

On the (partially-)inalienable rights of participants in virtual communities

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As virtual communities become more central to the everyday activities of connected individuals, we face increasingly pressing questions about the proper allocation of power, rights, and responsibilities. This paper argues that our current legal discourse is ill-equipped to provide answers that will safeguard the legitimate interests of participants and simultaneously refrain from limiting the future innovative development of these spaces. From social networking sites like Facebook to virtual worlds like World of Warcraft and Second Life, participants who are banned from these communities stand to lose their virtual property, their connections to their friends and family, and their personal expression.

Because our legal system views the proprietor's interests as absolute private property rights, however, participants who are arbitrarily, capriciously, or maliciously ejected have little recourse under law. This paper argues that rather than assuming that a private property and freedom of contract model will provide the most desirable outcomes, a more critical approach is warranted. By rejecting the false dichotomy between 'public' and 'private' spaces and recognising some of the absolutist and necessitarian trends in the current property debate, we may be able to craft legal rules that respect the social bonds between participants whilst simultaneously protecting the interests of developers.

The potential of new communities remains one of the most exciting promises of the digital age. From massively multiplayer online games to social networking sites, these communities provide a means for people from around the world to connect and share their experiences. They provide shared spaces for friends and family, for business, for learning and teaching, for individual self-expression and for political action. As virtual communities become more central to the everyday activities of connected individuals, however, we face increasingly pressing questions about the proper allocation of power, rights, and responsibilities. As participants who feel injured by the arbitrary, capricious, or even malicious actions of the proprietors of these spaces raise their voices, legislators and judges are being asked to make decisions that will shape the way in which virtual communities are allowed to develop. This paper argues that our current legal discourse is ill-equipped to provide answers that will safeguard the legitimate interests of participants and simultaneously refrain from limiting the future innovative development of these spaces.

Our current legal discourse generally frames the issues in a way which supports the marginalisation of participant interests. When a participant is banned from a social networking site like Facebook, or a virtual world like World of Warcraft or Second Life, she loses more than a mere right of access to a commercial service. She has her virtual property confiscated, her connections with her social network severed, and her expression within the community silenced. The legally relevant question, however, is not whether the proprietor acted justly or fairly in the circumstances, but rather whether or not the proprietor has an absolute right to exclude.

This is the cyberproperty debate, and it has been predominantly framed in terms of property rules and liability rules. In the regulatory model developed by Calabresi and Melamed (1972), property rules provide an absolute right to exclude, whereas interests covered by liability rules may be appropriated by others against the wishes of the holder on the condition that they pay a price set by a third party such as a judge. Applying this distinction to the internet, the classic cyberproperty question is whether the owner of an internet resource ought to have an absolute right to exclude (property rule protection) or only a right to damages for misuse (liability rule protection). If the owners of internet servers are granted an absolute right to exclude, it generally follows that they are able to set the conditions upon which access may be granted

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and revoked, and thereby exercise almost complete control over the behaviour of the participants who choose to connect (subject to restrictions imposed by contract law, competition law, or other areas of law).

Focusing on whether an absolute right to exclude exists leads to a false dichotomy and tends to encourage a necessitarian or deterministic approach. It is a false dichotomy because it is argued in such a way that it is assumed that the proprietor must either have the right to exclude or not, and must either have the right to determine the rules of access or not. This conception does not account for the middle ground, that a proprietor may well have a right to exclude but that we may impose some restrictions on the exercise of that right. It is necessitarian in that even if we recognise that the dichotomy is false, the use of the private property metaphor tends to lead towards absolutist outcomes.

The argument for the application of property rules stems from the assumption that doing so will facilitate private bargains and hence increase total social welfare. In this conception, an absolute right to prevent access to internet resources is necessary in order to be able to offer innovative and responsive terms of access to customers, and a competitive environment will ensure that there is a healthy marketplace of norms, where consumers are able to efficiently bargain for the level of access they desire at the price they are willing to pay (Hardy 1996; Epstein 2001). In this way, access to resources will be efficiently allocated to the highest value users, and governments will not have to face the difficult task of allocating entitlements. Flexibility and innovation are the guiding principles here, and the argument is made that allowing providers more control will benefit everyone in the end through the development of new business models and a plurality of norms (Wagner, 2005: 504-6).

This argument is quite powerful. It draws upon the sanctity of private property and our hesitation to interfere in the private sphere. It is also somewhat deterministic, as the assumptions that are made drive the underlying theme that most regulatory problems can be solved by clearly defining property interests and reducing transaction costs. Critics of cyberproperty tend to frame their critique internally, attacking these assumptions and attacking the method in which physical property law is transplanted and made to fit incorporeal entitlements in internet servers or bandwidth (Burk, 2000; Hunter, 2003; Lemley, 2003; Balganes, 2006; Carrier and Lastowka, 2007; Lastowka 2007).

This article suggests that if we are to develop legal rules that can safeguard the interests of participants and simultaneously protect the future development of unique virtual communities, then we need to take a much more critical approach. In Calabresi and Melamed's (1972) model, property and liability rules were supplemented by inalienability rules, which removed certain entitlements (like body parts, children, and severe physical harm) from the market. In a 1987 article, Margaret Jane Radin introduced a theory of partial market inalienability which argued against universal commodification – the suggestion that everything can be thought of in market terms – from the perspective of personality theory (1987: 1905-6). Crucially, Radin recognised that sometimes, we may want to prevent some interests from being traded on the market, and further, that we are also may wish to restrict alienation and commodification in certain circumstances – but not all. These insights may prove useful in the regulation of virtual communities. A large part of the difficulty in the current regulatory discourse lies in the fact that the interactions of individuals in virtual communities is not wholly market-based. Individuals use the market to bargain for access to spaces where participants can engage in a wide variety of extremely personal behaviour – forming and maintaining meaningful relationships, self-actualising through the development of an avatar or online persona, communicating with friends and loved ones, and expressing themselves in any imaginable way. This article argues that we may be better able to understand the tensions within these communities if we recognise the hybrid nature of these public / private spaces, and that we may be able to reach better regulatory conclusions if we avoid the necessitarian conclusions which have been drawn from a private property based approach.

1. breaking down the market equation of liberty with property

There is a strong libertarian trend in the cyberlaw discourse. In 1996, John Perry Barlow gave

voice to "a civilization [...] more humane and fair" than that of territorial states, premised upon a libertarian utopia of an unregulable space with no scarcity and no costs of creation or distribution (Barlow, 1996). Around the same time, Johnson and Post argued both that territorial governments had no legitimacy in cyberspace and that cyberspace would be better governed through self-regulation (Johnson & Post, 1996). In their argument for self-governance, these cyber-libertarians were essentially arguing for the enforcement of strong property-like protection for internet resources and a hands-off deregulatory approach to their use. Johnson and Post made a strong normative argument against regulation, arguing that (Johnson & Post, 1996: 1393)

If the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule set does not fundamentally impinge upon the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.

This is a common claim amongst advocates of self-regulation. This argument takes many forms, but the core theme is that governments will be less able to determine good norms for virtual communities than will the communities themselves (Lastowka & Hunter, 2004: 71). In its current form, this model goes some way to delegitimising government regulation of terms of access, on the basis that any terms which are not offered are evidently not in sufficient demand. This reasoning is, of course, unjustifiably deterministic. This approach largely ignores the power imbalance at play between the large corporate proprietors and individual participants. There is no guarantee that market rule will result in better (more liberal) norms, and indeed significant grounds to expect that it will result in the further marginalisation of minorities and the erosion of the basic requirements for citizenship (Netanel, 2000: 498).

A survey of the terms upon which access is conditioned to the current batch of virtual worlds and social networks shows no significant concern for the protection of participant interests (Jankowich, 2006; Clapperton & Coronas, 2007). This is largely predictable. Firms generally do not compete on terms, and there is a large degree of homogeneity in the terms which are offered to users (Jankowich, 2006). As the contracts which condition access are rarely read, firms have little incentive not to choose the most restrictive terms they can, reserving to themselves almost complete discretion and control over the relationship. There is a common argument that any particular deficiencies will be remedied by new entrants in the market, because there is no scarcity of resources on the internet. Unfortunately, this deterministic approach is also false, as the costs of creating a platform are – especially in the cases of virtual worlds – extremely expensive, and the network effects which require that a platform have a large user base in order to survive impose a significant barrier to entry to the market.

There are also significant barriers to exit, which constrains competition and eases pressure on proprietors to react to the demands of participants. The suggestion that an individual subscriber 'vote with her feet' involves leaving her social network behind, leaving behind the time she has invested in the platform and the indicia of her persona – in virtual worlds, her avatar, money, and possessions, or on other platforms, her profile page and message wall, her message history and her contributions. She can take none of this with her, even if she does find a competing and substitutable platform, which is not in itself guaranteed. The fact that the only power that participants realistically have is the ability to leave the community completely tends to downplay the significance of claims that a proprietor must be responsive to the demands of its participants.

If we choose not to rely on the assumption that the market will necessarily provide the best outcome, we may be able to provide some safeguards that allow intensely personal relationships to take place within commercial environments. The argument could be made that allowing market forces to dictate whether we can associate with our friends and family or our avatars "creates and encourages an inferior conception of human flourishing" (Radin, 1987: 1912). In a world which encourages rich and diverse social relationships, to have those relationships subject to arbitrary severance by the platform owner may be damaging in itself.

The counter argument is that we often allow rich and diverse human relationships to be governed by markets. In the case of virtual communities, where the high costs of creating and maintaining the environments are borne, at least initially, by the investment of a commercial developer, then the market plays a vital role in providing the platform which enables these interactions to take place. Any regulatory approach must therefore be sensitive not only to the

personal interaction between participants, but also the commercial context which requires a developer to be able to recoup its investment if these spaces are to exist at all.

These twin tensions suggest the need for a more refined regulatory approach than has so far been proposed. It may be possible to remove some of the basic interests which underpin personal relationships from the market, such that we would not expect individuals to bargain for them within the broader terms of access to a community. For example, certain rights of privacy or guarantees of security in the ability to contact one's friends or family may be made inalienable, and any contractual term which purported to limit those rights would be unenforceable. This could create a guarantee that as long as access has been granted, the proprietor of a community may not monitor or disclose communications or impose restrictions on the content of private conversations between willing participants.

If this approach is followed, we may be able to craft legal rules which allow spaces with innovative and responsive internal norms to flourish, backed by baseline guarantees of inalienable boundaries, limits beyond which communities may not regulate for themselves. (Radin and Wagner, 1998: 1317) These boundaries could be established to remedy the inequalities in bargaining power, especially in those areas in which demand is not likely to be adequately manifested, or for which we do not trust the market to adequately provide – such as protection for critical speech or guarantees of privacy and access.

Such a model could simultaneously provide the flexibility which the libertarians crave whilst limiting the most extreme examples of popular market oppression. This does not have to be seen as a contradiction – the suggestion that we cannot establish boundaries for private ordering is a necessitarian argument that we do not have to accept. Instead, we could adopt a positive view of liberty which recognises that imposing limits on the commodification of certain personal interests actually increases, rather than decreases, freedom (Radin, 1987: 1903).

2. Breaking down the public / private divide

A significant problem with the framing of the regulatory debate as one of private property is that it ignores the extent to which we rely upon 'private' online spaces to fulfil what we have generally thought of as 'public' functions. The sharp distinction between private and public spaces hinders our conceptualisation of the way people interact with each other. Privately owned internet resources are becoming increasingly central to almost every facet of our lives, as we rely on gaming platforms and social networking sites to remain in contact with our friends, family, and business associates; on private search engines to locate businesses and information providers; on corporate email systems to pass on our important communications; on private auction sites to buy and sell our goods; and on online service providers to host our documents, calendars, photos, and even health information. In this context, the public/private distinction begins to feel archaic.

The legal discourse, however, has not yet adapted to the malleability of public and private spheres. Most significantly for the purposes of regulation, constitutional law applies only to 'public' actions. The limits that we impose on the state generally do not apply to the actions of 'private' actors. We instead tend to delegitimize government intervention in the 'private' sphere, even while the 'public' services we rely on are increasingly being provided by 'private' actors.

This tendency is somewhat understandable. Hunter (2003) explains that our conception of 'cyberspace' as a 'place' tends to push us to accept property metaphors where they may not be justified. Private property, in turn, holds a certain exalted place in our legal system. Its protection forms the basis of much of classical natural law, and Blackstone's characterisation of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone, 1766: 2) continues to reflect the absolutist trends which underpin property discourse. Despite warnings not to rely on Blackstone's exaggerated necessitarian construction, (Epstein, 2001: 805) the rhetoric of property continues to weigh heavily on the way in which we approach questions of regulation, far beyond mere utilitarian balancing can account for (Humphreys, 2006: 13; Hunter, 2003: 443, 482). The 'natural' sanctity of property tends to lead us towards absolutist constructions of property interests.

The absolutist trend also continues in the law and economics discourse, which, following Coasean logic, tends to assume that regulatory problems are typically caused by failures in defining property rights or creating an efficient market. This absolutism is reinforced in the case of intangible resources, because access can be almost-perfectly denied, without regard to the limitations which both physical properties and law impose on the right of exclusion from physical property (Carrier & Lastowka, 2007: 1495) – such as easements and rights of passage, the doctrine of necessity, or the lack of the ability to control airspace or prevent communication to and from adjoining properties. As these limitations are not generally carried into cyberproperty rights, the result is that the form of property which is created to govern access to internet resources becomes “a caricature of absolute rights” (Carrier & Lastowka, 2007, 1510).

The private property discourse suffers from a fundamental limitation in that, on its own, it tells us very little about regulation (Lemley, 2003: 542). The fact that the operator of a virtual community has a right to exclude does not necessarily determine whether that operator can terminate access, once granted, in any given circumstance. It says nothing of the ability of the operator to impose sanctions on a participant, to confiscate the participant's resources, or to listen in on the participant's conversations. It is certainly not the case that we are bound to accept that the right to exclude is absolute in all its forms, and that that right entitles the proprietor to exercise complete control over participants in the community.

This way of thinking about regulation is dangerous in that it tends to lead us into the trap of thinking of property rights as an all-or-nothing approach. In reality, no conception of property is complete without considering the limitations imposed by contract law, by tort law, by anti-discrimination law, by competition law, and innumerable other sources (Radin & Wagner, 1998: 1297; Wagner, 2005: 479-80). There is, however, an unfortunate tendency within the cyberproperty discourse to brush aside and marginalise these exceptions (Epstein, 2001: 827, Bellia, 2004: 2201).

Complex questions of governance require more subtle conceptions of rights and limitations. The cyberproperty model, which tends towards absolute property rights and non-interference in 'private' contractual agreements, obscures more than it illuminates these subtleties. In 1987, Sir Anthony Mason and Stephen Gagelar reminded us that decisions about contract (and property) are important policy decisions (Mason & Gagelar, 1987: 2):

A court order for the enforcement of a contract does not simply allow the parties to pursue their own freely chosen course of conduct. It brings the full power of the state to bear against one party in the service of another. When and how this should be done are necessarily important questions of public policy.

This fundamental point, articulated and restated by the realists, the post-structuralists, the critics, the pragmatists, and many, many others, should not be forgotten. When we are considering what power the providers of social networks and virtual worlds will be able to exercise over the participants in these spaces, we must remember that there are decisions to be made and that we are able to shape regulatory policy in a way that furthers our goals. We are no more bound to impose a certain regulatory system through the search for a particular model of economic efficiency than we are through the requirements of 'natural' private property rights. All of these decisions are malleable, and all require careful attention to the world which we want to create.

A reconstituted regulatory framework may allow us to be more sensitive to the way in which personal interaction and expression takes place within communities that are created as commercial ventures. Take, for example, a common term in a virtual community contract which states that a participant can be removed at any time for any or no reason. We can consider whether a participant has an entitlement not to be removed from a community without due process. The analogous real-world right, as against the government, is inalienable (as evidenced by the writ of habeas corpus or its modern day descendants). The analogous right as against the owner of private property is generally trumped by the owner's property entitlement to exclude access to his or her land. In a cyberproperty model, the owner of an internet resource will have a similar property entitlement to exclude, and the presumption will be that participants remain in the environment by the consent of the owners of the environment which, while subject to agreement, is revocable.

We may say that a participant's interest in not being unjustifiably removed from one's social network, virtual possessions and digital identity are so important that we do not want to expose them to a market model. We may say that a situation where only the affluent are able to pay to ensure fair treatment is undesirable, or even that the market is likely to be so inefficient, because people consistently discount the risk that they will be treated unfairly, or because they undervalue the harm that they may suffer as a result, that we will isolate such interests from the market framework. On the other hand, we would do well to remember that there are any number of reasons that a person may wish to play a game or join a community with entirely arbitrary rules, where one's access may be terminated at any time (Bartle, 2004).

In this case, we may want to evaluate a model which rests upon real consent. We could develop a stronger set of contractual rules, for example, that would presume that an agreement that allowed arbitrary termination is coercive, unless the proprietor can show real consent on the part of the participant. Alternatively, we could impose some restrictions on the right of a proprietor to exclude or terminate an agreement that grants access, requiring that if it is to be exercised in certain circumstances, it must be exercised honestly, or even with a degree of reasonableness having regard to the interests of the person being excluded (as is the case with the stronger conceptions of the duty of good faith in contract law (Mason, 2000; Peden, 2002)). Properly structured, such a rule could allow the protection of 'public' type interests in 'private' spaces, while still allowing a participant to waive the protection in appropriate circumstances. The important point to remember here is that we are in no way bound to accept either absolute property entitlements or absolute prohibitions.

There is some suggestion that the law may be able to accommodate other 'public' interests in 'private' property; Balkin, for example, suggests that virtual worlds may find that they are increasingly regulated in the same manner as company towns, allowing constitutional principles to apply directly to 'private' providers (Balkin, 2004). In some situations, this would give a participant a positive right to freedom of speech and association, even against so called 'private' actors. Such a right would have to be properly constructed, such that there would be many contexts in which it would not operate. We could tailor this right to limit its application to appropriate circumstances. For example, in environments which mimic 'public' space, where proprietors encourage and benefit from reasonably open discourse, we may prevent those proprietors from imposing undue restraints on speech.

In the main, the public/private distinction tends to operate to obfuscate the possibilities of government intervention. This is, of course, a criticism that has been made many times before, but it bears repeating here. It is a mistake to conceive of private property as value neutral, and to decry government intervention as the external imposition of subjective ideals. The institution of private property is a social institution, and its boundaries are set through public means. Perhaps the most significant danger in the property discourse of regulation is the danger that we will tie our own hands and refuse to act for fear of interfering with so-called 'private' 'property' (Elkin-Koren, 1998: 1162-3).

3.Avoiding the marginalisation of participant interests

The search for the proper allocation of property rights in internet resources tends to marginalise the value provided by those who are not awarded the label of 'owner'. In virtual worlds and social networking sites, for example, while the technology to create the platform is often the result of significant expenditure on behalf of the developer, a very significant (arguably, the most significant) part of the value of the platform comes from the social network provided by the participants (Humphreys, 2005). The network effects which distinguish successful communities from virtual ghost towns are the result of social interactions, but these are often disregarded in the allocation of property interests. One of the significant advantages of property is that it provides a single owner with whom others can transact to make welfare-maximising deals (Epstein, 2001: 806). This same advantage, however, becomes a source of marginalisation and alienation for those whose contributions, though valuable, cannot be expressed as proprietary entitlements.

This marginalisation exacerbates the power imbalance that is generally present in virtual

communities. The corporate proprietor is in a much stronger position than any single individual or even group of individuals, even though in aggregate, the participants might be more powerful. The difficulties of coordinating such a disparate mass of individuals, each with their own personal preferences, means that in practice, the proprietor is often able to exercise significant control. When it comes, for example, to terminating access to a particular individual, the provider's discretion will only be checked in cases where the action is so outrageous as to sufficiently unify and motivate a large number of participants. In many cases, the provider's discretion will be much less fettered (and largely unnoticed).

Under the property paradigm, we start from the proposition that access is not permitted without permission, and that, in cases of legitimate access, the 'owner' has 'consented' to 'allow' the participant to access the system. Immediately, the relationship between owner and participant is structured in a way which embeds and reflects the power asymmetry. The value that the participant brings to the system is not easily recognised within this framework (Humphreys, 2005).

We may be able to take a more nuanced approach. Rather than focusing solely on property rights, it would be possible to develop a system where those interests that are not recognisable as property interests are nonetheless protected in some way. For example, the moral rights of participant-creators of user-generated content which is incorporated in a virtual world may act to restrain the commodification of that content without regard for the proper attribution or the respect for the integrity of authorship. These types of restrictions can be inalienable, as they are in Australia and Europe, such that they live on even though the participant may have assigned the copyright in the content to the proprietor. If extended, the moral rights of contributors could assure that contributors are prominently attributed for their work, and that their work is not distorted, unduly commodified, or associated with unsavoury themes or messages.

The interests could be even more abstract. It would be open for us to recognise that a significant portion of the value of social networks is predicated on the interactions and input of its users. We could respect the contributions that users make by limiting the ability of a powerful proprietor to benefit from the aggregate value without offering some safeguards of due process to the users who created it. Such an interest may not be so alien to our common law – concepts of unjust enrichment, for example, may, if extended, act to prevent the provider from taking the entire benefit of a user's participation for itself.

Australian common law is flexible enough to appropriately deal with the interests of participants, if it is able to recognise them. So far, the focus has been on the property interests of the platform owner, and not on the interests of participants. If courts are able to take a more critical approach, however, and examine the different interests at play in virtual communities, then the common law may provide some important safeguards. Unjust enrichment is a good example – in cases where we can see that a proprietor has been enriched by a participant's actions within the community, and has treated the participant unconscionably or otherwise obtained the benefit unjustly, then the participant may be able to sue for damages. Taken to its logical conclusion, this could mean that because virtual communities and social networking sites benefit from the interactions of each additional user, there is then a common law requirement to act justly towards those users. In practice, this could mean that the proprietors of virtual communities would be prevented from arbitrarily or maliciously refusing service to an individual after they have benefited from the individual's participation in the community.

The availability of a remedy for unjust enrichment, like many other common law remedies, will always depend on whether the court is able to recognise that conflicting interests exist. This, however, requires a critical approach and a deeper understanding of the tensions at play in virtual communities. The focus in the legal discourse on property rights tends to obscure these other interests, and continues to stand in the way of achieving more balanced and nuanced outcomes. If we are to take advantage of the flexibility inherent in the common law, we must first move away from the private property paradigm and work to ensure that the marginalised interests of participants are able to be recognised.

4. Conclusion

Some aspects of the current regulatory debate seem to suffer from certain deterministic fallacies. Rather than assume that a private property and freedom of contract model will provide the most desirable outcomes, a more critical and subtle approach is almost certainly warranted. A more nuanced vocabulary is required in a world which situates 'privately' 'owned' communities as the sites for a significant proportion of our 'personal' interaction – our teaching and learning, our communication with friends and family, our expression and individuality, our loves and our passions.

By recognising some of the absolutist trends in the current property debate, we may be able to craft legal rules which respect the social bonds between participants whilst simultaneously protecting the interests of developers in creating innovative new platforms and, of course, being remunerated for their efforts. By allowing some recognition to participant interests that are otherwise marginalised by the property discourse, we may be able to craft rules which allow these communities to flourish without subjecting the interests of the participants who are personally invested in the community to the harsh treatment of the commercial market.

Fundamentally, the regulatory problems we face require careful consideration. We should avoid over-regulation that stifles development and differentiation of new communities. But we should also avoid reducing the personal and social bonds between participants to mere commodities. The current state of property and contract law, by not recognising these interests, encourages rational firms to attempt to appropriate all the value of virtual communities and social networks. By marginalising participant interests, the law vests most power and control in the hands of these firms. It may just be the case that we will decide that the things we cherish in these communities, the ability to express oneself and to form meaningful relationships, are diminished by this type of absolute control. In these circumstances, we may want to consider providing some balance by removing some of those personal and social interests from the vagaries of the market.

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