Avatar Rights in a Constitutionless World

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Avatar Rights in a Constitutionless World

by
TIFFANY DAY*

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I. Introduction

Virtual worlds are places where people come together to create, play, exchange, and realize dreams. Like a playground, users are free to explore and play on slides, swings, and jungle gyms. But a virtual world is more than just a playground—users also have the ability to create; and they do so using a representation of their person, called an avatar. Avatars are fictional creations of the imagination. They are an embodiment of our imaginations, transformed into a manipulable object that exists in a virtual world. The term “avatar” was originally derived from Hindu philosophy, where it was believed that an “avatar” acted as the physical manifestation of a higher being in the

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real world. "In the virtual world, the tables are turned: the ‘higher being’ is the user, and the avatar is the user’s digital manifestation in the virtual world." When examining constitutional protections and considering to whom they extend, avatars may not immediately come to mind.

Avatars can resemble real persons: for example, they can laugh, cry, and dance. However, as web programming begins to advance and robots begin to act on their own, the courts will soon face the problem of addressing whether avatars are persons in a legal sense. Are they entitled to legal protections in a virtual world? If so, should the courts recognize those rights? This Note will address that issue.

A virtual world such as Second Life is a place where players have a second chance at life. Based on real world principles—moral, legal, and economic—the virtual world mirrors the real world with one exception: instead of real-world law as regulation, the creator of the virtual world governs with its Terms of Service. But is that enough?

Emerging issues in this area also include intellectual property, trademarks, business implications, criminal law, and even constitutional law. This Note will examine these issues and ultimately determine that corporate legal protections for avatars will benefit society and advance moral and legal principles.

II. Background

A. Avatar Rights

With regard to avatar rights, Raph Koster created a Declaration of the Rights of Avatars modeled on the Bill of Rights. He declared that “avatars are the manifestation of actual people in an online medium, and . . . their utterances, actions, thoughts, and emotions should be considered to be as valid as the utterances, actions, thoughts, and emotions of people in any other forum, venue, location, or space.” The declaration treats avatars as humans, subject to the

2. Id.
5. Id.
same liberties: "Foremost among these rights is the right to be treated as people and not as disembodied, meaningless, soulless puppets. Inherent in this right are therefore the natural and inalienable rights of man. These rights are liberty, property, security, and resistance to oppression."\(^6\)

However, the rights for avatars are directly linked to the duties of the administrators, and it is difficult to hold administrators accountable for players' actions. The declaration also fails to take into account the business implications of virtual worlds and what effect declaring avatar rights would have on these business models.

B. Second Life

In 2006, the emergence of Second Life, an internet-based virtual world, brought to the world's attention the phenomenon of online interaction and communication.\(^7\) Second Life was developed by Linden Lab, who created a Terms of Service and End User License Agreement ("EULA") that users (called "Residents") accept when they join the online community.\(^8\) These agreements are adhesion contracts, "standardized contract[s], which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."\(^9\)

Second Life is unique in the way it deals with online property. It specifically allows Residents to retain intellectual property rights in their digital creations, including avatar characters, clothing, scripts, textures, objects, and designs.\(^10\) Such rights have real-world consequences. Second Life attempts to regulate these consequences through its Terms of Service and EULA.\(^11\)

C. Terms of Service

Internet service providers commonly use online terms of service to define their legal relationships with subscribers and others who enter their domains.\(^12\) "The rules of the game themselves can be

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\(^6\) Id.
\(^8\) Id.
\(^9\) DURANSKE, supra note 1, at 27.
\(^11\) Id.
\(^12\) Davidson, supra note 7, at 688.
considered as a form of law and, in fact, often include notions of retribution, punishment, and self-defense from criminal law principles long recognized by real-life judicial systems." Interestingly, included in Second Life's Terms of Service is a disclaimer: "Linden Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service." Linden Lab also retains the right to suspend or terminate an account for any reason at any time. Users must also abide by rules of conduct and community standards such as no intolerance, harassment, assault, disclosure, indecency, or disturbing the peace. These terms suggest a relatively hands-off approach and lack of policing on the part of Linden Labs.

III. Potential Frameworks

A. State Action

One way to approach the question is to identify whether state action exists. The state action doctrine may be triggered when state inaction is alloyed with private action in ways that unduly lend state power to the private action. In this setting, private action that violates or curtails fundamental rights is unconstitutional. An example of this occurred in Marsh v. Alabama, where the Court held it was unconstitutional for a company town to impose criminal punishment for the distribution of religious literature due to the express agreement between the state and the company to allow use of the company's property as a town. The Court stated, "ownership does not always mean absolute dominion," and, "the more an

13. DURANSKE, supra note 1, at 64.
15. Id.
16. Id.
18. Id.
19. Marsh, 326 U.S. at 507–08 (holding that "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free . . . . [T]he town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through.").
20. Id. at 506.
owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.\textsuperscript{21} The Court went on to say, "the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees . . . the statute which enforced such action by criminally punishing those who attempted to distribute religious literature clearly violates the First and Fourteenth Amendments.\textsuperscript{22}

Some adopt the view that virtual worlds such as Second Life should be entitled to the same constitutional protections and regulated like the company town in \textit{Marsh v. Alabama}.\textsuperscript{23} The virtual world has developed in such a way that it now resembles reality more than it does a video game, as evidenced by a lawsuit where a Pennsylvania lawyer sued Linden Lab, alleging the "company unfairly confiscated tens of thousands of dollars worth of his virtual land and other property."\textsuperscript{24}

While there may be some elements of state action in the virtual world, none meet the tests set forth in later Supreme Court decisions. In ruling that the corporation in \textit{Marsh} was a state actor, the Court focused mainly on the function of the town, stating that Chickasaw was not different from any other town.\textsuperscript{25} The Court further narrowed its position in \textit{Hudgens v. N.L.R.B.} and adopted the view that privately owned shopping centers could be treated as public only "when that property has taken on all the attributes of a town."\textsuperscript{26} In

\begin{itemize}
  \item \textsuperscript{21} \textit{Marsh}, 326 U.S at 508.
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{25} \textit{Marsh}, 326 U.S. at 501.
  \item \textsuperscript{26} \textit{Hudgens v. N.L.R.B.}, 424 U.S. 507, 514–16 (1976). The Court expressly overruled its decision in \textit{Amalgamated Food Employees Union v. Logan Valley Plaza}. \textit{Id.} at 514. That case involved peaceful picketing within a large shopping center near Altoona, Pa. \textit{Id.} at 514–15. The picketing took place on the shopping center’s property in the immediate vicinity of the store. \textit{Id.} The Court held that the doctrine of the Marsh case required reversal of the judgment of the Supreme Court of Pennsylvania that affirmed the issuance of an injunction that required all picketing to be confined to public areas outside the shopping center. \textit{Id.} at 515. Justice Black dissented in the Logan opinion, stating:

  \[\text{In affirming petitioners' contentions the majority opinion relies on \textit{Marsh v. Alabama} . . . and holds that respondents' property has been transformed to some type of public property. But Marsh was never intended to apply to this kind of situation. Marsh dealt with the very}\]
holding that warehouse employees of a company, which operated a retail store in a shopping center, had no First Amendment right to enter the shopping center for the purpose of advertising their strike against the employer, the Hudgens Court stated the following:

The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, Marsh v. Alabama, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the state. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the state.\textsuperscript{27}

Similar to a shopping mall, Second Life is a private sphere in which the Terms of Service reign, but not to the extent that it can be considered a state actor. Justice Black warned against transforming all private property into public property, and extending the Marsh doctrine to encompass virtual worlds would eliminate Second Life’s rights to create a game space open to select users and to determine the rules to regulate the game space. The virtual world does not function as a town even though it may contain towns where avatars reside.

However, unlike public sidewalks and parks, virtual worlds have not, “immemorially been held in trust for the public.”\textsuperscript{28} Part of determining whether First Amendment restrictions apply depends on the classification of the space as a private or public forum. Thus far, virtual worlds are still classified as private spheres where private actors may regulate as they please.\textsuperscript{29}

\textbf{B. Public Function}

Similar to state action, some have argued that the public function doctrine should apply to virtual worlds. The question is whether the virtual world has effectively become a public space, and if so, whether

\begin{quote}
special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town .... I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama.
\end{quote}

\textsuperscript{27} Hudgens, 424 U.S. at 519.
\textsuperscript{29} See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983), for an overview of forum classification.
it can override the free exercise of an operator's rights. When does a private space become public?  

The Court has categorized spaces into three areas. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." The first category involves places traditionally devoted to assembly and debate, such as streets and parks, which have immemorially been held in trust for the use of the public, where the government may not prohibit all communicative activity. "For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."  

The second category of spaces recognized by the Court "consists of public property which the State has opened for use by the public as a place for expressive activity." The Court states that, "reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."  

Finally, the third category of spaces is "public property which is not by tradition or designation a forum for public communication is governed by different standards." In addition to the regulations stated for the second category, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."  

The Internet includes, "[g]overnment systems, academic systems, corporate systems and individual systems." Government systems
may be public, but may also deny the public general access. Academic systems also do not always allow access to the public, though their resources may be made available to students, professors, and researchers. Corporate and individual systems are generally private systems. Therefore, in some respects the internet is both public and private; however, the First Amendment does not extend its guarantees to private property.

While virtual worlds create broad spaces that are infinitely malleable, the creator still retains control over the space and can choose to alter it as he or she sees fit. Linden Labs has the right to, and could choose to, terminate Second Life completely.

Signing up for a service is a gamble that some people are willing to take. These players invest time and money, but ultimately their fate is determined by the rules Linden Lab creates and by which they have chosen to abide. In this sense, while the public function of these virtual worlds may be incredibly important, it does not override the free exercise of the operators’ rights under the First Amendment.

C. Virtual and Intellectual Property as Real Property

"Virtual property is digitally created wealth acquired within virtual worlds." Virtual property is freely transferable within virtual worlds, and due to the forces of supply and demand, a market exists for virtual property in the real world." While residents may have a right to the property they have created in-game, this does not mean there is a constitutional guarantee over this property.

There have been virtually no court opinions directly addressing avatar rights in virtual property. Bragg v. Linden Lab was the first case to imply that virtual property rights may have tangible value in the legal system. In his complaint, the plaintiff stated:

Defendants’ computer code was designed and intended to act like real world property that requires the payment of U.S. dollars to buy, own, and sell that property and to allow for the conveyance of title and ownership rights in that property separate and apart from the

39. Id.
40. Id.
44. Id.
code itself, and as such, Plaintiff's rights in the virtual property should be regulated and protected like real world property.\textsuperscript{46}

The case was decided in 2007.\textsuperscript{47} As Federal District Judge Eduardo C. Robreno stated in the opening paragraph of the opinion, "While the property and the world where it is found are 'virtual,' the dispute is real."\textsuperscript{48} The court ultimately did not address whether Bragg had a right to his virtual property as real property, but did hold that the arbitration clause in Second Life's Terms of Service was unconscionable.\textsuperscript{49}

As such, the settlement created no precedent and left users with confusion as to what legal rights they truly have with respect to their virtual land, items, and accounts. Bragg, the plaintiff, alleged that Linden Lab, the operator of Second Life, had unfairly terminated his access to his virtual "land" after he allegedly violated rules for obtaining land through online auctions.\textsuperscript{50} It raises the question what actual 'damages' may accrue for virtual 'land' and enhancements to it: in other words, whether any rights beyond general access rights, such as property rights, are recognized by law in the context of virtual worlds."\textsuperscript{51}

Additionally, in December 2003, a Chinese court ordered an online video game company to return virtual property to a player whose account was taken over by a hacker.\textsuperscript{52} The player was 24-year-old Li-Hongchen, who had spent approximately $1,200 on a popular online computer game.\textsuperscript{53} He sued the game company arguing that the weapons he had accumulated were his property.\textsuperscript{54} Li stated that, "[he] exchanged the equipment with [his] labor, time, wisdom and money, and of course they are [his] belongings."\textsuperscript{55} The company countered that the "value of the virtual property only existed in the

\textsuperscript{47} Bragg, 487 F. Supp. 2d at 593.
\textsuperscript{48} Id. at 595.
\textsuperscript{49} Id. at 612.
\textsuperscript{50} Bragg, 487 F. Supp. 2d at 595.
\textsuperscript{52} JON FESTINGER, VIDEO GAME LAW 102 (Lexis Nexis Canada Inc. 2005).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
game and was ‘just piles of data to our operating companies.’ The Court ruled that the player’s lost items should be restored.\footnote{56} Intellectual property law includes copyright, trademark, patent, and trade secrets.\footnote{57} “There is a fair argument that intellectual property rights in the characters users create, homes they build, and stories they tell through their interactions with other users should be the property of the users.”\footnote{58} Second Life broke the tradition of claiming these rights in the Terms of Service or EULAs by letting users retain intellectual property rights.\footnote{59}

Intellectual property rights are generally enforced through a reporting copyright and trademark infringement mechanism.\footnote{60} Rules set up by the Digital Millennium Copyright Act provide structure for how to file a claim.\footnote{61} In these worlds there is widespread potential for copyright, trademark, and patent infringement.\footnote{62} Because most virtual worlds are “created by game manufacturers and distributed through Internet Service Providers,” limitations created by contractual agreements and EULAs can be very effective.\footnote{63}

The EULA is a legal mechanism well-suited to the peculiar demands of virtual-world governance.\footnote{64} When the EULA is properly enforced, each virtual world would become its own “parallel legal universe, immunized as much as it can be from the inability of existing law to reckon with its strangenesses and possibilities.”\footnote{65}

One phenomenon that the EULA may not be able to protect the virtual world from is intelligent avatars. Avatars are increasingly able to perform a range of tasks, including playing chess, composing music, and portraying a range of emotions and facial expressions.\footnote{66} Even in

\footnote{56} Id.
\footnote{57} Id.
\footnote{58} See generally DURANSKE, supra note 1, for an in depth review of intellectual property areas.
\footnote{59} DURANSKE, supra note 1, at 40.
\footnote{60} Id. at 141.
\footnote{61} Id. at 145.
\footnote{62} Id.
\footnote{63} Id. at 147.
\footnote{64} FESTINGER, supra note 52, at 104.
\footnote{66} Id.

the field of medicine, avatars are helping to train medical students by playing the role of the patient.\(^6\) While these avatars may possess intelligence and human capabilities, they are lacking a defining feature of life—consciousness. No avatar can act on its own. Even the most complex avatars are dictated by a computer code, without which they have no meaning, at least for now. The real question becomes how will society choose to regulate virtual worlds and with what mechanisms?

D. Allowing Tort Claims

What are the legal consequences of actions taken within the context of a game, such as “murder” of another player, or “theft” of property? While these actions may be devastating to a player, there are no resounding real world consequences. New avatars can be created easily and the punishment for the crime of property enforced in-game.\(^6\) However, with their increasing prevalence these crimes may soon demand our attention.

A sports analogy is useful to explain why virtual worlds should not allow tort claims.\(^7\) Most sports are governed by the principle of, “volenti non fit injuria—there is no injury to one who consents.”\(^7\) But to what extent should a player need to be injured to demand recourse?

“Generally speaking, football players cannot sue other players who tackle them during the game, even if the tackle results is lasting and permanent injury or the tackle was ruled a foul.”\(^7\) However, there is a limited exception for egregious fouls entirely outside of the rules which cause physical harm.\(^7\) Professor Balkin comments that

By analogy, we might imagine a limited cause of action for intentional infliction of emotional distress in virtual worlds. Certainly the infliction of emotional distress would have to be wildly outside the pale of the ordinary forms of mistreatment that participants suffer at the hands of their fellow players.

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70. FESTINGER, supra note 52, at 107.
71. Id.
73. Id.
Most forms of misbehavior toward other players—collectively known as “griefing”—would not fall into this category.74

There are three types of actions players perform that may be considered griefing. These three types of actions are: (1) the use or abuse of a game mechanic that was not intended by the game’s developers; (2) the inability of the victim to exact some means of retribution beyond utilizing similar unintended game mechanics, and; (3) the intended purpose of an act of griefing must be to negatively impact the gameplay of another person.75

However, proving actual harm is likely to be difficult and emotional damages even harder to assess.76 Players can be harmed in more than just a physical sense—there can be cheating claims, defamation claims, and theft claims that can irreparably harm the pleasure a player may derive from participating in a virtual world. Unfortunately, the courts have not directly addressed these issues.

While the virtual goods market has been expanding, the growth has a dark side as well—there has been “an increase in virtual crime, particularly the theft of virtual goods.”77 The first difficulty lies in determining whether virtual property is real property. If courts do take that position, applying real property rules will make regulating theft much simpler. Currently, the definition of what constitutes property is left to the states.78 Jurisdictions “either protect all intangible property or none at all.”79 Until states come to a consensus, there are no readily applicable rules dealing with theft of virtual property.

74. Balkin, supra note 72, at 2068. Professor Balkin also observes that “[t]he designers’ freedom to design and the players‘ freedom to play are often synergistic . . . . The code and the EULA form, respectively, the architecture and the social contract of the virtual world that enable people to play the game and enjoy themselves. To a considerable extent the players‘ freedom to play is the freedom to play within the rules of the game as it has been designed.” Id. at 2050. Balkin illustrates that as people spend more time in virtual worlds and as their sense of identity becomes fused with their avatars, their tort arguments may become increasingly plausible. Id. at 2068.

76. Festinger, supra note 52, at 108.
78. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (noting that “[p]roperty interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”).
79. Arais, supra note 77, at 1311.
But arguments do exist to support player ownership of in-game items and currency, and at least three theories have developed to support the recognition of these rights.\(^8\) Joshua Fairfield has directed attention to the "inherent characteristics of physical property to help identify those aspects of virtual property that deserve recognition and protection."\(^8\) Fairfield points to three legally relevant characteristics of virtual property and real world property: "rivalrousness, persistence, and interconnectivity."\(^8\) In the real world, rivalrousness allows the owner to exclude others from using his owned objects.\(^8\) Objects and places in the physical world can remain in a physical form for hundreds of years.\(^8\) Similarly, code is often made persistent because it may run on multiple computers and does not fade with one use.\(^8\) Lastly, real world objects are connected as, "two people in the same room experience exactly the same objects."\(^8\) Because virtual property shares the same traits of rivalrousness, persistence, and interconnectivity with real-world property, it should be recognized as real property.

**IV. Proposed Solution**

The solution proposed in this Note is to treat avatars who engage in economic commerce as legal persons, analogous to the way corporations are treated. Creating bright-line standards for what constitutes "commerce" in the virtual world and whether the business of the avatar encourages investment or profits would allow the legal system to categorize avatars along with corporations and develop a specific set of rules to apply to them.

Regulating the virtual world with a business mindset helps delineate which rights should be accorded to avatars based on the investment potential. While some may consider virtual worlds as spaces of "play," for many the virtual world is a place of business. Virtual worlds have their own internal economy dealing with virtual


\(^8\) Fairfield, *supra* note 79, at 1053–54.

\(^8\) Id. at 1053.

\(^8\) Id.

\(^8\) Id.

\(^8\) Id.
property. Online commerce is becoming the norm. More and more business activity is conducted online, and even President Barack Obama's fundraising campaign utilized the Internet and its resources to reach a vast array of demographics.

A. Corporations

Corporations may serve as a model for extending human rights to avatars. Just like corporations, avatars are non-human, and both can exist to increase economic investments in the marketplace. Whatever rights have been extended to corporations should also extend to avatars for the goal of increasing productivity.

A corporation is a "legal person [...] by statute." The Supreme Court has repeatedly held that certain constitutional rights protect legal persons based on the principle that legal persons are organizations of human individuals, and based on the statutory interpretation of the word "person." One of the earliest mentions of constitutional rights for corporations occurred in the late-nineteenth century case Santa Clara County v. S. Pac. R.R. Co. In the opinion, Chief Justice Waite stated:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.

87. See Dr. Richard A. Bartle, Pitfalls of Virtual Property (2004), available at http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf (arguing that "the more people who accept an illusion... the more it becomes real. A "share" in a company is not a tangible thing, for example, but folk deal with them on stock exchanges every day. If a player can buy and sell virtual goods in a virtual world, there's no conceptual barrier to selling them in the real world. People can trade in intellectual property, so why not virtual property?").
89. JOHN E. MOYE, THE LAW OF BUSINESS ORGANIZATIONS 159 (Thomson Delmar Learning 6th ed. 2004) (1982). The law of corporations was developed by each state to regulate the internal affairs of the corporations that state had chartered to do business within its boundaries. Id.
92. Id. at 395.
The Supreme Court officially validated this statement and recognized that corporations were persons under the Fourteenth Amendment, and thus entitled to protection of the Due Process Clause in *Minneapolis & S.L.R. Co. v. Beckwith.* The Court stated, "[C]orporations can invoke the benefits of provisions of the Constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it."

Despite the fact that the corporate form is in no way human, corporations are nonetheless endowed with many of the same rights that an ordinary citizen is given:

Corporations are “persons” within the meaning of the United States Federal Constitution and the Bill of Rights. They are entitled to protection against the taking of their property without due process of law. They are entitled (at least to some extent) to freedom of speech. They can contribute money to political causes and campaigns.

Under the Constitution, “corporations are ‘persons’ and are entitled to at least some of the guarantees of the Bill of Rights.”

“The law allows corporations to act as persons for certain limited purposes—most commonly lawsuits, property ownership, and contracts.”

"Also note that basic rights (like the rights to free speech and due process of law) do not necessarily follow from legal personhood.” There is an ongoing debate over which rights are guaranteed, and until that debate is settled, avatar rights will also be an open question under this analytical framework.

One way that defamation claims can arise from interaction in a virtual world or game is when a well-known link exists between an avatar and a real-life person. "When an avatar is inexorably linked with the person who controls the account, a strong argument can be made that the reputation of the avatar is sufficiently linked to the account owner to permit a claim based on statements about the

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94. Id. at 28.
96. Id.
97. See Darling, supra note 90.
98. Id.
99. DURANSKE, supra note 1, at 184.
This is seemingly straightforward, but what of the situation where the avatar is not inexorably linked to someone’s real-life identity? Bettina Chin notes that “[a]ny living person [or] entity that is capable of having a reputation and is legally competent to sue may bring an action for defamation, including corporations and partnerships,” although “some courts have indicated that [companies] may recover only for statements that directly attack their finances or businesses.” Under the principles of corporate law, where the relationship between an avatar and a user is comparable to that of a corporation and its shareholder, defamation actions may arise.

“In light of this perspective, the relationship between the avatar and the user may thus be comparable to that between a non-living, business entity and a sole shareholder, where the entity is essentially the ‘alter ego’ of the controller, and thus an action may be sustainable on that basis.”

A potential disadvantage of using a corporate framework to create legal rights for avatars lies in the determination of the scope of liabilities. Limited liability corporations act as a shield for the incorporator, whose assets are not subject to seizure by the courts even if the corporation is found guilty of a wrongdoing. If an avatar was charged with theft of another’s virtual property or some other crime, how would payment or punishment be enforced? Like “shell companies,” users could create “shell avatars” and be immune from any liability. The user behind the avatar would be exposed to liability provided that the plaintiff is able to pierce the corporate veil, but this is an extremely difficult maneuver.

B. Business Model

Because most gaming platforms are created for the sole purpose of generating profit, a business framework is the best way to analyze the implications of granting avatars legal protections. “[T]he most obvious way to profit from user-generated content is simply to acquire, or find a way to otherwise monetize, the intellectual property
rights in the content that users generate." Second Life encourages product development and creates markets and platforms for Residents to display their inventions. It reports that over 100 people are making at least $5,000 per month, which is the equivalent of around $60,000 per year, by selling virtual objects.

In November, 2003, Linden Lab made an unprecedented policy change which had not yet been attempted in online games: it allowed the players of Second Life to "retain full ownership of their virtual creations." Linden Labs Terms of Service states:

Linden Lab retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own.

You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.

By allowing users to retain their property rights, the market economy in the virtual world thrived. Many in-world small businesses are succeeding by selling user-created content to other users, by renting virtual land to other users, and by selling services in-world. According to Linden Lab CEO Philip Rosedale, nearly 1,000 Second Life users were making more than $1,000 each month "in-world" as of August 2007. As time goes on, companies will find

112. Hof, supra note 110.
113. DURANSKE, supra note 1, at 13.
114. Id.
ways to use virtual worlds for advertising, lead generation, product sales, and market positioning. Virtual worlds could transform the way they operate by providing a new template for getting work done, from training and collaboration to product design and marketing. "IGE Ltd., an independent online gaming services firm, estimates that players spent about $1 billion in real money last year on virtual goods and services at all these games combined, and predicts that could rise to $1.5 billion this year." This past January, Second Life players spent nearly $5 million in close to 4.2 million virtual transactions which included buying or selling clothes, buildings, and other virtual goods.

There are numerous examples of people who earn their real world living via Second Life. Many choose to earn income through the competitive real estate market. One broker from Germany claims to hold more than 275 million lindens (Second Life currency) worth of Second Life assets, equivalent to $1 million. Others such as Doug Basset, a senior technical instructor for Thomson NETg, a training company in Scottsdale, Arizona, have begun charging for educational services. He teaches courses in Cisco and Microsoft technologies and is expanding his company's presence into Second Life, offering virtual courses that players can take in the game-world. Bassett indicates that revenue from growing in-game sales of courses has increased to more than $10,000 a month and is continuing to rise.

Even real-world companies such as Toyota and American Apparel are exploring whether they can utilize Second Life to serve real business purposes. American Apparel hired Aimee Weber to create an analogous American Apparel boutique in Second Life.

115. Id. at 14.
117. Id.
118. Hof, supra note 108.
121. Id.
122. Id.
123. Id.
125. Id.
Virtual worlds have become another strategic marketing maneuver for companies who have realized the potential success of reaching out to a demographic that spends much of its time online.

Despite this realization, Gartner, a market research firm, has reported that not all virtual enterprises are successful, finding that nine out of ten virtual worlds launched by businesses for purposes ranging from advertising expansion to facilitating employee communication fail within the first 18 months.126

Second Life stands in opposition to the general proposition that content created by users in virtual worlds is locked into the world.127 "By allowing residents to build businesses within their environment and extract real returns from their virtual labor, Second Life provides a more porous border for investments."128 "When people have real stakes in virtual worlds, they tend to act consistently with their investment-backed expectations."129 Protecting property rights against seizure without due process will encourage investments in virtual worlds.130

There are also commercial uses of behavioral data—can companies use the information generated from virtual worlds to predict real-life trends? Companies could transform this data into marketing tools and strategies that boost consumerism. Participating in virtual worlds creates skills and develops ideas that may be beneficial to society. Right now, most of the value generated is locked into the virtual world. More worlds should be created to allow that value to be accessible to outside companies.

The implication of treating avatars as corporations grants avatars certain constitutional rights that corporations are currently entitled to, such as freedom of speech131 and the right to jury trial under the Seventh Amendment.132 Avatars would also be accorded rights in the

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127. Lastowka, supra note 107, at 916.
128. Id.
129. Id.
132. Ross v. Bernhard, 396 U.S. 531, 542 (1970). In Ross, the Court considered whether a plaintiff bringing a derivative suit on behalf of a corporation would be entitled to a jury trial under the Seventh Amendment. Id. In a derivative claim, a plaintiff first must establish a right to sue on behalf of the corporation, and then must prove the merits of the claim. Id. at 518. Despite the fact that the claim is brought by a stockholder, "[t]he claim pressed by the stockholder against directors or third parties 'is not his own but the
Fourteenth Amendment's Due Process Clause, where no person shall be deprived of, "life, liberty, or property, without due process of law." Guaranteeing these rights to avatars treats the virtual world as the real world, and thus makes real world laws fully applicable.

V. Conclusion

Courts should adopt a corporate framework to approach the issue of avatar rights. Rights that have been accorded to corporations should also apply to avatars because of the investment potential of virtual worlds. Knowing that there are protections in place for avatars will encourage users to communicate their ideas and become entrepreneurs. For now, in-game rules such as Terms of Service and EULAs govern, but as society moves forward to a paperless, virtual world, courts will eventually have to step in. Extending legal protections to avatars would encourage investments in business, reduce litigation potential, and promote creativity. Virtual worlds are not just games anymore.

corporation's." Id. at 538 (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522 (1947)).

133. U.S. CONST. amend. XIV, § 1.