

## THE VIRTUAL WORLD AS A COMPANY TOWN – FREEDOM OF SPEECH IN MASSIVELY MULTIPLE ON-LINE ROLE PLAYING GAMES

BY PETER S. JENKINS<sup>1</sup>

In 1978, a collection of papers prepared for the 19<sup>th</sup> International Congress of Anthropological and Ethnological Sciences in Chicago was published under the title “The World as a Company Town”<sup>2</sup>. It examined some of the effects of then emerging trans-national corporations on developing countries. The reference to the entire world being a company town was a fine example of the imaginative political metaphor for which the decade of the seventies was famous. It was obviously not meant to refer to a company town literally, like Chickasaw, Alabama in the seminal United States Supreme Court decision, *Marsh v. Alabama*<sup>3</sup>. In that case, the Gulf Shipbuilding Corporation owned the entire town, including the streets, sidewalks, stores, and residences, leading the Supreme Court to rule that Gulf had stepped into the shoes of the state for purposes of First Amendment rights. It would be preposterous to suggest that a corporation or even multiple corporations could literally own the entire world in the same way. Or would it?

Fast forward 26 years to 2004. The United States is fighting a guerilla war in Iraq and there are Massively Multiple Online Role Playing Games (MMORPG's) such as EverQuest, The Sims Online, Star Wars Galaxies, There and Second Life that are three-dimensional persistent virtual worlds where millions of individuals interact in real time<sup>4</sup>. One of these game developers, There Inc., enters into a contract with the U.S. Army to create a full-scale, 1:1, virtual replica of the entire planet for purposes of combat simulations, known as the Asymmetric Warfare Environment (AWE).<sup>5</sup> So far, we are dealing with actual facts, strange as they may seem. Fast forward now to 2010 and enter into the realm of speculation. The conflict in Iraq is over. Osama Bin Laden has been captured, tried and executed. The U.S. Government has a huge debt that it has racked up in pursuing the war. It decides to turn over its virtual world to the private sector, in the same way that the ARPANET, the military ancestor of the Internet, was devolved into private hands. In doing so, the U.S. Government hopes to make a huge amount of money, and auctions off the virtual world in large tracts for billions of dollars to international mega-corporations. This new virtual earth becomes even more popular than the smaller virtual mini-worlds, such as EverQuest and There that spawned it. The majority of the real world's

inhabitants begin to spend large proportions of their waking hours there, finding it a convenient, fun and trendy place to shop, do business and socialize. Many individuals spend more time pursuing these activities in this virtual world than doing anything else in the real world. There is only one problem. The large transnational corporations that own it do not allow freedom of expression. Pointing to a series of decisions from the courts between 2005 and 2010 on freedom of expression in MMORPG's that ruled that the state action requirement was not met, and therefore the First Amendment was not applicable, they are able to convince the United States Supreme Court that the new virtual world is no different from MMORPG's. It is just a simulation. They successfully argue that they did not step into the shoes of the state in the way that the Gulf Shipbuilding Corporation did in establishing the company town of Chickasaw, since no one actually lives in this new virtual world. But do they?

This thought experiment is meant to illustrate the central objective of this article, which is to demonstrate that serious attention should be devoted now to the issue of freedom of expression in MMORPG's. This is not only because of the need to deal with issues such as in-game whistleblowing by players concerning sexual content available to minors,<sup>6</sup> in-game protests about the violent nature of the game<sup>7</sup>, the use of in-game stores to sell commercial products, raising issues about picketing of businesses<sup>8</sup> and in-game peace rallies.<sup>9</sup> It is also because the case law regarding MMORPG's will have a profound precedent-setting effect on freedom of expression issues when these virtual worlds in the future become inextricably intertwined with the fabric of our daily lives, and when the virtual world successfully competes with the real one for the lion's share of the time and attention of the majority of the human species, or at least that portion of it with computer access. History shows that the legal principles concerning new technologies tend to become set at a relatively early stage (for example, most of the decisions that determined the nature of the broadcasting culture were made between 1920 and 1926).<sup>10</sup> Even if the nightmarish scenario outlined above never materializes then, at the very least, virtual worlds are certain to become a central part of our lives and to play a key role in the way society functions as a whole, like the Internet does today.<sup>11</sup>

You are probably now thinking something along the following lines: "But MMORPG's are just games! Why should anyone care about freedom of expression in that context any more than freedom of expression rights in an improvisational theater group? Even if it is an important issue for these games for some reason, then how could the case law possibly be a precedent if MMORPG's evolve into something more serious, i.e. a platform for commerce, adjudication, education etc.?" The answer is that MMORPG's are already more than games in most cases. The acronym, MMORPG, is actually something of a misnomer. For example, Second Life prefers not calling its virtual environment a game, but rather calls it "an expansive online society, lived in and built by its participants".<sup>12</sup> This syndrome of the MMORPG as a space for social interaction rather than a game per se is not restricted to ones with contemporary settings

such as Second Life. Even historical and futuristic MMORPG's have this characteristic. MMORPG's are "places where the atmosphere is more like a middle American shopping mall than the market of Rheims or Space Station Zebra" as Edward Castronova has pointed out.<sup>13</sup> Many currencies in MMORPG's are freely exchangeable for real U.S. dollars in well-organized online exchange markets<sup>14</sup>, and virtual goods, e.g. magic potions and weapons, are for sale on eBay and "grey market" auctions also for U.S. currency<sup>15</sup> (despite the efforts of some game developers such as Sony to stop this practice). Virtual real estate in some of these games is for sale for both game currency and U.S. dollars.<sup>16</sup> Whoever has heard of Monopoly money being convertible into hard currency, or properties on Boardwalk being auctioned off on eBay for U.S. dollars? Clearly, then what is involved here is already very much more than a game in the classical sense. I refer to these virtual worlds in this article as MMORPG's, however, because that is still the generally recognized technical name for them.

### The First Amendment and the State Action Doctrine

The state action doctrine is the threshold issue in examining the application of First Amendment rights within virtual worlds. The basic principle is that the Federal Constitution only restricts the activities of federal and state government entities. Currently, the vast majority of MMORPG owners are in the private sector. The most notable exception is "America's Army", a "first person shooter" MMORPG that is distributed free to high school students by the U.S. Army for recruitment purposes.<sup>17</sup> However, the vast majority of virtual worlds are and will likely remain or end up in the private sector so the state action requirement is a significant one when discussing the issue of freedom of expression in virtual worlds. The key question is whether MMORPG's are more like community associations, clubs, condominiums and other private organizations or do they on the other hand assume a "public function" which satisfies the requirements of the state action doctrine. If the MMORPG is performing a public function, then the state action requirement may be satisfied.

The seminal case on the public function issue is *Marsh v. Alabama*<sup>18</sup>, a 1946 U.S. Supreme Court decision involving a company town. In this case, a Jehovah's Witness, Grace Marsh, attempted to disseminate her beliefs on the streets of Chickasaw, Alabama, which was entirely owned by Gulf Shipbuilding Corporation which employed most of the town's residents. Chickasaw resembled a regular town in that it had a main street, a business district with stores and a residential neighborhood. It was not a gated community. The town and its shopping district were freely accessible by members of the public. Merchants rented stores in the business district and the U.S. Postal Service occupied one of them for purposes of delivering U.S. Mail to the residents. A Deputy of the Mobile County Sheriff, paid by the company, served as the town's law enforcement officer. When Marsh went spreading the gospel on the main street, she was

arrested for criminal trespass. She raised her rights under the First Amendment as a defense. The U.S. Supreme Court reversed her conviction on the ground that the state action requirement was met in that Gulf performed a public function in operating the company town.

Some academic analysis of this issue has been done previously by Dan Hunter and Gregory Lastowka, in their groundbreaking work *The Laws of the Virtual Worlds*<sup>19</sup>. Hunter and Lastowka do not deal with the freedom of speech issue in much detail, but their work sets out a useful summary of some, but not all, of the relevant types of issues. First, they deal with the state action doctrine and cite Paul Berman's *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private Regulation'*,<sup>20</sup> as stating that it is unlikely that the company town principle would apply to Internet Service Providers (ISP's) since no one actually lives in cyberspace. Although Berman acknowledges that the courts have thus far not applied the *Marsh* principle to ISP's<sup>21</sup>, he goes on to suggest that the courts should use a community values oriented approach that he calls "constitutive constitutionalism" instead of the state action analysis. Berman then concludes that if the courts used this new approach, they could be open to arriving at the same result concerning ISP's as in the *Marsh* case.<sup>22</sup> This would apply even more to a virtual world, which is qualitatively different from an ISP in that the latter is basically just a conduit or at best an information content provider rather than a self-contained environment.

Hunter and Lastowka then cite Raph Koster, who is the Chief Creative Officer of Sony Online Entertainment, as supporting the limitation of freedom of speech on the basis of private property rights. They quote Mr. Koster as stating: "Somebody saying something in [Star Wars Galaxies] and being witnessed by somebody else can reflect not just on the game but on Lucasfilm and George Lucas ... If someone started walking around in the San Diego Zoo screaming profanity or handing out Nazi leaflets, the park would remove them from the premises. We need to be able to do that also."<sup>23</sup> Mr. Koster primarily seems to be concerned about the issue of forced speech, not about the state action issue. The issue of forced speech arises where the views of person A are misattributed to person B, in which case B has a good argument that his First Amendment rights are being violated<sup>24</sup>. However, issues of forced speech do not arise unless the state action threshold is met in the first place. Furthermore, it seems unlikely that the crackpot views of an avatar carrying a Nazi sign in Star Wars Galaxies could ever reasonably be misattributed to George Lucas any more than the views of Darth Vader. In situations where the views are less extreme and there is at least some possibility of misattribution, this could be minimized through a disclaimer placed by the MMORPG owner in an appropriate location, as was recently done by There, Inc. in connection with an in-game peace rally organized by some of the players.<sup>25</sup>

Hunter and Lastowka then refer to the argument that the MMORPG owner has its own freedom of expression rights in that the virtual world it has created is

a form of art. These freedom of expression rights of the owner would, the argument goes, trump any corresponding rights of the players to the extent that the latter would infringe on the owner's expressive rights as the creator of the virtual world. Hunter and Lastowka then state that this could be rebutted by legal arguments that have been made to the effect that participant interaction in video games is a form of co-authorship.<sup>26</sup> Although those arguments were rejected by the court in the case they cite, it is a 1982 decision that obviously did not deal with the types of virtual worlds available now where players can significantly alter the game environment, thereby making the co-authorship argument much stronger.

Finally, Hunter and Lastowka discuss the "exit" argument, which states that those who are dissatisfied with the lack of freedom of speech rights in a MMORPG should just change to another MMORPG.<sup>27</sup> They deal with this argument by stating that exit is not always possible since many players develop networks of friends within certain games that they do not want to lose. Hunter and Lastowka make a good point, but the real concern with the "exit" argument is that it goes beyond the available alternate forum principle and presumes that the player has made a valid waiver of his or her First Amendment rights. Typically, the MMORPG owner's policies on speech would be contained in the End User Licensing Agreement (EULA) which the prospective player would have to assent to by clicking on the "I Agree" button prior to first accessing the game. Although it is well established that a person may waive his or her First Amendment rights, such a waiver is required to be "knowing, voluntary and intelligent".<sup>28</sup> The EULA is a contract of adhesion that is imposed on the player without the possibility of negotiation. The courts have generally viewed such contracts as lacking in voluntariness for purposes of the waiver of constitutional rights.<sup>29</sup> Even the small minority who actually read the EULA prior to clicking the "I agree" button would not meet the "knowing and intelligent" part of the test, since most EULA's are written in a very general fashion and do not expressly set out the constitutional rights that are being waived.<sup>30</sup> As well, the courts generally consider whether the waiver would be contrary to public policy.<sup>31</sup> The principles set out in the *Marsh v. Alabama* decision indicate that such a waiver would be contrary to public policy since, as stated later in this article, it would have a censoring effect on the information available to players in the MMORPG.

Hunter and Lastowka conclude that "If constitutional speech protections extend to company towns like Chickasaw, Alabama, it seems likely that such rights will be asserted by, and eventually granted to those who live in virtual worlds."<sup>32</sup> Although I do not agree with all of their reasoning, I certainly do agree with their conclusion. At this point, I would like to deal with some key issues that Hunter and Lastowka did not explore.

## Does anyone live in a MMORPG?

At first blush, this seems like an absurd question, but the issue warrants closer examination. Consider the example of the corporation, which is considered to be equivalent to a real person for numerous purposes including the Constitution of the United States. A corporation is said to be “domiciled” in Delaware, for example, even though it obviously does not “live” there as an actual person would.<sup>33</sup> The first retort to the “nobody lives there” argument then is obvious. If a corporation, which has no physical body and legally is separate from its shareholders and directors who do have physical bodies, can be said to be “domiciled” in a certain location then certainly a MMORPG player, who has a physical body, and who is directly manifested in the MMORPG by his avatar, can be said to be “domiciled” in a MMORPG, especially if the player operating the avatar spends more time in the MMORPG than anywhere else. Where a person is “domiciled” and where he “lives” are essentially one and the same.

A domicile must involve a “place”. The issue of whether cyberspace, including parts thereof such as MMORPG’s, can be said to be a place, has already been extensively explored in the academic literature, by Hunter and others. Hunter concluded that the “cyberspace as place” metaphor has become entrenched in our understanding of the Internet. He pointed to the spatially-oriented vocabulary used to describe it, e.g. entering or visiting a site, homepages, chatrooms, roaming, robots or spiders crawling over websites, denial of access, website addresses, backdoors, navigator, explorer, encryption keys etc. He also pointed to the use of the legal doctrine of trespass to chattels by courts in adjudicating cases involving unsolicited bulk e-mails. He noted the California Court of Appeal decision in the *Intel v. Hamidi*<sup>34</sup> case which involved a disgruntled former Intel employee who was sending bulk e-mails to Intel employees at work. Hunter stated that the court recognized the spatial nature of cyberspace, but was unwilling to go so far as to apply the doctrine of trespass against real property and so it misapplied the trespass against chattels doctrine by distorting it and ignoring the damage requirement of this tort. The case was appealed to the Supreme Court of California. Subsequent to the appearance of Hunter’s excellent article, the Supreme Court released its decision<sup>35</sup>, and citing Hunter among others, it reversed the lower court and concluded that the doctrine of trespass to chattels should not be twisted to resemble the doctrine of trespass to real property. However, this does not undercut Hunter’s thesis that the courts are greatly influenced by the cyberspace as place metaphor. The Supreme Court, after discussing the academic literature concerning the propertization of the Internet and the possible loss of ease of communication that it might entail, simply stated; “In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law”. Given that the court’s caution in applying real property rules to the computer servers stemmed from its concern that openness and ease of communication should not be unduly restricted, it would be ironic indeed if this

ruling were to be used in the future as support for the argument that no one can be said to live in a MMORPG and therefore there are no free speech rights there. Perhaps that is why the court so deliberately left the door open by emphasizing that the controversy was still unresolved? In any event, *Intel v. Hamidi* dealt with e-mail systems, which are essentially two-dimensional, and not with three-dimensional virtual worlds. However, the fact that the court at least left the door open to the possibility that an e-mail system could be a place is certainly encouraging in terms of potential future judicial support for the concept of a virtual world as a place.

Edward Castronova and Nick Yee have done some interesting empirical research on the players in Norrath, the virtual world in Sony's EverQuest (EQ)<sup>36</sup>. Highlights of Castronova's survey of EQ players include the following interesting and startling pieces of information:

Percentage who view themselves as living in Norrath (residents) - 20%  
Number of hours per week of a resident in Norrath - 36.1  
Percentage of residents devoting more time to Norrath than to work - 44.7%  
Number of hours per week of a visitor in Norrath - 27.1  
Percentage of visitors devoting more time to Norrath than to work - 28.9%

Nick Yee's survey includes the finding that 1.5% of all players spend 60 to 70 hours a week in Norrath. Clearly, from the point of view of both the objective behavior and the subjective attitudes of the players of this MMORPG, a good case can be made that it is possible for a player to live in the MMORPG. In fact, for the small minority of seriously addicted individuals who spend the astronomical amount of 60 to 70 hours per week in this virtual world, it is likely beyond contention that they do actually live in the MMORPG, since they spend more time there than any real world activity including sleeping, eating, working, socializing etc.

### The Informed Citizen and the Democratic Culture Rationales

One of the key rationales for the decision of the United States Supreme Court in *Marsh v. Alabama* is the need for the residents in a company town to receive, if they wish, all of the information necessary to make informed decisions in exercising their democratic right to vote. Although it has never been overruled, and it has been cited in several hundred court decisions, the *Marsh* case has not been directly followed in a large number of cases. This is primarily because of the decline of company towns in the post-war period. However, arguably it is also because of the increase in the amount of new media available to the general public tending to counteract any censoring effect that enclaves such as company towns may have. In view of this, does the "informed citizen" rationale have any continued relevance?

Some academics, such as Cass Sunstein<sup>37</sup> of the University of Chicago, are of the view that the Internet does not necessarily always result in exposure to opposing points of view, given that many individuals sort themselves into digital deliberative enclaves together with those who share the same viewpoints (cyberbalkanization), often with the result that the group arrives at a more extreme conclusion than the majority of its members each individually held prior to joining the group. There has been some theorizing by political analysts that the failure of the Howard Dean campaign was partly due to this phenomenon.<sup>38</sup> Also, a study by Markus Prior<sup>39</sup> has shown that among persons who are not particularly interested in the political process to start with, gaining access to the Internet actually results in a decline in their voter participation rates, rather than having the opposite effect. The views of Sunstein and his acolytes have been controversial and there has been some criticism that they are based on false technological assumptions about the ability of Internet users to filter out opposing views.<sup>40</sup> However, irrespective of whether one believes that Sunstein is correct, the fact remains that MMORPG's have an insular and addictive nature. As noted above, a sizeable percentage of game players regard themselves more as citizens of the virtual world rather than the real one.<sup>41</sup> This two-fold effect, i.e. balkanization of opinion through deliberative enclaves, and addictive isolation by MMORPG players (or just the latter on its own if you do not believe Sunstein's hypothesis) may indicate that the "informed citizen" rationale in the *Marsh* case posits that the new company town should actually be the MMORPG.

Recently, some scholars such as Jack Balkin of Yale University have criticized the "informed citizen" theory of freedom of speech as being too narrow, and have stated that the primary goal of the First Amendment is not to foster democratic deliberation about public issues of interest to the electorate, but rather it is to promote and develop a democratic culture, through the freedom to advocate and make changes in "institutions, practices, customs, mannerisms, speech and dress".<sup>42</sup> In Balkin's view the right, for example, to juggle a chainsaw and two bowling balls on Venice Beach dressed in a ballerina outfit would not merely be an inevitable by-product of the freedom of speech rights necessary to ensure that citizens are informed about the relevant public issues. In Balkin's view, it seems that deliberative democracy is not an end in itself but rather a means of ensuring that the juggler can continue to perform his act. If one subscribes to Balkin's theory, it does not mean that the rationale in *Marsh* is inapplicable to virtual worlds. In fact, it actually makes *Marsh* a better fit in theory for virtual worlds, given that MMORPG's are, after all, still games or game-commerce hybrids and not earnest New England Town Hall meetings. We can still expect both the proselytizer and the juggler to want to exercise their First Amendment Rights in virtual worlds. However, if the role of the proselytizer is seen as facilitating a deliberative democracy the purpose of which is to ultimately preserve the rights of the juggler, the MMORPG players may be less inclined to take the view that the entertainment value of the game is being eroded by free speech.

This is all very fine in theory, you may say, but what would be the reaction of a character from a mediaeval role-playing game, if while killing diseased rats in a public square of a village, he was confronted by an avatar representing the Jehovah's Witnesses, the National Rifle Association, or the National Democratic Party? Someone who has never played one of these games would assume the reaction to be incredulity, amusement, annoyance, or even virtual violence. However, it is more likely that the player would take it all in stride since the non-contemporary worlds of MMORPG's have "decayed into places where the atmosphere is more like a middle American shopping mall" as Edward Castronova has pointed out. Castronova attributes this "decay" to the blurring of the lines between real and virtual worlds due to the buying and selling of virtual assets for real dollars on eBay and to in-game conversations about real world issues such as baseball games and politics.

Does Castronova's point suggest, though, that MMORPG's are more akin to shopping malls than to company towns? If so, then the First Amendment would be held not to be applicable due to the ruling of the U.S. Supreme Court in *NLRB v. Hudgens*<sup>43</sup>, which reversed the earlier decision in *Logan Valley*<sup>44</sup>. Although some state courts, such as New Jersey's, have interpreted their state constitutions to permit freedom of expression in shopping malls, the great majority of state courts have ruled the other way.<sup>45</sup> I would argue that the resemblance to the middle American shopping mall which Castronova points out is merely an indicator of the ordinariness and contemporary quality of the conversation among avatars, a quality that conversation in the public spaces of a company town would have as well.

There are of course less potentially dissonant examples than that of the Jehovah's Witness accosting individuals in a MMORPG with a mediaeval setting. One can imagine various proselytizing organizations taking less intrusive approaches than the one noted above, e.g. a more subtle strategy of introducing avatars into the game who appeared interested in pursuing the game but who would gradually befriend fellow players in order to attempt to convert them to their point of view. Then there are MMORPG's such as Second Life where the setting is contemporary although unreal. Moving further along towards the reality end of the game-reality continuum, there is the emerging virtual retail business within the MMORPG that uses the game as a platform for selling real world goods for real world currency.

As can be seen from the above-noted examples, even situations squarely in the game portion of the continuum (i.e. non-contemporary, non-retail) that would seem at first blush to be counter-productive in terms of the dissemination of information necessary for citizens to be able to make informed democratic choices, (e.g. the Jehovah's Witness popping out from a bush in the mediaeval MMORPG), would on further examination not be completely incongruous with the principles in the *Marsh* case. If the behavior of the proselytizer verged into

behavior unprotected by the First Amendment, then the game owner could exercise its right to “pull the plug” on the player’s game account, which in fact would be a much easier remedy than obtaining an injunction in the real world against a person who steps over the line of constitutionally protected behavior (e.g. yelling from the sidewalk through multiple bullhorns at 3 a.m. near an apartment building). The company town principle would merely mean that the First Amendment would apply to the Jehovah’s Witness in the virtual world. It would not mean that the person would have the right of unrestricted free speech. The same considerations that apply in the real world would be at play in the virtual world, e.g. prohibitions against forced listening, forced speech and incitement to violence etc.

To prevent what he sees as the “decay” of game spaces due to the intrusion of real world rights and behaviors, Edward Castronova has advocated a two-tiered system for MMORPG’s.<sup>46</sup> Utilizing the analogy of incorporation law, he suggests that a statutory scheme be established whereby the players and the owners of virtual worlds, such as mediaeval role playing games, could be shielded from various laws and regulations, e.g. defamation, taxation of virtual assets etc., in the same manner that the shareholders and directors of corporations are protected from various forms of liability. He indicates that this would prevent the erosion of these worlds as genuine game spaces and would at the same time benefit society in that imaginative play is salutary to the mental health of the general population. Virtual worlds that did not choose to take advantage of this protection would be considered as “nothing more than mundane expressions of Earth territories and be treated as such under law”.<sup>47</sup> He speculates that this statutory scheme would involve regulating the appropriate behavior within protected worlds; for example, it would be illegal to have virtual currency exchange markets and also to sell virtual goods for real world dollars.

Castronova is an economist, not a lawyer, so he did not analyze whether such a scheme would withstand constitutional scrutiny. Obviously one cannot override the First Amendment through an ordinary statute. However, would Castronova’s equivalent of incorporation, which he calls “interration” to signify the creating of a new fictional world that has a separate legal identity, change the character of “interrated” virtual worlds to the extent that the company town principle would not apply to them? In terms of some of the current similarities between MMORPG’s and company towns, it would probably not change the public access aspect. Furthermore, it would also seem to exacerbate the “political isolation booth”<sup>48</sup> syndrome of these spaces and therefore actually increase the strength for the argument that the First Amendment should apply. Castronova’s suggestion that the interreration scheme would contain bans on real world markets for virtual goods and properties would be almost impossible to effectively enforce and may also be disregarded by courts as a contract of adhesion. In any event, it would make the interrated MMORPG’s equivalent to the former Soviet Union, which was perhaps essentially nothing but a very tightly run company town on a national scale.

Company town residents and the employment issue

The comparison of Castronova's interrated MMORPG to the former Soviet Union may beg the question of whether some significance should be drawn to the fact that both the Gulf Shipbuilding Corporation and the Soviet State were the employers of all of the individuals who resided in the applicable company town (in the case of the former, it was Chickasaw, Alabama and in the latter case, it was the entire Soviet Union). In fact, the Supreme Court in the *Marsh* case may have been subtly influenced by the developing post-war anti-Soviet hysteria when it decided the case in 1946, since a company town that owned all of the property and employed most of the residents must have appeared decidedly totalitarian to them.

In the case of a MMORPG, however, most of the persons playing the game are not employees of the game owner. Does this make a difference in comparing the MMORPG to the company town? A MMORPG is not like a shopping mall since many persons spend more time there than anywhere else, and not like a gated community since it is accessible to the general public. Then is it more like a corporately-run planned community, something like Disney's Town of Celebration<sup>49</sup>, rather than a classic company town like Chickasaw that many corporations set up in the first half of the 20<sup>th</sup> century to provide housing for their employees? The fact that most of a town's residents are not employed by the corporate owner is not really relevant. The Supreme Court in the majority's decision in *Marsh* did not even mention the fact that the residents of Chickasaw were mostly employed by the Gulf Shipbuilding Corporation. The key points that the majority noted in *Marsh* were that the corporation performed a public function in owning and operating the town, that the town was accessible to the general public, and that the information available to the town's residents should not be censored by the corporation.

Is there public access to the MMORPG?

One of the key factors relied on by the U.S. Supreme Court in the *Marsh* case was the accessibility of the town to members of the general public who did not reside there. Do MMORPG's have a similar level of public access? There are some obvious requirements of entering a MMORPG that did not apply to Chickasaw, i.e. computer and Internet access, being of a minimum age (in most cases), payment of the user fee, and agreeing to and abiding by the terms and conditions of service in the End User Licensing Agreement (EULA). Dealing with technological access issues first, although anyone with \$3 can rent Internet access for a half-hour or so at a local Cyber Café or use it free at their local

library or school, (assuming there is one in their area and that it has a broadband connection which is often not the case), there is the problem that the MMORPG software must be downloaded onto the computer which is usually contrary to a Cyber Café's, library's or school's terms of use policy. Most sensible employers do not allow their employees to play MMORPG's at work. Therefore, MMORPG use is generally limited to individuals who have access to a broadband Internet connection through a privately owned computer in a non-work setting, a category that is known as residential broadband. The most recent U.S. Department of Commerce Study on the extent of residential broadband penetration pegged it at 14% of U.S. individuals as of the end of 2001.<sup>50</sup> Even if this figure were to have doubled since 2001, it would still be a minority of individuals.

When one eliminates the individuals who are under the necessary age (for example, 18 in the case of the MMORPG *Second Life*, and 13 in some other games such as *The Sims Online*), the figure becomes smaller still. The issue of the ability to pay a user fee is also a significant one. Although the fees are often relatively small, ranging on average from \$5 to \$25 a month depending on the services involved, not everyone will be able to afford them and therefore the subset of individuals in the public who can be said to have access to MMORPG's becomes even smaller. Finally, there is the issue of the EULA, which, as mentioned previously, is essentially a contract of adhesion that the user must initially assent to by clicking on an "I agree" button or other similar device prior to being granted admission to the MMORPG. The wording of the EULA varies considerably amongst games, but the typical one reserves broad rights to the game owner, including the right to terminate a user's account for misbehavior such as harassment of other players or commercial solicitations and the right to "reset" the game at any time, without notice and without reason, which involves wiping out all of the players' accumulated virtual assets.<sup>51</sup> Persons visiting the company town of Chickasaw obviously did not have to sign such an agreement before entering, although persons renting stores or residences there would obviously have to sign some form of lease agreement.

Therefore, a MMORPG is greatly different from the company town in the *Marsh* case from the point of view of the key issue of public access. However, are these differences important? Is not the limited percentage of the population with residential broadband access equivalent to the limited percentage of the U.S. population that lives within a couple of hundred miles of Chickasaw for whom a visit would be feasible? What about the numerous serious allegations that the age limits in MMORPG's are frequently flouted?<sup>52</sup> Can a membership fee of as little as \$5.00 for one month, for example, really be considered as creating exclusivity and restricted access in the U.S. market? In this regard, it is significant to note that courts have generally regarded small license fees imposed by the state for purposes of parades and other forms of public expression to be permissible constitutionally<sup>53</sup>, so such small fees should arguably not be considered as significant when determining whether the access

to a MMORPG is effectively public or not. Finally, is not the EULA essentially a contract of adhesion that would be strictly construed against the MMORPG owner, much in the same way as an exculpatory clause on the back of the ticket that a driver grabs from the machine as he enters the public parking facility? Do not the driver and the MMORPG player both have similar public access?

In terms of how this compares to MMORPG's, one might ask as a final question – who are the “residents”, if any, of a MMORPG and who are the visitors? The distinction between residents and visitors is important because the accessibility by visitors is key to establishing the public function test. The existence of residents is, of course, important to be able to point to the group of individuals who require access to uncensored information in the place where they spend more time than anywhere else. I would argue that the residents of a MMORPG would probably be the group of individuals noted by Castronova who view themselves as living in the game.<sup>54</sup> Alternatively, an objective approach could be used based on number of hours per week spent playing the game.

#### What kind of forum is a MMORPG – traditional, designated or non-public?

If a MMORPG could be a company town for purposes of satisfying the state action requirement, there then arises the issue of what type of forum is involved. This issue is important because it determines what kinds of restrictions on freedom of speech are permissible in such an environment. The Supreme Court of the United States has developed a tripartite categorization of public spaces that are protected by the First Amendment. These are 1) the traditional public forum, e.g. streets, sidewalks, parks, public squares 2) the designated public forum, e.g. a municipal auditorium and 3) the non-public forum, e.g. zoos, hospitals, public transit, army bases etc.<sup>55</sup>

In the traditional public forum, there is the greatest amount of unrestricted speech allowed. The state may restrict free speech in a traditional public forum only for substantial and compelling reasons and only if the restriction is narrowly drawn. Content-neutral restrictions (time, place and manner) will be justified only if they serve an important state interest and leave open alternative avenues of communication.<sup>56</sup> The main difference between a traditional public forum and a designated one is that in dedicating and defining the forum, the state may adopt reasonable limitations on who may use the forum. However, having defined the class of persons who may use it (e.g. limiting a state university meeting room to students), it is not permissible for the state to allow students to use it for some expressive purposes but not others, (e.g. for academic and social purposes but not political ones).<sup>57</sup> In the non-public forum, the state is allowed to impose the greatest number of restrictions. As long as the restrictions are reasonable and viewpoint neutral, they will not violate the First Amendment.<sup>58</sup>

How would this tri-partite test be applied to MMORPG's? Certainly, it seems quite clear that a MMORPG is not a traditional public forum in the sense that such forums have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public issues".<sup>59</sup> An argument could be made that since most MMORPG's contain streets, sidewalks and squares similar to those in the real world, the traditional public forum analysis should apply despite the fact that MMORPG's have only been in existence in their present form since the mid 1990's.<sup>60</sup> However, the better view is that MMORPG's are not traditional public forums, due to their newness. The real question then is whether MMORPG's are designated public forums or non-public forums.

The United States Supreme Court has held that, in determining whether a designated public forum or a non-public forum is involved, one must look at the intention of the state (in this case, the corporation in the role of the state).<sup>61</sup> The court stated that this intent is evidenced by the state's policy and practice as well as the nature of the property and its compatibility with expressive activity. I would argue that under this test a good case could be made that MMORPG's are designated public forums. The MMORPG owners' policy and practice is to allow members of the general public who are over a minimum age and who pay a small monthly fee to enter the MMORPG, which is a property set aside by the owner for expressive activities by the players. As Dan Hunter says, "People are, essentially, paying to amuse one other."<sup>62</sup> This seems to satisfy the test for a designated public forum, such as a municipal auditorium, quite well, since almost all of the activities within the MMORPG are expressive. A non-public forum, on the other hand, is not as good a fit for the MMORPG as is the designated public forum. A non-public forum such as a hospital or an Army base<sup>63</sup> has a different nature than a MMORPG in that it is primarily devoted to purposes other than expressive activity and is usually not compatible with many forms of expressive activity. For example, a protest inside a hospital would obviously distract the staff there from the efficient running of the facility, putting lives in jeopardy.

As the owner of a designated public forum, the MMORPG owner would not be permitted to discriminate amongst various types of expressive uses by the persons who are permitted to enter. For example, the First Amendment would be violated if a pro-Gulf war rally was allowed but not an anti-Gulf war rally, or a political meeting was allowed but not a religious one. As with traditional public forums, narrowly drawn time, place and manner restrictions that are content neutral would be allowed if they served an important "state" (in this case, company town as state) interest. For example, the MMORPG may levy the equivalent of "parade permits" which are permissible if they are nominal in nature<sup>64</sup> and may prohibit picketing of residences.<sup>65</sup> On the other hand, the real world jurisprudence allowing bans on soundtrucks at night is not of much relevance to virtual worlds, since although some have sound features, no one actually sleeps there.<sup>66</sup>

## Game design issues

Saying that the designated public forum rules apply to a MMORPG does not mean that the entire MMORPG is such a forum. In a MMORPG, there are public spaces and there are private ones, the latter being owned or rented by players who determine who will enter them. The designated public forum rules would obviously only apply to the public spaces within the MMORPG. In most MMORPG's, it is often possible for a player's avatar to "teleport" instantly from one location to another, so it may not always be necessary to have public streets and sidewalks for persons to get from A to B. Most MMORPG's do contain numerous and extensive public spaces to facilitate social interaction amongst the players, especially the new ones who have not had the time or opportunity to form and join groups and clubs. However, what would happen if MMORPG owners, in response to First Amendment pressures, and increasing numbers of avatars exercising their freedom of expression rights, decided to deal with the problem by changing the architecture of the space of their virtual worlds so as to severely limit the number and size of public spaces available. For example, say that a MMORPG only contained a single small public space for new players for orientation purposes, e.g. "Newbie Plaza", and the entire rest of the MMORPG was divided up into virtual land holdings owned or rented by avatars or associations of avatars, e.g. "Southern Guild Estates". Access to virtual lands belonging to an association of which one was not a member would be by permission only, with a requirement to submit a profile of interests and the purpose of the visit. Would this lead to a successful argument that the MMORPG owner had instituted a form of systemic denial of First Amendment rights? It is unlikely that such a systemic denial claim would be successful. Owners of shopping malls have been successful in resisting First Amendment claims<sup>67</sup> even though the general public has much freer access to them than they would have to the virtual gated community example mentioned above.

Would MMORPG owners need or in fact want to take such a drastic step as creating a series of gated communities within their MMORPG? Such an enclosure movement would probably adversely affect the marketability and popularity of the MMORPG. One of the compelling features of most MMORPG's today is the ability to freely explore<sup>68</sup>, to go on far-ranging quests either alone or in groups, and even in some cases to wander into private virtual accommodations unannounced in a manner similar to some Club Med resorts in the 1960's. What then would be the difficulties associated with freedom of expression in a MMORPG that did not contain a series of enclosed gated communities? Could these problems be resolved in a manner that would uphold the players' First Amendment rights while at the same time causing less damage to the MMORPG's appeal for players than the enclosure solution would?

Dealing with the fundamental issue of picketing, one of the key concepts to bear in mind is that picketing in the real world is, of course, more arduous for

the picketer than it is in the virtual world. In the real world, the picketer faces traffic, bad weather, darkness, hunger, and face-to-face encounters that are not always pleasant. In the virtual world, the picketer, through his avatar, faces some of these problems, but in a form that is obviously less bothersome. For example, an avatar picketer that is bumped by a virtual dune buggy will feel no pain, and in some games, code has even been put in place to prevent this from happening. Acrimonious face-to-face encounters can be mitigated or eliminated by clicking on the “ignore” or “mute” buttons. The environment is obviously not a problem since the player can picket via his avatar while seated comfortably in his warm den.

From the point of view, though, of the player whose virtual property or space is being picketed, there are also advantages of being picketed in the virtual world as opposed to the real one. Because most MMORPG's allow players to fly, either unassisted or with the aid of a machine, access to most properties, even without teleporting, can be achieved without having to run through a gauntlet of picketers waving signs. A person's avatar can simply fly over or around the picketers. Of course, some of the picketers may be hovering in the airspace around the edges of the property, but this would be equivalent to trying to effectively picket all of the airspace around JFK airport rather than picketing the entrances to the parking lot – a daunting and hopeless task. Furthermore, the option of the “ignore” button is available to persons seeking to be shielded from intrusive attempts by the picketers to engage them in dialogue. Therefore, we see that although there are some technological advantages that make it easier for pickets to function in virtual space, there are also offsetting advantages in virtual space for the person being picketed, so that the balance of power that exists in the real world is not lost in translation when transferred to the virtual one.

A 1998 proposal by Noah Zatz<sup>69</sup> for the legislative mandating of an electronic sidewalk to allow picketing of web sites, e.g. through pop-ups, icons, banners etc., would have been problematic because the balance of power would have been seriously tilted towards the picketers in that they could automate the process and would not have to make the same investment of personal time and effort that is required in operating an avatar<sup>70</sup>. Picketing in the context of MMORPG's solves this concern and preserves the balance. Although MMORPG players could probably from a technological point of view automate their avatars by using “bots” to picket while they are not playing, MMORPG owners would probably be permitted under the First Amendment to ban this practice on the grounds that it is obstructive and there are alternative ways of communicating the information within virtual worlds.

Another concern that MMORPG owners may have about freedom of speech rights in virtual worlds was expressed by Raph Koster, when he referred to the hypothetical example of the avatar handing out Nazi leaflets in Star Wars Galaxies, i.e. the hate speech problem. I already previously discussed the forced

speech issue that Mr. Koster raised. As well, players can easily overcome the forced listening issue by using the “block” or “ignore” options. MMORPG owners would be permitted under the First Amendment to implement content neutral anti-littering measures to ensure that these electronic leaflets do not remain on the virtual landscape, e.g. software code that would make them self-destruct once discarded. This leaves the issue of visual displays such as burning crosses, swastikas etc. There is no easy way of avoiding a visual encounter with, for example, a one hundred feet high burning virtual cross on a hill top at night. In addition, there is the problem that these displays would tend to be more persistent (a virtual cross does not burn out) and on a larger scale (virtual structures can easily reach enormous proportions) than their counterparts in the real world.

In 2003, the Supreme Court of the United States released a significant decision, *Virginia v. Black et al.*<sup>71</sup> The court stated that cross burning is a form of expression not merely a form of conduct. However, the court ruled that the First Amendment does not protect cross burning done with the intent to intimidate since it is a “true threat” of violence given its association with the activities of the Klu Klux Klan. An interesting question is whether this rationale would also apply to a virtual depiction of a burning cross. I would argue that it is, on the basis that the *in terrorem* factor is equal to if not greater than in the real world due to persistence and scale as well as the immersive and interactive nature of the virtual experience. There is a clear quantum leap from a depiction of a burning cross in a painting or a movie to a cross burning in a virtual world. When this is combined with the possibility that a hacker may be able to obtain a player’s physical real world address, the “true threat” materializes. Nazi displays, on the other hand, have generally received more protection from the U.S. courts, unlike in Europe, probably due to the fact that the Holocaust did not occur on U.S. soil. Freedom of speech anomalies such as Nazi displays are best dealt with by education, lobbying and consciousness-raising rather than by censorship and enclosure which merely echo the horrors perpetrated in totalitarian systems. In addition, viewpoint-neutral zoning and building by-laws, coded into the software, could either eliminate such displays completely, or extensively mitigate the offensiveness of their size and placement.

## Conclusion

The prospect of free speech in MMORPG’s may be alarming at first, but it is important to note several points:

1. Free speech in MMORPG’s is dependent on the right of public access. Virtual worlds whose owners wish their worlds to retain the character of a private association or club can always require prospective members to fill out membership applications and screen these individuals in the same

- manner that private clubs do. For example, a virtual world that is designed to provide therapy to victims of spousal abuse could exclude other individuals whom the world was not designed to support and therefore freedom of speech rights would not apply.
2. Even within MMORPG's that essentially have a right of public access, freedom of speech rights would not extend to the gated or private areas within the MMORPG.
  3. In the non-gated areas of a MMORPG with effective public access, the same protections against abuses of free speech rights would apply as in the real world, e.g. prohibitions against forced speech, forced listening, incitements to violence, true threats, defamation and obstructive picketing. In fact, in most MMORPG's, the software contains built-in protections against certain abuses such as forced listening that are not available in the real world, e.g. clicking the "ignore" button<sup>72</sup>. Offensive visual displays can be dealt with in the same manner as in the real world, i.e. through viewpoint-neutral zoning and building by-laws, and again the software can provide more effective protection against infractions than in the real world.
  4. As many MMORPG's seem to be reaching their limits in terms of attracting new players, and some are experiencing financial difficulties as a result,<sup>73</sup> freedom of speech rights in these virtual worlds may assist the owners in broadening their customer base from the hard core nucleus of young game players to encompass various different elements of society who are interested in the social and political interaction that these virtual worlds are capable of providing.<sup>74</sup> In terms of the game owners' interest in retaining the hard-core nucleus of existing loyal players, it should be reiterated that even in non-contemporary MMORPG's such as mediaeval or futuristic ones, much player behavior is already out of character, with discussions about contemporary goings-on such as sports and films. Therefore, freedom of speech rights would not have the effect of spoiling the "willing suspension of disbelief" associated with fantasy role-playing.<sup>75</sup>
  5. Finally, as pointed out at the beginning of this article, MMORPG's are the leading edge of a coming virtual world that will eventually supersede the current structure of the Internet, providing a world-wide three-dimensional immersive platform in which we will shop, play, socialize, travel and work. How we treat freedom of speech in MMORPG's, the nascent virtual worlds we now have, will set the pattern for freedom of speech in the universal virtual world that is sure to come. Do we want this universal virtual world to be nothing more than a nightmarish global shopping mall where there is only commercial speech? Or do we rather wish it to become an empowering enhancement of the real world with all its boundless opportunities for serendipitous, revitalizing and challenging encounters with persons of opposing viewpoints?

<sup>1</sup> B.F.A., LL.B., LL.M. Admitted to the State Bar of California and the Law Society of Upper Canada. Mr. Jenkins will be exploring many of these issues further in a forthcoming book he is writing on virtual worlds. He can be contacted at [peter.jenkins@sympatico.ca](mailto:peter.jenkins@sympatico.ca)

<sup>2</sup> Ahamad Idris-Soven, *The World as a company town: multinational corporations and social change*, (The Hague, Mouton, 1978). I trust the authors of this work will not mind my “rip, mix and burn” of the title.

<sup>3</sup> *Marsh v. Alabama*, 326 U.S. 501

<sup>4</sup> MMORPG’s have five main characteristics – 1) physical rules (e.g. if you drop something, it falls to the ground) 2) you are represented in the game by a character, called an “avatar”, 3) your avatar reacts with other players’ avatars in real time with almost immediate feedback 4) the world is shared and three-dimensional 5) the world is persistent (i.e. if you build something in the world, it will usually still be there when you return.) Richard Bartle, *Designing Virtual Worlds*, (Boston, New Riders Publishing, 2004) p.4

<sup>5</sup> “US military creates second earth” BBC News, Feb. 23, 2004

<http://news.bbc.co.uk/1/hi/technology/3507531.stm> “Spot On: The U.S. Army’s There-Based Simulation” Gamespot News, April 21, 2004 [http://www.gamespot.com/news/2004/04/21/news\\_6093860.html](http://www.gamespot.com/news/2004/04/21/news_6093860.html) (These and all other websites mentioned were last visited on May 24, 2004.)

<sup>6</sup> “The dark side of digital utopia” BBC News, Dec. 22, 2003

<http://news.bbc.co.uk/2/hi/technology/3334923.stm>

<sup>7</sup> For example, Anne-Marie Schleiner’s virtual posters in Counterstrike. See Nick Wadhams, “Online games increasingly a place for protest” Openflows Networks, Feb. 7, 2003

<http://news.openflows.org/article.pl?sid=03/02/12/1654235&mode=nocomment&tid=22>

<sup>8</sup> “What will the island be? (Option One)” Second Life: Notes from a New World, by Wagner James Au

[http://secondlife.com/notes/2004\\_01\\_19\\_archive.php#20040119](http://secondlife.com/notes/2004_01_19_archive.php#20040119)

<sup>9</sup> The “Polygons for Peace” Rally in There on March 28, 2004

<sup>10</sup> Yochai Benkler, *Freedom of the Commons: Towards a Political Economy of Information*, 52 Duke L.J. 1245 at p. 1276. (April, 2003)

<sup>11</sup> For some speculation about the technical future of MMORPG’s see for example “PS9” from the recent Game Developers’ Conference, March 22-24, 2004

<http://www.cmpevents.com/GDx/a.asp?option=G&V=3&id=104416>

<sup>12</sup> “What is Second Life?” <http://secondlife.com/about/>

<sup>13</sup> Edward Castronova, *The Right to Play*, p.6 (Paper presented at the “State of Play” conference at New York Law School, November, 13, 2003) <http://www.nyls.edu/docs/castronova.pdf>

<sup>14</sup> For example, The Gaming Open Market <http://www.gamingopenmarket.com/>

<sup>15</sup> For example see Ebay listings for Ultima Online virtual items such as Runic Hammers etc.

<http://search.ebay.com/search/search.dll?query=Ultima+Online&ht=1&sortproperty=1&from=R10&BasicSearch=>

<sup>16</sup> See Second Life land auctions - <http://secondlife.com/auctions/auction-list.php?id=1>

<sup>17</sup> See [www.americasarmy.com](http://www.americasarmy.com)

<sup>18</sup> Supra note 3.

<sup>19</sup> F. Gregory Lastowska and Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REVIEW 1 (2004), p. 59-63. See also a draft paper by Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*. [http://www.yale.edu/lawweb/jbalkin/articles/virtual\\_liberty1.pdf](http://www.yale.edu/lawweb/jbalkin/articles/virtual_liberty1.pdf)

Balkin also endorses the company town principle applying to virtual worlds, subject to exceptions for ones that are not publicly accessible, e.g. virtual worlds used for military simulations or psychotherapy, (p. 37).

<sup>20</sup> Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 COLO. L. REV. 1263 (2000)

<sup>21</sup> For example, *Cyber Promotions v. America Online Inc.* 948 F. Supp. 436

<sup>22</sup> Supra note 20 at p.1307, n.168

<sup>23</sup> Supra note 19, p.60, n.318. The San Diego Zoo is owned by the Zoological Society of San Diego which is a private entity.

<sup>24</sup> See *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>25</sup> See note 9 supra.

<sup>26</sup> Citing *Williams Electronics Inc. v. Artic International Inc.* 685 F.2d 870 (1982)

<sup>27</sup> Supra note 19. p. 61

- <sup>28</sup> See for example *Charter Communications Inc. v. County of Santa Cruz*, 113 F. Supp. 2d 1184, 1191 (N.D. Cal. 2001). Also, *D.H. Overmyer v. Frick Co.* 405 U.S. 174 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972)
- <sup>29</sup> See, for example, *Isbell v. County of Sonoma*, 21 Cal. 3d at 69-70.
- <sup>30</sup> See, for example, *County of Ventura v. Castro*, 93 Cal. App. 3d 462, 471 (1979)
- <sup>31</sup> See *Town of Newton v. Rumery*, 480 U.S. 386 (1988)
- <sup>32</sup> Supra note 19 p. 72
- <sup>33</sup> See Joel Bakan, *The Corporation*, (Toronto, Viking, 2004) p.13-20 for an excellent summary of the legal history of how the corporation achieved the legal status of a person.
- <sup>34</sup> *Intel v. Hamidi* 114 Cal. Rptr.2d 244 (2001) (Calif. Court of Appeal)
- <sup>35</sup> *Intel v. Hamidi* 71 P.3d 296 (2003) (Supreme Court of California)
- <sup>36</sup> Castronova, Edward, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* (December 2001). CESifo Working Paper Series No. 618. Tables 1 and 3 <http://ssrn.com/abstract=294828> Nick Yee, *The Norrathian Scrolls: A Study of Everquest* [Version 2.5], 12, <http://www.nickyee.com/report.pdf>
- <sup>37</sup> Cass Sunstein, *Republic.com* (Princeton, Princeton University Press, 2001)
- <sup>38</sup> See Amy Harmon, *Ideas & Trends; Politics of the Web: Meet, Greet, Segregate, Meet Again*, New York Times, January 25, 2004. <http://query.nytimes.com/gst/abstract.html?res=F30E1FFB3D5C0C768EDDA80894DC404482>
- <sup>39</sup> Markus Prior, *Liberated Views, Polarized Voters – The Implications of Increased Media Choice for Democratic Politics*, The Good Society, (2002) Vol. 11, No. 3
- <sup>40</sup> Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 Stan. L. Rev. 831 (2002); Dan Hunter, *Phillipic.com*, 90 Calif. L. Rev. 611 (2002) <http://ssrn.com/abstract=295245>; and Anupam Chander, *Whose Republic?* 69 U. Chi. L. Rev. 1479 (2002). For a rebuttal of these views, see Peter S. Jenkins, *Leafleting and Picketing on the “Cydewalk” – Four Models of the Role of the Internet in Labour Disputes*, 2003 UCLA J.L. & Tech. 1. <http://ssrn.com/abstract=470682>
- <sup>41</sup> Supra note 36.
- <sup>42</sup> Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, New York University Law Review, Forthcoming <http://ssrn.com/abstract=470842>
- <sup>43</sup> *NLRB v. Hudgens*, 424 U.S. 507
- <sup>44</sup> *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308
- <sup>45</sup> States in which courts denied access include Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Maryland, Michigan, Minnesota, New Mexico, New York, Ohio and Wisconsin. Those granting access include California, Colorado, Massachusetts, New Jersey, Oregon, Pennsylvania and Washington State. See “Scorecard” of *Pruneyard Litigation* ICSC, November, 2003 <http://www.icsc.org/law/prune.pdf> Also, Frank Askin, *Free Speech, Private Space and the Constitution*, Rutgers L. J. (1998) Vol. 29:827
- <sup>46</sup> Supra note 13, at p. 12-16.
- <sup>47</sup> Id p. 13
- <sup>48</sup> *State v. Kolcz*, 114 N.J. Super. 408, 276 A.2d 595 (Law Div. 1971)
- <sup>49</sup> See Douglas Franz and Catherine Collins, *Celebration U.S.A. - Living in Disney’s Brave New Town*, (New York, Holt & Co., 1999)
- <sup>50</sup> *A NATION ONLINE: How Americans Are Expanding Their Use of the Internet*, Washington, D.C. February 2002 (U.S. Dept. of Commerce)
- <sup>51</sup> See, for example, the Second Life EULA <http://secondlife.com/corporate/terms.php> Also, the There.com EULA <https://webapps.prod.there.com/login/74.xml>
- <sup>52</sup> Supra note 6.
- <sup>53</sup> *Cox v. New Hampshire*, 312 U.S. 569 (1941)
- <sup>54</sup> Supra note 36.
- <sup>55</sup> *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983)
- <sup>56</sup> *Cornelius v. NAACP Legal Defense & Educational Fund*, 105 S.Ct. 3439 (1985)
- <sup>57</sup> Supra note 55 at 46, n.7
- <sup>58</sup> *Cinevision Corp. v. City of Burbank*, 745 F. 2d 560 at 569, n.8
- <sup>59</sup> *Hague v. CIO* 307 U.S. 496 (1939)

---

<sup>60</sup> See Richard Bartle *Designing Virtual Worlds* (Boston, New Riders, 204) p.3-31 for an excellent history of virtual worlds

<sup>61</sup> Supra note 56

<sup>62</sup> Supra note 19 at p.61

<sup>63</sup> *Greer v. Spock* 424 US 828 (March 24, 1976)

<sup>64</sup> Supra note 53

<sup>65</sup> *Frisby v. Schultz*, 487 US 474 (1988)

<sup>66</sup> *Ward v. Rock Against Racism* 491 US 781 (1989).

<sup>67</sup> Supra notes 43-45.

<sup>68</sup> See, for example, Wagner James Au's account of his expedition thru Second Life

[http://secondlife.blogs.com/nwn/2004/03/the\\_trek\\_begins.html](http://secondlife.blogs.com/nwn/2004/03/the_trek_begins.html)

<sup>69</sup> Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 Harv. J. of Law & Tech. 149 (1998)

<sup>70</sup> Peter S. Jenkins, *Leafleting and Picketing on the "Cydewalk" – Four Models of the Role of the Internet in Labour Disputes*, 2003 UCLA J.L. & Tech. 1. <http://ssrn.com/abstract=470682> p.58-68.

<sup>71</sup> *Virginia v. Black et al.* 538 U.S. 343 (April 7, 2003)

<sup>72</sup> In the event that some harassing statements by players escape these measures, the MMORPG owner would be shielded from civil rights liability because of the provider immunity in §230 of the *Communications Decency Act of 1996*. Also, even if the immunity did not apply, there would be no civil rights liability given that the MMORPG would not be "a place of public accommodation" under Title II of the *Civil Rights Act of 1964* since the statutory definition contains a clear requirement that it be a physical location. See *Noah v. AOL Time Warner* 261 F. Supp. 2d 532, affirmed by the U.S. Court of Appeals on Mar. 24, 2004, 2004 U.S. App. LEXIS 5495. This is consistent with the concept of a MMORPG as a company town, since the latter is not rooted in a narrow statutory definition of place.

<sup>73</sup> See "There throws in the towel" Clickable Culture, May 23, 2004

<http://www.clickableculture.com/index.php?id=P1955>

<sup>74</sup> See "How to Get Gamers Play Online" Wired Magazine,

[http://www.wired.com/news/games/0,2101,63492,00.html?tw=wn\\_tophead\\_1](http://www.wired.com/news/games/0,2101,63492,00.html?tw=wn_tophead_1). May 19, 2004

<sup>75</sup> See note 13, supra.