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AVATAR: FROM DEITY TO CORPORATE PROPERTY

A philosophical inquiry into digital property in online games

The focal point in this paper is our virtual selves, the avatars with which we interact with others in online virtual environments. The dispute is growing as to whom these digital manifestations belong to. The dispute is in part due to the ability of the technology to transfer the avatars and also in part on the desire of the software manufacturers to enforce the end user licence agreements. These licences do not follow contract theory but have been enforced by the courts. Despite the actions of the court their validity as a whole is still questionable. This paper contains descriptions of the disputed objects and presents the arguments of both sides. There is also a presentation of the law regulating the area and its rationale, strengths and weaknesses. Then there follows a critique of the law as it is and a presentation of what the law could, and indeed in some cases, should be. In the conclusion this work both describes the importance of this issue and what is at stake if an equitable and reasonably balanced solution to the collective rights cannot be found.

Keywords MMORPG; intellectual property rights; avatars; law; computer games; Eula & Shrinkwrap licence

Setting the scene

Carrying an unwieldy acronym, the MMORPG (massively multiplayer online role-playing game), which can be defined as any online role-playing game where a hundred or more players can play simultaneously in the same environment, has quickly become a huge success. The games, such as *Ultima Online*, *Asheron's Call* and *Everquest* have evolved from single player games and text-based MUDs (multi-user domains), and they have been created as a way of combining the

playing advantages of single player games, strategy games and synchronous social interaction.

To play the game, the player buys the program and installs it on a computer with an Internet connection. Once the installation is complete, the player then logs on to the server and creates an account. Financing the game is done in two stages: first there is the initial fee to buy the software, and then there is a monthly cost to access the game environment. These games cannot be played without access to the game environment. Once the account has been set up, the player then creates a character from a list of choices. These choices can include certain fixed attributes, which the character will then have during the rest of the game – such as hair colour and occupation – and they also have a certain number of features that will change during the game – for example, the character's strength, agility and other vital statistics. From this point on the player enters the online environment and can perform tasks within this world. The limits of the actions of the character are limited or decided by the configurations of the program.

One peculiarity of the MMORPG is the level of interaction that is possible between the players via their online personas. The players often form teams or guilds in which they can help each other with the more difficult tasks inside the game. The guild not only provides help and tips for new players but also a sense of security, since the self-regulatory guild system ensures that the players within the same guild will not cheat each other while trading or cheat within the game to the detriment of fellow guild members.

In certain games, the guild is almost a necessity for those who wish to play the game and be unhampered by other players who have managed to manipulate the program and grant their characters powers unintended by the programmers, such as the power to destroy or kill the characters of other players.

What is an avatar anyway?

The online character is often seen as a reflection of the offline self and is in literature referred to as the avatar since it is a manifestation of the self in this online world. Avatar is a Sanskrit word that refers to the incarnation of God, but is more commonly used to mean a manifestation of the self.

While the initial creation of an avatar is merely a list of choices which then generates a character by use of a sophisticated algorithm, many players tend to develop deeper relationships to the avatars they use.

The MMORPG not only involves playing in an online environment but there is also a strong aspect of online cooperation and communication. This cooperation and communication can even be seen as a crucial aspect of the online game, since the successful completion of many situations in which the player will find him- or herself are not possible to complete with only one

player. The game also requires that the avatar collects a steady stream of artefacts, which are more and more powerful; without these more powerful artefacts the player will have a difficult time proceeding in the game.

The online collaboration also makes the MMORPG a more socially oriented game than any of the computer game predecessors. The online environments are created as complete worlds with their own topologies and cosmologies, which are often reasonably coherent within the confines of the game. For a discussion on the importance, growth and future of MMORPGs, see, for example, Krantz (2002), Keighley (2002), Kosak (2002) and Shachtman (2002).

The development of an avatar from an unskilled, low-level character to a level of skill and strength within the virtual environment requires, above all, a great deal of time and commitment from the player. The more one plays the greater the skill of the avatar. With the improvement of skills comes the greater accumulation of wealth (either in currency or in goods), and with all this follows an improved social standing both within the game and also within any guild the player belongs to or even in any external offline gathering where two or more players meet.

The avatar is therefore not only the physical representation of self within the online environment but also a social being within its own social circle and a corresponding position that follows this social position.

Finally, the avatar is an investment. The time spent creating a powerful avatar can be seen as an investment within a social group, but it can also be seen as an investment in monetary terms as well. The fact that MMORPGs have internal economies has been mentioned briefly earlier, but, in fact, these economies are not to be sneered at. *Everquest's* virtual world 'Norrath', if compared with offline economies, has a gross national product per capita of US\$2,266, which makes it more economically sound than China (Castronova 2001). The currencies of online games have been (and some still are) more valuable than the currencies in offline environments.

Outside the game

Not only is online currency traded in relation to offline currency, but the avatars themselves and the artefacts they possess can be seen as being economic assets. Trade in these assets has been carried out both within and outside the virtual environment. Trading the in-game assets within the game has almost always taken the form of bartering since no offline money has changed hands. But this is not the only trade that has been taking place. Much of the trade has been carried out in other, non-gaming, virtual environments such as the online virtual marketplaces like eBay and Yahoo!. The practice of selling artefacts and avatars on online auctions has been seen as a natural part of the game for the

players, even though those who buy powerful characters do lack a certain amount of social cachet and are often considered inferior players. This is much the same attitude that old money has towards the nouveau riche.

In 2000, a wizard sold, by online auction, the cloak of flames he had managed to obtain after successfully vanquishing Lord Nagafen of 'Norrath'. The cloak was sold on eBay for over US\$1,000. Others have sold their avatars for prices reaching the thousand-dollar mark and above (Sandoval 2000). It is interesting to note that the virtual world is not free from sexism; male avatars usually fetch higher prices than female avatars (Castronova 2003).

In 2001, this practice was stopped by the auction houses. Their rationale for stopping the auctions in virtual merchandise and avatars was their policy of cancelling auctions that may violate intellectual property rights (Sandoval 2001). This issue was quick to spark a debate about who owned the products of the game (Carter 2002; Taylor 2002). Most players felt that they had acquired proprietary rights over their avatars. This right arises, according to the players, not from the actual payment of the software or the monthly subscription fee. The players feel that they have a right to their avatars and the merchandise they collect because of the time they invest in the game (Carter 2002). The legal questions that arise are natural. First, what is it that is being traded? And, second, if that which is being traded can be seen as being property, then to whom does it belong and, finally, which rights do they have over it?

The dispute begins with the first question. Most players who want to trade their avatars claim that they are selling their time while the game manufacturers claim that they are selling the game manufacturers' own intellectual property. When it comes to artefacts found or bartered within the virtual environment, the defences are the same but the arguments of the players tend to be much weaker. The whole issue of selling both artefacts and avatars recently came to a head when Blacksnow Interactive sued Mythic Entertainment for unfair business practices and interference with prospective business advantage.

Mythic Entertainment is the computer game developer that developed and runs the MMORPG *Dark Age of Camelot*. Blacksnow Interactive specialized in creating high-level avatars for *Dark Age of Camelot* and selling them. In the beginning of 2002, Mythic contacted auction sites and requested that they stop dealing in copyrighted material – sites like eBay complied, while Blacksnow did not. Mythic's actions led Blacksnow to file charges that Mythic was behaving in an anti-competitive manner and was attempting to 'exert monopoly-like control over uncopyrightable material'.

On 10 May the same year, the District Court of California¹ found that the end user licence agreement (eula) was valid in this dispute and that, according to the terms of the licence, the dispute was to be settled by arbitration. Since arbitration is a private affair, the terms of the resolution of the conflict are not public knowledge and one can only point out the Blacksnow Interactive no longer trades in artefacts from any online games.

The enforcement of the eula has led to the demise in large-scale trade in avatars and artefacts. But the interesting issue with the eula is how enforceable is it and how is it that it can control the activities of the user? To answer this, we need to take a closer look at the origins of the eula and its position in the law.

Positive law

While many discussions on the issue of digital property tend to gravitate around the concept of intellectual property, there is a very important issue to be resolved before we can enter into that arena and this is the question of whether or not the property (intellectual or otherwise) belongs to those who wish to sell it.

To be able to answer this, we must look at how the property came into the hands of those who wish to sell it. The first stage is actually a simple contract. And while there is still no actual international consensus on which requirements must be fulfilled for there to be a contract, most jurisdictions agree upon a simple formula when attempting to explain contract law. This is usually referred to as the offer-acceptance model. The idea is that the contract is a reflection of the will of the parties to be bound by contract. Formally, this occurs when one party makes an offer that the other accepts.

Leaving aside the differences of opinion as to whether offers are binding (e.g. in Nordic law) or not, whether there needs to be consideration (common law) or not, (civil law) the simple model sketched above is the basis of contract law.

In the case of the MMORPG buyer, the first stage of the contract is that he purchases the software, usually in the form of a CD, and then installs it onto a computer. The buyer then logs onto the site and enters into an agreement to pay a fixed sum each month to access the online game (this is usually around US\$10 per month).

However, there is a small part that is usually ignored by the buyer in the rush to commence use of the new game. When the actual installation of the program begins it is usually interrupted by several questions, which the experienced computer user tends to agree to without a second glance. The questions involve technical settings such as where the program shall be located and whether a shortcut shall be placed on the desktop and so on.

Among these questions the eula makes its appearance. It is usually in the form of a box where the buyer must click on the 'I Agree' icon to be able to install the program onto the computer. The text box containing the licence agreement is not especially interesting and the text is rarely reader friendly. A friendly interpretation of the scenario is that the buyer and manufacturer are in general agreement of what can be done with the software, so the buyer tends to agree to the terms without much ado. In reality the terms are quite

harsh. There is no option to negotiate on any of them. The situation is all or nothing. If the user does not wish to agree then the software cannot be installed and attempting to return an opened software CD to a vendor is a harrowing experience.

So the position of the buyer is either to agree or to lose the money already spent and to not be able to play the game that was bought. What is the position of these agreements in the law?

Much has been written on this question. The question is usually dealt with theoretically and seen as: the actual terms that appear after the purchase of the CD should not be part of the contract and cannot be binding. This is usually because it is not seen as fair that one contracting part can put himself in a better position after the deal has been done. However, the fact is that the shrinkwrap licence and the clickwrap licence have become standard practice and have been regularly enforced in courts in several jurisdictions.

Therefore this paper could be at an end here. The eula is seen as being binding by the courts and, therefore, the situation under the law is clear: if the eula states that the avatars and artefacts within the MMORPG are the property of the software house and may not be sold, then this is binding to the user. If we were to remain here, the question would not be complex, and to many this is the complete answer of the discussion. This may be regrettable since the many players feel that the situation is not equitable, but it is legal. Therefore, the question should be posed: Is there a rationale for increasing the scope of protection for the players and should this mean that they have greater rights of which the law should take notice?

The limits of end user licence agreements

Simply because eulas have been enforced by the courts does not mean that legal systems are prepared to enforce all their terms in all situations. The eula is an important document since it does more clearly state the obligation of the purchaser or user of the software. The courts apply these licences since they generally reflect the trade practices that are currently in use today. But it is important to remember that these trade practices are not fixed in stone and also the courts still often have the power to interpret these practices in favour of the purchaser should a need to do so arise.

The eula does not live in a vacuum and comes from a context known to lawyers as adhesion contracts. These are contract terms that are part of the contract without being actually included in the contract text or that have not been discussed during the negotiation. These adhesion contracts are not unusual nor something to be feared (Gomulkiewicz & Williamson 1996). For example, airline tickets are bought without consulting the mass of rules that apply – in

this case, the adhesion contract simplifies the negotiating process by standardizing the terms involved.

It is important to remember however, that the adhesion contract does limit the scope of rights available to the parties and as such must be treated with some care. Software companies wishing to ensure that their eula is applicable should ensure a certain amount of transparency and information in the process of presentation of the eula. This entails such steps as: (1) making the eula visible and enabling the user to study the terms in a reasonably easy manner; (2) any limitation to the rights of the software user should be included as highlighted warnings; (3) the language must be such as to be comprehensible to the average reader, meaning that a limited number of legalese and unclear terms should be used; (4) it should be possible for the users to return to the eula for future reference; (5) uncommon or onerous terms should be highlighted – inclusion of especially harsh terms should even require that the users acknowledge their awareness of the harsher terms (Brown 2002).

As we can see, there is a common thread in all this and that is the act of creating clarity and agreement between the buyer and the seller. Unfortunately, the craft of drafting contracts and the inclination of those who draft them has moved away from clarity. This has led to the increasing disparity between the contracting parties. The more this trend continues and the more the parties are mismatched in legal power the more likely it will be for the courts to find eulas to be inequitable.

Looking at eulas today, we can see that many of the basic rules – which were created to ensure that adhesion contracts are not unduly onerous and surprising to one of the parties – are being ignored. Even a cursory survey among users will show that they do not read the contract terms. Those who read them find them confusing and, as the current situation with avatars shows, they are not in line with what the ordinary user feels to be correct. The sections of the eula that particularly limit the rights of the user are no more clearly displayed and as such it is possible for the parties to have an increasingly mismatched concept of their rights and obligations.

All these factors create a new scenario where it may be that the courts will eventually limit the power of the eula. This does not mean that the eula will not be a very important document in guiding the rights and obligations of all involved, but the lack of transparency and clarity has led to an opening for the courts wishing to curtail the absolute freedoms created by eulas. This situation becomes even more poignant when the parties involved are mismatched, such as a large software house and an individual consumer.

While there are openings for these kinds of interpretations, the courts have not yet shown a willingness to move in this direction. The American legislators have, however, proven to be more forthright, and in the UCITA (Uniform Computer Information Transactions Act) they legitimized the shrinkwrap licence, creating an even stronger position for the eula than it had already held

(Crotty 2002). The position of the eula is strong in law and it has yet to be challenged in the manner discussed within this paper. Until serious challenges to the eula occur, it will maintain its current strength and must be taken as a starting point in any legal analysis of virtual property.

Critique of positive law

If we were only concerned with the law 'as it is', then legal philosophy would never evolve and the needs of the people would never be met. The validity and scope of the eula might easily end this debate, bringing all other complaints to an end. But attempting to end a discussion by simply referring to the fact that the current solution is in line with the law is neither a fruitful nor an interesting discussion. Also, it must be remembered that the eula can be interpreted by the courts and it is they who will fill it with meaning via their interpretation and understanding of what the eula really is. Without an active discussion on the role of the eula, the courts will not have much material with which to interpret the eula. There is also a final question that must always be posed: What is it that the law should be? And in this discussion the role of the users is crucial. This issue is too important to be answered less rigorously than it deserves with a condescending remark to read the end user licence agreement.

While positive law (i.e. the written law and the decisions of the courts) is an important tool of the lawyer, it has often come into conflict with the moral rights and obligations of the citizens. In classical terms this is the conflict between positive and natural law. Both the age and the content can be illustrated in the Greek tragedy of Sophocles where Antigone disobeyed King Creon's command and buried her dead brother. When Creon asks her if she broke the law she replies:

Yes; for it was not Zeus that had published me that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but from all time, and no man knows when they were first put forth.

(Sophocles 1912)

The conflict in the tragedy is the fact that there are worldly laws and there are laws that must be followed since they have a greater standing and supersede the laws of men. Today it is not the laws of any god which one can use to argue a higher obligation and therefore a diminished need to follow positive law. But this does not mean that positive laws take precedence. Today we tend to discuss the rights of individuals as being important enough to stand above written laws enforced within the borders of a single state.

The question is, therefore, can there be a right to ones own avatar? The initial response to a question such as this is that no such right exists; but this is a much too short-sighted answer since rights tend to evolve over time. The fact that there is no such right now does not mean it cannot evolve. And also the fact that we claim something to be a right does not mean that it will be enforceable – for example, the American Declaration of Independence (1776) declared all men to be equal but did not prevent slavery.

Avatar as property

What would be the basis of the right to ones own avatar? The first such basis must be found in the discussion of what an avatar is. If we return to the older understanding of the term, we find that in Hinduism it is the incarnation of a deity in a human or animal form. It commonly refers to the ten appearances of Vishnu, who appears to counteract some particular evil in the world. Or, as Lord Krishna tells Arjuna in the Bhagavadgita:

Whenever there is a decline of righteousness and rise of unrighteousness then I send forth Myself. For the protection of the good, for the destruction of the wicked, and for the establishment of righteousness, I come into being from age to age.

(Johnson 1994)

The reputation aspect

While this is an interesting background it may not be applicable here since we are not deities taking on human form – even though in certain role-playing games some may argue against me. One thing that the avatar is, however, is the manifestation of my self in a virtual environment. My self is not only my appearance, even though this is not without weight, but my self is also the sum of my actions. This last point is usually summed up as reputation and, indeed, the avatar is the focal point of my reputation within the virtual environment. As in the real world, my reputation is a valuable asset, which I use and abuse at my discretion, but it is not something I can fully control since it is the sum of other people's opinions of me that make up my reputation. If the avatar is a part of my reputation, or if the avatar is the bearer of my reputation within a virtual world, then should it not be protected in the same way as my offline reputation and be part of my assets to be dealt with as I see fit?

Human reputation is protected to some extent in most, if not all, jurisdictions and is even protected in Article 12 of the Universal Declaration of Human Rights and Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The protection of reputation is therefore a human

right, and, in much the same way as the government has an obligation to protect their citizens other rights, there is also an obligation to protect the reputation of its citizens.

The problem is, of course, that the rise of the MMORPG and virtual environments in general has not received the amount of attention they deserve. There is a tendency to look upon these environments as being unimportant and mere playthings not requiring legal protection outside the scope of the protection of the intellectual property of the software manufacturer. Reputation is a key aspect of all virtual environments and will require a more serious legal protection than previously envisaged.

The speech aspect

Another important function fulfilled by the avatar is the mode in which I express myself within this world. While there is a difference between expressing oneself and obtaining a right to protected freedom of expression (Schauer 1982), in these environments the full control of ones avatar is essential for the right to control ones speech. It is hardly necessary to point out the massive amount of work that has been done on the importance of free speech in an open society. Yet it is important to underscore the fact that most legislation for the protection of speech only protects the speaker from governmental involvement or persecution.²

Considering the technological realities of the day and the rapid advances in technological development it is an open question as to whether the right to speech will be limited to protection from the involvement of governmental actions. But the question of human rights may one day create the right to ones avatar. But will these rights 'to be left alone' and to 'free expression' also entail a right to treat the avatar as personal property that may be traded? The right to ones own avatar should be an absolute right for a human person since any interference with the right will quickly limit the efficiency with which the avatar can be used in exercising these rights. Therefore, the rights should include a full right to dispose of ones avatar as one feels fit.

The property aspect

And, finally, we reach the aspect of property. This is where most arguments on the rights of avatars usually end up. In this case, I would like to take a slightly different approach. I would like to take the starting point of a non-eula-regulated environment. In other words, I would like to explore who owns the avatar if there is no eula to weigh the arguments so heavily in the favour of the manufacturers.

To be able to discuss this in more depth, we must return to the creation of the avatar. Since the avatar is created out of a, more or less, complex series

of settings, the actual avatar cannot be seen as anything other than the output of an equation or programming function. However, the user then has the option of naming the avatar, and this act of providing the avatar with a unique name does entail a certain amount of separate intellectual investment in the avatar. In the same way as trademarks are protected, so can the avatar be protected. While the act of naming does entail a certain activity that could make the avatar less likely to be a result of the programming, it is still a weak link upon which to claim ownership.

An interesting argument can, however, be found in the works of John Locke when he writes:

. . . every man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State of Nature hath provided, and left it in, he has mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.
(Locke 1960, pp. 287–288)

If we see the newly created avatar as coming from the state of nature, it is devoid of personality and does not noticeably differ from many other avatars (except in name). The player's use of the avatar can be seen as enjoining the state of nature with one's own labour and, as such, the product of these actions, in this case a more powerful and socially adept avatar, should belong to the player since he is the one who has created it.

The purpose of this section is to attempt to seek a rationale for the right to one's own avatar. The law of intellectual property has reached an interesting point today since in many situations there has been a reversal of position from its origins. Originally, only a limited number of things were protected and the use of most intellectual property was unregulated. Today we see that the situation is the opposite, since the default situation is that most usages of intellectual property are regulated and what is left is only a small area of rights (Lessig 2001). When it comes to the ownership of the avatar, the situation is clearly in the favour of the software manufacturers, but this should not prevent others from finding arguments with which to attempt to rebalance the scales.

Conclusion

Today, the computer software manufacturers have the power and the ability to close down the accounts of any users who are in violation of the *eu*. This means that buying or selling an avatar could result in the termination of one's whole account. To many the termination of an account in a computer game does not seem like a harsh punishment. Some would even claim that the players

should join the real world instead of spending their time online. This, however, is a very short-sighted approach. We are presently drawing up the future of the legal status of avatars, and, at present, the status is that they are to an ever greater extent falling under the ownership of the software manufacturers. If the situation were only relevant to online games, this would maybe be less important to the larger community; but this is not so.

The growth of MMORPGs has shown that they are here to stay and that they will continue to grow. Another future trend is the development of mobile platforms that allow access to virtual environments. The future will bring a much easier access to virtual environments and maybe even the development of more avatars for more diverse roles.

The more dependent we become on our avatars the more necessary it becomes that they are seen by the law as being an integral extension of the human body in the virtual environment, since they will be the way in which we express ourselves and the way in which others perceive us in the future. This is a development that we must begin to take seriously. Whether or not this requires the creation of a new right, as in the right to ones own avatar, remains to be seen. But what should be understood is that, even without the separate right, the avatar must start to be perceived as the extension of body.

This extension of body and rights does not affect the software manufacturer. A question that is rarely raised is: For what purpose does the software manufacturer claim to need the rights of ownership in my avatar? Instead of the users needing to explain the rationale for what is an easily understandable reaction, it would be interesting to hear the rationale from the software manufacturers.

The Blacksnow incident has led many to believe that there is not much point in arguing any more. The courts have determined the fate of the avatars, and with legislation like UCITA the situation seems very bleak indeed. But the situation where a company for business purposes cultivated avatars for the express purpose of selling them should not be the reason why no rights can be given to the avatars of private individuals.

Notes

- 1 Blacksnow Interactive, et al. v. Mythic Entertainment, Inc. (2002) SA CV 02-112 GLT (ANx), 10 May.
- 2 Conventions are often used to create and defend human rights. For example:

Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his

honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4.XI.1950. Article 10 – Freedom of expression. (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others. . . .

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