‘Virtual Infringement’ – Is it real?
How to deal with IP infringement in Virtual Worlds

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Participating in virtual worlds (‘VWs’) is big entertainment and big business. Given the enormous and diverse participation in these computer generated environments, VWs offer an exciting new channel for intellectual property (‘IP’) owners to promote and test their brands and associated products and services. However, they also present a significant challenge, in the form of widespread infringement of IP rights. IP owners have a number of options to deal with this challenge:

1. rely on VW operators to regulate;
2. apply ‘real world’ laws; and
3. promote IP awareness to change the culture of IP infringement in VWs.

This article discusses the benefits and difficulties of these options. It seems that a combination of all three is required to address virtual IP infringement. Over time, as real world laws are applied to VW scenarios, enforcement of IP rights in VWs should become more straightforward and outcomes more predictable. This, in turn, should deter virtual infringements, promote a better understanding of the role of IP rights in VWs, and foster a culture of respect for IP rights in VWs.

Introduction

What are virtual worlds?

Virtual worlds are computer-based, simulated three-dimensional environments designed for users to inhabit and interact with other users. Interactions are usually via character representations or ‘alter egos’ called ‘avatars’ who communicate through text or via real-time voice communication.

There is much debate about the definition and scope of the term ‘virtual world’. Most commentators agree that essential requirements of a ‘VW’ include that the virtual space is persistent and dynamic. An environment is persistent if it continues to exist without

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2 For examples of debates regarding the scope of the definitions of “virtual world”, see the Terra Nova weblog: http://terranova.blogs.com/terra_nova/2004/06/a_virtual_world.html.
the active engagement of any one user.\textsuperscript{4} It is \textit{dynamic} if it continues to change and develop over time.

\textbf{Evolution: MMOGs, ‘social VWs’ and beyond}

VWs have largely been developed by the gaming industry in the form of massively multiplayer online games (‘MMOGs’).\textsuperscript{5} These are traditionally fantasy based games with fictional plots requiring the user to complete quests and participate in conquests. Examples of these types of VWs include World of Warcraft, Everquest and Ultima.

More recently, VWs have evolved to include ‘social virtual worlds’\textsuperscript{6}, which do not have any game plan or specified goals. Rather, users determine their own activities and social interactions. In contrast to traditional MMOGs, users create or customise the content of the VW. They use built-in scripting tools to create furniture, clothing, houses, landscapes and products, which are then uploaded into the VW. Through their avatars, users engage in social activity, forming complex communities and cultures. The emphasis is on creativity and socialising. In many ways, these VWs are like a natural extension of the popular two-dimensional social networking websites such MySpace and Facebook.\textsuperscript{7} Examples of these types of social VWs include Kaneva, Active Worlds, There, Lively, Habbo and Second Life\textsuperscript{8}. Similar sites specifically for children include Club Penguin, Webkinz World, Neopets and Stardoll.

VWs are also used, in both open and secured contexts, for education and information purposes. For example, some universities offer their students online lectures in a VW context\textsuperscript{9}; while some companies use the medium as a way of allowing their customers to ‘experience’ an opportunity before they commit to it in the real world\textsuperscript{10}.

\textbf{VW inhabitants}

Millions of people from varied demographics ‘inhabit’ VWs.\textsuperscript{11} The average age of VW users is reported as being 32, with a ratio of 1:1 men to women.\textsuperscript{12} Second Life alone has

\begin{thebibliography}{99}
\bibitem{8} Second Life is particularly interesting as it allows users to own IP rights in their creations: Second Life Terms of Service, s 3.2: http://secondlife.com/corporate/tos.php. This is a radical departure from the general position in the online gaming industry requiring users to sign over their IP rights as a precondition of participation.
\bibitem{11} Above, n 4.
\end{thebibliography}
over 16 million residents\textsuperscript{13}, with the average user spending 20-40 hours in-world per week.\textsuperscript{14} World of Warcraft has more than 11 million subscribers\textsuperscript{15} and Habbo has 114 million registered users.\textsuperscript{16}

Whilst everything in VWs is obviously ‘virtual’, in the sense that it is a digital representation of invented imagery, the emotional and perceptory experience of many users can be very real. This may result in a ‘cross over’ between VW and real-world experiences and effects.

**Are VWs merely a passing fad or are they part of an evolving Internet?**

Many commentators believe that VWs are here to stay. In fact, it has been predicted that they will play an increasingly prominent and diverse role in the future – for example:

> As multiplayer game platforms become increasingly powerful and lifelike, they will inevitably be used for more than storytelling and entertainment. In the future, virtual worlds platforms will be adopted for commerce, for education, for professional, military, and vocational training, for medical consultation and psychotherapy, and even for social and economic experimentation to test how social norms develop. Although most virtual worlds today are currently an outgrowth of the gaming industry, they will become much more than that in time.\textsuperscript{17}

In particular, VWs may have wide-ranging impacts for the way we use the Internet in the future. It is speculated that VWs could represent an ‘evolutionary leap that could transform the entire Internet from a relatively static collection of 2D pages into a 3D universe more like the real world’.\textsuperscript{18} VWs could operate as interfaces or intuitive portals to the Internet, so that we interact with online information and services in a more interactive and realistic way.\textsuperscript{19}

**Business opportunities in VWs**

VWs are not just a source of entertainment or social interaction – they are also big business. VW commerce has grown into a multi-billion dollar industry.\textsuperscript{20} Some users generate enough revenue in-world that they don’t need real world jobs. In Second Life

\textsuperscript{13} As at 5 December 2008: http://secondlife.com/what/c/economy_stats.php.

\textsuperscript{14} Above, n 12.


\textsuperscript{16} Note that the number of unique visitors is estimated to be 110 million – see: Sulake ‘Habbo – where else?’ (Nov 2008) http://www.sulake.com/.habbo.


\textsuperscript{20} Dougherty F ‘When worlds collide: applying real-world law to virtual world disputes’ (2007) Internet Law Bulletin 10(8) 94 at 95.
for example, it is reported that in November 2008 over 59,000 residents made a profit from their in-world business activities, and 181 residents made more than US$5,000 for the month. VWs are also big business for their Operators. In August 2007, it is reported that Disney purchased the children’s site Club Penguin in a deal that could total up to US$700 million.

Virtual business activity is largely a result of the ability of users in social VWs to create content, and to provide virtual goods and services to other residents. There seems to be a trend for ‘realism’ in the sense that VW users prefer to generate and interact with content that makes the VW resemble the real world. One aspect of this is the widespread demand in VWs for real world branded goods and services, including cars, food outlets, clothing, accessories, magazines and music.

The interactive and immersive nature of VWs, allows businesses to connect in a new and innovative way with a diverse customer base. VWs provide an opportunity for businesses to test, advertise and profile their brands in association with both real and virtual merchandise. Many real world businesses have recognised this potential and most leading real world brands have some presence in VWs.

Commercial activity in VWs is often translated into real-world profits. For example, in Second Life, a virtual currency exchange facilitates in-world currency to be converted to real US dollars. This means that the border between real and virtual economies is blurred. Similarly, brand reputations earned (or lost) in VWs can impact on a business’ real-world operations.

The ‘virtual infringement’ risk

Engaging in business activities in VWs can be risky. This is due to a combination of factors, including the uncertain legal and regulatory context of VWs, and the wide-ranging powers of VW operators, typically set out in non-negotiable Terms of Service (‘ToS’). In this article, we will focus on the particular risk of ‘virtual infringement’ – that is, IP infringement in the VW.

Virtual infringement is prolific, and is a very real risk to VW business owners. The demand for ‘realism’ and ‘real’ brands increases the risk of unauthorised use of real-world trade marks and copyright material. For example, the misappropriation of trade marks in Second Life has been described as ‘so ubiquitous, so safe, and so immensely

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23 There are many examples of innovative business operations in the VWs. For instance: CISCO has set up an in-world working prototype of a virtual hospital in Second Life, where potential customers can move around and test CISCO's wireless communication. Toyota launched a particular car model in the VW before it was officially launched in the real world. KPMG runs virtual job interviews for real jobs.
27 Above, n 12.
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profitable, that it has become a wholly transparent part of Second Life’s bustling commercial landscape’.

IP may be infringed in VWs in a number of ways, including:

- Unauthorised use of real-world or VW brands for virtual products or services.
- Unauthorised reproduction of VW content in-world – for example, reproduction of virtual user generated content, without permission of the copyright owner. Some VWs provide some technological means to protect unauthorised copying of content, however infringers have developed a range of software tools to override such protection.
- Unauthorised reproduction of real-world content in-world – for example, unlicensed music played in public virtual spaces.

There are a number of features which may contribute to this widespread phenomenon of ‘virtual’ infringement. Firstly, it is relatively easy and cheap to reproduce high quality copies of content, brand names and logos in a virtual environment. Secondly, the virtual environment seems to foster a culture of irreverence towards IP rights, resulting in a general lack of respect for the intellectual creations of others. Finally, participants in VWs are afforded the opportunity to hide behind an avatar. Many people don’t use their real names, and may be difficult to track down. Perhaps, this anonymity gives rise to a feeling that there will be no consequences flowing from illegal activity.

Does virtual infringement matter?

After all, virtual worlds are not ‘real’ – are they? In our opinion, virtual infringement does matter. It can have serious consequences for all VW participants.

Most obviously, virtual infringements impact VW business owners. Virtual businesses are becoming increasingly aware of the consequences of virtual infringement and are starting to voice their concerns. One clear example of the ‘real’ impact on business owners is the diversion of income and reputation. By creating virtual counterfeit products and supplying them at a reduced price, an infringer may undermine the IP owner’s business. In addition, the IP owner may be deprived of licence fees for the

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29 Another IP infringement scenario is the copying of VW content (e.g. VW screenshots or videos) in the real world. However, this will not be discussed here, as the focus of this article is on in-world infringement.

30 For example, in Second Life, creators of objects can set ‘permissions’ informing third parties whether they are authorised to copy, modify, transfer or move the objects. Once a level of access is selected, technical restrictions are imposed corresponding to the granted permission.


reproduction and use of real or virtual material and it loses control over the quality of that material. If an IP owner does not have a presence in-world, then unauthorised use of its material in the VW may jeopardise the ability of the owner to exploit its rights in the VW at a later stage.

Perhaps the most serious potential impact for business owners of virtual infringement is damage to brand value, both in the real and virtual worlds. In particular, the value and reputation of real-world brands may be damaged or tarnished if the associated virtual goods or services are not of an acceptable quality, or the brand is not applied in an appropriate or sanctioned context. The same principals will apply regardless of where the relevant conduct occurs. In particular, if a trade mark owner loses control over who is using its mark and how it is being used, the mark may become diluted and no longer distinctive of the IP owner’s goods or services.

Virtual infringement may also impact other VW users, who believe themselves to be paying for, or interacting with, genuinely branded commodities. Furthermore, it may affect VW Operators, who strive to attract participants on the basis that they offer a safe and regulated virtual environment.

**Options for dealing with virtual infringement**

There are a number of ways that a business owner can address the virtual infringement of its IP.

1. **In-world regulation**

Most VW Operators have provision in their ToS to deal with complaints about infringing (or allegedly infringing) material, including removing the material. For example, the ToS governing Second Life set out procedures for users to make complaints to the VW Operator, Linden Labs, if they believe third parties are infringing their IP rights.\(^{33}\) Linden Labs has the right to remove content from Second Life if it believes the complaint is justified.\(^{34}\) The benefit of this type of procedure is that it provides a potentially quick and cheap way of removing unauthorised material.

However there are reports that VW users are frustrated by the failure of VW Operators to act in response to complaints.\(^{35}\) This may be partly due to reluctance by VW Operators to adjudicate on IP issues, in the absence of a court determination.\(^{36}\) In addition, the explosive growth in the number of users of VWs may mean that the increasing quantity of infringement complaints is too large for VW Operators to adequately respond.

Even if action is taken by VW Operators, one of the most significant limitations to VW regulation of virtual infringement is that damages and compensation are not available. Therefore, any lost profits or reputation damage suffered by the IP owner are not compensated. In addition, the lack of penalty for the infringer may mean there is

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36 Rosedale, chief executive of Second Life owner, Linden Labs, is reported as being ‘reluctant to put his company in a position of aggressively policing the virtual world’ (Holahan C ‘The Dark Side of Second Life’ [21 Nov 2006] Business Week http://www.businessweek.com/technology/content/nov2006/tc20061121_727243.htm).
insufficient deterrent to dissuade infringers from engaging in further infringing behaviour.

Accordingly, whilst in-world regulation may be helpful in some instances, the inability to obtain damages as well as criticisms of inadequate levels of action taken by VW Operators, means that more traditional legal action may be preferable.

2. Application of ‘real world’ laws

In considering the application of real world laws to VWs, a preliminary question arises - is it appropriate for real world laws to operate in the virtual environment at all?

Answering this question in the negative are a number of commentators, who suggest that VWs embody a different ‘culture’ which makes the application of real world IP laws inappropriate. They argue that ‘virtual worlds are separate jurisdictions from our own, with their own distinctive community norms, laws and rights’. The traditional justification that IP protection is required in order to motivate creativity, is argued not to apply in the VW context (or at least, not to the same extent). Rather, it is thought that VW users are motivated to create for the inherent joy of creating, and the pleasure of expressing themselves in a range of different ways. It is this very ability to contribute to user generated content which makes many VWs so popular, and this capacity to create with is essential to user satisfaction. In addition, often the end result of a creation in the VW is a collaborative effort and interplay of a number of users. It is argued that this participatory culture means that granting anyone monopolistic IP rights is unnecessary and inappropriate.

Based on this notion of a separate and different culture in VWs, these commentators consider that real world IP laws should not be imposed in the virtual context. Rather, it is suggested that we should explore a parallel alternative to existing legal systems for this new virtual environment, perhaps allowing VWs to evolve their own laws.

With respect, the authors of this paper strongly disagree. As discussed, IP infringements in VWs can have serious consequences. Virtual and real world economies are not completely separate, but can significantly overlap. Many IP owners operating in VWs are deeply concerned and unhappy about unauthorised infringements and the effect on their business. While VWs may be ‘virtual’, they are operated by real people and businesses that may be impacted by activities which occur in them. We have already made reference to the revenue generated by VWs and the kudos VW participants attach to genuinely branded goods and services. Just like in the real world, these types of

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40 Above, n 38 and n 39.

41 Above, n 39 at 204.

42 Above, n 31 and n 32.

43 See above sections of this paper entitled “Opportunities for business in VWs” and “Does ‘virtual’ infringement matter”?
benefits cannot be obtained in isolation of other rights and responsibilities. From an IP perspective, IP protection should apply to VWs for the same reasons that they it is necessary in the real world; namely to protect creative efforts against free-riders, to motivate creativity and innovation and to prevent consumer confusion.

If we assume then that real world IP laws should apply in VWs, the next question is - how should they be applied?

The relationship between virtual property and IP rights is complicated. Traditional IP laws were obviously not designed with VWs in mind - although the same could be said for many advances in technology and the arts. Similarly, laws relating to consumer protection, privacy, censorship and jurisdiction may on their face struggle for application in a VW context. However, courts are adept at applying the law to unique factual circumstances, and it may be argued that the application of real world law to a VW scenario is merely an example of this.

This is not to say however, that applying real world laws in a VW context will be easy. ‘IP owners and their lawyers must navigate their way through a legal landscape that, as yet, is not neatly way-marked with statues and case law’. Examples of the sorts of issues with which courts and legislators may need to grapple in the virtual context, include:

- In the context of trade mark infringement – whether virtual and real goods and services should be considered ‘similar’ in kind’;
- Whether use of a real world trade mark in a VW will constitute ‘trade mark use’, as required for infringement;
- How exceptions to copyright infringement will be construed in a VW. In particular, what will constitute ‘fair dealing’?
- How moral rights should be dealt with in the VW. What will be ‘reasonable’ for the purposes of the defence to moral right infringement?
- Whether performance rights should include the ‘performance’ of avatars.

The legal landscape is not completely barren – there have been some real world court actions in response to IP infringements in VWs. These have been largely in the US courts and have mostly been settled between the parties. However, they do offer some guidance as to the sorts of issues that may arise for determination.

**Bragg v Linden Research Inc.**

Marc Bragg, a resident of the VW of Second Life, worked out a way of acquiring virtual land at a reduced cost. Linden Labs, the Second Life Operator, claimed that Mr Bragg’s actions breached the End User Licence Agreement. It terminated Mr Bragg’s account, including over US$2,000 value, and disposed of his virtual land. Mr Bragg argued that the ownership of virtual land had all the real-world features of exclusive ownership, and should therefore be treated as such by courts. He sued Linden Labs claiming that they had unfairly terminated his account, and demanding

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45 For discussion of this point, see Dougherty F ‘When worlds collide: applying real-word law to virtual world disputes’ (2007) Internet Law Bulletin 10(8) at 97.
46 Above, n 12.
47 No. 06-08711 (Chester Co., Pa., Ct. C.P.).
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US$8,000. The matter was settled after 2.5 years, on confidential terms. Mr Bragg’s account and land were reinstated. Whilst this case was not concerning IP rights, it does raise some interesting issues of ‘ownership’ in the virtual context. Given the intersection between real and virtual economies, such issues may arise more often in the future.

**Eros, LLC (and others) v Thomas Simon**

An action was brought against Thomas Simon by a number of fellow virtual world residents, alleging copyright and trade mark infringement. In particular, he was accused of making copies of the creators’ virtual products, and selling the products in-world. Again, the matter was settled, and a consent judgement entered by the Court. Mr Simon agreed to pay US$525 in damages representing profits generated from the unauthorised use of the plaintiffs’ IP. Whilst the monetary penalty was small, this case clearly indicates that there are opportunities to pursue damages through real world courts for virtual infringement.

**Eros, LLC v Robert Leatherwood and John Does**

Eros is a VW business which creates and sells virtual adult-themed objects. One of its creations was the ‘SexGen bed’ – a virtual piece of furniture containing 150 sex animations. The Defendant began making unauthorised copies of Eros’ product and selling them at about one third of the original price, using Eros’ trade mark. The Defendant’s avatar’s name was Volkov Catteneo. In order to determine the identity of the infringer behind the avatar, Eros filed a ‘John Doe’ action. It then used the discovery process to obtain more information about the infringer, obtaining a subpoena against the VW Operator and PayPal, who subsequently provided IP addresses used by Volkov Cattereneo’s real life operator to access this VW account. A further subpoena was then obtained against the internet service provider hosting the email address. This process finally led Eros to 19 year old Robert Leatherwood. Eros could then file a lawsuit for IP infringement against Mr Leatherwood.

Again, the case settled. Perhaps the most interesting aspect of this case, is that it sets out a procedure to identify the real user behind the avatar. This is likely to be very useful for future business owners, given that many VW users do not provide their real name. Whilst the process is somewhat cumbersome, it is apparently not overwhelmingly expensive.

Over time, real world laws will continue to adapt to the development of VWs. Case law will emerge to clarify how legislation should be applied. Legislation may be ‘tweaked’ to simplify application to the virtual context. Perhaps international norms will be

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48 The case also raised issues about the validity of some of the terms of Linden Lab’s End User Licence Agreement (‘EULA’). The court held that aspects of the EULA were unconscionable, and as a result, these have been modified.


developed for guidance and consistency. The result will hopefully be a less uncertain legal context.

3. Awareness and education

A third approach to addressing unauthorised use of IP in the VW, is to try to change the current ‘infringement’ culture by fostering an understanding of, and promoting respect for, IP rights. This would involve educating users about the purpose of IP laws and the damage suffered by virtual business owners if IP rights are infringed.

An example of just such a campaign is the ‘naked avatar’ campaign entitled “Content Theft Steals the Clothes Off Our Backs”. The campaign highlights that theft of IP impacts not only the IP owners, but also the VW community generally - if creators of virtual content are unable to get a return on their investments, then they will stop creating, which will detriment VW users. Users are implored not to buy stolen content and to report instances of suspected IP infringement.

Another interesting example of a campaign to draw awareness to virtual infringement is that of the furniture designer of Herman Miller. In the real world, the company runs a ‘Get Real’ campaign to tackle those who copy its designs. In the virtual world, it set up an online presence and offered anyone who had bought unauthorised versions of its chairs the chance to exchange them for an ‘authentic’ virtual version. In addition to increasing the value of the brand in-world, this represents an innovative way of tackling the issue of in-world IP infringement.

In addition to these types of campaigns, there are many other ways that VW brand owners can promote awareness about IP rights and the impact of virtual infringement. For example:

- actively engaging with the VW Operators to discuss IP issues;
- ‘planting’ an avatar in-world to roam around either talking about IP or seeking to discuss a specific virtual infringement concern;
- raising the issue in industry forums for discussion with other IP owners;
- providing ‘feedback’ or even ‘whistle blowing’ opportunities in-world; and
- providing incentives for in-world users who respect IP rights (eg: a bonus branded key ring with a genuine branded car; or genuine branded buttons on a branded garment).

Conclusion

This paper has identified three approaches to tackling IP infringement in the VW:

1. in-world regulation;
2. application of real world laws; and
3. promoting awareness and education of IP rights and the impacts of virtual infringement.

These approaches should not be viewed as mutually exclusive. Rather, any effective approach to the virtual infringement issue will probably involve all three. In-world

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52 Above, n 32. The campaign is designed as a parody of a previous campaign designed to discourage people from wearing fur. The earlier campaign, run by People for the Ethical Treatment of Animals, was entitled ‘I’d rather go naked than wear fur’ and caused a sensation by showing a number of female celebrities nude.

53 Above, n 44.
regulation is likely to remain as an important step, given its potential to remove infringing material quickly and cheaply. However, where IP owners have suffered significant loss, or to deal with repeat infringers, the application of real world laws may be required. With time, courts and legislatures will have the opportunity to clarify current difficulties in the application of traditional laws to the virtual context. As the process for identifying the real operator behind an avatar becomes more streamlined, infringers may be less brazen in flouting IP laws, particularly if the law evolves to make it clear that ‘virtual’ infringement will be penalised. This in turn, is likely to affect the current culture of widespread infringement.

VWs are an exciting channel for Operators, businesses and users alike. Whilst virtual commerce is still in its infancy, it seems to offer an abundance of opportunities. However, the legal and regulatory context of VWs remains uncertain. Business owners should be mindful of this uncertainty and the associated risks discussed in this paper.

From a practical perspective, IP owners may wish to consider:

• Familiarising themselves with the ToS governing the VW within which they operate;
• Actively monitoring and policing their VW market for unauthorised IP uses;
• Actioning any infringement of their IP in-world; and
• Fostering a culture of IP awareness and respect, where infringement will not be tolerated.

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