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**Computer Law
&
Security Report**

Internet Law

No one knows you are a dog: Identity and reputation in virtual worlds[☆]

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A B S T R A C T

“Virtual world” identities are becoming indistinguishable from “real” identities, just as “e-commerce” became indistinguishable from “commerce”. Control over online avatar identities has begun to have many real-world consequences. We can use the graphical, networked screen to create vibrant, visual representations of personal identity (i.e., the avatar) separate from and independent of our offline characteristics while simultaneously creating context-specific reputations in online communities separate from and independent of our social identity in real space. This article will explore the notions of identity and reputation both of the online user and his/her alter ego avatar.

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1. Introduction

E-commerce is the buying and selling of goods and services over the Internet. Virtual worlds, such as *Second Life*, are thriving meccas of e-commerce because they have invented a much more appealing way to use the Internet: through an avatar (Morningstar and Randall Farmer, 1991).¹ This avatar can be completely customized and is designed mainly for social interaction (Lastowka and Hunter, 2004). Ordinary people, who are bored and frustrated by regular e-commerce, participate vigorously and passionately in avatar-based online markets. Hence, e-commerce has evolved into the compelling story about individuals and businesses recreating themselves and extending their identities into cyberspace (Gautier, 1999).

Identity online is full of possibilities and opportunities. “Virtual world” identities are becoming indistinguishable

from “real” identities, just as “e-commerce” became indistinguishable from “commerce.” Control over online avatar identities has begun to have many real-world consequences. We can use the graphical, networked screen to create vibrant, visual representations of personal identity (i.e., the avatar) separate from and independent of our offline characteristics while simultaneously creating context-specific reputations in online communities separate from and independent of our social identity in real space. We do this with “social software” technology tools which make it possible for our chosen communities to help to create a meaningful reputation for ourselves (Noveck, 2005). As with any technological development that has an extensive human interface, fear (can someone steal my identity?) and opportunity (how can I make some money from this?) are at the forefront. However, those in the gaming community are already focusing on what a real, rich

[☆] Peter Steiner, p. 61 of 5 July 1993 issue of *The New Yorker*, vol. 69 (LXIX), no. 20.

¹ This usage of the term was coined in 1985 by Chip Morningstar, a user of the first avatar environment created by LucasFilm called *Habitat*. *Habitat* lacked many of the features we have in today’s games such as quests and puzzles. It was more similar to a social MUD in which the interactivity between avatars was the ultimate goal. According to Encarta: “Avatar [Sanskrit]: (1) incarnation of Hindu deity; an incarnation of a Hindu deity in human or animal form, especially one of the incarnations of Vishnu such as Rama and Krishna; (2) embodiment of something; somebody who embodies, personifies, or is the manifestation of an idea or concept; (3) image of person in virtual reality: a movable three-dimensional image that can be used to represent somebody in cyberspace, for example, an Internet user”. 0267-3649/\$ – see front matter © 2008 Angel Adrian. Published by Elsevier Ltd. All rights reserved. doi:10.1016/j.clsr.2008.03.005

identity is online from an even more personal perspective. They are asking, “Who is in charge of this identity?” The majority of players create avatars which resemble themselves to simplify identification. Nonetheless, they tend to take advantage of the game’s possibilities to improve their representations, making themselves prettier, stronger, and smarter (Filiciak, 2003).² This further calls into question who is really behind this avatar. Thus, the question before us is who can destroy a life (or more importantly, a reputation) online?

Seeing how much time is devoted to virtual worlds, it seems that a significant portion of the population finds a life mediated through one’s Earth avatar less fulfilling than life mediated through an Earth avatar and one or more virtual others (Alter, 2007). Digital media, including video games, enable them to manipulate their ‘selves’ and to multiply them indefinitely (Filiciak, 2003). Many appear to enjoy these different identities each of which enjoys its own reputation.

The notion of identity is one of the most important questions posed by Western culture; ‘self’ is the measure of reality (Bolter, 1984). We match our ‘selves’ to social relations and in specific situations we present a different ‘version’ of ourselves. To be conscious is to be engaged in a world that embeds and defines the subject (Davies, 2002). Carl Jung wrote about *personas*, the mask being an integral part of our personality and shaped according to the need to match it with cultural requirements (Campbell, 1972). Today individuals are encouraged to create their personas according to standards presented by mass media. One creates a persona for oneself in a manner similar to the celebrities who are creating trade marks for not only their products but also for themselves (Walsh, 2004).

A random sample of the moniker changes of celebrities shows a rather predictable fact that when authors and celebrities adopt new symbols to identify themselves, they pick better trademarks: shorter, more memorable names with more appealing connotations.³ For example, Prince Rogers

² It is significant to note that people talking about their activities while in the virtual world use the pronoun ‘I’, each identifying his or her ‘self’ with their avatar they have created.

³ Fabricated monikers include Woody Allen (Allen Konigsberg), Alan Alda (Alphonso D’Abruzzo), Anne Bancroft (Anna Maria Italiano), Pat Benatar (Patricia Andrejewski), Jack Benny (Benjamin Kubelsky), Mel Brooks (Melvin Kaminsky), George Burns (Nathan Birnbaum), Tom Cruise (Thomas Mapother IV), Tony Curtis (Bernard Schwartz), Kirk Douglas (Issur Danielovitch), Bob Dylan (Robert Zimmerman), Cary Grant (Archibald Leach), Elton John (Reg Dwight), Karl Malden (Mladen Sekulovich), Barry Manilow (Barry Alan Pincus), Ricky Martin (Enrique Martin Morales), Walter Matthau (Walter Matuschanskayasky), Chuck Norris (Carlos Ray), George Orwell (Eric Blair), Jack Palance (Walter Palanuk), Martin Sheen (Ramon Estevez), Ringo Starr (Richard Starkey), Sting (Gordon Sumner), and Mark Twain (Samuel Clemens). For more examples, see Nom de Guerre, <http://go.to/realnames>. Such monikers are not always voluntarily adopted. Some performers have been pressured to use stage names. This was allegedly the case with John Mellencamp (ne John Mellencamp, but previously called Johnny Cougar, John Cougar, and John Cougar Mellencamp). See Wikipedia: John Cougar Mellencamp, http://en.wikipedia.org/wiki/John_Cougar_Mellencamp. Not all celebrities take or are forced to take this course – for instance, Madonna and Britney Spears are well-known for the hyper-fabrication of their popular images, but have retained their birth names: Madonna Louise Ciccone and Britney Jean Spears, respectively.

Nelson (who was formerly known as “Prince”) changed his name to a symbol defying conventional articulation.⁴

2. Identity

Avatars “are much more than a few bytes of computer data – they are cyborgs, a manifestation of the self beyond the realms of the physical, existing in a space where identity is self-defined rather than preordained” (Reid, 1994). Virtual environments are the domain of liquid identity. This identity question causes all kinds of insecurities. Just who is the puppeteer hidden behind this little mass of bits and bytes displayed on my computer screen? Can I trust this person? Are they who they say they are? Are they really representing what they say they represent? Can I do business with someone I cannot see?

In any medium, social cooperation relies on trust (Axelrod, 1984).⁵ Signals of commitment are needed to support cooperative behaviour. We usually rely on face-to-face mechanisms for creating these signals and trust (Moringiello, 2005). Cyberspace by its nature facilitates interaction which is independent of geography, physical space or even physical place. It changes how we engage in social relations (Noveck, 2005). As soon as something is valuable and persistent, we seek to associate rights and duties with it. What will those rights be? And what will be the law of online identity to which those rights apply? Raph Koster has drawn up a Declaration of the Rights of Avatar. “Foremost among these rights is the right to be treated as people and not as disembodied, meaningless, soulless puppets. Inherent in this right are therefore the natural and inalienable rights of man. These rights are liberty, property, security, and resistance to oppression” (Koster, 2000).

At first blush, this may seem to pose a marked challenge for legal theory. Law is built on the concept that the self is a unitary, rational actor. Nevertheless, psychologist, Sherry Turkle, has contended that “the ability of the agent to represent herself as a different person in different online communities, without anyone being able to trace one identity to another, effectively creates multiple ways of knowing, which can be thought of as multiple selves” (Turkle, 1995). This may be a semantic issue. In such an argument, what are referred to as ‘multiple selves’ are not the same as the ‘unitary, rational, choosing self’. To be more precise, the ‘multiple selves’ exist

⁴ Though the symbol defies articulation, it has the benefit of being registered as a trademark and also subject to copyright protection, unlike the vast majority of personal names. Judge Posner explained: “The defendant, identified only as “Prince” in the caption of the various pleadings, is a well-known popular singer whose name at birth was Prince Rogers Nelson, but who for many years performed under the name Prince and since 1992 has referred to himself by an unpronounceable symbol reproduced as Figure 1 at the end of this opinion. The symbol is his trademark but it is also a copyrighted work of visual art that licensees of Prince have embodied in various forms, including jewellery, clothing, and musical instruments.” *Pickett v. Prince*, 207 F.3d 402, 403 (7th Cir. 2000).

⁵ “The very possibility of achieving stable mutual cooperation depends upon there being a good chance of a continuing interaction” because it is through repeat play that trust is developed.

purely because a unitary higher-order actor, deciding rationally, chose to generate and then occupy them. This higher-order actor is the “self”. (Id.) At any given moment, one can actively create himself. One’s ‘self’ arises just to be revoked a moment later and replaced by another ‘self’ – equally as real as the previous one (Foucault, 1980).⁶

Identity is not merely a set of facts: name, location, employment, position, age, gender, or merely certain online behaviours. In *The Presentation of Self in Everyday Life*, Erving Goffman suggested the notion of identity as a series of performances, where we use “impression management” to portray ourselves appropriately in different environments (Goffman, 1959). Some part of identity is controlled by the individual, but most of identity is created by the world in which that individual operates. We can think of identity as a streaming picture of a life within a particular context. Each of us has multiple identities (Clarke, 1994).⁷ The role of groups in shaping ‘real life’ identities is implicit, as is the multiplicity of ‘real life’ identity. What is interesting and new about virtual worlds is that they make this group-shaping explicit and multiplicity of identity actionable.

Post-modern identity is a self-aware identity. The mechanisms running and ruling today’s world are complex social relations which require maximum flexibility. Therefore, we relinquish the attempts to maintain a single constant “self” (Turkle, 1995). Identity in the real-world is carried with an individual from context to context – the office meeting, the cocktail party or the football field. He ‘is’ those set of facts. On the other hand, reputation is contextual. On the football pitch, one may be the great coach. But in the office meeting, one might always be the late comer. The fact that one is a winning sports coach is unlikely to automatically earn respect as an expert at a wine tasting. People do not carry a “good” reputation into all the different areas of their lives. Reputations are earned within particular contexts (Zimmer, 2000).

Conceivably the emergence of avatars will expose behaviours that seem contradictory under present theories about

the nature of tastes. This flexibility would have been condemned in the old paradigm as inconstancy which is associated with insincerity, hypocrisy, or mental illness. Nowadays, it is a positive attribute. A new, more useful model replaces the non-functional monolithic self. Everybody is a player, and must do everything to the ‘self’ to correspond to the conditions of the game in order to play better (Gauntlett, 2002).⁸ This leads to hyper-identity which is related to identity as a hypertext is to a text (Filiciak, 2003; Foucault, 1980). It is more of a process than a finished formation, a complex structure that is updated incessantly by choosing from the multitude of solutions. The argument could be made that the emergence of anonymity on the Internet changes nothing essential about the nature of human behaviour (Martens, 2007).⁹ Throughout history, technological advancements have allowed the “self” to act in assorted ways in diverse communities, without anyone being the wiser. The Internet only exaggerates this ability.

Hence, it can be suggested that what is changing is not the “self”, which remains unitary, but the effortlessness with which the “self” can manipulate its appearances in different physical spaces. It exists in the state of continuous construction and reconstruction (Giddens in Gauntlett, 2002). But again, this is nothing new. People have lived double lives since time began. Liquid identity is not in conflict with constancy if the object integrates the individual’s activities. The significance in which these lives are ‘double’ is wholly a social construct. But it is the individual mind that decides what style coheres.¹⁰ From the point of view of theory, no incongruity occurs when someone appears in *Second Life* as both a young man and an old woman. If variety is really the spice of life, theorists would predict that the unitary actor will opt for a number of different physical appearances by which to materialize. The development of avatars, and

⁶ Michel Foucault stressed that “there is no inside ‘self’, no essence making me who I am”. For Foucault, people do not have a ‘real’ identity within themselves; that’s just a way of talking about the self – a discourse. An ‘identity’ is communicated to others in your interactions with them, but this is not a fixed thing within a person. It is a shifting, temporary construction.

⁷ “Identity is used to mean ‘the condition of being a specified person’, or ‘the condition of being oneself ... and not another’. It clusters with the terms ‘personality’, ‘individuality’ and ‘individualism’, and, less fashionably, ‘soul’. It implies the existence for each person of private space or personal lebensraum, in which one’s attitudes and actions can define one’s self ... The dictionary definitions miss a vital aspect. The origin of the term implies equality or ‘one-ness’, but identities are no longer rationed to one per physiological specimen. A person may adopt different identities at various times during a life-span, and some individuals maintain several at once. Nor are such multiple roles illegal or even used primarily for illegal purposes. Typical instances include women working in the professions, artists and novelists, and people working in positions which involve security exposure (such as prison wardens and psychiatric superintendents).” (Clarke, 1994).

⁸ Anthony Giddens describes this as the “narrative of the self”. He believes our everyday activities consist in strengthening and reproducing a set of expectations (theory of structuration).

⁹ “There will be times and places where it may be alright or even desirable for people to be anonymous, perhaps in areas where confidential feedback is sought or where knowing specifically who someone is just is not important. Alongside such anonymity, there will be occasions and locations where any kind of dissimulation about identity is not only wrong, it is a felony.” said Irving Wladawsky-Berger, chairman emeritus of the IBM Academy of Technology, “For instance, an adult pretending to be a child so that they can enter a virtual world that’s meant to be only for kids” (Martens, 2007).

¹⁰ The history of video games indicates that there is no perfectly ‘reflective’ avatar; i.e., one that resembles the player visually (like in a mirror) and seems to gaze back on her. If the avatar is a reflection, its correspondence to embodied reality consists of mapping not of appearances but of control. One way to consider this ‘reflective relationship’ in third-person games such as the *Tomb Raider* series (1996–present), in which a ‘chase camera’ follows the avatar but rarely reveals her face, is by analogy a two-mirror system. Positioning a hand mirror so that its reflection is visible in a larger mirror, I can, for example, glimpse the back of my own head: the image is still recognizably me, yet I do not return my own gaze.

the shifting of the “self” between them, has no real consequence for the applicability of rational choice theories (Castronova, 2003; Turkle, 1995; Rehak, 2003). In conventional terms of reasoning, post-modern identity can be considered schizophrenic; however, it should not be looked upon as pathology but as a virtue.

However, these changes have consequences for the communities that humans form. Rational choice theories of social effects stress the importance of information for the preservation of social norms. The enforcement of norms is effective only if it is possible to impose some kind of penalty on the violators.¹¹ As such, past reputational data should be preserved, transparent, and widely shared in order to produce reliable and persistent online identities. “Our conception of identity is dependent on the technology that mediates between social interaction” (David, 2005). Although, identity online is more easily created, abandoned or shielded than in real life virtuosity,¹² is making that both easier and yet more difficult. Technology, thus, defines the scope of social relationships and our online social interaction has different characteristics. The most important characteristic being that identity is becoming enriched with more persistent forms of reputation. Reputation is of course tied to an identity. They are two sides of the same coin. Reputation, however, is earned over time. As such, identity without reputation is nearly meaningless (Resnick et al., 2006).¹³

¹¹ Resolving problems is less likely to involve law enforcement and more likely to centre around the contracts entered into when becoming a member of a particular virtual world, according to Beth Simone Noveck, a professor of law at the New York Law School. “We’ll see the emergence of more sophisticated contract services,” she said, so that the residents in a virtual community set the rules on which their world is based and take all the major decisions on the criteria for the entry contract” (Martens, 2007).

¹² Tools such as OpenID and ClaimID are the beginnings of managing virtuosity across online spaces. OpenID allows people to carry their identity from one virtual place to another for convenience, while ClaimID gives them a tool to pool and manage their various reputations. OpenID is a solution for the log-in problem of having multiple identities online. With OpenID, a person creates one master identity online at a site that he uses a lot and tends to remain logged in to – for instance, a social network site or a personal blog. When that person needs to identify himself to another new site, he points that site towards his main identity-providing site where he is already logged in. His main site sends the new site his log-in credentials, so the new site now knows who he is. In theory, if OpenID was adopted on every Web site around the Web, you’d need only one universal log-in and could forgo the often tedious practice of remembering user names and passwords. <http://www.openid.org/news.aspx>; see also, <http://www.virtuosity.com/>.

¹³ It is a measure of reputation allowing us an assessment of risk in doing business with someone. In business at the moment of “transaction” (however it is defined) what is needed is to know and determine is reputation. So, reputation devices like credit scores or a domain name system or eBay ratings have been created. See for example, http://pages.ebay.co.uk/help/feedback/building_your_reputation.html.

3. Reputation

A reputation is the “estimation in which a person or thing is commonly held” (Pocket Oxford Dictionary, 1975). Reputation is a fundamental part of your virtual self. Conversations in virtual worlds can be stored, and who you are becomes more a function of the community’s view of you, your behaviour and your contributions to a particular piece of a virtual world. In this social software environment of collaborative creativity and interaction, representation becomes malleable and reputation becomes community-created. As such, online reputation needs to recognize the interests of the collective as well as of the individual in the manner in which identity is constructed online.

In a pay-for-play game like *World of Warcraft* for example, reputation is key.¹⁴ Unfair play is punished by banning a player from the game. The player’s account is terminated, and all his avatars effectively eliminated, permanently. Unfortunately, nothing can stop the banished player from opening a new account, with a different credit card, and starting new avatars (Mnookin, 1996; Lessig, 1999). Hence, it appears that nothing thwarts anyone from violating any and all social norms, without consequence. This may cause one to think that the future of a stable community in such an environment seems hopeless. The instability of online communities has been studied by sociologists for a long time (Id.; Damer, 1998; Turkle, 1995). However, economists suggest that people/players will sort themselves into discrete units based upon how interested they are in living in a community regulated by particular social norms (Samuelson, 1994; Johnson, 1997). Such arrangements are apparent in existing virtual worlds. Virtual worlds with built-in systems for maintaining player reputations seem immeasurably more popular than worlds where

¹⁴ Listed below are the different reputation levels. Generally speaking, you start out as neutral with most factions; gaining friendly takes some effort, but it’s not excessive. Honoured is a bit more challenging; revered and exalted are monumental accomplishments requiring tremendous effort (reputation guide at <http://www.worldofwar.net/guides/reputation/>)

Exalted	The highest level of reputation attainable with any faction.
Revered	Special reputation level reserved for heroes.
Honoured	10% Discount on bought items from vendors.
Friendly	Standard reputation level which gives access to certain vendor items.
Neutral	Standard reputation level for factions that are not on a players list and are not KOS (Kill on Sight).
Unfriendly	Cannot buy, sell or interact, but are not KOS either. Isn’t that a real peach?
Hostile	KOS, there’s no coming back from this one folks.
Hated	KOS (all opposing team factions are set on this level).

reputations cannot be known. For example, *AlphaWorld*¹⁵ bestows upon all avatars the same capabilities at all times. Consequently, a player who defies a social norm in *AlphaWorld*, if banished, can generate a new avatar immediately, using a different name, which will have all of the same capabilities and skills as previously. The community can have no effect on behaviour.

This is in direct contrast with a game like *EverQuest*. In *EverQuest*, a player's ability to be a nuisance to others depends on his level of skills. These skills and talents can only be acquired by dedicating hours to an avatar, in team-based operations with other avatars. As a result, advancement in the game necessitates that a player become recognized for good play, so as to be invited into teams or guilds. A player who breaches the unwritten rules will not advance very far, purely on grounds of reputation. Indeed, there is little or nothing a player can achieve in *EverQuest* without the help of others. A player may weigh up starting again to obtain a new reputation by simply creating a new avatar; however, the new avatars are so weak and poor that they can be of very little use to anyone (<http://town.uo.com/bnn>).

If any of these virtual worlds arbitrarily altered or deleted a player's reputation despite the fact that the community had created it, there is little assurance that robust and persistent identities would be developed. Reputation scores and collaborative filtering devices are signalling mechanisms for successful collective action. Merely because that reputation depends on software tools for its articulation should not produce an exclusive property right for the platform owner without regard for the needs of the group (Noveck, 2005).

¹⁵ *AlphaWorld* is the oldest collaborative virtual world on the Internet, and home to millions of people from all over the world. Since its birth in 1995, *AlphaWorld* attempted to do for 3D virtual worlds what web browsers did for the 2D Web: it created a tool for exploring and building three-dimensional spaces. The programmers at Active Worlds created a library of objects that users could assemble like Lego blocks into buildings, cars, and other composite structures. By 1998, they had released a software development kit that enabled users to build their own custom objects, called blocks. See *The Active Worlds SDK*, <http://www.activeworlds.com/sdk>, and particularly the timeline of changes to the SDK, at *What's New in the Active Worlds SDK*, <http://www.activeworlds.com/sdk/whatsnew.htm>. With these tools, *AlphaWorld* users have not only replicated Rome's Coliseum, but have created entire parallel worlds. For all this construction and creativity, Active Worlds have never been a commercial success: it only instituted a monthly-fee model in September 1997, and to date has only registered a total of 70,000 users, see *The Activeworlds Corporation: Company Information*, <http://www.activeworlds.com/info/index.asp>, partially because the world has no teleology. See Raph Koster, *MUDs v. MMORPGs*, <http://www.legendmud.org/raph/gaming/mudsvsmassive.html>. That said, *AlphaWorld* set the stage for a new generation of virtual worlds, like Linden Lab's *Second Life*, that not only offer malleability to their users, but also economic freedom to sell their creations in both virtual markets and real-world exchanges. *AlphaWorld* has rapidly grown in size and is roughly as large as the state of California, and now exceeds 60 million virtual objects. <http://www.activeworlds.com/worlds/alphaworld/>.

4. Law

What constitutes an appropriate interest in a particular piece of property, especially when, as with intellectual property rights, you are dealing with creations of the human mind? An individual's personal identification with all of her physical and mental capacities could give rise to personal identification with the intellectual products of those capacities – without any reference to 'creativity'. For instance, if a person identifies with her own mental capacities, this may cause her to identify first, with the process of using those capacities, and then with the products of those processes. It is possible that someone would identify more with the processes and less with the product, but unlikely in the virtual worlds discussed here.

Assume that the individual identifies with (1) their capacities; and thereby (2) the processes of using those capacities; and thereby (3) the intellectual products of these processes. One might conclude that step (1) is wrong, that the individual does not have any particular entitlement to identify with the talents with which she is endowed. One might further consider that even the ability to expend effort to be determined by factors outside a person's control and hence a morally impermissible criteria for distribution (Rawls, 1971).¹⁶ This counter-argument fails in virtual worlds. Each person has chosen who and what they want to be. They have chosen, albeit from a pre-selected set of criterion, their capacities and the process of using those capacities. Thus, they may have acquired a particular entitlement to identify with these talents.

Hughes (1998) in his article, *The Personality Interest of Artists and Inventors in Intellectual Property*, identified three separate personhood interests in intellectual property *res*¹⁷: (1) creativity; (2) intentionality; and (3) identification as the source of the *res* (Hughes, 1998). They are as intrinsic to the virtual world as they are to the real-world. He begins with creativity – a fundamental notion of copyright law – as a core personhood interest that blurs the notions of originality and personal expression (Hughes, 1998). He refines this by following with intentionality. *Black's Law Dictionary* (1990) defines intent as "design, resolve, or determination with which a person acts" (Witters, 1939); "a state of mind in which a person seeks to accomplish a given result through a course of action" (Wager, 1979); and "a mental attitude which can seldom be proved by circumstances from which it may be inferred" (State, 1975). Hughes ends with questioning whether merely being the source of *res* creates legitimate

¹⁶ "The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit."

¹⁷ "Res is everything that may form an object of rights and includes an object, subject-matter, or status." *Black's Law Dictionary* (1990) citing *In re Riggles Will*, 205 N.Y.S.2d 19 (N.Y. App. Div. 1960).

personhood interests that justify some sort of protection (Hughes, 1998). These principles can be applied to both the players and corporate governors of virtual worlds in attempt to determine who has the stronger property rights in these creations.

4.1. Creativity

How fundamentally connected is creativity to individuality and identity? Creativity as a characteristic is something we nurture in our children for their development as independent individuals. The identification of a certain work with a certain individual transpires with subtler expression, in a manner similar to a particular defensive play in a chess tournament or a particular style of lighting scenes in a film.¹⁸ In these understated cases, there is a groping for some new terminology like 'critical judgement' or 'intellectual insight'. As this is the case, then there is no wonder that the three ideas – creativity, originality, and personal expression – have become so completely entwined in law that there may be no simple or clear way to disentangle them, despite some courts' and commentators' attempts to keep originality and creativity conceptually separate and distinct.

In the beginning, the traditional Common Law approach towards the requirement of originality was developed in England and is still enforceable there. This approach has served as a baseline for all other Common Law-based systems, including the early days of copyright law in the United States. The British approach could be described both as pragmatic and practical. 'Originality' is equated with a minimum standard of labour, skill or judgement in the production of a work which must not be a copy of another work. There is no requirement of novelty or creativity in the protected work, but only a requirement for some basic degree of skill and labour in the production of a work that is not a mere slavish copy of another work (Stokes, 2001).¹⁹ Consequently, British courts have tended to acknowledge copyright in almost any work which has even a slight element of labour and skill

invested in its production, and is not a simple copy of another work.²⁰

If the choice and arrangement of source material demand more than a minimal standard of skill and labour, the final form of expression of the work will be entitled to a copyright which is independent and additional to the one which may exist in the source materials (Cornish, 1999; Stokes, 2001).

This approach must be read alongside another basic principle of copyright law well established in the British system: the *idea-expression dichotomy* rule which excludes mere facts from the protection of copyright. Hence, copyright subsists only in a particular form of expression, in which ideas and facts are conveyed, and not in the abstracted form of the facts and ideas which are embodied within an expression.²¹ The true nature of the protection granted to factual compilations was summarized clearly by the authors of *Copinger and Skone James – On Copyright* (1999), who state that the merit of such works lies in the time and money spent in collecting and choosing the raw materials and it is this skill and effort that the law really intends to protect in this context: "The skill and effort is not literary in any conventional sense but as a matter of convenience it is protected as a literary work." Thus, intellectual creation or personal expression must be applied to the abstracted form of the facts in order for a copyright to subsist. This would then answer to the *Oxford Dictionary's* (1975) definition of original, "... not imitative, novel in character or style, inventive, creative, thinking or acting for oneself ..."

The Privy Council case of *Interlego AG v. Tyco Industries Inc.* (1988) which held that "[s]kill, labour, or judgement merely in the process of copying cannot confer originality ... [t]here must ... be some element of material alteration or embellishment which suffices to make the totality of the work an original work" (Id.).

In the 1991 *Feist* decision, the US Supreme Court unequivocally declared that 'originality' as employed in copyright law should be defined at least partially by means of creativity: "Original, as the term is used in copyright, means only that the work was independently created by the author (as

¹⁸ In discussing the development of a few leading cinematographers from the Hollywood studio system of the 1930s, John Bailey said: "Coming out of that [studio system were] some really stellar people ... who had such strength and such individual voice that they kind of transcended whatever studio they happened to be working for. Today you can look back and very easily recognize their films from the look irrespective of the director". *Visions of Light* (Arnold Glassman, director, 1994).

¹⁹ *University of London Press Ltd. v. University Tutorial Ltd.* [1916] 2 Ch. 601, 608-9, in which it has been declared that: "The word 'original' does not in this context mean that the work must be the expression of original inventive thought. Copyright acts are not concerned with the originality of ideas but with the expression of thought, and in the case of a 'literal work', with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author".

²⁰ Thus, the requirement of originality was acknowledged with regards to mundane factual compilations (see *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* (H.L.(E.)) [1964] 1 W.L.R. 273, 287, 289, 292, 1 All ER 465) such as a chronological list of sports' matches (see *Football League v. Littlewoods* [1959] Ch. 637, 2 All E. R. 546, 3 W.L.R. 42); a transcript of a public speech as it was documented by a skilful journalist (see *Walter v. Lane* [1900] A.C., 539); listings of programs to be broadcast (see *Independent Television Publications v. Time Out* [1984] F.S.R. 64); and 'unoriginal works' which concentrate solely on the documentation of another work such as photographs of paintings or objects in a collection (see *www.Antiquesportfolio.com plc. Rodney Fitch & Co. Ltd.* [2001] F.S.R. 345, at 352-4). The cases which did not meet this basic requirement were cases such as a slightly enlarged image produced by using a simple photocopier (see *The Reject Shop plc v. Mannors* [1995] F.S.R. 870, at 876); or short slogans or titles (see *Rose v. Information Services Ltd.* [1981] F.S.R. 254).

²¹ This basic rule is stated in many cases. For a recent House of Lords decision referring and applying the Idea-Expression Dichotomy, see *Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.* (H.L. (E.)) [2000] 1 W.L.R. 2416, at 2422-3 [1 All E.R. 700]. For examples of factual information in the context, see e.g. *Walter v. Steinkopff* [1892] 3 Ch. 489; *Express Newspapers v. News (UK)* [1991] F.S.R. 36, at 41.

opposed to copied from other works) and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low, even a slight amount will suffice.”²²

The Feist decision has had influence beyond the borders of the United States and has reached other common law-based countries that have adopted the ruling of the United States Supreme Court, while abandoning their traditional leaning towards the British approach. In Israel, the Supreme Court in the *Interlego A/S v. Exin-Lines Bros. SA* decision adopted the Feist ruling with regards to both the interpretation of the originality requirement and the general rejection of the ‘sweat of the brow’ doctrine and the labour theory as a legitimate interest for establishing a copyright claim. In Canada, a Canadian Federal Court of Appeal withheld protection from a telephone directory arrangement,²³ even though other cases restricted the *Tele-Direct* (1997) precedent to compilations and generally defined originality in more traditional common law terms (Hager, 1998).

4.2. Intentionality

Intentionality is used here as a counterpart to ‘creativity’ and as a constituent part of ‘personality’ (Hughes, 1998). A common theme in philosophical discussions of intentions is a sense of their ‘nowness’ – that an intention is a desire or decision being put into action.²⁴ There is no question that artistic works that seem imbued with creativity also seem imbued with the artist’s intention or purpose. As such, “[w]here the work constitutes a work that has both artistic intent and aspects of craftsmanship; it will attract copyright protection as a work of artistic craftsmanship” (Lambretta, 2004). Dewey (1980) remarked that: “no matter how imaginative the material for a work of art, it issues from the state of reverie to become the matter of a work of art only when it is ordered and organized, and this effect is produced only when purpose controls selection and development of material”. This returns us to the concept of authorship in British copyright law. The author of a work is the person who creates it (CPDA 1988 s 9(1)).

²² Id. at 345. In the statutory grant that “copyright protection subsists ... in original works of authorship”, 17 U.S.C. Section 102(a) (1988 and Supp. IV 1992), ‘original’ is interpreted as having ‘originality’ or meeting the ‘requirement of originality ...’ (see *Key Publications v. Chinatown Today Publications*, 945 F.2d 509, 512 (1991)).

²³ See also *CCH Canadian Ltd. v. Law Society of Upper Canada* (1999) 2 C.P.R. (4th) 129 (Fed. Ct.) (in which a compiling reported judicial decisions, even adding headnotes and other matters, have been found as lacking the ‘creative spark’ essential to a finding of originality). By contrast, in another case, different facts, such as the selection of information useful for the community, the court has allowed to distinguish another telephone directory as original (*Ital-Press Ltd. v. Sicoli* (1999) 86 C.P.R. (3rd) 129 (Fed. Ct.) (telephone directory of Italian-Canadians in the Edmonton area)).

²⁴ Hughes (1998), *Personality Interests* quoting Castaneda: “intending to do something is to be already in the process of doing it, even if merely by having undergone a re-arrangement of the causal powers within oneself in the direction of the action one intends to do” and Charles Taylor: “awareness of [an] intention incorporates, and may be nothing more than, our awareness of what we are doing intentionally”.

In most work, this is self-evident. Author has also been defined as the person who gathers or organizes the material contained within a work and who selects, orders, and arranges that material (Waterlow, 1995).

One might say that the person’s intentionality is intention in the process which led to creation of the res, not intention in the res itself. This, in turn, leads us from an exploration of the artist’s expression into exploration of her intentions, i.e., “what was she trying to express?” easily becomes “what was her intention?”. To John Dewey, purpose was as keenly connected to one’s personality as creativity: “purpose implicates in the most organic way an individual self. It is the purpose he entertains and acts upon that an individual most completely exhibits and realizes his most intimate selfhood. Control of material by a ‘self’ is control by more than just ‘mind’: it is control by the personality that has mind incorporated within it” (Dewey, 1980). However, not just any intent is enough for a personhood interest in intellectual products; the individual must intend to produce some form or shape that does not yet exist.

4.3. Sourcehood

Besides creativity and intentionality, there may be another personality interest: identification as the source of the res (Hughes, 1998). I suggest that this is a more basic aspect, but one which may resonate closely with players in a virtual world. The idea of ‘sourcehood’ takes two forms. The first is the purely private self-identification with the res. This is a private belief that one is the source of the res (Hughes, 1998). An example would be a player creating a distinctly unique avatar as opposed to accepting a generic avatar. On the other hand, it could be the computer programmer who created the code to allow avatars to acquire blue dye which, in turn, would allow them to have blue hair. Contrast this with the desire for the attention of others, recognition, or social place; a person who wants others to identify her and might try to achieve this recognition by ‘marking’ things as her own (Hegel, 1952; Gordon, 1993). These markings could be the symbols a craftsman uses to identify his goods or it could be the marks that a guild might use to identify its members. This ‘sourcehood’ interest, being identified as the source of some intellectual work, may be a personality justification.

Certainly, the personhood interest in intellectual property is most often protected with a guarantee of social recognition: the right of attribution (Berne Convention, article 6bis). Attribution rights protect sourcehood interests; however, in America these rights are not as developed as in Europe. In the United States, the default position is that a source of intellectual property res does not have a right of attribution.²⁵

²⁵ See, e.g., *Cleary v. News Corp.*, 30 F.3d 1255, 1259-60 (9th Cir. 1994); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 524-7 (7th Cir. 1947) (holding that an artist could not claim a right of attribution against a magazine where the artist granted the magazine all rights to his drawings in exchange for monthly compensation); *Nelson v. Radio Corp. of Am.*, 148 F. Supp. 1 (S.D. Fla. 1957) (denying a singer a right of attribution in the context of a master/servant relationship between recording company and singer and absent agreement to provide label credit).

Although, self-identification and the desire for recognition from others are conceptually distinct, one can imagine creative people who identify with their work and do not want social recognition. Perhaps, an artist wants to avoid social recognition in order to maintain greater creative freedom. Or perhaps, an individual wants to relate to others via a different identity provided by their avatar. In MMORPGs, this is where the aspect of role-playing is at its height. Virtual worlds are the domain of liquid identities.

Even so, these two notions – self-identification as the source of a *res* and desire for social recognition through the *res* – are rarely disentangled. They are combined on the assumption that the person seeks social identification for those things with which she already self-identifies. The notion of identity is compelling when studying culture; “self” is the measure of reality (Filiciak, 2003). Protecting this “self” takes the form of social mores as much as laws. If the right of attribution is limited in our mores and laws, then so is the extension of any other rights (i.e., to control the intellectual property *res*) relating to one who self-identifies with that *res*.

5. Conclusion

While the undertaking of designing enjoyable avatars and virtual worlds may be complex and somewhat byzantine, the fact remains that these virtual worlds are in demand which, consequently, suggests that they will have the net effect of increasing cumulative well-being.²⁶ “The junction of the new and the old is not a mere composition of forces, but is a recreation in which the present impulsion gets form and solidity while the old, the ‘stored’, material is literally revived, given new life and soul through having to meet the new situation. It is this double change that converts an activity into an act of expression. Things in the environment that would otherwise be mere smooth channels or else blind obstructions become means, media. At the same time, things retained from the past experience that would grow stale from routine or inert from lack of use, become coefficients in new adventures and put on raiment of fresh meaning. Here are all the elements needed to define expression” (Dewey, 1980).

Dewey’s view is that both the subjects our minds engage and what we do with those subjects are the results of personal experience being reworked in the present tense. Because each of us is a unique experiential timeline, whatever we produce constitutes personal expression (*Id.*). Each of us is a unique order of experiences and each new creation might somehow be

²⁶ IBM believes that virtual worlds and other 3D Internet environments offer significant opportunity to our company, our clients and the world at large, as they evolve, grow in use and popularity, and become more integrated into many aspects of business and society. As an innovation-based company, IBM encourages employees to explore responsibly and to further the development of such new spaces of relationship-building, learning and collaboration. As we engage in these new environments, IBMers should follow and be guided first and foremost by our values and our Business Conduct Guidelines. IBM Virtual World Guidelines at http://domino.research.ibm.com/comm/research_projects.nsf/pages/virtualworlds.IBMVirtualWorldGuidelines.html.

predictable and mechanical while staying beautiful and unique (Nozick, 1989).

As we delve deeper and wider into virtual spaces, both our identities and reputations are scattered across them. Control over online avatar identities will have many real-world consequences, because these clouds of bits may include our credit records, our buddy lists, our job records, personal references and other information regarding reputation, medical histories, certifications and academic transcripts. As soon as something is valuable and persistent, we seek to associate rights and duties with it. What will those rights be? And what will be the law of online identity to which those rights apply? The rise of these types of difficult problems of choice in cyberspace has nothing to do with the fact that human beings are interacting via avatars in virtual reality; it has everything to do with the fact that they are human beings, interacting.

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