

WHO'S IN CHARGE OF WHO I AM?:  
IDENTITY AND LAW ONLINE

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As we enter this new century, identity online seems full of opportunity. Someday “virtual world” identities will be indistinguishable from “real” identities — just as “e-commerce” has become indistinguishable from “commerce.” Control over online avatar identities will have many real-world consequences, because these clouds of bits may include our credit records, our buddy lists, our job records, personal references and other information regarding reputation, medical histories, certifications and academic transcripts. As soon as something is valuable and persistent, we seek to associate rights and duties with it. What will those rights be? And what will be the law of online identity to which those rights apply?

Currently, in the mainstream dialogue we are hearing the traditional responses to any new technical development that has a broad human interface — a category into which online identity unquestionably falls. First, fear (“is someone going to steal my identity?”), and second, opportunity (“how can I make money from identity?”). But people in the gaming community are already focusing on what real, rich identity is online from a human perspective, and who is in charge of it. Thus, the question before us is who can destroy a life online?

I suggest a set of preliminary responses to these questions about law, rights and destruction in this Essay. First, online identities are emergent. Identity is by definition a group project: Something created by the context in which the identified operates. Identity is not a matter of “rights” that we can think of in the abstract or in advance. For this reason, having some centralized one-size-fits-all “law of identity” (and associated rights) does not make

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sense: The context for identities does not arrive before us fully formed, and different groups have and will continue to have different ways for dealing with identity-removal questions.

Second, just as we are getting comfortable with the idea of these contextual, group-shaped, customized online avatar identities, it is disturbing to learn that online intermediaries (the companies who create online spaces — currently, games, but in the future, walled worlds that will be our internets)<sup>1</sup> now have “ownership” of online identities, together with hooks allowing them to remove identities they don’t like. In other words, the “gods” of the virtual worlds are making all the rules (or laws) about identity.

But because there is no norm of transparency with respect to these laws — no way for an individual to understand or predict how his/her identity will be treated by the intermediary — accountability is difficult. We are not used to asking the question “who is in charge of who I am?” Nor do we realize how important the answer may be.

Third, it does not look as if traditional sources of law will assist in rationalizing this state of affairs. Indeed, traditional statutory or judge-made law likely will not fit the identity context. Judging from past experience in similar domains, traditional law-givers will either defer to the actions of online intermediaries to remove identities (because the whole matter is just too complicated to get into), or promulgate centralized rules about identity that are unenforceable as a practical matter.

We have something important that we don’t yet completely understand (online identity), that although created by groups are subject to the unaccountable, invisible actions of private intermediaries. If we individual players/avatars/users were kings, what would we do to address this problem?

The bad news is that “we” (as individuals) will not be kings in these walled worlds that will be our future internets. The people who erect the walls will have a great deal of power that they will be unwilling to devolve. The good news is that, when it comes to iden-

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1. See David R. Johnson et al., *The Accountable Net: Peer Production of Internet Governance*, 9 VA. J.L. & TECH. 9 (2004) (accountability for future online interactions will be found in individuals’ decisions to connect to (or exclude) particular individuals; the Internet we know in 2004 will be replaced by many smaller internets).

tity, the “gods”<sup>2</sup> will need to recognize the power of the groups that live within their worlds. An administrator that makes its walled world hospitable to groups (and defers to group “rulings” about identity) will make that world wildly successful. Groups, or guilds, may provide some help when it comes to deciding what to do about identity questions.

### I. WHAT IS IDENTITY ONLINE?

The interesting and new thing to realize is that identity is something that groups do. Identity is emergent. We are not used to this way of thinking about identity; we prefer, unasked, to think of ourselves as fully formed by our own actions within our chosen environment. Or, if we think of ourselves as having various role-playing identities, we imagine ourselves to be voluntarily, purposefully role-playing. These conjectures of ours, however, are only partial: We are, in fact, constantly bumping up against and watching and learning from everyone around us. Everyone who makes up our “group” has a hand in our identity, and we emerge over and over again changed by the interactions we have with that group (or those groups). The duet played by groups and individuals is constant, seamless and endlessly productive of identity.

To be sure, subsets of virtual identity data can be used in slices — to authenticate for the “truth” of who an actor is, to signal permission to enter a particular area, and to permit associations across areas. But identity is much broader than these mechanical matching practices. It is all of these data points, and more. The being perceived by others (in games/virtual worlds, the avatar) is that being’s identity, and that being’s identity is in turn shaped by the others who interact with him or her. Identity and reputation go hand in hand, as individuals gain reputations that are connected to particular contexts and groups.

As defined by the United States General Accounting Office (“GAO”), “identity theft or identity fraud generally involves ‘stealing’ another person’s personal identifying information . . . and then using that information to fraudulently establish credit, run up

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2. “Deities create virtual worlds; designers are those deities.” See RICHARD A. BARTLE, *DESIGNING VIRTUAL WORLDS* 247 (2003).

debt, or take over existing financial accounts.”<sup>3</sup> It is amazing that the GAO has undertaken the task of describing “identity theft.” It is not surprising that the GAO has emerged with a crabbed description of identity.

Identity is not just credit card data or clickstream information or address details. In *The Presentation of Self in Everyday Life*, Erving Goffman suggested the notion of identity as a series of performances, where we use “impression management” to portray ourselves appropriately in different environments.<sup>4</sup> Some part of identity is controlled by the individual, but most of identity is created by the world in which that individual operates. We can think of identity as a streaming picture of a life within a particular context. Each of us has multiple identities.<sup>5</sup> The role of groups in shaping “real life” identities is implicit, as is the multiplicity of “real life” identity. What is interesting and new about virtual worlds is that they make this group-shaping explicit, and multiplicity of identity actionable.

Indeed, as Richard Bartle puts it, “[t]he celebration of identity is the fundamental, critical, absolutely core point of virtual worlds.”<sup>6</sup> The combination of interactions with fellow players and code-driven constraints produces a “stream of challenges” that shapes the identities of virtual world inhabitants in an explicit way

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3. U.S. General Accounting Office, Report to the Honorable Sam Johnson House of Representatives, Identity Theft: Greater Awareness and Use of Existing Data Are Needed, GAO-02-766, at 1 (June 2002).

4. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 208 (1959).

5. See, e.g., Roger A. Clarke, *Human Identification in Information Systems: Management Challenges and Public Policy Issues*, 7 *INFORMATION TECH. & PEOPLE* 4, 6–37 (1994), available at <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html> (“[I]dentity is used to mean ‘the condition of being a specified person’, or ‘the condition of being oneself . . . and not another’. It clusters with the terms ‘personality’, ‘individuality’ and ‘individualism’, and, less fashionably, ‘soul’. It implies the existence for each person of private space or personal *lebensraum*, in which one’s attitudes and actions can define one’s self . . . The dictionary definitions miss a vital aspect. The origin of the term implies equality or ‘one-ness’, but identities are no longer rationed to one per physiological specimen. A person may adopt different identities at various times during a life-span, and some individuals maintain several at once. Nor are such multiple roles illegal or even used primarily for illegal purposes. Typical instances include women working in the professions, artists and novelists, and people working in positions which involve security exposure (such as prison wardens and psychiatric superintendents.)”).

6. BARTLE, *supra* note 2, at 159.

over a compressed period of time.<sup>7</sup> It may be that people now go to virtual worlds at least in part because of this compressed, playful, group-based identity-creation experience.

Once we recognize that identity is a group project, the tension produced by the physics of virtual worlds is obvious. The “gods” of the online world — the people writing the code that makes the world run — can have a conclusive effect on identity: They can remove all traces of anyone and anything (indeed, the “gods” may see themselves as shaping identity; their shaping is done through code rather than hints, actions, and conversations). What happens when emergent, group-shaped identity is threatened with erasure?

## II. WHAT MAY HAPPEN TO THESE ONLINE IDENTITIES?

At the present time, email addresses are the most widespread form of digital identity in cyberspace. Email handles do not seem very rich or meaningful, and having recently been through a substantial change of address I can attest that losing this particular element of online identity leads to very few consequences other than less spam.

Future (non-game) online worlds, however, may be far more serious than games — they may have consequences for our wallets and our way of life. They may involve transactions that are more and more inseparable from our “real” lives. If an avatar is walking through an online world as “you,” making friends, doing work, and transacting in all kinds of ways, loss of that digital identity will be far more meaningful. Indeed, it does seem that something like an early version of Snow Crash is already happening.<sup>8</sup> Cyberspace users may be getting used to the idea of identity online that is different from identity offline — identity that is “unbundled” and exists only in an online space may be a concept whose time has now come.

This movement towards meaningful online identity is happening at the same time that more online “gods” are being promoted

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7. *Id.* at 161.

8. NEIL STEPHENSON, SNOW CRASH (2000) (Hiro Protagonist spends his time in the “metaverse,” an open world wide web-like virtual reality world, and foils a plot to control minds through use of a virtual drug called Snow Crash (which destroys avatars by showing them a special bitmap pattern in the form of snow on a scroll in the metaverse)).

into position. Online privately governed internets will soon become more prevalent than they are in 2004, as concerns about security, viruses, spam and the unknown increase, as valuable content is made accessible only to those who have been granted permission to see it, and as hardware and software systems made available to the masses increasingly take on "trusted" aspects.<sup>9</sup> Online games are precursors of these future, more serious, private competing internets.

Key characteristics of both games and walled worlds are their limited access, clear boundaries, rules, roles/players and feedback mechanisms that create reputational information. As Professors Bradley and Froomkin make clear, these characteristics of games make them ideal laboratories for experimentation with rule sets, particularly in an era of increasing harmonization in the real

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9. The public, worldwide internet is increasingly perceived as a polluted space, and individuals, enterprises, and ISPs all have good reasons to protect themselves against spam, viruses and spyware. The results of the aggregated filtering/connecting efforts of these actors can be viewed as a kind of collective online governance. The spaces across which sets of such rules will operate can be viewed as walled gardens (the traditional term) or, more optimistically, as privately governed internets that will compete against one another for customers and attention by filtering out dangerous bits and connecting to desirable material. Pessimistically, such privately governed internets could be monopolistic, government-mandated spaces that greatly control access to content and require identity certification before entry is allowed. In late 2003, a rumor swept internet mailing lists to the effect that someone from the RIAA had suggested that users should be identified with digital certificates before being allowed online. While the RIAA denied saying this, it is true that such a "drivers license" would benefit the content industry. See, e.g., Jonathan Weinberg, *Hardware-Based ID, Rights Management, & Trusted Systems*, 52 STAN. L. REV. 1251 (2000) (discussing Intel's Pentium III architecture, and Intel's Processor Serial Number and its function as a globally unique ID for Internet-connected computers); Hal Abelson & Lawrence Lessig, *Digital Identity in Cyberspace* (1998), available at <http://www.swiss.ai.mit.edu/6095/student-papers/fall98-papers/identity/white-paper.html> ("Identification could be required as a precondition for access to cyberspace using law, technology, or a combination thereof. Using law, the government potentially could regulate access to cyberspace whether access is obtained through government-subsidized or private ISPs. In the case of private ISPs, the government could require the ISPs not only to require identification as a precondition to access, but also to keep logs of cyberspace users linking their cyber-aliases to their real world identities."). A more optimistic view of the future of the internet would include many private internets that are affirmatively chosen by end-users rather than mandated, and that feature security/spam/spyware protections. See Johnson, *supra* note 1.

world.<sup>10</sup> David Johnson suggests that new kinds of organizations may arise in the online context, as we begin to take the screen seriously and understand its ability to allow new kinds of roles, new kinds of writings and new kinds of visible interactions to shape our imagination. My view is that games can provide early-warning alerts about identity issues that may arise in the “serious” virtual worlds of the future.

Choosing (and holding on to) an online identity in an online world is likely to become even more meaningful in the future than it is now. At the moment, whoever I play in Everquest<sup>11</sup> is certainly meaningful, if I obsessively work at improving the life and abilities of my character. But in the future, in this next generation, who I play in Everquest may morph into the question of who I play generally online, and whether who I play has just bought a house or a car, and whether who I play has a new job contributing to a peer-production group effort of some kind, and whether who I play has a sterling reputation. Who is in charge of this identity becomes something I care about. When people pay attention to something, and want to associate rights and duties with it, they talk about law.

### III. SHOULD WE HAVE AN INTERNATIONAL (OR NATIONAL) “LAW OF IDENTITY”?

Because identity is an emergent group project — in a permanently beta, contingent form — it is difficult to imagine how anyone could write an effective “law of identity” or a “bill of rights” of the identified. “Those who act badly under the Terms of Service of walled worlds have a right to notice and arbitration before an international online identity tribunal before their identity may be affected or destroyed” seems like a nonsensical legislative enactment in this contextual arena. What if the virtual world is a private list-serv, or a thinly-populated chat room, or the network of a multinational corporation? Would it even be possible to enforce such a centralized rule? How would the putative enforcer know what “identity disputes” to address or what punishment to mete out? Many of these same issues have arisen in the data privacy context,

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10. Caroline M. Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules*, 49 N.Y.L. SCH. L. REV. 103 (2004).

11. <http://www.Everquest.com> (last visited Oct. 21, 2004).

and it is fair to say that enforcement of privacy rules have proven to be extremely difficult. What does “notice of affected identity” mean in a world of swirling, undifferentiated bits? And won’t the groups who transact in a particular walled world want some say in what happens to the identities of their members? A single “law of identity” is likely to be even more difficult to articulate — much less enact into law or enforce — than privacy rules have been. On the other hand, individuals who are dependent on the continued actions of their avatars for their livelihoods will seek assurances that these identities will not be frivolously altered or destroyed by walled-world administrators.<sup>12</sup>

I want to suggest to you that the answer to this conundrum may lie in the activities and decisions of voluntarily-formed groups of 150-or-so members — the size of group that we as individuals can deal with daily and understand, and the size of successful “guilds” in current virtual worlds.<sup>13</sup> It is true that group jurisdiction over identity management in walled worlds is unexplored territory. Such

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12. In the gaming world (which is a precursor of future, more “serious” walled worlds of transactions and work), such altering and destroying has unquestionably taken place. “Full purges can be great fun if you are bored . . . wipe a tenth of the persona file, randomly. This way everyone worries it may be them . . . Personally, I used to like going onto a game as a wizard and threatening someone . . . [Admins] are there for the people above them to abuse, but as a sideline, they are there to abuse the people below them . . . To be successful at being a “big” arch-wizard you need to be extremely arrogant . . . wipe them and all of their friends out in one fell swoop. Make a point of doing it loudly . . . The odd act of kindness, like say, making a novice with a cute name a wizard, can really annoy people who have been playing for months . . .” Michael Lawrie, a/k/a Lorry, *Confessions of an Arch-Wizard*, at <http://plig.org/bofh/bmafh.html> (last visited Sept. 20, 2004). More serious alterations have occurred as well. *See, e.g.*, THE AGE.COM.AU, Sept. 16, 2002 (20,000 players of Warcraft III kicked off for cheating; banishment extended for two weeks, and win-loss records were permanently deleted).

13. Robin Dunbar, *Co-Evolution of Neocortex Size, Group Size, and Language in Humans*, 4 BEHAVIORAL AND BRAIN SCIENCES 16, 681-735 (1993), available at <http://www.bbsonline.org/documents/a/00/00/05/65/bbs00000565-00/bbs.dunbar.html> (“[T]here is a species-specific upper limit to group size which is set by purely cognitive constraints: animals cannot maintain the cohesion and integrity of groups larger than a size set by the information-processing capacity of their neocortex . . . 150 may be a functional limit on interacting groups [of humans].”); *see also* ROBIN DUNBAR, GROOMING, GOSSIP AND THE EVOLUTION OF LANGUAGE (1997) (concluding that social channel capacity is correlated to the size of the neocortex, and arrives at a figure for humans of 147.8; asserts that the average number of members in hunter-gatherer tribes is 148.4; and points out that functional fighting units are often scaled to be around 150 soldiers in size).

groups can be trusted by individual users, however, and their rules can be congruent with the desires of their members in a way that a centralized source of rules never will. So a group's assertion of some control over what happens to identities and reputations are very likely to occur whether or not legal rules exist supporting this assertion.<sup>14</sup> Groups, after all, will have assisted in creating these identities.

#### IV. WHAT ARE THE RELEVANT EXISTING RULES ABOUT IDENTITY IN VIRTUAL WORLDS?

Just as we are getting comfortable with the idea of these contextual, group-shaped, customized online avatar identities, it is disturbing to learn that online intermediaries (the companies who create online spaces — currently, games, but in the future, private internets) now have “ownership” of online identities. These providers may not be very accountable or transparent, and their rules may be effectively unreviewable by any terrestrial court or legislature. This means that online intermediaries will be handing out “law,” whether we like it or not. Online intermediaries are a different source of law than those we are used to (such as courts and legislatures). This difference presents both opportunities and risks. We will start with the risks.

##### A. Risks

As several online services (such as MSN, EA, and AOL) ramp up to provide a platform for all online interaction, bringing hardware, software and single-sign on benefits into one seamless secure virtual world, how they treat identity becomes more relevant. One representative example of how online services treat online personas is found at the MSN Gaming Zone. MSN says:

*1. Microsoft reserves the right to immediately terminate or suspend a user's Zone.com account for violations of our Code of Conduct; and*

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14. Paul Schiff Berman, *Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002), is instructive on this point. Why should we privilege state assertions of jurisdiction over non-state assertions? Online groups will have (and should have) some jurisdiction over identity questions, as a matter of self-enforcing norm development.

2. *Microsoft also reserves our right to amend or change the Code of Conduct at any time without notice. You agree to periodically review this document to ensure you are doing your part.*<sup>15</sup>

This means that, in MSN's discretion, they can decide whether to terminate a user for any action they view as violative as their (mutable) Code of Conduct.

AOL says much the same thing: "*America Online reserves the right, in its sole discretion, to terminate your access to all or part of this site, with or without notice.*"<sup>16</sup>

And Electronic Arts retains similar discretion:

*If you, or anyone using your Account, violate our online conduct or Content standards, EA.com may take action against your Account. We may issue you a warning about the violation, or we may choose to immediately terminate your account. You acknowledge that EA.com is not required to provide you with notice before terminating your Account, but it may choose to do so.*<sup>17</sup>

It seems clear that the current state of play is that an identity chosen in a particular online world (such as the world of MSN, AOL, or EA, or any subworld within those contexts) can be wiped out by the intermediary who runs the online garden. Such an event would not be subject to First Amendment scrutiny.<sup>18</sup> A private on-

15. <http://www.zone.com/zxxx/help/zonehelpcodeofconduct.asp> (last visited Oct. 21, 2004).

16. <http://www.aol.com/copyright.adp> (last visited Oct. 21, 2004).

17. <http://www.eagames.com/official/thesimonline/home/index.jsp> (link to Terms of Service) (last visited Oct. 21, 2004).

18. *See, e.g., Noah v. AOL Time Warner, Inc.*, 261 F. Supp.2d 532 (E.D.Va. 2003) (where plaintiff claimed that AOL violated his First Amendment rights by briefly terminating his account, allegedly in response to his pro-Islamic statements; court held that AOL is not a state actor and so the First Amendment cannot support plaintiff's claim); *see also* *Hudgens v. NLRB*, 424 U.S. 507 (1976). First Amendment does not protect against actions taken by private entities, rather it is "a guarantee only against abridgment by government, federal or state." *Id.* at 513; *Green v. America Online*, 318 F.3d 465, 472 (3d Cir. 2003) (noting that AOL is a "private, for profit company" and rejecting the argument that AOL should be treated as a state actor); *Cyber Promotions, Inc. v. American Online, Inc.*, 948 F.Supp. 436, 441-44 (E.D. Pa. 1996) (rejecting the argument that AOL is a state actor). It is also clear that the intermediary retains the discretion *not* to eliminate any particular identity. *See, e.g., Noah*, 261 F.Supp.2d at 545 ("The plain language of the Member Agreement makes clear that AOL is not obligated to take any action against those who violate its Community Guidelines. Thus, the Member Agreement provides that AOL 'has the right to enforce them in its sole discretion,' and that 'if you . . . violate the AOL Community Guidelines, AOL may take action

line intermediary has no particular legal requirement to be neutral as to viewpoints or actions of users.

Courts will defer to extraordinarily broad (and ever-changing) terms of service for these online worlds.<sup>19</sup> So the law of identity online is private, contractual law. The use of force online — the removal of identity — has been handed over to private parties.

Because an intermediary's control will trump any legal requirement found in the "real world" to be neutral, the possibility for abuse exists. One can imagine particular online worlds kicking members out whose actions (graphical or text-based) don't fit the values of clerks working in the compliance department of the online intermediary. Particularly if you have invested a great deal in your life in a particular online world, and have gathered a rich reputation through your persistent involvement in relationships with others online, you may be quite upset to lose that investment because of pique on the part of the intermediary. In fact, you will have no meaningful recourse.

Who owns identity? Who owns reputation? From the intermediary's perspective, software creates rules that control what social context can be moved elsewhere. Your identity is "really" a database entry, and the intermediary can argue that your identity is their intellectual property, not yours. You may attach great importance to it, but this identity (and its reputation) will not, as a practical matter, survive outside the world in which it was formed. Virtual world designers have incentives to raise switching costs and capture all the value of this reputation.<sup>20</sup> But users may defect from environments that attempt to constrain them in how persistent their reputations and identities are. The difficult task for developers and

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against your account'."). See also Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1302-05 (2000) (state action is unlikely to apply to ISPs, given that we don't really "live" in cyberspace.).

19. So far, my research has not revealed cases in which members thrown out of virtual worlds have successfully challenged these contracts.

20. As Raph Koster puts it, "Make sure that players have a reasonable expectation of future interaction. This means persistence of identity and limited mobility." Raph Koster, *Small Worlds, Competitive and Cooperative Structures in Online Worlds*, Proceedings of Computer Game Developers' Conference, at slide 114 (2003), available at [http://www.legendmud.org/raph/gaming/smallworlds\\_files/frame.htm](http://www.legendmud.org/raph/gaming/smallworlds_files/frame.htm)

intermediaries is how much freedom to give their users. This takes us from the realm of risks to the realm of opportunities.

### *B. Opportunities*

It is true that online intermediaries very readily defer to national laws regarding content, and are likely to do the same when it comes to identity.<sup>21</sup> It is also true that there will be attempts from some sectors to encourage providers of online worlds to kick off users. For example, in the United States, ISPs have been asked to terminate subscribers that were uploading music files.<sup>22</sup> But given a service provider's fervent desire to hang on to as many subscribers as possible, it is unlikely that service providers will be receptive to requests to terminate their customers. It is far more likely that they will be very cautious in responding to requests to terminate, even when pressed by governments or well-funded industry sectors, for fear of the precedent that might be created by acceding to such requests.

Similarly, it is unlikely that service providers will internally troll their online worlds, looking for subscribers to zap. The monitoring costs of looking for "bad" behavior are substantial,<sup>23</sup> and every subscriber is a no-cost revenue stream, as long as the service doesn't spend any time looking at what those subscribers are doing. Service providers, by and large, want to remain dumb and are not by nature devilish. They want to get as many people as possible interested in their online worlds. As long as we ensure that users have choices at all — in other words, as long as membership in MSN's virtual world is not required for your online life to continue<sup>24</sup> — users will have

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21. See, e.g., Pedro Gomes, *The case of Yahoo! in China*, INFO SATELLITE.COM, July 24, 2002, available at [http://www.infosatellite.com/news/2002/07/p240702yahoo\\_china.html](http://www.infosatellite.com/news/2002/07/p240702yahoo_china.html) (noting that Yahoo! agreed to refrain from "producing, posting or disseminating pernicious information that may jeopardize state security and disrupt social stability").

22. See, e.g., *Recording Industry Association of America v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003).

23. When the Children's Online Privacy Protection Act became effective in April 2000 — mandating monitored chat rooms for children online — many services reacted by simply dropping chat for kids. Providers of online worlds are low-margin businesses, and are likely to become more so as revenues for providing online access continues to drop.

24. See Eli Noam, *The Internet: Still Wide Open and Competitive?*, Telecommunications Policy Research Conference (TPRC) (September 2003), available at [http://intel.si.umich.edu/tprc/papers/2003/200/noam\\_TPRC2003.pdf](http://intel.si.umich.edu/tprc/papers/2003/200/noam_TPRC2003.pdf) (finding "pronounced

some (limited) ability to control their identity. With any luck, on-line individuals will retain the ability to leave the roles they have taken up online. I am not saying this will be an easy thing to do; indeed, your investment in your online identity may be such that leaving it is extremely painful.<sup>25</sup>

But we should not have to go bowling alone.<sup>26</sup> Short of exit, we may have other options online that allow us to route around extreme actions of intermediaries. Group online interactions, just beginning now, provide interesting ways to construct an embedded online self. The “social software” discussion going on right now is dealing with questions of online identity.<sup>27</sup> Games already allow groups to do very interesting things.<sup>28</sup> Gaming conflicts bring comrades together in the tribal relationships that humans crave.<sup>29</sup> As real work becomes a more common online activity — in addition to buying airplane tickets and keeping a diary — identity created in connection with groups will be more and more meaningful. Why, though, should intermediaries care about the groups whose interactions they facilitate (as more than aggregates of individual subscribers)?

## V. WHY GROUPS ARE IMPORTANT

The total value of a communications network grows with the square of the number of the devices that it interconnects. This is Metcalfe’s Law, named for Bob Metcalfe, the inventor of the

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horizontal and vertical trends of concentration in the Internet sector”); Computers & Consumers Industry Association, *CyberInsecurity Report* (October 2003), available at <http://www.ccianet.org/papers/cyberinsecurity.pdf>.

25. See, e.g., F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 62 (2004) (“Is the option of virtual exit real if you have to give up family, friends, property, society, and your very form?”).

26. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

27. See, e.g., Many2Many, a group blog on social software, at <http://www.corante.com/many/> (last visited Oct. 21, 2004).

28. As the Multiplayer Online Games Directory puts it, “What would an RPG be without guilds???” Guilds often have many staff positions, can tax their members, can provide health coverage, and generally provide an identity for the user.

29. See, e.g., Arthur Jacobson, *Origins of the Game Theory of Law and the Limits of Harmony in Plato’s Law*, 20 CARDOZO L. REV. 1335 (1999) (contrasting idea of law as an instrument for achieving harmony, and playful law needed for games in which conflict exists).

Ethernet. Metcalfe's Law has been critical in understanding why applications that run on top of the Internet spread as quickly as they do. The more people who use a particular piece of software, or a particular standard, the more useful that software or standard is to each participant.

In addition, "[n]etworks that support the construction of communicating groups create value that scales *exponentially* with network size," much more quickly than Metcalfe's law.<sup>30</sup> This is David Reed's law. In other words, if ordinary networks scale at a  $N^2$  rate, where  $N$  is the number of subscribers who want to reach all the other subscribers and do peer-to-peer transactions, networks that facilitate group communications (such as team rooms, chat rooms, discussion groups etc.) will scale at a rate of  $2^N$ , because potential groups can form easily and people can find others who share their interests.

Where Metcalfe's Law is dominant, because a network is seeking to add many new users, one-to-one transactions are the most important communications that take place on that network. But, where Reed's Law is ascending, collaboration and jointly-constructed value become the most important content distributed by the network, and the formation of groups becomes the key longed-for activity. David Reed calls these changes "scale-driven value shifts."<sup>31</sup> A frequently cited example of a  $2^N$  network is eBay, whose structure allows individuals to easily form marketplaces.

Human nature will always tend toward groupness. We are by nature social animals. We form bonds immediately and look for people with whom we can share our time.<sup>32</sup> We know that scale matters. We care deeply about 12-15 people, and we are probably not capable of caring so deeply about more than that number. Psychologists call this "channel capacity."

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30. David P. Reed, *That Sneaky Exponential — Beyond Metcalfe's Law to the Power of Community Building*, available at <http://www.reed.com/Papers/GFN/reedslaw.html> (last visited Oct. 21, 2004).

31. *Id.*

32. GARY MARCUS, *THE BIRTH OF THE MIND* (2003) (very few genes are responsible for brain development; genes code flexible circuits that continue to adapt in response to the environment); STEVEN JOHNSON, *MIND WIDE OPEN* (2004) (basic neuroscience introduction).

But we also know that humans have “social channel capacity” (caring, but not so deeply) for about 150 people.<sup>33</sup> It turns out that functional fighting units in the real world are often about 150 people in size. Virtual worlds work the same way: Guild sizes show a “knee” (trail off) beyond about 150 members.<sup>34</sup>

Reed’s Law will be important to virtual world administrators. Networks that want to scale at a  $2^N$  rate will want to facilitate easy group formation (particularly of groups that are about 150 strong). Users may even exit if group interactions are not facilitated as part of the virtual world. As Raph Koster puts it, “You could probably kill off another game by persuading all its guild leaders to switch to your game simultaneously. Offer ’em free accounts. Conversely, don’t expose who your hubs are to competitors. You want them to stick with your game. It makes good business sense to offer incentives to hubs.”<sup>35</sup>

The single most important action a world designer can take to improve a virtual world is to increase the bandwidth of social interaction. This means, in turn, that identity created in the context of group work should be particularly respected by online intermediaries. That is the kind of identity an online intermediary will want to encourage to keep its network strong.

Indeed, network administrators that do not facilitate (and defer to) the workings of groups will have to expend more energy moderating their worlds than those who do defer to group jurisdiction over identity. To the extent any network administrator wants to retain the ability to turn off troubling identities, aggregate information (how is the group behaving?) is easier to watch over than individual information.

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33. See the work of Robin Dunbar, British anthropologist, cited in *supra* note 13.

34. BARTLE, *supra* note 2, at 225 n.118, pointed me to Raph Koster, *Small Worlds*, *supra* note 20; this is a very well-done 125-slide presentation about network theory, groups, and gaming, and includes an extensive bibliography.

35. Koster, *supra* note 20, at slide 105.

VI. IF INDIVIDUALS WERE KINGS, WHAT WOULD THEY DO TO  
ADDRESS THIS DISCONNECT BETWEEN GROUP CREATION OF  
IDENTITY AND INTERMEDIARY CONTROL  
OVER ONLINE EXISTENCE?

A. *Ensure Choices of Online Intermediaries Are Real*

It is very clear that no one is going to stop an online intermediary from cutting off a user. These intermediaries set their own laws and serve as judge and jury. Courts routinely defer to such decisions, citing the very broad language of intermediaries' terms of service. The ratchet here may be one-way: Governments and interest groups will want a lever over private online intermediaries that they can use to ensure that a disliked user "disappears." It is essential, therefore, to keep choices of online intermediaries available. This is the role of antitrust law. But individuals also have a role in ensuring that choices remain. They can make this happen by voting with their feet, demanding reasonable terms of service and moving on (with their guilds) when they are not satisfied.

B. *Demand Visible Online Laws and Disclosures Relating to Identity Dealings by Online Intermediaries*

The key insight here is that games and online worlds give us the opportunity to understand law by seeing it. It may be that we have never really understood regimes to which we are subject because we have not seen them for ourselves. We see the buildings and the texts, but in order to understand these things as institutions and laws we need interpreters — we need lawyers. In the online world, we have a chance to understand law directly, as it is applied, without making an analogy or writing a paragraph. This visual presentation of law will allow us to make the direct connection to comprehension without an intermediate step. There will be many interesting questions with which we will grapple:

1. Should we (can we) make the interaction of real-world identity law with online intermediary law visible? Should we show when someone has been "disappeared" by an intermediary for failure to adhere to a particular nation's rules?

2. Will an intermediary ever voluntarily show anyone what it is up to when it comes to questions of identity? What legal enforcement mechanisms are needed? Or can this entire development be

left to market pressures and the perceived need for an “identity seal”?

3. What would be made visible? The fact that someone’s identity has been taken away, and the reasons why? Or speech-related actions of the intermediary that have an impact on identity (but are less than “disappearing” someone)?

4. What about reputation? Is it right that a user must leave her reputation behind when she leaves a particular online world? Is “reputation portability” possible? Or is reputation so context-dependent that the online world should be permitted to own it? And what, exactly, does the online world “own”? A group-created construct?

5. Is this entire problem avoided by staying out of “walled gardens” and maintaining our own domains? Will this be possible, as online worlds become more and more attractive, and as hardware and software increasingly intertwine? Will we have to live in the online equivalent of Ted Kaczynski’s Montana cabin?

In order to understand the rules that affect our identities online, we should be able to see them. If we see these rules — and, indeed, are part of these decisions — we should be able to act on them by leaving intermediaries who are acting abusively (or at the direction of a third party with which the individual doesn’t agree). We should demand and use patterns of identity decisions to help us decide which intermediary to trust. Requiring publication of such patterns does not mean requiring publication of private individual data. We need to be able to understand the trends that our intermediary is displaying (with our help), and compare them to others’ activities. Establishment of a seal program would be a key step towards making identity-removal visible. Another key step might be to have removals of users’ identities made possible only if the online community agreed — a sort of online death penalty procedure. Because identities are contextual and mutually-created, it makes sense to have the community involved in deciding whether they will persist or not.

C. *Join Groups — Then Route Around Any Attempt to Squelch Identity*

One key way to retain identity is to link yourself to others. This may seem paradoxical, but if the identity of a member of a functional group is attacked, the group can move elsewhere — intact. By forming groups within these online worlds, individuals can create identity that cannot be taken away because it resides within the minds and memories of others, and intermediaries will be interested in facilitating these groups because of the 2<sup>N</sup> impact on the overall health of their networks. As Raph Koster has noted to an audience of game developers, “Your guild structure had better support 150 comfortably. You need interdependence, so that groups do notably better than soloers.”<sup>36</sup>

D. *Take Seriously the Idea of Group Banishment*

I have not, perhaps, made enough of the severe losses that might accompany a loss of identity caused by an intermediary. Given the elaborate and ever-increasing investments that people will be willing to make in walled worlds, the loss of someone’s reputation (her win-loss records) may have a real impact on her ability to make a living. One approach to this disconnect may be to establish within new walled worlds the idea that the community is responsible for government. This means that only the community can act together to trigger rustication of a member. No one can take such an action unilaterally. “In the end, it boils down to the fact that the best government is the one that you can trust, which will be the one you know personally: The people close to you in your virtual community, who are held accountable precisely because of community ties. Your best government is going to be each other, because the man behind the curtain is not going to know you any more than you know him.”<sup>37</sup> Banishment can be the tool that enforces the community’s rules.<sup>38</sup>

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36. *Id.*

37. Raph Koster, *The Man Behind the Curtain*, (1998), available at <http://www.legendmud.org/raph/gaming/essay5.html>.

38. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (overview of jurisdiction literature; asking why non-state actors should be privileged in the consideration of jurisdictional questions). See, e.g., David R. Johnson & David Post, *Law and Border — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367

## VII. CONCLUSION

We are still at the early stages of the first two steps in dealing with any technology: fear and opportunism. Enlightenment is not far away. I want to suggest that we skip quickly through the fear, linger on the opportunism (for the good it will do for jobs in Silicon Valley), and move on to human betterment. This social benefit may come (as so many good things do) from playfulness. Games have a great deal to teach us about how we establish and maintain identity.

The fundamental problem that is yet to be addressed is that while reputations and identities are group projects, legal ownership of collectively-created intangible identities currently appears to reside (by default) in online intermediaries. We need to forge a direct link between how we live and work online (especially within virtual worlds) and how we structure control over online resources. Who will own a shared online space of identities if the new mode of work online is collaborative peer-production of resources?<sup>39</sup> This ownership may have to be collective. We may need to make some noise about this and ensure a better fit. Perhaps the game should belong to the players.

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(1996) (advocating the self-regulation of cyberspace as a jurisdiction independent of territorial sovereigns); Dick Morris, *Direct Democracy and the Internet*, 34 *LOY. L.A. L. REV.* 1033 (2001) (advocating direct democracy via Internet mechanisms). “For most people feeling out the limits of the network it only takes one short line (global ban) to elicit an apology for their behaviour. It’s amazing what effect denying access to social networks can have, especially on hardcore online games players.” See Tom “cro” Gordon, message to MUD-Dev list, April 5, 2004, at <http://www.kanga.nu/archives/MUD-Dev-L/2004Q2/msg00030.php>.

39. Yochai Benkler defines peer production as a new mode of collaboration in which individuals contribute to the construction of some valuable work product, in exchange for recognition or reputational gain rather than as part of an employment relationship or in the course of a market-based transaction. Yochai Benkler, *Coase’s Penguin, or Linux and the Nature of the Firm*, 112 *YALE L.J.* 369, 375 (2002).

