JICLT
Journal of International Commercial Law and Technology
Vol. 7, Issue 2 (2012)

Trademarks in Virtual Worlds: Law, Outlaws or New in-Laws?

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Abstract. Internet service providers are on the agenda, when considering their involvement in and responsibility for infringement of trademark rights. The keyword advertising by search engines and the activity of internet auction sites constitute the top of the iceberg, while the use of trademarks on social network sites and particularly in virtual worlds are up and coming issues. While the first two are entering trademark law through the door of criminally sanctioned trademark counterfeiting, there is no trade in physical goods in virtual worlds. The issue of trademark infringement might be raised, when virtual goods replicating physical goods are sold in-world under someone else's trademark. Similarly, the use of service marks for competing services seems like free-riding. But who owns rights in trademarks in virtual worlds? This article explores the channelling of real world trademark law into virtual worlds and highlights some aspects that merit consideration.

1 Introduction

Johan Huizinga studied the play-element in culture and introduced the idea of a Magic Circle encapsulating the playground, which is marked beforehand either materially, ideally, deliberately or as a matter of course and within which special absolute rules apply.[1] He noted that play creates order, even *is* order and even the least deviation spoils the game and makes it worthless.[2] Play is distinct from 'ordinary' or 'real' life in that it is free or voluntary, generally disinterested; free of non-play interests and limited both in time and scope.[3] Nevertheless, permanent play communities are common due to human propensity to want to 'be apart together'.[4]

Huizinga sees play in all areas of human activity: social relations, law, politics, economics and trade. For example, he notes:

> "The statistics of trade and production could not fail to introduce a sporting element into economic life. In consequence, there is now a sporting side to almost every triumph of commerce or technology: the highest turnover, the biggest tonnage, the fastest crossing, the greatest altitude, etc. Here a purely ludic element has, for once, got the better of utilitarian considerations, since experts inform us that smaller units – less monstrous steamers and aircraft, etc – are more efficient in the long run. Business becomes play."[5]

Although play-activity is often present in such serious activity, non-play activity may also be disguised as play. Such abuse of play Huizinga calls false play and pucrilism and is, to his mind, rampant in politics, where the value purism and absoluteness of play is degenerated, manipulated or reduced to technicalities that deprive

[1] Huizinga (1949), Homo Ludens: A Study of Play-Element in Culture, Routledge, at 7, 10 and 77.
[2] Huizinga 1949 at 10.
[3] Huizinga 1949 at 8-9.
[4] Huizinga 1949 at 12.
[5] Huizinga 1949 at 200.

the game of its characteristics of freedom, disinterestedness and limitedness.[6] Thus, real "play…lies outside morals. In itself it is neither good or bad…[and a]s soon as truth and justice, compassion and forgiveness have part in our resolve to act…[it] looses all meaning."[7]

From a legal perspective the Magic Circle marks the line between what can be regulated and governed with non-game rules and that which cannot.[8] While it would be easy to equate the Magic Circle with the click of a mouse or typing of a password gaining entry[9] to e.g. Second Life, the legal question is more complex. Unlike Huizinga's parameter of play, lawyers tend to have a fairly straightforward view on where the line between real world law and in-world rules should be drawn. They tend to treat like things alike and equate e.g. real-world theft with in-world theft applying real-world rules in determining harm and sanctions.[10] Thus, theoretically lawyers do not recognize 'a magic circle' that exempts all play-actions from real world consequences.

However, many users, designers and players argue that in world actions, although seemingly similar, are different, and that application of real-world law disrupts and even destroys the game.[11] Huizinga's argument has resonance: while in-world rules may not be pretty and may have gruesome consequences, it is just a game and nobody is really getting hurt. Even in social virtual worlds that seemingly mirror the real world, the whole point of the game is to make a new world, one that is different, if not necessarily better.[12]

Joseph's example on the practice of killing new players for their possessions in Ultima Online shows how differently things develop in an in-world society:

> "Under the new rules [change of settings by the provider], many possessions disappear from new player-controlled characters when they are "killed," thus making crimes against them less lucrative. In addition, steps were taken to make it harder to identify new players as new. Thus, the so called "player-killer" can never know for sure whether he or she is attacking a vulnerable opponent. Persistent player-killing of "good" characters can result in the offender being identified as such an evil character that he or she will be killed on sight by the computer-controlled guards merely for entering a town. Essentially, this is a system of "outlawry" in which the condemned are forced to live outside the normal channels of society and commerce available to everybody else. A system of bounties will give players additional incentives to "kill" those who make a habit of indiscriminate "killing".
>
> The "player-killers" … have established player-controlled fortresses from which they venture out to kill and to steal. Others have found ways to trick "good" players into becoming aggressors in situations where the guards will kill them, thus doing the player-killer's work…Some players have styled themselves as guardians who routinely patrol areas and kill player-killers when they are found. Other ad-hoc groups of players have confronted particularly egregious player-killers…giv[ing them] an ultimatum to change or be hunted down."13

[6] Huizinga 1949 at 204-205.
[7] Huizinga 1949 at 213.
[8] Duranske (2008) Virtual Law: Navigating the Legal Landscape of Virtual Worlds, ABA Publishing.
[9] Johnson and Post (1996) Law and Borders – The Rise of Law in Cyberspace, 48 Stanford Law Review 1367 arguing that cyberspace should be treated as separate space for legal purposes, since it fundamentally challenges the reliance on territorial borders in law at 1368-1370.
[10] Duranske 2008 at 58.
[11] Duranske 2008 at 59.
[12] Duranske 2008 at 60-61.
[13] Joseph (2011), Ultima Online: Justice in a Virtual World available at http://usf.usfca.edu/pj/articles/Ultima.htm, last visited August 15, 2011.

Although no one really dies[14], the form and structure of the game naturally raises questions of "what is social and anti-social conduct, what is just and unjust, what is "legal" and what is not".[15] While pressure initially is placed on the provider to change the game rules (i.e. settings) these questions are ultimately up to the participants themselves choosing to enforce means of social control: by continuing unchanged play, changing their play, organizing their play or ceasing to play.[16]

2. The role of the service provider

The role of the provider is especially interesting from the legal point of view, because it stands, so to speak, with one foot inside and the other outside the magic circle. The provider in-world can be merely a provider of service, which is, although technically participating in the game, rarely viewed as a player. The role is more like that of an umpire. The provider supervises play and reacts only to violations of the game rules. In practice, the provider may dictate rules of play and participation, refuse access and eject users that do not abide by the rules. Nevertheless, from the perspective of the game the provider is an outsider.

This is because from the *in-world perspective*, although taking the legal form of a contract *between* the provider and individual *users*, the provider provides a playground that makes play possible without playing itself. Thus, the provider does not participate in the every game dynamics of "rule-making while playing" which introduces nuances to playing the game that may be accepted, frowned upon or rejected by the other players, and subsequently introduced to other players of the game making their way into the formal rules of play. In this regard, the provider is merely an enforcer or arbiter of disputes between users of the service. Even, if a user is charged with violation of real world rules for an action against another user, the role of the provider is seemingly neutral, e.g. closing of account or reimbursing a user based on a real world court judgment.[17]

In any event, the game-nature of the activity incentivizes the provider to employ a laissez-faire approach to regulation, so as not to spoil the game by micro-managing it, and thus removing the element of unpredictability and fun from it. Therefore, the role of the provider in relation to users is a paradox: it has all the power, but is most likely to succeed (attract players, be fun) the less (more than necessary) power it exercises.

On the other hand, the role of the provider, when subject to *real world rules*, becomes complicated when in-world activity or player actions affect *non-players*. Huizinga's magic circle does not extend to non-players and per definition play only exists between voluntary participants.

When considering the following questions we reach our second paradox: our theoretical framework for defining playgrounds breaks down, while the crude lawyer's view discussed above risks depriving the game of its nature as a game. To what extent do actions in-world that affect non-players incur liability? What type of

[14] In fact, 'death' of a character is not necessarily final, but it can be 'resurrected'. Usually the character loses something in the process assets, skills or tools. Duranske 2008 at 65 and 68.
[15] Joseph available at http://usf.usfca.edu/pj/articles/Ultima.htm.
[16] In fact modern virtual worlds expressly leave governance to the players. However, the only sanction available is social exclusion, since any other sanctioning of players by other players is not technically possible, but requires action by the provider of the service (breach of contract). Duranske 2008 at 69.
[17] The service provider naturally acts with self-interest and like with any actor legal, social and market context may influence decision-making in individual circumstances. However, from the perspective of e.g. complying with a court order to freeze or terminate an account the provider is primarily a neutral, disinterested actor. Similarly, the provider primarily arbitrates player disputes or sanctions breach of Terms of Use without showing favouritism. For an example of the opposite, see Lim (2009) Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds, 11 Vanderbilt Journal of Entertainment and Technology Law 1053.

effect is sufficient to trigger liability? Who is responsible for actions in-world when the overall activity affects non-players? A simple in-world play-answer that does not recognize real world effects, risks perpetuating the player-killing scenario described by Joseph. A crude real world law-answer risks killing the game. Both approaches seem to draw the line based on fact[18] either established by in-world or real world rules presupposing that there is a rule for every scenario.

When it comes to the question of liability for trademark infringement, I argue that the question is more complex. The rules on whether trademark infringement even can occur in virtual worlds do not exist and is one of regulation, not application. Consequently, we search not for a simple rule, but for a *system of governance* that may regulate the overlaps between the two.[19]

3. Law and the Magic Circle

Law and rules are only effective, if they can be enforced. Therefore, in-world rules that are absolutely enforced by e.g. computer-based termination of a character or the provider closing an account are naturally more like real world law. Like real world law the level of enforcement in practice does not determine whether a rule constitutes law. Non-legal sanctions such as social exclusion or refusing to play with players that do not abide by the rules are less binding, since it requires social acceptance of the foundation of the rule. If individual players disagree and stop enforcing a rule it may ultimately cease to be a rule that triggers a sanction when breached.[20] Therefore, there is a difference between rules as "prevailing law" and rules as governance (real law). The question of whether real world rules apply to in-world actions can be phrased as 1) is it law (known to all), or the broader fundamental question 2) is it governed by law.

Duranske's argument can be placed in the first category *i.e.* asking whether rules are followed. Duranske argues that this question is one of fact, not law and the legal issues arising from virtual world acts are problematic because they represent either too different or too simplified views of what is fact.[21] His Magic Circle test turns on understanding, which encourages "users and designers" to choose between a closed or open world.

> An activity that occurs in a virtual world is subject to real-world law if the user undertaking the activity reasonably understood, or should have reasonably understood, at the time of acting, that the act would have real-world implications.22

To Duranske, it does not make a difference, if the test is applied to users or providers, since providers have control over the design of the game the same way as users have control over their actions.[23] Similarly, the strength of the test lies in allowing distinction between different user's actions without thereby considering the fundamental question of whether the game is protected from real world law by the magic circle. Duranske's test emphasizes the significance of Terms of Use as a general indicator of what rules can reasonably be understood to apply.[24]

Fairfield criticizes the Magic Circle test because the distinction between virtual world and real world actions is artificial.[25] Virtual actions originate with and impact real people even though the means are technological. Therefore, the legal question should turn on consent; i.e. liability arises when actions exceed consensual

[18] Duranske 2008 at 72.
[19] Duranske 2008
[20] Duranske 2008 at 69-70.
[21] Duranske 2008 at 72-73.
[22] Duranske at 75.
[23] Duranske at 75-76.
[24] Duranske 2008 at 76-77.
[25] Fairfield (2009) The Magic Circle, 4 Vanderbilt Journal of Entertaiment and Technology Law 823 at 824-825.

playing.[26] Consent within this meaning is general, what Fairfield calls "blanket consent to the game rules as a package", not informed consent, e.g. to each specific provision in the Terms of Use.[27] Thus, a player may be considered to have consented to more than the official rules stated in Terms of Use, if the act is routine in the course of the game.[28]

Legally, Fairfield's discussion is limited to the effect of real world laws in virtual worlds *between players or between provider and player.* However, he also recognizes the significance of in-world rules in determining consent. Thus, while virtual worlds are subject to real world law, in-world "law" may be likened to an industry standard and thus gain legal force and effect.[29] Like Duranske, he emphasizes the rules of the game in determining liability, but to him different rules govern different relationships.[30] Thus, the contract may govern in provider-player relationship, while the rules of the game (exceeding official rules) may govern in player-player relationships. By contrast, real world law may not supersede the Terms of Use in provider-player relationships (absoluteness)[31], while real world law may trump game rules in player-player relationships.

Fairfield's approach to the question whether real world law applies in-world treats the *issue* as one of *governance that turns on legal consent*. While in-world law may gain legal force and effect, it is on principle always subject to real world (law) governance and cannot be a sovereign protected by a magic circle. Thus, real world law may place limits on what a person can be considered to have consented to and real world law may never be completely excluded, although players and providers have great power to determine what law enters the virtual world.[32]

Duranske's test turns on understanding the legal consequences of acts, while Fairfield's test turns on whether the consequence is permitted by law and community expectations. Both recognize, albeit differently, a boundary around in-world citizens and the in-world as a community. Real world law disguised as societal interests may enter to govern in-world actors.

However, neither test addresses the question whether nor to what extent real world people (non-players) with real world expectations may enter and request enforcement of real world law to in-world acts. We focus on those next.

4. Non-player interests as law in virtual worlds

The question of trademark infringement in virtual worlds could easily be reduced to one of protecting property interests or preventing free-riding. Both miss the fundamental questions of *whether there are trademark rights and if so, who owns them* in virtual worlds. There can only be trademark infringement, if there are trademark rights to be infringed. Unlike physical property, like land or cars, trademarks are intangible resources that cannot be defined as units; a plot of land or my Ford Focus. It is tempting to argue that e.g. Coca-Cola is specific enough a unit that it is clear to all who owns it. However, I refer here to objects that constitute a legal unit that can be owned in the legal sense. As such, the legal unit, which is a trademark right in the Coca-Cola trademark, is very different from and much more restricted than it appears. Indeed, unlike my car, which I own as one unit, the trademark right Coca-Cola Company owns is the COCA-COLA word mark, the *Coca-Cola* picture mark, the Coca-Cola logo, the slogan "Coca-Cola is it" and so forth, all registered for a specific category of goods or services.

[26] Fairfield 2009 at 825 and 831-832.
[27] Fairfield 2009 at 832.
[28] Fairfield 2009 at 833.
[29] Fairfield 2009 at 830.
[30] Fairfield 2009 at 833.
[31] Lim criticizes that the provider has absolute control over enforcement, when it may lead to severe infringement on the rights of players. Lim 2009.
[32] Fairfield 2009 at 837.

The *perceived absolute ownership* thus follows from 1) ownership of a portfolio of trademark rights that 2) cover several product categories outside the primary soda market and that are 3) based on separate registrations in most of the world's jurisdictions. The Coca-Cola Company does not own just one car, but the equivalent of all cars in a Ford Factory parking lot. While all are perceived as generating with Coca-Cola Company (or Ford) legally they are treated as units that can be separately owned. Legally, therefore, each right can be bought, sold, held, lost or infringed.

Trademark rights are acquired through use or registration of a trade symbol for the purposes of distinguishing one's products or services from those of another trader. Trademarks are registered for specific goods or services and the right consists of preventing other traders from using signs, which are likely to cause confusion as to source within the consuming public between the goods/services bearing the trademark and the sign. The same sign can be registered and used for different products or services within the same jurisdiction and the same trademark for the same products or services may be owned by different entities in different jurisdictions.[33]

Whether trademarks rights exist in virtual worlds depends on whether 1) someone owns them through use or registration 2) maintains them by continuously using them in commerce and 3) whether someone's use of a sign in the virtual world is likely to cause confusion as to source in the mind of the consumer. The above not-withstanding a trader (or anyone) may use another's trademark, if there is due cause. Thus, trademark rights cannot be invoked against most non-confusing, non-commercial or non-source-identifying uses.

Thus, the legal question of infringement of a trademark right is *theoretically* not as simple as stealing a car. Neither, is it as simple as joy-riding, free riding or hitch-hiking. First, the trademark is non-rivalrous[34] and therefore is not lost or lessened by legitimate uses, nor by theft. It can also legitimately be used by the public and by other traders. Technologically these acts are indistinguishable by themselves. Second, each offence presumes ownership of what is taken; the car, the use of the car, the payment for use of the car or the non-payment for the use of the car. Third, if we have a car without an owner or an owner, but no car, can stealing, joy-riding, free riding or hitch-hiking per definition ever occur?

Fourth, there is the question of who owns rights in unowned previously non-existing matter. By analogy, if I have valid title to my Ford Focus and so does my neighbour to his Ford Focus, do either of us have valid title to a 2012 Ford Focus or the Ford Focus left standing between our houses? Unlike adverse possession of land, i.e. physical space that either is visibly possessed by the owner or possessor, the trademark analogy would turn on proof of proximity, not proof of possession to establish legal possession that amounts to ownership. I could claim ownership of a 2012 Ford Focus, *because* people know that *I possess my own* Ford Focus.

Applying Locke's theory of ownership to the fruits of one's labour may extend rights, where there is reputation, but his theory only extends to what is not lawfully held by others (common or private property).[35] Thus, regardless of reputation, a trademark owner may regularly only prevent uses that interfere with the source-identifying function of the trademark, i.e. the existing trademark right. However, the concept of blurring the distinctiveness or repute of a trademark on line is still very much under debate.[36]

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[33] The principle of territoriality of intellectual property rights is enshrined in the TRIPS Agreement The Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. U.N.T.S. 1867, p. 3. The groundwork for this principle was laid in 1883 with the signing of the Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979. U.N.T.S. 828, p. 305.

[34] Barry (2004) Property rights in common and civil law at 192; Brosseau (2004) Property Rights in the Digital Space at 465; and Isaac and Park (2004) On Intellectual Property Rights: Patents versus free and open development at 386-387 in Colombatto (Ed.) The Elgar Companion to the Economics of Property Rights Edwar Elgar Publishing.

[35] Locke (1690) Two Treatises of Government Peter Laslett (Ed. 1988) Cambridge University Press at 285-286, 302.

[36] The Google Adwords -case (Joined cases C-236/08-C-238/08 *Google France and Google* [2010] ECR I-0000), the L'Oreal v. Bellure -case (Case C- 487/07, *L'oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v.*

Unlike the theory of adverse possession the underlying theory of dilution by blurring is that the trademark owner has already established rights through use outside the scope of registered rights and that the infringer trespasses on that right. Thus, if I fail to register my Ford Focus in my name and someone steals it, I can claim theft by proving that I am the owner. Similarly, if a trademark owner can establish a prior right, regardless of registration, then it can be infringed and infringement sanctioned. However, the opposite approach; proving defendant's use of a sign and similarity to one's own mark, misses the proper point, whether there are rights in the mark against the claimed use to begin with and that these rights belong to the plaintiff.

Asking the proper question becomes crucial in the virtual world context. We could focus on whether there is "commercial effect"[37], whether the claimed use constitutes "trademark use" or whether the use is "non-commercial", but all these questions assume that there are trademark rights that are potentially infringed. *Asking whether there are rights instead of whether there is infringement presents us not with a question of whether real world law applies, but whether real world law governs.*

5. Governance of virtual worlds

The question of governance can be pursued as a principled or practical matter. On the one hand, virtual worlds are governed by the service provider and the Terms of Use, since the provider has factual control over the computer game (code).38 On the other hand, service providers are subject to obligations stemming from the Terms of Use and real world law. Consequently, virtual world governance extends past the service provider both on principle and in practice (fact). If governance is in this way detached from the service provider does it follow that only law can impact the service provider and in effect the computer game?

Lessig argues that viewing regulation as merely legal regulation is fundamentally flawed. Instead, regulation can take four forms: law regulates, norms regulate, markets regulate and architecture regulates.[39] None are fixed or pre-destined, but subject to human control, i.e. governance.[40] The Magic Circle thus contains no magic; computer code is its architecture, the game rules are its norms, the Terms of Use are its laws and player interaction[41] its market.[42]

From a broader view of governance, computer code manifests itself *as* law (not governance) because of the game nature: in playgrounds the rules must be absolute or they allow spoiling of the game. However, computer code is not absolute in the sense that it could not be changed, nor is it absolute law, in-world or out-world. This goes to the heart of Lessig's argument of computer code as Man-made architecture, not as divine or natural matter.[43] What is Man-made *is* and can be governed. Computer code, as law and in-world architecture, at any given time, reflects our choice of governance, but also our choice of balance of values.[44]

Bellure NV, Malaika Investments Ltd and Starion International Ltd, [2009] ECR I-5185); and the L'Oreal v eBay - case (Case C-324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL and eBay (UK) Limited* [2011] ECR I-0000).

[37] Article 2 and 3 of WIPO Joint Recommendation Concerning Provisions on the Protection of Marks and Other Industrial Property Rights in Signs on the Internet, adopted by the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of the World Intellectual Property Organization at the Thirty-Sixth Series of Meetings of the Assemblies of the Member States of WIPO September 24 to October 3, 2001. WIPO Publication 845.

[38] Lim argues that there is due cause to monitor the monitor in order to secure the rights of players against maltreatment and unfounded disciplinary action by service providers. Lim 2009 at 1054-1055.

[39] Lessig (1999) Code and Other Laws of Cyberspace, Basic Books, at 88.

[40] Lessig 1999 at 90. The rules are not fixed by God or to be found in nature.

[41] Where the service provider acts as umpire.

[42] This example is not a statement confirming the legal argument that is that real world law does not extend within the Magic Circle, only an example that all forms of regulation exist also in a virtual world as much as outside it.

[43] Lessig 1999 at 90.

[44] Lessig at 7 and 91 talks of a Constitution or rules that lay the foundation of a society and law. It forms a structure for governance, but also reflects the substantive values by which we govern.

For the purposes of the argument made here, it is important to note a distinction to Lessig's main argument in Code. It is advocated here that computer code as architecture and law in fact, is enhanced in virtual worlds, because of their game nature. The game nature as a sociological phenomenon described by Huizinga through the concept of the Magic Circle, dictates the absoluteness of rules. The technological nature of the playground boundaries may make the rules seem more absolute than they in fact are, but the game settings in virtual worlds, like any rules of a game, continuously change with play through the interaction between players and players and the service provider. Rules, although fixed for every occurrence of a game, are on a time-spectrum in fact dynamic and fluid, another essential element of keeping the fun character in the game. By contrast, law tends to be detailed, fairly static and slow to change. It is argued here *only*[45] that computer code is architecture and absolute in character from the perspective of regulating behavior in-world at any given time.[46]

Governance occurs through different means of regulation. Regulation entails both active, positive acts of regulating in a specific manner, but also passive acts of allowing other means of regulation to govern. Regulation by law, although only one of four regulatory forces, is generally the most efficient form of regulation, because it comes with an established and direct enforcement mechanism with a manifested steering effect of behaviour. By contrast social norms are less effective at steering behaviour as we saw in the player-killing example.

While the architecture (computer code) in the virtual world context is a very effective regulator of in-world actions, its keeper is easily influenced by real world interests through regulation by both law and market. The combined forces of market and law may thus cause the service provider to self-regulate and further strengthen the influence of regulation by law and market by manifestation in the architecture. Computer code in virtual worlds is not governed by an invisible hand, it is very clear who you should seek to influence, if you want changes to occur in-world. This is true for non-players that may seek to influence directly by increased enforcement or claims of infringement or liability, or indirectly through changes in law.

Removal of the protection of law or inaction is regulation in that it maintains the status quo of rights in changed circumstances. Thus, both the existence of and lack of specific regulation constitutes regulation that affects law as governance and may force a change of computer code (architecture) and the law as we know it. Changing computer code constitutes in-world and real world governance, not merely governance of a community within a magic circle, because it restrikes the balance of interests in society, i.e. changes values. Values are not governed by space, but people and their elected representatives through the established structures and rules of society. The foundation for governance in-world and out-world is shared as is its structure and substance, and should not be reduced to a question of whether real world laws can be transferred and applied as such, in-world.

6. Conclusion

Whether it is possible to have your Avatar wear Nike shoes, drink Starbuck's coffee and sell virtual Mercedes cars for a living, is a question of values. Is it harmless fun, or is it infringement of another's intellectual property rights? Answering either-or is a question of real world governance and the striking of a balance between competing interest groups and values that constitutes active regulation by law. Reducing the question to either one, without considering the other, constitutes passive regulation by law that allows other forms of regulation to

[45] It concerns "how things are", not "how they should be". Thus, it is not intended as a statement on "the problems that perfection makes" that Lessig discusses (p.139), e.g. making legal acts impossible in cyberspace. Post counter-claims that the possibilities of fine-tuned technology allows for more specifically tailored methods making illegal acts impossible in cyberspace. See Post (2000) What Larry Doesn't Get:Code, Law and Liberty in Cyberspace, 52 Stanford L. Rev. 1439 at 1447.

[46] It would be tempting to go further and discuss what computer code of virtual worlds ought to be and what balance it should strike in trademark law. This article, however, stops short and discusses building an awareness of the foundation for application of trademark law in virtual worlds. It asks if we can apply real world trademark law as it would be applied in the real world, in the virtual world context?

more easily influence the outcome. In the latter scenario, non-players may influence the service provider by e.g. demanding changes in computer code, Terms of Use or their enforcement. By bringing suit against the service provider for facilitating or turning a blind eye to rampant trademark infringement in-world the question of governance can be reduced to real world parties and real world law without consideration of the fundamental question of whether trademark rights extend to and who owns them in-world.

Regardless of whether we choose to protect trademarks or not in virtual worlds, we should, I argue, make a conscious decision. Choosing not to regulate by law is merely a value judgment in favour of extending established rights positions into new areas without a re-calibration of the balance of competing interests. Protecting rights without a defined object, or intangible objects without asking who owns them in virtual worlds, may just ruin the fun for everyone.

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