

2008

Avatars: a right to privacy or a right to publicity?

Angela Adrian
Bournemouth University

Publication details

Post-print of: Adrian, A 2008, 'Avatars: a right to privacy or a right to publicity?', *International Journal of Intellectual Property Management*, vol. 2, no. 3, pp. 253-260.

Published version available from:

<http://dx.doi.org/10.1504/IJIPM.2008.021139>

ePublications@SCU is an electronic repository administered by Southern Cross University Library. Its goal is to capture and preserve the intellectual output of Southern Cross University authors and researchers, and to increase visibility and impact through open access to researchers around the world. For further information please contact epubs@scu.edu.au.

Avatars: a right to privacy or a right to publicity?

Angela Adrian
Robert Gordon University
E-mail: attorneyangel@hotmail.com

Abstract: ‘Virtual world’ identities are becoming indistinguishable from ‘real’ identities, just as ‘e-commerce’ became indistinguishable from ‘commerce’. The problem of the appropriation of personality tends to be associated with ‘character merchandising’, with a fine line drawn between real people and fictitious characters. The control over online avatar identities has begun to have many real-world consequences.

Introduction

E-commerce is the buying and selling of goods and services over the internet. Virtual worlds, such as Second Life, are thriving meccas of e-commerce because they have invented a much more appealing way to use the internet: through an avatar (Morningstar and Farmer, 1991).² This avatar can be completely customised and is designed mainly for social interaction (Lastowka and Hunter, 2004). Ordinary people, who are bored and frustrated by regular e-commerce, participate vigorously and passionately in avatar-based online markets. Hence, e-commerce has evolved into the compelling story about individuals and businesses recreating themselves and extending their identities into cyberspace. (Gautier, 1999) One of the most compelling stories is of Anshe Chung, first self-proclaimed millionaire in Second Life.³ Anshe Chung Studios (2008) has offices in the real world which employs more than 80 people full time as well as a huge network of virtual reality freelancers worldwide. The company looks after thousands of residents in 12 gated communities over more than 40 square kilometres in Second Life.³

The designing of enjoyable avatars and virtual worlds is complex and somewhat byzantine. The readiness to pay for participation in a shared virtual reality environment is conditional upon the emotional experiences that the environment provides which, in turn, is a function of the attributes a player is permitted to have, as well as the player’s inherent non-physical attributes and the attributes of the environment itself. The virtual world builders control the coding authority, and the coding authority can make the virtual world into absolutely anything that the mind can imagine.⁴

Avatars have become something that is valuable and persistent. As such, perhaps there is a need to associate rights and duties with it. What will those rights be? And what will be the law of online identity to which those rights apply? Koster (2000) has drawn up a Declaration of the Rights of Avatar: “Foremost among these rights is the right to be treated as people and not as disembodied, meaningless, soulless puppets. Inherent in this right are therefore the natural and inalienable rights of man. These rights are liberty, property, security, and resistance to oppression.”

Anshe Chung Studios has developed more virtual property than any other Metaverse development company. As such, she is well-liked by many and a wonderful target for others. In December, Anshe was being interviewed by CNET reporter Daniel Terdiman when a group of grievers staged an assault on the proceedings by raining down a torrent of pixelated male genitals (Hutcheon, 2006). The rights of her avatar, according to the Declaration, had been violated.

Identity and reputation

Avatars “are much more than a few bytes of computer data – they are cyborgs, a manifestation of the Self beyond the realms of the physical, existing in a space where identity is self-defined rather than preordained” (Reid, 2005). Identity is not merely a set of facts: name, location, employment, position, age, gender, or merely certain online behaviours. In *The Presentation of Self in Everyday Life*, the concept of identity as a series of performances in which ‘impression management’ was used to portray ourselves appropriately in different environments was suggested (Goffman, 1959). Some part of identity is controlled by the individual, but most of identity is created by the world in which that individual operates. We can think of identity as a streaming picture of a life within a particular context. Each of us has multiple identities (Clarke, 1994).⁵ The role of groups in shaping ‘real life’ identities is implicit, as is the multiplicity of ‘real life’ identity. What is interesting and new about virtual worlds is that they make this group-shaping explicit and multiplicity of identity actionable.

So what can the group do when an identity is threatened? Should the group be able to take action when a personality is harassed in an inappropriate manner? “The most common ‘griever counter-measure’ is to put in place a strong community system”, says Davis of IT GlobalSecure, a firm that specialises in developing security technologies for online games. These community services provide clan features, friends’ lists, reputation stats, and other features both to tie players more closely to the game and create an environment that reduces anonymity for misbehaving players. Increasingly, the solution to griefing is not simply to ban nuisance players, but to encourage the development of virtual societies capable of dealing with their own virtual crimes (Davies, 2006).

Appropriation of personality

The problem of appropriation of personality tends to be associated with ‘character merchandising’ with a fine line drawn between real people and fictitious characters. This has also been described as ‘personality merchandising’. Character merchandising is a broad term covering a variety of activities which may have a range of underlying rights like copyright, trade mark or business goodwill (Ruijsenaars, 1994). They do not apply to human beings because they are not ‘characters’ as such. However, avatars are blend of a ‘real’ human being’s image and an image which is based upon some degree of original creativity or investment on the part of the creator.

The central problem that emerges lays in reconciling economic and dignitary aspects of personality within a cause of action. Beverley-Smith (2002) detailed a scheme in which the main interests that would be damaged by appropriation could be divided and more easily understood.

- Economic interests

- 1 existing trading or licensing interests
- 2 other intangible recognition values.

- Dignitary interests
 - 1 interests in reputation
 - 2 interests in personal privacy
 - 3 interests in freedom from mental distress (Beverley-Smith, 2002).

The first actions developed primarily protected dignitary interests rather than economic interests. Thus, the right of privacy was developed before the right of publicity. Personal dignity was deemed of more importance but was harder to define. The extent and precise form of protection tends to differ greatly around the world. At first, most legal systems would give priority to claims for physical injury. But as societies evolved, claimants began to demand redress for other kinds of harm. Interests in reputation or personal honour, personal privacy, and interests in freedom from mental distress became more important.

English law does not use the Roman concept of *injuria*, which would mean insult or outrage if directly translated. The Roman idea 'embraced any contumelious disregard of another's rights of personality' (Nicholas, 1962). In the absence of such a notion, the English gave limited recognition to non-economic or dignitary interests. Recovery for invasion of interests such as privacy and freedom from mental distress thus has been achieved parasitically by relying of judicial interpretation of other torts such as defamation and trespass where other substantive interest such as reputation, property or interests in the physical person have been affected (Beverley-Smith et al., 2005).

In the USA, the right to privacy was developed in an article by Warren and Brandeis (1890), who derived the concept of a right of privacy from the English case, *Albert v Strange*, 1 McN. and G. 23.43 (1849). They borrowed the term 'privacy' to describe their concern with media intrusion into the affairs of private citizens. Essentially, the article defended the individual's 'right to be let alone' arguing that the common law allowed every individual the right to determine the extent and manner in which his thoughts might be communicated. A right held irrespective of the method of expression adopted, the nature or value of the thought or emotion, or the quality of the means of expression (Warren and Brandeis, 1890). By way of analogy, they looked at the protection provided by common law copyright and determined that private thoughts and actions were entitled to some similar protection (Warren and Brandeis, 1890).

This right of privacy was a natural development, evolving as a logical application of common law principles to new developments. They concluded that common law was initially created to protect property and life from physical injury. Warren and Brandeis then noted that as legal systems began to recognise the spiritual nature of human beings, the common law expanded to include that protection of intangible possessions and non-physical injuries through laws such as assault, nuisance, libel and slander (Warren and Brandeis, 1890). Warren and Brandeis examined the common law to see if it afforded protection to those individuals 'victimised' by new technologies. Thus, the law could be invoked to protect the privacy of the individual from invasion by the over-intrusive press, by photographers or by the use of modern devices for recording and reproducing scenes or sounds. Such protection was not just for conscious

products of labour, but also for the person and one's personality (Warren and Brandeis, 1890; see also, Madow, 1993).

On the other hand, British courts have been reluctant in creating monopoly rights in nebulous concepts such as names, likenesses or popularity (Earlier cases were concerned with honour and reputation, see *Lord Byron v Johnston* (1816) 2. Mer. 29; *Clarke v Freeman* (1843) 12 Jur. 149; *Routh v Webster* (1847) 10 Beav. 561). As early as in *du Boulay v du Boulay*, (1869) L.R. 2 430 PC, a court stated that the use of another's name is a grievance for which English law affords no redress. English law has never moved towards creating rights in a name per se (see for example *Earl Cowley v Countess Cowley* [1901] A.C. 450). In line with this doctrine, protection for other personality features such as likeness, voice, distinctive clothes, etc., or a more general right of publicity has constantly been rejected: first in *Tolley v Fry*, [1931] A.C. 333, then in *McCulloch v May*, (1948) 65 R.P.C. 58, through various celebrity merchandising cases in the seventies, (*Wombles v Wombles Skips Ltd* [1977] R.P.C. 99; *Taverner Rutledge Ltd. v Trexapalm Ltd* [1975] F.S.R. 479; *Lyngstad v Annabas* [1977] F.S.R. 62.). The Whitford Committee considered integrating 'character rights' for fictional characters into the Copyright Act but concluded that they would fit better within an unfair competition law, Cmnd. 6732 HMSO, 1976–1977, para. 909 in 1977. Then in *Elvis Presley Enterprises Inc. v Sid Shaw Elvisly Yours*, [1999] R.P.C. 567, the courts appeared to like neither the celebrity nor the merchandising business.

In the absence of privacy, personality or publicity rights, celebrities in the UK are forced to try to seek protection of the business value of their personality or popularity under trade mark, registered design and copyright laws, as well as to attempt to establish an extension of the tort of passing-off and various other torts. The protracted litigation in *Douglas* has provided important clarification on the extent to which breach of confidence can be used to protect privacy (*Douglas v Hello Ltd* [2001] E.M.L.R. 9). Taken with the recent decision of the House of Lords in *Wainwright v The Home Office*, [2003] 3 W.L.R. 1137, it provides a convenient point for assessing just how far the protection of privacy has developed. To say the least, recognition of a post-Human Rights Act 1998 privacy right in English law has been patchy.

In a comprehensive judgement by Lindsay J. in *Douglas*, [2003] 3 All E.R. 996 he held that, because of the exceptional nature of a wedding and the elaborate and expensive security measures adopted by the Douglases, the event was private in nature and that the images of the couple were confidential. The exclusivity deal with OK! was a legitimate and reasonable way to control and limit the press exposure, and resulted in the information becoming a valuable commercial trade secret. He went on to find that subterfuge and surreptitious means had been used in obtaining the photographs. He also found that that the claimants had suffered detriment and damage, including the genuine distress in the realisation that someone had invaded and taken pictures of their wedding ceremony. Other interesting points made in this ruling include the fact that even if the Douglases were public figures who had previously welcomed publicity, the confidentiality of their wedding was still protected. Moreover, the sale by the Douglases of exclusive rights in information to OK! did not affect or reduce the level of protection; nor did the fact that private and confidential photographs were about to be published by OK! reduce protection under the law of confidence (Madow, 1993).

This set of facts is similar to the Anshe Chung's incident and many other grieving incidents in virtual worlds. For example, presidential candidate, Edwards' campaign headquarters in Second Life was vandalised in highly scatological manner. Or another successful entrepreneur called Prokofy Neva in Second Life had her real life photo (of Catherine Fitzpatrick) acquired by a group of greifers who have made her into a sport. One built a giant Easter Island head of Ms. Fitzpatrick spitting out screenshots of her blog. Another incident involved Prokofy teleporting to one of her rental areas to find her own face looking down from a giant airborne image overhead. She described this as "very creepy" (Dibbell, 2008).

Prokofy has complained that she is losing business. Once real money is involved then 'serious business' starts to take place. This, in turn, implies that messing around with it will have legal implications. In Second Life, real money is exchanged for 'fictional currency'. This is the fine line that the organised greifers point too. They declare that Second Life is a game and not to be taken seriously. The developers and most of the population of Second Life do not see it as a game, but as a marketplace. Even to the point of inviting corporations to market virtual versions of their actual products.

In June 2003, the Select Committee on Culture, Media and Sport issued its report concerning privacy and media invasion. The committee concluded:

"On balance, we firmly recommend that the government reconsider its position and bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone – not the press alone – into their private lives. This is necessary to fully satisfy the obligations upon the UK under the European Convention on Human Rights." (Thomson, 2003)

The response of the government was to issue a statement saying that it had no intention of bringing in specific legislation to protect privacy. The government's formal response in early October 2003 was that, that following HRA 1998, the government is content to let the courts deal with the issue:

"The weighing of competing rights in individual cases is the quintessential task of the court, not of government or of parliament. Parliament should only intervene if there are signs that the courts are systemically striking the wrong balance; we believe there are no such signs" (Thomson, 2003).

Regrettably for lawyers, the courts have taken the opposite view. On 16 October 2003, the House of Lords gave judgement in *Wainwright v The Home Office*, [2003] 3 W.L.R. 1137 which was criticised for being too conservative. It should be remembered that it was made with regard to a case brought prior to the implementation of Human Rights Act 1998. The House of Lords refused to hold that there has been a previously unknown tort of invasion of privacy, since 1950 at least. However, Lord Hoffmann appeared to accept that a 'confidential relationship' was no longer necessary to establish a 'breach of confidence' claim (Thomson, 2003).

Neither the government nor the courts are taking responsibility for the protection of privacy. Douglas illustrates that where private information can be described as commercially confidential, substantial damages may be recoverable. In the personal sphere, it seems that any decisive impetus will have to come from Strasbourg. In the meantime, the aspects of the judgements which will receive most attention are the judicial analysis of the interrelationship between privacy and breach of confidence, the question of whether the privacy right has horizontal direct effect, and the interpretation of s.12 of the Human Rights Act.

As Sedley, L.J. noted in Douglas:

“The courts have done what they can, using such legal tools as were to hand, to stop the more outrageous invasions of individuals’ privacy; but they have felt unable to articulate their measures as a discrete principle of law. Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy. The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly, and in any event, the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in Article 8 ... [By] virtue of s.2 and s.6 of the [Human Rights] Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights.” (Sedley L.J., paras 110-1, in *Michael Douglas, Catherine Zeta-Jones, Northern & Shell plc v Hello! Ltd*, [2001]

E.M.L.R. 9, 21 December 2000, CA. [2001] E.M.L.R. 9)

Conclusion

“The junction of the new and the old is not a mere composition of forces, but is a recreation in which the present impulsion gets form and solidity while the old, the ‘stored,’ material is literally revived, given new life and soul through having to meet the new situation. It is this double change that converts an activity into an act of expression. Things in the environment that would otherwise be mere smooth channels or else blind obstructions become means, media. At the same time, things retained from the past experience that would grow stale from routine or inert from lack of use, become coefficients in new adventures and put on raiment of fresh meaning. Here are all the elements needed to define expression.” (Dewey, 1980)

Dewey’s view is that both the subjects our minds engage and what we do with those subjects are the results of personal experience being reworked in the present tense. Because each of us is a unique experiential time line, whatever we produce constitutes personal expression (Dewey, 1980). Each of us is a unique order of experiences and each new creation might somehow be predictable and mechanical while staying beautiful and unique (Dewey, 1980).

Someday virtual world identities will be indistinguishable from 'real' identities – just as 'e-commerce' has become indistinguishable from 'commerce'. Control over online avatar identities will have many real-world consequences, because these clouds of bits may include our credit records, our buddy lists, our job records, personal references and other information regarding reputation, medical histories, certifications and academic transcripts. The rise of these types of difficult problems of choice in cyberspace has nothing to do with the fact that human beings are interacting via avatars in virtual reality; it has everything to do with the fact that they are human beings, interacting.

References

- Anshe Chung Studios (2008) <http://www.anshechung.com/>.
- Beverley-Smith, H. (2002) *The Commercial Appropriation of Personality*, Cambridge Studies in Intellectual Property Rights.
- Beverley-Smith, H., Ohly, A. and Lucas-Schloetter, A. (2005) *Privacy, Property, and Personality: Civil Law Perspectives on Commercial Appropriation*, Cambridge Studies in Intellectual Property Rights.
- Bulkley, K. (2007) Today Second Life, Tomorrow the World, 17 May, <http://www.guardian.co.uk/technology/2007/may/17/media.newmedia2>.
- Clarke, R.A. (1994) 'Human identification in information systems: management challenges and public policy issues', 7 *Information Tech. & People*, Vol. 4, pp.6–37, <http://www.anu.edu.au/people/Roger.Clarke/DV/HumanID.html>.
- Davies, M. (2006) Griefers Don't Want More Grief, 15 June, <http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>.
- Dewey, J. (1980) *Art as Experience*, New York: Perigee Books.
- Dibbell, J. (2008) 'Mutilated furies, flying phalluses: put the blame on griefers, the sociopaths of the virtual world', *Wired Magazine*, 18 January, http://www.wired.com/gaming/virtualworlds/magazine/16-02/mf_goons.
- Gautier, K. (1999) 'Electronic commerce: confronting the legal challenge of building e-identities in cyberspace', 20 *Miss. C.L. Rev.*, 117.
- Goffman, E. (1959) *The Presentation of Self in Everyday Life*, New York: Basic Books.
- Hutcheon, S. (2006) 'Good grief, bad vibes', *Sydney Morning Herald*, 21 December, <http://www.smh.com.au/news/web/good-grief-bad-vibes/2006/12/21/1166290662836.html?page=2>.
- Koster, R. (2000) *The Laws of Online World Design*, <http://www.raphkoster.com/gaming/laws.shtml>.
- Lastowka, G. and Hunter, D. (2004) 'The laws of the virtual world', 92 *Calif. L. Rev.* 1.
- Madow, M. (1993) 'Private ownership of public image: popular culture and publicity rights', 81 *Cal. L. Rev.* 127.
- Morningstar, C. and Farmer, F.R. (1991) 'The lessons of LucasFilm's habitat, in cyberspace: first steps', M. Benedikt (Ed.), <http://www.fudco.com/chip/lessons.html>.
- Nicholas, B.N. (1962) *An Introduction to Roman Law*, Oxford University Press.

- Reid, E. (2005) 'Text-based virtual realities: identity and the cyborg body', <http://www.rochester.edu/College/FS/Publications/ReidIdentity.html>.
- Ruijsenaars, H.E. (1994) 'The WIPO report on character merchandising', 2 IIC 532.
- Thomson, M. (2003) 'Confidence, privacy and damages: hello! to clarity', New Law Journal.
- Warren, S. and Brandeis, L. (1890) 'The right to privacy', 4 Harv. L. Rev. 193.

Notes

1 Peter Steiner, page 61 of 5 July 1993 issue of The New Yorker, (Vol. 69 (LXIX) No. 20).

2 This usage of the term was coined in 1985 by Chip Morningstar, a user of the first avatar environment created by LucasFilm called Habitat. Habitat lacked many of the features we have in today's games such as quests and puzzles. It was more similar to a social MUD in which the interactivity between avatars was the ultimate goal. According to Encarta: "Avatar [Sanskrit]: 1. incarnation of Hindu deity: an incarnation of a Hindu deity in human or animal form, especially one of the incarnations of Vishnu such as Rama and Krishna. 2. embodiment of something: somebody who embodies, personifies, or is the manifestation of an idea or concept. 3. image of person in virtual reality: a movable three-dimensional image that can be used to represent somebody in cyberspace, for example, an Internet user."

3 <http://www.anshechung.com/>

4 Philip Rosedale CEO of Linden Lab told the Guardian that they are building the technology to allow a Second Life avatar identity to wander out across the web. The founder of the virtual world Second Life believes that his company, Linden Lab, is at the forefront of the internet's next big revolution – the 3D web. "We are building the backend to support that. We believe the concept of identity through your avatar will span the web. We are going to seek to enable that. Technology-wise, it's only about 18 months away. I do think we will see some interconnected virtual worlds... But reputation must come right along with identity" (Bulkley, 2007).

5 "Identity is used to mean 'the condition of being a specified person', or 'the condition of being oneself ... and not another'. It clusters with the terms 'personality', 'individuality' and 'individualism', and, less fashionably, 'soul'. It implies the existence for each person of private space or personal lebensraum, in which one's attitudes and actions can define one's self ... The dictionary definitions miss a vital aspect. The origin of the term implies equality or 'one-ness', but identities are no longer rationed to one per physiological specimen. A person may adopt different identities at various times during a life-span, and some individuals maintain several at once. Nor are such multiple roles illegal or even used primarily for illegal purposes. Typical instances include women working in the professions, artists and novelists, and people working in positions which involve security exposure (such as prison wardens and psychiatric superintendents)."