Workshop on Legal Issues of Virtual Worlds
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Panel I: Regulation of and In Virtual Worlds

Remarks on Selecting the Proper Analytic Metaphor

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In my remarks today I wish to offer three ideas to the conversation about regulating virtual worlds. First, the government must regulate. Second, the choice of the analytic metaphor has important effects on how and when the government regulates. Third, the metaphor of theater is a powerful but overlooked metaphor which carries several analytic advantages.

I. Government Must Regulate

In thinking about the regulation of and in Virtual Worlds, the two primary relationships I would like to focus on are (a) the relationship of the virtual world developer (also called "provider") to the users of the virtual world, and (b) the relationship of the users among themselves. There may be other relationships (users to non-users, for example), but I believe the primary relationships about which there is currently some uncertainty are the two just listed.

My first point is that the government has no choice but to regulate these relationships, as it regulates all relationships between legal actors. By "regulation" I do not refer to the kind of sociological regulation that Foucoult studied. I am a lawyer and so I mean only regulation by legal rules.

The government regulates in two ways. First, it uses its law-making authority to regulate behavior *ex-ante*. Legislatures enact laws regulating behavior, and government agencies issue regulations under authority delegated to them by the legislature. Second, the government uses its dispute resolution authority *ex post* to create legal rules that then regulate future behavior.

The first method of regulation is the more evident. When government law-makers (whether elected or appointed) come to believe that certain relationships or behaviors need legal rules, they will write those rules into statutory laws or administrative regulations. Either way, legal actors are expected to conform their behavior to the codified rules and legal advisors consult the rules to advise clients how to conform.

The second method of regulation is less evident. When legal actors have a dispute, it is the government---which is no more than the concentration of legitimate force of the collective---that is the ultimate arbiter of the dispute, and thereby creates or makes clear the rules regulating the disputed relationship. While some might refer to "private" regulation, such as "private" negotiation or "private" arbitration, all of that activity occurs in the shadow of the ultimate arbiter of disputes: the government.

For example, I enjoy confounding my law students by insisting to them that there is no such idea as a "free market." The relationships between market actors are fully regulated in both of the senses I describe above. What is hard for the students to see is how the dispute resolution function of government is also a regulatory function, that government regulates relationships even the absence of laws enacted by the legislature or rules promulgated by bureaucracies. This can be seen in Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947), where the SEC refused to allow a proposed reorganization of the Chenery Corp., even though there was no rule against it. The Supreme Court approved the SEC action, recognizing that agencies could regulate behavior on a case-by-case basis---thereby creating a legal rule or implementing a legal policy---and were not required to regulate behavior only through issuing regulations *ex ante*.

In the common law countries, courts have considerable freedom to create and apply rules through adjudication of disputes. But even in civil law countries, I would suggest that regulation through dispute resolution function exists --- a rule can never capture the possible future variations of its application and decision on whether and when to apply which rule is a quintessentially judicial, or adjudicatory, function. So while a civil law court may appear to simply be "applying" a rule, it is in truth clarifying the rule's application by resolving a dispute. After all, if application of the rule was perfectly clear, there would be no dispute.

In summary as to this second mode of regulation, if there are two laws that potentially apply to the dispute, the court must select which legal rule to apply.

Both common law and civil law courts must resolve differences that arise between market actors by choosing the appropriate legal rule to apply. To choose the appropriate rule, courts must know the nature of the relationship being regulated: is it personal or commercial or consumer, or whatever other category that formalists create? This then leads to my second idea: the importance of metaphor.

II. Metaphor is Important

The choice of appropriate legal rules to govern the relationship between legal actors depends in no small part on how the relationship is conceived. One example that connects somewhat with virtual worlds is the California Supreme Court's decision in *Intel Corporation v. Hamidi*, 71 P.3d 296 (Cal. 2003). Greg Lastowka does a masterful job in recounting the problems created by two competing metaphors of cyberproperty: one metaphor analogized the ownership of computing resources (the software and the computer equipment running the software) to ownership of land and the competing metaphor analogizing the ownership to ownership of chattels. The dispute between Mr. Hamidi and Intel arose when Mr. Hamidi sent more than 30,000 emails to employees of Intel complaining about the company. The courts were called upon to sort out --- to regulate --- the relationship between Mr. Hamidi and Intel (a relationship that was non-mutual, by the way). To do that the courts had to consider whether the relationship looked more like a person trespassing onto land or a person trespassing onto chattels. If the former, Intel would not have to demonstrate actual damages to its computer resources to recover any relief. If the latter, Intel would have to show actual damages. Mixed in with this choice was also the decision of whether to look at the relationship through the lens of the first amendment of the U.S. Constitution.

The Cal. S.Ct. decided that the relationship looked more like a trespasser against chattels. Since Intel had stipulated that Mr. Hamidi has caused no damages, it could obtain no relief.

The Hamidi case illustrates the importance of metaphor. Not to beat a dead "horse" (a reference to Richard Posner's famous rant) but the true regulatory question regarding virtual worlds is not how to handle new technology, but is how to characterize or conceive of the relationships between legal actors engaging in that technology. That is, the relationships between developers and users, and among users, must be regulated. What other relationships are like them? What metaphor captures the nature of those relationships? This leads to my third idea: the metaphor of theater.

III. The Metaphor of Theater

In my own study of whether and when activity occurring within virtual worlds should be taxed by the U.S. government, I found that the metaphor of theater provided a powerful and useful analytic tool, good way to think about the relationships among legal actors engaged in virtual worlds. The metaphor not only helped descriptively (that is, it helped explain why activity should currently NOT be taxed), it also helped normatively (that is, it helped me figure at what point in-world activity should be taxed.

As Shakespeare might have said, "All the world's a stage, but all the virtual worlds especially so." In the theater metaphor, the relationship between the developers and users can be likened to the relationship between a play's producer/theater owner/writer and the actors. The relationship between the users can be likened to the relationship between actors on a stage. Users are, first and foremost, actors who play a part, as represented by their in-world avatar. They may play many parts and different users might play the same part; just as Hamlet may be played by many actors, the Hamlet avatar may be played by many users.

Using a theater metaphor, code is no longer "law" it is "script." It constrains the behavior of the **characters** much as script does. But it does not constrain the behavior of the **actors** nearly as strongly. For example, the developer of World of Warcraft (Blizzard Entertainment, Inc.) hates Real Money Trading and has implemented many technological barriers to it. One barrier is to make valuable treasure "soulbound" so that only the avatar (character) who picks it up can use it. While that script limited the character, it did not constrain the actors who found ways to circumvent the ban on RMT that the script was seeking to enforce. They did so by selling their services in questing for the loot and then letting the purchaser pick up the dropped loot.

I have many reasons for liking the theater metaphor but shall share only one main reason here: the theater metaphor captures the unreality of virtual worlds and helps demarcate the virtual from the corporeal worlds. Part of the problem with analyzing legal issues in virtual worlds is separating the representation of things from the actual things themselves. In a wonderful article, Professor Orin Kerr demonstrated that the choice of legal rules may turn, in part, on whether one takes an "internal" view of what occurs in virtual worlds or an "external" view. I take a robustly external view, at least currently, and the theater metaphor helps maintain that perspective.

Theater involves role play and the relationships that occur both within a script and the relationships that occur outside the script. By the way, by "script" I refer not only to the content provided by developers but also to the content provided by users. Second Life can be seen as one large, ongoing, improvisational play.

One of the most confusing aspects of virtual worlds lies in distinguishing the representation of things from the actual things themselves. For example, Mr. Bragg sued Linden Labs for tortuous interference with his "land" deals when they suspended his account in Second Life. But the "land" Mr. Bragg's suit referred to was not real land; it was merely representations of land in the virtual world of Second Life. The U.S. federal district judge deciding the case became very confused and asserted, with no analysis, that the virtual "land" was the same as real land and so decided that the law governing the relationship between the developer and the user would be the same as between buyers of real land and those who tortuously interfere with their purchases.

A stronger awareness of the theater metaphor would avoid such error. Just as in the Hamidi case, the easy and tempting analogy of virtual land with real land leads to erroneous selection of the appropriate legal rule to govern the relationship between the disputants. Certainly no one would expect that the actor playing Shylock in Shakespeare's Merchant of Venice would be able to sue in court for breach of contract that occurs in the play. After all, the actor playing Shylock signed on for the role. Similarly---and literally---Mr. Bragg "signed on" to the role of land speculator in Second Life and cannot complain in real world about errors in the script. What Mr. Bragg could complain about would be a violation of the contract between him and Linden Labs, just as an actor might complain if the production company welched on their agreement. But one must keep straight the characters from the actors in order to correctly identify the relationship that the government must---one way or another---regulate.