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## Personal Jurisdiction over Offenses Committed in Virtual Worlds

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## PERSONAL JURISDICTION OVER OFFENSES COMMITTED IN VIRTUAL WORLDS

*Zachary Schaengold\**

### I. INTRODUCTION

In 1993, writer Julian Dibbell chronicled a trip into the virtual world called LambdaMOO, where he was witness to what would later be called “A Rape in Cyberspace.”<sup>1</sup> Into the living room of a virtual mansion, where users congregated to chat and mingle, a user named Mr. Bungle entered.<sup>2</sup> The user, sitting in front of a keyboard, could only see text move slowly across the screen as interactions unfolded,<sup>3</sup> but each user could write what their representation (known to others in the room by their screen names) in this virtual house would do and say.<sup>4</sup> Mr. Bungle entered the room with a subprogram that permitted him to take control of the “actions” of the other representations in the room, and used this to inflict sexual and violent acts on and with them.<sup>5</sup> The result, on those in the room typing in their representations’ actions and words and watching the others, was emotionally traumatizing.<sup>6</sup>

While rape or physical assault in a virtual world will not meet the requisite elements for such causes of action in U.S. federal or state court, it is not inconceivable that one of the users whose representation was sexually assaulted would bring charges against Mr. Bungle’s user under a claim for intentional infliction of emotional distress, or some other trauma-based action.<sup>7</sup> Assuming this claim were actionable, in which court would the plaintiff be able to bring the claim?

Rape and emotional assault are not the only crimes in a virtual world that might be actionable in the non-virtual world. Contract disputes, defamation, and maybe even property rights could all lead to virtual world injuries requiring non-virtual world court decisions.<sup>8</sup>

When someone signs into a virtual world like Second Life, they enter

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1. Julian Dibbell, *A Rape in Cyberspace*, JULIAN DIBBELL (DOT COM), <http://www.juliandibbell.com/articles/a-rape-in-cyberspace/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See BENJAMIN TYSON DURANSKE, *VIRTUAL LAW* 180 (2008).

8. See generally Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 *VAND. J. ENT. & TECH. L.* 1 (2008).

into a virtual world.<sup>9</sup> This world, connected by the internet, does not recognize geopolitical boundaries.<sup>10</sup> The internet itself breaks these boundaries, but in many cases sites are still bound to where their users are—by language, time of activity, ISP, or even domain name.<sup>11</sup> When one goes onto the internet, one directs activities to sites that are presumptively directly connected with some geographic place. However, entering a virtual world does not create the same presumption, especially a virtual world designed to replace one's real-world existence. The result is that every action is directed into the virtual world, but not at any forum outside the virtual world.<sup>12</sup> There is no expectation of being bound by the laws of a given state, except perhaps one's own;<sup>13</sup> if there are any laws that the user of a virtual world assumes will bind her, it is the specific set of laws found in the virtual world.<sup>14</sup>

This Comment proposes an approach to personal jurisdiction in cases arising out of virtual world injuries. In doing so, it proposes that (a) virtual worlds are disjointed from the non-virtual world and so require discussion beyond application of prior internet personal jurisdiction law, such as *Zippo*,<sup>15</sup> (b) this approach to personal jurisdiction for virtual worlds should correspond with existing personal jurisdiction law and not consider internet exceptionalism as a methodology, (c) in order to determine non-virtual world personal jurisdiction for injuries in the virtual worlds, the best approach to the separable unity of User/Avatar is to analogize it to a sole proprietorship, and (d) the non-exceptionalist approach to personal jurisdiction should be augmented by Terms of Service (TOS).

## II. THE INTERNET AND VIRTUAL WORLDS

### A. *The Internet*

Eric Goldman<sup>16</sup> describes the evolution of the law and the internet in

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9. See *infra* Part II(C).

10. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 165 (1997).

11. See, e.g., *id.* at 167.

12. See, e.g., Chris Reed, *Why Must You Be Mean to Me?*, 13 NEW CRIM. L. REV 485, 487–88 (2010).

13. See Chris Reed, *The Authority of Law in Cyberspace*, 1 (Draft Discussion Oct. 13, 2010), available at <http://profchrisreed.blogspot.com/2010/10/authority-of-law-in-cyberspace.html>.

14. *Id.*

15. *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997) (proposing a sliding scale of interactivity of the website to help determine jurisdiction). For why this test is unsatisfactory, see generally Kristin Woeste, *General Jurisdiction and the Internet: Sliding Too Far?*, 73 U. CIN. L. REV. 793 (2004).

16. Eric Goldman is the Associate Professor at Santa Clara University School of Law and

three phases.<sup>17</sup> The first was utopianism, for which Goldman gives as an example 47 U.S.C. § 230, which favors online publishers over offline publishers in their liability for third party content, even if the content published is identical.<sup>18</sup>

The second phase was a turnabout into paranoia, in which regulators started to fear the internet, and produced stricter rules for internet activities than for the offline equivalents.<sup>19</sup>

The most recent trend, Goldman states, is specific regulation for the internet—or, as he calls it, exceptionalism. He notes that the development of blogs and virtual worlds (including Facebook) have led to a sort of specific exceptionalism: not just treating the internet as unique in its need for regulation, but even with that, treating certain activities on the internet as needing their own specific regulation.<sup>20</sup>

His take on this is that in some cases this regulation may be necessary, but “before enacting exceptionalist Internet regulation, regulators should articulate how the Internet is special or different and explain why these differences support exceptionalism.”<sup>21</sup>

One of the more salient problems is connected to the source of the laws establishing borders. In addition to newer exceptionalist ideas, some propose that cyberspace “needs and can create its own law and legal institutions.”<sup>22</sup> On the far other end is the argument that “[c]yberspace transactions are no different from ‘real-space’ transnational transactions . . . . There is no general normative argument that supports the immunization of cyberspace activities from territorial regulation.”<sup>23</sup>

These extremes indicate the debates being carried out in scholarship. In the absence of strict governmental or ISP regulation, does this mean that “[b]y venturing into cyberspace, a person steps outside the sphere of his home country’s jurisdiction and potentially subjects himself to the laws of all the countries in the world”?<sup>24</sup> In *People v. World Interactive*

director of the school’s High Tech Law Institute. ERIC GOLDMAN, <http://www.ericgoldman.org/biography.html> (last visited Oct. 17, 2012).

17. Eric Goldman, *The Third Wave of Internet Exceptionalism*, INFORMIT (July 15, 2012), <http://www.informit.com/articles/article.aspx?p=1325266>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Marketa Trimble, *The Future of Cybertravel: Legal Implications and the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (forthcoming 2012) (citing David R. Johnson & David Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996)). *Id.* at 16 n.54.

23. *Id.* at n.55 (citing Jack L. Goldsmith & Alan O. Sykes, *The Internet and The Dormant Commerce Clause*, 110 YALE L.J. 785, 827 (2001)).

24. Chris Reed, *The Authority of Law in Cyberspace*, 1 (Draft Discussion Oct. 13, 2010),

*Gaming Corp.*,<sup>25</sup> the Supreme Court of New York held that internet transactions, personal and commercial “shed their novelty for jurisdictional purposes [in] that similar to their traditional counterparts, they are all executed by and between individuals or corporate entities which are subject to a court’s jurisdiction.”<sup>26</sup> However, a hypothetical Chinese woman doing business through a Hong Kong ISP, selling website maintenance from a website setup in South Africa to primarily South Americans, could give pains to this 1999 New York case—even more so if everything is being done in a virtual world whose servers and operators are in California. And what if there is no “transaction,” but simply communication and community, as part of a full projection of an alternate self into a virtual world?

Because the internet, and the perceptions of the internet, have changed so much in even a relatively short time, “[i]t is clear that the set of legal rules which is applicable to a cyberspace actor was not designed as a coherent set of rules. Rather, it is an emergent phenomenon resulting from individual normative directives produced, in the main, at the national level.”<sup>27</sup> Thus, a cyberspace actor will not enter into cyberspace with a transferred system of laws attached to her interactions in cyberspace, and any laws she recognizes will be specific to the cyberspace environment.<sup>28</sup> Chris Reed<sup>29</sup> argues that a rule of law should apply to cyberspace<sup>30</sup> and that the laws should be set up “rationally rather than capriciously”<sup>31</sup> based upon the idea that cyberspace actors will conduct themselves according to a recognized community standard (the cyber-community) and will conform accordingly.<sup>32</sup> His motivation for this is that “[t]he internet has pervaded our lives to such an extent that it is fast becoming as important to us as our physical transport infrastructure. Lawless driving reduces the utility of the roads, and for the same sorts of reasons we have the right to demand lawful behaviour in cyberspace.”<sup>33</sup> Recognizing, however, the possible perceived disjunction of real and virtual worlds, he encourages states to “offer cyberspace actors the same respect that they demand from them” when

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available at <http://profchrisreed.blogspot.com/2010/10/authority-of-law-in-cyberspace.html>.

25. 714 N.Y.S.2d 844 (N.Y. 1999).

26. *Id.* at 848–49.

27. Reed, *supra* note 24, at 3.

28. *Id.* at 1.

29. Chris Reed is a professor of Electronic Commerce Law in the Centre for Commercial Law Studies at Queen Mary University of London. *Id.*

30. *Id.* at 15.

31. *Id.* at 7.

32. *Id.*

33. *Id.* at 17.

creating these laws.<sup>34</sup>

All this is to say that, while a set of legal rules applicable to the internet, whether the same is applied to the offline world or not, is yet to be established—and this is in part because we have not yet figured out how we view the internet—what is important is that the rules be coherent, only exceptional when necessary and reasonable, and generally known and accepted by the online actors.

### *B. Virtual Worlds*

Virtual worlds gained prominence in the early twenty-first century with the publication of studies of virtual property by Edward Castronova.<sup>35</sup> In his working paper, “Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier,” Castronova wrote, “[a]t a time when many e-commerce concerns are going under, revenues from online gaming will grow to over \$1.5 billion in 2004. Some 60,000 people visit Norrath in any given hour . . . . The exchange rate . . . value exceeds that of the Japanese Yen and the Italian Lira.”<sup>36</sup> The virtual world of Norrath<sup>37</sup> in the online game Everquest, supported by five servers in California, had a GNP per capita that would have placed it as the seventy-seventh wealthiest country in the world.<sup>38</sup> In addition, Castronova reports that “[s]ome 20 percent of Norrath’s citizens consider it their place of residence; they just commute to Earth and back. To a large and growing number of people, virtual worlds are an important source of material and emotional well-being.”<sup>39</sup>

The law’s relationship with virtual worlds is best developed in a context that takes into account what happens in the “real reality (not the virtual reality) of these games.”<sup>40</sup> As Rónán Kennedy writes,<sup>41</sup> “[i]t would be tempting to write virtual worlds off as a type of game or a more sophisticated virtual reality system. In fact, these games are part of everyday life for many people worldwide and will become increasingly important as a communications tool and as a method of

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34. *Id.* at 18.

35. Kristina Denapolis, Real Concerns in Virtual Property 4 (July 1, 2005) (unpublished manuscript), <http://ssrn.com/abstract=1154234>.

36. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 3 (CESifo, Working Paper No. 618, Dec. 2001).

37. *Id.*

38. Depapolis, *supra* note 35, at 5.

39. Castronova, *supra* note 36, at 3.

40. Rónán Kennedy, *Law in Virtual Worlds*, 12 No. 10 J. INTERNET L. 3, 1 (2009).

41. Rónán Kennedy is the co-ordinator of the L.L.M program in Law, Technology, and Governance at NIU Galway. ACADEMIA.EDU, <http://niuagalway.academia.edu/RónánKennedy> (last visited Oct. 17, 2012).

commerce.”<sup>42</sup> For Kennedy, the virtual worlds are not so much games as they are “significant platforms for human activity and business, with real money being exchanged for virtual goods and services.”<sup>43</sup> But for many, virtual worlds are more than just newer economic zones.

### C. *Second Life*

Second Life is perhaps the best known of the virtual worlds, boasting fifteen million users in 2010,<sup>44</sup> and so will be used as the primary example in this Comment. Included among those real-world entities with a presence in Second Life are hundreds of higher education institutes, the Smithsonian, NASA, the Holocaust Museum, Nike, Microsoft, CNN, BBC, and the City of Ontario.<sup>45</sup> Classes are sometimes held—and created—in Second Life,<sup>46</sup> and it has been used as a method of therapy for both congenital diseases and victims of abuse.<sup>47</sup> The 2004 and 2008 U.S. presidential elections were felt in Second Life, and President Barack Obama has invested millions of U.S. dollars<sup>48</sup> in green project development in Second Life.<sup>49</sup>

The Linden dollar has a variable exchange rate with real-world monies, and fluctuates according to market supply and demand.<sup>50</sup> Second Life’s recognition of user ownership of assets<sup>51</sup> has led to a real market existing in Second Life. Many Second Life users earn a few hundred dollars per month, but some have reported significant success. For example, one sale of Second Life real estate purportedly sold for fifty thousand U.S. dollars.<sup>52</sup> Enough users have created a large enough economy that \$125 million in transactions was reported for the first quarter of 2009.<sup>53</sup>

There is no homogenous culture in Second Life; users range from sex escort entrepreneurs to humanists to original Second Life users passing down knowledge to new arrivals. There are people who exist in Second

42. Kennedy, *supra* note 40, at 1.

43. *Id.* at 2.

44. Simon Gottschalk, *The Presentation of Avatars in Second Life: Self and Interaction in Social Virtual Spaces*, 33 *SYMBOLIC INTERACTION* 501, 502 (2010).

45. *Id.*

46. *Id.* at 502–03.

47. *Id.* at 503.

48. Obama invested three billion “Linden” dollars. *Id.*

49. *Id.*

50. Stephen J. Davidson, *An Immersive Perspective on the Second Life Virtual World*, 947 *PRACTICING L. INST.* 673, 680 (2007).

51. SECOND LIFE TERMS OF SERVICE, <http://secondlife.com/corporate/tos.php> at 7.1 (last visited Oct. 17, 2012).

52. Davidson, *supra* note 50, at 681.

53. Gottschalk, *supra* note 44, at 503.

Life simply to prey on others, some are there to learn as students or ethnographic researchers, and some enter as virtual tourists, with either Second Life itself, or the sights in Second Life as their destination.<sup>54</sup> There are churches, synagogues, and mosques,<sup>55</sup> and a memorial to the 2007 Virginia Tech shooting.<sup>56</sup>

### III. THE RELATIONSHIP BETWEEN USER AND AVATAR

#### A. *Being in Second Life and Other Virtual Worlds*

The interactions between users, through their avatars, in Second Life and other virtual worlds are unlike any other form of interaction on the internet. It is not communicating through emails or chat programs. It is not fundamentally buying and selling. Nor is it similar to taking part in a large discussion on varied or specific topics, such as on blogs or in chat rooms. The closest analogue to non-virtual life to what people do in Second Life is actual living; working, communicating, building communities, emotionally bonding, and learning are the beginnings of an inexhaustible list of what people do in the non-virtual world, and what user/avatars do in the virtual world.

Second Life alone has spawned a large number of research papers in a variety of fields, many looking at the relationship between user and avatar, and between the virtual world and non-virtual world. Some have even argued that the end of the non-virtual world is soon to come as the avatar and the virtual world become of greater reality to the user in the non-virtual world.<sup>57</sup> On the other hand, anthropologist Alex Golub recognizes that a virtual world cannot be considered equal to the non-virtual world if for only the different results in the death of the avatar and the death of the user.<sup>58</sup> So then, how do people cope with this and correspondingly prioritize their virtual lives? Golub argues that “[t]he hierarchicalization of worlds . . . is here imposed amongst virtual spaces, which results in a focus of the true ‘placeness’ of Second Life at the expense of other locations where Second Lifers might congregate.”<sup>59</sup> Put simply, in spite of this seemingly mortal flaw, everybody in Second

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54. Davidson, *supra* note 50, at 682–83.

55. *Id.* at 683.

56. *Id.* at 684.

57. Alex Golub, *Being in the World (of Warcraft): Raiding, Realism, and Knowledge Production in a Massively Multiplayer Online Game*, 83 ANTHROPOLOGICAL Q. 17 (2010) (citing EDWARD CASTRONOVA, *EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY* xiv–xv (Palgrave Macmillan 2007)).

58. *Id.*

59. *Id.*

Life recognizes that Second Life is a uniquely shared place among all of them, and so it is given the most value as a “place,” to the detriment of other places, such as the offline world.

This is perhaps most accurate for those who feel that they are more residents of Second Life than of the offline world. User/avatar relationships with virtual worlds run the gamut. There are those who feel as if they live in the virtual world more than the offline world,<sup>60</sup> those who use the virtual world for teaching<sup>61</sup> or therapy,<sup>62</sup> and those whose relationship is bound up in bridging the two worlds—a position that implicitly posits a distinct and separable virtual world.

One distinguishing aspect of Second Life and similar virtual worlds is that there are no “established and universal game objectives.”<sup>63</sup> The users have no mission or goal in Second Life—just creativity and interaction.<sup>64</sup> As such, the residents “become *creators* of this world (and themselves in it) rather than its subjects.”<sup>65</sup>

Thus, it is evident that even when virtual worlds are construed as being connected to the real world, as opposed to being separate and sovereign kingdoms,<sup>66</sup> the interaction in and with the virtual worlds is not the same as one has with other websites geared towards basic communication, such as email and chat programs, information wiki’s, blogs, .edu’s, personal pages, or with commercialized sites, such as Amazon.com, eBay.com, and corporate webpages. The interaction with virtual worlds is closer to mimicking, replacing, or extending real life. relationships, personalities, desires (cupidinous and otherwise), responsibilities, and cause-and-effect interactions are all developed in Second Life. While Second Life cannot be said to exist independently of real life (after all, the servers are in a real-world state, as are the people keeping the project going), the claim that virtual worlds exist, slightly disjoint and separable from the real world, is colorable.

### *B. The Relationship Between Avatar and User*

If we are to accept the concept of a separable virtual world, we must

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60. Castronova, *supra* note 36, at 3.

61. Molly W. Berger, *Manon of Second Life: Teaching in the Virtual World*, 49 *TECH. AND CULTURE* 430 (2008).

62. Giuseppe Riva et al., *Interreality in Practice: Bridging Virtual and Real Worlds in the Treatment of Posttraumatic Stress Disorders*, 13 *CYBERPSYCHOLOGY & BEHAV.* 1 (2010).

63. Thomas M. Malaby, *The Second Life of Institutions: Social Poetics in a Digital State*, 83 *ANTHROPOLOGICAL Q.* 355, 358 (2010).

64. Gottschalk, *supra* note 44, at 504.

65. *Id.*

66. John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 8, 1996), <https://projects.eff.org/~barlow/Declaration-Final.html>.

define the relationship between the user and the avatar. This is problematic, and many commentators take the approach that the avatar is at most property, likely intellectual property.<sup>67</sup> This latter interpretation gains support from the End-User License Agreement (EULA) or TOS of Second Life, which gives the user full intellectual property rights over whatever she creates in Second Life.<sup>68</sup> While the avatar can be modified, it must be noted that it comes into existence when the user enters the game, and so cannot be considered at this incipient stage to be the intellectual property of the user. It might be argued that Second Life, or another virtual platform, owns the newly-formed avatar, and in this case one could make a principal-agent analogy. It could also be argued that the avatar and user are separate forms of the same entity, one in the virtual world and one in the real world. These two possibilities will be developed below, but first a few more possible analogies to the relationship must be discounted.

If the separability of the virtual and real world is assumed, it cannot be argued that the user and avatar are identical. The interactions the avatar has with other avatars in its path through the virtual world and the traces it leaves of itself (in communication, construction, and as part of the background) in the virtual world are not what the real person leaves in either the real world or the virtual world. Nor can the avatar be the façade on communication—a visual pen name—for the same reasons. The influence and impact the avatar has in the virtual world is not the same as the influence and impact the user has in the real world. In fact, it would be impossible, as the user does not even have access to the virtual world except through an avatar.

If the avatar, as a distinct entity, is owned by the virtual platform provider, which gives total control to the user, then it is possible that this relationship can be analogized to that of a principal-agent. The Third Restatement of Agency defines agency as “the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>69</sup> It should be noted that this Comment does not claim that the relationship is actually that of principal-agent; only that the relationship might be considered analogous. There are obvious problems with an exact comparison. For example, if the platform provides an avatar that is considered an agent, what sort of relationship is then formed between the platform and the “principal”?

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67. See generally Joshua A. T. Fairfield, *Virtual Property*, 85 B.U. L. REV 1047 (2005).

68. SECOND LIFE TERMS OF SERVICE, <http://secondlife.com/corporate/tos.php> at 7.1 (last visited Oct. 17, 2012).

69. RESTATEMENT (THIRD) OF AGENCY: AGENCY DEFINED § 1.01 (2011).

Within the scope of what is expected of the avatar-agent in acting for the principal-user (which is effectively everything in the virtual world), the agent will act with some sort of authority, be it actual, apparent, or implied. Therefore, the principal user will be liable for actions committed by the agent avatar.<sup>70</sup> This would result in real-world liability for virtual world injuries, and as this Comment has not claimed the absolute disjointedness of the two worlds, the relationship might still stand. However, the assent or consent requirement on the part of the agent makes this an impractical analogy.

Another way of viewing the avatar-user relationship is by analogy to a sole proprietorship. The user would be analogous to the person, and the avatar to the business. This is the default, “natural” business form<sup>71</sup> and combines a business and a person into one,<sup>72</sup> even if the person views the business as separate from herself or her personal identity. In addition, the person retains full liability for injuries caused by the business.<sup>73</sup> And while, depending if the jurisdiction considers the avatar the property of the user, the avatar might be inherited like a sole proprietorship, the avatar would likely cease to exist, just like the business.<sup>74</sup>

The world of commerce can be analogized to the virtual world by viewing them both as human-constructed worlds with specific rules, boundaries, and assumptions that separate them from the nonbusiness virtual world. The sole proprietorship creates a bridge between the business and nonbusiness world, with the business aspect of the sole proprietor acting and interacting within the rule set and boundaries of the business world, and the nonbusiness aspect inhabiting the nonbusiness world. Similarly, the avatar is the form the user/avatar connection uses to act in the virtual world, with its rule set and boundaries, and the user is the form that inhabits the non-virtual world. While this separation does not take place from a legal standpoint, very often for both the business owner and the user the distinction of which world they are operating in is evident. In both cases, the non-constructed-world inhabitant is liable for the acts and omissions of the constructed-world actor. The two (avatar/user and the business/sole proprietor) are fundamentally one, but appear as separate (to themselves and to those with whom they interact) in different worlds, for which the

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70. *See id.* §§ 2.01–03.

71. *Doing Business in the United States*, in *DOING BUSINESS IN THE UNITED STATES* § 7.02 (2010). This is the default form for one person doing business. The presumption is that one person or real-world entity is related to one avatar.

72. *Id.*

73. *Id.*

74. *Id.*

avatar and business personnel are specifically designed.

This relationship serves as a model by which the offline entity is subject to any jurisdiction where it would normally be subject, yet still retains a presence in the virtual world. An individual would automatically be subject to jurisdiction for virtually-committed acts wherever the individual resides, and wherever else the individual is subject to personal jurisdiction. A corporate entity subject to jurisdiction in all fifty states would be subject to jurisdiction for virtually-committed acts in all fifty states. Each would also be subject to jurisdiction where mandated by the TOS of the virtual world provider.<sup>75</sup>

#### IV. PERSONAL JURISDICTION

##### A. A Brief History of Personal Jurisdiction

The United States Supreme Court broke from the historic *Pennoyer v. Neff*<sup>76</sup> determination of personal jurisdiction in *International Shoe v. Washington*,<sup>77</sup> when it stated that, as a corporate personality was itself a fiction, the idea of presence within a forum state for purposes of taxation or responding to legal suits must correlate with a certain degree of activity engaged in by those acting on the corporation's behalf within the forum state.<sup>78</sup> For the purposes of personal jurisdiction, due process required that for a defendant to be subject to suit in a forum, she have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>79</sup>

The Court continued to develop the nuances of this ruling in *World-Wide Volkswagen v. Woodson*, discussing the tension between the need to "remain faithful to the principles of interstate federalism embedded within the Constitution,"<sup>80</sup> and the recognition that "[a]s technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase."<sup>81</sup> The result in this case was that if the contacts with a forum are such that a defendant can reasonably anticipate being haled into

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75. See *infra* Part II(C).

76. 95 U.S. 714 (1878).

77. 326 U.S. 310 (1945).

78. *Id.* at 316–17.

79. *Id.* at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

80. *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 293 (1980).

81. *Id.* at 294 (quoting *Hanson v. Denckla*, 357 U.S. 235, 250–251 (1958)).

court in the forum,<sup>82</sup> then the forum state does not go beyond the limits of due process in asserting personal jurisdiction.<sup>83</sup>

Using *World-Wide Volkswagen's* foreseeability approach, the Court in *Calder v. Jones*<sup>84</sup> held that a newspaper reporter and his editor, both living and primarily conducting business in Florida,<sup>85</sup> could be haled into court in California.<sup>86</sup> The petitioners wrote and published allegedly defamatory material about the respondent, who resided in and earned a living in California. The Court noted that the sources for the article were from California,<sup>87</sup> and the “intentional, and allegedly tortious, actions were expressly aimed at California . . . [the defendants] knew that the brunt of that injury would be felt by respondent in the state in which she lives and works and in which the National Enquirer has its largest circulation.”<sup>88</sup> Therefore, the petitioners could “‘reasonably anticipate being haled into court there’ to answer for the truth of the statements made in their article.”<sup>89</sup>

The Court took into account these developments in deciding *Burger King v. Rudzewicz*.<sup>90</sup> In this case they looked at whether a contract could constitute a sufficient contact for the purposes of due process.<sup>91</sup> It noted its past history of holding that a contract is “ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.”<sup>92</sup> Adding to the minimum contacts analysis from *World-Wide Volkswagen*, the Court stated that “‘it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws,’”<sup>93</sup> and “jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.”<sup>94</sup> In addition, the Court laid out a series of factors to determine whether jurisdiction did not exceed the limits of fair play and substantial justice, looking at:

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82. *Id.* at 297.

83. *Id.* at 297–98.

84. 465 U.S. 783 (1984).

85. *Id.* at 785–86.

86. *Id.* at 788–89.

87. *Id.* at 788.

88. *Id.* 789–90.

89. *Id.* at 790 (citing *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 297 (1980)).

90. 471 U.S. 462 (1985).

91. *Id.* at 478.

92. *Id.* at 479 (citing *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316–317 (1943)).

93. *Id.* at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235 (1958)).

94. *Id.* (citing *McGee v. Int'l Life Ins.*, 355 U.S. 220 (1957)).

[T]he burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.<sup>95</sup>

Most recently, in the plurality opinion in *McIntyre v. Nicastro*<sup>96</sup> the Court shored up the *Asahi*<sup>97</sup> plurality opinion, which iterated that the minimum contacts must come “about by *an action of the defendant purposefully directed toward the forum State.*”<sup>98</sup> The *McIntyre* plurality rejected the New Jersey Supreme Court's holding that McIntyre would have needed to take some reasonable steps to prevent its products from ending up in New Jersey.<sup>99</sup> The plurality declared that the stream-of-commerce metaphor had in some situations been carried away, and that generally, the defendant must “purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws” to be under the judiciary's power, excepting some rare situations, such as intentional torts.<sup>100</sup> Justice Kennedy continued, stating: “This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.”<sup>101</sup>

Thus we can see that the overall trend in asserting personal jurisdiction over nonresidents has become more refined, requiring knowledge of the empowerment of a sovereign state's courts with jurisdiction, in exchange for which the defendant is granted the benefits of the laws of that state. In addition, the determination of whether or not the assertion of personal jurisdiction through these minimum contacts offends traditional notions of fair play and substantial justice is done by weighing certain factors, as stated in *Volkswagon*.

### B. Internet Jurisdiction

If there is one consensus among academic commentators on the state of personal jurisdiction and the internet, it is that it is unsatisfactory. The exceptionalist debate continues: ought there be a separate set of personal specific jurisdictional rules for claims arising out of or within

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95. *Id.* at 477 (internal quotation marks omitted) (citing *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 292 (1980)).

96. 131 S.Ct. 2780 (2011).

97. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

98. *Id.* at 112.

99. *McIntyre*, 131 S.Ct. at 2786 (citing *Nicastro v. McIntyre*, 987 A.2d 575, 579 (N.J. 2011)).

100. *Id.* at 2785 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

101. *Id.* at 2789.

the internet? The next subpart will discuss various proposals for the best approach to internet-based personal jurisdiction, arguing that the best is that which looks for ways to fit the new problem into the older framework, without bending or refuting the older rules to fit the new problem.

### 1. Making the Old Fit the New

One approach is to distort the spirit of the old rules and require internet users to restrict their activities consciously, either in a legal or geographic manner.<sup>102</sup> As there is technology capable of letting an internet user restrict the geographical reach of her actions, the actor should be responsible, or be presumptively liable, in every jurisdiction.<sup>103</sup> For author A. Benjamin Spencer,<sup>104</sup> this does away with the possible defense of ignorance in directed acts that occur over the internet. He writes, looking at *Calder*: “[t]he targets of wrongdoing are those victimized by it.”<sup>105</sup> He continues by explaining that “[j]urisdiction is about contacts with a forum . . . ’ what should be and is relevant under *Calder* is that the victim was the target of the wrongdoing and whether that victim is a resident of the forum State . . . . Those who intentionally violate copyrights or defame others are not targeting the State of X or the People of the State of X; rather, they are targeting their victims.”<sup>106</sup> Thus, the defendant will have the burden of establishing a lack of intent to interact with anyone in the forum state.

This theory puts a very large burden on the defendant, not just in court, but in life. It also pushes the limits of the substantial justice and fair play factors in *Burger King*. In addition, it misses the mark on how to determine whether the defendant could reasonably anticipate being haled into a court, by focusing on the plaintiff and not the state in which the injury is felt. Finally, it takes into account only network-mediated contacts. What happens when the contacts are construed as network-only, such as between two avatars in a virtual world? The latter concern is hopefully resolved by this Comment, and the former is dealt with by other commentators.

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102. A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 71 (2005).

103. *Id.* at 75.

104. A. Benjamin Spencer is an Assistant Professor of Law at the University of Richmond School of Law. He received his J.D. from Harvard Law School in 2001. *Id.* at 71 n.\*.

105. *Id.* at 102.

106. *Id.* (citing Robert J. Condlin, “Defendant Veto” or “Totality Of The Circumstances”? *It’s Time For The Supreme Court To Straighten Out The Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 143–44 (2004)).

The Ninth Circuit recently held that a single eBay sale did not provide the sufficient minimum contact necessary to provide personal jurisdiction.<sup>107</sup> The court “return[ed] to the original minimum contacts test, refus[ed] to use a special test for internet contacts, and avoid[ed] ensnarement in the technologically detailed facts . . . .”<sup>108</sup> In this case, a California resident bought a car from a Wisconsin resident on eBay. The car then did not work very well, so he sued in federal district court in California.<sup>109</sup> On appeal, the Ninth Circuit panel held that “a contract alone was insufficient to create minimum contacts,”<sup>110</sup> with one concurring judge writing that the “location of the winning bidder was a ‘fortuity’ beyond [defendant’s] control.”<sup>111</sup> Under Spencer’s test, the defendant in the Ninth Circuit case above would have had the presumptive burden of disproving interactions with California, which a sole contact and contract might have given. To iterate, Spencer’s theory not only would have been found errant by the Ninth Circuit, but is also biased towards network-mediated contacts. A more extreme approach, briefly discussed below, views these latter contacts as the only type.

In Michael Traynor<sup>112</sup> and Laura Pirri’s<sup>113</sup> “Personal Jurisdiction and the Internet: Emerging Trends and Future Directions,”<sup>114</sup> the authors argue that the contention that geographically based personal jurisdiction does not work with the borderless internet is spurious, because the internet architecture can be rearranged to limit jurisdictional contacts.<sup>115</sup> In addition, they argue that the analogy of a telephone call taking place in either the location of the calling or receiving party is appropriate for the internet, and that the use of the term “cyberspace” has simply created a false idea of a separate space, when everything actually happens in real space.<sup>116</sup> Furthermore, the authors disagree with commentators who state that because one is often unaware of the location of internet contacts, it would offend due process to apply

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107. *Personal Jurisdiction—Minimum Contacts Analysis—Ninth Circuit Holds That Single Sale on eBay Does Not Provide Sufficient Minimum Contacts with Buyer’s State*, 122 HARV. L. REV. 1014, 1014 (2009).

108. *Id.*

109. *Id.* at 1014–15.

110. *Id.* at 1016.

111. *Id.*

112. Michael Traynor was the president of the American Law Institute between the years of 2002 and 2008. AMERICAN LAW INSTITUTE, [http://www.ali.org/index.cfm?fuseaction=about.bio&bio\\_id=9](http://www.ali.org/index.cfm?fuseaction=about.bio&bio_id=9) (last visited Oct. 17, 2012).

113. Laura Pirri was senior counsel for the Linden Lab and is currently legal counsel for Twitter. LINKEDIN, <http://www.linkedin.com/in/lpirri> (last visited Oct. 17, 2012).

114. Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PRACTICING L. INST. 93 (2002).

115. *Id.* at 121–22.

116. *Id.* at 124.

personal jurisdiction based only on that contact, and go so far as to state that the Supreme Court, in *Burger King*, has “retreated substantially from a requirement of actual knowledge.”<sup>117</sup> Their first argument—in favor of restructuring the internet—goes down a similar path as Spencer’s. This road seems likely to lead to a “cat to catch the mouse, dog to catch the cat” problem, where restructuring leads to a new approach to the internet, which itself needs restructuring to deal with more personal jurisdiction issues.

The analogy to a telephone falls apart, in that telephones at one time required one to call and inform the operator which state, city, or country one wished to speak to, and then later replaced the operator with area and country codes. This is not a sound analogy. In addition, there were not possibly separable virtual worlds that people chose to inhabit and connect with through the telephone system. To analogize the two is to indicate a narrowly biased perception of the internet, and what it is capable of. Finally, the recent *McIntyre* decision would seem to indicate that actual knowledge is not only *not* a waning requirement, but rather is essential to establishing personal jurisdiction.

## 2. Understanding How the New Fits the Old

C. Douglas Floyd<sup>118</sup> and Shima Baradaran-Robison<sup>119</sup> provide a more helpful framework, basing their approach in a vague enough statement about the internet: “The Internet is simply one means of communication, albeit one which casts a wider, more anonymous, and less geographically predictable sweep than more traditional means.”<sup>120</sup> The authors start by looking at past precedent as a way of approaching new issues, as opposed to using new issues to argue against past precedent. Foundationally, they look at the Supreme Court’s decisions in *Burger King* and *World-Wide Volkswagen*, in which the Court held that the Due Process Clause “serves the dual purpose of protecting the defendant from inconvenient litigation, and of ensuring that the sovereign authority of the states in relation to each other is appropriately confined.”<sup>121</sup>

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117. *Id.* at 124–25.

118. C. Douglas Floyd was Emeritus Francis R. Kirkham Professor of Law at Brigham Young University Law School. PILLSBURY, <http://www.pillsburylaw.com/index.cfm?pageid=15&itemid=21934> (last visited Oct. 17, 2012).

119. Shima Baradaran-Robison is an associate professor at Brigham Young University Law School. LINKEDIN, <http://www.linkedin.com/pub/shima-baradaran-robison/5/a65/466> (last visited Oct. 17, 2012).

120. C. Douglas Floyd & Shima Baradaran-Robison, *Towards a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 628 (2006).

121. *Id.*

With this as background, Floyd and Baradaran-Robison propose a test in which “the Court . . . adopt[s] a unified approach to personal jurisdiction analysis which turns primarily on whether the defendant objectively should be held on notice that his conduct was substantially certain to have the impact claimed by the plaintiff to be wrongful in the forum state.”<sup>122</sup> They argue that while the development of a personal jurisdiction test for widespread informational wrongs and intangible injuries is not easy, their approach eliminates the issue of intent or purpose, and instead focuses on the reasonable expectation of being haled into court in a forum state.<sup>123</sup>

This approach is not far off of Brian D. Boone’s, in “Bullseye!: Why a ‘Targeting’ Approach to Personal Jurisdiction in the E-commerce Context Makes Sense Internationally.”<sup>124</sup> Boone starts out differently, with the presumption that “[t]he Internet is ‘not merely multi-jurisdictional, it is almost a-jurisdictional. The hardware and software structure of the internet is designed to ignore rather than acknowledge geographic location. For purposes of jurisdiction, there is ‘simply no coherent homology between cyberspace and real space.’”<sup>125</sup> The best approach to personal jurisdiction, especially within the context of e-commerce, is thus a “targeting approach,” which would remove “much of the uncertainty that accompanies the usually-applied soft ‘effects’ approach.”<sup>126</sup> The result, Boone claims, is a return to O’Connor’s plurality opinion in *Asahi*.<sup>127</sup> He gives as an example the case of *Rio Properties, Inc. v. Rio International Interlink*,<sup>128</sup> a trademark infringement case. The defendant’s Costa Rican passive website through which the alleged infringement took place was not sufficient to provide jurisdiction; instead, personal jurisdiction was established by the defendant’s radio and print advertising in the forum state.<sup>129</sup> Boone claims that by using the concept of “targeting,” the concepts ‘purposeful availment’ and ‘stream of commerce’ are refined in an Internet targeting analysis, not redefined.”<sup>130</sup>

What is peculiar about Boone’s argument is that his claimed result, a

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122. *Id.* at 666.

123. *Id.*

124. Brian D. Boone, *Bullseye!: Why a “Targeting” Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally*, 20 EMORY INT’L L. REV. 241 (2006).

125. *Id.* at 246 (internal quotation marks omitted) (citing Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3, 17 (1997)).

126. *Id.* at 266.

127. *Id.*

128. 284 F.3d 1007 (9th Cir. 2002).

129. Boone, *supra* note 124, at 268 (citing *Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002)).

130. *Id.* at 266.

return to O'Connor's plurality opinion, is what the Supreme Court seems to want in *McIntyre*. The idea of targeting also encompasses the virtues of Floyd and Baradaran-Robison's proposal, in that the targeting seems to not require a purpose or intent to cause harm, but more of an intent to connect with a forum state. It is, in effect, an intent to purposely avail oneself of what the forum state has to offer.

These last two approaches, and particularly the latter, emphasize what is missing in the earlier proposals: a connection with the forum. An attempt to gain jurisdiction over an out-of-state defendant on the basis of wronging an in-state resident, especially in the age of the internet, is too attenuated, as the act or omission causing the injury may be completely disconnected from the forum state. The Boone and Floyd/Baradaran-Robison approaches would seem to be better in terms of following precedent and not offending due process or overly burdening the defendant.

What is important is that the approach try to fit the Supreme Court's analysis post-*McIntyre*, and not the other way around. A targeting or knowledge of directed effects test is the best. However, the emphasis on the act or omission's connection with the forum state becomes problematic when virtual worlds are introduced. One way of reducing this problem is to analogize the avatar/user unity to a relationship. However, even when such a relationship is assumed, this model may be deficient in providing personal jurisdiction. One way to mitigate this is by use of EULA or TOS agreements.

### C. EULA/TOS Agreements

In 2007, the Eastern District of Pennsylvania denied a motion to compel arbitration<sup>131</sup> because it found that the arbitration clause written into the TOS of Second Life was unconscionable, and that "the arbitration clause is not designed to provide Second Life participants an effective means of resolving disputes with Linden."<sup>132</sup> Since then, Second Life has changed its TOS,<sup>133</sup> and any non-injunctive or equitable relief claim for less than ten thousand dollars is subject to binding non-appearance based arbitration if either party chooses such.<sup>134</sup> In addition, any non-arbitrated dispute is subject to California law and venue, except for suits for equitable or injunctive relief to protect intellectual property, which may be filed wherever the owner resides or has its principal place

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131. *Bragg v. Linden Research, Inc.*, 487 F.Supp.2d 593, 605–14 (E.D. Penn. 2007).

132. *Id.* at 611.

133. DURANSKE, *supra* note 7, at 31.

134. SECOND LIFE TERMS OF SERVICE, <http://secondlife.com/corporate/tos.php> at 12.1 (last visited Oct. 17, 2012).

of business.<sup>135</sup>

Generally, the software and certain rights are licensed to the user in the EULA/TOS.<sup>136</sup> The EULA and TOS are, for the purposes of this Comment, effectively the same because for both the user must agree to the provider's demands in order to access and use the system, and both give significant decision making power to the provider.<sup>137</sup> In addition, platform providers often give themselves the power to proscribe certain behavior, such as racist or other offensive statements or conduct, between or among avatars.<sup>138</sup>

The most recent Second Life TOS indicates that Second Life owner Linden Labs feels it is legally capable of determining the choice of law and venue for some suits against itself, excepting equity and injunctive claims. These are suits against Linden itself, but it could be possible to extend this to suits by and against any avatar/user by virtue of the claimed injury taking place entirely within the virtual world provided by Linden. This is admittedly a broad proposition, but not unreasonable.

There exists the concern about extending the scope of these agreements to conflicts between private parties, and not to those between the virtual world provider and inhabitant. However, these types of agreements already exist and have force behind them. The Uniform Domain Name Dispute Resolution Policy (UDRP)<sup>139</sup> is put forth by the Internet Corporation for Assigned Names and Number (ICANN).<sup>140</sup> The UDRP states that anyone who registers a domain name within certain top level domains (such as .com, .net, and .org) is bound by the Registration Agreement, which sets forth "the terms and conditions in connection with a dispute between [the registrant] and any party other than [the registrar]."<sup>141</sup> For example, Section 4 of the UDRP requires a mandatory administration proceeding when one party complains that another party is violating her trademark rights.<sup>142</sup> Once the mandatory administrative proceeding has commenced or concluded, the party or

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135. *Id.* at 12.2. Generally EULA/TOS choice of law provisions provide for the law of the state in which the server company has its headquarters. Choice of law is less straightforward, and varies by global location of the user. *See generally* DURANSKE, *supra* note 7, at 30–31.

136. Allen Chein, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059, 1084 (2006).

137. Jennifer Gong, *Defining and Addressing Virtual Property in International Treaties*, 17 B.U. J. SCI. & TECH. L. 101, 113 n.82 (2011).

138. DURANSKE, *supra* note 7, at 129.

139. *Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules")*, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, <http://www.icann.org/en/dndr/udrp/uniform-rules.htm> (last visited Oct. 17, 2012).

140. *Id.*

141. *Uniform Domain Name Dispute Resolution Policy*, INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, <http://www.icann.org/en/dndr/udrp/policy.htm> (last visited Oct. 17, 2012).

142. *Id.* at Section 4.

parties may submit the dispute to a court.<sup>143</sup> Thus, an offline defendant would be bound to act in accordance with the TOS, but could, once the suit is commenced, challenge the plaintiff's complaint in another court, if that court had proper jurisdiction.

#### *D. Personal Jurisdiction in Virtual Worlds*

Two presumptions have been made in the discussion of personal jurisdiction in virtual worlds. The first is that the virtual world exists distinctly from the real world, and so the borders establishing sovereignty within the United States are not etched onto the virtual world. The second is that the user/avatar unity is best analogized to that of a sole proprietorship.

Generally unincorporated associations (including sole proprietorships) do not have a state citizenship of their own.<sup>144</sup> In addition, suing an unincorporated association can be done by the recognition of it as a jural entity, by a court, state, or federal statute.<sup>145</sup> A sole proprietorship, in which the business and the person are one, would be subject to jurisdiction wherever the person is a citizen, and wherever the person does enough business to create minimum contacts.

Thus, to start out, the user of an avatar would be subject to jurisdiction for any actionable virtual world injuries through acts or omissions in the state in which she has citizenship. If user/avatar (U/A 1), a citizen and resident of Ohio, injures in the virtual world user/avatar 2 (U/A 2), a citizen and resident of Idaho, U/A 2 should be able to go to Ohio and bring a lawsuit against U/A 1.<sup>146</sup> That one U/A actionably injured by another U/A should be able to bring a suit against that U/A should not be denied. The simplest way to bring a suit would be to go to the home state of the injuring U/A. But if U/A 2 in Idaho wishes to make U/A 1 in Ohio leave Ohio and come to Idaho or a more convenient state for U/A 2, then personal jurisdiction becomes a problem. The injury took place in the virtual world, which is disjointed from the real world and does not reflect state sovereign jurisdictions. It would be unfair to presume that any interaction in a virtual world is subject to every jurisdiction.<sup>147</sup> It would be equally unfair to shield a U/A from

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143. *Id.* at Section 4(k). Of note here is that the policy indicates that the dispute may be submitted to a court of "competent jurisdiction." *Id.* One could argue that analogizing to a system that itself does not give jurisdiction detracts from the analysis. However, the emphasis of the analysis is on the TOS that mandate procedures for private party disputes.

144. 32 AM. JUR. 2D *Federal Courts* § 1177 (2011).

145. Charles Alan Wright et al., 7 *FEDERAL PRACTICE & PROCEDURE* § 1861 (3d ed. 2012).

146. This is assuming that the identity of the injuring user is discovered by the injured user. In some situations this will be easier than others. *See generally* DURANSKE, *supra* note 7, at 165–75.

147. Here, only state jurisdiction is discussed. The international issues of jurisdiction are equally

every state jurisdiction but her own. It is also overly exceptionalist to demand a specific virtual jurisdiction because of the unity of the user and avatar. The injuries upon the avatar are assumed to have been in one way or another visited upon the user, in addition to having another user as original provenance. Therefore, some sort of fair, real world jurisdiction system is required.

The Supreme Court's attempt to eliminate the Brennan concurrence<sup>148</sup> in *Asahi* and focus on directed acts in the recent *McIntyre* case is a good guide. Simply dropping a product into the stream of commerce, or the virtual equivalent of interacting without directed injurious acts, should not be sufficient to allow the state in which the accidentally injured avatar/user is found. This seems appropriate, and in conformity with *Asahi*, *World-Wide Volkswagen*, and *McIntyre*. On the other end of the spectrum, one U/A directly injuring another U/A, which seemingly would fall under the spectrum of *Calder*, is problematic. Using the idea of directing at or targeting a jurisdiction through directing at or targeting an entity within that jurisdiction being sufficient notice to the entity doing the targeting, the question is whether the U/A targeting another U/A, presumably in another jurisdiction, should be on notice that she is subject to jurisdiction in either any state or in a previously specified state. This previously specified state could be incorporated into the EULA or TOS, along with choice of forum and arbitration clauses. Or, if it were reasonably facile to determine the jurisdictional state of the targeted entity, such as by a simple web finding of identical names and products in the real and virtual world, the injuring U/A might be considered on notice to be bound by the jurisdiction-granting state of the injured U/A.

Using a predetermined forum (agreed upon in the EULA or TOS) would permit any user/avatar to know where she could be haled into court, regardless of residence of the alleged victim. For example, the consistent knowing use of the Linden Server, and the continuous contact with the server necessary to maintain a Second Life existence, satisfy the minimum contacts test in California, if that were the state forum for such dispute resolution laid out in the EULA/TOS. The four factor test laid out in *Burger King* to determine substantial justice and fair play would also be taken into account. The burden on the defendant would be lower, based on the defendant's prior knowledge that she might be haled into the predetermined forum, and the convenient and effective relief for the plaintiff would be provided by a court system well-versed

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problematic, but beyond the scope of this comment.

148. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (finding that "jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause" and requires no further contacts).

in virtual world injuries in a forum the plaintiff knows the defendant must accede to. The resolution of interstate controversies would be made more efficient by the prior knowledge of a given state in which the controversies would be disputed. Finally, the substantive social policies (read here as policies affecting parts of society) regarding virtual world offenses having effect in the non-virtual world of the several states would be addressed by the establishment of a defined jurisdiction for suits arising out of virtual world injuries.

#### V. APPLICATION

A recent survey of online gamers found that they spent an average of over twenty hours a week in the virtual world, and that the experiences that most affected them, both positively and negatively, were online.<sup>149</sup> In his article on crime and the online persona, Reed proposes four categories of attacks on online persona that would make criminalization of the conduct justified: (1) attacks likely to cause distress to the user, (2) attacks likely to damage the online reputation of the avatar, (3) attacks limiting the connectivity between user and avatar, and (4) attacks pushing avatars out of social spaces and limiting their free speech.<sup>150</sup> It is important to note that none of these encompasses actual physical injury to the avatar—because while the virtual world is separable, many physical aspects of the real world do not transfer. However, crimes that are physical in nature in the real world would, if committed by one U/A against another, can fall into the “causing distress” category. Rape, assault, battery, or theft of what would be considered the avatar’s belongings would all lead to distress of the user. In addition, depending on the severity of the distress, the injury might result in a disconnect between the user and avatar. The other two of Reed’s categories go more towards defamation and harassment.

Reed discusses the ability to report to customer service concerns that one has in Second Life. In response to complaints, Second Life makes a decision and then can choose to do anything, from taking no action to terminating a user’s account.<sup>151</sup> The user has agreed to be bound by this in the EULA, and in fact could probably not do otherwise. As Reed puts it, “owned online spaces operate very much under a sovereign form of governance, in which the owner as world God enforces its will for its own ends. Redress against attacks on an online persona depends entirely on whether [it] . . . advances the interests of the world

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149. Chris Reed, *Why Must You Be Mean to Me? Crime and the Online Persona*, 13 NEW CRIM. L. REV. 485, 487 (2010).

150. *Id.* at 493–94.

151. *Id.* at 497.

owner.”<sup>152</sup> This not only effectively disables the U/A’s access to real world justice, but also very much reduces the U/A to a lower-class of citizen than the user on her own. Reed argues for an approach that would criminalize certain actions in virtual worlds, with suits brought in the real world.<sup>153</sup> In addition, his proposal to focus on the behavior and not the victim<sup>154</sup> could be seen as a first step towards the law truly extending its reach into the virtual world.

### A. Rape

While there has been widespread discussion on whether rape is possible in Second Life,<sup>155</sup> if it is assumed that it is possible, clearly a crime has been committed by one or more U/A’s against another U/A. And, while the physical injury that results in the real world is not present in the virtual world, the emotional trauma can be.<sup>156</sup> Thus, if this conduct were criminalized, even under a less severe criminal harassment statute instead of a sex crime statute,<sup>157</sup> it would still be actionable in the real world. But where could the victim bring suit?

In this case, the U/A rapist targeting another U/A is probably not considering the victim user’s home state. While the crime is terrible, it would not be fair to say that just because the crime is more offensive, the standard for determining personal jurisdiction can be lowered. In this case, the two options can be put to use. In the first, in which the U/A attacker knew or should have known that the U/A victim was connected to a known state (through the identity of the U/A), the attack could be considered as an attack against that state, in so much as the laws of that state permitted the victim to self-integrate into the virtual world significantly. In the second, the attacker was specifically taking advantage of the virtual aspects of the world, and so should be subject to wherever the EULA or TOS specify. In this way, the victim U/A is not without remedy, and the attacker U/A is not unfairly subject to the jurisdiction of every state.

### B. Breach of Contract

In Second Life, one way of developing one’s avatar is by scripting

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152. *Id.* at 498.

153. *Id.* at 505.

154. *Id.* at 512.

155. *See, e.g., id.* at 504; DURANKSE, *supra* note 7.

156. Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 77 (2008).

157. *Id.* at 79.

new facial features, body parts, or clothing. Or, the avatar can pay Linden Dollars to another avatar who has already scripted these. If the product turns out to be defective or to not work as promised, might the buying avatar sue for breach of contract? If so, which state's law controls? Should the seller be liable in every state? It would seem to violate "fair play and substantial justice" to say that someone who scripts and sells a few virtual Hawaiian shirts per month has the requisite minimum contacts to be under the jurisdiction of every state.

In addition to establishing the relationship between the user and platform provider, many EULA's and TOS's also have sections governing the relationship between and among user/avatars, prohibiting various conduct, such as racially or personally offensive acts, and even regulating in-world transfer of property.<sup>158</sup> These tend to give the platform provider the ability to banish a user, but at its discretion, and only if it wishes to.<sup>159</sup> The user-avatar seeking to enforce a contract has no established remedy or forum to obtain justice.

Under the directed or intentioned action approach to personal jurisdiction, the seller would not be subject to personal jurisdiction in the buyer's state unless the buyer could prove that the seller knew or should have known her resident state. However, the seller would be subject to personal jurisdiction in his or her own state of residence, or in a previously agreed-upon forum state, such as California. This state would change, dependent on the EULA or TOS of the virtual world.

### C. Defamation

As virtual worlds develop into non-identical reflections of the non-virtual world, communities form within them. It is this notion of community that makes defamation injuries likely causes of action in virtual worlds.<sup>160</sup> If defamation is determined by the context of community, the victim's work and living location, the source of publication, and audience of the defamation,<sup>161</sup> then virtual world defamation will be problematic insofar as determining whether it was

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158. DURANSKE, *supra* note 7, at 129–30.

159. *Id.* at 130. Duranske develops the nuance that the provider has the right to banish for offensiveness, but not the duty to maintain a world free of offense. For example, if the offensive user provided a not-insignificant portion of the provider's profits, it might choose to not banish the offensive user/avatar.

160. This is in the situation where the avatar and user are not so closely linked as to produce the assumption that any attack on the avatar is an attack on the user's real-world identity. *See generally id.* at 182–85. In such a situation, it is likely *Calder* would generally apply, though the issue of where the injury was felt would still be problematic.

161. *See, e.g.,* Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COM. L. & POL'Y 231, 257 (2010).

the avatar or user who felt the injury, where each “lived” or “worked,” and whose reputation was injured. In the situation of one avatar defaming another, allowing a plaintiff to “plead and prove relevant community . . . may provide the only real opportunity to recover for injury to reputation.”<sup>162</sup> Claiming that the injury was felt in the virtual world, or even more specifically, the virtual community in which the defamed avatar existed, permits a valid defamation claim triable in real world courts.

Because defamation is a directed act, the burden of proving that the defamer knew or should have known the resident state of the defamed U/A might require fewer contacts, but would still be on the plaintiff. Absent this proof, the plaintiff would have the option of finding the U/A’s resident state to sue there, or in a previously designated forum state.

## VI. CONCLUSION

The development of virtual worlds and the possibility of solely virtual world injuries has led to certain concerns, among them acquiring personal jurisdiction over the alleged injurer. As rules on the internet tend to be best followed when those who would fall under their scope recognize and knowingly accept these rules, determining the rules for personal jurisdiction for injuries which occur completely inside the virtual world before, and making these rules part of the EULA/ TOS is the best way to ensure compliance. That these rules can fit into our already existing rules for personal jurisdiction will ensure that applying personal jurisdiction to plaintiffs in virtual world injuries will not encroach upon a state’s sovereignty, or defy standards of substantial justice and fair play.

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162. *Id.* at 262–63.