

Human Rights and Private Ordering in Virtual Worlds

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Abstract. This paper explores the application of human rights in (persistent) virtual world environments. The paper begins with describing a number of elements that most virtual environments share and that are relevant for the application of human rights in such a setting; and by describing in a general nature the application of human rights between private individuals. The paper then continues by discussing the application in virtual environments of two universally recognized human rights, namely freedom of expression, and freedom from discrimination. As these specific rights are discussed, a number of more general conclusions on the application of human rights in virtual environments are drawn. The first general conclusion being that, because virtual worlds are *private environments*, participants are subject to private ordering. The second general conclusion being that participants and non-participants alike have to accept at times that in-world expressions are to an extent private speech. The third general conclusion is that, where participants represent themselves in-world, other participants cannot assume that such in-world representation share the characteristics of the human player; and that where virtual environments contain *game* elements, participants and non-participants alike should not take everything that happens in the virtual environment at face value or literally, which does however not amount to having to accept a higher level of infringement on their rights for things that happen in such an environment.

1 Introduction

With the advent of online virtual environments in general, and online virtual worlds and games in particular, the question arises in what way human rights need to be respected in such environments. Is there, for example, a right not to be discriminated against within such an environment on the basis of race or sexual orientation? And, does the principle that everyone is free to express their views also apply within such environments?¹

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¹ While this paper takes The Netherlands as guiding jurisdiction, the principles discussed most likely apply in other jurisdictions as well.

In addition to the question of the application of human rights principles in virtual environments themselves, there is the question of the protection of human rights of participants in real life (IRL). Can participants safely assume that their privacy will be respected and that no personal information about themselves is made available in-game? For example, if a participant in a virtual world unjustly publishes information on a conviction of another participant, known by his or her real name, can the later assume that such information will be promptly removed from the world? And can the person who made the announcement—perhaps when claiming that the information should remain available—invoke the right to freedom of expression?

All persistent multi-user environments share the characteristic that the “environment” exists on the servers of an operator, most often a private party. The environment continues to exist as long as the operator of the game keeps it in operation. Some, but not all, environments share the characteristic that the participant takes on a role, in a world that mimics our own or not, such as that of a wizard, perhaps a beautiful young person or even a squirrel. Such environments often, if not always, contain elements of play, including elements of representation, where the participant pretends to be someone else than in real-life.

This paper looks at the question of whether human rights apply in a virtual (game) environment, and if they do, to what extent. This paper first describes the type of actions within virtual environments that are relevant from a human rights perspective. This paper then continues with examining the extent to which two human rights in particular—the right to freedom of expression; and the right to freedom from discrimination—are applicable within a virtual environment, especially by looking at the issues that may arise when these two human rights intersect within (and sometimes outside) the virtual environment. Particular emphasis is thereby put on environments that are games (or that contain game elements). In connection with the above, this paper will also address the question of provider liability in the context of ensuring the protection of the aforementioned rights. Finally, this paper will address the question whether a player (or third parties outside of the environment) has a right *in rem* for human rights abuses against the operator of the virtual environment and/or other participants.

2 Human Rights in Virtual Environments: Principles

2.1 Characteristics of Virtual Environments (and Worlds)

What actions within virtual environments are relevant from a human rights perspective? In order to answer that question two relevant characteristics that almost all virtual worlds, if not all virtual environments, share, can be identified.

The first characteristic is the possibility to create an avatar (an online persona, character, or representation). It is important to note here that *each particular* avatar is commonly the representation of *one particular* person in real life. And, depending on the particular setting, an avatar in a virtual environment may take a human or non-human form. (Very much like in Hinduism.)

The second characteristic is the possibility for communication in a virtual environment. This communication may be temporary, such as chat or voice communications, or less temporary, such as a forum, or in-game newspapers or magazines,

similar to the BBS (Bulletin Board System) of old. In addition, such communication may be directed at one participant, or at a group or a number of participants in the virtual environment. Finally, sometimes participants know who the actual person (IRL) behind the avatar is, but usually they do not.

From a human rights perspective, these characteristics, or elements, are important: with them, you can act and be present within a virtual environment in a way that is relevant to such human rights as freedom of expression, and the right not to be discriminated against: rights that come into play.

2.2 The Application of Human Rights in Virtual Worlds

The application of previously existing rights to new technologies has been, and is, a topic of discussion in many jurisdictions. To take The Netherlands as an example, in the mid-nineties, when the use of the Internet and the Web greatly increased, it was a topic of debate among local *Internautes* and legal scholars alike whether the law in general and human rights in particular applied in a virtual (or digital) environment. This discussion would, for example, look at the question of whether putting a picture of a person online without that person's permission amounted to a violation of that person's privacy rights or not? Today, more than ten years later, there is little discussion about whether the law, and in particular human rights, also applies in a virtual environment. There is no online free-for-all.² The legal debate at the national and international level is now more about how legal standards, including human rights, should be interpreted when applied to online environments; and on whether additional standards –specifically directed at the online environment sphere– are possibly required.³

The doctrine of horizontal effect of human rights is important in connection with the legal relationship between a virtual environment operator and the real-life participants. To take again The Netherlands as an example, human rights in this jurisdiction have only direct effect in the relationship between governments and citizens (*vertical effect*). Although there is no direct effect in relations between citizens, the norms and standards contained within human rights texts and treaties may play a role in the coloring-in of open legal (tort) norms and terms such as the duty to act in good faith and the duty of care. In a court of law a judge may, when weighing the competing interests of the litigant parties, take such an interest to be the protection –for one, or for each litigant– of a human right, resulting in an indirect horizontal effect of human rights between private parties.⁴

² See generally, on the rights of players, Raph Koster, *Declaring the Rights of Players*, 2000, available at <http://www.raphkoster.com/gaming/playerrights.shtml>, in which article Koster calls for a kind of “benevolent dictator” to protect the natural rights of players in a game environment.

³ See generally, on the protection of human rights in virtual environments, the *UN Declaration of Principles for the World Summit on the Information Society (WSIS)*, 12 December 2003, Document WSIS-03/GENEVA/DOC/4-E, <http://www.itu.int/wsis/documents/index.html> (visited 1 March 2009); *Declaration on Human Rights and the Rule of Law in the Information Society* of the Committee of Ministers of the Council of Europe (CM(2005)56 final, 13 May 2005): <https://wcd.coe.int/ViewDoc.jsp?id=849061> (visited 1 March 2009).

⁴ See generally, on these competing interests, Jack Balkin, “*Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*”, 90 *VIRG. LR* 2043 (2004), where Balkin dubs these competing interests “freedom to play” and “freedom to design”.

In addition, when evaluating expressions or behavior in a virtual environment, two elements should be taken into account. First, there is the element of such an environment more often than not being a “confined space”: as a walled garden it is not public but not always entirely private either. Because of this, virtual environments are not the same as websites, including publicly accessible forums and social networks, and the corresponding standard of care is possibly lower than that for the “general-purpose” Web.⁵ (This includes those services often labeled as the 3D Web.) Second, there is the element of play: if it regards a virtual *game* environment then the elements of play should be taken into account. Not everything that is said and done in such an environment should be taken *too* seriously. Again, this separates some virtual environments from websites, including publicly accessible forums and social networks. As a result of these, the standard of care for closed or semi-open, and/or game environments may be different than in real life.⁶

As regards the constitutional rights analysis, there are similarities between an online virtual environment and a play or a game of sports. In a play certain characters may use expressions that IRL would be considered discriminatory. However, within the framework of the play such an expression is not lightly taken to be discriminatory and/or attributed to the actor in question. This both because the speech act is performed in the *context* of a play, and because the actor *portrays* a (fictional) character. Similarly, a sports and games situation: within the confines of the sports pitch, different standards of care apply between the players for the duration of the game than after the game and outside of the pitch. One could argue that in the different context of a play, or in the setting of a game of sports, the boundaries of what is permissible and what isn’t are temporarily enlarged, or in any case redrawn. More or different things are allowed, but not everything. Where exactly these new boundaries are set in a play, a sports game, or a virtual environment is different for each case.⁷

⁵ See also, ECHR, Perrin v. United Kingdom 18 October 2005, *European Human Rights Cases 2006*, ep. 2, 7 February 2006, pp. 112-119, with a note by Groothuis, where the Court, in connection with a case regarding a convicted pornographer, in addition to confirming that Article 10 ECHR also offers protection for acts of expression (pictures in that case) on the Internet, also seemed to make a distinction between different forms of online communication, whereas Perrin had put online pictures on a publicly available website (as opposed to a website with limited access). Consider here also the fact that many online environments only use the (TCP/IP layer of the) Internet for server-to-client communication but are not as publicly available as a website.

⁶ See differently, Tal Zarsky, *Privacy and Data Collection in Virtual Worlds*, in STATE OF PLAY – LAW, GAMES AND VIRTUAL WORLDS (Jack M. Blakin and Beth Simone Noveck eds., NYU Press, 2006), pp. 217-223, at p. 222, where Zarsky argues that whereas such closed gardens and “playful” settings enhance privacy concerns in virtual environments, the legal standards applied to Terms of Use agreements governing virtual environment should be more protective compared to those for ISPs and other Internet applications.

⁷ See generally, Edward Castranova, *The Right to Play*, 49 N. Y. L. SCH. L. REV. 185 (2004), pp. 185-210, 2004, at pp. 188-193, where Castranova, quoting Johan Huizinga, draws a distinction between play within the “Magic Circle” and common behavior outside of the Magic Circle, before arguing for codifying the boundaries of the Magic Circle. In my opinion, insofar Castranova argues for a binary choice of “game” vs. “non-game”, this is a choice that cannot be made, and does not need to be made.

In conclusion, within virtual (game) environments, the duty to act in good faith and the duty of care are colored in, amongst others, by the indirect horizontal effect of human rights. Where, in this sense, human rights should be respected within a virtual environment, the question remains how and to what extent a participant in such environment –and possibly other individuals and groups outside of the virtual environment– can uphold such rights, either by acting against another participant in the virtual world, or against it’s operator. In the following paragraphs, the possibilities for legal actions are discussed for two human rights that often play a role in virtual environments: the freedom of expression, and the right not to be discriminated against. (And, for the avoidance of doubt, it always regards the direct protection of the human rights of natural persons; their on-line personae have no rights.)

3 Freedom of Expression Applied to Virtual Worlds

3.1 In-Game Expressions: Some Examples

Within virtual environments there are a number of options to express one’s view via one’s in-world (or in-game) character. Especially in environments with a visual interface, the ways are myriad. Chat or voice communication is one, but one may also put up images in a virtual environment (cf. to a BBS posting with an attachment) or publish an in-world newsletter. If one participant finds such expression illegal, he or she may complain to the moderator (or Game Master in the case of a game) as the first point of contact, acting on behalf of the operator of the environment.⁸ The moderator can then proceed to remove the expression and/or deny the player in question access to the world, either temporarily or permanently.

3.2 Normative Framework

I believe that, in deciding whether to remove a particular expression, and possibly a player, from the virtual world, an operator (and, initially, the moderator), has to meet the standard of care that normally applies to all private actions.⁹ Because of the above-mentioned coloring-in of the standard of care by human rights norms, it is the operator who has to weigh the importance of freedom of expression of the participant, as expressed through his or her in-world persona, against the interest of the party or parties that the operator is seeking to protect, and against the private interests of the

⁸ Automated filtering through blacklists is disregarded here, although a point may be made that this amounts to preliminary censorship. However, the same counter-point made elsewhere in the paper applies here as well: the virtual environment is a private one.

⁹ The liability exemptions for ISPs (*mere conduit, caching and hosting*) from the EU eCommerce Directive (*Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market*, OJ L 178, 17.7.2000) most likely do not apply here, whereas it is uncertain that the service that the operator provides is an ‘information society service’ (“any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”) under the Directive since it regards information that the participant wants to provide *through* the infrastructure of the operator, like a telephone service almost.

operator. The later interest can be, for example, the interest to protect the good operation or atmosphere of the world, which may include an interest to act against in-game discrimination.

3.3 Possible Actions

If the operator does not correctly apply the above-mentioned standard of care, the removal of (an expression of) a participant from the world, the participant whose freedom of expression within the environment is limited may possibly have an action (based on tort) against the operator. What is then the (unwritten) standard of care that the operator must apply here? The obligation not to limit unnecessarily another person's freedom of expression follows from the (indirect) horizontal effect of the human right of freedom of expression. This standard is likely set less high than IRL, because of the *closed nature* of the virtual world, and because of the participant, more often than not, having accepted terms of use. Consequently, because of the closed nature of a virtual environment it is possible that more is allowed in-world than IRL. However, the converse may also hold true: if the virtual environment knows a setting more utopian than ours, the standard may be that less is allowed.

In addition, where the participant has agreed to Terms of Use, these terms often contain certain provisions on what type of behavior is and is not allowed. These terms, and any restrictions they may contain, naturally vary from environment to environment. It is entirely possible that a set of Terms of Use contains no provisions on limiting expressions within the environment. If this is the case, it can be argued that a participant would not expect a limitation of his or her expression to be done lightheartedly. It bears notice here that many Terms of Use contain catch-all provisions that allow the operator a wide discretionary power vis-à-vis the participant, including the power to remove certain in-world expressions and the power to correct certain behavior, for example by removing the participant from the world.¹⁰

Because of the above, and because of the relatively weak (indirect) effect of human rights in a "horizontal" relationship between private parties, it can be argued that the operator has a large discretionary space in taking the decision whether or not to limit the freedom of expression of a virtual environment participant.¹¹

If a participant would begin a tort action against the operator, on the basis of the operator acting as censor, a Dutch court can be expected to balance the interests of the participant to express his or her views freely against the interests of the operator to

¹⁰ For example, the *User Agreement of Sims Online* from Electronic Arts (<http://www.ea.com/official/thesims/thesimsonline/us/nai/info.html>) contains the provision that: "[Electronic Arts] reserves the right to terminate the Sims Online service after 90 days notice." Whether such terms are enforceable under consumer law is a question that falls outside the scope of this paper.

¹¹ See also, the 2008 *Human rights guidelines for online games providers* of the Council of Europe (H/Inf (2008) 8) in which the Council remarks, in connection with removing gamer-generated content, that "Acting without first checking and verifying may be considered as an interference with legal content and with the rights and freedoms of those gamers creating and communicating such content, in particular the right to freedom of expression and information", pp. 6-7.

run the environment.¹² This balancing takes as a background the applicable standards of care for the operator. My assessment is that this balancing by the court—because of the relatively weak requirement on the operator alone, and the unique characteristics of a virtual environment that make the indirect horizontal effect weaker still—will not easily fall in favor of the participant. Consequently, I consider the likelihood of success of a tort action by a participant in a virtual world against an operator for cause of the operator limiting the in-world freedom of expression, to be very small.

4 Freedom from Discrimination as Applied to Virtual Environments

4.1 In-Game Discrimination: Some Examples

The most obvious way to be discriminated against in a virtual environment, is by a discriminatory expression of another player.¹³ However, it can also occur in other ways, as the following examples illustrate.

For example, back in early 2006, in the MMORPG *World of Warcraft* Chinese-speaking players were discriminated against, as (groups of) North American players saw *all* Chinese-speaking players as gold farmers, who corrupted the game and their in-game experience.¹⁴ The discriminating behavior by the English-speaking players to the non-English speaking players consisted notably of making discriminatory comments and of not allowing the non-English speakers to join existing groups (*guilds*). In this case, discrimination on the basis of language resulted in discriminatory acts and exclusion from a group.

To give another example of discrimination in a game. In the MMORPG *A Tale in the Desert*—which is set in the Egypt of old— a number of players had created a NPC (*Non-Player Character*, a kind of chatbot or intelligent agent) that did not sell in-game items to female characters.¹⁵ An interesting detail is that it was the developers

¹² See also, ECHR, *Appleby and others v. United Kingdom*. 6 May 2003, where Appleby and others protested against them not being able to express their views inside of a privately owned shopping mall. In *Appleby*, the Court, in an *obiter dictum*, considered that: “While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, The Court is not persuaded that this requires the automatic creation of rights of entry to private property [...]” Where [...] the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights.” (Par. 47.) The property rights concerned in our case would be those of the operator to its infrastructure.

¹³ For the avoidance of doubt, it is the discrimination of a natural person that is discussed here; discrimination of an online character (*avatar*) is *not* possible.

¹⁴ http://www.eurogamer.net/article.php?article_id=62493; see also http://www.pressbox.co.uk/detailed/Internet/Discrimination_Surfaces_in_World_of_Warcraft_49114.html.

¹⁵ See, for example, Daniel Terdiman, *Wired*, 3 November 2004, <http://www.wired.com/news/games/0,2101,65532,00.html>.

themselves who had made the NPC.¹⁶ An example of what normally amounts to discriminatory behavior being acceptable since it is in a virtual world and follows the story-line of such world? Also striking here was that the Terms of Use of *A Tale in the Dessert* allow this kind of behavior, or at least do not prohibit it.

4.2 Concept Definition

When is there in-world discrimination? Before answering this question, it should be noted that within those virtual environments that allow participants to choose a visual representation of themselves, participants do not always choose a representation (or *avatar*) that shares the same characteristics as themselves. Young, male players can choose an older female avatar, and *vice versa*. If there are elements of play, it may be attractive and interesting to role-play as someone else. This may mean that what in-world looks like discrimination, isn't IRL.¹⁷ Conversely, it can also happen that a participant, without the intent to discriminate directly against another participant in the same environment, on the basis of a characteristic that the discriminated participant does not share with his or her in-world persona. Although such a situation is interesting from a sociological point of view, it is less so from a legal point of view: after all, the actual participant should be considered here, regardless of the characteristics of his or her in-world.

It is also interesting to note here that discrimination within a virtual environment may have an outside effect IRL. The breadth and scope of this effect will be different between different virtual environments, depending on, for example, the accessibility and persistent nature of the information in question.

4.3 Possible Actions

If we confine ourselves to the participants (or third parties outside of the virtual environment) who are discriminated against: who can they take action against? First, there is a possible action against the discriminating participant. Second, the participant may have an action against the operator of the world if the operator –on request or of own volition– does not promptly and adequately remove a discriminatory expression or discriminating participant from the world. Third, the discriminated participant may have an action against the operator to retrieve name and address records for the discriminating participant, if such data is not already known to the requesting participant by other means, such as the participant him- or herself having previously shared such information in-world.¹⁸

The first mentioned action, although relevant for society, is not any different between the context of a virtual environment and any other case of discrimination between citizens IRL.

What about the second action mentioned? For an action against the operator, where the participant asks for an expression to be removed from the environment the

¹⁶ *Id.* “But the trader was actually a non-player character controlled by the developers to intentionally start a controversy in a virtual world they feel is sometimes too polite.”

¹⁷ Under Dutch penal law, for example, intent on discrimination of a specific individual is not an element. (See Articles 90quater and 137c Dutch Penal Code.)

¹⁸ The latter action is not further discussed in this paper.

question is whether a given expression is of an illegal or manifestly unlawful nature; an assessment that is never 100% sure. If an expression is clearly unlawful, and the operator does not move promptly to remove it, the operator can be held liable. The assessment by the operator of an expression being either lawful or illegal is very fact-dependent, and includes an assessment of the importance of free expression for the participant who made the contentious expression. If a participant's request to remove information is not honored by the operator, and it comes to a court case, the Dutch court will make the same type of assessment as the operator made before, containing the same elements, and performing the same balancing analysis.

Similarly, if a request is made to remove the discriminating participant from the world, for example in the case of repeated behavior. Here also, the operator, and ultimately the courts, will have to balance the importance of freedom from discrimination against the other competing interests, of the discriminating participants, other participants, the operator itself, and society outside of the virtual environment.

5 Conclusion

In conclusion, human rights do apply in virtual environments but their normally already limited effect on legal relationships between private parties is further lessened by mainly three important characteristics of virtual environments. First, such environments are private worlds, where they are almost always operated by private parties, and there is an amount of private ordering that occurs. Second, such environments are semi-private worlds where what happens in the world becomes not always (widely) known outside of the world. Third, elements of play within such environments may mean that participants are not always who they seem they are, and that actions from participants should not always be taken literal.