
VIRGINIA LAW REVIEW

VOLUME 90

DECEMBER 2004

NUMBER 8

ARTICLES

VIRTUAL LIBERTY: FREEDOM TO DESIGN AND FREEDOM TO PLAY IN VIRTUAL WORLDS

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VIRTUAL worlds are upon us. Games are now among the most lucrative parts of the entertainment industry, and an increasingly important segment of computer games are massively multiplayer online games featuring tens of thousands of players.¹ These games are far more complex than the previous generation of first-person shooter games where the object is to move around a space and fire at objects, monsters, and people. They involve entire worlds of activity, where people can take on and develop multiple identities, create virtual communities, and tell their own stories.

As multiplayer game platforms become increasingly powerful and lifelike, they will inevitably be used for more than storytelling

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¹ One recent survey estimated the market for online electronic games in 2003 was \$1.9 billion, predicted to grow to \$5.2 billion in 2006, and \$9.8 billion by 2009. NPD Funworld Industry News, at http://www.npdfunworld.com/funServlet?nextpage=news_article.html&nwsid=3959 (last accessed Sept. 1, 2004) (on file with the Virginia Law Review Association). In parts of Asia, online games have become ubiquitous; an estimated one in four teenagers in South Korea play NCsoft's *Lineage*. See Associated Press, *Online Game Craze Sweeps South Korea*, May 12, 2003, at http://www.bizreport.com/article.php?art_id=4394. (on file with the Virginia Law Review Association).

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 game industry, they will become much more than that in time.

This Article is about what freedom means in these virtual worlds, and how real-world law will be used to regulate that freedom. Professors F. Gregory Lastowka and Dan Hunter have recently argued that virtual worlds should be treated as “jurisdictions separate from our own, with their own distinctive community norms, laws, and rights.”² The inhabitants of these virtual worlds should be given a chance to decide what internal norms will guide them. “If these attempts by cyborg communities to formulate the laws of virtual worlds go well, there may be no need for real-world courts to participate in this process.”³ This Article will take a different approach. Even at this early stage of technological development, people have simply invested too much time, energy, and money in virtual worlds to imagine that the law will leave these worlds alone, and allow them to develop their own norms and re-

² F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 Cal. L. Rev. 1, 73 (2004).

³ Id. Lastowka and Hunter acknowledge that their argument for the relative jurisdictional autonomy of virtual worlds echoes arguments made in the first generation of cyberlaw scholarship which urged courts and legislatures to treat the Internet as a separate space or series of spaces that could produce its own rule sets. Id. at 68–69. See also I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. Pitt. L. Rev. 993, 995–96, 1019–32 (1994) (advocating self-help, custom, and contract to regulate cyberspace); David R. Johnson & David G. Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law, in Coordinating the Internet* 62 (Brian Kahin & James H. Keller eds., 1997) (arguing for a decentralized system of Internet governance); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1395–1402 (1996) (noting possibilities of internal regulation of the Internet through competing rule sets); David G. Post, *Governing Cyberspace*, 43 Wayne L. Rev. 155, 161 (1996) (arguing for metaphor of cyberspace as separate space); cf. Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 Tex. L. Rev. 553, 553–56 (1998) (arguing for a “Lex Informatica” which would regulate cyberspace through technological devices).

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solve their own disputes unhindered.⁴ Indeed, the first lawsuits have already been filed.⁵ Precisely because virtual worlds are fast becoming important parts of people's lives,⁶ and because they are likely to be used for more and more purposes in the future, legal regulation of virtual worlds is inevitable. If this regulation is not developed by courts through resolving contract and property disputes, it will surely occur through legislation and administrative regulation. Lastowka and Hunter recognize this fact implicitly when they also argue that people should have property rights in items existing in virtual worlds.⁷ If virtual assets are regarded as property, it is difficult to imagine that the law will not move to protect them.

Rather, the key question is how the law should preserve and defend the autonomy of virtual worlds and those who play within them, including the ability of participants in those virtual spaces to

⁴ See Julian Dibbell, *The Unreal Estate Boom*, *Wired*, Jan. 2003, at 106, available at <http://www.wired.com/wired/archive/11.01/gaming.html> (describing investments in virtual real estate in game worlds) (on file with the Virginia Law Review Association).

⁵ For example, a company called Blacksnow Interactive came up with an ingenious way to make money off of virtual worlds. It went to Mexico and hired unskilled laborers to play *Dark Age of Camelot* around the clock, collecting virtual assets which Blacksnow then sold on eBay. After Mythic Interactive, the owners of *Dark Age of Camelot*, tried to put a stop to Blacksnow's business model on the grounds that it violated Mythic's intellectual property rights, Blacksnow sued Mythic for engaging in unfair business practices. The case never proceeded very far, since Blacksnow, a fly-by-night organization, eventually disappeared. See *id.* at 109; see also Julian Dibbell, *Owned! Intellectual Property in the Age of Dupers, Gold Farmers, eBayers, and Other Enemies of the Virtual State*, at <http://www.nyls.edu/docs/dibbell.pdf> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association); *Lawsuit Fires Up in Case of Vanishing Weapons*, *China Daily*, Nov. 20, 2003, at http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283094.htm (last accessed Sept. 17, 2004) (describing lawsuit in the People's Republic of China concerning theft of virtual biological weapons) (on file with the Virginia Law Review Association).

⁶ See Lastowka & Hunter, *supra* note 2, at 5-11 (describing the growing numbers of people who inhabit virtual worlds and the importance of the virtual communities to their lives). The average *EverQuest* player spends about twenty hours a week within the virtual world. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 10 (CESifo Working Paper No. 618, Dec. 2001), at <http://papers.ssrn.com/abstract=294828> (on file with the Virginia Law Review Association); see also Nicholas Yee, *The Norrathian Scrolls: A Study of EverQuest* 12 (Version 2.5, 2001), at <http://www.nickyee.com/report.pdf> (reporting that the average *EverQuest* player spends an average of 21.9 hours per week playing the game) (on file with the Virginia Law Review Association).

⁷ Lastowka & Hunter, *supra* note 2, at 49.

develop and enforce their own norms. This question is important precisely because those internal norms can be preempted or made irrelevant by law. Similarly, although technological design can also regulate virtual spaces, legal restrictions (for example, prohibitions on electronic surveillance or on the use or installation of anticircumvention devices) can dictate which uses of code are permissible and which are not. Hence, a significant amount of the regulation and the protection of virtual spaces will occur through real-world law, not outside of it: through contract, through property, and through the protection of values of freedom of speech and association.

In this Article, I will argue that the freedom to design and play in virtual worlds has constitutional significance. Much of what goes on in virtual worlds should be protected against state regulation by the First Amendment rights of freedom of expression and association. At the same time, I shall argue that First Amendment doctrine, as currently understood, will be insufficient to fully protect freedom in virtual worlds, and that legislation and administrative regulation will be necessary to vindicate important free speech values. Finally, I shall argue that still other activity in virtual worlds will not and should not be so protected from legal regulation. Some might hope that virtual worlds will be left to themselves to develop their own norms and methods of enforcement. What happens in virtual worlds, however, has real-world effects both on players and nonplayers, and governments will have important interests in regulating those real-world effects for reasons that are unrelated to the suppression of free expression.

The single most important development that will lead to legal regulation of virtual spaces is the accelerating real-world commodification of virtual worlds. Virtual worlds increasingly contain items that are freely bought and sold in real-world markets and have attained real-world value.⁸ In addition, virtual worlds are full of items

⁸ For a partial list of virtual items currently being auctioned off on the Internet, see eBay Listings, Internet Games, at http://entertainment.listings.ebay.com/Video-Games_Internet-Games_W0QQfromZR4QQsacategoryZ1654QQsocmdZListingItemList (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association). In his weblog "Playmoney," cyberjournalist Julian Dibbell describes his continuing attempts to earn a living from buying and selling virtual items. Julian Dibbell, Playmoney, at <http://www.juliandibbell.com/playmoney/index.html> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

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that either are or will be protected by intellectual property laws. To the extent that game owners encourage people to treat elements in those worlds like real-world property, and allow purchase of those assets in real-world markets, they will not and should not be able to use the First Amendment to insulate their business practices from government regulation. Conversely, the more that game owners endeavor to design their platforms to avoid real-world commodification and take steps to preserve their “speech-like” character, the more protection they can and should expect under the free speech principle. The other major method for game owners and players to protect their autonomy in virtual spaces will be contracts between the game owner and the players. However, as I shall argue, these contractual rights easily can be modified by legislative and administrative regulations, such as those found in consumer protection laws. In the final Part of this Article, I will consider how governments might protect free speech values in privately owned spaces by creating “interration” statutes specifically designed for virtual worlds. These statutes would allow platform owners to choose what kind of virtual world they wish to create and what corresponding duties they owe to the players. Players, in turn, could choose which virtual worlds they wish to occupy knowing in advance what their free speech rights in those worlds will be.

I. THREE KINDS OF FREEDOM IN VIRTUAL WORLDS

I begin by distinguishing three different kinds of freedom in virtual worlds. The first is the freedom of the players to participate and interact with each other in the virtual world. Generally speaking, players participate in virtual worlds through representations of themselves called avatars. Players identify with their avatars; they experience what happens to the avatars in the virtual world as happening to themselves.⁹ The right to participate in the virtual world

⁹ Avatars are a kind of cyborg, combining the player with a machine representation in a virtual space. See Lastowka & Hunter, *supra* note 2, at 63–65. For this reason, Lastowka and Hunter consider the possibility that cyborgs have rights. *Id.* at 68. This way of talking, however, tends to conflate two separate issues. The first issue concerns what internal norms and technological structures govern the interactions of avatars within a virtual world. For example, internal community norms often develop in virtual worlds to police certain forms of conduct. These norms are often enforced both

through one's avatar (or avatars) is the "freedom to play."¹⁰ Because what makes virtual worlds fun and exciting is the continual interaction among the participants, Professor Yochai Benkler has also called it the freedom "to play together."¹¹

The second kind of freedom is the freedom of the game designer to construct the virtual world and run it in the way that he or she sees fit. I call this the "freedom to design." For purposes of this discussion I do not make a distinction between the people who design and maintain the game and the people who own the intellectual property rights to the game platform. They may be different people, but in most cases they are the same person or they work for the same entity. Therefore in the discussion that follows I use the terms "game designer" and "platform owner" interchangeably.

The freedom to play is of particular value to the players, although the game designers and platform owners can, and often do,

by the avatars and the platform owners, and we might consider them to be the rights of cyborgs or avatars relative to the virtual space.

The second issue—which is the focus of this Article—concerns the rights of players recognized by real-world law to play as avatars and participate in virtual worlds. The right to play concerns the rights and duties of players that are recognized by law. These rights and duties may run between the player and the state, between the player and other players in the virtual world, or between the player and third parties outside of the virtual world.

These two types of rights may often intersect and build on each other, but they are also analytically distinct. To give an example: a virtual community might have adopted an internal norm against group tackling of an avatar by a swarm of players who steal all the avatar's virtual possessions. This norm might be enforced informally by shunning players who engage in the practice, or more formally by a system of dispute resolution created and enforced by avatars in the virtual world. However, there can also be questions of real-world law: Is swarm tackling in violation of the platform owner's Terms of Service Agreement which, in turn, is enforceable in the courts? And is the practice of shunning avatars who violate the norm itself permissible under the Terms of Service Agreement? Presumably, if players violated the Terms of Service Agreement for either reason, the platform owner would have the legal right to discipline or expel the offending players.

¹⁰ For a related formulation, see Edward Castronova, *The Right to Play* (Oct. 2003), at <http://www.nyls.edu/docs/castronova.pdf> (arguing for a right to participate in virtual spaces) (on file with the Virginia Law Review Association).

¹¹ Yochai Benkler, Remarks at State of Play Conference (Nov. 14, 2003), at <http://www.nyls.edu/pages/1430.asp> (on file with the Virginia Law Review Association). James Grimmelman offers the related concept of a "free-as-in-speech-game," which he distinguishes from a "free-as-in-speech-game platform." James Grimmelman, *The State of Play: Free As In Gaming?*, *LawMeme*, Dec. 4, 2003, at <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1290/> (on file with the Virginia Law Review Association).

play in the virtual worlds they operate. Conversely, the freedom to design is of particular value to the game designers and platform owners, although many game spaces give players considerable freedom to add new things to the game space, so that they, in effect, become subdesigners of the virtual world, albeit subject to the veto of the platform owner. For example, in *There* players create virtual clothing that they sell in virtual bazaars; and in *Second Life* players have designed and built a wide variety of landscapes, vehicles, buildings, and tools that are important parts of that virtual world.¹²

Game designers and platform owners control what goes on in the virtual world in two basic ways: through code and through contract. First, they control what can be done in the game space by writing (or rewriting) the software that sets the physics and the ontology of the game space, defines powers, and constitutes certain types of social relations. Through code they can change features of the virtual landscape, grant or deny powers to participants, and kick participants out. They can also write the code to allow them to watch surreptitiously what is going on in the game space. Because they can magically change the physics of the game space and see everything that is going on there, the platform owners are sometimes referred to as the “gods” or “wizards” of the game space.¹³

Second, game designers can control what goes on in the game through contract. In most cases, in order to participate in virtual worlds, players must agree to the platform owner’s Terms of Service (“TOS”) or End User License Agreement (“EULA”). The EULA covers features of proper play and decorum that cannot easily be written into the code. Game designers enforce social norms in the game space by kicking out (or threatening to kick out) people who violate the EULA.¹⁴

¹² For a description of *There*, see <http://www.there.com/index.html> (last accessed Nov. 9, 2004); for a description of *Second Life*, see <https://secondlife.com>, 2004 (last accessed Nov. 9, 2004).

¹³ Lastowka & Hunter, *supra* note 2, at 54–55; Jennifer Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO* (1996), at <http://www.ascusc.org/jcmc/vol2/issue1/lambda.html> (on file with the Virginia Law Review Association).

¹⁴ See, e.g., Terms of Service, *Second Life*, at <http://secondlife.com/corporate/terms.php> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association); Rules of Conduct, *EverQuest*, at http://eqlive.station.sony.com/support/customer_service/cs_rules_of_conduct.jsp (last accessed Sept. 9, 2004) (on file with the Vir-

The designers' freedom to design and the players' freedom to play are often synergistic. The code and the EULA form, respectively, the architecture and the social contract of the virtual world that enable people to play the game and enjoy themselves. To a considerable extent the players' freedom to play is the freedom to play within the rules of the game as it has been designed. Thus the game designers create various sorts of utopias (or dystopias) and players can choose which game spaces they would like to inhabit and play in. The game space that the designer creates may be very unpleasant indeed (a prisoner of war ("P.O.W.") camp or a torture chamber, for example) but some players will be intrigued by the experience and want to play there. The nature of the freedom to play in a particular game space thus depends in large part on the nature of the game space. The person who takes on the role of a mistreated prisoner in a P.O.W. camp reenactment cannot really complain that his freedom to play has been abridged because he cannot order virtual room service there.¹⁵

Moreover, game designers like to keep their players happy to ensure that they stay and that even more people want to play the game. Hence designers often listen to the player community about how the game could be tweaked to make it more fun to play, or how certain loopholes or features that make the game less fun to play should be eliminated—and the designers sometimes change the code and the EULA accordingly. In these cases the platform owner's freedom to design supports and nourishes the players' freedom to play, and the designers and the player community work together to improve the game space.

These happy synergies, however, may not always occur. Platform owners and individual players may have very different desires and interests, and so the freedom to play and the freedom to design can also conflict. Game designers may run their worlds in ways that the players find oppressive or high-handed. Although players

ginia Law Review Association); Terms of Service (TOS): Behavior Guidelines, *There*, at <http://webapps.prod.there.com/login/73.xml> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

¹⁵ In this context, game designer Raph Koster has spoken of the importance of "games we love to hate." Raph Koster, Current and Future Developments in Online Games, at <http://www.legendmud.org/raph/gaming/futuredev.html> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

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can choose which game spaces to play in initially, over time they invest considerable time and effort in the game world and in their identities there, and this and various other network effects of virtual worlds may make exit more difficult over time.

Conversely, some players may want to do things in the game space that game designers think is particularly offensive, gives the player an unfair advantage, dilutes the competitive spirit of the game, or makes the game less fun for all. In response, designers sometimes rewrite the code or change the EULA in ways that these players do not like, or simply kick the offending players out of the game space. When they do any of these things, players may object that their right to play has been abridged by the game designer, in part because the platform owner is being arbitrary or because the rules of the game have been changed in midplay. In response, the game designer can point out that virtual worlds are an ongoing experiment and that human interactions and human ingenuity are always broader than the game designer could have foreseen. Therefore the designer needs to make judgment calls about whether players are acting in accordance with the spirit of the game, and needs to be able to fine tune the game space as the designer learns more and more information about how people are behaving in the game space. The players, in turn, may respond that the game designers are making excuses for their own arbitrary behavior, and so on. Many of the most important controversies in game worlds revolve around the potential conflicts between assertions of the right to design and counter assertions of the right to play.

Although this Article focuses primarily on the freedom to play and the freedom to design, there can be a third kind of freedom in virtual worlds, one that combines elements of both. The platform and the rules of the game could be collectively created by the players themselves. For example, the platform could be based on open source materials; the players could collectively innovate on it and decide what the rules of the virtual space would be. In this type of virtual world, a strict division between players and designers would collapse. We might call this sort of freedom the “freedom to design together.” The freedom to design together may become very important if a robust and flexible open source platform for games becomes widely available. That platform would be the equivalent for

virtual worlds what Linux is for the world of operating systems. Even within proprietary spaces, however, players often have the ability to set up and enforce virtual world norms among themselves.¹⁶ In some cases, players have the ability to add functions and upload virtual items or software programs to the game space with the permission of the platform owners. These practices also involve the rights to play and design, and are usually subject to the final veto of the platform owner. Nevertheless, we might consider them as elements, however limited, of the right to design together.

The notions of freedom to play and freedom to design in virtual worlds are related but not identical to the constitutional values of freedom of speech, expression, and association. Indeed, in the future, I predict that both game designers and game players will repeatedly invoke freedom of speech and freedom of association as defenses against attempts by the state to regulate virtual worlds. Nevertheless, the doctrines of American free speech law, as they are currently constructed, are insufficient to give adequate protection for many features of the freedom to design and the freedom to play in virtual worlds. The most important limitation is that freedom of speech is, generally speaking, a right that runs between the state and private individuals or associations, and not between private parties. To be sure, important aspects of the freedom to design and the freedom to play are concerned with freedom from state regulation of game spaces. But protection of the freedom to play and the freedom to design often turns on the resolution of conflicts between platform owners and game players, both of whom are nominally private parties. It is true that in adjusting rights between players and platform owners the state will always be involved, and some adjustments of private rights can violate the First Amendment.¹⁷ But it does not follow that all such adjustments implicate First Amendment rights.

¹⁶ See Mnookin, *supra* note 13 (describing the rise of community norms in the virtual space of LamdaMOO); see also *A Tale in the Desert*, Lawmaking Supplement, at <http://www.atitd.com/man-lawmaking.html> (last accessed Nov. 9, 2004) (offering elaborate instructions about how players of the multiplayer online game *A Tale in the Desert* can make laws for Ancient Egypt) (on file with the Virginia Law Review Association).

¹⁷ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that enforcement of common law defamation rules between private parties violated the First Amendment).

II. DESIGN AND PLAY IN VIRTUAL WORLDS AS SPEECH

For the moment, however, I want to focus only on the relationship between the state on the one hand, and the players and designers of virtual worlds on the other. To what extent should the design and play of massively multiplayer games and virtual worlds be protected under the free speech principle? If the state regulates virtual worlds because of the ideas expressed by the players and designers, the free speech principle is surely violated. That, however, is true of most activities. The question I am concerned with is whether design and play should themselves be considered exercises of the right to speak. Courts consider a wide variety of social activities to be speech: examples are using a press to publish a newspaper, dancing, using a musical instrument to make music, painting, picketing, leafleting, charitable solicitation, and so on. We want to know whether the design and play of massively multiplayer games is speech like dance, picketing, leafleting, or charitable solicitation.

The category of speech is historically contingent. It changes over time, as conventions and technologies change. There are no necessary and sufficient conditions for something to be considered speech within the free speech principle. Rather, what counts as speech changes over time, as new media of communication evolve, and older ones change their constitutive conventions and understandings. The domain of speech protected by the free speech principle is a historical and sociological construction.

Protection of freedom of speech is protection of media for the communication of ideas.¹⁸ I put the point in that rather abstract way because the notion of a medium of communication—like television, or dance, or leafleting—is actually a combination of various technologies, conventions, and social practices. Media require technologies of communication, ranging from the human voice to motion picture projectors, printing paper, and computer hard drives. Media of communication also involve social practices and conventions that come into being at certain points in history, and then change over time.

¹⁸ See the discussion in Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1253 (1995) (noting that “[t]he ‘ideas’ prized by First Amendment jurisprudence are often as much a product of First Amendment media as they are independent ‘entities’ transparently conveyed by such media”).

Motion pictures are a good example: When the Supreme Court first considered the question of whether motion pictures were protected speech, it said no. Motion pictures, the Court explained, were just a form of entertainment.¹⁹ It was not until 1952 that the Supreme Court officially held that motion pictures were a form of protected speech.²⁰ Today it seems obvious to us that people communicate ideas through motion pictures and that motion pictures are an important part of public discourse and the world of art.

As conventions and technologies change, so too do the boundaries of speech. The normative question we have to ask ourselves is whether it makes sense to count a particular social activity at a particular point in time as a medium through which people communicate ideas to each other, and whether we should regard this practice as a form of life through which people participate in the exchange and communication of ideas. That normative question is based on sociological judgments, which change over time. Thus, the boundary of constitutionally protected speech is a moving target, a normative judgment influenced by an interpretation of social conventions and technological development. Our judgments about what counts as speech change, in part, because the world around us changes, and the development of new technologies is an important part of that change. The rise and adoption of a technology—like motion picture technology—changes our ideas about what art is, what communication is, what identity is, what appearing “in public” means, and so on. It does so even before courts come around to seeing the new technology as a form of protected speech.

I would argue that something similar is happening with massively multiplayer games and virtual worlds. The technologies that produce these games and worlds have evolved in a relatively short space of time. As they do so, massively multiplayer games and virtual worlds are becoming recognized as media for the communication of ideas, including every sort of representation and recreation of human interaction.

Courts already recognize the design of much simpler games—like first-person shooter games—as artistic creations protected by the

¹⁹ *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243–45 (1915); see also *Post*, *supra* note 18, at 1252–53.

²⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).

First Amendment.²¹ The arguments for massively multiplayer games and virtual worlds are even stronger. Virtual worlds are a medium of expression, a medium in which you can say things and express things. Game designers certainly understand what they are doing in this way. Indeed, the world of computer games and the world of motion pictures are quickly merging. The work of producing a new game is increasingly similar to the work of putting together an animated motion picture—and the same technologies are useful for both. Not only do the latest animation techniques move easily from motion pictures to games and back again, but games are regularly marketed and advertised as if they were motion pic-

²¹ See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 956–58 (8th Cir. 2003) (holding that digital video games are protected by the First Amendment); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577–78 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001) (same); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (same); see also *James v. Meow Media, Inc.*, 300 F.3d 683, 695–96 (6th Cir. 2002) (attaching tort liability to the communicative aspect of video games implicates First Amendment); *Wilson v. Midway Games*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (“While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment.”).

Note that one early district court decision that refused to consider video games as protected speech viewed them just as the Supreme Court did motion pictures in 1915. It regarded video games as a mere form of entertainment without any relevant information content, and it analogized them to mechanical entertainment devices like pinball machines and rule-based sports like baseball and hockey:

In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games “talk” to the participant, play music, or have written instructions does not provide the missing element of “information.” I find, therefore, that although video game programs may be copyrighted, they “contain so little in the way of particularized form of expression” that video games cannot be fairly characterized as a form of speech protected by the First Amendment. Accordingly, there is no need to draw that “elusive” line “between the informing and the entertaining” referred to in *Winters v. People of New York*.

America's Best Family Showplace v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (citations omitted) (quoting *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982) and *Winters v. People of New York*, 333 U.S. 507, 510 (1948)); see also *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (holding that video games are unprotected by the First Amendment); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 927 (Mass. 1983) (“From the record before us, it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential.”).

tures. Game designers roll out new versions of games in the same way that movie studios roll out new releases.

In addition, games, particularly massively multiplayer games and virtual worlds, have creative and interactive features that, in some ways, make them even more like speech than motion pictures.²² (Just as the ability to create games is part of the freedom to design, the ability to interact within games is part of the freedom to play.) People sometimes criticize television and motion pictures as a sterile form of mass culture, in which people watch passively and are entertained. In fact, it is much more complicated than that. People appropriate the ideas and images they find in movies and make something out of them in conversations with other people. With massively multiplayer games, it is even more obvious that what is going on is participatory. The most sophisticated multiplayer games allow you to tell your own stories and add things to the world in which you are playing. If movies are media for the communication of ideas, so too are massively multiplayer games.²³

Multiplayer games and game universes embrace the possibility of contingent events. Unlike the simplest computer games, there is no set narrative or fixed set of possible narrative chains of events. As a result, virtual worlds have histories. They allow not only the game designer, but also the participants, to make new meanings, to have new adventures, and to express themselves in new ways. Mas-

²² Note, ironically, that interactivity has sometimes been offered as a possible reason why video games are not protected speech—because this makes them more akin to pinball machines. Judge Posner, however, correctly rejects this argument as spurious. See *Kendrick*, 244 F.3d at 577 (“Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.”); see also *Wilson*, 198 F. Supp. 2d at 181 (“The nature of the interactivity set out in Wilson’s complaint, however, tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about *Mortal Kombat*: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced.”).

²³ In fact, there is already a nascent movie industry within virtual worlds called machinima, in which people “film” or make digital copies of what happens in virtual worlds and alter them for artistic effect. Of course, the fact that people are making movies about and inside virtual worlds suggests that these virtual worlds are both a kind of art and a kind of reality. They are a form of life that a certain form of art is imitating. For a description of machinima, see <http://www.machinima.com/> (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

