wide range of human activity and, as one might expect, some of the first activities in virtual worlds were sexual in nature. Perhaps, as a comment on the polymorphously perverse sexual aspect of human nature, there is a widespread commercial sex industry in virtual worlds.<sup>45</sup> The commerce of sex in virtual worlds takes at least two forms: commercial sex workers who provide text-based fantasy sexual services, and the commercial providers of software code that permits others to engage in graphically satisfying sexual activities. Software codes permit avatars to engage in more realistic graphical sexual activities or to act out fantasies.<sup>46</sup> All of this sexual activity has even led these participants to obtain software to (re)produce baby avatars. This suggests that all aspects of human kinesic motions are being duplicated in virtual worlds, including some new movements such as flying that humans could only dream of in the past.

Kinesics help to weaken the barriers between the real world and virtual worlds so that the individual experiences life between them as becoming increasingly permeable and the line separating reality and virtuality slowly dissipates. Although avatars capable of a full range of human movement are not required, individuals rated avatars “with higher-realism and more behaviorally realistic avatars as being more capable of effective social interaction.”<sup>47</sup> Effective social communication is an instrumental part of developing deep social and emotional relationships with other individuals and the virtual objects associated with those individuals.

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43. SARAH ROBBINS AND MARK BELL, *SECOND LIFE FOR DUMMIES* 107 (For Dummies, 2008).

44. *Id.* at 108.

45. See, e.g., WAGNER JAMES AU, *THE MAKING OF SECOND LIFE* 92 (Collins ed., 2008) (noting that one adult provider of virtual adult simulation earned \$8,000 per month).

46. *Id.*

47. SIN-HWA KANG ET AL., *COMMUNICATORS' PERCEPTIONS OF SOCIAL PRESENCE AS A FUNCTION OF AVATAR REALISM IN SMALL DISPLAY MOBILE COMMUNICATION DEVICES*, PROC. 41ST ANN. HAW. INT'L CONF. ON SYS. SCI. 147, 147 (2008) (a study using mobile phones), available at <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=04438850>.

### E. Vocalics/Paralanguage

Although vocalics would not intuitively be considered NVC,<sup>48</sup> it does include “all aspects of the voice, including loudness, pitch, accent, rate of speech, length of pauses between speech, and tone.”<sup>49</sup> Vocalics requires voice communication but, depending on how something is said, the same words may carry very different meanings. Based on vocalics, individuals are often able to make accurate judgments about sex, age, height, and cultural background.<sup>50</sup> In a popular example, the entire conceit of the film *My Fair Lady* is that changing vocalics can potentially change someone’s life.<sup>51</sup> Communication accommodation theory teaches that individuals change their speaking styles in order to attract those with whom they wish to associate and that failure to accommodate the speaking style of a group indicates a disinterest in joining that group.<sup>52</sup> The increasing availability of avatars with “voice” capability, as well as technology that can modify the voice so that it is congruent with the avatar rather than the individual, will make this area of study more significant in the future.

### F. Physical Appearance

There is an axiom that there are no ugly people in cyberspace. Since the earliest days of the chat room, everyone in cyberspace is stereotypically handsome, pretty, or otherwise attractive to those sharing the same standards of physical beauty. A corollary to this is that there are few, if any, ugly avatars. When creating avatars most individuals replicate traditional Western standards of attractiveness so that conventional standards of attractiveness apply equally in virtual space. One scholar observed:

A seductive, sexy, or simply “attractive” avatar can have a powerful impact on other members. One member described how his prop of a cartoon animal didn’t seem to be getting him much attention from females. Most of them wouldn’t talk to him. Curious about whether he could alter this situation, he searched the net and found a picture of Brad Pitt, which he turned into a prop. The result? . . . Lots of attention. If he happened to be wearing his cartoon prop and found that he was being ignored by a woman, he would move to another room, switch to Brad Pitt, and then return. Or he would switch to Pitt right in front of her. Nine times out of

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48. Afifi, *supra* note 9, at 46.

49. *Id.*

50. *Id.*

51. The plot of the film involves an uneducated flower girl who, tutored by a linguist, learns to change her speech patterns and thus passes herself off as wealthy and well-educated. *MY FAIR LADY* (Warner Bros. Pictures 1964).

52. Afifi, *supra* note 9, at 46-47.

ten, he said, the woman would strike up a conversation with him even if he hadn't said a word.<sup>53</sup>

Additionally, in a study of static, or non-kinesic, avatars, the individuals behind other avatars considered the "physically" attractive avatars to be more credible in social interactions.<sup>54</sup>

Some researchers have concluded from CMC research that "people conform to the stereotypical behaviors associated with their digital self-representations,"<sup>55</sup> a phenomenon sometimes described in the CMC literature as the Proteus Effect.<sup>56</sup> In one study, individuals were randomly assigned avatars that were either tall or short; those with tall avatars tended to negotiate more aggressively than those assigned shorter avatars and were more likely to end the negotiation with an unfair resolution to the negotiation.<sup>57</sup> In another study, individuals were randomly assigned conventionally attractive or unattractive avatars; the attractive avatars were friendlier, more willing to share information, and were often "closer" to other avatars in a virtual space.<sup>58</sup>

### G. Artifacts

Artifacts are "physical objects and environmental attributes that communicate directly, define the communication context, or guide some social behavior in some way."<sup>59</sup> Artifacts are often used to create or reinforce social norms or to inform the participants in a virtual world about the expected standards of conduct.<sup>60</sup> Like real-world artifacts, virtual artifacts may be commodified, fetishized, and bartered for other virtual artifacts or currencies (e.g. virtual

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53. John Suler, *Types of Avatars: Seductive Avatars*, in *PSYCHOLOGY OF CYBERSPACE* (John Suler ed.), available at [http://www-usr.rider.edu/~suler/psy cyber/av\\_seduct.html](http://www-usr.rider.edu/~suler/psy cyber/av_seduct.html).

54. Kristine L. Nowak & Christian Rauh, *The Influence of the Avatar on Online Perceptions of Anthropomorphism, Androgyny, Credibility, Homophily, and Attraction*, 11(1) *J. COMPUTER-MEDIATED COMM* (2005), available at <http://jcmc.indiana.edu/vol11/issue1/nowak.html>.

55. Jeremy N. Bailenson et al., *Transformed Social Interaction in Mediated Interpersonal Communications*, in *MEDIATED INTERPERSONAL COMMUNICATIONS* 77, 79 (Elly A. Konijn et al. eds., 2008).

56. *Id.*

57. *Id.* at 88.

58. *Id.*

59. Afifi, *supra* note 9, at 47.

60. See generally GIUSEPPE MANTOVANI, *NEW COMMUNICATION ENVIRONMENTS: FROM EVERYDAY TO VIRTUAL* 64-66 (1996).

currencies like *Second Life* Lindens or real world currencies like U.S. dollars).<sup>61</sup>

Even more, there are also real-world, commercial enterprises built around virtual economies.<sup>62</sup> As one economist noted, “there’s no difference, either culturally or economically, between production in *Second Life* and production in the real world, meaning that we should pay attention to synthetic world economies as if they were real world economies.”<sup>63</sup> According to some estimates, the economic value of trade in virtual artifacts is comparable to the economies of countries such as Nicaragua, Bahrain, Jamaica, and Macedonia.<sup>64</sup> The fact that individuals are willing to sacrifice free time by working in a virtual world for trade goods or real world money in the pursuit of virtual artifacts suggests that, for some individuals, there is a strong emotional nexus to these objects.

## II. LAW AND THE EMOTIVE AVATAR

The anecdotal stories of life in virtual worlds and research on avatars suggest that there is potential for a strong empathic relationship between the avatar and the individual. However, an understanding of the rights of individuals and their corresponding avatars must be grounded in the realities that not all avatars are created equal, not all individuals have the same empathic relationships with their avatars, and not all virtual worlds are the same. Some avatars are created as characters in single-player games or multiplayer, fantasy-based games, and, as such, represent costumes that individuals wear for short periods of time; there is no strong, meaningful, or deep identification between the individual and the avatar. These avatars are the same as the roles that players assume in traditional fantasy games such as *Dungeons & Dragons*. Other avatars are new and not yet socially situated in the virtual world; the bond between the new avatar, the individual, and the virtual environment is tenuous at best.

Ideally, though, some avatars have deep enough roots in both the virtual world and the individual’s identity that empathy exists, and the individual feels the effects of the avatar’s interaction with the virtual world. This raises the questions of whether a sufficient nexus

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61. *Virtual Artifact*, ABSOLUTE ASTRONOMY.COM, [http://www.absoluteastronomy.com/topics/Virtual\\_artifact](http://www.absoluteastronomy.com/topics/Virtual_artifact).

62. See generally AU, *supra* note 45, at 141-63.

63. EDWARD CASTRONOVA, EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY 12 (2007).

64. *Id.* at 13.

could exist between the individual and the avatar to justify extending the legal protections that the individual enjoys in the real world to the avatar in the virtual world and whether these real-world individual rights may have penumbras that provide shadow protection for avatars. Under some circumstances the underlying core values behind an individual's human rights or the public policies behind a legislative grant of rights may compel the law to recognize that the avatar must be protected as the alter ego or agent of the individual and that a failure to protect the individual acting through his agent-avatar may frustrate the legal purposes that lay behind the grant of a right.<sup>65</sup> The basis of this determination should be more than conjecture, anecdotes, or magical thinking; rather, it requires a sound understanding of the relationship between the roles of the individual in virtual space, the individual in real space, and that individual's avatar. This understanding of life and relationships in virtual spaces should be informed both by experience and by CMC/NVC research.

The emotive nexus between the individual and an object or an experience is often a critical factor in determining whether the law recognizes (or should recognize) either a right or a remedy.<sup>66</sup> Two examples show that an emotive connection may serve as justification for property rights or as a justification for recognizing an action sounding in tort. The best-known theoretical defense of property rights that relies axiomatically on the relationship-nexus between the individual and putative property was developed by Professor Margaret Jane Radin in her seminal article "Property and Personhood."<sup>67</sup> In that article, Professor Radin observed:

A general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: [t]he more closely connected with personhood, the stronger the entitlement.<sup>68</sup>

Professor Radin then explored various types of property relationships recognized by law that implicitly use a personhood rationale to protect

65. Cf. *Buckley v. Valeo*, 424 U.S. 1 (1976) (standing for the money equals speech case).

66. See, for example, the tort of negligent infliction of emotional distress. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 54, at 361-67 (5th ed. 1984).

67. See generally Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

68. *Id.* at 986.

property.<sup>69</sup> Later commentators such as Professor M. Scott Boone have critiqued this approach by applying personhood theory to virtual worlds. He concluded:

[T]he difficulty may not be so much in envisioning what rules would be mandated by a finding that virtual world property is personal, but rather the difficulty in accepting those rules as desirable on an intuitive level arises because virtual world property does not appear to us to be as personal as many of the examples used by Radin.<sup>70</sup>

Professor Boone's critique acknowledges the applicability of Professor Radin's personhood theory to virtual worlds, yet it also limits the scope of that applicability. In the seminal article on the law of virtual spaces, Professors F. Gregory Lastowka and Dan Hunter reached similar conclusions:

[Personhood] theory plays out in the virtual world in a particularly interesting way. First, it draws no distinction between the accumulation of real-world chattels or land and its virtual analogs. That is, to the extent that personality theory justifies private property in land or goods, it justifies property in virtual land or goods. The theory is predicated on the effect of the property interest on human needs like liberty and identity, and these are presumably not different just because the property at issue is virtual. More importantly, when it comes to avatars, personality theory would seem to be strongly in favor of granting property rights. It is well documented that people feel connected to their avatar, not as a thing but as a projection of their self.<sup>71</sup>

Our understanding of virtual worlds does not yet permit the legal finding of congruent "objects" in virtual worlds that are as equally "personal" as analogous objects in the real world. For example, there is a clear understanding of the unique personal status of a wedding ring, but there is no accepted social understanding of which virtual objects carry the emotional significance of a wedding ring. However, the CMC/NVC research supports a counter-intuitive finding that the objects in a virtual space are as strongly personal to individuals acting through avatars as the personal physical objects that individuals use in real space.<sup>72</sup> This includes concepts of personal space in virtual worlds or the role of "physical attractiveness" in facilitating communication between avatars.<sup>73</sup>

Perhaps, it is maladroit to consider a loved one a possession or to analogize from a relationship with a person to a relationship with a

69. *Id.* at 991-93.

70. M. Scott Boone, *Virtual Property and Personhood*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 715, 745 (2008).

71. Lastowka & Hunter, *supra* note 6, at 49.

72. See also, Andrew Stern, *Creating Emotional Relationships With Virtual Characters*, in *EMOTIONS IN HUMANS AND ARTIFACTS* (Robert Trappl, et al, eds., 2003), available at [http://www.interactivestory.net/papers/stern\\_emotionartifacts1999.html](http://www.interactivestory.net/papers/stern_emotionartifacts1999.html).

73. Jeffrey & Mark, *supra* note 17, at \*\*3-4.

thing, but consider a recent headline, “Japanese Woman Arrested for Virtual-World ‘Murder.’”<sup>74</sup>

A 43-year-old Japanese woman whose sudden divorce in a virtual game world made her so angry that she killed her online husband’s digital persona has been arrested on suspicion of hacking, police said Thursday. . . . “I was suddenly divorced, without a word of warning. That made me so angry,” the official quoted her as telling investigators and admitting the allegations. The woman had not plotted any revenge in the real world, the official said.

She has not yet been formally charged, but if convicted could face a prison term of up to five years or a fine up to \$5,000. . . . The man complained to police when he discovered that his beloved online avatar was dead.<sup>75</sup>

An interesting fact about this case is that the object of revenge was the avatar rather than the man behind it, and that the death of the avatar was an injury sufficient to justify the man reporting the death of the avatar to the police. Also interesting is the journalist’s choice of words—“his beloved online avatar was dead”—a choice of words traditionally applied to the physical passing away of a loved one but ill-suited to the death of a virtual character.<sup>76</sup> When the crime was dismissed by a blogger who stated, “[n]o matter how attached you might be, these are just strings of 1s and 0s,”<sup>77</sup> the virtual-world community pushed back with comments to the posting such as “string of 1’s and 0’s? I guess all the author is, is a string of A, T, G and C’s. I

74. *Japanese Woman Arrested for Virtual-World “Murder,”* FOX NEWS, Oct. 24, 2008, <http://www.foxnews.com/story/0,2933,443767,00.html>. Another recent case involved a theft of virtual goods in the Netherlands effected through real-world actions. Edwin Feldmann, *Netherlands Teen Sentenced for Stealing Virtual Goods*, PC WORLD, Oct. 23, 2008, [http://www.pcworld.com/article/152673/.html?tk=rss\\_news](http://www.pcworld.com/article/152673/.html?tk=rss_news) (reporting that a “16-year-old boy [was] charged with beating another teenager in the victim’s room and stealing virtual property. On Sept. 6 last year the defendant forced the 13-year-old victim to log in to RuneScape and hand over the money and virtual goods he possessed in the virtual world, according to the charges. The lawsuit only dealt with the theft of the goods—a virtual amulet and a virtual mask in RuneScape—but it’s the first time a judge in the Netherlands has ruled that the theft of virtual property is illegal and should be treated like stealing real-world objects . . . . The judge ruled that ‘goods don’t have to be material for the law to consider them stolen.’”).

75. *Japanese Woman Arrested for Virtual World ‘Murder,’* *supra* note 74.

76. There is some debate on the blogosphere as to whether or not the avatar could be restored to “life” by the operators of the Maple Story virtual world. *See, e.g.,* Patrick Stephens, *Virtual Murder*, Oct. 23, 2008, <http://www.psjs.net/index.php/2008/10/virtual-murder/>. The author was unable to locate any information in the FAQ and similar sections of the virtual world on the process of restoring a murdered avatar (or even one deleted in error). However, it is unlikely that one could reset the same so as to restore one character without changing the lives of other avatars. *See generally* RICHARD A. BARTLE, *DESIGNING VIRTUAL WORLDS* 347-50 (NEW RIDERS, 2003).

77. Posting of Earnest Cavalli (*Scorned Gamer Jailed After Vengeful Deletion*) to GameLife, <http://blog.wired.com/games/2008/10/scorned-gamer-j.html#comments>. (Oct. 24, 2008, 16:06 EST).

mean really, it nothing more than that right? Those 4 bases dont lead to anything larger than the bases themselves” (*sic*).<sup>78</sup>

In tort law, conduct that injures an object emotionally close to an individual can constitute a breach of duty coupled with a harm sufficient to impose liability on the alleged tortfeasor.<sup>79</sup> A New York court recognized the tort of negligent infliction of emotional distress. The court required “an especial likelihood of genuine and serious mental distress [that], aris[es] from . . . special circumstances, which serve[] as a guarantee that the claim is not[a] spurious [claim].”<sup>80</sup> Some commentators have argued that injury to a companion animal is a sufficient special circumstance for courts to recognize a negligent inflection of emotional distress claim.<sup>81</sup> Likewise, the relationship between the individual and the avatar may also be a sufficiently special circumstance to satisfy courts without concern for opening the floodgates to spurious litigants displeased with the rough and tumble of daily life either in the real world or virtual worlds. An individual who witnesses an injury to his avatar should receive the same legal treatment as the individual who witnessed an injury to a close relative.<sup>82</sup>

Courts worry that recognizing virtual injuries may open a floodgate of litigation.<sup>83</sup> However, this concern is unfounded in the

78. Posting of blurb to GameLife, <http://blog.wired.com/games/2008/10/scorned-gamer-j.html#comments> (Oct. 24, 2008, 14:34 EST).

79. It should be noted that negligent infliction of emotional distress claims usually cannot be based on an injury to property. *See, e.g.*, HAWAII REV. STAT. § 663-8.9 (“No party shall be liable for the negligent infliction of serious emotional distress or disturbance if the distress or disturbance arises solely out of damage to property or material objects.”). In *Guth v. Freeland*, the court found the statute did not apply to the mishandling of human remains because it is neither “property” nor a “material object” under the statute. 28 P.3d 982, 989 (Haw. 2001). Arguably, an avatar is neither property nor a material object for a negligent infliction of emotional distress claim. *Cf. Lyria Bennett Moses, The Applicability of Property Law in New Contexts: From Cells to Cyberspace*, 30 SYDNEY L. REV. 639, 646 (2008), [http://www.law.usyd.edu.au/slr/slr30\\_4/Bennett-Moses.pdf](http://www.law.usyd.edu.au/slr/slr30_4/Bennett-Moses.pdf).

80. Johnson v. New York, 334 N.E.2d 590, 592 (N.Y. 1975) (quoting WILLIAM L. PROSSER, TORTS § 54, 330-33 (4th ed. 1971); *see generally* W. PAGE KEETON ET AL., *supra* note 66, § 54, at 361-67).

81. *Carbasha v. Musulin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting) (describing the majority opinion that did not permit a recovery at common law for negligent infliction of emotional distress for an injury to a companion animal “medieval,” and urging the court to “permit recovery of damages for sentimental values, mental suffering, or emotional distress”); Janice M. Pintar, Comment, *Negligent Infliction of Emotional Distress and The Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and their Owners*, 2002 WIS. L. REV. 735, 764-65 (2002).

82. *See Mazzagatti v. Everingham* by Everingham, 516 A.2d 672, 679 (Pa. 1986); *Arauz v. Gerhardt*, 137 Cal. Rpt. 619 (Cal. Ct. App. 1977).

83. *See* Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 116 (2003); *cf. Bowen v. Lumbermens*

case of injuries to individuals' avatars. The nature of virtual worlds may preclude such claims or result in such claims being dismissed early in the litigation process on grounds of failure to state a claim, judgment on the pleadings, or at summary judgment, since avatars in virtual worlds are the ultimate extension of the assumption of the risk theory in tort law.<sup>84</sup> Individuals through their avatars enter virtual worlds where there are rules governing play, which mitigate and explain the risks.<sup>85</sup> As long as the individual substantively follows the rules, he assumes the risks inherent in that virtual world.<sup>86</sup> This is analogous to the assumption of risk in a real-world game or activity. If one creates an avatar to exist in a virtual world dedicated to the purposes of murder and mayhem, one should not have a legal claim when that avatar is assaulted, battered, murdered, ensanguined, or disemboweled. Similarly, if one creates an avatar for a virtual world dedicated to polymorphously perverse, hedonistic pleasures, one should not complain about lewd contact or sexual exhibitions.<sup>87</sup>

The rules of consent or assumption of risk in a single-purpose, fantasy-based virtual world should be easy to understand since they often comply with our traditional understanding of consent and the penumbras over game rules in the real world.<sup>88</sup> For example, the violation of some game rules do not vitiate consent, while the egregious violation of other rules are sufficient to vitiate consent and subject the violator to civil or criminal liability.<sup>89</sup> However, the game rules governing a social virtual world in which the complexity in terms

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Mut. Cas. Co., 517 N.W. 2d 432, 437 (Wis. 1994) ("Furthermore courts feared that opening the courts to claims for negligent infliction of emotional distress would open the floodgates of litigation and lead to unlimited liability for a negligent tortfeasor.").

84. Assumption of the risk generally has two primary and secondary assumption of the risk. Timothy Davis, *Avila v. Citrus Community College District: Shaping The Contours Of Immunity And Primary Assumption Of The Risk*, 17 MARQ. SPORTS L. REV. 259, 270 (2006). Primary assumption of the risk focuses on whether the defendant had a duty to the plaintiff based on the nature of the sport or activity and the plaintiff and defendant's relationship to that sport of activity. Mark Seiberling, "Icing" On The Cake: *Allowing Amateur Athletic Promoters To Escape Liability in Mohny v. USA Hockey, Inc.*, 9 VILL. SPORTS & ENT. L.J. 417, 424 (2002). Secondary assumption of the risk is a defense based on whether the defendant was reasonable in conducting the activity. *Id.* A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." RESTATEMENT (SECOND) OF TORTS § 496 (1965).

85. *Fairfield*, *supra* note 5, at 836-37.

86. *See, e.g., Ridge v. Kladnick*, 713 P.2d 1131, 1133 (Wash. Ct. App. 1986) ("Those who participate in sports or amusements are taken to assume known risks of being hurt, although they are not deemed to have consented to unsportsmanlike rule violations, which are not part of the game."); *Fairfield*, *supra* note 5, at 836-37.

87. *Fairfield*, *supra* note 5, at 839-40.

88. *Id.* at 11.

89. *Kladnick*, 713 P.2d. at 1133.

of individual purposes of play and virtual places of play mirrors the human condition are more problematic and each act of consent should be determined on an ad hoc basis in much the same way that those determinations are made in the real world. For example, if one's avatar is in the virtual red-light district, the standard of conduct for which consent is presumed is quite different than the norms of behavior in a virtual temple, church, mosque, or public square. The question of which rule violations are sufficiently egregious to vitiate consent should be left to common understandings of the license agreement as interpreted by the collective social norms of the individual participants.

Almost all access to virtual worlds or virtual spaces is authorized through terms of service, terms of use, or end-user license agreements.<sup>90</sup> Whether the license terms, imposed by the whims of the virtual-world providers (or "game gods") and their lawyers, is a sound basis on which to build a civil code or a criminal code enforceable by the authority of the state is of critical concern, but it is outside the scope of this Article.<sup>91</sup> These agreements are analogous to the rules of the game, meaning that egregious violations of them vitiate consent to play and result in unauthorized access to the

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90. J. M. BALKIN & BETH SIMONE NOVECK, *THE STATE OF PLAY: LAW, GAMES AND VIRTUAL WORLDS* 86-87 (2006); Jason T. Kunze, Comment, *Regulating Virtual Worlds Optimally: The Model End User License Agreement*, 7 NW. J. TECH. & INTELL. PROP. 102, \*6 (2008) ("The primary law for a particular virtual realm is established by its end user license agreement (EULA) or terms of service agreement (TOS). These are agreements between the user and the developer that typically must be accepted by the potential user before entering the virtual world.").

91. See, e.g., BALKIN & NOVECK, *supra* note 90, at 109-11; Kunze, *supra* note 90, at \*17 ("The first problem with the typical virtual world license agreement is the developer gets unilateral, unchecked, godlike power, while the customer has few or no rights."). Some courts have recognized the scholarly critiques of using private contract law to create online criminal liability. See, e.g., *Southwest Airlines Co. v. BoardFirst, L.L.C.*, Civil Action No. 3: 06-CV-0891-B, 2007 WL 4823761, at \*13 (N.D. Tex. Sept. 12, 2007) ("[T]he CFAA was designed to prevent computer hacking and 'was never intended to afford website owners with a method for obtaining absolute control over access to and use of information they have chosen to post on their publicly available Internet sites.") (quoting and describing Christine D. Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 MD. L. REV. 320, 368 (2004)); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1600 (2003) (proposing "that courts should reject contract-based notions of authorization, and should limit the scope of unauthorized access statutes circumvention of code-based restrictions on computer privileges."); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 528 (2003) ("An even more serious problem is the judicial application of the [CFAA], which was designed to punish malicious hackers, to make it illegal—indeed, criminal—to seek information from a publicly available website if doing so would violate the terms of a 'browserwrap' license.").

game.<sup>92</sup> Additionally, license agreements may contain specific terms that the license automatically terminates upon violation of any of the license terms.<sup>93</sup> The Computer Fraud and Abuse Act has been interpreted so as to provide criminal penalties for breaching the terms of service agreements that authorize a computer's access.<sup>94</sup> The U.S. Department of Justice observed that

[in] many cases . . . involv[ing] exceeding authorized access, and establishing the scope of authorized access will be more complicated. The extent of authorization may turn upon the contents of an employment agreement or similar document, a terms of service notice, or a log-on banner outlining the permissible purposes for accessing a computer or computer network.<sup>95</sup>

Furthermore, some courts have applied principles of the law of agency to hold that, when the individual is no longer acting in furtherance of the purposes for which the permission was granted, that permission is deemed automatically terminated.<sup>96</sup> An analysis under this line of cases would allow the potential criminalization of any act that is not in the furtherance of the economic or social interests of the game gods—for example, individuals who engage in

92. Like most game rules, few individuals, if any, will initially read the license agreement and even fewer will read subsequent unannounced amendments. *See, e.g.,* Fairfield, *supra* note 5, at \*\*15-16; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 429-31 (2002). However, this may result in license agreements so egregious that courts will find them unconscionable due to lack of notice. *See, e.g.,* Ting v. AT&T, 182 F. Supp. 2d 902, 930 (N.D. Cal. 2002).

93. *Cf.* Helen H. Richardson, *Website Development Agreements/Licensing of Website Content*, SL035 ALI-ABA 143, 178 (Sept. 2005) (giving an example of a license term that “terminates [the license] immediately without notice . . . if you fail to comply with any provision of this license.”).

94. *See, e.g.,* Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES, Nov. 26, 2008, available at <http://www.nytimes.com/2008/11/27/us/27myspace.html> (Noting that in *United States v. Drew*, the defendant was convicted of violating the CFAA by accessing a computer without authorization when she violated the terms of the myspace.com terms of service); *see also* P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Store, LLC, 428 F.3d 504, 508 (3d Cir. 2005) (Noting that the CFAA also provides for a civil remedy to the game gods if the rules of the game are violated.); U.S. DEPARTMENT OF JUSTICE COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION CRIMINAL DIVISION, PROSECUTING COMPUTER CRIMES 6 (Scott Eltringham, ed., 2007), available at <http://www.usdoj.gov/criminal/cybercrime/ccmanual/ccmanual.pdf>.

95. U.S. DEPARTMENT OF JUSTICE COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION CRIMINAL DIVISION, *supra* note 94 (citing *EF Cultural Travel BV*, 318 F.3d at 59-64 (various site notices); *EF Cultural Travel BV v. Explorica*, 274 F.3d 577, 581-82 (1st Cir. 2001) (employee confidentiality agreement); *Southwest Airlines Co. v. Farechase, Inc.*, 318 F. Supp. 2d 435, 440 (N.D. Tex. 2004) (user agreement); *Register.com v. Verio*, 126 F. Supp. 2d 238, 253 (S.D.N.Y. 2000) (terms of use notice); *America Online v. LCGM*, 46 F. Supp. 2d 444, 450-51 (E.D. Va. 1998) (terms of service agreement)).

96. *See* *US Bioservices v. Lugo*, 595 F. Supp. 2d 1189, 1192 (D. Kan. 2009) (analyzing the two lines of cases which apply, or decline to apply, the “purpose/motive test” to determine unauthorized use, and then declining to apply the test).

commercial activities such as selling virtual property in violation of the rules of the game or individuals who compete commercially with the game gods in providing virtual objects or services to other users.

While these license agreements and notices are superficially bilateral between the individual and the game gods, they may be better understood as creating an environment of virtual-world law that protects others beyond the game provider and the individual player. In a recent, real-world example of using the breach of a bilateral license agreement to punish bad acts against a third party, Lori Drew was indicted for alleged violations of a terms of service agreement and convicted on three misdemeanor counts of accessing computers without authorization. after she created a fictitious identity on MySpace, a social networking site, and then engaged in the cyber-bullying of her daughter's 13-year-old classmate, acts which ultimately led the classmate to commit suicide.<sup>97</sup>

In contrast to gaming virtual worlds, the question of consent in social virtual worlds is more problematic. The explicit consent terms that the individual agrees upon in order to create an avatar as part of the virtual world still exist, but these explicit rules are supplemented by formal and informal social norms and private agreements.<sup>98</sup> Here, the analogy is even closer to the assumption of risk model: if one is aware that an area in the social virtual world is zoned for unconventional or deviate behavior from the predominant general social norms governing the game and still elects to enter that zone, then one has assumed the risk of offensive behavior. The law in the context of virtual worlds should not permit individuals to act like Captain Renault in *Casablanca*, who expresses his shock that gambling is taking place in Rick's Café even as he collects his winnings.<sup>99</sup>

The argument for a zoning defense in virtual worlds is stronger than that in the real world. Individuals in the real world may be faced with no choice but to pass through an offensive zone, but in a virtual world it is always the individual's choice, once warned, to subject herself to the possibility of offense. An understanding of this should prevent the courts from experiencing the feared flood of torts.

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97. Steve Ragan, *Misdemeanor Conviction for Lori Drew Leads to More Legal Debate*, TECH HERALD, Dec. 1, 2008, <http://www.thetechherald.com/article.php/200849/2537/Misdemeanor-conviction-for-Lori-Drew-leads-to-more-legal-debate>. AP New Calendar, Apr. 24, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5hmxn8kZrLZzHNf42MT9i80AV44-gD97P11RO1>.

98. Fairfield, *supra* note 5, at 836-37.

99. *Casablanca* (1942), Memorable Quotes, <http://www.imdb.com/title/tt0034583/quotes> (last visited Apr. 8, 2009).

### III. CONCLUSION

The legal status of the avatar in virtual space will depend to a substantial degree upon the empathic nexus between the individual and the avatar. A sound start to making policy in this area is a better understanding of the emotive affect of computer-mediated communications and the technology underlying the virtual space. As policymakers gain insight into the human attachment to avatars in virtual worlds, the richness of virtual communicative communities, and the impact of virtual actions on the real world, they can better apply real-world law to individuals for their avatars' virtual acts rather than having to create a *sui generis* set of laws for the avatar.