

2007

## Regulating Your Second Life: Defamation in Virtual Worlds

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### Recommended Citation

Bettina M. Chin, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 Brook. L. Rev. (2007).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol72/iss4/4>

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# Regulating Your Second Life

## DEFAMATION IN VIRTUAL WORLDS

### I. INTRODUCTION

[W]e came out of the cave, and we looked over the hill and we saw fire. And we crossed the ocean and we pioneered the West, and we took to the sky. The history of man is on a timeline of explorations and this is what's next.<sup>1</sup>

Second Life, a three-dimensional virtual world created by Linden Research, Inc. ("Linden Lab"), is perhaps the first attempt by Internet users and programmers to make the digital realm of *The Matrix*<sup>2</sup> come to life.<sup>3</sup> In Second Life, users will find the sun, wind, buildings, paved streets, grass, rivers, seas, mountains, islands, and countries, all recreated to look and "feel" as if users were actually living in cyber reality.<sup>4</sup> Thus, by introducing the laws of physics and real-world topography to the virtual space, this platform<sup>5</sup> is the closest thing to a parallel universe that the Internet currently offers.<sup>6</sup> But Second Life provides even more than what the real world is able to: in this virtual world, one may encounter vampires,

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<sup>1</sup> *The West Wing: Galileo* (NBC television broadcast Nov. 29, 2000).

<sup>2</sup> See generally The Internet Movie Database: *The Matrix*, <http://imdb.com/title/tt0133093/> (last visited Mar. 29, 2007).

<sup>3</sup> David Lazarus, *Real Fear in Virtual World*, S.F. CHRON., Sept. 15, 2006, at D1, available at 2006 WLNR 16024708 (quoting Philip Rosedale, founder and CEO of Linden Lab).

<sup>4</sup> See, e.g., *It's a Whole New World*, NEWSWEEK, Mar. 25, 2002, available at 2002 WLNR 8853895.

<sup>5</sup> Second Life's creators have markedly referred to Second Life as a complex "platform" instead of a "game," which speaks to the diversity and flexibility of Second Life as an Internet phenomenon. Irene Sege, *Leading a Double Life: In a User-Created Universe, Alter Egos Bridge the Gap Between Fantasy and Reality*, BOSTON GLOBE, Oct. 25, 2006, at 1D (quoting John Lester, Linden Lab's community and education manager). The term "platform" refers to an overarching operating system, a grand "scheme" on which computer applications and software may run. Webopedia: Platform, <http://www.webopedia.com/TERM/P/platform.html> (last visited Mar. 29, 2007).

<sup>6</sup> Eric Auchard & Kenneth Li, *Reuters Opens Virtual News Bureau in Second Life*, REUTERS, Oct. 16, 2006, available at <http://in.tech.yahoo.com/061016/137/68izr.html>.

elves, talking animals, flying humans, and whatever else its users and programmers dare to imagine.<sup>7</sup>

To begin her Second Life experience, a user creates a personal account by registering with Second Life's homepage.<sup>8</sup> The initial registration,<sup>9</sup> which is free of cost, comprises of inventing a first name and selecting a surname from a list provided by Second Life, choosing a preconceived avatar,<sup>10</sup> and downloading and installing the appropriate application.<sup>11</sup> Linden Lab then provides the user with a sign-up bonus of 250 "Linden Dollars,"<sup>12</sup> which may be used to buy any digital item or service offered on the Web site.<sup>13</sup> To bulk up her "bank" account, a user may trade real money for in-world currency with a third party or use digital "ATM" machines.<sup>14</sup> Certainly, a user may conduct her activity without exploiting the Second Life economy; she may simply interact with other users in the online community.<sup>15</sup>

However, Second Life was designed to be more than an interactive "chat room" for conversations, or a "game" with set objectives and goals.<sup>16</sup> It is ostensibly a free-range graphical environment where users may explore, interact, create, and trade as they do in real life—only this happens, of course, in a "second life."<sup>17</sup> Nearly every object in Second Life, from cars to

<sup>7</sup> See, e.g., Eyder Peralta, *In Second Life, the World Is Virtual. But the Emotions Are Real*, HOUS. CHRON., May 28, 2006, at 12, available at <http://www.chron.com/disp/story.mpl/ent/3899538.html>; Daniel Terdiman, *Phony Kids, Virtual Sex*, CNET NEWS, Apr. 12, 2006, [http://news.com.com/Phony+kids%2C+virtual+sex/2100-1043\\_3-6060132.html](http://news.com.com/Phony+kids%2C+virtual+sex/2100-1043_3-6060132.html) [hereinafter Terdiman, *Phony Kids*].

<sup>8</sup> See Second Life, Registration, Basic Details, <https://secure-web6.secondlife.com/join> (last visited Mar. 29, 2007).

<sup>9</sup> Second Life, Memberships, Land, & Pricing, <http://secondlife.com/whatis/pricing.php> (last visited Mar. 29, 2007).

<sup>10</sup> For a definition of "avatar," see *infra* note 59 and accompanying text.

<sup>11</sup> See Second Life Home Page, <http://secondlife.com> [hereinafter Second Life Home Page] (last visited Mar. 29, 2007).

<sup>12</sup> The official Second Life currency is called Linden Dollars, otherwise known as "L\$." Lazarus, *supra* note 3.

<sup>13</sup> Second Life Frequently Asked Questions, <http://secondlife.com/whatis/faq.php> [hereinafter Second Life FAQ] (last visited Mar. 29, 2007).

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* note 318.

<sup>16</sup> Kenneth James, *Real Benefits in Virtual Worlds*, BUS. TIMES (Singapore), Dec. 11, 2006, available at 2006 WLNR 21377087.

<sup>17</sup> See, e.g., Mark Glaser, *Wired*, CNET, *Reuters Agog over Second Life*, MEDIASHIFT, Oct. 23, 2006, [http://www.pbs.org/mediashift/2006/10/virtual\\_journalismwired\\_cnet\\_r.html](http://www.pbs.org/mediashift/2006/10/virtual_journalismwired_cnet_r.html). In creating this virtual world, Linden Lab's chief executive officer, Phillip Rosedale, set his aim high: he wanted Second Life to be a place where people could "realize their dreams and ideas." Annalee Newitz, *Your Second Life Is Ready*, POPULAR SCI., Sept. 1, 2006, at 74, available at

clothes to characters, is created by its inhabitants using scripting tools and other design programs.<sup>18</sup> Importantly, Second Life also runs on a synthetic economy<sup>19</sup> in which “real-world” money is converted to digital currency (Linden Dollars), which likewise can be converted back.<sup>20</sup> Because users retain the rights to their digital creations, they can create, trade, sell, or purchase any creation with other users, which furthers the growth of this in-world economy.<sup>21</sup>

In fact, because Linden dollars may be reconverted to real-life currency at online currency exchanges, some users, or “residents” in Second Life jargon,<sup>22</sup> have profited significantly, earning real income from the sale of digitally created products and digitally created land.<sup>23</sup> Because of the potentially high return of profits, some residents have supplanted or replaced their real-life careers with their online transactions.<sup>24</sup> These residents spend as much time online in Second Life as they would at a typical nine-to-five job,<sup>25</sup> and have thus come to view their investment in Second Life as their livelihood.<sup>26</sup> For

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<http://www.popsi.com/popsi/technology/7ba1af8f3812d010vgnvcm100004eecbccdrerd.html>.

<sup>18</sup> Currently, there are over five million subscribed users. Second Life FAQ, *supra* note 13; *see also* Lazarus, *supra* note 3; *Second Life Considers Opening UK Office After Growth in Users*, NEW MEDIA AGE, Sept. 14, 2006, at 6 [hereinafter NEW MEDIA AGE].

<sup>19</sup> *See generally* wiseGeek: What Is a Synthetic Economy?, <http://www.wisegeek.com/what-is-a-synthetic-economy.htm> (last visited Mar. 29, 2007) (defining a “synthetic economy” as the economy in which virtual worlds that “employ their own form of currency, participants purchase virtual currency with real-world dollars”).

<sup>20</sup> Second Life FAQ, *supra* note 13.

<sup>21</sup> What Is Second Life?, <http://secondlife.com/whatis> (last visited Mar. 29, 2007).

<sup>22</sup> The definition of a “resident” is arguably stricter than that of a “user.” *See generally* Posting by Wagner James Au to GigaGamez, Second Life: Hype vs. Anti-Hype vs. Anti-Anti-Hype, <http://gigagamez.com/2006/12/18/second-life-hype-vs-anti-hype-vs-anti-anti-hype> (Dec. 18 2006, 10:16 PST) (claiming that the difference is that “users” are simply account holders who sign up and refrain from participating in Second Life and “residents” establish long-term identities in the virtual community).

<sup>23</sup> *See* Mark Wallace, *The Game Is Virtual. The Profit Is Real*. N.Y. TIMES, May 29, 2005, at 37, *available at* 2005 WLNR 8515571.

<sup>24</sup> *See, e.g.*, Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury Is Still Out*, WASH. POST, Dec. 12, 2006, at A1, *available at* 2006 WLNR 22504925 (stating that Veronica Brown, an in-world fashion designer, “makes a living” in Second Life, earning about \$60,000 in 2006); *infra* notes 29-30 and accompanying text.

<sup>25</sup> *See supra* note 24.

<sup>26</sup> *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 8-9 (2004) [hereinafter Lastowka & Hunter, *Laws*] (“[V]irtual worlds are attracting an ever-increasing population of participants who believe that the social interactions that occur within these environments are important.”); John Gapper, *The*

example, Anshe Chung, whose real world counterpart is Ailin Graef, is known among the residents as the “virtual Donald Trump”<sup>27</sup> or the “virtual Rockefeller.”<sup>28</sup> As a real estate tycoon in Second Life, Chung engages in real estate ventures with any resident interested in purchasing or renting virtual homesteads.<sup>29</sup>

By purchasing virtual land, subdividing it, and reselling or renting it to the Second Life community, Chung/Graef created a virtual empire that has grossed significant real-world profits.<sup>30</sup> In November 2006, Chung proclaimed herself to be the first “online personality” with a net worth of over one million U.S. dollars.<sup>31</sup> Her financial achievements mark a milestone for online entrepreneurs since her business is conducted solely with intangible goods.<sup>32</sup> Accordingly, one question that may arise is what, if any, legal recourse Chung or any other virtual industrialist would have if another resident tarnished his or her reputation by spreading defamatory statements.<sup>33</sup> Insofar as a resident’s business depends on his or her reputation in the metaverse,<sup>34</sup> and where harm incurred

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*Real-Life Right to Virtual Property*, FT.COM, Oct. 29, 2006, available at 2006 WLNR 18825635.

<sup>27</sup> Sean F. Kane, *Virtual Wealth Management: Asset Creation, Seclusion, and Money Laundering in the Online World*, 185 N.J. L.J. 988 (2006).

<sup>28</sup> Paul Sloan, *The Virtual Rockefeller*, CNNMONEY.COM, Dec. 1, 2005, [http://money.cnn.com/magazines/business2/business2\\_archive/2005/12/01/8364581/index.htm](http://money.cnn.com/magazines/business2/business2_archive/2005/12/01/8364581/index.htm).

<sup>29</sup> Kane, *supra* note 27, at 988. Chung commented that “this virtual role-playing economy is so strong that it now has to import skill and services from the real-world economy.” *My Virtual Life*, BUS. WK., May 16, 2006, at 72 (quoting Anshe Chung).

<sup>30</sup> *Second Life’s Housing Boom Creates Virtual Millionaire*, COMMWEBNEWS.COM, Nov. 27, 2006, available at 2006 WLNR 20536783. Graef also runs Anshe Chung Studios, which develops three-dimensional environments for commercial and educational applications. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., Virtual Intellectual Property Rights, <http://www.ipblog.ca/?p=46> (Jan. 11, 2007, 11:13 EST) (regarding recent “griefing” incident, post states that “if Ms. Chung can’t bring an action for defamation of character in the virtual world, I’m sure those days aren’t far in the future”). Naturally, copyright, trademark, and content creation issues also raise significant legal issues in Second Life. See, e.g., Posting by Robin Linden to Official Linden Blog, Copyrights and Content Creation in Second Life, <http://blog.secondlife.com/2006/11/13/copyrights-and-content-creation-in-second-life> (Nov. 13, 2006, 18:57 PST) (discussing the legal implications of CopyBot, a program that allows a user to freely and permissibly replicate objects).

<sup>34</sup> “Metaverse” was coined in Neal Stephenson’s novel *Snow Crash* and is used to describe virtual reality in an online environment. Chris Taylor, *Google Moves into Virtual Worlds*, BUS. 2.0 MAG., Dec. 14, 2006, available at [http://money.cnn.com/2006/05/11/technology/business2\\_futureboy\\_0511](http://money.cnn.com/2006/05/11/technology/business2_futureboy_0511).

there is as real as it would be in the natural world, the law should be able to protect these Second Life users from any real torts that may arise.<sup>35</sup>

Although the issue of “virtual” harm has never been raised in real-world courts, virtual worlds like Second Life have become increasingly significant in terms of both time and money for their users.<sup>36</sup> As such, it is important to develop theories of how the law may apply to and resolve disputes that originate in these worlds.<sup>37</sup> This Note will therefore argue that because users have imported real-world concepts, specifically currency and economy, into the metaverse, it would behoove brick and mortar societies to provide for redress if a user suffers pecuniary loss in these worlds. This Note will also explore certain ambiguities inherent and unique to the virtual environment when traditional elements of defamation law are applied to it. Moreover, this Note will argue that real-world courts should be the proper forum in which to litigate defamation actions, where victims suffer pecuniary loss due to the fall of their reputations.<sup>38</sup>

Part II of this Note will introduce Second Life and examine its construct as a virtual environment that diverges from standard massively multi-player/multimedia online role-playing games (“MMORPG”).<sup>39</sup> Second Life is unique in that its users have an important role in creating and financially sustaining Second Life as an open-ended metaverse.

Part III will address the various legal issues that arise in, and are unique to, the virtual world, such as online speech-based actions between and among the “in-world” and “real-world” identities. Part III will also address Second Life’s Terms of Service agreement (the “TOS Agreement”) and Community Standards Agreement, as they mutually establish the rules by which users must abide before engaging in any

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<sup>35</sup> See Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 74 (2004) [hereinafter Balkin, *Law and Liberty*].

<sup>36</sup> See Balkin, *Law and Liberty*, *supra* note 35, at 74.

<sup>37</sup> *Id.*

<sup>38</sup> See *infra* notes 334-36 and accompanying text.

<sup>39</sup> An MMORPG is a type of online computer role-playing game in which a large group of players subscribe to a gaming platform and interact with one another in this virtual world. wiseGeek: What is a MMORPG?, <http://www.wisegeek.com/what-is-a-mmorpg.htm> (last visited Mar. 9, 2007). See also *infra* note 66. For more information regarding MMORPGs, see Ung-gi Yoon, *A Quest for Legal Identity of MMORPGS—From a Computer Rack, Back to a Play Association*, 10 J. GAME INDUSTRY & CULTURE (2005), available at <http://ssrn.com/abstract=905748>.

online activity in Second Life.<sup>40</sup> Subsequently, Part III will taxonomize a hypothetical defamation action by applying the statutory text of the Restatement (Second) of Torts.<sup>41</sup> Specifically, it will also discuss problems that Second Life residents will encounter when real-world defamation legislation is applied to their claims.

Finally, Part IV will expound on scholarly concerns regarding the interference of real-world governance and the available alternative means of policing the virtual world. It will conclude that courts should overcome any ambiguities when applying real-world defamation legislation to the metaverse in order to properly safeguard all participants of the virtual world.

## II. INTRODUCING THE SECOND LIFE PHENOMENON: HISTORY AND DEVELOPMENT

The turn of the twenty-first century has marked the “Age of the Internet,” as technology has exponentially advanced such that a three-dimensional, self-sustaining virtual world can now mimic the real world with alarming accuracy.<sup>42</sup> Online simulations<sup>43</sup> are not a new technological concept, although most simulations are used in games.<sup>44</sup> However, as the next evolutionary step for role-playing video games,<sup>45</sup> these worlds, which incorporate advanced simulation technology, have

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<sup>40</sup> Second Life, Community Standards, <http://secondlife.com/corporate/cs.php> [hereinafter SL Community Standards] (last visited Mar. 9, 2007); Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> [hereinafter SL TOS] (last visited Mar. 9, 2007). Both contracts, which legally bind the registered user to Linden Lab’s specifications, describe the behaviors that are both allowed and prohibited within this virtual community. SL Community Standards, *supra*; SL TOS, *supra*.

<sup>41</sup> This Note will not specifically address injurious falsehood, which protects against a plaintiff’s “disparagement of property in land, chattels or intangible things or of their quality,” because defamation may broadly cover statements that may cause pecuniary loss but were not intended to harm the “interests of the other having a pecuniary value.” RESTATEMENT (SECOND) OF TORTS § 623A cmt. a (1977). Because defamation law varies among jurisdictions, this Note will focus on the elements proffered by the Restatement of (Second) Torts.

<sup>42</sup> See, e.g., Second Life Home Page, *supra* note 11.

<sup>43</sup> Simulation technology attempts to recreate a real-world environment in a computer-generated, virtual space. Paul A. Fishwick, *Computer Simulation: The Art and Science of Digital World Construction*, Oct. 9, 1995, <http://www.cis.ufl.edu/~fishwick/introsim/paper.html>.

<sup>44</sup> See Henry S. Kenyon, *Second Life Opens New Vistas*, 3 SIGNAL CONNECTIONS (Armed Forces Comm. and Electronics Ass’n), June 15, 2006, available at [http://www.imakenews.com/signal/e\\_article000597695.cfm?x=b11,0,w](http://www.imakenews.com/signal/e_article000597695.cfm?x=b11,0,w).

<sup>45</sup> Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L. 173, 174 (2005) [hereinafter Jankowich, *Property*].

become interactive environments where users are able to “see, hear, use, and even modify simulated objects in the computer-generated environment.”<sup>46</sup>

For example, within the last two decades and especially with the advent of World of Warcraft, Sims Online, Everquest, and Eve,<sup>47</sup> entertainment software and the online virtual environments that it provides have altogether gained prominence, with millions of players from around the world subscribing to these games.<sup>48</sup> Yet what separates Second Life from these prefabricated MMORPGs is that Second Life employs no clear objectives for its users or a scoring system that rates the progress of a user; thus, a resident’s reputation is not based on how many points he amasses or how many game levels he surpasses, but rather how he establishes his identity by interacting with other Second Life users in this virtual culture.<sup>49</sup> As a global network that bonds real people with similar interests, as a marketing tool for real-world businesses, and as a virtual environment where users may suspend disbelief to do ordinarily impossible feats such as flying or talking with graphical animals, Second Life is like no other online community.<sup>50</sup>

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<sup>46</sup> Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649, 649 (2006). Although virtual communities and MMORPGs are foreign to those over the age of, say, forty, they are quite familiar to the younger generation of video game players and social-networking Web site users. Richard Siklos, *Not in the Real World Anymore*, N.Y. TIMES, Sept. 18, 2006, at C1, available at 2006 WLNR 16157613. For example, some social networking Web sites, such as Facebook.com and Myspace.com, have successfully attracted millions of users, particularly among high school students. See, e.g., Lev Grossman, *Power to the People*, TIME, Dec. 25, 2006, at 42, available at 2006 WLNR 21920583 (describing Facebook.com and Myspace.com as important cultural phenomena).

<sup>47</sup> World of Warcraft, Eve, Everquest, and Sims Online are all MMORPGs. See Wikipedia, List of MMORPGs, [http://en.wikipedia.org/wiki/List\\_of\\_MMORPGs](http://en.wikipedia.org/wiki/List_of_MMORPGs), (last visited Mar. 29, 2007) (listing various MMORPGs). See also *supra* note 39.

<sup>48</sup> See, e.g., Viktor Mayer-Schönberger & John Crowley, *Napster’s Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1783 (2006). See also Press Release, Blizzard Entertainment, World of Warcraft Reaches More Than One Million Customers in Europe (Jan. 19, 2006), <http://www.blizzard.com/press/060119.shtml>.

<sup>49</sup> Kenyon, *supra* note 44.

<sup>50</sup> See Second Life, The World, <http://secondlife.com/whatis/world.php> (last visited on Mar. 29, 2007) (describing the various activities and opportunities offered in Second Life).

A. *What Is Second Life?*

In 2003, the line separating fantasy from reality became fainter with the arrival of Linden Lab's Second Life.<sup>51</sup> The popularity of Second Life has been unprecedented.<sup>52</sup> With a nearly cult-like following of over 4,400,000 registered members,<sup>53</sup> with thousands of individuals using the program at any given time, Second Life has provided a sophisticated multidirectional blank slate for people, "tech savvy" or not, to create an entirely distinct online existence.<sup>54</sup> Moreover, Second Life allows its users to start "anew," if they so choose to, by creating a graphical character with features and personalities unlike their own.<sup>55</sup>

To take part in Second Life, a user registers with the Second Life web site by creating a free account, setting up a name and basic character to use, and downloading the Second Life application to begin using the program.<sup>56</sup> When a user registers with Second Life for the first time, Linden Lab gives her a stipend of 250 Linden dollars, Second Life's official digital currency, to spend on any virtual service or product the user wishes.<sup>57</sup> Initially, the user may acquire more money by converting real-world dollars for Linden dollars with third-party operators or at Linden Lab's currency exchange, LindeX.<sup>58</sup>

Importantly, the user must also create a virtual "avatar," which is a graphical persona or likeness, to represent the user in the virtual world, that is, her "in-world" self.<sup>59</sup>

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<sup>51</sup> See NEW MEDIA AGE, *supra* note 18. Pushing the technological envelope with its creation of Second Life, Linden Lab owns and maintains a large array, or "grid," of servers that run the virtual world. SL History Wiki, Second Life Grid, <http://history.secondserver.net/index.php/Grid> (last visited Mar. 29, 2007).

<sup>52</sup> NEW MEDIA AGE, *supra* note 18.

<sup>53</sup> Second Life Home Page, *supra* note 11.

<sup>54</sup> *Buying into the Virtual World*, MSNBC, Aug. 7, 2006, <http://msnbc.msn.com/id/14228225>.

<sup>55</sup> Sege, *supra* note 5 (describing Jeff Lipsky, a Second Life user, whose avatar is a cartoon character named Filthy Fluno, a "bearded, wide-bodied, wild-tressed, fang-toothed, black gallery owner").

<sup>56</sup> See *supra* note 8.

<sup>57</sup> Second Life, Membership Plans, <http://secondlife.com/whatis/plans.php> (last visited Mar. 29, 2007).

<sup>58</sup> Second Life, Economy, <http://secondlife.com/whatis/economy.php> (last visited Mar. 29, 2007). See also *supra* note 12.

<sup>59</sup> The definition of an avatar has evolved dramatically within the last few decades and can signify either a generic user representation in cyberspace, i.e., a personality that is connected to a user's name or "handle," or a two-dimensional icon. Barfield, *supra* note 46, at 651. At the core, an avatar is an online identity that

Avatars are three-dimensional pictorial models that can be altered to meet a user's specifications.<sup>60</sup> For example, Linden Lab has provided a platform with which users may customize the "look and feel" of their avatars by specializing every aspect of the avatar, from skin hue to body proportions.<sup>61</sup> Residents may also create three-dimensional objects by atomistic construction, as they manipulate and combine geometric primitives or "prims"<sup>62</sup> to form more complex objects.<sup>63</sup> Additionally, Second Life offers access to an individualized scripting language, which residents may use to control the behavior of their in-world creations.<sup>64</sup> Residents thus have the full capability to direct the appearance and behaviors of their avatars, customizing their look as easily and as often as they wish.<sup>65</sup>

*B. How Is Second Life Different from Any Other Online Community?*

The creators and programmers of Second Life take pride in the fact that the interactive world they have created is not

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assumes either a textual or pictorial form. See, e.g., Allen Chein, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059, 1064 (2006). In a simplistic, typical MUD, or "multi-user dungeon," players would log in to a public forum as avatars to engage in role-playing. Pavel Curtis, *Mudding: Social Phenomena in Text-Based Virtual Realities*, Proceedings of the 1992 Conference on the Directions and Implications of Advanced Computing, Berkeley (1992), available at [http://www.eff.org/Net\\_culture/MOO\\_MUD\\_IRC/curtis\\_mudding.article](http://www.eff.org/Net_culture/MOO_MUD_IRC/curtis_mudding.article); see also Wikipedia, MUD, <http://en.wikipedia.org/wiki/MUD> (last visited Apr. 2, 2007) (defining a multi-user dungeon as a computer game that combines role-playing elements in a social chat room setting). For a more in-depth discussion regarding MUDs, see HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* 145-75 (1994). See also Wikipedia, Dungeon (Computer Game), [http://en.wikipedia.org/wiki/Dungeon\\_%28computer\\_game%29](http://en.wikipedia.org/wiki/Dungeon_%28computer_game%29) (last visited Mar. 29, 2007) (defining "dungeon").

<sup>60</sup> See, e.g., Second Life, Create an Avatar, <http://secondlife.com/whatis/avatar.php> (last visited Mar. 29, 2007).

<sup>61</sup> *Id.* Although the following implication is not addressed in detail, users also have the option of utilizing non-humanoid shapes. See, e.g., Wagner James Au, Electing the Extraordinary, [http://secondlife.blogs.com/nwn/2005/08/electing\\_the\\_ex.html](http://secondlife.blogs.com/nwn/2005/08/electing_the_ex.html) (Aug. 22, 2005, 12:04 PST) (discussing showcase of non-human avatars in Extraordinary Avatar Expo).

<sup>62</sup> A primitive is generally a simple geometric shape, stored and created as a computer-generated graphical object. Webopedia, Primitive, <http://webopedia.com/TERM/p/primitive.html> (last visited Mar. 29, 2007) (defining "primitive").

<sup>63</sup> Second Life, Building, <http://secondlife.com/whatis/building.php> (last visited Mar. 29, 2007).

<sup>64</sup> Second Life, Scripting, <http://secondlife.com/whatis/scripting.php> (last visited Mar. 29, 2007).

<sup>65</sup> Second Life, Create an Avatar, *supra* note 60.

simply an environment for avatars to mingle.<sup>66</sup> Moreover, unlike some online communities that are set in fantastical worlds where the players must earn “winnings” to continue to play in the game, there are no dragons to slay or princesses to save in Second Life.<sup>67</sup> There is neither an end strategy nor losers in this platform, as there typically are in other games.<sup>68</sup> Simply put, the purpose of Second Life is to provide an interactive meeting ground and marketplace where people are not limited by the confines of real-world physics; users here can accomplish more than what is physically possible in the real world.<sup>69</sup> In Second Life, the residents create and market every object, textile, or item that other residents use.<sup>70</sup> They interact, shop, create communities, travel and even retain jobs.<sup>71</sup> Any virtual endeavor is possible, whether it be buying and selling of real estate, setting up shopping malls to outfit other avatars, or putting together a political rally based on real or fictional controversies.<sup>72</sup>

Moreover, Second Life users retain complete intellectual property rights for all digital goods created in Second Life, and these rights are fully enforceable both “in-world and offline.”<sup>73</sup> Importantly, this means that a Second Life user has the ability to exercise his rights over digital property within the Second Life platform as well as in the real world.<sup>74</sup> Hence, if a resident illegally copied another’s digital product, the victim of the infringement may prevent the replica from being proliferated by informing the appropriate in-world representative and

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<sup>66</sup> Lazarus, *supra* note 3. Although the Second Life interface may resemble a MMORPG, Linden Lab claims two significant differences: (1) Second Life endows its users with considerable freedom; (2) Second Life allows its users to retain all intellectual property rights of any in-world creation. Second Life FAQ, *supra* note 13. See also *infra* note 72 and accompanying text.

<sup>67</sup> Andrew Lavalley, *Now, Virtual Fashion*, WALL ST. J. ONLINE, Sept. 22, 2006, [http://online.wsj.com/public/article/SB115888412923570768-HtFYrBweWpF25yJkLOCdXvkFRkY\\_20070922.html](http://online.wsj.com/public/article/SB115888412923570768-HtFYrBweWpF25yJkLOCdXvkFRkY_20070922.html).

<sup>68</sup> Wikipedia, Second Life, [http://en.wikipedia.org/wiki/Second\\_life](http://en.wikipedia.org/wiki/Second_life) (last visited Mar. 29, 2007).

<sup>69</sup> Sege, *supra* note 5.

<sup>70</sup> Lazarus, *supra* note 3.

<sup>71</sup> Lavalley, *supra* note 67.

<sup>72</sup> Reena Jana & Aili McConnon, *Second Life Lessons*, BUSINESS WK., Nov. 27, 2006, at 17, available at 2006 WLNR 20258448. See also Press Release, Law Offices of Marc Bragg, Virtual Land Dispute Spills Over Into Real World (May 8, 2006), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/05-08-2006/0004356685>.

<sup>73</sup> Second Life, IP Rights, [http://secondlife.com/whatis/ip\\_rights.php](http://secondlife.com/whatis/ip_rights.php) (last visited Mar. 29, 2007); see also *infra* note 137.

<sup>74</sup> Second Life, IP Rights, *supra* note 73.

initiate a real-world action pursuant to the Digital Millennium Copyright Act (the “DMCA”).<sup>75</sup>

As intangible as the items and characters may seem, the currency exchanged in Second Life is not.<sup>76</sup> Second Life users exchange real money for digital items and services that exist only “in-world.”<sup>77</sup> Second Life markets at least 7,000 profitable businesses in which the users supplement or derive their main income from their in-world participation.<sup>78</sup> In fact, a number of residents may have earned nearly six-figure salaries due to their virtual entrepreneurialism.<sup>79</sup> In 2005, the top ten in-world entrepreneurs averaged over \$200,000 in annual profits.<sup>80</sup>

### C. *The Significance of Second Life*

In part because Second Life provides a “one-of-a-kind virtual experience”<sup>81</sup> where its residents can make real money from virtual concepts, Second Life has attracted and sustained a loyal and widespread global audience.<sup>82</sup> Because of this,

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<sup>75</sup> *Id.* Creators also reserve the right to determine whether other residents may duplicate, transfer, or alter their inventions. *Virtual Online Worlds: Living a Second Life*, ECONOMIST, Sept. 30, 2006, at 62, available at 2006 WLNR 16831134 [hereinafter *Living a Second Life*]. Cory Ondrejka, vice president of product development of Linden Lab, says, “[i]t is the ability of the user to make their own content that makes Second Life special.” Kenyon, *supra* note 44. See also *infra* note 129 and accompanying text.

<sup>76</sup> Bragg, *supra* note 72. Of course, the idea of earning income online is not particularly new. See JULIAN DIBBELL, PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT 2 (2006) (describing Dibbell’s experiences making a viable living in this “half illusory economy those worlds sustain”). See also Daniel Terdiman, *Virtual Trader Barely Misses Goal*, WIRED NEWS, Apr. 16, 2004, available at <http://www.wired.com/news/games/0,2101,63083,00.html>.

<sup>77</sup> Second Life, Currency Exchange, <http://secondlife.com/whatis/currency.php> (last visited Nov. 4, 2006). To convert Linden dollars for legal tender and vice versa, a user may access third-party sites, such as IGE.com, SLEExchange.com, or ZToken.com, and exchange currency for a fee. *Id.*

<sup>78</sup> *Living a Second Life*, *supra* note 75.

<sup>79</sup> Bragg, *supra* note 72. See also Balkin, *supra* note 35, at 80 (contending that “players will find ways to exchange virtual items for money” as the popularity of virtual spaces continues to rise); Adam Reuters, *Surge in High-End Second Life Business Profits*, REUTERS SECOND LIFE NEWS CENTER, <http://secondlife.reuters.com/stories/2006/12/05/surge-in-high-end-second-life-business-profits> (Dec. 5, 2006) (stating that forty percent of Second Life residents made profits over \$5,000).

<sup>80</sup> *Living a Second Life*, *supra* note 75.

<sup>81</sup> Kenyon, *supra* note 44; David Kirkpatrick, *It’s Not a Game*, FORTUNE, Feb. 5, 2007, at 56 (stating that about 300 IBM employees regularly participate in Second Life in order to conduct “company business”).

<sup>82</sup> See, e.g., Lazarus, *supra* note 3. The average user spends about forty hours per week participating in Second Life and nearly half the residents are female. *Id.* Almost half the residents are from outside of the United States. *Id.*

many real-world industries have decided to take advantage of the commercial marketing opportunities in Second Life.<sup>83</sup> For example, due to its innovative and sensory progressive platform, Second Life has attracted the attention of audiovisual media, including marketing labels and record executives,<sup>84</sup> and several artists, such as folk singer Suzanne Vega and hip-hop/rap artist Jay-Z, have held virtual concerts.<sup>85</sup> Even motion pictures have premiered in Second Life, where moviegoers were able to mingle with the avatars of real-world celebrities.<sup>86</sup>

“Corporate America” has also made inroads in Second Life, and numerous large companies and investors have devoted considerable monies to develop marketing strategies in the virtual context.<sup>87</sup> For example, clothing has become a hugely popular commodity in Second Life, and companies such as American Apparel, Nike, and Adidas/Reebok have launched shops in virtual “real estate” that they have purchased for their commercial use.<sup>88</sup> Users can thus outfit their avatars in clothing that they themselves may wear.<sup>89</sup> Other real life corporate marketers, such as Sun Microsystems, Toyota, Nissan, Sony BMG Music Entertainment, and Starwood Hotels, have retained Second Life services as a virtual “test bed” for advertising and feedback schemes.<sup>90</sup> These companies

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Sara Kehaulani Goo, *Hear the Music, Avoid the Mosh Pit: Artists Find Their Audience Online*, WASH. POST, Aug. 21, 2006, at A1 available at 2006 WLNR 14473246; Wagner James Au, *Jay-Z Comes to Second Life*, [http://nwn.blogs.com/nwn/2006/11/jayz\\_comes\\_to\\_s.html](http://nwn.blogs.com/nwn/2006/11/jayz_comes_to_s.html) (Nov. 22, 2006, 14:26 PST). For example, in November 2006, Ben Folds promoted his new album with two performances: the opening party for Aloft, a digital hotel chain architected by Starwood Hotels and Resorts, and at Media Island, a virtual city space located in Second Life and owned by his label Sony BMG. See, e.g., Richard Siklos, *A Virtual World but Real Money*, N.Y. TIMES, Oct. 19, 2006, at C1, available at 2006 WLNR 18131976 [hereinafter Siklos, *Virtual World*]; BenFolds.com, *Ben Folds: Second Life Events*, <http://benfolds.com/secondlife/> (last visited Mar. 29, 2007).

<sup>86</sup> Second Life, Second Life Community: Events, X-Men 3: The Last Stand, <http://secondlife.com/events/event.php?id=217357&date=1148065200> (last visited Mar. 29, 2007).

<sup>87</sup> *Buying into the Virtual World*, *supra* note 54.

<sup>88</sup> See Reyhan Harmanci, *Get a Life and Leave the Real You at Home in Virtual Online World*, S.F. CHRON., Nov. 9, 2006, at E1; Lavalley, *supra* note 67; Siklos, *Virtual World*, *supra* note 85.

<sup>89</sup> See Lavalley, *supra* note 67. Even Second Life residents, both amateur and professional, have partaken in the virtual fashion industry. *Id.*

<sup>90</sup> See Siklos, *Virtual World*, *supra* note 85. “Guests” at Aloft can test out the rooms and service offered by the digital hotel chain. They may leave feedback with the digital hotel’s designers for Starwood to consider when creating the real-world versions of the hotels. *Id.* According to Yankee Group, in-game advertising revenue will reach

have “follow[ed their] consumer[s] [to Second Life], that’s where they’re spending their time.”<sup>91</sup> In turn, advertisers have also set up shop to support the various business options and campaigns in which these companies engage in Second Life.<sup>92</sup>

Even politicians have recognized Second Life to be an important communicative forum.<sup>93</sup> Mark Warner, former governor of Virginia, became the first real-world politician to hold an interview in Second Life.<sup>94</sup> Campaigning for the 2008 Democratic presidential candidacy, Warner “flew” into a virtual town hall to meet with Hamlet Au, a full-time reporter in Second Life.<sup>95</sup> Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has also addressed the Second Life audience to discuss various legal issues regarding intellectual property.<sup>96</sup> In front of a crowd of avatars, including animated chipmunks and supermodels, Judge Posner stated that Linden Lab must ensure due process and other rights, if only for its own interests.<sup>97</sup>

### III. LEGAL IMPLICATIONS OF THE VIRTUAL WORLD

With the world paying close attention to the technological advancements in Internet usage and the opportunities that virtual worlds can offer, the law must do the same in order to protect the livelihood of Second Life residents.<sup>98</sup> As more users participate and find innovative ways to make full use of the virtual platform, Second Life will eventually evolve from a digital medium of social interaction to

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\$875 million by 2009. Olga Kharif, *Big Media Gets a Second Life*, BUS. WK. ONLINE, Oct. 17, 2006, available at 2006 WLNR 17994980.

<sup>91</sup> Siklos, *Virtual World*, *supra* note 85 (quoting Steve F. Kerho, director of interactive marketing and media for Nissan USA).

<sup>92</sup> Jana & McConnon, *supra* note 72. The most popular four advertising companies, Electric Sheep Company, Aimee Weber Studio, Millions of Us, and Rivers Run Red, have exponentially grown as their clientele has expanded to include seventeen real-world clients. Reena Jana and Aili McConnon, *Second Life Lessons*, BUS. WK. ONLINE, Oct. 30, 2006, available at [http://www.businessweek.com/innovate/content/oct2006/id20061030\\_869611.htm](http://www.businessweek.com/innovate/content/oct2006/id20061030_869611.htm). Campaigns can run anywhere from \$5,000 to \$1 million dollars. *Id.*

<sup>93</sup> *Living a Second Life*, *supra* note 75 (discussing Warner’s appearance in Second Life); Sipress, *supra* note 24 (discussing Posner’s appearance in Second Life).

<sup>94</sup> *Living a Second Life*, *supra* note 75.

<sup>95</sup> *Id.*

<sup>96</sup> Sipress, *supra* note 24.

<sup>97</sup> *Id.* Judge Posner predicted that the international law of virtual worlds will eventually evolve into a new legal doctrine similar to maritime law. *Id.*

<sup>98</sup> Kirkpatrick, *supra* note 81.

an actual, organic culture.<sup>99</sup> More importantly, when real-world concepts, such as business transactions, money, and interrelated societies, are imported into virtual spaces, proper governance in the form of laws and (computer) code must be guaranteed.<sup>100</sup> Currently, Second Life offers some relief for transgressions by its users, including two governing documents that spell out what conduct is prohibited or permitted: the TOS Agreement and the Community Standards Agreement.<sup>101</sup>

On a basic level, these agreements are helpful to ensure that no one resident oversteps her social boundaries when interacting with another resident.<sup>102</sup> However, they are nonetheless insufficient to protect the residents when a more serious injustice, particularly virtual property disputes, fraud, or defamation, is committed against them by other Second Life participants.<sup>103</sup> Furthermore, mere termination of an account may not be a viable solution when victims of these cyber-crimes have suffered an actual loss, whether pecuniary or not.<sup>104</sup> Legal remedies are thus essential to protect against virtual crime and bullying because merely exiting Second Life, an obvious and potential solution, is not necessarily the best option for a resident who has devoted time and money in the virtual worlds.<sup>105</sup> Therefore, this Note assumes the position that courts must accept the burden of considering virtual tort claims brought by Second Life residents and protect these residents who have integrated their online livelihood into their actual lives.<sup>106</sup>

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<sup>99</sup> *Id.* (“Second Life gives you the chance to meet people in wildly varying contexts, and do it in a body you created.”).

<sup>100</sup> *See supra* note 92; *see also infra* Part III.B to Part III.D.

<sup>101</sup> SL Community Standards, *supra* note 40; SL TOS, *supra* note 40. Violation of these agreements may result in account suspension or termination. SL TOS, *supra* note 40, at Part 4.1.

<sup>102</sup> *See* SL Community Standards, *supra* note 40 (“Within Second Life, we want to support Residents in shaping their specific experiences and making their own choices. The Community Standards Agreement sets out six behaviors, the ‘Big Six,’ that will result in suspension or, with repeated violations, expulsion from the Second Life Community.”).

<sup>103</sup> Lastowka & Hunter, *Laws*, *supra* note 26, at 50-51, 72.

<sup>104</sup> *See, e.g.*, Balkin, *supra* note 35, at 63-64.

<sup>105</sup> *See id.*

<sup>106</sup> *See infra* Part III.B.

A. *Terms of Service Agreement and Second Life's Community Standard*

Because non-virtual harms often arise in cyberspace and in the exploitation of the Web, service providers must take steps in order to legally protect themselves and, to an unfortunately lesser extent, Internet users.<sup>107</sup> One step that service providers customarily take is to employ governing documents, such as end-user license agreements (“EULAs”), terms of service agreements, and rules of conduct, that dictate the appropriate behavior and rights of users and the service providers themselves.<sup>108</sup> These governing systems of regulation constitute the initial crossover between cyberspace and the real world.<sup>109</sup> Therefore, although governing documents are ultimately inadequate to protect Second Life users, residents interested in commencing a legal action should first refer to these documents to determine what rights they retain at the outset and what actions they may take when they sustain injury in the virtual space.<sup>110</sup>

By and large, a TOS agreement is the first legal and rule-driven aspect of a web site that an online user encounters.<sup>111</sup> Before a user is allowed to access the services that the web site provides, she must assent to the terms of the agreement.<sup>112</sup> Typical click-wrap TOS agreements<sup>113</sup> incorporate terms forbidding certain forms of communication,

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<sup>107</sup> See generally Andrew Jankowich, *EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 9 (2006) [hereinafter Jankowich, *EULAW*] (arguing that EULAs, which are a type of governing document, represent “an important crossover point between real world law and virtual law”); David Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that cyberspace requires a distinct set of regulations in contrast to laws that govern geographically-defined territories).

<sup>108</sup> Jankowich, *EULAW*, *supra* note 107, at 7.

<sup>109</sup> *Id.* at 1-7.

<sup>110</sup> See SL TOS, *supra* note 40; SL Community Standards, *supra* note 40.

<sup>111</sup> Steven Johnson, *Brave New World: Online Fantasy Worlds Put Our Democratic Ideals to the Test*, 27 DISCOVER, Apr. 2 2006, available at <http://discovermagazine.com/2006/apr/well-intro>.

<sup>112</sup> See E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1 (2d ed. 1998).

<sup>113</sup> Click-wrap agreements are the online, interactive counterpart of shrink-wrap licenses. For a more in-depth discussion of clickwrap agreements, see William J. Condor, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433 (2004). For a comprehensive dialogue about TOS Agreements that govern virtual worlds, see Jankowich, *EULAW*, *supra* note 107, at 5.

including use of racial epithets, and user behavior.<sup>114</sup> Whereas platform owners, such as Linden Lab, have the alternative to code the software so that users participate only within parameters set by the programmers,<sup>115</sup> many web site operators implement TOS Agreements to enforce proper behavior and conduct because they are more time and cost efficient.<sup>116</sup> After all, software coding, such as setting up passwords and personal names for each user account, can only limit—not eliminate—conflict.<sup>117</sup> Thus, to remedy infractions by users, platform owners generally remove certain player privileges and powers or terminate a user account based on a violated TOS provision.<sup>118</sup>

Similarly, despite having comparatively nonrestrictive policies,<sup>119</sup> Second Life's TOS agreement reserves to Linden Lab the right to maintain control of in-world activity by suspending or terminating accounts at its own discretion, without any obligation or liability to the user.<sup>120</sup> In Part Four of its TOS Agreement, Linden Lab specifically dictates what user conduct is acceptable in Second Life and has instituted rules "prohibiting illegal and other practices that Linden Lab deems harmful."<sup>121</sup> These restrictive provisions include any content transmittal that may violate the rights of a third party; any content transmittal that may be deemed vulgar,<sup>122</sup> defamatory,

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<sup>114</sup> Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELEC. FRONTIER FOUND., <http://www.eff.org/wp/eula.php> (last visited Mar. 29, 2007).

<sup>115</sup> Platform owners control the virtual worlds by way of "code," where the owners write software so that users interact within the parameters set by the programmers, and by way of "contract," namely by employing governing documents. Balkin, *Law and Liberty*, *supra* note 35, at 64.

<sup>116</sup> Jankowich, *EULAW*, *supra* note 107, at 11; Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 342 (1996).

<sup>117</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1793.

<sup>118</sup> Balkin, *Law and Liberty*, *supra* note 35, at 64-65.

<sup>119</sup> See, e.g., Jankowich, *EULAW*, *supra* note 107, at 44 (arguing that Second Life has the least restrictive policies in comparison to the forty-four EULAs examined for the article).

<sup>120</sup> SL TOS, *supra* note 40. Linden Lab may exercise this right as it retains all rights to any account and related data created on Second Life, despite its observance of a user's rights to digital creations and/or property. *Id.* at Part 3.3.

<sup>121</sup> *Id.*

<sup>122</sup> In Part IV of his *EULAW* article, Andrew Jankowich discusses the prohibition of certain types of speech in virtual worlds, in which TOS Agreements favor the use of broad terms such as "vulgar" or "offensive." Jankowich, *EULAW*, *supra* note 107, at 28. He further contends that the "norm for communication in virtual worlds require[s] the 'abandonment of constitutional protections.'" *Id.* (quoting Sandra Braman & Stephanie Lynch, *Advantage ISP: Terms of Service as Media Law*, in

threatening, hateful, etc.; interference with service or with the networks that provide service; and abuse or harassment of users.<sup>123</sup>

In conjunction with the TOS Agreement, Second Life requires that a resident abide by a “Community Standards” agreement when engaging in online activity.<sup>124</sup> The “Community Standards” agreement sets forth six behaviors that will result in account suspension or, worse, expulsion from the Second Life community:<sup>125</sup> intolerance, harassment, assault, disclosure, indecency, and disturbing the peace.<sup>126</sup> Specific locations within Second Life<sup>127</sup> may demand different standards, but resident behavior must conform to the regional decree.<sup>128</sup> If a resident believes that he was subject to any of the prohibited conduct, he should report the violations, or, if he requires immediate assistance, seek counsel from an in-world Liaison.<sup>129</sup>

*B. Virtual Worlds Demand the Law’s Attention, But Are the TOS Agreement and Community Standards Agreement Enough?*

As massive numbers of people continue to partake in virtual worlds like Second Life by devoting substantial time and money there, the law must be forced to pay attention to the development of these interactive environments, if only for the

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<sup>123</sup> SL TOS, *supra* note 40, at Part 4.1. To ensure the truthfulness of the participants, the TOS Agreement prohibits multiple users from sharing accounts so that user identities do not diffuse. *Id.* Because a user is responsible for any action taken by the avatar and under her name, this prohibition is essential to ensure that an unprincipled user does not engage in fraudulent and deceptive behavior by misbehaving under another user’s handle. *Id.*

<sup>124</sup> SL Community Standards, *supra* note 40, at Part 6.2. This agreement also states that California law governs the rights and obligations of the parties to the agreement and that binding arbitration will apply to settle such matters. *Id.* However, this requirement will likely not dictate actions between residents. *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Second Life divides its community into separate districts that are characterized by ratings, namely, Mature (M), Non-Mature (PG), Safe, and Unsafe. *See id.*

<sup>128</sup> *Id.* For example, if one area permits certain types of sexual behavior but disallows any display of sadomasochism, then the user must abide by that rule to remain in the area. *See id.*

<sup>129</sup> Liaisons are in-world representatives of Linden Lab who have the capabilities of addressing disciplinary problems, such as temporarily removing the transgressor from participating in Second Life. *Id.*

sake of society's cumulative investments in this new technology.<sup>130</sup> The mere possibility of these legal infractions occurring in the virtual space with real-world results already indicates that both the real and virtual worlds are intrinsically linked in law.<sup>131</sup> Thus, a resident's opportunity to bring a legal action to the real world courts is essential to facilitate the commercial culture and economy in Second Life.<sup>132</sup> Plainly, a resident's exit, forced or self-imposed, from Second Life is often an unjust option because of the total investments in the virtual space and the desire to maintain social connections.<sup>133</sup>

Recent disputes in Second Life, both in-world and real-world, underscore this point.<sup>134</sup> Insofar as both the Second Life TOS Agreement and the Community Standards Agreement broadly address the "can do" and the "cannot do" rules of Second Life participation, several in-world dilemmas have manifested themselves in the virtual world and these governing documents were unable to fully address certain legal

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<sup>130</sup> Balkin, *Law and Liberty*, *supra* note 35, at 66. See also Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 1, 39 (CESifo Working Paper Series No. 618, 2001), available at <http://papers.ssrn.com/abstract=294828> (listing three reasons why social scientists have a particular interest in virtual worlds). See also *infra* Part III.D.

<sup>131</sup> See, e.g., Catherine Holahan, *The Dark Side of Second Life*, BUS. WK. ONLINE, Nov. 11, 2006, available at 2006 WLNR 20202728. Notably, the CopyBot incident and Marc Bragg's Second Life law suit, see *infra* notes 137-38, are not the first incidents to draw the attention of the public to possible real-world legal ramifications in virtual worlds. See, e.g., Julian Dibbell, *A Rape in Cyberspace*, THE VILLAGE VOICE, Dec. 21, 1993, at 36, available at <http://loki.stockton.edu/~kinsellt/stuff/dibbelrapeincyberspace.html> (describing the aftermath of a cyber-rape by "Mr. Bungle" in LambdaMOO). The Mr. Bungle incident has interested many cyberlaw scholars and spurred serious legal debates about the symbiotic relationship between real-world law and novel Internet mediums. *Id.*

<sup>132</sup> See, e.g., Balkin, *Law and Liberty*, *supra* note 35, at 63 ("[L]egal regulation of virtual worlds has become a pressing issue in cyberlaw as increasing numbers of people flock to virtual worlds and invest their time and resources there."); Edward Castronova, *On Virtual Economies* 1, 28 (CESifo Working Paper Series No. 752, 2002), available at <http://papers.ssrn.com/abstract=338500>; F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 315 (2004) [hereinafter Lastowka & Hunter, *Crimes*] (claiming that if game owner victims can point to real economic harms, real-world legal actions may ensue); Bragg, *supra* note 72 (example of real-world suit over virtual property).

<sup>133</sup> See Balkin, *Law and Liberty*, *supra* note 35, at 63, 66 (claiming that termination of accounts or a player's ability to play may not be a viable option). See also Lastowka & Hunter, *Crimes*, *supra* note 132; Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1443-44 (1996).

<sup>134</sup> The Internet is no stranger to legal actions based on online investments. See, e.g., Elise Ackerman, *eBay Lawsuit Reveals Foibles of Site Feedback*, SAN JOSE MERCURY NEWS, Aug. 9, 2006, available at 2006 WLNR 13734827 (describing incident where negative feedback on eBay merchant's site detrimentally affected his online business).

issues that were the by-product of these incidents.<sup>135</sup> If these governing documents cannot resolve the issues that will surely continue to plague the virtual space, the backbone of Second Life—its thriving economy—will ultimately suffer.<sup>136</sup>

For example, Second Life has already spurred a legal dispute in which Marc Bragg, an attorney in Pennsylvania, sued Linden Lab for alleged conversion, fraud, unjust enrichment and breach of contract when Linden Lab terminated Bragg's account.<sup>137</sup> The suit is of particular interest because the parcel of land in dispute does not exist in the real world, and no law currently exists in the United States with regard to such ownership.<sup>138</sup> According to Assistant Professor Greg Lastowka of Rutgers University, this case will turn on whether Second Life's TOS Agreement trumps Bragg's property rights.<sup>139</sup>

As a further example, over the last few months of 2006, a huge uprising occurred within the Second Life community over a new rogue program, nicknamed the CopyBot.<sup>140</sup> This program enables users to quickly replicate in-world objects and characters, and thereby potentially erode the value of a

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<sup>135</sup> See, e.g., Posting by Torey Linden to Official Linden Blog, <http://blog.secondlife.com/2006/12/06/replicator-object-attack-underway-inworld/#more-580> (Dec. 6, 2006, 17:15 PST). Moreover, although economic losses are a grave concern to Second Life residents, yet another potentially worrisome situation has arisen in the Second Life space: age-based role-playing, or "age play." See, e.g., Terdiman, *Phony Kids*, *supra* note 7.

<sup>136</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1789.

<sup>137</sup> See Bragg, *supra* note 72 (detailing a lawsuit that Bragg filed against Linden Lab to collect damages on a virtual land purchase gone sour). Due to Bragg's law suit, Linden Lab amended its TOS Agreement so that the company would retain ownership of user accounts "regardless of intellectual property rights you may have in content you create or otherwise own." John Bringardner, *IP's Brave New World*, *IP LAW & BUSINESS*, Feb. 2007, at 30, available at <http://www.law.com/jsp/article.jsp?id=1170237755271>.

<sup>138</sup> *Virtual Land Lawsuit Reveals Dark Side of Second Life*, PR NEWSWIRE, Oct. 6, 2006, available at [http://www.breitbart.com/article.php?id=prnw.20061006.PHF014&show\\_article=1&cat=tech](http://www.breitbart.com/article.php?id=prnw.20061006.PHF014&show_article=1&cat=tech). Bragg was accused of acquiring land in Second Life through an "exploit" in the platform. *Id.* Although the defendants, Linden Research, Inc. and Philip Rosedale, had told Bragg that they were going to refund \$300 for the land at issue, they terminated his account so that he could not access any of his virtual belongings, including \$2,000 (in US currency) in his account. *Id.* No court has ruled on this case as of yet. *Id.*

<sup>139</sup> Sheri Qualters, *If a Tree Falls in a Virtual Forest, Who Owns the Lumber?*, *LAW.COM*, Oct. 30, 2006, <http://www.law.com/jsp/article.jsp?id=1161939921797>.

<sup>140</sup> Jennifer Granick, *Second Life Will Save Copyright*, *WIRED NEWS*, Nov. 20, 2006, <http://www.wired.com/news/columns/0,72143-0.html>; Sipress, *supra* note 24; Adam Reuters, *Outcry as 'CopyBot' Threatens Copyright Protection*, *REUTERS/SECOND LIFE*, Nov. 14, 2006, <http://secondlife.reuters.com/stories/2006/11/14/outcry-as-copybot-threatens-copyright-protection>.

resident's virtual property.<sup>141</sup> Although Linden Lab originally created this program for the purpose of finding vulnerabilities in the Second Life platform, the program has been proliferated to others, and cunning users have modified the program to the detriment of others.<sup>142</sup> In particular, businesses in Second Life are enraged by CopyBot, to the point where certain merchants are closing their virtual stores until Linden Lab arrives at a proper resolution.<sup>143</sup> These merchants are particularly concerned about unscrupulous CopyBot users that will "steal" virtual possessions, undercut the price of such items, and take away their business.<sup>144</sup> This possibility casts considerable doubt on the sanctity of Second Life's virtual economy.<sup>145</sup>

As with any economy, the value of virtual goods is based on their scarcity.<sup>146</sup> If any virtual ware can be cloned and sold to others, people will unquestionably pay less, or nothing at all, for easily accessible or free products.<sup>147</sup> CopyBot, as Second Life residents contend, destroys the protection that copyright may offer to virtual property because CopyBot users could be infringing the rights of the creators, which disincentivizes the creation process.<sup>148</sup> Although Second Life's TOS Agreement stipulates that the user "will retain any and all applicable copyright and other intellectual property rights with respect to any Content . . . create[d] using the Service," such rights are meaningless if the production and distribution of such virtual intellectual property is at the hands of a CopyBot user gone

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<sup>141</sup> Granick, *supra* note 140; Sipress, *supra* note 24.

<sup>142</sup> 'Worm' Attacks Second Life World, BBC NEWS, Nov. 20, 2006, available at <http://news.bbc.co.uk/2/hi/technology/6164806.stm>.

<sup>143</sup> Granick, *supra* note 140. For example, Veronica Brown, a well-known fashion designer in Second Life who expects to have earned at least \$60,000 in 2006, is particularly concerned that her handiwork may be cloned and sold by others. Alan Sipress, *supra* note 24. In response to why she briefly shut down her electronic business, she stated that "it was fear, fear of [her] effort being stolen." *Id.*

<sup>144</sup> Posting by Robin Linden to Official Linden Blog, *supra* note 33.

<sup>145</sup> Granick, *supra* note 140. See also Bringardner, *supra* note 137 ("Within days of the CopyBot outbreak, players were forced to click through a new agreement that specifically banned the use of such software. Protesting shopowners have reopened their businesses, and the most visible evidence of the CopyBot's disruption is the ubiquity of anticopying measures that can slow activity in Second Life. As avatars move about the virtual world, they now frequently encounter scripts, or software code, placed near shops to disable the CopyBot before it can be used. The scripts appear as text shouted at residents, and now punctuate conversations between players—Second Life's equivalent of e-mail spam.").

<sup>146</sup> Granick, *supra* note 140.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

awry.<sup>149</sup> Moreover, even though the DMCA, which criminalizes the production of technology that is used to circumvent copyright protections, may force Linden Lab to delete CopyBot replications,<sup>150</sup> it will not provide for any monetary compensation to Second Life victims unless they file a federal lawsuit.<sup>151</sup>

Linden Lab has also experienced security breaches in Second Life.<sup>152</sup> During the summer of 2006, the Second Life grid became exposed to viral attacks on residents by “grey goo,” which are self-replicating objects that overload the Second Life databases and slow down in-world activity.<sup>153</sup> According to the Official Linden Blog, malicious users, known as grieferers,<sup>154</sup> have abused the creation tools in Second Life by creating and replicating objects that either harasses a user or, in over-replicating, destabilizes the servers that run the virtual

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<sup>149</sup> See, e.g., SL TOS, *supra* note 40, at Part 3.2. These concerns take a toll on the Second Life economy as well, because the value of all in-world products may decrease. See, e.g., Adam Reuters, *CopyBot Furor Roils Second Life Currency*, REUTERS/SECOND LIFE, Nov. 16, 2006, <http://secondlife.reuters.com/stories/2006/11/16/copybot-furor-roils-second-life-currency>. The CopyBot incident forced Second Life businesses to halt, and the value of Linden currency against the U.S. dollar was pushed down. *Id.*

<sup>150</sup> See, e.g., Second Life DMCA: Digital Millennium Copyright Act, <http://secondlife.com/corporate/dmca.php> [hereinafter Second Life DMCA] (last visited Mar. 29, 2007). When a verified DMCA complaint is filed, Linden Lab will respond by taking down the offending content, which may include the deletion of illicitly copied material. *Id.*

<sup>151</sup> Granick, *supra* note 140. The DMCA allows a victim of copyright infringement to initiate the “takedown” process by notifying the service provider that an individual has infringed his or her copyright. See, e.g., Second Life DMCA, *supra* note 150. Unfortunately, given the low cost of virtual goods, many infringements may be unnoticed or ignored because they are not worth the expense of properly filing a real-world action. *Id.*

<sup>152</sup> See, e.g., Posting by Robin Linden to Official Linden Blog, Security and Second Life, <http://blog.secondlife.com/2006/10/09/security-and-second-life/> (Oct. 9, 2006, 12:04 PST) [hereinafter Security and Second Life]; Posting by Robin Linden to Official Linden Blog, UPDATE: Grid Reopened (Grey Goo on Grid), <http://blog.secondlife.com/2006/11/19/grey-goo-on-grid/> (Nov. 19, 2006, 17:46 PST) [hereinafter UPDATE: Grid Reopened].

<sup>153</sup> See *supra* note 152.

<sup>154</sup> Grieferers are “so-called because they create grief.” Stephen Hutcheon, *Second Life Miscreants Stage Members-Only Attack*, SYDNEY MORNING HERALD (Australia), Dec. 21, 2006, available at <http://www.smh.com.au/news/web/good-grief-bad-vibes/2006/12/21/1166290662836.html> [hereinafter Hutcheon]. “Their antics are designed to interrupt proceedings in virtual worlds and games usually for no other reason than because they can.” *Id.* For example, an incident arose in which Anshe Chung was forced to abandon a staged Second Life interview with CNET reporter Daniel Terdiman because several “grieferers” had “assaulted” the avatar with pixilated images of flying phalluses. See, e.g., Daniel Terdiman, *The Legal Rights to Your ‘Second Life’ Avatar*, CNET NEWS, Jan. 5, 2007, available at [http://news.com.com/The+legal+rights+to+your+Second+Life+avatar/2100-1047\\_3-6147700.html](http://news.com.com/The+legal+rights+to+your+Second+Life+avatar/2100-1047_3-6147700.html).

platform because they become overburdened by the strain of new activity.<sup>155</sup>

As expected, the TOS Agreement clearly prohibits user transmittal of content that “contains any viruses, . . . spyware, . . . [and] other computer programming routines . . . intended to damage [or] detrimentally interfere with . . . any system, data or personal information.”<sup>156</sup> However, the agreement also stipulates that such violation may result in either suspension or termination of the account.<sup>157</sup> Although Linden Lab later implemented several code changes to rectify the problem,<sup>158</sup> its TOS Agreement does little to mete out the appropriate punishment.<sup>159</sup> During the extensive time in which the Second Life users are locked out so that administrators and programmers can “clean” out the replicated objects, residents are losing face-time in the world and, thus, suffer potential loss in profits.<sup>160</sup> Because terminating or suspending a violator’s account fails to compensate residents who have lost revenue during “griefing”<sup>161</sup> attacks, the TOS agreement ignores the fiscal needs of the victims to these viral attacks.<sup>162</sup>

Problems thus arise in the economic context due to the fact that the makers of Second Life consistently attest that Second Life is a “free-form canvass [where] you can do what you want, and be what you want, and that’s what attracts people.”<sup>163</sup> As soon as Linden Lab erects restrictions about the way Second Life and its residents should appear, censorship will become an irreconcilable problem.<sup>164</sup> Thus, the dilemma

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<sup>155</sup> See, e.g., Will Knight, ‘Grey Goo’ Engulfs the Virtual World, *NEW SCIENTIST TECH*, Nov. 20, 2006, available at <http://www.newscientisttech.com/article/dn10616-grey-goo-engulfs-virtual-world.html> (reporting that during one of these attacks, virtual gold rings appear in various parts of Second Life); Security and Second Life, *supra* note 152; UPDATE: Grid Reopened, *supra* note 152.

<sup>156</sup> SL TOS, *supra* note 40, at Part 4.1.

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., Posting by Pixeleen Mistral, Linden Lab Plans Fixes after Grey Goo Fence Fails, [http://www.secondlifeherald.com/slh/2006/09/linden\\_lab\\_grey.html](http://www.secondlifeherald.com/slh/2006/09/linden_lab_grey.html) (Sept. 21, 2006, 16:09 PST). Linden Lab restricted scripting privileges to “trusted” residents and had several developers monitor the grid’s stability. *Id.*

<sup>159</sup> SL TOS, *supra* note 40, at Part 4.1.

<sup>160</sup> Emma Boyes, *Worm Closes Second Life*, *GAMESPOT UK*, Nov. 20, 2006, available at <http://www.gamespot.com/news/6162061.html>. Several users have felt as though the grey goo attack was a “real-life tragedy.” *Id.* (discussing avatar Karsha Yutani’s reaction to the grey goo incidents).

<sup>161</sup> See *supra* note 154.

<sup>162</sup> See SL TOS, *supra* note 40, at Part 4.1.

<sup>163</sup> Terdiman, *supra* note 7 (quoting David Fleck, Linden Lab’s vice president of marketing).

<sup>164</sup> *Id.*

and its resolution may lay within the dynamic social norm of the Second Life community: what conduct or speech is acceptable to the few versus what is reprehensible to the masses.<sup>165</sup> If Second Life's governing documents cannot generally censure questionable behavior alone, then either other forms of in-world policing or the opportunity to bring virtual suits into the real world must be proffered.<sup>166</sup>

On the whole, the aforementioned in-world behaviors mirror the civil wrongs that any individual may encounter.<sup>167</sup> Although these behaviors can be partially rectified or policed through in-world dispute resolution, real-world law must nonetheless be available to redress injuries occurring in the virtual world because virtual environments are becoming more than mere entertainment to their users.<sup>168</sup> After all, a user's livelihood, both virtual and real world, may be at stake when a tort such as defamation transpires among avatars.<sup>169</sup> The likelihood that defamation will occur is greater than it may appear, as real-world and virtual identities may clash at any time and the line between role-playing and real-playing is easily blurred.<sup>170</sup>

With the rise of economic power among avatars in the virtual worlds, platform providers, such as Linden Lab, are encountering new concerns of virtual governance.<sup>171</sup> Although simply leaving behind the "second life" or creating a new

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<sup>165</sup> See, e.g., *id.* (commenting on the fact that certain residents may find legal, virtual-pedophilic behavior objectionable). Linden Lab must balance their laissez-faire principles with the ethics of the residents. *Id.*

<sup>166</sup> See, e.g., Holahan, *supra* note 131. Initially, Linden Lab responded that users whose intellectual property rights had been violated should invoke the DMCA. See, e.g., Posting by Steve O'Hear to ZDNET, How Long Before the Law Enters Second Life?, <http://blogs.zdnet.com/social/?p=31>, (Dec. 1, 2006, 1:01 PST). Reluctant to begin enforcing real-world laws, Linden Lab has hoped that the community would develop its own "local authorities" to deal with these issues of copyright and property ownerships. Holahan, *supra* note 131. In fact, residents have already begun taking matters into their own hands by setting up "Better Business Bureau-style associations," and a community group called Second Life Anti-Griefing Guild to police and prevent griefing. See Hutcheon, *supra* note 154. Linden Lab has also encouraged residents to publish blacklists of known copyright infringers to facilitate the "weeding" out. Holahan, *supra* note 131. However, whether these vigilante residents are qualified to patrol the grid and administer punishment as they deem fit for these crimes is left unanswered. *Id.*

<sup>167</sup> See, e.g., Mayer-Schönberger & Crowley, *supra* note 48, at 1789-91.

<sup>168</sup> Balkin, *Law and Liberty*, *supra* note 35, at 74-75. Viktor Mayer-Schönberger and John Crowley commented that "[a]s virtual world providers are discovering, informational goods are easy to share but hard to control . . ." Mayer-Schönberger & Crowley, *supra* note 48, at 1789.

<sup>169</sup> Balkin, *Law and Liberty*, *supra* note 35, at 74.

<sup>170</sup> *Id.*

<sup>171</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1789.

character (or account) may technically resolve these issues, these options may not satisfy the users who have spent much time and energy developing their avatars, their in-world reputations, and their online businesses.<sup>172</sup> Moreover, governance within the virtual space is simply not as developed or as mature as that which is found in the real world.<sup>173</sup> Thus, as virtual worlds such as Second Life both technologically and socially mature, the participation of real-world lawmakers may become necessary.<sup>174</sup> Although courts may be hesitant to recognize new technological mediums as legitimate spaces where actual harm may occur,<sup>175</sup> the law must still be able to protect those who view their Second Life experiences with high regard and who depend on their virtual existence for purposes outside of leisure.<sup>176</sup>

However, many scholars argue that the strict importation of real-world legislation into the virtual worlds is ineffective and instead offer “code” or TOS Agreements to resolve issues of governance.<sup>177</sup> They question whether real-world regulators should interfere at all with virtual worlds; in fact, this concern may not even be a legal inquiry, but rather, a political one.<sup>178</sup> Nonetheless, irrespective of these debates, the rapid progression of virtual worlds may not wait for a conclusive resolution while real-world constructs like economies, property laws, and local governing structures unfailingly permeate the virtual space.<sup>179</sup> As residents continue

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<sup>172</sup> Balkin, *Law and Liberty*, *supra* note 35, at 66.

<sup>173</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1801.

<sup>174</sup> *See generally id.* (examining the interaction between the laws and regulatory systems of the virtual worlds and the real world).

<sup>175</sup> *See, e.g.,* *Brown v. Paramount Publix Corp.*, 270 N.Y.S. 544, 547 (App. Div. 1934) (extending protection to film production, then a novel concept, to recognize that portrayals of real-life characters can be deemed defamatory); *Merle v. Sociological Research Film Corp.*, 152 N.Y.S. 829, 831 (App. Div. 1915) (same).

<sup>176</sup> *See infra* note 172 and accompanying text. *See also My Virtual Life*, *supra* note 29 (describing the business affairs of Anshe Chung).

<sup>177</sup> *See, e.g.,* LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999) (promoting the notion that code is law); Jankowich, *EULAW*, *supra* note 107, at 11 (“[T]he dominance of governing agreements is [based on] the relative ease and cost-effectiveness of writing a document of rules compared to the effort involved in creating a complex behavior-controlling code.”); Julian Dibbell, *OWNED! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State or, How I Learned To Stop Worrying and Love the End-User License Agreement* (Paper presented at State of Play conference, N.Y. Law School, Nov. 2003), available at <http://www.juliandibbell.com/texts/owned.html> (EULAs are the most efficient way for virtual spaces to deal with real-world issues).

<sup>178</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1819.

<sup>179</sup> *See supra* notes 87, 92.

to invest significant time and money in Second Life, they will undoubtedly expect legal recourse when their investments are threatened by other virtual world participants. To many residents, Second Life is not a game and is certainly not inconsequential.<sup>180</sup> Arguably, activity in these worlds is not virtual at all.<sup>181</sup> With real value and consequences, it deserves the full attention of policy and law.<sup>182</sup>

### C. *Defamation*

With the aforementioned considerations in mind, the question thus becomes whether current real-world legislation could successfully apply to virtual claims, specifically defamation.<sup>183</sup> As all activity in these worlds is contingent on the interactions between users, defamation—the focus of the following analysis—is the paradigm violation of virtual communication and expression.<sup>184</sup> Whether for economic reasons or not, virtual world participants rely on their reputation, and this dependency receives more heightened emphasis in Second Life than in any other platform because a resident's existence relies on her interactions with and reputation among other residents.<sup>185</sup> For this reason, Linden Lab expressly proscribes defamation in Second Life in both of its governing documents.<sup>186</sup> Both the TOS Agreement and the Community Standards Agreement strictly prohibit a user from engaging in defamatory actions that “marginalize [or] belittle” any Second Life resident.<sup>187</sup> Thus, defaming an individual or group may result in banishment from the Second Life community entirely.<sup>188</sup>

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<sup>180</sup> See Peralta, *supra* note 7.

<sup>181</sup> Lastowka & Hunter, *Crimes*, *supra* note 132, at 314 (quoting Edward Castronova).

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., Balkin, *Law and Liberty*, *supra* note 35, at 63.

<sup>184</sup> See *supra* note 133 and accompanying text.

<sup>185</sup> See *supra* note 49 and accompanying text.

<sup>186</sup> SL TOS, *supra* note 40, at Part 4.1; SL Community Standards, *supra* note 40, at 1 (“Actions that marginalize, belittle, or *defame* individuals or groups inhibit the satisfying exchange of ideas and diminish the . . . community as [a] whole.” (emphasis added)).

<sup>187</sup> See *supra* note 186. If Linden Lab discovers that a resident has engaged in such behavior, it reserves the right to suspend or cancel the account. Linden Lab also reserves the right to “take whatever steps [are] necessary” to prohibit such behavior, even without notice to the resident. SL TOS, *supra* note 40, at Part 4.1.

<sup>188</sup> SL Community Standards, *supra* note 40.

But both governing documents are ineffective at restoring the reputation and financial loss that Second Life residents experience.<sup>189</sup> Although courts may rely on TOS Agreements and other types of governing documents, these documents arguably are crafted to better protect the platform designers than the members of the virtual community.<sup>190</sup> Courts may even reject such agreements to the extent that they impede the economic interests of virtual world participants.<sup>191</sup> Thus, if the law has specific rules that apply to real-world instances of defamation, it should similarly apply such rules to virtual spaces to protect the users.<sup>192</sup>

Nonetheless, the foregoing syllogism raises an important question: whether existing law has any significant hurdles that a potential Second Life plaintiff may be unable to overcome. Because defamation law is complex, the following analysis will only highlight a few crucial problems that will arise when a resident brings a claim regarding virtual activity to a real-world court.<sup>193</sup> Specifically, two predicaments will surface when a Second Life plaintiff attempts to bring a defamation claim to a real-world court: the “of and concerning” requirement as stipulated in Restatement (Second) of Torts § 558 and the constitutional prerequisite of “falsity” in the allegedly defamatory communication.<sup>194</sup> Therefore, to protect the residents and preserve the Second Life economy, a reviewing court must resolve these issues to allow for a

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<sup>189</sup> See *supra* note 136.

<sup>190</sup> See Lastowka & Hunter, *Laws, supra* note 26, at 50-51, 72.

<sup>191</sup> See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-02 (2d Cir. 2004) (discussing the requirement of assent in order for an electronic contract to be valid); *Specht v. Netscape Comm'n Corp.*, 150 F. Supp. 2d 585, 591 (S.D.N.Y. 2001) (noting that plaintiffs are not bound to an arbitration clause in a license agreement if they did not consent to the agreement). See also Lastowka & Hunter, *Laws, supra* note 26, at 50-51, 72.

<sup>192</sup> See, e.g., *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 922-25 (7th Cir. 2003) (analyzing whether plaintiff can produce evidence to show that a film is defamatory if its fictional protagonist refers to him); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 623-27 (D.C. Cir. 2001) (applying elements of defamation to determine whether statements in magazine article are actionable); *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1146 (D.C. Cir. 1994) (arguing that the court's analysis of defamatory remarks was not dependent on medium upon which statements appear); *Tackett v. Gen. Motors Corp.*, 836 F.2d 1042, 1046-47 (7th Cir. 1987) (noting that a sign hanging on a wall in a manufacturing plant could constitute libel, if “intentional[] and [owner] unreasonably fail[ed] to remove” the sign).

<sup>193</sup> See *infra* Part C.1 to C.3.

<sup>194</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

justiciable defamation claim in which both parties are virtual world participants.<sup>195</sup>

### 1. What's Defamation?

As a threshold matter, to determine whether a Second Life plaintiff has been defamed, the court must first determine what statements in the virtual space would constitute defamation.<sup>196</sup> Broadly defined, defamation is “the act of harming the reputation of another by making a false statement to a third person”<sup>197</sup> and a statement is deemed “defamatory” if it “[harms] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>198</sup> However, defamation actions are often difficult for plaintiffs to successfully litigate due to constitutional restrictions.<sup>199</sup> In 1964, a unanimous majority in the Supreme Court held that public speech that may potentially harm reputation must nevertheless be constitutionally protected.<sup>200</sup> In *New York Times Co. v. Sullivan*, Justice Brennan erected a far-reaching First Amendment shield to protect “freedom of expression upon public questions.”<sup>201</sup> Justice Brennan also noted that the Court’s constitutional review must incorporate factual analysis, examining “statements in issue and the circumstances under which they were made,” because not every action involves a clear violation of regulated speech.<sup>202</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> BLACK’S LAW DICTIONARY 427 (7th ed. 1999).

<sup>198</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>199</sup> Until the 1960s, the Supreme Court consistently stated that the Constitution simply did not protect private actions of either libel or slander. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (finding that the First Amendment and Fourteenth Amendments provided safeguards for the defamatory statement in question); *Smith v. California*, 361 U.S. 147, 152 (1959) (holding that “obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press”); *Roth v. United States*, 354 U.S. 476, 486 (1957) (holding that “obscenity is not protected speech”).

<sup>200</sup> *Sullivan*, 376 U.S. at 269 (1964) (“[L]ibel can claim no talismanic immunity from constitutional limitations.”).

<sup>201</sup> ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 153-63 (1991) (claiming that *Sullivan* imposed limits on defamation actions through the First Amendment). *See Sullivan*, 376 U.S. at 268-80 (proposing that courts have always used the First Amendment to protect “freedom of expression upon public questions”).

<sup>202</sup> *Sullivan*, 376 U.S. at 284-85. This decision established a higher bar of judicial inquiry of any allegedly defamatory statement that may appear before a court:

Judicial treatment of defamation actions since the Court's fateful 1964 decision has undergone several permutations.<sup>203</sup> For example, courts now differentiate between claims that involve "private" and "public" plaintiffs<sup>204</sup> and consider whether a communication would invoke a strict First Amendment analysis if public issues were involved.<sup>205</sup> Currently, the Supreme Court appears to remain committed to *Sullivan* as the doctrinal First Amendment defamation case to preserve freedom of speech, and all federal and state courts must preserve the First Amendment's constitutional principles when reviewing any defamation action.<sup>206</sup>

With *Sullivan*, the Supreme Court ultimately restricted the type of speech that may appear before a state court.<sup>207</sup> Notably, each state has its own black letter law to apply to defamation actions.<sup>208</sup> Yet, even though defamation law varies among states, the requirements for a cause of action still depend on the identities of the parties and the character of the allegedly defamatory statement.<sup>209</sup> These requirements are contextualized in The Restatement (Second) of Torts, which, for the purposes of this Note, will provide some basis for the criteria that a plaintiff must satisfy to plead defamation.<sup>210</sup>

The Restatement codifies the essential requirements that a plaintiff must satisfy to have a cause of action.<sup>211</sup>

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a defamed public official can only recover if he/she showed that the accused published the statement with "knowledge that it was false" or in "reckless regard." *Id.* at 280. With this newfound "actual malice" standard, nearly all defamation actions hereafter became vulnerable to "constitutional scrutiny." ROBERT D. SACK, 1 SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS 1-7 (3d ed. 2006).

<sup>203</sup> See *infra* note 205.

<sup>204</sup> See *supra* note 202.

<sup>205</sup> See 1 SACK, *supra* note 202, at 1-4 to -26 (expanding on the history of relevant cases following *Sullivan*, including *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

<sup>206</sup> 1 SACK, *supra* note 202, at 1-26.

<sup>207</sup> See, e.g., *Hatfill v. N.Y. Times Co.*, 427 F.3d 253, 254-55 (4th Cir. 2005).

<sup>208</sup> 1 SACK, *supra* note 202, at 2-5. Internet jurisdiction is a more complex topic than the jurisdictional concepts pertinent to this Note and is beyond the scope of this Note. For a discussion of internet jurisdiction, see Dan Jerker B. Svantesson, *Borders On, or Around—The Future of the Internet*, 16 ALB. L.J. SCI. & TECH. 343 (2006).

<sup>209</sup> 1 SACK, *supra* note 202, at 2-4 n.3, 2-5.

<sup>210</sup> *Id.* Section 558 requires that a claimant show "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or . . . special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>211</sup> 1 SACK, *supra* note 202, at 2-5.

Despite the checklist of factors provided in Section 588, the usefulness of this list is nonetheless limited because defamation has been constitutionalized.<sup>212</sup> With these considerations in mind, the following analysis observes that in order to bring a justiciable claim of defamation to a real-world court, the Second Life plaintiff must be able to prove that defamation of her avatar is equivalent to defamation of herself and the context of the statement allows for the plaintiff's cause of action, even though the harm occurred in a virtual environment, because she suffered actual, pecuniary harm.<sup>213</sup>

To better illustrate these two concerns, the following hypothetical will be used: Edmund Mann, a young Caucasian male, lives in New York and works at an advertising agency.<sup>214</sup> When not at work, he devotes much time to his Second Life existence as the online personality Teddy Kuramoto, a fifty-year-old, Japanese business tycoon known in the community as "the virtual Helmsley." Over time, Ed/Teddy has earned hundreds of thousands of real-world dollars by accumulating virtual assets in shopping malls and vacation destination islands, as well as selling plots of virtual land. Teddy has also given conferences to the public about how to best earn and maximize one's income in Second Life, and the high attendance at these conferences evidence his considerable popularity in the virtual community.

Unfortunately, several controversies have been brought to light regarding Teddy Kuramoto's possibly disreputable history and current dealings. Vivianna Lee, known in Second Life as Mea Ghan Maculate, has discovered some salacious "dirt" about Ted and posted it on her web log, which happens to have a large following of Second Life residents. Mea Ghan's "dishing" resulted in the loss of significant potential earnings for Teddy. Now, very few residents consult with Teddy for business or attend his formerly popular conferences. At a recent real estate conference that Teddy held in Second Life, in which the auditorium was laden with empty seats, several "griefers" also caused a ruckus, accusing Teddy of being a "liar" and a "hustler." Can Edmund bring a defamation action to a real-world court against Mea Ghan or the "griefers"?

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<sup>212</sup> *Id.*

<sup>213</sup> See *infra* Part A and B. The concerns listed are by no means exclusive, but for the sake of brevity, this Note will only address these two factors.

<sup>214</sup> This hypothetical is based on virtual tycoons such as Anshe Chung but in no way attempts to describe any particular factual situation with veracity.

## 2. Party Identification and the “Of and Concerning” Requirement

Unsurprisingly, ascertaining a party’s identity is a necessary element of any legal action<sup>215</sup> and, in the virtual context, fraught with legal and definitional land mines. To prevail in a defamation action, the Second Life plaintiff must establish that it was she who was defamed and the defendant was the one who caused it, even if the defendant had no intent to defame the plaintiff.<sup>216</sup> Thus, using the hypothetical presented above, the first query is whether Edmund has standing to bring a defamation action against the user-avatar defendants; this will depend on the identities of the parties.<sup>217</sup>

Any living person and nongovernmental entity that is capable of having a reputation and is legally competent to sue may bring an action for defamation, including corporations and partnerships.<sup>218</sup> In the same vein, any person or nongovernmental entity that makes a defamatory statement and is capable of being sued may be liable.<sup>219</sup> So, how does an avatar fit into this framework? The definition of internet identity, at least in the context of an avatar’s existence, is an ongoing debate among cyberlaw scholars.<sup>220</sup> Identities are arguably fluid and fragile, particularly when the possibility of expulsion or banishment from a virtual space is a factor.<sup>221</sup> In

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<sup>215</sup> See *supra* note 209 and accompanying text.

<sup>216</sup> See, e.g., *Naantaanbuu v. Abernathy*, 746 F. Supp. 378, 380 (S.D.N.Y. 1990) (“Second Circuit, construing New York law, has held that allegedly defamatory material must be ‘of and concerning’ the plaintiff”); *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980) (remanding a case entailing a transsexual character in a novel because a reasonable reader might associate the character with the plaintiff); 1 SACK, *supra* note 202, at 2-128 (noting that defendant’s intent is irrelevant). A plaintiff need not be named to have a successful claim. RESTATEMENT (SECOND) OF TORTS § 564 cmt. B (1977).

<sup>217</sup> See RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

<sup>218</sup> 1 SACK, *supra* note 202, at 2-148 to -151. However, some courts have indicated that they may recover only for statements that directly attack their finances or businesses. *Id.* at 2-149 n.559 (Seventh, Ninth, and District of Columbia circuits have all recognized that non-human plaintiffs may only bring defamation actions where business interests are at stake).

<sup>219</sup> *Id.* at 2-149. With partnerships, for instance, every member is liable for defamation by one of the members acting within the scope of the firm’s business. *Id.* at 2-153.

<sup>220</sup> See, e.g., Susan P. Crawford, *Who’s in Charge of Who I Am?: Identity and Law Online*, 49 N.Y.L. SCH. L. REV. 211, 211 (2005) (arguing that “[c]ontrol over online avatar identities will have many real-world consequences”).

<sup>221</sup> See, e.g., *id.* (hypothesizing that a user’s loss of time and labor investment in a virtual world is possible due to an intermediary’s abuse of control over user membership in the virtual world).

some virtual worlds, an avatar's identity is the intellectual property of the online "intermediary," who administrates the space in which the avatar lives and participates.<sup>222</sup> For example, in Part 3.3 of the TOS Agreement, Linden Lab specifies that "it retains ownership of the account and related data, *regardless* of intellectual property rights [the user] may have in [the] content [he/she] create[s] or otherwise own[s]."<sup>223</sup>

Conversely, if avatars are deemed to be the intellectual property of the user, then a possible assumption in the context of virtual worlds is that defaming one's property is the same as defaming one's person.<sup>224</sup> In reference to the defamation hypothetical, Teddy's identity and reputation ultimately belong to Edmund. Thus, Mea Ghan and the "griefers" ultimately harmed Edmund's possession when they tarnished Teddy's reputation. This determination triggers implications of trespass to chattel, where the defendants' intentional interference with the chattel—Teddy—resulted in damages to Edmund's interest in Teddy.<sup>225</sup> In the interest of justice, the defendants must compensate Edmund for the harm incurred.<sup>226</sup> Here, Edmund has suffered loss of business and reputation in his avatar. Because Mea Ghan and the "griefers" intentionally publicized information that interfered with Edmund's use of Teddy, Edmund may possibly have a cause of action in tort.<sup>227</sup>

Defamation actions may also be brought under principles of corporation law where the relationship between an avatar and a user is analogous to that between a corporation and its shareholder.<sup>228</sup> Alternatively, F. Gregory Lastowka and Dan Hunter contend that an avatar functioning in a virtual world is a cyborg, or a "technological extension of the self," in that users communicate with others in the virtual

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<sup>222</sup> *Id.*

<sup>223</sup> SL TOS, *supra* note 40.

<sup>224</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 218 (1977) (defining trespass to chattels). *See also infra* note 340 and accompanying text.

<sup>225</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 218 (1977) (defining trespass to chattels).

<sup>226</sup> *Id.*

<sup>227</sup> This property consideration could also lead to questions of whether other torts can substitute defamation to properly address the situation. *See, e.g.*, 2 SACK, *supra* note 202, at 13-2 (discussing injurious falsehood); *but see id.* at 13-11. For example, in the case of injurious falsehood, Edmund would have to prove special damages, which in this hypothetical is possible considering his loss of virtual business, even if the defamation did not arise under particularly "economic" circumstances. *See id.* at 13-6.

<sup>228</sup> *See* PROSSER AND KEETON ON THE LAW OF TORTS 779 (W. Page Keeton et al. eds., 5th ed. 1984).

space through a computerized self-representation—a scientifically advanced “prosthetic limb.”<sup>229</sup> An avatar may have no legal rights unto itself, but when a user acts *through* the avatar in a virtual world, the avatar and user are inexorably linked. Specifically, Lastowka and Hunter remark that this type of relationship, where the avatar is the cyber inverse of the user, is “fundamentally different” from a “cherished . . . possession”—after all, “[p]eople do not speak of property . . . using the first person.”<sup>230</sup>

In light of this perspective, the relationship between the avatar and the user may thus be comparable to that between a non-living, business entity and a sole shareholder, where the entity is essentially the “alter ego” of the controller, and thus an action may be sustainable on that basis.<sup>231</sup> For example, courts regard corporations as having no reputation in any personal sense, so one cannot defame the corporation by words that affect the “purely, personal repute of an individual.”<sup>232</sup> However, a corporation does demand prestige and standing in the business in which it engages, and any statement that may question the corporation’s honesty or efficiency may be actionable, so long as it “tends to prejudice it in the conduct of its business or to deter others from dealing with it.”<sup>233</sup>

Furthermore, “where a [corporation] is in fact a mere instrumentality or alter ego of its owner,”<sup>234</sup> the actions of the sole controller, or “shareholder,” may expose the business entity to liability, provided that the plaintiff is able to “pierce the corporate veil.”<sup>235</sup> Accordingly, any unlawful action taken by an avatar may expose its user to liability. An alter ego analysis reveals the particular relationship between the operation of the corporation and the controllers of that operation.<sup>236</sup> If the existence of both entities “operate[] as a

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<sup>229</sup> Lastowka & Hunter, *Laws*, *supra* note 26, at 64.

<sup>230</sup> *Id.*

<sup>231</sup> *See supra* note 228.

<sup>232</sup> *Id.*

<sup>233</sup> RESTATEMENT (SECOND) OF TORTS § 561 (1977). *See also* PROSSER AND KEETON, *supra* note 228, at 779. Words directed at the organization’s officers, employees, or stockholders are not deemed defamatory unless “the words are such, in the light of the connection between them, as to defame [them] both.” *Id.* at 779-80.

<sup>234</sup> Geyer v. Ingersoll Publ’ns Co., 621 A.2d 784, 793 (Del. Ch. 1992).

<sup>235</sup> *See, e.g.*, Harper v. Delaware Valley Broadcasters, Inc., 743 F. Supp. 1076, 1085 (D. Del. 1990) (discussing alter ego doctrine); United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1104-13 (D. Del. 1988) (recognizing alter ego doctrine).

<sup>236</sup> *Golden Acres, Inc.*, 702 F. Supp. at 1104. Factors in the analysis include:

single economic entity such that it would be inequitable for [a] [c]ourt to uphold a legal distinction between them,” the analysis is satisfied and thus may allow for a piercing of the veil in which shareholders may be liable for the debts of their corporate instrumentality.<sup>237</sup> For example, to pierce the veil, a plaintiff must show that there is a unity of interest or ownership between the defendant and the corporation and that failure to pierce would be “fraud” or a promotion of injustice.<sup>238</sup>

This business-entity relationship favors the likelihood of success in the defamation suits of Edmund and other potential Second Life plaintiffs. Like corporations or partnerships, avatars have no separate consciousness, but are efficient mechanisms through which users conduct their businesses in cyberspace.<sup>239</sup> Words directed at avatars as non-living entities affect a user’s in-world reputation and communal existence.<sup>240</sup> With this correlation amply stressing the interconnection between the avatar and user, defamatory statements about Teddy reasonably caused Edmund to lose money and potential real estate business.

Likewise, this definition may apply to Vivianna and Mea Ghan, the human agent and her avatar, in which actions taken by the business entity, Mea Ghan, in exercise of Vivianna’s authority, may render Vivianna liable. The application of the alter ego theory is particularly useful in this avatar-user framework because the theory recognizes that non-living entities do not merely stand alone as separate and independent: they are simply extensions of an operating individual and courts may explicitly disregard them as separate legal entities in the interest of promoting justice.<sup>241</sup>

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whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.

*Id.*

<sup>237</sup> *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, CIV. A. No. 8578., 1990 WL 44267, at \*5 (Del. Ch. Apr. 12, 1990).

<sup>238</sup> *Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 570 (7th Cir. 1985).

<sup>239</sup> *See supra* note 59 and accompanying text.

<sup>240</sup> *See infra* note 318.

<sup>241</sup> *See, e.g., Harper v. Delaware Valley Broad., Inc.*, 743 F. Supp. 1076, 1085 (D. Del. 1990); *Harco Nat’l. Ins. v. Green Farms, Inc.*, CIV. A. No. 1131, 1989 WL 110537, at \*4 (Del. Ch. 1989).

Without Vivianna's input and actions, Mea Ghan, the avatar, clearly would not have been able to induce harm. Thus, a reviewing court may collapse any legal distinctions between the avatar and user and allow for Edmund's recovery in a defamation action; doing otherwise would be wholly unfair and would endorse injustice.<sup>242</sup>

In any event, for a Second Life plaintiff to sustain a legal action for defamation, the avatar must be implicitly identified with the user in order for a court to allow the user to litigate on any actionable harm sustained by the avatar.<sup>243</sup> If a court acknowledges this interdependent relationship, it may allow for the recognition of another threshold requirement necessary to establish a defamation action:<sup>244</sup> a reasonable jury must conclude a defamatory statement is "of and concerning" the plaintiff.<sup>245</sup> This question is posed at the onset of any defamation inquiry and is one that is constitutional by nature,<sup>246</sup> as a result of *Sullivan*.<sup>247</sup>

This requirement is quite strict: for instance, the Court of Appeals in California has observed that "mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person."<sup>248</sup> To determine whether the burden of establishing a link between the statement and the person is met, courts must thus consider a variety of identifications—all of which are contingent on the facts of each case.<sup>249</sup> Such factors include similarity in name,

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<sup>242</sup> See *supra* notes 235, 237, 241.

<sup>243</sup> See *supra* note 215 and accompanying text.

<sup>244</sup> See RESTATEMENT (SECOND) OF TORTS §§ 558, 564 (1977) ("A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.").

<sup>245</sup> *Id.* § 558.

<sup>246</sup> *Id.* § 564, *ill. g.*; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). See also *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 852 (Ct. App. 1999); *Eyal v. Helen Broad. Corp.*, 583 N.E.2d 228, 230 (Mass. 1991).

<sup>247</sup> *Sullivan*, 376 U.S. at 286-88. Specifically, if a statement can be interpreted to refer to anyone else but the plaintiff, then the statement is not actionable *per se*. *Chapski v. Copley Press*, 442 N.E.2d 195, 199 (Ill. 1982).

<sup>248</sup> *Aguilar v. Universal City Studios, Inc.*, 219 Cal. Rptr. 891, 892 (1985) (plaintiff failed to meet the "of and concerning" requirement because no reasonable audience would understand the film character to be plaintiff).

<sup>249</sup> See *e.g.*, *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980) (noting that plaintiff and character shared same name); *Springer v. Viking Press*, 458 N.E.2d 1256, 1257 (N.Y. 1983) (similarities between plaintiff and minor character in novel as to name, height, build, incidental grooming habits, etc., were insufficient to establish that the novel was of and concerning plaintiff); *Carter-Clark v. Random House, Inc.*, 768 N.Y.S.2d 290 (Sup. Ct. 2003) (similarities between plaintiff and character in novel were insufficient to establish that novel was of and concerning plaintiff).

type of occupation, age, and physical characteristics.<sup>250</sup> That is, when a claimant can sufficiently show a tangible semblance between the claimant and the defamatory reference, she satisfies the “of and concerning” requirement.<sup>251</sup>

Thus far, much of the existing, real-world case law that deals with the “of and concerning” requirement involves situations in which a defendant created a fictional statement that the plaintiff believes to be a defamatory portrayal of herself.<sup>252</sup> For example, in *Aguilar v. Universal City Studios, Inc.*, the plaintiff contended that the defendant had created a character that was based on the plaintiff because the character and the plaintiff shared the same first name, the plaintiff was involved in the incident upon which the film is based, and some persons claimed to believe that the character was based on the plaintiff.<sup>253</sup> She further argued that the defendant’s portrayal was defamatory because the character was depicted in the film as being unchaste.<sup>254</sup> However, the Court of Appeals in California concluded that no reasonable person would have construed the character that the defendants had created in their film to be a portrayal of the plaintiff.<sup>255</sup> Thus, the plaintiff did not satisfy the “of and concerning” requirement.<sup>256</sup>

Additionally, in *Doe v. TCI Cablevision of Missouri*, the plaintiff sued the creators of the graphic series, *Spawn*, for defamation because he believed the villain in *Spawn* to be based on him since both the character and the plaintiff share the same name.<sup>257</sup> However, Court of Appeals of Missouri noted that “none of the . . . characters . . . or descriptions contained in the *Spawn* comic books . . . is identifiable with plaintiff or purport to be ‘of and concerning’ the plaintiff . . . [because] no

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<sup>250</sup> See *supra* note 249.

<sup>251</sup> See generally RESTATEMENT (SECOND) OF TORTS § 564 cmt. a, b, d (1977). However, the law has proven fickle in terms of the degree of similarity necessary to fulfill that requirement. See generally Annotation, *Sufficiency of Identification of Allegedly Defamed Party*, 54 A.L.R. 4th 746 (1987).

<sup>252</sup> See generally 1 SACK, *supra* note 202, at 2-57 to -58 (in fictionalizations, defendant “invents defamatory dialogue or other defamatory details in what purports to be nonfiction [so that] characters are understood to be ‘of and concerning’ their living models . . .”).

<sup>253</sup> *Aguilar*, 219 Cal. Rptr. at 892.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Doe v. TCI Cablevision of Missouri*, No. ED 78785, 2002 WL 1610972, at \*1-3 (Mo. Ct. App. July 23, 2002).

reasonable person could confuse the [p]laintiff with the fictional fantasies and characters portrayed therein.”<sup>258</sup>

Therefore, if the human agent<sup>259</sup> claims that her avatar has been defamed by another agent or avatar, she will have to prove that the statement against her avatar was clearly “of and concerning” the claimant, and show that the Second Life community would comprehend the avatar and the user as non-distinct bodies.<sup>260</sup> The “identity tourism”<sup>261</sup> argument, in which a real-world user can experiment with scripting language to create an avatar that looks entirely different from the user, is derived from the ability of a Second Life resident to determine how her avatar will appear to others.<sup>262</sup> Second Life allows for much creativity in creating the avatar, including appearance, names, and other markers.<sup>263</sup> Moreover, some residents may create an avatar in direct resemblance of their real-world counterparts; others have exercised the option of creating non-humanoid creatures.<sup>264</sup> Namely, in Second Life, the resident must be able to overcome the hurdle that despite the differences between the physical characteristics of the avatar and herself, she and the avatar are one and the same for the purposes of a defamation inquiry.<sup>265</sup>

However, the free-to-design concept, or the resident’s right to invent her own graphical persona, may override any concern that factual dissimilarities will not allow the plaintiff to satisfy the “of and concerning” requirement.<sup>266</sup> To some extent, this individual right to choose one’s “appearance” has

<sup>258</sup> *Id.* at \*3. The defamation claim was dismissed because the claim was actually one for the violation of the “right to publicity.” *Id.* at \*6.

<sup>259</sup> For the purposes of this note, the term “agent” can refer to the human counterpart of a resident as the entity who controls the speech and conduct of their avatars.

<sup>260</sup> See 1 SACK, *supra* note 202, at 2-128 n.459.

<sup>261</sup> Lastowka & Hunter, *Laws, supra* note 26, at 65.

<sup>262</sup> See *supra* note 61 and accompanying text.

<sup>263</sup> Mayer-Schönberger & Crowley, *supra* note 48, at 1781 (“For example, a short overweight female teenager can become a tall twenty-something with a triathlete’s body . . . [be a] man or woman [or] even of [another] race. . .”).

<sup>264</sup> See generally Second Life, Create an Avatar, *supra* note 60; Wagner James Au, The Extraordinary Meet the Extraordinary, *New World Notes*, [http://secondlife.blogs.com/nwn/2005/08/the\\_extraordina.html](http://secondlife.blogs.com/nwn/2005/08/the_extraordina.html) (Aug. 31, 2005, 21:44 PST).

<sup>265</sup> See *supra* note 246.

<sup>266</sup> J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 130, 134-35 (1995) (claiming that the right to publicity is generally a property interest reserved to real human beings to control the commercial use of identity).

already been codified in real-world common law, namely, the right to publicity.<sup>267</sup> Although the right to publicity is generally invoked when a defendant has commercially exploited the identity of a public individual, the legitimate converse to this proposition is the idea that the public individual has a certain right to the way he or she is portrayed.<sup>268</sup>

In the hypothetical presented, presuming that Mea Ghan and the “griefers” have defamed Edmund by communicating malicious statements regarding Teddy, the reviewing court would have to first recognize that any statement made against Teddy is equivalent to making a statement against Edmund.<sup>269</sup> If Edmund’s act of choosing the way he wants to appear, whether as a fifty-year-old Japanese male or not, is sufficient to link his reputation to that of Teddy, then Edmund’s creative freedom will not bar him from bringing a defamation claim to a real-world court.<sup>270</sup> Ultimately, this question of sublimating the co-dependent identities between avatar and virtual world user will depend on a reviewing court’s legal definition of their relationship.<sup>271</sup> Likewise, if a reviewing court is willing to concede that harming Teddy is

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<sup>267</sup> *Id.*

<sup>268</sup> *See Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002) (holding that plaintiff may prove a claim of commercial misappropriation of privacy if defendant used plaintiff’s identity to defendant’s advantage without plaintiff’s consent and resulting in injury to plaintiff); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1182 (C.D. Cal. 2002) (California law recognizes rights to publicity); *Johnson v. Corp. Special Serv., Inc.*, 602 So. 2d 385, 387 (Ala. 1992) (Alabama recognizes that “wrongful intrusion into one’s private activities constitutes a tort known as the invasion of privacy.”).

<sup>269</sup> *See supra* note 260.

<sup>270</sup> *See supra* note 243-44 and accompanying text. If anything, the ability to appear “different” in a metaverse should not subvert a user’s claim of an injury in fact. *See, e.g.*, Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1133-34 (2000) (recounting emotional trauma suffered from racial prejudice as African American avatar). For example, in his article *Cyber-Race*, Jerry Kang, an Asian American male, described one personal virtual experience in which he “played” an African American male by creating a bald-headed avatar with dark skin. *Id.* When a Caucasian female asked him if he was “African American” in real space, and he answered “yes,” other virtual participants began to attack Kang with a slew of racial slurs. *Id.*

Importantly, the virtual world allowed Kang to do something he would literally be unable to do: to present himself a “black man.” *Id.* As a dark-skinned avatar in this chat room who became a victim to prejudice, Kang commented that he felt as though he were discriminated against *because* he was “black,” despite his true (real-world) ancestry. *Id.* (claiming that Kang’s feelings of distress and insult as a dark-skinned male were as genuine as if he had internally absorbed all insults to his avatar). By analogy, if being a victim to prejudice were per se actionable, Kang should be allowed to bring a justiciable claim to court, even if his suffering was due to statements directed at his avatar. *Id.* at 1131.

<sup>271</sup> *See infra* Part III.E.

equivalent to harming Edmund, both the party identification issue and the “of and concerning” requirement may be satisfied.

### 3. Context and Custom: “A False and Defamatory Statement”

Another prerequisite to a defamation action is establishing that the statements and actions made by Mea Ghan and the “griefers” are in fact defamatory.<sup>272</sup> Defamation has been defined as a communication<sup>273</sup> that must wholly “tend[] . . . to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”<sup>274</sup> This classification highlights several noteworthy points. First, the communication need not universally affect the overall perspective of the community.<sup>275</sup> Instead, it must only distort the individual’s reputation in the eyes of a “substantial and respectable minority.”<sup>276</sup> Second, as a constitutional precondition, a claimant must establish falsity,<sup>277</sup> whereby a court will examine the context of the communication to determine whether such communication could be deemed as false (or true, for that matter).<sup>278</sup> That is to say, context is key.<sup>279</sup>

Thus, at the outset, the court must determine whether the allegedly defamatory statements put forth by the Second

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<sup>272</sup> See *infra* note 273.

<sup>273</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977). See also 1 SACK, *supra* note 202, at 2-18 to -24 (“A court will not pick out and isolate particular phrases and determine whether, considered alone, they are defamatory. . . . [T]he meaning of each communication may be understood in light of the other communication or communications . . . . The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement.” (quoting *Fitzjarrald v. Panhandle Publ’g Co.*, 228 S.W.2d 499, 504 (Tex. 1950))).

<sup>274</sup> RESTATEMENT (SECOND) OF TORTS § 559 (1977).

<sup>275</sup> *Id.* at cmt. e.

<sup>276</sup> *Id.* See *Peck v. Tribune Co.*, 214 U.S. 185, 190 (1909) (holding that a plaintiff may have a viable case if a negative portrayal of the plaintiff’s likeness sufficiently harmed her standing with a “considerable and respectable class in the community”).

<sup>277</sup> See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (“[o]nly those false statements made with the high degree of awareness of their probable falsity demanded by [*Sullivan*] may be the subject of either civil or criminal sanctions.”).

<sup>278</sup> 1 SACK, *supra* note 202, at 2-22 to -24 (describing importance of context in which statements were made so that definitions extrapolated from dictionaries may not necessarily be helpful to the courts).

<sup>279</sup> *Id.*

Life resident distort her reputation in the eyes of a “substantial and respectable” minority.<sup>280</sup> Determining what constitutes a “minority” within the Second Life community may be difficult to ascertain, as the community is constantly in flux with new registrations and inactive accounts.<sup>281</sup> Moreover, a significant component of Second Life is its appeal to those seeking online recreation.<sup>282</sup> Thus, participants who spend time online for sheer entertainment may view communications less stringently and even find humor at the crux of the statements.<sup>283</sup> Although use of humor may still render an unwise speaker at legal peril,<sup>284</sup> courts generally defer to the community’s notions of protected, non-actionable speech.<sup>285</sup>

In this instance, the “griefers” could have taken part in Second Life for mere entertainment purposes—in other words, they could have engaged in grieving for amusement alone, not because they expected to cause injury to Teddy’s reputation. If the Second Life community attributes such actions as being recreational or even illusory, a reviewing court may disregard the seriousness of their behavior or the ensuing harm. Even so, the “griefers” actions and the information posted in Mea Ghan’s blog altogether impaired Teddy’s livelihood. Namely, Teddy’s fans have steadily decreased since the alleged defamation, and fewer residents have turned to Teddy for business due to the influence of Mea Ghan’s statements. Hence, residents who once depended on Teddy for economic advice and sale may constitute the “substantial and respectable” minority. As the intent of the defendant to make

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<sup>280</sup> RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

<sup>281</sup> Second Life Home Page, *supra* note 11.

<sup>282</sup> See Second Life, Community: Connections, <http://secondlife.com/community/connections.php> (last visited Mar. 29, 2006).

<sup>283</sup> See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (claiming that “loose, figurative, or hyperbolic” statements are not defamatory); *Informational Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (“[A] court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.”); *Blake v. Hearst Publ’ns, Inc.*, 75 Cal. App. 2d 6 (1946) (statements understood to be in good-natured jest are not defamatory).

<sup>284</sup> See, e.g., *Ford v. Rowland*, 562 So. 2d 731, 735 (Fl. Dist. Ct. App. 1990) (questioning whether “humorous poem” is capable of being read as a defamatory factual assertion).

<sup>285</sup> See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (recognizing that a vulgar parody of a television evangelist was nonetheless non-actionable because plaintiff did not satisfy burden of proving actual malice).

defamatory statements is irrelevant, this recognition will in turn permit Edmund to meet this burden.<sup>286</sup>

Furthermore, as a matter of constitutional law, Edmund must also establish “falsity” as a prerequisite for recovery.<sup>287</sup> A plaintiff may not recover in a defamation suit if the statement of fact at issue proves true, even if the statement is made solely for the purpose of harming the plaintiff.<sup>288</sup> Truth of a defamatory statement is a complete bar to all forms of recovery.<sup>289</sup> Equally important is the fact that the First Amendment thus extends to cover statements that cannot be reasonably interpreted as stating actual “facts” about an individual.<sup>290</sup> Thus, common law has traditionally invoked constitutional principles to shield the use of epithets, insults, and name-calling.<sup>291</sup>

In *Milkovich v. Lorain Journal Co.*, the Supreme Court noted that one determinant factor of whether a statement is defamatory is whether such statement constituted a falsehood.<sup>292</sup> The Court held that existing case law already provided sufficient protection for opinions; most statements, excluding public concern and non-media defendants,<sup>293</sup> were covered by the First Amendment.<sup>294</sup> As opinions cannot be

<sup>286</sup> See *supra* note 216.

<sup>287</sup> 1 SACK, *supra* note 202, at 2-6 to -7. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (“[R]ecovery of presumed or punitive damages [is not permitted] . . . when liability is not based on a showing of knowledge of *falsity* or reckless disregard of the truth.” (emphasis added)).

<sup>288</sup> RESTATEMENT (SECOND) OF TORTS § 581A cmt. a (1977). For a more in-depth discussion on “actual malice,” which establishes falsity in public official cases, see *Sullivan*, 376 U.S. at 254.

<sup>289</sup> RESTATEMENT (SECOND) OF TORTS § 581A cmt. d (1977).

<sup>290</sup> See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (“[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law.”); *Greenbelt Coop. Publ’g Ass’n., Inc. v. Bresler*, 398 U.S. 6, 14 (1970) (“[E]ven the most careless reader must have perceived that the [statement] was no more than rhetorical hyperbole, a vigorous epithet.”); *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139 (1992) (“[O]nly statements alleging facts can . . . be subject of defamation action.”).

<sup>291</sup> See generally *Milkovich*, 497 U.S. at 1 (holding that ridicule or epithets fail to be actionable). But see PROSSER AND KEETON, *supra* note 231, at 777 (“It has been said that a common form of defamation is ridicule, and it has been so held in a number of cases [where] the publication is defamatory, even if it asserts nothing false whatsoever about the plaintiff.”). Even malicious and profane epithets may not be actionable. *Milkovich*, 497 U.S. at 16-17.

<sup>292</sup> *Milkovich*, 497 U.S. at 20-21.

<sup>293</sup> Various jurisdictions, including New York and California, have applied *Gertz*’s ‘fault’ ruling to non-media defendants. See 1 SACK, *supra* note 202, at 6-20 to -21.

<sup>294</sup> *Milkovich*, 497 U.S. at 19.

provably false, opinions cannot be actionable.<sup>295</sup> Hence, after *Milkovich*, the amount of protection that the Court affords to opinions has been largely determined by the *Hepps* doctrine.<sup>296</sup> Therefore, if the statements were “rhetorical hyperbole, vigorous epithets, and loose, figurative language,” and thus not demonstrably false, they would fail to be actionable because “[t]hey cannot reasonably be interpreted as assertions of fact.”<sup>297</sup> To determine what is provably false, reviewing courts make a two-part inquiry regarding the custom (or the way the words are generally used) and the context (what language is used and in what situation is such language used).<sup>298</sup> Actionability is also contingent on the notion of privilege, where the defamer may make “fair comments” about a public plaintiff and not be subjected to liability for her speech. In that instance, only if the defamer knows that “the statement is false . . . or acts in reckless disregard of these matters” will she be liable.<sup>299</sup>

As a result, Second Life merchants may be subjected to the common law “fair comment” privilege, which protects criticism that chiefly concerns public matters,<sup>300</sup> as they are

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<sup>295</sup> *Id.* at 20 (relying on the *Hepp* doctrine, in finding that “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection”); *see also* 1 SACK, *supra* note 202, at 4-15.

<sup>296</sup> 1 SACK, *supra* note 202, 4-22 (referring to *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), which held that the Constitution requires the plaintiffs of public-official and public-figure cases to prove falsity to protect the dissemination of truth). The *Restatement (Second)* similarly adopts this perspective in that “defamatory communication may consist of a statement in the form of an opinion; but [it would be] actionable . . . if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” RESTATEMENT (SECOND) OF TORTS § 566 (1977).

<sup>297</sup> 1 SACK, *supra* note 202, at 4-48 (differentiating between hyperbolic and truthful statements). *See also supra* note 283.

<sup>298</sup> *Id.* Simply shrouding a fact in the form of an opinion, such as using prefatory language like “in my opinion,” may not safeguard the statement from being held actionable. *Milkovich*, 497 U.S. at 18-19. Thus, if the alleged defamatory statement appears in a “place usually devoted to, or manner usually thought of as representing, personal viewpoints, it is also likely to be understood—and deemed by a court—to be a nonactionable opinion.” 1 SACK, *supra* note 202, at 4-27 & n.88. If a statement is published in a context in which the reader would expect assertions of fact, courts would likely treat it as an assertion of fact. *Id.* at 4-31.

<sup>299</sup> RESTATEMENT (SECOND) OF TORTS § 580A (1977).

<sup>300</sup> *Id.* § 566 cmt. a. *Restatement (Second)*’s Element (B) specifically invokes the privilege of “fair comment,” which has been considerably revamped by various Supreme Court decisions, most notably *Milkovich v. Lorain Journal Co.* in 1990. 1 SACK, *supra* note 202, at 4-13 to -27. In *Sullivan*, the Supreme Court held that the “fair comment” defense, which largely covers published or spoken opinions regarding public officials and figures, is designed to ensure that “debate on public issues should be uninhibited, robust, and wide-open.” 376 U.S. 254, 270 (1964). However, the Court discarded the privilege in *Gertz*, claiming that the “fair comment” principle provided

“manufacturers whose goods are on sale to the public,” or “artists,” or even “authors” in a more figurative sense.<sup>301</sup> For example, Second Life residents who sell their virtual products to other residents generally have “manufactured” their goods using scripting language.<sup>302</sup> Subsequently, if the reviewing court determines that Second Life merchants qualify for fair comment privilege,<sup>303</sup> the merchant must then be able to evoke falsity and prove that the context of the statement nevertheless allows for a cause of action.<sup>304</sup> The court must determine whether the defendant’s statement is a “pure” expression of opinion or is based on a provable fact by examining the context and custom of the words in the communication.<sup>305</sup>

In the defamation hypothetical, Edmund is essentially a public figure because of his reputation, his dealings with marketing virtual land, and his educational services in the real estate business. If Mea Ghan and the “griefers” criticized the services provided by Teddy, Edmund must then make a showing that they made the statement with actual malice or reckless disregard of the truth. Thus, for example, if Mea Ghan and the “griefers” intentionally disseminated falsities about Edmund’s past which jeopardized his reputation, Edmund will meet the burden of this requirement. On the other hand, if Mea Ghan and the “griefers” disseminated plain opinions about Edmund that were rooted in truth, that is, if they said that he had hustled clients in the past and had actually engaged in seedy business, Edmund cannot demonstrate “falsity.”

Moreover, any inter-player banter in Second Life would likely remain as non-actionable as it would in a real-world

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inadequate protection of speech. 418 U.S. 323, 340-41 (1974). Thus, the extent to which constitutional protection may be afforded for opinions is relatively ambiguous. 1 SACK, *supra* note 202, at 4-8.

<sup>301</sup> 1 SACK, *supra* note 202, at 4-66 to -67.

<sup>302</sup> See *supra* notes 70-71 and accompanying text.

<sup>303</sup> Even if a reviewing court states that Second Life merchants fail to qualify as public figures, one may argue that that *Gertz’s* constitutional principles covering pure opinions would extend to private figures as well. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977) (“Although it is . . . possible that private communications on private matters will be treated differently, the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type.”). Pure opinions contrast statements of opinion that implies an assertion of a fact, which can trigger liability. See *Milkovich*, 497 U.S. at 1 (finding that statements of opinion are actionable if they imply an assertion of a facts that are provably false).

<sup>304</sup> See *supra* note 298.

<sup>305</sup> *Id.*

situation.<sup>306</sup> Because epithets and name-calling often occur in a game environment,<sup>307</sup> this proscription of insults as being actionable is beneficial to reduce the number of frivolous claims over virtual activity that may appear in court.<sup>308</sup> To determine what transgresses the social and cultural norms of the virtual space,<sup>309</sup> a court may potentially defer to the TOS Agreement and Community Standards Agreement.<sup>310</sup> Thus, if a user broadcasts speech prohibited by the governing documents and Linden Lab terminates the user's account, a court may rely on Linden Lab's determination in their ruling of whether the speech is acceptable.<sup>311</sup>

However, the "context" element of the falsity requirement still poses a significant problem for claims arising from virtual activity. The very concept of creating and operating an avatar is based on the fact that the in-world representation facilitates "role-playing," which is characteristic of virtual worlds.<sup>312</sup> If role-playing, as being essential to virtual world expression, affects the context in which users make statements, then the "defamed" resident must be able to trounce the presupposition that the defamatory statement was theatrical or overtly fictional;<sup>313</sup> otherwise, First Amendment concerns will triumph and bar the resident's claim.<sup>314</sup>

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<sup>306</sup> See *supra* note 297 and accompanying text.

<sup>307</sup> See, e.g., Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2069 (2004) [hereinafter Balkin, *Virtual Liberty*] (noting that a cause of action for intentional infliction of emotional distress would be limited to certain forms of misbehavior because of the "right to play" in virtual worlds).

<sup>308</sup> See, e.g., FED. R. CIV. P. 11 (sanctioning frivolous law suits).

<sup>309</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520-21 (10th Cir. 1979) (certain behaviors may be actionable when they transgress the customs and rules of a game). One court held that a plaintiff's participation in a game may imply consent in that the plaintiff may have placed himself in a situation knowing the risks. *Tavernier v. Maes*, 242 Cal. App. 2d 532, 540 (1966). Consent prevents recovery. *Id.*

<sup>310</sup> See SL TOS, *supra* note 40; SL Community Standards, *supra* note 40 (warning residents to "adhere to local standards as indicated by simulator ratings, and refrain from any hate activity which slurs a real-world individual or real-world community").

<sup>311</sup> Balkin, *Virtual Liberty*, *supra* note 307.

<sup>312</sup> See, e.g., Chein, *supra* note 59, at 1065.

<sup>313</sup> See *supra* note 318.

<sup>314</sup> 1 SACK, *supra* note 202, at 2-48 ("The context in which particular worlds are used thus is again the key to determining whether they are accusations in libel or slander or merely epithets which, as a matter of law, are not."). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (noting that courts have "recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions"); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (in a public

Therefore, Edmund must be able to show either that Mea Ghan and the “griefers” were not role-playing in Second Life when they published their statements, or that Second Life community would believe that Mea Ghan and the “griefers” were not role-playing. He must further prove that Mea Ghan and the “griefers” instead had maliciously promulgated information that unjustifiably tarnished Teddy’s reputation.

In any event, whether a statement is capable of being defamatory is a question of law, rather than fact. Thus, a court must construe such statements by taking into account their pertinent and reasonable meanings.<sup>315</sup> Provided that a court overlooks the arguably fictional context of Second Life and appreciates the critical implications of the types of communications transmitted in the virtual world, a plaintiff such as Edmund Mann may be able to successfully litigate a defamation action.<sup>316</sup> If the courts allow for these causes of action, Second Life residents will not have to rely on protection by service providers through their governing documents and may better safeguard their reputation and virtual-to-real-world assets from the illicit use of language and the abuse by users of the virtual platform.<sup>317</sup>

#### IV. THOUGHTS ON APPLYING LEGISLATION TO SECOND LIFE

At the outset of all legal discussion, courts must always keep in mind the aims and motivations of Second Life residents and MMORPG users as a whole, because users have widely different motivations to participate in virtual worlds.<sup>318</sup> For example, some Second Life inhabitants have claimed that they have been “much more uninhibited in the virtual world of Second Life than . . . in the real world. This is largely a factor of using a pseudonym when interacting with other Second Life members and having an [avatar] to hide behind.”<sup>319</sup> Physical safety is not a cause for concern, and considering that an option to exit exists, one’s psychological welfare is also at less of a

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figure case, defendant’s use of the word “blackmail,” constitutionally speaking, was no more than “rhetorical hyperbole”).

<sup>315</sup> RESTATEMENT (SECOND) OF TORTS § 563 (1977).

<sup>316</sup> See *supra* note 163 and accompanying text.

<sup>317</sup> See *supra* note 189-92.

<sup>318</sup> See, e.g., Lastowka & Hunter, *Laws*, *supra* note 26, at 61 (“[T]he primary reason subscribers are drawn to virtual worlds is not for the backdrop of castles or condos, but for the social interaction with like-minded friends and enemies. People are, essentially, paying to amuse one another.”).

<sup>319</sup> Lazarus, *supra* note 3.

risk.<sup>320</sup> Thus, critics have consistently argued that real-world law should never interfere with virtual worlds, whether from the point of views of the virtual world participants or the real-world courts themselves.<sup>321</sup> They claim that these worlds are distinct places, and virtual world activity simply does not affect the real world in ways that justify legal intervention.<sup>322</sup>

These critics have also argued against collapsing the realism between the individual and the character for the purposes of a legal action. To properly engage in a virtual world, a participant must psychologically separate herself from real-world existence in order to act through her avatar.<sup>323</sup> Whereas current cyberlaw may treat the individual who created the defamatory content and the means to convey that content as indistinct,<sup>324</sup> scholars have cautioned that it may not necessarily be wise to construe the avatar and its manipulator as one and the same.<sup>325</sup> Moreover, they have contended that the character of an online world may ultimately and forever be altered if real-world regulations are imported to virtual spaces.<sup>326</sup> For example, Yale law professor Jack Balkin argues that “courts and legislatures should give virtual communities wide latitude to design their own rules and social norms to deal with misbehavior and leave plenty of room for the creativity of the people who design games as well as the people who play them.”<sup>327</sup>

But the onslaught of real-world politics and law into the virtual space is, and should be, inevitable. As the next step in technology, virtual worlds “are where video and VCRs were in the early 1980s, or where the Web was in 1993,”<sup>328</sup> and the

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<sup>320</sup> Kang, *Cyber-Race*, *supra* note 270, at 1161.

<sup>321</sup> See, e.g., Balkin, *Law and Liberty*, *supra* note 35, at 76; James Grimmelmann, *Virtual Borders: The Interdependence of Real and Virtual Worlds* (2005), available at <http://ssrn.com/abstract=868824>; Lastowka & Hunter, *Laws*, *supra* note 26, at 53 (“[The owners’] exclusive ability to exert absolute control over these environments hopelessly complicates attempts to map traditional notions of democratic governance onto these settings.”).

<sup>322</sup> Grimmelmann, *supra* note 321.

<sup>323</sup> See Barfield, *supra* note 46, at 649-50.

<sup>324</sup> See Elise Ackerman, *Negative Postings May Spur Lawsuit: Person Who Puts Critical Thoughts Online, Not Web Site, Is Held Responsible*, SAN JOSE MERCURY NEWS, July 16, 2006, at 1, available at 2006 WLNR 12244803.

<sup>325</sup> See, e.g., Lastowka & Hunter, *supra* note 26, at 62-63. Should the law equally subjugate Second Life participants who believe that virtual worlds “at their core” are merely “games”? *My Virtual Life*, BUS. WK.

<sup>326</sup> See, e.g., Jankowich, *Property*, *supra* note 45, at 188-89.

<sup>327</sup> Balkin, *Law and Liberty*, *supra* note 35, at 76.

<sup>328</sup> Kirkpatrick, *supra* note 81.

politicians and legislators in the United States have already taken sharp notice of this particular metaverse. For example, Congress has penetrated the virtual wall between Second Life and the real world with a new, permanent architectural rendering in Second Life: a virtual U.S. Capitol.<sup>329</sup> Representative George Miller of California, the chairman of the Democratic Policy Committee urged other Congressional members to partake in this new political discussion forum.<sup>330</sup> Even the Joint Economic Committee has noted that “development of virtual economies has outpaced the law,”<sup>331</sup> and the United States Congressional Committee proposes to investigate Second Life economy to determine how better to levy taxes on virtual income.<sup>332</sup> It also intends to examine “some of the philosophical problems thrown up by people and corporations conducting valuable business inside.”<sup>333</sup>

Moreover, with legal controversies arising from the CopyBot incident and other copyright and trademark infringements running rampant in Second Life, real-world lawyers have begun to set up practices in the virtual world to resolve these disputes.<sup>334</sup> Benjamin Duranske, who is known in Second Life as “Benjamin Noble,” founded the Second Life Bar Association. Duranske, together with Stevan Lieberman, a practicing attorney, and other interested lawyers, have even begun advocating for an arbitration system in Second Life to address disputes from an internal perspective.<sup>335</sup> Nevertheless, until Linden erects a proper arbitration forum, or any other dispute resolution system, Second Life users must “threaten

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<sup>329</sup> Grant Gross, *U.S. House Member Gets Second Life*, IDG NEWS SERVICE, Jan. 4, 2007, available at <http://computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=security&articleId=9007218>. Miller has already held an in-world dialogue regarding the goals of the House Democrats during the first 100 hours of the new congressional session. *Id.*

<sup>330</sup> *Id.*; Posting by Sarah Wheaton to The Caucus: Political Blogging from the New York Times, <http://thecaucus.blogs.nytimes.com/2007/01/03/second-life-and-the-peoples-house/> (Jan 3, 2007, 11:44 EST).

<sup>331</sup> See, e.g., Stephen Foley, *US Taxman Targets Virtual World Booming on the Internet*, INDEPENDENT (UK), Oct. 20, 2006, at 50 (noting that current legislators are looking into virtual economies).

<sup>332</sup> James Harkin, *Get a (Second) Life*, FT.COM, Nov. 17, 2006, <http://www.ft.com/cms/s/cf9b81c2-753a-11db-aea1-0000779e2340.html>.

<sup>333</sup> Foley, *supra* note 331.

<sup>334</sup> Bringardner, *supra* note 137 (“[For example,] Cooper was one of the first IP attorneys to open a virtual office in Second Life, where he solicits online and offline clients for his U.K.-based firm, Crossguard. He typically spends his working hours in the real world, playing in Second Life at night.”).

<sup>335</sup> *Id.* (attorneys are currently “lobbying Linden to include arbitration in its [TOS] agreement”).

real-world court battles against fellow residents and Linden itself to protect their assets.”<sup>336</sup>

If the sheer existence of a virtual Capitol in the Second Life grid, the current congressional interest in Second Life’s economy, and the newly established legal institutions in the Second Life community, can together convince other real-world political figures to partake in the virtual world,<sup>337</sup> such real-world interest in virtual living may portend the rise of a new form of governance. Although overtly political propagandizing may instigate protest among Second Life residents with varying beliefs,<sup>338</sup> this introduction of real-world policymaking to Second Life, at the very least, prefigures the amalgamation of real-world and in-world legislation and rulemaking.<sup>339</sup>

Eventually, real-world laws, the authorities who enforce them, and other governing structures will spill over into the virtual realms so that activities that occur within these realms may be efficiently regulated.<sup>340</sup> In the meantime, whether Linden Lab or the Second Life communities should promote or engage in more rigid self-regulatory policies will always be up for debate unless residents and users of virtual worlds have the option to bring their claims to real-world courts. If judicial institutions can mutually agree to overcome the ambiguities that arise in the application of real-world legislation to the online context, such as the classification of party identification and of the context in which user infractions may arise, the prospects of safeguarding all virtual world participants are positive.

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.*; Gross, *supra* note 329.

<sup>338</sup> Adam Reuters, Congressional Democrats’ Agenda Gets SL Stage, <http://secondlife.reuters.com/stories/2007/01/02/congressional-democrats-agenda-gets-sl-stage/> (Jan. 2, 2007, 12:01 PST).

<sup>339</sup> Foley, *supra* note 331.

<sup>340</sup> See, e.g., Balkin, *Virtual Liberty*, *supra* note 307, at 2046-47; Jankowich, *Property*, *supra* note 45, at 206; Mayer-Schönberger & Crowley, *supra* note 48, at 1818-19. See generally Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435 (2003) (arguing that property law is the effective body of law to govern the actions and characters of virtual world participants).

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