

# Overview of the Legal Issues in Virtual Worlds

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**Abstract.** The following paper contains a summary and brief assessment of the legal problems that may arise in virtual worlds. The results presented herein were gained during the legal research in order to establish a virtual world platform named VirtualLife. Virtual Life is an FP7 ICT research project conveyed by the EU. The project aims to provide an immersive and secure environment, combining a high quality 3D virtual experience with the trustiness of a secure communication infrastructure based on a peer-to-peer architecture. The paper cannot provide a comprehensive solution to all problems, but has to be seen as a basic overview of the legal aspects of virtual worlds. The ultimate answer to any legal problem will hinge on the exact scenario and therefore be subject to the law of the individually competent legal system and the deciding court.

**Keywords:** Virtual worlds' legal issues, virtual world property, user evaluation systems, data protection, copyright, trademarks, advertising, liability, online dispute resolution (ODR).

## 1 Introduction

Although the user takes part in a Virtual World by controlling an image of himself, the *Avatar*, which therefore is the only way the user gets in touch with other users, the only legal subject in a virtual world environment itself is the user who registers to this world, while the Avatar would simply be regarded as the means the user acts through.

The applicable law in virtual worlds differs depending on which relationship between the involved parties (i.e. user, provider of the software, service provider) is affected. All these parties first of all fall under the jurisdiction of a certain state whose law applies to the respective relationship. This state is defined by national and international rules of conflict of laws. Further customization of the virtual platform's legal framework is possible by means of contractual agreements [1].

## 2 Virtual World Property

The issue of virtual world users reclaiming virtual world property also in the real world may be decided on the contractual agreements between the software company and the user, real world criminal [2] or intellectual property law. This legal framework does not offer complete protection, e.g. protection by copyright requires a certain level of creativity or originality. Having property in virtual items would give

users an absolute rather than a mere contractual right, which would be effective against everyone not only the contractual partner and which does not hinge on the requirements of the aforementioned framework. However, the grant of protection will eventually hinge on national law and on the type of virtual item in question, as the different national legal systems have different requirements regarding definition of property and regarding the scope of protected objects. There are sufficient justifications to recognize property rights in virtual items: Virtual world property already is a real life commodity. Non-recognition would lead to an artificial restraint on the transference of wealth between real and virtual worlds and may prevent the production of further virtual property since people want to be rewarded for the labour and effort they have invested irrespective of existing intellectual property rights in the object.

Up to now, courts, users and software companies still have to rely on privately enforceable contractual agreements between software companies and consumers, law of contracts and intellectual property laws.

### 3 User Evaluation Systems

Social interaction depends on the development of ongoing relationships of trust which is formed through iterative interaction that gives rise to shared values and norms. Specifically reputation is a marker of this trust [3]. Hence evaluation systems are an essential feature of a platform with the exclusive use of electronic means such as a virtual world as they are the only possibility to gain trust without personal interaction.

From a legal point of view the feedback on a transaction with another user gives rise to the issues of the freedom of expression as opposed to the right to the protection of one's personality. The granting of a court order for a feedback removal will primarily depend on the result of the balancing of these legal guarantees in the individual case. Only if the plaintiff's personal rights outweigh the defendant's right to express his opinion, the court will order the removal from the feedback profile.

To be protected by the user's right of freedom of expression usually the feedback must not be false or reach a degree of abusive criticism which qualifies it as defamation. The individual decision may differ from jurisdiction to jurisdiction. Not only does it depend on the individual wording of the comments and the context of the case, but also on the weighting of those rights by the constitution and the case law in the competent jurisdiction.

### 4 Data Protection

To achieve trust in one's contractual partner not only the aforementioned user evaluation systems but also authentication methods have to be implemented.

These methods will to some extent involve the collection of information concerning the individual, who at the same time has the right of "informational self-determination", i.e. the right to have a say in how data relating to oneself are processed by others. Data protection is regarded as a fundamental human right in Europe [4]. The legal requirements for data processing hinge on the concrete scenarios as well as on the respective law in force. Legal requirements will be stated by the applicable national law of a

certain state as well as by international regulations such as the Data Protection Directive of the European Community [5] respectively its transformation into national law.

## 5 Copyright Issues in Virtual Worlds

Content provided by users in virtual worlds can be divided into two categories. First, there are items created for the virtual world itself, such as the user's Avatar and virtual items like buildings or clothing. Secondly there may be content that exists independent of the software but is communicated via the means of the virtual world, e.g. videos, photos, music or narratives posted on discussion boards.

### 5.1 Legal Framework

Copyright law has developed nationally and is founded on very different concepts and justifications for protection.

**Protection Criteria.** To qualify for protection, a work has to meet several requirements as to form, content and status. Following from the idea/expression concept the mere idea behind a work is not protected. Laws require that the work must have a certain form, i.e. a perceptible expression [6], in the case of literary works by an expression in words. The criterion of content comprises two aspects: First, it concerns the particular subject matter. National laws may have exhaustive (usually the common law countries) or non-exhaustive (the civil law countries) lists of protected subject matter. Secondly, it is generally accepted that a work must be classified as original or creative. Protection further depends on the status of the author, i.e. his nationality or place of residence, or the status of the work, i.e. its place of publication.

**Beneficiaries of Protection.** Beneficiaries of protection are those persons the laws on copyright indicate as the person in favour of whom the rights are granted, or by whom rights may be exercised.

**Objects of Protection.** The software, the virtual world's (game) concept, and its multimedia representation in the form of graphics and sound may merit copyright protection. So, the developers of a platform will only be afforded protection of the platform software, not of the user-generated content.

In detail, object of protection can be the audiovisual representation that may be protected as computer program or as film. Protection as computer program requires that the interfaces lie within the scope of the applicable law. Regarding the protection as film the design of a virtual world platform will meet the defining factor of creating the impression of a moving image. Traditionally however, films constituted a closed system where scenes, actions and dramatic development could not be altered. Therefore protection as film must not be limited only to unalterable sequences of images as a virtual world does not predefine certain alternative actions. It rather is the users who make distinct contributions by individual decisions that influence the scenes and development. There is also little to no creative input on the part of the software developer regarding the dramatic development. Nonetheless, a scene that takes place in a virtual world once recorded will be protected under copyright law as moving image, if the applicable law offers protection for this kind of work at all.

As copyright does not protect ideas but only the expression of an idea it likely does not protect the concept of virtual worlds as a platform for users to interact.

## 5.2 Eligibility for Protection of In-World Created Items

**Avatar.** The visual depiction as seen by other Avatars interacting with the user and the unique person of an Avatar may fulfil the requirements of copyright protection.

It may generally fulfil the criterion of originality or creativity as it is the aspiration of the user to design his Avatar as individual as possible to be recognizable. This will only be achieved by investing at least a certain amount of labour, skill and judgment and creativity respectively. In jurisdictions with a closed list of protected subject matter the visual depiction has to meet this list. If the Avatar's unique persona, i.e. the Avatar's features of appearance, speech or moral attitude has become exceptionally distinctive, it may enjoy protection – though only in some jurisdictions.

Protection in common law countries is likely to fail since there is no category of work that would embrace an Avatar's visual depiction or his persona [7]. If protection is available, in light of the creation process and the aforementioned justifications for copyright the beneficiaries of protection are the users.

**Virtual Items.** Furthermore virtual items created by users of virtual worlds may fulfil the requirements for copyright protection. First, they should qualify as “artistic” works, even if artistic is defined rigidly requiring a distinctive element of aesthetic creativity not only investing labour and capital. Secondly, they may show the required level of creativity/originality which would be questionable regarding the representation of a real-world object. Thirdly, a certain fixation, if required by the law applicable, is given the moment text, pictures etc. are electronically incorporated in the random access memory or hard disk of a computer or server [8]. As it is the user that created the Avatar or virtual item he should be the initial beneficiary of protection.

## 5.3 Copyright Infringements and Exploitation of Rights

Copyright infringements will in particular surface by unauthorized use of copyrighted material, e.g. virtual items may be copied without authorization and traditional media content such as audio and video clips and photographs may be made available without the rightowner's authorisation. To minimize litigation from the outset EULAs [9] of providers of a virtual world may contain provisions addressing the question of use of copyright works in the virtual world. Additionally the graphical user interface could provide an easy to understand licensing system, maybe based on the CC [10] licenses, that enables users to share their creations with other users.

# 6 Trademark Issues in Virtual Worlds

As companies like Toyota, Dell and Reebok have opened virtual outlets in the virtual world Second Life [11], trademark issues will come to virtual worlds as well as purely “in-world” trademarks will be created and may receive substantial profits. Furthermore, content creators in virtual worlds may use real-world trademarks for their virtual products, with or without the real-world trademark owner's authorization. In this

context, all of the attendant concerns of brand reputation and disparagement will be present in this new medium just as they are in the real world.

## 6.1 Protection of In-World Trademarks

There are three basic justifications for offering legal protection of trademarks, which relate to the different economic functions of a trademark [12]. First is to guarantee origin, i.e. it operates as an indicator of the trade source from which goods or services come thus enabling customers to easily distinguish between different goods and products. Secondly, trademarks perform an investment or advertising function since they are symbols around which investment in the promotion of a product is built. Thirdly, it is said that trademarks should be protected as manifestations of creativity.

In-world trademarks in principle fulfil the requirements for protection as well as they are not excluded from protection from the outset. So even an Avatar's name and likeness as such are registrable, just as their real-world counterparts are.

## 6.2 Protection against Virtual Knock Offs

Besides the classical type of infringement where a user uses a real-world trademark on virtual items users could apply the trademark to other virtual items the trademark owner usually is not associated with. In general infringements for example require using a trademark for which registration is sought identical or similar to an earlier registered trademark.

These infringements in the virtual world can only be qualified as infringements also in the real world or another virtual world if one does not have to distinguish between these worlds. Since users may participate in different virtual worlds the border between these worlds will as well be blurred as the border to the real world as the virtual world has developed to a platform for transactions and interactions which also affects the real world. Therefore it seems indispensable to consider other virtual worlds as well as the real world when examining a trademark infringement [13].

As concerned the identity or similarity of signs, the same considerations as in the context of real-world trademarks have to be made. Thus there are no particularities regarding virtual worlds. Determining the identity or similarity of goods or services may be more of a contentious issue. With regards to goods, in most cases it will be very difficult to talk about identity in virtual worlds. Avatar clothes are definitely not identical to real clothes and a virtual vehicle is not identical to a real car [14]. It also seems difficult to establish similarity of goods unless the judge is willing to accept the argument that driving a car in the virtual world is the same as driving the car in the real world. The products do not compete with each other. Rather, the sale of a t-shirt effectively is the provision of a service consisting of the creation of code that displays the t-shirt on the Avatar. Claims for trademark infringement may thus fall short of identity or similarity of goods. By way of contrast, services may as well be identical.

Assuming that the goods or services were similar and the marks were similar, it is questionable whether there is a likelihood of confusion, as the average user would have to be likely to assume a material trade link between the goods or services offered in virtual worlds and the real-world trademark owner. On the one hand, it is not common yet for trademark owners to establish some presence in virtual worlds. Hence

there will be no confusion. On the other, if a trademark owner had opened a business in the virtual world, it seems that the assessment would have to be different. The use of an identical or similar sign will further infringe an earlier trademark where the use of the sign would take unfair advantage of or would be detrimental to the distinctive character or the repute of an earlier registered trademark. Anyway, all of the infringement cases require the use in the course of trade.

Apart from trademark law, a real-world trademark owner could further try to invoke national unfair competition law to protect his mark against virtual knockoffs.

## **7 Advertising in Virtual Worlds**

To reach customers offerors need advertisement to make products known. Similarly to the rising market of in-game advertising it can be expected that advertising in virtual worlds will be a market of the same scale, as a virtual world combines the possibilities of a realistic “game-graphic” with the possibilities of a social network – the options of digital and real life.

### **7.1 Possible Types of Advertising**

Comparing the advertising opportunities in virtual worlds to in-game advertising, advertisements are generally divided into three general types, namely static advertisement, dynamic advertisement and product placement [15]. Additionally, as a fourth type the so-called multi dynamic advertisement is particular to virtual worlds.

Static advertisement is firmly incorporated in the source code. So each user will see the same advert. In dynamic advertising the content of advertising space changes dynamically. It could be individualised depending on the Avatar “looking at” the advert. Additionally, product placement is likely to be heavily used in virtual worlds as an Avatar might be able to dress himself in clothes of a specific brand. Multi dynamic advertising offers the possibility to create advertisement that will not only change by time or user, but also by place or a user’s movements in the virtual world.

### **7.2 Legal Assessment**

There is no particular law regulating advertising in virtual worlds but restrictions extend from other fields of law into them. These particularly are restrictions on unfair commercial practices, restrictions resulting from data protection law or the laws on the protection of minors, restrictions based on the regulation of audiovisual media services, restrictions relating to specific products such as intoxicants, and limitations following from third parties rights such as trademarks.

If the applicable law does not contain any constraints regarding its scope, virtual world advertisements thus have to meet the same obligations as in the real world taking into account the particularities of experiencing a virtual world.

## **8 Provider Liability for User-Generated Content**

Virtual worlds are used to distribute user-generated content like videos, photos, music, book reviews or personal narratives. This, however, may infringe other content

providers' rights or community sensibilities in many ways. For instance, it could infringe copyright or trademarks, it could be an act of unfair competition or it could amount to defamation. Generally, the user will be liable for his infringements. Because of the anonymous structure of the Internet it may be difficult to determine the user who had uploaded the material and, even then, any effort to claim substantial damages may be failed by their lack of sufficient assets. More importantly, an action against the originator is unlikely to prevent further dissemination of the content as another user may post it again. So, the question of liability of third parties providing the infrastructure the users interact in, i.e. intermediary service providers, arises.

To translate this into a virtual world, it is not only the provider of the software but also other service providers, including the user's individual Internet access provider, the host providers and other service providers that provide virtual environments in which Avatars meet without actually storing data for their user. These third parties could be held liable to remove user-generated content, to cease and desist the distribution of such and to pay damages.

As access providers offer mere conduit services their responsibility for unlawful material is rather limited. Anyhow, parties have generally tried to obtain injunctions to block or remove illicit content.

The provider of software does not qualify as a provider of mere conduit service since he only provides the tool with the assistance of which users can initiate a transmission within an already existing network [16]. Therefore, he will only be held liable for illicit content, if it is sufficient by the law applicable to provide the software in the absence of which an infringement would not be possible at all. Thus providing software may qualify as inducement, contribution or may lead to secondary liability for interferences. Though it has to be taken into account that a virtual world software is generally intended to be used for lawful purposes.

Host providers offer the creation and maintenance of server space as well as the organisation of content. Their immunity from liability for third party content therefore hinges on whether they have constructive knowledge of the infringing act and, if so, react expeditiously to remove it.

Summing up, the question whether a virtual world service provider is liable for unlawful acts by his users depends on the service in question and on the courts' construction of the national implementation of immunities of the E-Commerce Directive.

## **9 Dispute Resolution in Virtual Worlds**

As a virtual world platform offers the possibility to let important transactions happen it also provides a platform to solve disputes that may arise from these transactions or do not even have such a connection at all. As it will be assessed a virtual world platform combines all the advantages of Alternative Dispute Resolution (ADR) and combines it furthermore with the advantages of modern communication technologies. Therefore it is almost predestinated being a means to solve legal disputes.

### **9.1 Online Dispute Resolution**

**Introduction and Terminology.** Alternative Dispute Resolution (ADR) refers to processes other than judicial determination in which an impartial person assists those

in a dispute in order to resolve the issues between them. Its characteristic feature can thus be described as providing a platform for the settlement of legal disputes outside the traditional bodies of the State's judicial system. ADR avoids the problem of the increasing caseload of traditional courts, imposes fewer costs than traditional litigation before state courts and meets the preference for confidentiality and the desire of having greater control over the selection of the person who will decide their dispute.

Online ADR refers to ADR processes assisted by information technology, particularly the Internet. Therefore it is often seen as being the online equivalent of ADR for which ODR (Online Dispute Resolution) has emerged as the preferred term.

**Methods and Advantages of ODR.** ODR combines the benefits from ADR and the new information technologies. It significantly reduces the transaction costs of dispute resolution as there is no need for the parties to convene in a particular location and present evidence in written form. Lengthy documents can be sent as e-mail attachments, thereby avoiding copying fees as well as facsimile and/or postal charges [17]. There are no additional costs from the payment of human thirds [18]. ODR is accessible twenty-four hours a day, seven days a week around the world. This helps to eliminate scheduling conflicts and potential problems with time zone discrepancies. As a result, the dispute will be resolved much faster. Using e-mail, discussion groups and Web sites, agreements can be written, posted and responded to when convenient.

**Risks of ODR.** In essence, three risks have been identified that will particularly arise from the use of information technologies for the purpose of settling conflicts: Confidentiality, transparency and authenticity.

The principle of confidentiality requires the parties and the arbitrator not to reveal information and documents related to the case, and not to disclose the final agreement. The parties involved in the dispute need to be sure that the virtual arbitration body they are dealing with is trustworthy and completely impartial.

As the evidence is submitted electronically by the parties, ODR largely relies on a further development towards more advanced electronic authentication methods to proof the authenticity of a document.

## 9.2 Legal Aspects

Legal issues in the context of ADR/ODR primarily concern the validity of ADR clauses, the suspension of limitation periods and the enforceability of arbitral results.

As regards the enforceability of the result it is crucial to keep in mind it is nothing but a contract between the parties at dispute. Thus, non-compliance of the settlement agreement constitutes a breach of contract, which would have to be pursued before a traditional court as well as the judgment would have to be enforced [19]. Additionally the validity of the ADR clause itself may be questionable, i.e. if the parties can reach a valid agreement as to use ADR to solve their disputes outside traditional courts.

## 10 Conclusions

As every lawsuit differs in its facts from other lawsuits, the legal assessment does so as well. Therefore, regarding the legal issues of virtual worlds, it is only possible to



determine which problems may occur and which law may provide the solution to these problems. The final assessment is up to the national courts. While trying to anticipate these decisions, it has to be taken into account how the environment of a virtual world affects the legal assessment of a lawsuit. Most of the legal problems that may arise in virtual worlds are known from the real world. Examining possible copyright protection of virtual items, for example, does not differ from examining a real world item as both have to fulfil the same criteria of protection. Besides most of these differences just result from the new form of interaction a virtual world offers, which therefore has to be subsumed under common scenarios the current law addresses.

Besides, virtual worlds offer new possibilities of interaction whose risks have to be taken into account.

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