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SPEECH SHOWDOWNS AT THE VIRTUAL CORRAL

Eric Goldman†

INTRODUCTION

This article considers the tension between free speech rights and private property/contract rights. Neither free speech rights nor private property and contract rights are absolute. Where they intersect in the physical world, confusing legal doctrines usually emerge, such as the U.S. Supreme Court cases addressing private speech at privately-owned company towns and shopping centers.¹ Though a bright-line rule has emerged—the First Amendment pertains only to state actors—the rule provides little prospective guidance because private actors can be characterized as state actors in some circumstances.

In the online world, the speech/rights dichotomy also raises complex issues. Online private actors routinely use their private property (such as computers and networks) to create virtual spaces designed for speech, though speaker access is usually controlled by contract. An online provider exercising its property or contract rights inevitably squelches a speaker's rights. Nevertheless, despite online providers' capacity to exercise their rights capriciously, courts so far have unanimously held that private online providers are not state actors for First Amendment purposes.²

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1. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Hudgens v. Nat'l Labor Relations Bd.*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

2. See, e.g., *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000); *Island Online, Inc. v. Network Solutions, Inc.* 119 F. Supp. 2d 289 (E.D.N.Y. 2000); *Nat'l A-1 Adver. v. Network Solutions, Inc.*, 121 F. Supp. 2d 156 (D. N.H. 2000); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *Am. Online, Inc. v. Cyber Promotions, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996).

With the emergence of virtual worlds, we must once again consider the speech/rights balance. To strike the balance, we must decide if virtual worlds are more like physical world company towns or shopping centers or just another category of online providers. Some commentators, most prominently Professor Jack Balkin of Yale Law School, believe that virtual worlds are different and have argued for limits to a virtual world provider's ability to regulate speech by its participants.³ This article rejects these arguments, using a recent incident involving Sims Online and Peter Ludlow, to show that virtual worlds are not distinguishable from other online providers. As a result, this article concludes that we should not create special speech rules for virtual worlds.

I. PETER LUDLOW AND SIMS ONLINE

Sims Online is a for-profit subscription-based massively multiplayer online role-playing game ("MMORPG") operated by Electronic Arts ("EA").⁴ Peter Ludlow is a University of Michigan philosophy professor⁵ and author of the *Alphaville Herald* virtual newspaper,⁶ which chronicled in-game developments.

The incident started when Ludlow alleged that Sims Online participants, including some teenagers, engaged in "cyber-prostitution" in the game.⁷ The term "cyber-prostitution" implied that avatars were engaging in simulated sex, but the game's architecture limited the participants' ability to do so.⁸ Instead, participants (including some teenagers) allegedly traded cybersex chat for in-game currency,⁹ though Ludlow picked a fairly inflammatory term to make the point.

3. See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004).

4. The game's web page is located at <http://www.eagames.com/official/thesims/thesimsonline/us/nai/index.jsp> (last visited April 3, 2005). See generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004) (discussing Sims Online extensively).

5. Peter Ludlow's university website is located at <http://www-personal.umich.edu/~ludlow/> (last visited Apr. 2, 2005).

6. The newspaper, really a blog, is located at <http://www.alphavilleherald.com/> (last visited Apr. 2, 2005). It has been renamed the Second Life Herald.

7. See Amy Harmon, *A Real-Life Debate on Free Expression in a Cyberspace City*, N.Y. TIMES, Jan. 15, 2004, at A1; Farhad Manjoo, *Raking Muck in "The Sims Online,"* SALON, Dec. 12, 2003, at http://www.salon.com/tech/feature/2003/12/12/sims_online_newspaper/index_np.html.

8. See Harmon, *supra* note 7.

9. See Harmon, *supra* note 7; Manjoo, *supra* note 7.

Ludlow's claim received some media attention, and Ludlow claims EA targeted him because this publicity was damaging to EA.¹⁰ EA responded that Ludlow violated EA's rules by linking from his in-game profile to his newspaper site.¹¹ It is a little unclear exactly why this link violated EA's rules. Some reports say the link broke the rules because the *Herald* site linked to information about how to cheat the game;¹² other reports say that a rule violation occurred because the *Herald* site was a commercial website.¹³ Based on its user agreement, EA probably could have terminated Ludlow's account without any justification at all,¹⁴ but EA appears not to have taken that route.

Whatever its reason, EA terminated Ludlow's account in Sims Online—giving him the online equivalent of the death penalty.¹⁵ Ludlow claims that this termination was unjustified and discriminatory because EA selectively enforced its rule against him and not others.¹⁶

Since the termination, Ludlow has railed against EA for its censorship. That is not unusual; many disgruntled customers have found a soapbox in cyberspace. What is unusual, however, is that Peter Ludlow's story became a *cause célèbre*. His termination was covered by the *New York Times*,¹⁷ the *Boston Globe*,¹⁸ CNN,¹⁹ the BBC²⁰ and *Salon*,²¹ and high-profile commentators like Professor Balkin have supported his cause.²²

10. See Manjoo, *supra* note 7.

11. See Manjoo, *supra* note 7.

12. See Harmon, *supra* note 7.

13. See Manjoo, *supra* note 7.

14. It is virtually impossible to determine the exact terms of the EA-Ludlow user agreement. However, many (maybe all?) EA user agreements contain the following language: "EA and you both have the right to terminate or cancel your Account or a particular subscription at any time." See EA Online Terms of Service, at <http://www.ea.com/global/legal/tos.jsp> (last visited Mar. 20, 2005).

15. Manjoo, *supra* note 7.

16. See Harmon, *supra* note 7; Curt Feldman, *Q&A: Banned Sims Blogger Bites Back*, GAMESPOT, Dec. 17, 2003, at http://www.gamespot.com/all/news/news_6085767.html.

17. See Harmon, *supra* note 7.

18. See Hiawatha Bray, *Justice Has Its Price in Sim World*, BOSTON GLOBE, Jan. 14, 2004, available at http://www.boston.com/news/globe/living/articles/2004/01/14/justice_has_its_price_in_sim_world.

19. See CNN: *Paula Zahn Now* (CNN television broadcast, Feb. 19, 2004), available at 2004 WL 72847478.

20. See Mark Ward, *The Dark Side of Digital Utopia*, BBC NEWS, Dec. 22, 2003, at <http://news.bbc.co.uk/1/hi/technology/3334923.stm>.

21. See Manjoo *supra* note 7.

22. See Balkin, *supra* note 3, at 2075–76.

II. WHEN COMPANIES FIRE THEIR CUSTOMERS

Why should we care that a private company terminated a customer's account? Smart companies fire their customers all of the time.²³ Does something make Ludlow's firing special?

EA could have had a variety of reasons for terminating Ludlow's account, including their stated belief that he was violating their user agreement. However, for sake of argument, let us assume that this claim was purely pretextual to obscure that EA vindictively and discriminatorily censored Ludlow. Characterized this way, we instinctively react negatively and emotionally to the specter of *censorship*. For example, one commentator hyperbolically claimed that EA "acts like a classic despot, using its powers to single out individual critics for the dungeons and the firing squads . . . the Herald censorship smacks more of tyranny for its own sake."²⁴

However, when cooler heads prevail, we recognize that online providers routinely terminate accounts when users violate their private rules. In some cases, providers censor customers for reasons — like spam prevention—that are widely applauded.²⁵ If other online providers can enforce their private rules to curtail user speech, why shouldn't virtual world providers be free to do so as well?

Virtual world advocates typically advance three principal arguments to distinguish other online providers and explain why we should limit virtual world providers' discretion to terminate their customers.

A. *Virtual Worlds Are Immersive*

The first argument is that virtual world participants may psychologically feel that they are immersed in the virtual world and, in some cases, spend more hours online than in the physical world.²⁶

23. See, e.g., DON PEPPERS ET AL., *THE ONE TO ONE FIELDBOOK* (1999) (discussing the value of firing a company's least profitable customers, called "below zero customers"); Gary McWilliams, *Minding the Store: Analyzing Customers, Best Buy Decides Not All Are Welcome*, WALL ST. J., Nov. 8, 2004, at A1 (describing an initiative by the Best Buy retail chain to get rid of unprofitable customers).

24. James Grimmelmann, *Sims Online Censors Online Journalist*, LAWMEME (Yale Law School, New Haven, Conn.), Dec. 14, 2003, at <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1291>.

25. See, e.g., Jim Hu, *AOL Error Underscores Spam Filter Challenge*, CNET NEWS.COM, May 22, 2000, at http://news.com.com/2102-1023_3-240907.html ("Many of AOL's subscribers have applauded the company for installing email filters that can drastically cut down on the junk email that bombards their in-boxes.")

26. See Lastowka & Hunter, *supra* note 4, at 9.

However, even if some participants immerse themselves in a virtual world, we still need a reason to find legal significance in these self-perceptions. People can declare themselves part of a virtual republic (and, in fact, do so regularly²⁷), but this does not mean we should recognize these virtual republics as sovereign equivalents. So long as these individuals have a physical presence in the “real” world, they remain governed by real world laws despite their psychological declarations. The immersion argument is more an indictment of those participants’ ability to distinguish between reality and fantasy than a reason to create new legal rules.

B. *Virtual World Commoditization*

The second argument is virtual world assets have real value.²⁸ An exchange rate may develop between in-game economies and physical world economies,²⁹ giving some virtual assets a tangible, quantifiable, real-world cash value/opportunity cost. However, virtual worlds are not unique in this regard; cyberspace is filled with virtual assets that have real world value. Domain name registrars sell virtual locations (domain names), web publishers sell advertisers virtual real estate (positions on a web page), and websites even create an exchange rate between virtual near-currency (like airline miles or other loyalty program points) and cash.³⁰

Moreover, all of these virtual assets are built on a user agreement. With respect to virtual worlds, almost all user agreements give the provider unlimited discretion to change the world or terminate the participant’s access in its sole discretion. Therefore, a participant chooses to “create” value in virtual world assets premised on a shaky contractual foundation. Participants still have legal recourse for a provider’s capricious actions; contract law, consumer

27. See Andrew Weiner, *Wanted: Homeland for 300 Webheads*, METROACTIVE, Nov. 22, 2000, at <http://www.metroactive.com/papers/cruz/11.22.00/netnations-0047.html>.

28. See Balkin, *supra* note 3, at 2047. This value, in turn, may create flourishing in-game economies, in some cases expressly encouraged by the provider. See Noah Shachtman, *Will Gamers Buy What Game Sells?*, WIRED NEWS, May 24, 2002, at <http://www.wired.com/news/print/0,1294,52701,00.html> (discussing Project Entropia, which encourages entrepreneurship within the game).

29. See Lastowka & Hunter, *supra* note 4, at 10–11, 37–39. However, some providers (most prominently EverQuest) actively discourage these out-of-game transactions. See Greg Sandoval, *Sony to Ban Sale of Online Characters from Its Popular Gaming Sites*, CNET NEWS.COM, Apr. 10, 2000, at http://news.com/2101-1017_3-239052.html.

30. See Points.com, at <http://www.points.com> (last visited Mar. 20, 2005).

protection and other laws may still apply.³¹ However, absent deception, contract termination rights are generally upheld, even if the termination causes the terminated party to lose value.³²

C. *Virtual World Participants Face Switching Costs*

The third argument is that virtual world participants make significant investments in a world that creates costs to switch to alternatives.³³ Some virtual world participants spend hundreds of hours building relationships, reputations and virtual assets, much or all of which is lost if the participant exits the virtual world.³⁴ In theory, these switching costs could cause market failures by making it too costly for market participants to freely vote with their wallets and reward (or punish) virtual world providers appropriately.

Despite these investments, providers still feel the effects of market forces for several reasons. First, participants invest at different levels; although heavily-invested participants get the most attention (and make the most noise), many paying customers are casual users with trivial switching costs. Second, competitors can offer marketing programs or product features that can induce participants—even the heavily-invested ones—to switch.³⁵ Third, heavily-invested participants who do not terminate or switch may lose their enthusiasm for the world and decrease their contributions to the community accordingly, which can cause the world to atrophy and thereby make the community less compelling to newcomers.³⁶ Finally, word of mouth, especially about games, works really well as a market mechanism; if anything, the Internet (through blogs, enthusiast/fan sites and product review sites) has strengthened it. A

31. See Balkin, *supra* note 3 (emphasizing, in particular, the role of consumer protection laws).

32. See Eric Goldman, *Termination of Accounts in Virtual Worlds*, TECHNOLOGY & MARKETING L. BLOG, Feb. 13, 2005, at http://blog.ericgoldman.org/archives/2005/02/termination_of.htm. In *Hall v. EarthLink Network, Inc.*, 396 F.3d 500 (2d Cir. 2005), an EarthLink subscriber used a personal email account for business purposes. EarthLink terminated the account based on a mistaken belief that Hall was a spammer. The Second Circuit rejected all of Hall's claims for legal redress.

33. See Lastowka & Hunter, *supra* note 4, at 61–62; see also Balkin, *supra* note 3, at 2051, 2077; Neal Stewart, *Editorial: Simulating Free Speech in Virtual Lives*, SECOND LIFE HERALD, Mar. 4, 2005, at <http://www.dragonscoveherald.com/blog/index.php?p=693>.

34. Stewart, *supra* note 33.

35. Castronova has proposed some techniques that competitors can use to overcome their potential customers' switching costs. See Edward Castronova, *Switching Costs Fall*, TERRA NOVA, July, 24, 2004, at http://terranova.blogs.com/terra_nova/2004/07/switching_costs.html.

36. See Bray, *supra* note 18 (discussing the disengagement of Sims Online players in response to EA's perceived abdication of control).

bad buzz about a virtual world will keep away prospective new customers.³⁷ Therefore, even if investments inhibit competitive switching, providers still feel the marketplace effects of their choices.

Meanwhile, in other contexts, customers routinely incur some costs to switch between vendors. With respect to some online services (especially communication-oriented services like email, web hosting and blogs), these switching costs are not trivial but do not support regulatory intervention. Why should we give greater legal significance to the switching costs incurred in virtual worlds? As discussed above regarding commoditization, this seems especially problematic when the participant deliberately chose to incur these switching costs knowing that the provider could make unilateral choices at any time.

D. Conclusion on Virtual World Differences

Without a doubt, virtual worlds are both academically interesting and emotionally compelling. They can have richly textured visual environments, complex and absorbing story lines, curious denizens and strong communities. However, we cannot let our fascination with virtual worlds and the people who occupy them cloud our judgment. Proponents of new rules for virtual worlds need to prove that virtual worlds should be treated differently than other online providers. This discussion has raised significant questions about the proffered justifications.

Meanwhile, rules to protect virtual world participants from private censorship could have unintended consequences. Specifically, these rules would restrict providers' choices about how to deal with unwanted speech. These restrictions distort providers' abilities to make profit-maximizing decisions, which in turn increase providers' financial risk and reduce incentives to invest in the industry. Converting private virtual world providers into state actors could, paradoxically, limit speech rather than increase it.

III. PRODIGY REDUX

Once we acknowledge that virtual worlds are just like other online providers, the arguments being advanced to regulate their conduct begin to sound very familiar. That is because we dealt with online providers "censoring" their customers at least fifteen years ago.

37. Indeed, there is some evidence that Sims Online has suffered in the marketplace for these very reasons. *See id.*

Specifically, the Ludlow/EA incident mirrors a seminal event in Internet law. In the late 1980s, Prodigy Networks was a leading commercial online service that offered a self-contained universe of interactive tools, such as email, chat, message boards and file downloads. In 1990, Prodigy terminated the account of subscribers who complained about its practices, which led to claims that Prodigy engaged in censorship.³⁸ Prodigy responded that it could control user-submitted content to create a family-friendly environment, just as a newspaper has the right to make editorial decisions about what it publishes.³⁹

Prodigy may not have fully appreciated the consequences of its response. By analogizing itself to a newspaper, it implicitly invited courts to treat it like a newspaper in other respects as well. Five years later, a court did just that. In the 1995 *Stratton Oakmont v. Prodigy* decision, a New York Supreme Court held that Prodigy was liable for user-submitted defamatory content on its network, just like a newspaper would be liable for publishing defamatory content.⁴⁰

The *Stratton Oakmont* decision sent shock waves through the nascent Internet industry. Providers seeking to offer family-friendly services felt that they would be liable if they failed to catch and remove harmful user-generated content. Other providers felt compelled to implement new controls over user content even if such efforts would inhibit the community's development or would be cost-prohibitive. Either way, the threat of liability forced providers to increase their censorship of users.

Fortunately for the Internet's development, Congress overturned *Stratton Oakmont* nine months later by enacting Section 509 of the Communications Decency Act,⁴¹ codified as 47 U.S.C. § 230 ("Section 230"). Section 230 grants online providers a near-blanket immunity from liability for their users' content.⁴² This immunity

38. See John Markoff, *Home-Computer Network Criticized for Limiting Users*, N.Y. TIMES, Nov. 27, 1990, at D1, D5. The users were upset over a new surcharge Prodigy imposed on high-volume email users, and some irate subscribers went so far as to complain to Prodigy's advertisers. See Peter H. Lewis, *On Electronic Bulletin Boards, What Rights Are at Stake?*, N.Y. TIMES, Dec. 23, 1990, at F8.

39. See Geoffrey Moore, *The 1st Amendment Is Safe at Prodigy*, N.Y. TIMES, Dec. 16, 1990, at F13.

40. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

41. Communications Decency Act of 1996 § 509, 47 U.S.C. § 230 (2005).

42. The major exception being, of course, intellectual property claims. See 47 U.S.C. § 230(e)(2). In 1998, Congress attempted to provide some protection for intellectual property claims via the Digital Millennium Copyright Act, codified at 17 U.S.C. § 512, but § 512 has proven significantly less useful for online providers than 47 U.S.C. § 230.

applies whether the online provider tries to control content it deems objectionable or not, meaning that online providers can figure out the best way to serve their communities. With this legal protection, a thousand online communities have bloomed, spanning the spectrum from tightly controlled to virtually unregulated.⁴³ This diversity has allowed individuals to find venues that serve their needs, giving customers the power to reward (or punish) providers for their choices. Section 230 played a non-trivial role in the Internet's ascension as a dominant media, a development from which we have all benefited.

Prodigy's experiences from the early 1990s teaches a valuable lesson. We want to give providers the option to exercise control over content they deem objectionable. As a result, we give providers a tremendous incentive—near-absolute immunization from liability—to exercise this option.⁴⁴ Yet, those who object to EA's private censorship want to strip discretion away from providers, just like those who complained about Prodigy fifteen years ago. Fortunately, we know the Prodigy story ends happily with the proliferation of diverse and robust online communities. Why try to rewrite this ending?

IV. CONCLUSION

Unquestionably, it is tempting to celebrate virtual worlds as emerging utopias, but such reverence only creates frustration and disappointment when real-life imperfections like private "censorship" creep in. Unfortunately, utopias do not exist, not even virtual ones,⁴⁵ and we cannot allow our romanticized visions to blind us to the real enemy. The enemy is not a vendor's private censorship of a customer, however irrational or short-sighted that may be. The real

43. See Bray, *supra* note 18 (discussing Sociolotron, an adults-only game that allows players to engage in illicit behavior that is not permitted in Sims Online).

44. For a general policy argument in favor of letting online providers exercise discretion over their community spaces, see Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377. Castronova and Balkin have proposed "interration" statutes to give virtual world providers a safe harbor from liability if they agree to protect participant interests. See Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185 (2004–2005); Balkin, *supra* note 3, at 2090–97 (endorsing and extending Castronova's proposal). Of course, 47 U.S.C. § 230 already insulates providers for participants' actions and words, although it excludes coverage for intellectual property claims. Therefore, the only reasons to consider interration is to plug the intellectual property hole in § 230 or to give new substantive rights to participants at providers' expense.

45. See Ward, *supra* note 20 (discussing how Sims Online was touted as a virtual utopia but has never fulfilled that promise).

enemy is an emotional response to private censorship that trumps sound policy judgments.