

The IP Law Book Review

IP Law Center, Golden Gate University School of Law

Vol. 1 No. 2 (February 2011) pp. 61-68

VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS, by Greg Lastowka. Yale University Press, 2010, 226 pp. Hardcover \$27.50.

Reviewed by William K. Ford, The John Marshall Law School.
7ford@jmls.edu

Greg Lastowka's *VIRTUAL JUSTICE* is an introduction to the legal issues involving virtual worlds, examples of which include Blizzard Entertainment's *World of Warcraft*, Linden Lab's *Second Life*, and Disney's *Club Penguin*. Many of these virtual worlds are gaming worlds, though some, like *Second Life*, are better described as social worlds. Lastowka discusses several areas of law, focusing on issues of jurisdiction, contract, property, computer fraud (hacking), and copyright (with other areas of intellectual property law receiving only passing attention (p.194)). While in many ways the book is a survey of the field, threaded throughout the discussion are two related arguments, both made quite gently. The first is that it is meaningful to conceive of "virtual law" as a separate body of law. At present, virtual law is only "one corner of cyberlaw" (p.74), but Lastowka predicts it will and should become a distinct and recognized body of new law in the future (pp.11, 69). The second is that virtual law should be distinctive in large part by empowering customers against the "wizards" and the "online overlords" who own and control virtual worlds (pp.153, 195).

Lastowka defines virtual worlds as "persistent, interactive, simulated social places where users employ avatars" (p.31). For those who are not up to speed on virtual worlds, let alone the legal issues raised by them, the early chapters will fill in the gaps. While the lines between them are not rigid, Lastowka divides virtual worlds into three basic categories: (1) MMORPGs (Massively Multiplayer Online Role-Playing Games), (2) social worlds, and (3) kid worlds (p.58). MMORPGs like *World of Warcraft* are the game worlds (pp.59-61). Social worlds like *Second Life* are virtual worlds without the gaming elements. They are instead places to "hang out" (pp.61-

64). Kid worlds may be more like MMORPGs or more like social worlds, but either way, they are oriented towards children and feature heavy restrictions on what users can do and say (pp.64-66). In explaining the development of these modern virtual worlds, Lastowka reviews several areas of relevant history, including the ancient Greeks (Plato's *Cave*) and more contemporary novels, films, television shows, and non-electronic games (pp.29-38). For example, Dungeons & Dragons, probably more than any other game, provided important ideas for the features and content of early computer adventure games, and its influence remains evident to this day (pp.36-38, 59). The history of virtual worlds is of course in substantial part the history of computer and video games, and Lastowka covers the important developments here as well.¹

Lastowka's first major point is the distinctive character of virtual law. Like aviation law, which became the subject of comprehensive legislation in the 1920s, he sees virtual law as also becoming a body of "new law" (pp.68-69). As someone who teaches a seminar on computer and video game law, it might be expected that I would be sympathetic to this argument, but I see this area of law as mostly about the nuances of established fields of law, such as intellectual property law and First Amendment law. A sensible law school course is not about examples of disputes that *happen* to involve video games (or horses), e.g., an employment discrimination dispute that involves a video game publisher, but it could be about legal questions where the presence of video games affects the legal analysis. For example, what features of a game constitute unprotectable procedures, processes, or systems under 17 U.S.C. 102(b)?² Are video games more like posters and coffee mugs or more like books and films for purposes of the right of publicity?³ May the government restrict minors' access to violent video games because video games have negative effects attributable to video games' particular form of interactivity? Even if focusing on these questions does not "illuminate the entire law,"⁴ they are substantial and worthwhile, but I don't think they define a truly separate area of law. Lastowka, however, finds more than just nuances in virtual law.

Virtual worlds often include gaming elements, and Lastowka views law and games as an uneasy mix, at least as the law exists now. He views games as separate jurisdictions from law, "jurisdictions of play" (p.105). Games are a "rival regime of social ordering" to law, and game rules are "inherently in tension with the rules of law" (p.105). "We desire laws," says Lastowka, "to be rationally designed to efficiently promote the common good" (p.108). Games are different. They are "strange, inefficient, and economically counterproductive" (p.137). The consequence is apparently to push the law

and virtual worlds apart and create both an opportunity and a need for new law to deal with the resulting “anarchic online frontier” (p.121).

This tension between law and games is, I think, overstated. We want law to further the common good and various social ends. One of these ends surely includes the individual enjoyment afforded by a recreational activity like gaming. As a related example, law presumably favors the (efficient) production of films desired by consumers. It would be odd if law was then hostile to consumers enjoying them, as if law favored only production and not consumption. Perhaps the enjoyment of games is somehow different than the enjoyment of films in terms of efficiency, but the apparent inefficiency of games is essential to their enjoyment. Lastowka quotes Bernard Suits’ characterization of games as being “directed towards bringing about a specific state of affairs, using only means permitted by the rules, where the rules prohibit more efficient in favor of less efficient means” (p.109). But Lastowka omits the rest of this description: “the rules [of games] are accepted just because they make possible such activity.”⁵ The rules are essential to a game. While Lastowka concludes “play is . . . oriented toward a *process*, not a goal” (p.115), Suits points out the important relationship between rule-governed processes and goals: “Rules in games thus seem to be in some sense *inseparable* from ends, for to break a game rule is to render impossible the attainment of an end.”⁶ Assume a race around a circular track, an example used by both Suits and Lastowka (p.109). Would law, with its goal of efficiency, prefer that the contestants cut across the middle rather than run around the track? Lastowka apparently thinks so, but I don’t see why.

While I do not think that there is an *inherent* tension between law and games, I agree with Lastowka that they can sometimes clash. Lastowka discusses the example of the Georgia Supreme Court’s holding that the decisions of football referees cannot be challenged in court (p.109).⁷ He suggests that “law may have difficulty balancing the competing interests” between law and games because game rules are “sub-optimal” (p.110), but the law’s existing interest in efficiency and the common good seems a help rather than a hindrance. It supports allowing players to resolve their disputes through expert private referees rather than courts, at least when the disputes are of the conventional type for the relevant game. And despite the literal words of the Georgia Supreme Court—“courts of equity in this state are without authority to review decisions of football referees”⁸—there are undoubtedly limits. Referees cannot imprison or execute players as penalties, but there is much referees can do that courts can quite properly and quite confidently decline to second guess.

As a potentially more serious clash between law and games, Lastowka claims that courts have allowed at least some games, such as football, to “operate outside the boundaries of traditional social expectations” because at least some violence is permitted in football (p.113). Traditional social expectations, however, often countenance at least some violence. It all depends on the context. Russian roulette is out because the risks are so great and the benefits are so negligible.⁹ Football offers greater benefits (in terms of competitive enjoyment and spectator entertainment), and it does so with much less risk than Russian roulette. The limited autonomy granted to football is not because games are a sort of oddity that law struggles to deal with, but because law recognizes this autonomy is necessary to preserve the legitimate social value of games.

To the extent law grants games limited autonomy, what do we make of situations where, for example, game rules allow one player to defraud another, especially in a virtual world containing virtual property with real world value? Lastowka quotes a commenter on a blog who rejects the notion that such activity should be a problem: “It would be like suing someone you lost to at poker” (p.121). This seems correct to me. Like bluffing in poker or outright lying in a game of Diplomacy, thievery could very well be a legitimate “play style.” In Electronic Arts’ *Ultima Online*, this is the clearly stated rule (p.13). Thievery is part of *playing* the game, not the basis for a complaint to Electronic Arts—or to a court.¹⁰ Lastowka seems to have doubts about these types of rules, even when they are clear, but the more difficult problem he discusses involves situations where the rules of the game are ambiguous.

Ambiguous rules of conduct with real world monetary consequences can arise in any virtual world, including social worlds that lack traditional gaming elements and even in virtual worlds that prohibit the buying and selling of virtual items. Not surprisingly, there is extensive buying and selling of these items in violation of contract terms. Lastowka reports that Blizzard Entertainment has closed thousands of *World of Warcraft* accounts of players engaged in “gold farming,” the harvesting of virtual money to sell to other players (pp.22-24). Sony Online closed the account of someone who supposedly made approximately \$100,000 from selling virtual currency for *Everquest II* (p.159). In these situations, the gold farmers knew the risks of violating the contract terms. A loss from closed accounts, when it happens, does not seem inappropriate. Nor is it unfair to prohibit buying and selling in the first place. Virtual world owners need to control their

worlds to maintain the experience of players (p.140). Even insuring the scarcity of virtual items is necessary to maintain player interest (p.165).

But what if virtual property is legitimately bought and sold in a virtual world, and someone loses this investment for violating an ambiguous rule? Such problems are not completely novel. As a related example, courts have resolved ambiguous contest rules. In one case, the question was whether a player in a golf tournament managed to shoot a hole-in-one on the required hole to win an automobile; unfortunately, the required hole was ambiguously defined.¹¹ Virtual worlds magnify this type of interpretive problem. Games like poker have relatively simple rules compared to a virtual world. The software necessary to support a virtual world and regulate player conduct is extremely complicated. Glitches and bugs are common and are often discovered by players before the virtual world owners (pp.156-160). It can often be genuinely unclear whether a particular activity in a virtual world constitutes cheating and different players can legitimately have different expectations (pp.121, 145-46). Hard cases will likely result.

As an additional complication, virtual world users may expect owners to assist them against other users. Second Life's terms allowing users to retain their copyrights in uploaded content inevitably generates conflicts among users over copyright violations (pp.191-93). Users with disputes may demand the virtual world owner act. One class action lawsuit against Linden Lab was based on its alleged failure to act to protect user property (p.193). Users may instead sue each other, but virtual world owners may be dragged into these disputes as well (p.141). From the standpoint of virtual world owners, creative freedom for users combined with user ownership can "attract lawsuits from all directions" (p.193).

Virtual world owners—the "online overlords" (p.195)—recognize all of these problems and are likely to protect themselves with contract terms sometimes perceived (rightly or wrongly) as one-sided (pp.93-96). As a contributing cause of one-sided terms, Lastowka points to the problems of consumers not being able to freely negotiate terms with virtual world owners and often not reading the terms (p.91). While these are conventional concerns, I doubt the potential problem here has much to do with contracts of adhesion.¹² For most people, even most contracts professors, not needing to negotiate or even read most contracts is surely a blessing, not a curse. There may still be virtual world terms that the law should not enforce, and interesting questions will no doubt arise about whether one-sided terms in these contracts rise to the level of unconscionability, but like the questions

mentioned earlier, I see these issues as more likely representing the nuances of contract law rather than truly new law.

Lastowka's most aggressive suggestion for dealing with at least some of the legal problems of virtual worlds is to create "democratic and participatory structures," ones that would empower players by allowing them to more directly participate in the governance of virtual worlds. He doesn't detail how these should be created or argue for particular participatory structures, but he does briefly describe one experiment in virtual government in the relatively small virtual world of LambdaMOO (pp.40-41, 79-84). He describes the experiment, while it lasted, as "complicated, theatrical, contentious, and time-consuming" (p.82). Weighing against this innovation in other virtual worlds would be the desires of the players themselves. I assume Lastowka is correct when he predicts most players would not be interested in virtual legislatures or similar features in their virtual worlds (pp.89, 195).

With easy entry and exit into virtual worlds and extensive competition among them, I worry much less than Lastowka about the "anarchic online frontier," and I also doubt the future of virtual law becoming the distinctive field Lastowka envisions. I readily agree, however, that the legal questions raised by virtual worlds are interesting, substantive, and worthy of scholarly attention, and Lastowka's book provides an excellent introduction to them.

ENDNOTES

¹ Given the nature of the book, it is perhaps a justified quibble to note that Lastowka incorrectly refers to Ralph Baer as the inventor of Pong and the inventor of the patent covering table tennis, a patent that figured prominently in the legal history of the video game industry (p.37). Baer is certainly relevant to the general discussion as he is credited with the pioneer patent in the video game industry. See *Magnavox Co. v. Chicago Dynamic Indus.*, Nos. 74-1030 and 74-2510, 1977 U.S. Dist. LEXIS 17996, at *2 (N.D. Ill. Jan. 10, 1997) ("[Baer's] '480 patent, I think, is the pioneer patent in this art[.]"). He is also relevant to the more specific history of Pong, but Baer credits William Rusch with the idea for the table tennis video game. See Ralph H. Baer, *VIDEOGAMES: IN THE BEGINNING* 45-47 (2005); Deposition of Ralph H. Baer, *Midway Mfg. Co. v. Magnavox Co.*, No. 74-1657, at 11:28 (S.D.N.Y. Feb. 18, 1976) ("Q. Do you credit Mr. Rusch with having conceived the ping pong type game where one image appears to bounce off another? A. To the best of my recollection, that's how it was.").

Rusch is also the inventor listed on the relevant patent. See U.S. Patent No. RE28,507 (“Television Gaming Apparatus”). As Baer notes in his own history of video games, it was Rusch’s patent that was the critical one for determining infringement during the many years of litigation. Baer, *supra* note 1, at 126. See also *Magnavox Co. v. Mattel, Inc.*, No. 80-4124, 1982 U.S. Dist. LEXIS 13773, at *96 (N.D. Ill. July 29, 1982) (finding infringement of the ’507 patent); *Magnavox Co. v. Chicago Dynamic Indus.*, Nos. 74-1030 and 74-2510, 1977 U.S. Dist. LEXIS 17996, at *16-17 (N.D. Ill. Jan. 10, 1997) (same).

² See, e.g., *Atari Games Corp. v. Oman*, 979 F.2d 242, 245-46 (D.C. Cir. 1992) (suggesting that the game play mechanics for the movement of video game playing pieces are subject to copyright protection); *Midway Mfg. Co. v. Artic Int’l*, 704 F.2d 1009, 1013-1014 (7th Cir. 1983) (holding that an unlicensed device that speeds up the rate of play of a video game violated the exclusive rights of the copyright owner to produce derivative works).

³ See, e.g., J. Thomas McCarthy, 2 RIGHTS OF PUBLICITY AND PRIVACY § 7:26 (2d ed. 2010); Restatement (3d) of Unfair Competition, § 47 cmts. b and c.

⁴ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal. F. 207, 207 (1996). See also Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501, 502 (1999) (“I agree that our aim should be courses that ‘illuminate the entire law[.]’”).

⁵ Bernard Suits, *THE GRASSHOPPER: GAMES, LIFE AND UTOPIA* 48-49 (Broadview 2005). Lastowka cites page 34 for this quotation.

⁶ *Id.* at 39 (emphasis added).

⁷ See *Georgia High School Assoc. v. Waddell*, 285 S.E.2d 7, 9 (Ga. 1981).

⁸ *Id.*

⁹ See, e.g., *Neitzel v. State*, 655 P.2d 325, 337-38 (Alaska Ct. App. 1982) (“[A] participant has a 16.7% chance of being killed or seriously injured and an 83.3% chance of not being killed or seriously injured in a game of Russian Roulette each time he puts the gun to his temple and pulls the trigger. The act is so dangerous and so lacking in social utility, however,

that it demonstrates extreme indifference to human life and serves to distinguish murder from manslaughter.”).

¹⁰ The policy states, “[A]nything considered a valid play style in Ultima Online is not considered harassment. In other words, *player killing and thievery, including res-killing, is not considered harassment*. By valid, we mean that there are game mechanics created around these play styles in Felucca, such as stat loss, the thieving skill, bounty systems, murder counts, the existence of guards, etc. Ultima Online is a role-playing game that encourages various play styles, and players should seek ways of protecting themselves against these play styles through game mechanics rather than calling on customer support staff for help in these cases.” Ultima Online Harassment Policy, available at <http://support.uo.com/harass.html> (emphasis in original).

¹¹ See, e.g., *Grove v. Charbonneau Buick-Pontiac, Inc.*, 240 N.W.2d 853, 856 (N.D. 1976) (“The offer made by Charbonneau Buick stated that a 1974 Pontiac Catalina would be awarded to the ‘first entry who shoots a hole-in-one on Hole No. 8.’”).

¹² See generally Douglas G. Baird, *The Boilerplate Puzzle*, 104 Mich. L. Rev. 933 (2006).

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Suggested Citation: 1 *The IP Law Book Review* 61 (2011).