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**FROM CONTRACTUAL SERFDOM
TO HUMAN RIGHTS LIBERATION:
DOING JUSTICE TO VIRTUAL LIVES**

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Ph.D. Degree Submission

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I hereby declare that this thesis has been composed solely by me and it has not been submitted for any other degree or professional qualification.

Chapters 3 and 4 have incorporated few short extracts from work previously published in 2004, on the Journal of Information, Law & Technology.

Nicholas J. Gervassis

ABSTRACT

Analysis of relationships between states and citizens has almost monopolised the Human Rights legal discourse. In my thesis, I start from the position that Human Rights is a philosophical and historical victory of humankind, whose application cannot be limited to dictating norms in traditional forms of governance; Human Rights primarily define the human being as an individual, as a group, as a societal entity. Therefore, when we discuss Human Rights we do not pursue what governing states 'ought' or 'ought not' to do, but how human beings 'should' endure their lives in a dignified manner; how they should be treated independently of who their acting opponent might be.

The Internet, on the other hand, has evolved through the years into an uncharted virtual structure of uncouneted online operations and services run by private commercial actors. Within this setting, where the online application platform performs as a land parallel and the private commercial host as the de facto ruler, online identity is mirrored into service accounts. Hence the human being's digital existence seems to be depending, to a large degree, on the private initiative – and will.

Whilst exploring various relevant themes, the thesis revisits the issue of the application of Human Rights in private relationships through the lenses of online electronic communications and using the example of commercial online virtual worlds. According to my conclusions, a simple projection of the state/citizen model onto ISPs/users relationships does not give sufficient ground for contesting Human Rights within that context. What we need is to deconstruct predominant dogmas in modern Human Rights theory and legislation and to readjust our focus back on the human being and its universal manifestations.

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I am dedicating this effort to my father and the final work to Panagia, for reasons I can only start counting...

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ABBREVIATIONS

ACHR	American Convention on Human Rights
ACPA	Anticybersquatting Consumer Protection Act (US)
AfCHPR	African Charter on Human and People's Rights
AK	Astikos Kodikas (Greek Civil Code)
ArCHR	Arab Charter on Human Rights
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BS	Belgisch Staatsblad (Government Publication, Belgium)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Federal Constitutional Court Decisions, Germany)
BW	Burgerlijk Wetboek (Civil Code, The Netherlands)
CAN-SPAM	Controlling the Assault of Non-Solicited Pornography and Marketing Act (US)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCQ	Civil Code of Quebec
CDA	Communications Decency Act (US)
CDHRI	Cairo Declaration of Human Rights in Islam
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ChFR	Charter of Fundamental Rights of the European Union
CIPA	Children's Internet Protection Act (US)
CIPR	Commission on Intellectual Property Rights
COPA	Children's Online Protection Act (US)
COPPA	Children's Online Privacy Protection Act
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CPPA	Child Pornography Prevention Act
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRSA	Constitution of the Republic of South Africa
CTEA	Copyright Term Extension Act (US)
DMCA	Digital Millennium Copyright Act (US)

ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECPA	Electronic Communication Privacy Act (US)
EFF	Electronic Frontier Foundation
EULA	End User Licence Agreement
FTC	Federal Trade Commission
GG	Grundgesetz (German Basic Law)
GK RF	Grazhdanskii Kodeks (Russian Civil Code)
HRA	Human Rights Act (UK)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ISP	Internet Services Provider
MMOG	Massive Multiplayer Online Game
MMORPG	Massive Multiplayer Online Role-Playing Game
MPAA	Motion Picture Association of America
MUD	Multi-User Dungeon
NET	No Electronic Theft Act (US)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organisation of the Islamic Conference
OSP	Online Services Provider
S.H.	Sefer Ha-Hukim (Book of Laws - Official Gazette, Israel)
ToS	Terms of Service
ToU	Terms of Use
UDHR	Universal Declaration of Human Rights
URAA	Uruguay Round Agreements Act (US)
U.C.C.	Uniform Commercial Code (US)
U.S.C.	United States Code
VP	Virtual Property

VW	Virtual World
WIPO	World Intellectual Property Organisation
ZGB	Zivilgesetzbuch (Swiss Civil Code)

READING NOTES

Each Chapter is separated into main *Parts*, numbered in Latin. Parts do not necessarily follow narrative continuity but are linked within the Chapter's thematic unity. They are further divided into *sections* ('1.', '2.' etc), *subsections* ('1.1', '1.2' etc), *paragraphs* ('1.1.1', '1.1.2' etc) and *sub-paragraphs* ('1.1.1.1', '1.1.1.2' etc).

Where the structure of the discussion suggests so, the numerical values of the divisions abide by a secondary mode of representation to show internally progressive arrangements of descriptions or arguments (therefore '1.1.1' continues with '1.1.11', followed by '1.1.12'; note that this does not preclude subdivisions into e.g. '1.1.12.1', '1.1.12.2' etc).

A footnote reference to the main text like e.g. 4(II)[3.1.21.1] reads as '*Chapter 4, Part II, section 3.1.21.1*'.

Footnote content in angled brackets refers to websites (news-reports, press-releases etc.) found in the bibliography section, at the end of the thesis.

1. As an Introduction

The following account discusses online virtual worlds from a legal point of view. It is, however, not about virtual worlds. It puts forward an extensive comment on the human predicament in days of present future, as liberal societies, mesmerised by the myths of modernity and convinced of the so far successes of their political, technological and economic ventures, chase fervently visions of progress, only to cross paths with the phantom of liberty.

Commercial online virtual worlds are used as an example to discuss the paradigm of private regulation in closed settings and the applicability of human rights. Contemporary legal structures in many areas of life, in order to accommodate economic development, are frequently neutralising human rights claims in horizontal relationships. Considering the rise of privatisation and the allocation of public resources – and thus of vertical exercises of power over citizenship – to the private sector, the legal trend raises concerns.

Improving regulatory efficiency requires “sacrifices”, such as minimising the risk of fundamental rights disrupting the private economic sphere. These laws are worrisome not as much for their obvious ideological potency (which nonetheless becomes an issue) as for the moral bankruptcy they exhibit. It is rational for an efficiency-seeking structure not to involve values in its operational schemes: it is irrational, however, for a human formation (ethically suicidal) to submit voluntarily to dehumanising processes.

In parallel the thesis examines also an idiosyncratic form of privatisation of public spaces. My definition of public space adheres to the spatial development of communications exchanges which contextualises community formations. From this point of view, public spaces exist *as* parks, town-squares, but also exist *in* shopping-malls, private clubs, fitness centres etc. The ownership of physical space does not expand over the community of participants, but certainly determines it: (i) it conditions the coming together of persons and (ii) it authorises the application of rules at the owner’s discretion. Personal relationships, modes of co-operation and discussion content remain unaffected. This is *a* public space embedded within space.

The thesis investigates the realisability but not the reliability of the human rights perspective – and this is how it actually stands closer to discussing practice rather than crossing into constructing a theory of justice. The human rights rhetoric is not a panacea that resolves all social problems; there is no intrinsic guarantee within the discourse that it could provide an adequate replacement for existing socio-economic regulations that frequently resort to human rights.¹

1. Digital Issues - It is a plausible question, if the matter at hand is the non-applicable human rights to the Internet, why not discuss the Digital Divide, rather than engage with obsessions of Western consumerist societies, which, in the end, trivialise all possible perspectives for articulating human rights discourse in the digital era.

¹ *Mundlak, G. 'Human Rights and the Employment Relationship' in Friedmann & Barak-Erez [eds.] (2001) 313 – 314.*

1.1 - Generally, the “developed” Western political and economic schema performs as a model for countries without resources - not to mention, without sufficient entitlements and freedoms. Arguably, online technologies present a luxury for peoples with increased rates of disease and death, caused by malnutrition, famine, war – the familiar predicaments of humanity that international human rights regimes have failed to respond to (and are apparently failing to address more with the passing of time). We live in an era of increasing expectations that, bleakly, seem more and more undelivered. This failure resides in the Western world and it is primarily internal; for this is where promises start breaking. How can developed countries help nations washed in tragedy when internally they are flooding with intense struggles and human debasement? How can they support with stability politics of reason - wherever in the worlds this is considered to be missing - when their own internal practices are unreasonably opposed to any of the principles they politically declare to be championing? These are plausible concerns as well.

Hence, while not underrating attempts to “bridge” the Digital Divide, its resolution seems eventually futile if spaces like the Internet are turning into fields of human debasement. One may ask whether the latter contingency is ever possible. This work intends, if not to prove this point, at least to show that such worrisome potentials inhabit our politico-economic culture. The inability to realise solidly the democracy project and its humanitarian cargo within the daily Western social practices shows the difficulty of translating them in other settings.

1.2 - This takes us to the next query: what has human rights, or democracy for that matter, to do with virtual worlds? At first glance, closed online entertainment setups lie the furthest possible away from those juridico-political projects. Virtual worlds, however, facilitate a case study that reflects broader trends in the information society. The actual paradigm involves the commodification of social participation, the alienation and isolation of individuals (the *par excellence* valued objective of liberal democracy) through systematic practices of expanding the economic project.

Virtual worlds exemplify partial internal failures within the liberal structure that, if we take them seriously, they give us insights into societies' integrating and treating of upcoming technologies; technologies possibly more spectacular and socially permeating.

1.2.1 – Why should virtual worlds be considered of any relevant significance? In October 2010 the worldwide estimated number of registered users had reached 1 billion people.² Virtual worlds perform as technical facilitators for long-running communal and cultural experiences,³ projecting other, more socially integrated and expanded projects, such as social networks, business intranets and, even, economic structures. The fact that these worlds are labelled 'virtual' does not diminish their currency: after all, money is also a virtual product.⁴

1.3 - While VWs are used as a particularly good example, we are not dealing with activities that play only a marginal or accidental role in people's life, something they dip in and out of like other activities, e.g. going to a football match. Rather, we are seeing the emergence of lives lived largely online, ranging from playing to sociability in general (again, losing online accounts would destroy many people's entire social and professional circle) to, increasingly, work (consider the importance one's ebay trust rating has for many small businesses, or organisations such as "clickworker" which create new forms of potential exploitation at the workplace by making us all temporary, self-employed and most importantly non-unionised).

2. Overview – The discussion follows a step-by-step examination of legal, technological, cultural and political themes to gradually build its argument of juridico-political critique. The contribution of this thesis emerges from bringing human rights into perspective in the online world.

2.1 - Chapter 2 sets the background for the discussion by explaining the approach to human rights that the thesis takes onboard.

2.1.1 - The analysis opens with the anthropological claim that around the globe and through the ages, humans almost everywhere develop identical

² <KZero, 10/2010>.

³ Burri-Nenova (2009) 3.

⁴ Shields (2003) 161.

sensibilities of justice. What I address as a ‘civilizational tradition’ refers to humanity’s demonstrated sharing of basic social norms and moral principles. This suggestion comes arguably very close to conceding universalism, without though subscribing to such notions. More likely, it complies with Hart’s comprehension that rules overlap with morals, and in a manner reiterates Walzer’s concept of thin and thick principles.

The origins of human rights as a common juridical and ethical ground are possibly rooted in this civilizational tradition. I am associating the human rights doctrine to a conception of justice that I call ‘humane Justice’ (or simply ‘Justice’). However, I am not introducing another theory of Justice, but underlining the continuing philosophical and institutional project of humanity’s investing in posited laws its defence against suffering and injustice.

Suffering and injustice, in turn, become integral in igniting the responding moral components of the human rights tradition: the first appeals to humane compassion; the other mobilises vigilance against apparent misapplications of law.⁵ Historically, the development of the theoretical foundation of Justice involved rearticulating compassion juridically and preparing conceptually the positivisation of the moral sensibility of law. This overall process, that picked on naturalistic interpretations of justice and brought them gradually into ontological compatibility with modern law, is analytically presented in Part I, with the aim to highlight the deep integration of human rights in contemporary juridico-political structures.

In its conclusion, this retrospective sketches out the juridical device of the ‘human subject’, i.e. the subject in the theory and procedure of humane Justice. Subjectivity plays a decisive role in the administration of justice; hence, early in the thesis the subject of human rights is put within perspective.

2.1.2 - Part II follows the formal dimensions of national and international human rights law; the structures and legislative expressions in which it is manifested; the main expressions of content; and, finally, the modern

⁵ *Douzinas & Gearey (2005) 28 – 29 (on recognising justice via its opposite).*

problematic of application under statist constitutionalism (i.e. horizontality and exceptionalism).

Here are outlined the breadth and furthest limits of the existing posited orders, as the thesis generalises over the Internet's global expansion. The purpose is to establish a human rights perspective that may equally claim strong roots in the doctrinal tradition and practical regulatory resonance.

2.1.3 - The Chapter closes with exposing problems of human rights in relation to those concerns raised in the beginning of the present discussion. My locating of a multilayered 'crisis' involves the silent – yet seemingly effective - ostracising of the human rights grammar from contemporary legal practice. The dehumanisation of law unfolds in three ways: (i) the systemic shrinking of the human rights rhetoric; (ii) its undermining by economic liberalism; and (iii) its vanquishing under positivistic extremisms in law.

2.2 - Jumping from the legal and philosophical treatment of humanity, over to technological reconstructions of reality, Chapter 3 starts by installing a preliminary task: the onto-logical renegotiation of the concept of the subject.

2.2.1 - The capacity of law to understand and interpret the actual human being (i.e. a complex personality synthesis of identities and self) predisposes its affordances to channelling into legal subjectivity the probable multiplicity in which humanity is externalised in society. Hence, where otherwise the Chapter explores participation in Internet contexts, Part I commits to the unexpected endeavour of tracing the abstract blueprint of personhood, seeking to show that the 'human subject' of Chapter 2, this cognitive intersection of experienced truth and posited law, remains, for the purposes of Justice, open to genuine reincarnations of humanity; reincarnations like those emerging from online contexts. Towards these ends, the person concept is explored under an interdisciplinary perspective, on the basis of the triptych 'subject', 'identity' and 'self'.

This is a first step in building the paradigm of 'simulation'; that is, a virtualisation of life that we ought not to restrict only in understandings of virtual worlds. The virtual is in essence the symbolic, and the symbolic is any process/statement that intellectualises the experience of life into orders

of signs. Therefore, language, culture,⁶ religion, law and economy are equally considered to be virtual environments. This over-absorbing of reality by different virtualities exposes essentially as misinformed any discourse that claims exclusivity in defining meanings according solely to its resident reference field. Law appears possessive, exactly in this fashion, over notions of personality. Personality, though, like humanity, is broader than the limitations, which the legal instance contests to apply over its conceptual breadth and praxis.

2.2.2 - The second Part continues rather conventionally, presenting a brief historical account of the Internet experience. Then, though, it moves on with providing some alternative interpretations of the structural premises of online participation. A point of significance in the narrative of the thesis is raised by projecting relationships between online service providers and users on an analytical government and governed metaphor; the argument reaches full circle later, in the final two chapters. This Part wraps up with defining the premises of virtuality in full perspective of online relations and agency deployments.

2.2.3 - The discussion continues directly from there, with configuring the online aspect of the identity concept and then taking it a step further, into virtual domains. The purpose is to understand online participation from the experienced viewpoint of users, in its social and psychological dimensions. Virtual identities evolve into personality vessels/vehicles that we may simply call ‘online personae’. This transfer from the offline to the online, from the ‘concrete actual’ to the ‘idealised virtual’, reserves a parallel tale about digitised personalities and the second coming of humanity. The image of the Internet as a modern urban environment and an extensive reference to Hardt & Negri’s work suggest two alternative understandings into the structural development of online virtuality; these representations converge in discovering a lively multicultural social hub, but also in underscoring substantial fears of inequality and societal suppression, delivered ultimately in the form of exclusion mechanisms.

⁶ *Boellstorff* (2008) 32 - 35, recounts the endemic presence of virtuality in human culture – where culture, relying on symbols and symbolisms, is distinguished from nature.

2.3 - Chapter 4 might estrange the legal reader even more, as it launches an expedition into strange lands: an empirical account of digitised *utopias*.

Etymologically the prefix *u-* in *utopia* means “non” (*ουτοπία*). Virtual worlds (VWs) are “non-lands”, in the sense that physically these false images of territorial vastness exist nowhere else but on computer screens; and yet, they exist sufficiently to invade and alter the common perception of life for the millions of participants in those settings.⁷ It is more accurate to speak of *heterotopias*, ‘real spaces in which the ordinary rules of behaviour are, in different ways, suspended to permit the enactment of a variety of processes and rituals that do not occur in ordinary spaces.’⁸

My method for representing a setting of representations follows collected news reports and data on VWs’ to monitor the trend’s evolution within the past decade, focusing on two selected virtual landscapes. The first is the Massively Multiplayer Online Roleplaying Game (MMORPG) *World of Warcraft* (WoW) released by *Blizard/Vivendi*; the second is *Second Life* (SL), a socialising three-dimensional world that is ran by *Linden Lab*. My reasons for examining the particular two VWs have mainly to do with their popularity status; how this popularity factor has affected and is affecting common user/consumer psychology; how it is being projected in the relations between users and OSPs; and, finally, how it is predicted to interact in a culturally market-dominated society.

The examination of the two VWs includes analysis of particular contractual agreements and terms of use, which are integrally attached to the online software and regulate participation in such services: End-User License Agreements (EULAs) and Terms of Service/Use (ToS/ToU).

2.4 - The question which runs through Chapter 5 asks how did law understand and approach humanity’s migration to online settings; and what was law ultimately aiming at for getting where it is now.

⁷ *Castronova* (2005) 265 – 266, accounts a series of radical socio-economic impacts of VWs on the South Korean society.

⁸ *Cohen* (2007) 214; the concept of heterotopias was offered by Foucault in the posthumously published 1967 lecture ‘Of Other Spaces’.

2.4.1 - Part I enumerates the general development of Internet-related legislation in the US and the EU at the regional level. The reason behind picking these two particular geo-political formations is their infrastructural and jurisprudential influence in shaping the Internet as it is today. Moreover, they equally declare their serving of contemporary liberal democracy's maxims, "competing friendly" with each other as global models in promoting and establishing human freedom and humanist values. It is interesting to measure how close to these assertions the incoming waves of Internet laws have come. They arguably construct the next stage of our society's cultural and economic evolution. Thus is briefly addressed the realisation of human rights values through this legislation.

2.4.2 - Part II looks into the laws which apply specifically to VWs – or 'should apply', where legal practice has not yet confirmed them. Following the general trends which frame online legality, the juridico-political reality reaches participants of the information society through mass-distributed consumer contracts – the EULAs and ToS.

However, these virtual heterotopias generate their own, distinctive issues. The trade and various other appropriations of virtual items have raised controversy amongst OSPs and users and, at the same time, have fascinated lawyers and the media. Furthermore, involvement with VWs tends to cross the functional borders of such online services and to be externalised across the Internet (even off-line) in various forms of cultural re-appropriation; service providers frequently object, claiming infringements of their relevant intellectual property rights.

2.4.3 – In the final Part of the Chapter the first conclusions are drawn regarding the examined framework and its compliance with Justice – with legal practices that respond to the juridical human rights ideal.

The Internet by design revitalised public communications space, expanding to all possible directions the potentials for social progress and information-based human development.⁹ Internet-related laws and legal

⁹ The inventor of the World Wide Web had explained its openness to be describing a 'vision encompassing the decentralised, organic growth of ideas, technology, and society,' where anything is 'potentially connected with anything;' 'a vision that provides us with new freedom,

practices demonstrate signs of working against these prospects. Firstly, they reinforce attentively the economic hold of private actors on artefacts that crucially chill the performance of social spaces; in parallel, they appear as a whole to be withdrawing from responding directly to those human rights concerns, which online participation has in general raised. In these laws, the human being is being replaced with the “consumer”.

2.5 Human Justice, Virtual Humanity, the example of Virtual Worlds and the laws of virtual present and future: these are the four steps examined so far, building a spiral of critique that leads directly into Chapter 6 and attacking on the expanding systemisations of intellectual property (IP) laws and the conditioning of social participation by the utility of standard form contracts.

Online personae exist both as pure data or information and as nets of relations to other users and OSPs (“I am because I am befriended on facebook”). Unlike the off-line human with its physical substratum, online personae, in a radical sense, *are* information and relations.

This corresponds to the legal instruments of contract and IP: contract law governs the relational aspect and IP law the information part. As a result, we see a concept of “person” emerging that is nothing else but a result of the interaction of these two legal concepts: to the extent that they embody an ideology of free markets, we find the most complete form of commodification of the self imaginable. While in the traditional Marxist analysis of the labour contract similar issues are raised, ‘being employed’ was only ever one aspect in a person’s existence, even where being the most important to dominate all others. In the online context, we face a much more radical reduction of the self to a market object, understood through the terms of property rights and contractual obligations: we are nowhere more “owned” than online.

Part I reviews analyses in scholarship that have already confronted directly the legitimacy of the monopoly of power, which OSPs exercise under the pretext of IP rights and through EULAs/ToS. These practices

and allows us to grow faster than we ever could when we were fettered by the hierarchical classification systems into which we bound ourselves;’ Tambini *et al.* (2008) 2.

follow a larger campaign aimed at maximising the hold of market forces over information and its various social, political and cultural uses.

Part II deploys three conceptualisations, under which formal law could build a possible connection between personality and virtual personae and, furthermore, the human subject could legitimately access online virtuality.

Part III examines the dimensions of the malleable, made of software code digitised nature and the online limits between private and public. The conceptualisation of the ‘virtual public’ practically “digitises” the previous reference to the multitude, assessing briefly its juridical responsiveness to VWs.

2.6 – The final Chapter remarks briefly on the practices of the free market and on virtual humanity. It foresees the need to negotiate the contractual methods which regulate entrance to private spaces of apparent public function. The prospect is ambitious. This is why technologies and spaces that do not directly infringe our physical existence in their daily application offer the best chance we have for reviewing our daily practices.

After the Internet, after VWs, other technologies and other virtual spaces will follow, possibly closer to enveloping our existences. Before we reach to the extreme of not being able to adjust the machine to prevent dehumanisation, we can still adjust the other machine, law, to treat us humanly.

3. Motivation and Methodology - The inspiration for the main idea behind the topic was the work of mathematician Norbert Wiener; his warning that his revolutionary discoveries about machines and humans being equally communicative organisms¹⁰ should not be taken uncritically; without sufficient human values background to guide our treating of humanity’s merging with technology.¹¹ Humanity melding into online transmissions is little different to humanity melding into law. Actually, the second instance demonstrates deeper integration of human life into technical systemisations.

¹⁰ *Wiener* (1954) 136.

¹¹ *Conway & Siegelman* (2005) xiii.

On this basis, Douzinas' critical study of law under the scope of human rights jurisprudence¹² and Drahos' philosophical examination of IP¹³ formed an ideal starting point, for addressing structural developments in law that succumb to radically technocratic attitudes, and, moreover, realise dispositions that are anything but politically innocuous. Passing through cultural studies, the thesis' other two major streams relate to Hardt and Negri's multitude¹⁴ the terms of the online polity's socio-cultural production and Radin's work on property and personality.

3.1 - The reading of the thesis evolves over two substrata. The first is my extensive account of Justice. The second is the interdisciplinary examination of personality and existence in Chapter 3. Once the discussion reaches the case studies they both seem disappearing into the background. However, Justice forms the platform juridical perspective which permeates the entire critique developing in Chapters 5 and 6; therefore, its human rights take forms the yardstick against which legal structures and decision-making are being constantly measured. In a similar manner, the "person" analysis attempts from the shadows to reconnect subtly the most formulaic subjectivity understandings of law with materialising aspects of humanity.

3.2 – The treatment of laws was inevitably selective, on the basis of VW-related jurisprudence and, mainly, in view of the argument on economic-politically influential legal structures. Federal US and EU legislation demonstrate the mainstream understandings and perspectives which social policies and macroeconomics generally promote. On the contrary, the examination of human rights laws focuses more on the local level for comparing constitutional origins.

3.3 - The approach to VWs borrowed methodological principles from sociology and anthropology - specifically from symbolic interactionism.¹⁵ It

¹² (2000)

¹³ (1996)

¹⁴ (2004)

¹⁵ *Blumer* (1964) 2, analyses symbolic interactionism on three premises: 1 – 'human beings act towards things on the basis of the meanings that the things have for them'; 2 – 'the meaning of such things is derived from, or arises out of, the social interaction that one has with one's fellows'; 3- 'these meanings are handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters'.

is mainly informed by numerous conversations which took place during my short term field work in both WoW and SL as an active participant,¹⁶ upon empirical inquiry and studying ‘through firsthand observation what is actually happening in a given area of social life’.¹⁷ News reports, statistics and commentary from online sources like weblogs played also major part, where, precisely due to the infancy of the field, the lack of research bibliography is self-evident.

Where cited, the EULAs and ToS of WoW and SL (as included for comparison in the appendix section) refer to their status up until mid-2009. Later updates are mentioned, where relevant to the thesis’ objectives. Plausibly, such texts tend to change during the lifespan of a virtual world, following frequent policy adjustments.

¹⁶ From July 2007 to December 2008. My field research aimed at familiarising myself with the structures and practices of the two VWs of choice and with the mainstream community sense of those settings. Therefore, my participation was based precisely on blending in and chronicling the internal, firsthand perspective. Where sociological or economics research of VWs has frequently adopted the semi-external stance (the researcher announcing herself as such to the community and collecting data under this condition) my approach pursued rather to experiencing virtual lifestyles as a participant and recording changes in overarching trends during my time of involvement. The massively inclusive nature and open-ended character of the two setups (especially of WoW) prevented any actual influencing from my part upon the collected data. In any case, the themes, into which the present research looked, involve the massively participatory frameworks of commercial VWs and reflect little, if any at all, on incidental community developments that my virtual presence might possibly have affected. Moreover, where indicated, my discussions with other participants pertained to having common conversations on the shared virtual experience as this occurred, instead of “interviewing” or “surveying”, which would have taken the research scope to a different direction.

¹⁷ *Blumer* (1964). 38, fnt; *Boellstorff* (2008) 71 – 72, refers to this anthropological research model as “participant observation”, deploying short arguments on its advantages.

2. The Foundation of Human Rights

*'The idea of human rights consists of two parts. According to the first part, each and every human being is sacred – each and every human being is 'inviolable', has 'inherent dignity and worth', is 'an end in himself', or the like. According to the second part of the idea, because every human being is sacred (and given all other relevant information), certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.'*¹⁸

We need to understand Human Rights.

If anything else, this sounds like a plea, a call made in the defence of a discourse that claims of having been misunderstood; in a way, this is precisely the case. Since their initial celebrated insertion into the international language of law something profoundly has changed and, gradually, the hold of human rights notions over the systematisation of contemporary laws is waning; the connecting link between the two appearing more and more insignificant, almost irrelevant for lawyers to bother with.

At first glance, this assertion seems counterfactual. Aren't we living in an "age of rights", with recent high profile attempts to establish universal jurisdiction for certain human rights abuses but the latest in a long line of significant developments? The claim, obviously, has to mean something

¹⁸ Perry (1998) 4 – 5.

else. Rights, including human rights, so we will argue, have become a technocratic means of control, just a further trope in the positivistic legal vocabulary. This has made them efficient, but also sterile, removed from the context that gave birth of the idea – they are human rights forgetful of the human.

As we begin to become at home in cyberspace, and live our lives through our digital selves, we need to recover some of the old meaning of human rights, because we need its heuristic value. In situations where it is not any longer straightforward to decide where the human actor is - if anywhere at all - a much more rigorous reflection on the meaning of human rights is needed. This Chapter then is an exercise in the archaeology of human rights, to reconnect it to a notion of the human as sacred, and to give voice to the “dangerous complements” of human rights that got lost in their transformation to juridified rules of adjudication. What this will also achieve, crucial for any attempt to evoke them for the regulation of cyberspace, is to rescue them from an overly western-centric expression. It has been argued that the very concept of right is so embedded in parochial and contingent developments that affected solely the West that their utility for a global medium like the Internet is severely limited. We will show instead that while the specific *form* of right is at least partly western-centric, by retrieving their substance, their spirit of a cross-cultural recognition of what it means to be human, we can revitalise the concept of as yet unresolved issues of governance in cyberspace, and rebalance the overly contractarian model that dominates current discourse.

From an iconoclast’s point of view, human rights do not and never did exist: for what else are human rights but a condensed expression, in which the rather abstract pairing of moral justice and procedural justice acquires meaning? Looking back at humanity’s societal (and, in response, legal) evolution so far, the most persisting and agonising of all concerns has been ever since antiquity the transformation of the unattained ideal of *Justice* into the regulatory apparatus for applying normative order – i.e. *justice*. This long journey is carved in contemporary human rights expositions. Human rights

are juristic statements, which communicate the practical applicability of Justice, perceived through the eyes of man conscious of his humanity to the broader system of societal organisations. This also explains the variations in form and terminology of the human rights ideal across different legal systems; its blending with pre-existing linguistic arrangements in law marks an experience of such tremendous longing that it welcomed political compromises in “systemic destinations” such as “fundamental rights”, “civil liberties”, “social rights” and so on.

As the weighty image of Justice rises tall in the background, its shadow cast over all human rights discussion, it makes profound the deep relationship of origin between the two. Justice’s own tale speaks of an unending odyssey towards reaching a definite conceptual expression: moving from appeals to substantive morality, to the avoidance of suffering and the pursuit of pleasure, to economics-guided calculation and to interpretative judicial balancing, Justice appears omnipresent and yet ghostly at the same time. Even drawing an ideal Justice conception at the point where all such as the above mentioned approaches converge, would again have denied the benefit of a finite determination by giving in to unstable over-inclusiveness.

This Chapter reflects on the journey of humanity, through its struggles to pinpoint Justice and its achievements in the always developing justice project. There is good reason for choosing “humanity” over “law” as the traveller in this tale. For one thing, contemporary jurisprudence has longer than necessary been preoccupied with the technical evolution of law, with rationalising internal rules of recognition or interpretation perspectives; this has had negative ramifications, escalating in the dehumanisation of justice. Second, law is the vehicle, the means, not the valued cargo and end; the moment the importance of law is overstated when compared to the regulated body of living, breathing human entities, legal fetishism takes control in its most unwelcome expressions; the outcome will resemble nothing of a human society, and although not impossible we have to ponder whether that is eventually desirable.

Such contemplations may be read as a parable, informed by the involvement of human users in virtual worlds that are built on artificial conceptions and made of software code. Humanity is trying to define itself in digitised environments by infusing the code with principles of justice. Human rights mirror in the regulatory construction of justice the aspiration of humanity's aims and principles: the aspiration of Justice.

Human rights have not been devised randomly. They do not just discuss morality of natural law and rights. They most of all theorise a socio-political normative thesis. On their juridical materialisation is projected the composite picture that human Justice really is, a picture that touches upon several other conceptions of Justice and, in addition, it transmits ideologically clear social expectations and political requirements. Therefore, 'respect of life' (a moral assertion) is sitting next to 'freedom of speech' (a *democratic* imperative).

This is the form of an established Justice, of a celebrated Justice, which cannot be surgically removed from our legal vocabulary unless we are prepared to erase most of the fundamental normative principles which together have institutionally formed the modern Rule of Law. In this section we are directing attention to the development of Justice and human rights, historically and through the - less than obvious - institutional connections which have granted the human rights argument integral part in the structure of contemporary (posited) law. The aim of this Chapter is to rescue human rights from the narrow ethos of formal legality and review them as institutionalising a continuing dynamic of societal consciousness and progress.

1. A Civilisation of Human Justice

Attitudes, behaviours and biases that stem from the discussion over virtual worlds and which in following chapters I will relate to human rights reasoning, are primarily products of a predominant civilisational tradition.

Despite converging in modernity over Western, humanitarian legal doctrines and models of democratic governance, the component parts of this

tradition consist of dynamic cross-cultural dialectics with universally felt impacts. The driving force behind the shaping of our civilisation is not a parochial Western ideal or practice but the human spirit: its needs and interests just happen to be best served by the philosophical and political triumphs of the West; hence, for this reason the human spirit fought (as it is still fighting) globally for achieving political attachment to them. In this respect, the human rights discourse's importance as a political tool is increasing and expanding territorially.

Modern legal expressions of the human rights doctrine are the result of philosophical explorations and socio-political struggles over the content and exercise of rights. While the term "natural rights" may be rooted in the Western philosophical tradition, the demand for having a right recognised derives from human reasoning obeying the psyche's self-preservation instincts: when forming communities, rights are arguments articulated by rational beings who are striving to survive the struggles of their everyday lives; whether the contested entitlement is claimed against a ruler, a group of people or a neighbour, it aims at expanding temporally the human being's balanced existence. By being logical expectations, rights become characteristic properties of a civilisation of the intellect, of a human civilisation. Thus, in its essence the "invention" of rights cannot be territorially or historically attributed to a single part of this civilisation but to its entirety; arguably, to its human nature.

The development of this civilisational tradition was imbued with overlapping moral principles which gradually determined its core values. The humanitarian drive, which first in philosophy and later in law declared "rights" that define and at the same time are defined by a "humane" quality, did not arrive as the result of parthenogenesis, but as a genuine product of that very civilisation. Apart from the general capacity to reason, "humane" defines also an ability to reason with emotions, thus transforming them into principles: kindness, honour and compassion have not coincidentally become universal themes. In this sense, it appears plausible that over time strong

confirmations were sought for these themes also in the Justice discourse, even when this latter was forced to move along rather technical pathways.¹⁹

In short, the global village is small indeed, but not because of the communications revolution of the 20th century, or the more recent innovations in the field of digital technologies, but because its different parts are intrinsically interconnected within its human soul. From that civilisational tradition we can first extract a basis of principles in raw form, then move up to the level where these are formally granted with normative contents and regulatory functions.

1. A Shared Moral Ground - Outside the formalities of law and the relevant contemporary doctrine, the human rights idea is old,²⁰ based on broadly adopted principles of morality that since ancient times have penetrated the fabrics of cultural identities of human collectives and towards securing necessary community standards for peaceful and functional co-existence.²¹

1.1 - In the bosoms of religion are traced the first scrapings of the long and strong relationship between morality and law. Long before formal legal recognitions in human rights, religious beliefs had already incorporated a kernel of principles that enshrined the human being. More importantly, religion developed them into normative constructions, first by establishing itself as the connecting element and force within early social formations and later through the “religion-centric” historical evolution of nations.²² It provided for a code of basic ethics by which social participants abided,

¹⁹ A similar account was developed by *Walzer* (1994) in his ‘minimalist’ morality, i.e. the reiterated features of particular maximal moralities. These universally shared ‘thin’ principles, according to *Walzer*, do not resemble natural rights in a sense of morality, but derive from practices of human societies.

²⁰ *Kolakowski* cited by *Perry* (1998) 3.

²¹ ‘While the idea of human rights is not, for those who accept it, the whole of morality, it is a fundamental part.’... ‘Thus, for those who accept it, the idea of human rights operates as fundamental moral limit on how we human beings, both individually and collectively, may live our lives, on what choices we may make.’ *ibid.* 5.

²² Religion in most historical periods has been utilised offensively or defensively by nations as a means for achieving populace coherency and identity. In other words, religion projected, and in many countries still does, the nations’ faith to their unique cultural and ethnical character.

imposing the sanctification of such notions as “life”, “brotherhood”, “respect” and so on.²³

1.2 - There is evidence of both diachronically present and territorially spread values, which took shape independent of much younger humanist Western modules. My argument here, though, does not follow a universalists’ claim of an *underlying common humanity*.²⁴ Instead of proving of an early apparition of human rights, such moral qualities evidence a widespread “human sensibility” of Justice, since, despite the tremendous variations from society to society, their involvement with political institutions has been direct and deep. Human life was not protected because it was necessarily considered sacred, but rather because otherwise people would catastrophically eliminate each other;²⁵ or, to rephrase, human life became sacred *exactly* for averting societal collapse. The justice of law appeals to the Justice of the reasoned and sensible human; it was created in Justice’s rational image, like man was in the image of his perfect God. One end of this parable on faith speaks of fidelity to law, a notion now restated in explaining law as rising both efficient and righteous - that is virtuous due to its origins in humane reasoning.

Conversely, however, the same ethical basis of religious doctrines would usually also reinforce and prolong subordination to the authoritative governmental orders, which were in turn justified upon the presupposition of moral correctness. Hence, humanity’s civilisational tradition did not evolve inside a persistent natural law matrix of divine morality and humane goodness. Even despotic authorities could perpetuate their position in power effectively, by annexing an elementary moral stand within the laws of the King; if different, life for governed subjects would have been completely

²³ Runzo (2001) 187 – 188, identifies four constituents of the religious moral point of view, where conscience and behaviour seem inherently regulated by the ethical rationalities which bring followers together: 1. taking others into account when acting because of respect; 2. willingness to take into account how actions affect others by considering the good of everyone equally; 3. abiding by the principle of universalisability, weighing actions as equally laudable or permissible; and 4. willingness to be committed to some set of normative moral principles.

²⁴ In this sense, the *universality* of the human rights’ idea stands separate from *the history of its recognition*, Rosenbaum (1981) 8.

²⁵ Reflecting the overlapping of law and morality as expounded by Hart (1997) 193 – 200.

unreasonable and unbearable and have demanded its immediate structural reorganising. Effective exercises of justice necessitate the reasoning of Justice.

2. From Nature's Ethics to the Rule of Rationality – Despite being ubiquitous, the moral foundation alone did not suffice to achieve transformation nor received formal recognition into institutions everywhere. For that, the right circumstances were formed mainly within the Western heritage and were further developed with the coming of Christianity. In his landmark work 'the End of Human Rights', Douzinas analyses in depth the history of natural law and natural rights recognising there humanity's long struggle and meditation towards embracing true Justice, in meaning and practice alike.

2.1 - Historically, understandings that pointed to something closer to a "human rights" conception arrived last in a long line of partial answers to the morally fundamental problem of Justice, which the natural law tradition had originally raised in search for virtue and "goodness" in laws. In this sense, Justice explanations and natural law reflections frequently overlapped in their parallel disputing of the morality of posited rules and promoting of demands for alternative solutions for the application of justice. The actual human ideal became gradually intrinsic part of this reflective process, it was explored and later on re-imagined according to what needs drove the West's distinctive political and economic evolution.²⁶ In the long run, morality was separated from theocratic imperatives²⁷ and reinvented as "rationality" in the creation of civil, social and political rights.

2.2 *Civil Foundations and Civil Rationality* – Of those notable explorations in the juridical and philosophical tradition of natural rights we may underline here two specifically, for their long lasting – arguably pre-emptive – influence upon both the development and reasoning of modern law.

²⁶ When cultural relativism is brought into the human rights discourse, it becomes apparent that the majority of expressions of rights, and especially of freedoms have derived from the Western approach to democratic political identity, mainly back to the historical fomenting of the American and French declarations.

²⁷ For example, in Grotius influential works legal order was established as independent from religion and, at the same time, it realised a humanitarian argument within the moral mechanisms of law and society, *Haakonssen* (1996) 27.

2.2.1 - Therefore, we find in Hobbes the concept of justice being for the first time fully replaced by the idea of rights.²⁸ The dramatic significance of this exchange being incorporated in law is explained in the next section.

2.2.2 – Second, the premise of self-preservation was related by Locke to property's becoming the conceptual means and ends for securing individuality.²⁹ Upon the pragmatic merit of this pronouncement of individualism, property was established as a powerful meaning, which dominated the modern rights construction. Later Chapters of the thesis confront the not so clear normative convictions and juridico-political implications which these conceptualisations eventually proliferated, namely the ontological development of law being instructed upon proprietary comprehensions (for example, as being argued later, legal subjectivity is understood on the basis of whether someone *has* certain capacities and not on whether someone *is* essentially acting out subjectivity) and the facilitation of the private sphere's supremacy.

3. Landing Humanity and Justice in Law - Justice being that social ethical value by which the 'conduct of reasonable beings may be measured and judged,'³⁰ the gradual developments in natural law and rights theories responded to the compelling call for chaining society's regulatory restraints to human reasoning and sensibility. Whereat anthropological insights and the progressive jurisprudential project came spinning faster together, we come closer to witnessing the construction of the modern human rights argument. Either transformed into *stricto sensu* international human rights law rationality or contesting civil liberties in national regulatory frameworks, the argument translates its primary sources (i.e. a celebrated common moral tradition and shared conceptions of justice) into the operational logic of law.

²⁸ Douzinas (2000) 69 – 70.

²⁹ Locke's fundamental insight was that through property-related activity, the individual "creates and owes value through his own efforts" and thus '[s]elf-reliance and creativity become the marks of human achievement, acquisitiveness the mark of self realisation and dignity,' *ibid.* 83. In Locke, the acquisition of property, as an activity of individual empowerment, was acknowledged as the key means towards fulfilling the pursuit of happiness.

³⁰ Stone (1965) 31.

Here a different question of justice is posed, which leaves aside all inquiries into what is just, to investigate how modernity's legal thought envisioned law's systematisations so that delivering just decisions *can be* anticipated. From this angle, we may approach and comprehend the key components in determining a legal system's structural coherence with the potential of human rights justice.

3.1 On Human(e) Justice - Whether understood as "righteousness" or as "fairness", Justice remained through the years an elusive and controversial idea. For once, Justice in its primal manifestation appears emotional and wild: it represents untamed feelings aroused by and in reaction to acts of *injustice*, its origin similar to that communal instinct which prescribes the affirmation of natural law values across a society.

3.1.1 Justice's Fall from Grace - Classical *dike* captured the notion of Justice, within whose multiple facets the ancient *polis* and its citizens mirrored their ideal of an ultimate virtue. Justice was overwhelmed by Christian morality during the Middle Ages; for the dominant juridical understandings, earth law derived from divine law and thus carried within God's wisdom. Later, modern thought endorsed its over-zealously pronounced worship of reason exactly for casting off those predominant theological dogmas. However, whereas virtue and morality had come together under the principle of Justice and then religion had arrived to place a claim over them both, modernity, employing conventionalist notions of procedure that it took from general jurisprudence, expelled the moral substratum which the Classics had sought to merge with *nomos*, with the Law.

At that time Justice was reborn as justice, yet "unjust", being empty of the ethical "right"; missing this "right" it rediscovered "right" as order, and, consequently, "rights" as entitlements that submitted their judicial performance to principles of economic function. Property was reinstated as the ground for liberty, and, strangely for an age of victories in intellectual emancipation, the social value of "property" was thereupon increased.

3.1.2 Kant's Inhumane Humanity - The major apologist for the fall and resurrection of Justice turned out to be (without his knowledge) none other than Immanuel Kant, a point worth examining here briefly, both on the merit of Kant's decisive influence over Western juridical and moral thinking and as a platform explanation for the effects of reason on the moral component of Justice.

Kant's "moral self" was a product of pure reason; he modified humanism to 'satisfy the authority of Newtonian physics' and he separated reason from desire.³¹ The cold look of Kant's rationality into the human being envisaged the maxims of action and will (as standing in the centre of his *categorical imperative*) in terms of instrumentality. And yet, born to a poor pietist family, Kant resented detaching his thinking from values that had deeply affected him during his upbringing. Instead, he deconstructed Christian ethics to reformulate its fundamental morality into a functional logical methodology of societal contact.

This is where Kant's works resulted into a convincing excuse for the dispassionate human and the instrumental operation of those institutions that regulate its life. Reason (a fierce weapon into the hands of Rousseau against preceding despotisms and their supporting theocracies)³² acquired in Kant compatibility with Christian humanism. Therefore, along with the "Christian" element, any "humanitarian" interest in the human condition was declared equally redundant, displaced in favour of *anthropological* awareness. Kant's argument was so impressive in combining both pure ordered logic and a sincere caring attitude towards the rational being that his descendants in scholarship - either proponents or critics - willingly abided their meditations by the Kantian universe and its language.

Hence, Justice needed neither nothing like compassions nor emotion to be set forth. Legal systems submitted to a notion of justice which compelled strict obedience to rules, not however in confirmation of the superiority of values which compelled creation of those rules in the first

³¹ *Fite* (1914) 411.

³² Rousseau had previously identified reason with freedom and freedom with the rational human mind that defies nature and instincts, *Douzinis* (2000) 196-197.

place, rather than for the calculated societal benefit in the perfect order which they nominally pursued; superiority was now claimed by the rules (*means*) that compelled the universal maxim of the human state (*end*). Understandably, it was under these (positivistic) presuppositions that natural law and natural rights disappeared from comprehensions of the operation of justice. While Nietzsche's "Death of God" summarised the obsessions of an era with rejecting entire sets of values due to these values' historical ties with religious doctrines, the abolishment of goodness from justice would slowly necessitate the return of the natural law dialectic, yet under an improved guise.

3.1.3 - Jurisprudence entrusted rationality with securing decisive, swift and efficient administration of justice. Thus, modern justice adhered to impartially applying law's prescriptions; it tended the morality of law, which comprised of the 'correct following of formal procedures,'³³ rather than appealing to the realm of ethics.

Under this conception, rights and freedoms in laws represent agreed societal standards; a "right" is a procedural convention, aiming at harmonising and improving daily life. However, there are qualities which rational justice legislated as "rights" or "freedoms", yet they were born within human civilisation's moral conscience – called variously "natural law", "religious identity", compassion etc - and definitely did not grow out from procedural customary practices, the likes of sale and lease.

Therefore, we reach a critical point of contention: if "rights" are conditioned in the legal context on terms of a pan-societal contractual relationship, they are compromised every time political and economical circumstances demand optimisation of justice's mechanics. It thus follows that the rational – substantively technical - understanding of virtues in legalisation must eventually deprive them of their protected value and the effects that were originally pursued in establishing them by laws. This sort of justice, precisely for the reason that it over-relies on its administrative performance, is alienated from the human being, similar to Kafkian

³³ Douzinas & Gearey (2005) 132.

bureaucracies that, absorbed in the order of rules and formalities, get off the track from retaining the citizens' interests and are transformed into tyrannies.

*'By pretending that the law is innately rational, by immersing ourselves in the myths of jurisprudence, of the "science of law", we are abrogating our deeper responsibilities to individual justice.'*³⁴ Summarising Heidegger's frustration with the dehumanisation of law, this comment also mirrors the post-WWII crisis in political philosophy and jurisprudence. Rationality had apparently failed the promises of Enlightenment as well as the expectations which had elevated justice to become the universal cradle of humanitarian virtue.

3.1.4 - The introduction of international human rights law refuelled the morality dialogue, which had dried out within nation-state approaches to liberties. In its new incarnation, justice questioned its purposes and scrutinised its capacities to confer respect towards the human being, as well as to enforce resulting responsibilities. Morality was resurrected inside the milder and more socially considerate positivistic assertions of Hart; it made its peace with the distributive justice of economic liberalism in the works of Rawls; and was reinstated in judicial practice within the hermeneutics of Dworkin.

However, who qualifies for benefiting from this humane justice? Law's needs demonstrate remarkable prowess in dividing human existence, weakening it, fragmenting it, recomposing it; for example, personal legal incapacities perform even within trivial practices of private law to reflect in procedures both passing and persisting social, economic and political dispositions. The question we should have asked is "*how* does one qualify to be human", given that in the now positivised human rights the ideological premise of the sanctified human has been limitingly redefined towards complying with binary regulatory orders.

3.2 *The Human Subject* – Subjectivity within contemporary legal mechanics accrues really in reference to active objectification in law, i.e. the subject becomes a class of socio-economic power that has contested successfully

³⁴ Cited in *Ward* (2003) 11.

claims to entitlements. At the same time, behavioural rules defer to systematised logical schemes; the more societies dwell in abstractions that rationalise norms within generalised systemic orders, the more of human activity is deconstructed and transformed into algorithmic configurations. In fact, our laws have become so logical, that the task of sculpturing the “original” human being from them, as if they were raw material, appears precarious. (Note that the subject matter of the thesis poses an extreme by questioning the ordinary dimensions of both legal and human subjectivities of agents in artificial online contexts.)

3.2.1 *Subjectivity: a Logical Exercise* – Observing posited law’s central ontological scheme, subjects and rights exist in a dependence relationship: *subjects depend in their existence on rights and rights exist only because subjects exercise them*; being a carrier of rights defines in the letter of the law a subject and, *vice versa*, capacity of rights derives from allocated subjectivities, i.e. the various categories of personhood.

3.2.1.1 - A different account sees the pair’s internal relation as *asymmetrical existential dependence: subjects can exist without rights, no rights can exist without subjects to exercise them*. Executed in the form of “subjects can exist without thinking, no thinking can exist without subjects to think,” this line of logic moves the focus from rights *per se* as conceptual objects to the actual capacity for exercising them. We may speak of such “capacity”, only once a right (or “rights” as a class) has been (i) defined, (ii) ratified by the regime in power and (iii) has its operational connections with the agents/persons, who may activate it, established.

Regardless, both symmetrical and asymmetrical accounts problematically check with the legal positivists’ trademark thesis that no rights exist unless founded in laws. However, our concern here is rather subject-oriented and less about rights.

3.2.1.2 – We may also revert to another logical representation of a more “active” legal subject. Hence, generation of subjectivity in law coincides with the systematisation of claims: subjects exist formally for providing the capacity to make claims, while claims incarnate the will of subjects. This

subjectivity is impliedly born out of the (co)relational normative arrangement of associations between entities; such a reasoning blueprint was provided by Hohfeld's *Fundamental Legal Conceptions*.³⁵ Although originally expressing relationships between individual persons, the propositions which form his two schemes of Jural opposites and correlatives, capture the entire paradigm of how regulatory frameworks - regardless of their public, private, local or international character - structure behavioural expectations. Around the four properties distinguished (right, privilege, power and immunity), develop archetypical patterns of vertical and horizontal interaction. Along these lines and in accordance with the Hohfeldian formulae, any opportunity to communicate to another entity one's entitlement to the core properties activates legal subjectivity.

3.2.2 Subjectivity: a Human Condition – The jurisprudential ideal of human rights rejects such technical logic for constructing subjects. Although a latecomer in the area of posited laws, it had first claimed the *human condition* as the foundation of all forms of legitimacy. Therefore, the subject of that relevant discourse is not made through regulatory devices and techniques, or with objectives of balancing conflicting interests in mind: it is born human, an attribute that self-evidently reserves for its carrier an inalienable set of (sanctified) values. These values negotiate forcefully their externalisation within conventional legal formalities.

From this point of view, the power of human rights emerges as neither a “correlative” nor an “opposite”, but as *inherent*; far beyond classes of norms that were invented to essentially serve both historical and social conventions and convictions. It is established by virtue of the truest and most direct of experiences, that of possessing and feeling a human body and soul.³⁶

³⁵ First sketched out in *Hohfeld* (1913) and refined in *Hohfeld* (1917).

³⁶ To this extent we may start understanding how valuable and instrumental Kant's “inhumane” rationalisation of the soul becomes: where, for the most suspicious of technocratic thinkers, the soul represents the intellectualisation of emotions and experience; where it connotes a purely rational process for transforming past impressions of feelings into knowledge data/items.

In fact, the truly misleading aspect is the exercising of human values through the formality of “rights” instead of “subjectivity”; for the latter tackles effectively most binary representations of law, managing even to enclose the four properties of Hohfeld’s schema. Showing preference to – established “rights” formality, though, was not a conscious choice, but rather the result of limited historical and jurisprudential capacities: the development of the juridical conceptualisation of the subject failed, simply, to catch up with the human being as conceived by philosophy. As previously explained, even the process of asserting, eventually, human values via the most practical context of rights was extremely slow and eventful.

One should not be blinded to this arguably unfortunate trajectory; at the same time, though, we ought to acknowledge that, first, our juridico-political reality renders it pragmatically irreversible and, second, within it has been sealed one of the greatest conquests of humanity (historical, intellectual, societal and legal). For such reasons, it is hardly my intention to challenge the conventional status of human rights in law. However, I am invoking the silenced human subjectivity for unlocking the potential of human rights to overcome the strictly procedural discourse of rights. Such an ambitious project is not taking place within the safe sphere of morality but, instead, on the actual ontological level which applied legal grammars and syntaxes confer.

The above logical exercise of subjectivity assisted with the task’s first step, of pinpointing the onto-logical boundaries, which the shaping of legal subjectivity may reach. The second step into exploring the prospects for fleshing out a sustainable human subject conception appears now less like a leap of faith: having recharged the meaning of the human condition and pulled it closer to systemic readings of law, we may realistically discuss humanity as agency on juridical terms.

3.2.3 *Three Concepts of Subject* - Here we come across one variation of subject in law, one in compliance with the human rights ideal and one in the composite “humanist” law.

3.2.3.1 - The first subject is an invented concept within and by the systematisation of rules; it performs as the point of reference for the organic distribution of rules – mainly, of entitlements and duties. The legal subject represents a posited variable. Its social weight changes due to the attribution and loss of rights. Subjects and rights in this construction are connected to each other in a “hen or the egg” loop.³⁷

3.2.3.2 - We could argue that the second subject is very much real - if not for the confusingly abstract parameters that have been recruited in philosophy for defining “humanity” and its values.³⁸ With the latter reservation in mind, hypostasis of this subject is *assumed* as real. It precedes rights in time; substantially, rights follow it by mirroring in their meaning its activities. In its natural status, though, it is legally weak: unless conditioned first, it bears no reflection in laws. The human subject, pre-existing law is uncompromised; otherwise it would lose humanity, its defining and most valued attribute.

3.2.3.3 - Considering the inherent ties which bind together the human rights ideology with the naturalistic tradition, the distinction between human and legal subjects objectifies partly the theoretical debate between Natural Law and (hardcore) Legal Positivism. Therefore, at a first glance the third subject might be suggesting a rather uneasy settlement, since by being pulled towards two diametrically opposed directions at the same time it must either adapt with remarkable flexibility or be torn apart.

3.2.31 - The human legal subject (from now on “the human subject”) is truer to the politics of modernity than many other notions that were born out of the humanist argument. Historically we may attach it to late modernity’s democratic reforms and the gradual development of market economies. Non-political values of old, however, animate it as well; they give it purpose and justify its continuing course on a morality basis as self-evident, even though

³⁷ Just above, at 2(l)[3.2.1.1], we strongly contested that the subject comes first. Here, though, the legal subject and its relationship with rights are represented on the most basic level for perceiving their practised dimensions.

³⁸ *Douzinis* (2000) 211 – 212, notes the problematic of fitting symmetrically humanity across the diversity of political and legal philosophies, where definitions of humanity usually connote the dogmatic exclusion of any other individual or group human possibilities.

recourse to morality is not any longer directly shaping the law.³⁹ There does not necessarily derive an “ought to” to inform legal agency, yet, at the same time, the terms of this subjectivity integrate a kind of moral imperative for guidance.

Several difficulties seem to be haunting this conceptual hybrid. First, both components in this unity remain interchangeable and adjustable. The legal part is subject to changes in societal circumstances, where understandings of what is essentially human are ultimately affected by the beliefs of the time.⁴⁰ On the other hand, “humanity” has since early drawn criticism for being rationalised through theoretical abstractions of excessive “speculatism”.⁴¹ Moreover, the two determinants come into direct conflict with each other, thus externalising the agony of the subject for acceptance by its parent contexts; the lack of conceptual purity invites rejection by both. What happens eventually, though, is a constructive combination of forces: the legal feature distributes trace expressions of the humanitarian spirit into the field of law, while the demands of inherent humanity force immediate reconciliation of the subject’s more extreme legal juridification.

3.2.4 *The Human Subject through Human Rights* - If in the primordial stasis of things (i.e. similar to Platonic concepts) rights do not exist without subjects, from there and on, the subject may seek to validate the right within a taxonomy of already ratified values. Yet, once such a right has been defined in content and is posited, it requires the existence of the human element in those entities which pursue to exercise it.

3.2.4.1 - The term “human right” denotes exactly this prescriptive attribute that registers entitlements under the humanist scope and aims. To this extent is also hints at an alternative nexus to rights in common law. Therefore, while rights in law are generally created with instrumental purposes in mind, many descend from and directly respond to their human foundation. Rights, being products of social and political struggles, deliver strong statements

³⁹ Hart (1995) 185.

⁴⁰ Repeating here the most commonly summoned examples of exclusions from civil subjectivity, that of gender discriminations and slavery.

⁴¹ Strauss (1953) 304, on Burke attacking the rights theorists of the French revolution.

against degraded humanity and identify intuitively with challenging principles of freedom and aspirations for a dignified living. Looking at law as a whole from the outside, we realise that human rights claim a high degree of infiltration of the majority of the various areas of practice.

Regardless of how bold it sounds, this latter statement does not propose “stealing” rules from one field of law and subscribing them to the defence sphere of human rights. It rather builds a conceptual link, which enables us appealing to human rights protection reasoning in those instances where the applied judicial rhetoric, pre-empted by the formal character of the legal dispute (e.g. contract law), fails completely to address the particular ground. From this perspective, we discern the human subject in every aspect of humanly experienced life that laws lean upon, be it family, work, education, politics, entertainment and so on.

Note, though, that the conceptual device of the human subject was thus defined to perform ontologically within formal law. Therefore, its activation follows ordinary acquisition of personality; distinctions between natural and artificial persons, restrictions over the exercise of particular rights, as well as legal incapacities in domestic frameworks, all apply normally.

3.2.4.2 – This requirement of legality indicates also that a natural person can activate the inherent human subject, when able to challenge his/her human rights within the corresponding legal technicalities. On the other hand, artificial persons resemble frequently natural persons on the procedural level; however, the mere systematised representation of personality as agency does not suffice for supporting a convincing analogy. The artificial person may sustain a genuine instance of the human subject, if it manages to expand the personality simulation to the level where a self-evident apparition of human nature can be equally demonstrated.⁴² Whether that argument can come up to the challenge will be thoroughly analysed in later chapters; nevertheless, judicial practice offers countless examples where legal persons contested successfully human rights.

⁴² E.g. GG Art 19(3): ‘The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.’

3.3 Where Subject is Rights - The human subject, as constructed here, answers to the question of human Justice by *reminding* us of readings of procedural law, which have been residing within justice's apparatus for a long time: the bulk of jurisprudential explorations into Justice that modernity supposedly realised into laws. It appears paradoxical, then, how contemporary law, despite gaining its rationality from such a background, may frequently lack rational responses to the constant demands for Justice; it can demonstrate shocking cruelty, delivered under the guise of procedural neutrality. The human subject provides for a tool to investigate the concealed humanity within the procedural activities of subjectivity. Humanity is not morality: it constitutes the normative foundation of modern legality; it speaks fluently both languages, of ethics and rules.

At the end of the day, the human subject *is* (a bundle of) human rights. On the one hand its presence signifies the potential for exercising them. In reverse, by conceptualising human rights and bringing them together, modernity managed to give shape to juridico-politically sustainable subjects. Hence, the next logical step towards sketching out in tangible terms the unfolding subjectification parameter should be the applied legal protection of human rights.

II. The Human Rights Law

It feels unnecessary to repeat here the trail of historical instances that triggered world-wide humanitarian awareness, or of how the official recognition of human rights underscores a political event. In spite of speaking of "rights" and seemingly playing within the field of law, talk of legal mechanisms makes better sense under the light of political institutionalism. First of all, a human right can be found in a broad variety of terminological guises: we speak of "liberties", "freedoms" and "rights" that can be "civil", "basic", "fundamental" or (simply) "human". Each such expression (or combination of expressions) bears the distinctive mark of political choice over the *practised* character of human rights within a given

regulatory setting; that is the range and depth of applied legal effects. After all, as previously noted, even adhering to the term “rights”, for developing and establishing the connection between humanity and legality, reflects a choice of significant consequence in the legal and political present.

With the issue of political choice having entered the legal stage, another significant question emerges: which values qualify for being considered as human rights in a legal system? I believe that the answer is partly given in the previous part, with regards to the development of the human rights doctrine and the human Justice analysis. The problematic of political choice, though (i.e. how choice selectively awards one value with entrenchment and excludes another), is not so easily overcome; or, how it recognises the existence of a human right in principle, yet deactivates its exercise in practice. Some of these concerns are addressed in this part, only to the degree that they do not encroach on the discussion over applied law.

The paradigm of the intersection is well illustrated by the manner in which the human rights doctrine was released into practical legal reality. Human rights were first embedded into national laws as *civil rights* (the rights of citizens); positivised, either inside constitutional frameworks and ordinary legislation or through court activities.⁴³ Then national structures appreciated them as *fundamental rights* or *basic freedoms*. And, of course, the major breakthrough was achieved when the “human rights” term entered officially the international language of law with the adoption of the Universal Declaration by the United Nations in 1948.

We may argue that human rights law exists in those forms which a social setting can politically afford. Affordance is not defined by the bulk of daily political interference with the law, e.g. decisions or activities that circumvent and seemingly neutralise for a brief while the procedural legal apparatus; governmental legislative activities; political affiliations and inclinations of judges. Such instances of political praxis have only short-lived effects that – as a rule - leave unscathed the values which underscore the indicated legal system and the political vision that this materialises.

⁴³ Campbell, T. ‘Realising Human Rights’ in Campbell, Goldberg, McLean & Mullen [eds.] (1986) 3.

Political affordance here rather denotes the allowed boundaries for asserting substantially human rights through the in effect posited laws structure.

1. The Form of Law – Hence, all laws that are grounded in human rights claims turn into the focal point, not just those narrowly called ‘human rights laws’. The question is set over which laws facilitate and confer in reality the human rights argument; over the extent to which human rights have been integrated and implemented within institutional frameworks and, thus, their content and breadth has been determined to apply in practice.

From what has already been indicated, the socio-political feedback is valuable when interpreting and measuring the combined purposive, structural and functional standing of laws, and when identifying their institutional origins. In this investigation, though, one thing is to trace meanings and theoretical models that have been consciously rejected with the passing of time and another to locate ambivalences, which were intentionally planted in regulatory frameworks.⁴⁴

1.1 National Settings - Responses to calls for protection of positivised human rights were far easier pursued within state entities as ‘basic rights’. Not only was internationalisation probably unthinkable in early days, but also, the underlying understanding of how human rights were to function was primarily conceived within narrow “state and society” contexts. Freedom against suffering and degradation reflected mainly the political experience within the national locus. Hence, the struggle for freedoms initially involved rising economic and social forces that disputed the absolute power of the sovereign; at a later stage, the passing through the modern bourgeois/civil state and the ensuing competition between individualistic liberalism and socialism, resulted in the ascension of welfare rights.

1.1.1 Constitutional Law – In the majority of settings, the human rights doctrine was entrenched in national constitutional texts, under the politically functional description of fundamental rights. Establishing the individual subject and legitimising the natural rights of man, fundamental rights become ‘emanation of and, at the same time, invocation to the modern liberal,

⁴⁴ *Infra* 2(II)[1.1.1.2] and footnotes.

constitutional and individualistic regime.’⁴⁵ Thus emerging forms of government (i.e. democracy) cannot be conceived without guarantees of elementary freedoms of personal, ethical, social and economic development. Therefore, upon liberalism was cemented the historico-philosophical connection with constitutionalism.⁴⁶

The gradual, qualitative enrichment of constitutions in the area of freedoms and rights objectified the flow of ideological clashes in Western politics. First came the validation of fundamental individualistic concepts, such as liberties (political and social), equality and property; then followed the recognition of collective freedoms and social rights, with the parallel restriction of classical rights.⁴⁷

1.1.1.1 - In constitutions, principles and rights are vitally reinforced over domestic legal systems as becoming parts of the state’s supreme law. When protected, values are generally prescribed as such in the text explicitly.⁴⁸ Contemporary constitutions pursue protection of the person in reference to humanity,⁴⁹ and not as mere political facilitator of individuality; moreover, the “group” emerges as equally empowered to the single person in ascertaining subjectivity to most of the basic rights. ‘Fundamental’ entrenchments are broadly divided into individual, political and social; depending on their reach and character they require the positive or negative protective action of the state.⁵⁰ At the same time, constitutions do not omit appointing fundamental duties as a means towards serving the *public interest* (a term referring to the well-being of both the state entity and society).

⁴⁵ Tsatsos (1987) 68.

⁴⁶ *Ibid.* 73, pinpointing to art. 16 of the French 1789 *Declaration of the Rights of Man and of the Citizen*: ‘[t]oute société dans laquelle la garantie des droits n’est pas assurée [...] n’a point de Constitution.’ Interestingly, English translations when reading ‘droits’ switch between ‘guarantee of rights’ to ‘guarantee of laws’, altering significantly the meaning of the sentence.

⁴⁷ *Ibid.* 84; ‘classical’ are the rights which form the core of liberalism as defined in the works of Smith, Bentham and Mill.

⁴⁸ Not all the times, though, as principles may derive in reflection to implementations achieved through the constitutional structure. For example, constitutional separation of powers may not be accompanied by written references to the particular fundamental rights which it primarily serves. The fact may give rise to interpretational debates.

⁴⁹ Terms as ‘every person’ or ‘everyone’ line up with ‘human dignity’ and the ‘right to life’, e.g. GG Art 1(1) and Art 2(2) or CRSA s10 and s11.

⁵⁰ Tsatsos (1987) 89.

1.1.1.2 - Additionally, amongst contemporary constitutions *pragmatism* becomes the most visible common feature: they all attain to ideological neutrality that allows for constitutional interpretations to shift flexibly and favourably towards any possible direction across the spectrum of balancing political, economic and social forces.⁵¹

1.1.1.3 – On the other hand, there are several differences to spot, appearing almost critical on occasion. First of all, constitutional traditions vary distinctively, even across the philosophically homogeneous Western democracies. Some layouts are rigorously underlining the political organisation aspect, e.g. the French Constitution. Others reflect more vividly the contemporary human rights imprint, e.g. the South African Constitution (CRSA). Elsewhere human rights are represented closer to the ‘fundamental rights’ model. As a result, we find identical humanist values being enshrined by principles varying tremendously in political decisiveness and, consequently, in legal accuracy.

In short, we may speak of three characteristic constitutional structures of interest here: the German; the US; and the British. Each one develops different juridico-political channels and expressions for conferring the human rights argument. Later in this part, we will address how they come into play (and even into conflict) within practice; the solutions and problems they suggest; and, more importantly, their compatibility with the presumed requirements of the as analysed human rights doctrine.

1.1.2 Lower Legislation – Compatibility is also the key for discussing common domestic laws, from the viewpoint, though, that subordinate legislation should be in agreement with the constitution’s affordance for human rights, i.e. with the values that are pursued and protected in there.

1.1.2.1 - There is, of course, the question of whether lower laws depend exclusively on domestic constitutions for spelling out human rights claims; whether the pre-existing ambit of constitutional entrenchments limits their evocating of human rights. We could summon again Hart’s reasoning to explain the potential overlapping of minor public and private law rules with

⁵¹ *Ibid.* 88; in the area of fundamental rights, today’s constitutions include elements from both liberal and social(istic) appreciations that might complement or contradict each other.

the countless scattered visages of (humane) Justice that the overarching constitutional order might not have explicitly or otherwise covered.

1.1.2.11 - To demonstrate the most obvious example, the disapproval of violations against life, bodily integrity and property in penal laws has existed long before these values were moulded in constitutional texts.

1.1.2.12 – At the other end of the legal spectrum, private law always aspired for smooth societal and economic “cohabitation”. In all respects, the desired normative objective would never have become possible without having first prioritised the application of plausible standards that earned the public’s trust in the established legal order, allowed for unhindered activity between individuals and, finally, respected fundamental social structures and institutions (e.g. family).⁵²

In such regulatory settlements the social participant achieves *legal dignity*, which translates into the fulfilment of individual human dignity within a stable, non-declining order of justice. The point is characteristically exemplified in the general concepts of ‘good faith’, ‘reasonableness’ and ‘public policy’⁵³ and in regulations prescribing excuses from liability (e.g. “duress”), protection of juristic personality,⁵⁴ equality in raising civil action and, finally, restrictions to excessive exercises of rights.⁵⁵

1.1.2.13 – The palpable value of daily-life convenience which these subordinate laws bestow, brings us even closer to perceiving how the

⁵² *Friedmann & Barak-Erez* (2001) 3, remark that private law has always been concerned with human rights, never using the term but channelling their thinking into its processes.

⁵³ *Barak, A.* ‘Constitutional Human Rights and Private Law’ in *Friedmann & Barak-Erez* [eds.], 14, arguing for the indirect application of human rights in private law.

⁵⁴ Meticulous personality designations in relation to e.g. legal capacities, keep one eye on maintaining balance over social dealings and transactions and one on protecting “incapable” persons from assuming responsibilities beyond reasonably comprehended limits; these limits, precisely, rest upon human sensibility. Of course, I am not arguing that the institution of personhood is primarily motivated by philanthropic intuitions; rather, it is not socially indifferent to morality and humane values.

⁵⁵ In (primarily continental) civil codifications, the doctrine known as “abuse of right” (*aemulatio vicini*, *abus de droit*, *Rechtsmisbruik*) derived from the principle of “good faith” (§242 BGB: “The obligor must perform in a manner consistent with good faith taking into account common usage”) to cover the full body of private law. It entails that the holder of a right should not exercise that to the extent of abuse, i.e. with the intent to harm another or altering the right’s original purpose; *Hartkamp* (1992) 566. Examples in civil codification: ZGB Art. 2/2; AK Art. 281; CCQ Art. 7; BW Art. 3:13; GK RF Art. 10.1; Civil Code of the Philippines Art. 19; see *Reid* (1998) and (2004) for further comparative analyses.

argument of human rights overlapping with rules denotes more the practice of reasonable (as in ‘humane’) living, than an abstract deontology.

1.1.2.2 – Yet the matter of how human rights principles manage to survive the narrow procedural interpretations of lower courts and be identified in the judicial process for what they essentially are remains open.

1.1.2.21 - For one thing, one may rightfully question whether courts would recognise a human right in subordinate legislation under circumstances where the right itself has not been ratified by the domestic juridical order. The answer is, plausibly, hypothetical, yet not unrealistic: the judge can always identify comparatively a human right, previously addressed in foreign jurisprudence, international instruments etc.

1.1.2.22 – In one scenario, the right that is evoked is coherent with the presiding order of principles and thus not being rejected by the “recipient” municipal system; judicial mechanisms may even empower it with precedence over future cases; eventually, the human right can be fully integrated and acquire greater weight. While this can be impressive, we need to bear in mind that a court decision could expressively confirm a given right, yet not immediately implement it domestically. Nonetheless, the rhetorical importance of such recognition must not be underestimated.

1.2 *Inter-national Settings* – When domestic human rights protection fails, appeals can be made to trans-national justice mechanisms, provided that the necessary formalities are effectively set out for legitimising intervention with local affairs.

1.2.1 *Regional Settings* – Organised on the basis of trans-national treaties, regional monitoring and action frameworks rely on political pressure for guaranteeing that member states across a specific geographical formation will comply with thus established judicial institutions. Non-compliance with decisions entails various possible sanctions for the member state (e.g. monetary, trade, in the most farfetched scenario even military), the severity of which is intensified through its territorial proximity with the collective entity.

1.2.1.1 - Most such settings attach continent-wide systematisations to a rights declaration treaty;⁵⁶ another alternative has been presented in the form of culturally defined inter-state schemes and systems.⁵⁷ The treaty is in the heart of the model; compliance is overseen by an inter-state Court. Where individuals have *no locus standi* before the Court, violations are usually reported to a Commission.⁵⁸

Regional frameworks are understandably plagued by various impediments, others experienced on the internal political level,⁵⁹ others found within the intended human rights outline.⁶⁰

1.2.1.2 - So far, only the European “regional experiment” may confidently claim a significant degree of success,⁶¹ with the European Court of Human Rights (ECtHR) producing vast case law through the years and interacting consistently with national laws.⁶² Moreover, in the ECHR framework individuals have the right to bring cases before the Court.

⁵⁶ Three main regional instruments exist, the ECHR, the *American Convention on Human Rights* (ACHR) and the *African Charter on Human and People’s Rights* (AfCHPR).

⁵⁷ The *Cairo Declaration of Human Rights in Islam* (CDHRI) provides general guidance to members of the *Organisation of the Islamic Conference* (OIC), drawing human rights from the perspective of the Islamic Sharia. An *Arab Charter on Human Rights* (ArCHR) adopted by the more politically concrete *League of Arab States* is currently seeing potential for advancing to inter-state human rights protection; the ArCHR marked a significant step by complying with basic U.N. human rights instruments as much as with the CDHRI, *Smith* (2003) 195.

⁵⁸ For example, this is the part played by the *Commission on Human Rights* of the *Organisation of American States*, *Smith* (2007) 215; a similar procedure was being carried out before in Europe, until the Council restructured its enforcement machinery, *Jayawickrama* (2002) 71.

⁵⁹ Not all states from the Americas have ratified the ACHR (notably the US, Canada and Cuba); hence, complaints have been brought before the Commission based on the preceding *American Declaration of the Rights and Duties of Man*. Actual application of the AfCHPR is being held back, due to complications and delays in the setting up of the African Union, *Lyons* (2006). The CDHRI lacks enforcement or monitoring mechanisms, *Smith* (2007) 134. Issues of cultural relativism set substantial obstacles against an ideology consensus over the ArCHR, *Smith* (2003) 195.

⁶⁰ Westerners have criticised the CDHRI as controversial due to the predominantly Muslim religious focus, which, amongst others, rejects freedom of religion and equality between men and women.

⁶¹ *Janis* (2000); *Moravcsik* (2000) 218; *Lindholt & Lindsnaes* ‘On Human Rights’ in *Andersen & Lindsnaes* [eds.] (2007) 60.

⁶² The ECHR model, however, is not without problems, e.g. excessive numbers of pending litigation; *Wolfrum & Deutsch* (2007).

1.2.1.21 - As of recently, the upgrading of the EU framework under the 2007 Treaty of Lisbon⁶³ has pushed the permeating effects of the ECHR on the politics of European law production and on law's operation. Primarily, the Charter of Fundamental Rights (ChFR) of the EU aims at lining up European legislation with the ECHR and at harmonising ECJ and ECtHR case law.⁶⁴ Considering that so far EU laws included only vague references to respecting human rights,⁶⁵ the Charter's impact should soon turn highly influential: the ChFR measures EU legislation's legality upon compliance with human rights.

1.2.2 'Universal' Implementation - The United Nations setting provides protection formulas at a higher level in the hierarchy, yet is several steps further away from the individual complainant and the infringement incident; the responding proceedings appeal rather to international relations and custom, turning less legal and more political in practice.

1.2.2.1 – Set upon article 55 of the UN Charter, the UN regime displays a network of treaties⁶⁶ and of a large number of functional commissions and monitoring bodies. Either Charter-based or treaty-based, those multi-nationally composed bodies investigate progress in the promotion and harmonisation of domestic and international human rights legislation; they may even receive petitions from individuals. Gaps in the international legislative setting due to partial ratifications and signing ups are often

⁶³ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.*

⁶⁴ Preamble of the ChFR.

⁶⁵ The EU structure had generally committed to universal human rights but not acceded to the ECHR. Characteristically, the preamble sections of EU laws include broad human rights enunciations that, in this sense, are either supplementing or intending to inspire European legislation on issues of e.g. national origin and discrimination in employment. Nevertheless, in spite of the economic scope plausibly prevailing, considerable work has been done from the human rights perspective by decision making institutions, like the ECJ; *Smith (2007) 131-132.*

⁶⁶ Of which, together with the Bill of Rights below, seven other Conventions form the main core. These aim specifically at eliminating torture, cruel treatment and punishment (CAT), as well as racial (ICERD) and gender discriminations (CEDAW); they prescribe protection of children (CRC), migrant workers (ICRMW) and people with disabilities (CRPD); and they oppose enforced disappearances (CPED).

covered by customary law;⁶⁷ under this scope, relevant regional and national laws may be consulted.

The results of UN-sponsored procedures are spread horizontally across participating States; persuasion is typically opted for instead of coercion,⁶⁸ since UN human rights operations subscribe to good-willed cooperation and not to tighter schemata of direct coordination or common policies. Therefore, in praxis, political pressure is exercised discreetly; only exceptional and extreme circumstances will legitimise enforcement measures.

1.2.2.11 - The predicament of internationalised human rights implementation lies in its susceptibility to the familiar weaknesses of international law enforceability.⁶⁹ Whereas regional formations have failed to reach a minimum ideal standard for cooperation, in the culturally and politically heterogeneous UN, difficulties with acceding to instruments and institutions get multiplied. In general, the effectiveness of global schemes and treaties can be hindered by subsequent layers of states' reservations and other well-known problems with international consensus, which are extensively covered in relevant literature and political commentaries and do not require deeper analysis here.

1.2.2.12 – Eventually, one may argue against the case of human rights law activity at this level, noting only loose and inconsequential political communications between states. Note, though, that such attacks usually focus on not the inevitably conventional character of international law, but the lack of either practical global human rights enforceability or consistent legal applications. Disillusioned criticisms thus charge the UN regime with many-levelled failure.⁷⁰

1.2.2.2 – Whilst political obstacles overshadow ambitious expectations for concrete global human rights legality, the UN project has been successfully influencing progress in national laws and producing model documentation,

⁶⁷ *Smith* (2007) 11 – 15.

⁶⁸ *Hafner-Burton* (2005) 603.

⁶⁹ *Ibid.* 597 – 602; *Hammer* (2007) 71 (general human rights problems in the international practice); *Moravcsik* (2000) 245 (major powers resisting to be bound by international humanitarian regimes, as in the International Criminal Court negotiations).

⁷⁰ *Hafner-Burton & Tsutsui* (2005) and (2007); *Posner* (2008).

with the gradual elaboration of the International Bill of Human Rights⁷¹ marking its greatest achievement.

1.2.2.21 – Forming the base of the Bill, the Universal Declaration of Human Rights (UDHR) of 1948⁷² stands out as a “gene pool” of rights conceptualisations and expressions. Most of the listed statements of principle were initially drawn in comparison to national contexts and then distilled into “universalised” forms that can be injected in the technical language of law of any regulatory framework, national or regional.⁷³

By discarding the weight of political and intellectual locality, these expressions manage to bring conceptually together as close as possible the human rights doctrine and formal law. With the UDHR, for the first time human rights were projected in legal form as independent of the political instruments which generated them (i.e. constitutions, the Declarations of the Great Revolutions etc); at the same time, legal cognition proceeded with reverse readings, of civil life through the lens of human rights; the utterances of Human Justice matched those idealised by formal justice.

1.2.2.22 – National systems recognise dualistically the functional value of these normative statements: they accommodate the juridical appropriation of principles and, at the same time, they universalise the identification marks which symbolically qualify states into reliable juridico-political shareholders of the international community.⁷⁴

⁷¹ The Bill of Human Rights consists of the UDHR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966), and the *International Covenant on Civil and Political Rights* (ICCPR) (1966) (plus the latter’s two Optional Protocols).

⁷² The two Covenants implemented most rights of the UDHR into a legally obligatory systematisation of international protection, setting up mechanisms for monitoring member states’ performance of obligations and for receiving individual complaints of alleged violations; *Jayawickrama* (2002) 132.

⁷³ The UDHR encompasses an (inclusive) statement of “a common standard of achievement for all peoples and all nations’ (UDHR preamble); states ‘a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community’ (proceedings of the 1968 International Conference on Human Rights); provides ‘a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards;’ *OHCHR* (1996).

⁷⁴ *Moravcsik* (2000) 228; *Posner* (2008) 1768 – 1769, discusses briefly how developing states purposively visualise their joining of the ‘club’ of the democratic ‘free-world’ or the various benefits they may receive from there when ratifying the UN human rights treaties.

The language of human rights treaties installs a morally and politically acceptable shared platform. Ratifications invite the universalised norms into national settings. Eventually, the prescriptions of UN human rights law are found pervading a multitude of jurisdictions; we need to repeat and emphasise that, although they may be associated to particular political expressions and in parallel fulfil specific political functions, they standardise internationally the human rights doctrine in formal expressions for exclusively legal usage.

1.3 *The Range of Law* – Concluding with the forms that human rights take in law we should return briefly to the recurring semantic issue of the term human rights and to some observations regarding a misconception between values and rights.

1.3.1 *The Semantics of Rights* - Understandably, the term “rights” is accepted as a linguistic convention, within which political thought enabled the legal recognition of “humanity”; rights formed the only conceptual means that law could offer at that time. Today, and several centuries later, the use of human rights in applied law denotes a broader range of freedoms, liberties and per se rights that are exercised mainly through constitutionalities. On several levels the reasoning, which I partly identify as the human rights argument, is delivered well through these established forms; yet at the same time the meaning of humanity is also consolidated in the formality of rights and its limits. There are a few notable ramifications that should be accounted:

1.3.1.1 – First, our legal grammar constraints expression. The intent to discuss human values in law is pre-empted by assumptions that only through preset modalities we may elaborate the topic of humanity. As a result, the applied meaning of human rights that the form imposes places barriers over the further negotiating of values in law; and in reverse, examinations of human values often overreach, devaluating the legal currency of human rights laws by trying to ‘derive rights which they cannot derive;’ Raz remarks in one of his criticisms that ‘scant attention is paid to the difference

between something being valuable, and having a right to it.’⁷⁵ The issue invokes a clearly institutional problematic.

1.3.1.2 – Second, the political enticed us to overrate human rights’ qualitative weight. Human rights served modernity’s civic constitutionality as ‘citizens’ rights’, forming the main legal weapon against the government of the emerging nation state. Their long-standing performance seems to have estranged them from their origins in reasoning and, most profoundly, their naming: several legal systems appropriate human rights exclusively in the traditional political sense as counterbalance opposite to governmental activity. Today, in this sense, citizens’ rights serve as ‘human rights’; the roles have been reversed and humanity is informed by state theory.

1.3.1.3 – Ultimately, positivistic feedbacks promote further linguistic confusion and disarray, where legally informed discussions make frequent references to ‘human rights values’. This latter expression clearly differs from ‘human values’: it raises the established regime of human rights to the conceptual source of human values in general. Therefore, a search into the values of humanity will return with increased technical input of legal rights that limits the hermeneutical perspective on “humanity”. Similarly, understandings of human values pick up the political performance of contemporary human rights to identify humanity with particular, contingent societal setups.

1.3.2 – All this gives the impression of a paradox; talking of ‘human rights laws’ and ‘human rights values’ prefigures nothing less surprising than the eventual coining of ‘human rights *rights*’! Law’s current systemic appropriations of “humanity” are widening the gap between human values and the positivised human rights regime, making the latter look as if following a path of its own into regulatory mechanisms and political realism. Admittedly, such contingency is steered by the form and what normative demands this raises in turn; however, the form has constituted the means for law to reach out to human values and Justice. Hence, a pseudo-dilemma is

⁷⁵ Raz, J. ‘Human Rights Without Foundations’ in Besson & Tasioulas [eds.] (2010) 323.

taking shape, since the absence of alternative legal tools to human rights institutionalised this way eliminates all other possible options.

1.3.3 – The noted contextual shortcomings of the form do not render its operations unnecessary. Certainly, application gaps are expected, but not more than what the general phenomenon of law - with all its small and larger imperfections - is expected to show. Otherwise, the constitutionalisation of human rights increases their effectiveness, at least from a purely functional viewpoint; for there are ideological factors at work which may shrink the aspired net potential (these are analysed further below, in Part III).

As noted, overall efficiency is constrained by structural limits that reside in the form. For example, domestic human rights law obligates action, whereas international law can only initiate pressure; the first ‘legalises’ while the second ‘legitimises’. The existing forms of law, then, may supplement each other, or be assisted by international custom and political activity, towards a more complete framework. Thus, most jurisdictions hold that once an international treaty has been ratified, it automatically becomes part of the domestic law; national laws may cover for trans-national indecisiveness; nations will appear taking treaties seriously to defend themselves against accusations of non-compliance.⁷⁶ One way or the other, form in its functional aspect will seek out cohesion.

1.3.4 – The true weaknesses appear to stem from the substantive content of human rights statements and the intervention of arbitrary political will. Despite the broader agreement over what general principles should be included in a human rights framework, disputes surface regarding particular aspects. In the end, the vision of Justice which human rights engulf in the described forms is not less feasible than any other conception of justice which laws otherwise pursue. Certainly, noted ‘imperfections’ (e.g. procedural obstacles, ambivalent semantics) register with common hardness and inadequacies in the administration of justice; they should not be overlooked, though, nor their significance be underrated.

⁷⁶ *Posner* (2008) 1759.

The form is subject to the uses it receives as a conveyor of meanings. Most certainly, several laws that do not on the surface relate to human rights configurations are carrying across the same message; and others, classified as such, are - not that rarely - observed subverting their human rights charge. To paraphrase Marxist language, the functional operation of the form is in the last instance determined by the content and, of course, by its purposed placement on the canvas of interacting regulatory tools.

2. Content of Human Rights – The humanistic belief’s dynamic is realised in this national and international scattering of laws, where the content of human rights appears in continuous development. The question of content is met equally with reductionist and expansive perspectives: there exists a basic core of human values to be protected; yet where their expressions become almost indiscernible within specialised contexts, proving of the relevant hidden connections is called for.

2.1 – Political affordance prescribes limits to the creativity with which content may be approached. Therefore, the content of human rights should be exercised as it is contained in formal law and accordingly be defined. However this does not imply that readings of human rights are handed over exclusively to posited laws; instead, the human rights argument should always explore humanity by testing formal law to its furthest limits with imaginative prowess. Content-wise, the form of law figures the – however demanding – means, definitely not the end.

2.1.1 – The discussion in the previous section exhibited nodal points and circumstances in the legal experience of human rights that bear implications for the approximation of their content.

2.1.11 - The UDHR provided the complete diagram of modernity’s thesis on fundamental freedoms and rights in one compact codification form. Along with the ICESCR and the ICCPR they generalised over the most popularised understandings on human rights content, as these had already been tested through national laws. Hence, the concretising of notions of humanism and Justice into human rights was preconditioned by equally local and internationally comparative political experiences; the law alone, without

being measured against the tapestry of occurring political clashes, would have never reached beyond verbalising moral imperatives.

2.1.12 - Furthermore, procedural prerequisites and juridical expressions of values continuously mutate, since they primarily refer to the crude reality of changing social circumstances, i.e. the manner in which infringing conduct may be perceived. Despite the wide utility which a kernel of principles (like the UDHR) has to offer, content in practice is being constantly rewritten in more detail and broken down into an impassable infinity of mushrooming manifestations; e.g. one thing is to recognise freedom of speech, a very different are its countless aspects which courts will face on a case by case basis. Understandably, extreme specificities impede the building of an analogy from the main general idea.

2.1.13 - As they were previously discussed, the semantics of rights introduces relevant contingency. Human rights law marked an attempt to objectify the multiplicity of constituents, which define the ideal of a dignified human, into an ontologically operational whole of trans-culturally comprehensible - yet globally instrumental - normative conceptualisations. Considering that *per se* rights in law signify positive and negative systemic limits in the exercise of entitlements, one may marvel over the qualitative and quantitative breadth of the human rights doctrine which is permitted to reach out, and the breadth of ideals which survived the typecast enumerations of legal codification. The simplified instances of law are sitting on a far broader range of co-impacting philosophical and religious meanings, a “hidden” knowledge layer that is definitely neither subservient nor identical to the one which legal rights as tools of practice will eventually deliver.

2.1.2 – The needs of practical normativity pre-empt the palpability which human rights seek to achieve in legality; the structural burdens they place reaching down to impose a qualitative quota on the flow of humanist articulations.

One could plausibly object that such concerns are unfounded; human rights theorise well-described states of affairs; not only the coupling of ‘quality’ with ‘quota’ (a quantitative signifier) seems paradoxical, but also

the figuration of human rights content cannot comply with notions of enumerations: there is no such question as of how many of these values will qualify for protection.

However, this is exactly the point which a ‘qualitative quota’ confers. At issue is how much of the human rights doctrine the structural harnessing of the law will allow to spread. The more limited, the more difficult their extrapolation to new and changing circumstances – such as the “Internet lives” at the centre of this thesis.

2.1.3 – Hence, a valid examination of the content of human rights registers the following parameters:

2.1.31 - the main dictates of the human rights doctrine, i.e. the undisputed imperatives that reasoned humanity by rationalising morality; and

2.1.32 - the institutional entrenchments and affirmations of values under local and international human rights regimes.

2.1.4 – The introductory Chapter stated the thesis’ take on human rights to be examining the experience of online virtual worlds. While from this standpoint one would expect the discussion over human rights content to propose bold online transformations of rights, that path holds credible dangers in store, e.g. the diffraction of potent human rights laws and their thinning into numerous specialised legal assertions.⁷⁷ Thus, the case at hand hardly calls for a radically creative content review, but instead requires to think creatively about already applied legal modules, when facing the diversities of “externalised humanity”; online activities constitute one of these external expressions of identity and humane existence.

2.2 - The present account posits human rights content on the expanded breadth across which it is *seemingly* allowed to *potentially* spread, in reference not only to the international declaratory documents but also to the more specialised domestic expressions.

2.2.1 - The UDHR adopts a rounded look over the philosophically sanctified human, promoting the ideal of compassionate justice. The first article lays

⁷⁷ Raz in *supra* 75, 322, warns against the lack of standards from the ethical doctrine of human rights, which leads to non-stop and over-expansive articulations of rights based on vague humanity grounds.

down the unsurpassed guideline that ‘[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ The obligation to protect this dignity and everyone’s free development of personality is set forth through the realisation of economic, social and cultural rights;⁷⁸ the premise of community, where such ends are possible to thrive is laid out;⁷⁹ freedom of association and assembly is provided.⁸⁰ From the universal human vision any form of discrimination and on any ground is abolished;⁸¹ everyone has a right to life, liberty and security,⁸² while degrading, inhuman treatments, like slavery, torture and cruel punishment, are prohibited;⁸³ free thought, conscience, beliefs and religion are enshrined⁸⁴ and there are particularly set freedoms of opinion and further expression of it.⁸⁵

Before the law every human being is recognised as a person amongst equals, entitled to remedies against infringing action.⁸⁶ As Article 12 sets it straight, ‘[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’

Property claims its historical role in the development of human rights, with the recognition of its positive and negative protection;⁸⁷ moreover is established the foundation of protected intellectual property, with the expressed mentioning of the author’s moral and material rights.⁸⁸ Participation in cultural life is equally sought.⁸⁹ Furthermore, everyone has a

⁷⁸ Art. 22.

⁷⁹ Art. 29 (1): ‘[e]veryone has duties to the community in which alone the free and full development of his personality is possible.’

⁸⁰ Art. 20.

⁸¹ Art. 2.

⁸² Art. 3.

⁸³ Art. 4 and 5.

⁸⁴ Art. 18.

⁸⁵ Art. 19.

⁸⁶ Art. 6 – 8.

⁸⁷ Art. 17: ‘(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.’

⁸⁸ Art. 27 (2).

⁸⁹ Art. 27 (1).

right to education,⁹⁰ to work⁹¹ and to leisure.⁹² The importance of family is emphasised as constituting the basis of all social institutions.⁹³

The Declaration pictures a model of state organisations, where the requirements of good government respond to the fulfilment of the prospected ideal framework; it thus sets democracy as its primary political guarantee.⁹⁴ Furthermore, it underlines the right to nationality as the means of personal civic empowerment, as well the related concept of “cosmopolitan citizenship” which calls upon international cooperation for protecting the individuals.⁹⁵

Finally, as the foundation for realising the Declaration’s objectives are prescribed specific limitations to the exercise of rights⁹⁶ and, most important, its humanity-wide (universal) breadth of application: ‘[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’⁹⁷

2.2.1.1 - Both the ISESCR and ICCPR, on the other hand, make sure from their opening articles to establish rights of social, political and cultural self-determination⁹⁸ and the people’s freedom to dispose their natural wealth and resources at will.⁹⁹

2.2.2 - What the International Bill of Rights’ pronouncements achieved was to refer directly preceding entrenchment activity to the ideological substratum of human rights that animate it. Yet, they only sketched out a “principle nucleus”: in reality, concretisations involve rights and freedoms being practised within institutional and social hierarchies. Therefore, the

⁹⁰ Art. 26.

⁹¹ Art. 23.

⁹² Art. 24.

⁹³ Art. 16.

⁹⁴ Free participation in government, directly or through representatives, Art. 21(1); equal access to public services, Art. 21 (2); the right to elect leaders, Art. 21 (3).

⁹⁵ Art. 28, Art. 29 (3).

⁹⁶ Art. 29 (2): ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

⁹⁷ Art. 30.

⁹⁸ ISESCR Art. 1 (1); ICCPR Art. 1 (1).

⁹⁹ ISESCR Art. 1 (2); ICCPR Art. 1 (2).

development of content follows understandings of the core human rights principles, and mixing them organically with the regional and domestic procedural experiences.

2.2.21 - For example, although the same generalising tone is pertained in the ECHR, abstractions accommodate the framework sense of legal and political realism of the signatory states. The article referring to freedom of expression exemplifies means of conduct (Art. 10(1)) for its purposes and pinpoints to important limitations on the bases of e.g. national security and health or morals (Art. 10(2)),¹⁰⁰ differing thus significantly from the corresponding UDHR provision.

2.2.22 - Moving down to national constitutions and from there to even lower relevant legislation (the likes of journalistic ethics for television broadcasters or special penal laws against Holocaust denial¹⁰¹) we observe the effect becoming even more strong and tangible. Content becomes more susceptible to reflective redefinitions - the closer the exercise of rights gets to mundane social circumstances. The specialising process evolves via applying limitations to a freedom, on top of limitations already imposed at a higher legislative level;¹⁰² in parallel, particular spheres of immunity are created within the setting through statutory and judicial reviews.

2.2.23 - Also, the symbiotic connection of constitutionalism and human rights might create deceptive impressions in terms of content. Rights terminologies, differing across jurisdictions, have converged developing

¹⁰⁰ Article 10: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹⁰¹ The French "Gayssot" Act: 'Loi no 90-615 du 13 Juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe'; Belgian 'Act of 23 March, 1995 on punishing the denial, minimisation justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War,' (BS, 30.III.1995) and 7 May 1999 (BS, 25.VI.99).

¹⁰² Örüçü, E. 'The Core of Rights and Freedoms: The Limit of Limits' in *Campbell, Goldberg, McLean & Mullen* [eds.] (1986) especially 41 – 43.

knowledge of human rights and institutional setups. To some degree they may breed confusion, where both constituent elements are being identified by one general term. Therefore, rights to resistance or to keep and bear arms are motivated by aspirations to political integrity rather than realising directly protection of human dignity.

2.3 - The human rights ideal at its most basic identifies with the relief of suffering.¹⁰³ The call for Justice craves primarily for the suffering to stop, the identity of the cause being in this sense of lesser concern. Hence, the pure demand which a human right expresses is acknowledged outside the facilitating juridico-political structures, on the basis of the human subject and his experienced circumstances. We may then speak of the political autonomy of the content of human rights, more profoundly stretched out in the universally declaratory character of the UDHR statements and in compliance with the humanist foundations of the original doctrine.

2.3.1 – Arguably, the distinction between objective and subjective (or psychological) suffering raises controversy over the response which the law is capable of delivering and its pragmatic delineation in practice. The subjective dimension in particular, dealing with the emotional and personal senses of pain, subscribes to indeterminate cultural variations and interpretations.¹⁰⁴ The articulation of specific human rights, though, and the application of dignity as a general concept perform towards overcoming the noted pitfalls of subjectivity.¹⁰⁵

2.3.11 - Nevertheless, a genuine appreciation of suffering mobilises the legal process into a more conscious state of human rights conveyance, where typological distinctions between constitutional and lesser laws become irrelevant and where, moreover, invocations to Justice, in the face of the human subject's ordeals, instantiate the human rights content in lesser laws. Thus takes shape a jurisprudence of non-denial of humanity and of

¹⁰³ *Williams* (2007) 136.

¹⁰⁴ *Ibid.* 137 – 139, quoting Levinas that '[s]uffering is surely a given in consciousness'; whilst objective suffering points to easily recognised experiences of misfortune, like death, disease, torture and 'all those manifestations of physical and psychological harm and denial.'

¹⁰⁵ *Ibid.*

reasonable affirmation of relevant content development within the broader body of laws (i.e. not determined by external to law approximations).

2.3.2 – In the sense of absorbing our comprehensions of suffering, dignity transforms into a powerful concept. The unity of the individual and his dignity grounds the appreciation of human rights as inherent and potentially *erga omnes* liberties.¹⁰⁶ At the same time, though, it may similarly restate relativistic articulations that preclude it from developing the static quality which legal practice demands. Thus, perceptions of dignity have been hardcoded in distinguishing a matter of ‘how one “legitimately feels”’ from a ‘matter of how one “feels when confronted **by** a particular law”,’¹⁰⁷ underscoring the importance of explicitly anchoring dignity in constitutional setups.¹⁰⁸

2.3.2.1 - Respect to the inherent human dignity was connected in the post-war constitutional paradigm¹⁰⁹ with giving legal priority to equal citizenship. Where dignity signifies active disapproval towards cruelty and dehumanisation, in systemic terms it also identifies with access to the rights of citizenship – encapsulating in the latter the means against human degradation. In this sense, the traditionally moral stance of dignity acquires systemic substance and volume: dignity provides the source for other freedoms and rights (thus, other human rights justify their content upon tight conceptual connections with it) and serves as the balancing benchmark within the order of interoperating rights and legal activities.

2.3.2.11 - Hence, dignity may appear as either supporting or constraining autonomy; in reality, though, it systemically serves both directions in setting up man and his laws as a whole. The alternatively manifested dignity strands become important in signifying how a legal system understands and applies

¹⁰⁶ Barak, *supra* 53, 15.

¹⁰⁷ Michelman (2004) 1756, discussing South African jurisprudence.

¹⁰⁸ Even where not expressly mentioned (e.g. the ECHR) respect for human dignity is recognised as the infrastructural core of human rights constructions, Brownsword ‘Freedom of Contract, Human Rights and Human Dignity’ in Friedmann & Barak-Erez [eds.] (2001) 188.

¹⁰⁹ As such Weinrib defines ‘a common constitutional model found in a wide variety of liberal democracies that views judicially enforced constitutional rights as crystallizations of inherent human dignity and comparative constitutional analysis as a natural by-product of the shared constitutional template that transcends jurisdictional boundaries;’ Choudry (2006) 27.

its own meanings of dignity; for the adopted and followed content of dignity determines the character and reach of all other rights: it justifies why certain empowerments are allowed and why certain limitations to freedom for action take place.

2.3.2.2 – At the same time, a legal order’s conception of dignity is ideologically susceptible to the political understandings, which the underlying constitutional preferences have been embedded with. Understandably, content is framed by the scope of the right which is appointed to a value and by the afforded level of protection. However, these parameters of scope and protection level are, eventually, tightly determined by the domestically championed dignity narrative, which forms the heart of the human rights construction. Under this light, further content shaping, breadth of liberties and boundaries in the exercise of rights, all derive like ripples from the fundamental interpretation of moral and political intent which the resident conception of dignity materialises.

2.3.3 – The positive aspects of classical rights contribute in justifying their conceptual extensions; for example, it might be found inconsistent to actively pursue freedom of speech and ignore access to media.¹¹⁰ Under such mode of liberal thinking that Nino addresses as ‘egalitarian liberalism’,¹¹¹ instead of their expansion, classical rights may undergo restrictions to ‘prevent the autonomy of some from being subordinated to that of others;’ thus is pursued a framework for effective social negotiations, since dignity of persons is secured.¹¹²

2.4 - The public goods rhetoric offers a different angle for approaching content and human rights in general. There is undoubtedly an interconnection between the two, as social impressions of global public goods are constructed in response to the needs of humanity. While human rights involve access to material or abstract (i.e. within the polity) resources, it has been noted that

¹¹⁰ Nino (1991) 217 – 218.

¹¹¹ Opposed to conservative liberalism, egalitarian liberalism views the state actively ‘engaged in the promotion of the autonomy of the least favoured members of society;’ *ibid.* 195.

¹¹² *Supra* 110, Nino offers the example of labour contracts and the circumstances of power between two parties, noticing that the juridical aim lies in providing a framework where the will of the parties will not be found invalid.

this coupling of discourses lacks symmetry. Global public goods frequently identify with rights or freedoms; while, however, some concepts of public goods will qualify directly (e.g. health, information and education) or indirectly (access to land and water), others will not be wholly recognised (good governance, information technology, even the rule of law)¹¹³ and many lie completely outside the scope of human rights reasoning (for example, traffic lights, air traffic regulation).¹¹⁴ Additionally, the discussion over public goods does not reach the institutional integration which human rights have attained.

However, endorsed notions of public goods implement the matching of juridico-political will against its contemporary socio-economic conditions. On this account, they set up a valuable platform upon which human rights content can be discussed in check with its social and political dimensions that legal formalities filter.

2.5 - At the last instance, private law and sub-constitution public laws fill in relevant gaps (for example, through interpretation of public policy or good faith principles), expanding domestically the institutionalised essence of human rights content. Such legislative and judicial inferences effectively realise the diffusion of the hard core of human rights values into matters of daily regulatory routine. Crucially, however, they (i) remain attached to their systemic roots in constitutionalism to thus (ii) disclaim all justificatory references of their practice to the human rights doctrine directly.

3. Application of Law – The subsumption of human rights under the notion of constitutionalism results in the practical problem of giving domestic ideological influences considerable impact on the manner in which legal systems process human rights. As both content and application meld into the ideological orientations of local orders, the human rights discourse becomes contained; that is, adjusted to the resident systemic idiom. In comparative law terms, the generated discrepancy across jurisdictions implies fragmentation of the Justice discussion on the operational level.

¹¹³ Lindholt & Lindsnaes, *supra* 61, 67.

¹¹⁴ Lindsnaes, B. 'The Global and the Regional Outlook' in Andersen & Lindsnaes [eds.] (2007) 74.

3.1 – The variety of national constitutions is first marked by tremendous diversities in political approaches to freedoms and entitlements, best seen on the way in which some still promote religion to be their source.¹¹⁵ Everywhere, though, constitutional assimilation entails freedoms are induced into the general mechanisms of justice, where they enjoy the highest degree of protection through continuing constitutionality reviews. Courts may scrutinise governmental and legislative activity, whereas individuals or groups are enabled to appeal against attacks on thus validated human rights.

The list of constitutions which redefined their national legal order under the influence of the Universal Declaration and other international human rights treaties is quite long. While the purposes behind global constitutionalisations of rights are vividly debated in scholarship, we may distinguish an argument of practical value for our main concern here. Regardless of what political and legal agendas found shelter under this ‘normative universalism’,¹¹⁶ a common standard of human rights expressions has openly penetrated the basis of state laws.

3.1.1 - Amongst the most influential “codified” structures in the international scene is counted the United States Bill of Rights,¹¹⁷ one of the first and most enduring frameworks that legitimised protection of (until then) natural rights. It sets limits to the powers of the federal government; it protects the rights of all citizens, residents and visitors on US territory; the freedoms of speech, press, religion and assembly; the rights to fair trial, bear arms, be free of unreasonable search and seizure; it prohibits cruel and unusual punishment and compelled self-incrimination. The Bill of Rights also restricts the Congress from making any law respecting an establishment of religion, and the federal government from depriving any person of life, liberty, or property without due process of law. Finally, it states that ‘the enumeration in the

¹¹⁵ Egyptian Constitution Art. 2: ‘Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Sharia)’; Israeli Basic Law: Human Dignity and Liberty (Art. 1(a)), 1992, S.H. 150: ‘The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the *State of Israel as a Jewish and democratic state*’ (emphases added); noted in *Hirschl* (2004) 1819-1820.

¹¹⁶ *Tushnet in Ghoudry* [ed.] (2006) 69.

¹¹⁷ The 1791 amendments to the Constitution of the United States.

Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’¹¹⁸

Faithful to its common law background, the American Constitution opted for only a basic enumeration in its text, setting the interpretation of freedoms as a task for courts to proliferate. Frugality was, in true liberal fashion, considered necessary for submitting the attributes and amplitude of freedoms and rights to continuing competitive discussion between states and the judiciary.

3.1.2 - Opposite, the Franco-Germanic constitutional tradition represents a historically and organically different institutional approach.¹¹⁹ The German constitution model sets an example that has been literally transplanted in many other jurisdictions. Citizens’ rights and freedoms are vividly described, to the extent where, with more details, they are differentiated into specific socio-political instantiations.¹²⁰

The burden of their protection falls upon the state in its unity; for that reason the separation of powers is prescribed in a rather analytical manner. In this respect, the complex constitutional structure provides instructions for the way in which, for example, the legislature will harmonise running measures with the prime obligation to preserve the principal core of constitutional rights. On similar premises are restrictions to rights by laws (*Gezetzesvorbehalt*) and restrictions to restrictions (*Schranken-Schranken*) prescribed. In short, this constitutional reasoning keeps a closer look on the organisational implementation of rights and freedoms, declaring increased degree of protectionism, which it counterbalances with thorough control mechanisms.

3.1.3 - The uncodified United Kingdom Constitution, on the other hand, extracted originally the sense of universal ideals not with declaratory statements but from the bulk of gradually added (statutory) sources and through granting rights. The Magna Charta, the 1689 English Bill of Rights and Scottish Claim of Rights launched a continuing dialogue over liberties

¹¹⁸ Ninth Amendment.

¹¹⁹ Generally *Tushnet* (1998).

¹²⁰ On German Law, *Youngs* (1998) & (2002).

inside the political and legal arenas. Thus, human rights principles have progressively been cropped in scattered Parliamentary enactments and expanded in courtrooms, becoming the object of constant political negotiation; in a sense, this practice combines continental and American approaches to the nature and exercise of rights with the acute flexibility in case law.

The introduction of the Human Rights Act 1998 marked an important change in this tradition. The U.K. Constitution engulfed a descriptive catalogue of rights by incorporating elements of the ECHR. For the first time in the constitutional order explicit definitions of negative rights were included.

3.1.4 - For the purposes of the present research, these three main models will suffice for building a cohesive understanding of the implications of choice of form, as noted in the beginning of the section.

A good example of core differences between the US and Germanic constitutional perspectives over application is given by Rosenfeld & Sajo regarding freedom of speech.¹²¹ The US expression is absolutist regarding the state abstaining from placing restrictions and the adopted liberal stance sees to issues of e.g. hate speech being resolved through public exposure and debate. By contrast, the German Basic Law provides for speech limitations in protecting youth and a right to personal honour and does not tolerate racial (anti-Semitic) speech. Mainly, opposite to the ample liberal idealism of the US Constitution, the Basic Law sets a hierarchy of values,¹²² under which rights are interpreted and harmonised, placing dignity on top.¹²³ In essence this antithesis underlies a deeper political and cultural dichotomy, between an ethos of dignified liberalism and liberalised dignity.

3.2 *Horizontality* - State constitutionalism has begotten one of the most essential problems in civil applications of human rights, that of horizontality.

¹²¹ 'Spreading Liberal Constitutionalism' in *Choudry* [ed.] (2006) 147 – 149.

¹²² The concept of the constitution as an 'objective order of values' ('objektive Wertordnung') was established in the German *Lüth* Case of 1958, BVerfGE 7, 198 (205).

¹²³ *Supra* 121, 148; *Gardbaum* (2003) 441.

3.2.1 - Human rights initially provided the response of justice to suffering. Tighter social institutionalisation reformed this premise, and ‘suffering’ was rewritten into ‘injustice’, an antithetically correlative notion to the civic resolution mechanisms that by its very nature carries institutional expectations. From there, the monopoly of governments in the exercise of power and administration of justice ascribed to states the dual responsibility of striking down and, at the same time, refraining from acts of injustice. As modern constitutions reflected the human in the political unit of the citizen, human rights functioned in opposition to the state.

3.2.1.1 - We find, however, two different structural understandings of the state. The first gives republican meanings¹²⁴ in viewing the state as the self-governing society,¹²⁵ while the second distinguishes the agency of governmental power from the political body.¹²⁶ Both conceptions have developed into cornerstones of Western constitutionalism, the former dominating the continental tradition, the latter practised prominently in the US.

3.2.1.11 – The allusion of the state formation to the Roman *civitas* in the first understanding allows protection of basic rights to unfold into a demand directed against the entire politically organised society, reaching beyond the government, to other individuals and groups. This strand brings basic rights closer to the politically autonomous human rights, as these were idealised in Justice’s humane response to suffering in general. At the same time, though, it complicates the mechanisms of regulatory praxis, if in modern legal systems constitutional imperatives apply directly to private relationships.¹²⁷

3.2.1.12 – Redefining the state not as the political body, but as synonymous with the government, gave birth to the state action doctrine, which, in short, finds constitutional rights violations only in governmental action.

¹²⁴ Tracing back to Cicero’s definitions in *De Re Publica*, of the people’s constructive connection to the State, *Wivel, P.* ‘The State and the Citizen’ in *Andersen & Lindsnaes* [eds.] (2007) 3 – 4.

¹²⁵ Austrian jurist Georg Jellinek defined the state in his *Allgemeine Staatslehre* (1900) as the ‘associational unity of settled peoples possessing original ruling power’ (translation from *Kelly* (2004)); alternatively, his juridical definition attributes this unity with legal personality.

¹²⁶ *Tsatsos* (1985) 68 – 72.

¹²⁷ *Barak, supra* 53, 16 – 17.

3.2.1.2 – Horizontality subscribes to a political interpretation of the human rights capital in the system of law, on the basis of two normative issues: (i) the nature of the human rights and (ii) the role of the state. As Bamfort summarises, the first concerns whether human rights exist to defend against the power of the state or to guard so fundamental interests that they must be protected *erga omnes*; according to the second, the state has either a moral obligation to refrain from infringing citizens’ freedoms through its own actions or the more proactive duty to provide mechanisms for redress where private entities have violated liberties.¹²⁸

3.2.2 - Barak observes that the majority of constitutions remain silent or rather ambiguous regarding horizontal application,¹²⁹ leaving discretion to the juridico-political process.

3.2.2.1 – The third-party effect doctrine (*‘Drittwirkung’* in German constitutional law) holds that constitutional rights bind states but also apply directly to private law and thus indirectly affect private actors. The *Drittwirkung* focus of protection is set on the victims, on suffering, the source of oppression being immaterial.¹³⁰

3.2.2.2 - Refusal to grant horizontal application does not derive from the common law tradition:¹³¹ the English *Somerset* case of 1772,¹³² which led to the abolishment of slavery, advocates triumphantly against such notions; it is thus attributed to the juridical effects of constitutionalisation.¹³³ Common law courts’ views against direct horizontality have nonetheless sustained several degrees of indirect application.¹³⁴ Hence, where private action is conducted in a manner that violates in principle constitutionalised human rights, courts have found the state’s affirming of enforcement to be

¹²⁸ Bamfort (1999) 170.

¹²⁹ Barak, *supra* 53, 14.

¹³⁰ Morgan (2002) 267.

¹³¹ Barak, *supra* 53, 13.

¹³² *Somerset v. Stewart* (1772) Lofft 1, 98 ER 499.

¹³³ According to Tushnet (2003) 88, a reason which makes the issue of horizontality important for some jurisdictions is the ‘different degree of commitment to social democratic norms among national political systems.’ Specifically in view of the US, he argues that attachment to state action formed a response against fears that ‘the political theory of social democracy’ threatened the norms of liberal autonomy, aiming at insulating ‘private decision making from assessment according to constitutional norms.’

¹³⁴ Gardbaum (2003).

unconstitutional.¹³⁵ Of course, this currently presents one application route of many.

3.2.3 – Notably, civil liberties have entered relationship spheres which were traditionally understood to be private - for example, employment - where ‘the managerial right of ownership and freedom of contract’ have been balanced by freedoms of occupation, speech, development of personality and rights to privacy and equality.¹³⁶

3.2.31 - If we are to discuss technically the human rights cargo that private laws carry, the constitution’s radiating of influential authority¹³⁷ and content through the legal system forms the basis for elaborating accordingly all subordinate public and private laws.¹³⁸ In reverse, lesser laws and their application should abide by constitutional values.

3.2.32 - The development of indirect application has enshrined the centrality of the basic rights ideology without degrading the role of private law, validating limitations to private power relationships (again, the example of employment) by either relying upon existing private law tools or in direct reference to institutional connections with constitutional freedoms.¹³⁹

3.2.4 – On the other hand, modern law reiterates expressions of human rights reasoning independently from structural reliance on constitutionalism. In this sense private law provides limits to rights and brings them into balance. For example, the claim that a contract is contrary to public policy, pre-existed constitutionalisations of human rights and, yet, performs efficiently.¹⁴⁰ Therefore, one may argue that horizontality becomes an issue the moment that structural burdens are intentionally emphasised or even devised.¹⁴¹

¹³⁵ In the much discussed *Shelley v. Kraemer*, 334 U.S. 1 (1948) for its constitutional disposition, the Supreme Court ruled that the Fourteenth Amendment prevented state enforcement of private racial covenants on real estate.

¹³⁶ *Mundlak, supra* 1, 321.

¹³⁷ *Berman* (2000) 1290 - 1293, calls the same idea ‘constitutive constitutionalism’, referring to the Constitution as society’s normative collective memory.

¹³⁸ *Moran, M.* ‘Inimical to Constitutional Values: Complex Migrations of Constitutional Rights’ in *Choudry* [ed.] (2006) 237 – 238.

¹³⁹ *Barak, supra* 53, 23 – 24, deploys extensive case law examples from Germany, Italy, Spain and Japan where activities of private actors have been held to be void as fundamentally infringing constitutional liberties and freedoms of others.

¹⁴⁰ *Ibid.* 18.

¹⁴¹ Horizontal application in the U.K. would have never been a matter of concern, if not for the Human Rights Act not having incorporated Art 1 of the ECHR, which expressively

3.3 Exceptionalism – The last observation leads directly to the second manner, in which state constitutionalism pre-empts human rights in the conflation of the political and the law.

Human rights discussion is confined within debates over domestic constitutional integrity. The global migration of human rights norms (which eventually become Justice precepts) is being resisted by jurisdictions that label it as foreign constitutional invasions. This form of opposition affects applied reasoning by enclosing it into the formalist dimensions of law, filtering out considerations over the substance of human rights content. Therefore, comparative analyses of human rights are opposed on the basis of undermining procedurally the domestic juridical tradition and the embedded political process. Apparently, the citizen/human equivocation here performs as a barrier against examining each of the two components separately.

3.3.1 - Most prominently the debate has surfaced in the US.¹⁴² The growing influx of human rights norms from other jurisdictions is seen as a Trojan horse that may influence negatively the constitutional order,¹⁴³ by proliferating constitutional judicial reviews which will presumably foster judicial activism.¹⁴⁴

3.3. 11 – It has been argued that this kind of systemic reluctance (Weinrib coins it ‘exceptionalism’)¹⁴⁵ links indirectly to the development of conservative jurisprudence in the human rights area. Practically, the systemic order refuses to engage in comparisons with the progressive juridical re-

provided protection against other actors apart from the state; *Beale & Pittam* ‘The Impact of the Human Rights Act 1998 on English Tort and Contract Law’ in *Friedmann & Barak-Erez* [eds.] (2001) 132 – 133.

¹⁴² Characteristically encapsulated in the conflicting jurisprudential stances of Supreme Court Justices Breyer and Scalia; *Choudry* (2006); *Rahdert* (2007); *Alford* (2004); *Koh* (2004); *Jacobson* (2004).

¹⁴³ *Rahdert* (2007) 561 – 562. All the same we may interpret US reluctance towards ratifying international treaties, where these become part of the ‘supreme law of the land’; *Strauss* (1998) 1243 (on the legal power and limits of ratified treaties); *Hartmann* (2002) 139 (on the political power of treaties and the constitutional framers’ concerns).

¹⁴⁴ *Neuman* (2004) 82.

¹⁴⁵ ‘The postwar paradigm and American exceptionalism’ in *Choudry* [ed.] (2006) 84 – 111; the thesis of exceptionalism, termed as ‘legal particularism’, is analysed in *Choudry* (1999) 830 – 832.

examining of content that takes place in the international setting, fostering divergence and regress.¹⁴⁶

3.3.12 - On the other hand, the US has not expressively aligned its constitution with the international human rights positive law, neither participates in regional integration and harmonisation processes, nor has submitted to a regime with an international human rights court (like the ECtHR) authorised to issue binding decisions.¹⁴⁷

3.3.13 - Frequently the interpretations of US courts return to the intention of the Constitution framers. Over this point, anti-exceptionalists emphasise how the Declaration of Independence prompted the nation to respect the ‘opinions of mankind’, and called for the domestic rule to seek out compatibility with the international system and principles.¹⁴⁸ Moreover, they observe that where most modern constitutions and covenants, including the UDHR, owe inspiration and normative form to the US constitution, the US demonstrate tendencies of judicial isolation.

3.3.2 - Understandably, contemporary common liberal democratic constitutionalism¹⁴⁹ locks the capacity to deliberate human rights principles within its internal institutional modalities, hence succumbing to difficulties (or reluctance) in disuniting humanity from its domestic political dimensions. In effect, the authority of constitutionalised human rights over subordinate laws requests attentiveness to the values of the constitutional order.¹⁵⁰ Sometimes, the structural differences are manifested to justify divergence in practised approaches to constitutional interpretation.¹⁵¹

¹⁴⁶ *Rahdert* (2007) 612 – 613, contests that the US has been placed out of step in outlawing the death penalty, prohibiting discriminations that refer to ethnic and linguistic minorities or issues of sexual orientation, recognising a right to education and pursuing privacy rights.

¹⁴⁷ *Neuman* (2004) 86.

¹⁴⁸ *Koh* (2004) 44, points to early sources, including Jefferson’s letters and court jurisprudence.

¹⁴⁹ *Goldsworthy* represents this as a four elements structure: (i) democratic elections for legislature and/or the executive; (ii) guarantees of individual rights; (iii) independent judiciary with authority to enforce constitutional provisions and settle exclusively legal disputes; and (iv) requirements that constitutional provisions can be changed (if at all) under procedures of strict democratic consensus; ‘Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence’ in *Choudry* [ed.] (2006) 116.

¹⁵⁰ *Moran*, *supra* 138, 240.

¹⁵¹ *Ramsey* (2004) 73 – 74, uses the example of sodomy laws to show systemic incompatibilities: under the ECHR ‘the question is whether restraining homosexual

3.3.3 - On a second level, the juxtaposition of human rights and liberal norms turns highly problematic, in the sense of undermining the purity of values that each strand brings into the mix, and, further on, when liberalism undergoes similar difficulties in relation to Justice: its theoretical broadening transcends a fixed definition, finding frequently the liberal position reverting to comparisons with open-ended notions of illiberalism for settling its characteristics.¹⁵²

3.3.4 - While, as noted, the prospects for developing the scope of human rights differ e.g. between egalitarian and other directions of liberalism, all liberal theories converge over a core of free speech imperatives.¹⁵³

However, the systemic language of law which is replicated in liberal constitutionalism reproduces again and again the same ontological structures and *that* particular conceptualisation of regulation, which is conditioned by the western design of law. There, the premise of principles pursues the preservation of the legal system's logical unity;¹⁵⁴ hence, the qualitative orientation of implicated value schemata is ultimately determined by the relation to a single method of positivistic implementation, one realised technically in the ontological project comprised by 'constitutions', 'statutes', 'private laws' and 'court hierarchies/degrees'. The domination of a single systemic understanding of the law phenomenon's incarnation and formal deployment, finds domestic and international orders (which were historically installed or suggested by the west) sharing the same foundation of organising principles. The values integrated into the domestic principles of law can thus leak – more easily than admitted - from one order into the other through the common ontological bedrock of positivist perception.

Thus, similar to the anthropologically observed geographical expansion of the moral precepts which framed the civilizational tradition of

intercourse violates the right (in Article 8(1)) to "privacy and family life" and are not justified under Article 8(2) (restrictions that are "necessary" to protect listed social values);' on the contrary, the US Constitution, according to the Supreme Court, questions 'whether sodomy laws violate "due process of law" under the Fourteenth Amendment.'

¹⁵² *Rosenfeld & Sajo, supra 121, 142 – 143.*

¹⁵³ *Ibid.* 144.

¹⁵⁴ *Gaudreault-Desbiens Jean-Francois 'Underlying Principles and the Migration of Reasoning Templates: a Trans-Systemic Reading of the Quebec Secession Reference' in Choudry [ed.] (2006) 191.*

humanity, posited legal systemisation (combined with liberal constitutionalism) circulates a core of values attached to the basic structural norms of law.

3.4 – We may pause over present discontent in applied law and with regards to human rights.

3.4.1 - Not all jurisdictions share the same conceptions of rights (Raz, for example, discusses education in this respect).¹⁵⁵ Disagreements on the exact content, hierarchy and social range of human rights in practice have been attributed to the ‘absence of an agreed upon philosophical justification for human rights,’ so much for their posited expressions.¹⁵⁶ We could add that such absence should not necessarily pass for ‘non-existence’; it arguably marks inability and unwillingness towards cooperating over human rights, whereas, in other areas, courts worldwide are engaged in common interpretation exercises.¹⁵⁷

3.4.2 - In substance the issue of horizontality involves the diffusion of human rights from the public to the private sphere; or, conversely, such diffusions into private power spheres are gaining more and more intense support by law as their range and social penetration expand.¹⁵⁸ Essentially, human rights are about ‘society’s failure to respond to suffering wherever it may be discerned,’ not only about ‘countering governmental disrespect;’¹⁵⁹ they provide a ‘means to engage the social discourse in providing a shape and context to society.’¹⁶⁰ Again, systemic reservations in the face of suffering can at first glance be nowhere else ascribed but to unwillingness.

3.4.3 - Such moral, philosophical and political insights and concerns test critically modern law’s exhibited affordances and tastes.

¹⁵⁵ Raz, *supra* 75, 335 – 336.

¹⁵⁶ Posner (2008) 1760 – 1761.

¹⁵⁷ Koh (2004) 54.

¹⁵⁸ Mundlak, *Supra* 1, 298 - 299, discussing in this regard employment.

¹⁵⁹ Williams (2007) 142.

¹⁶⁰ Hammer (2007) 95.

III. The Dehumanisation of Law

The crisis of human right has been recycled now and then in legal literature to emphasise painfully feelings of defeat in the face of systemic inefficiencies. The passion of the human rights rhetoric generated such expectations that have not been met by contemporary legal settings, on many occasions they are rather being brought down spectacularly enough to justify talk of substantial crisis. Therefore, crisis regards the many different levels of the ideological and practical projects in law which have internalised and deliberated the human rights argument, either domestically, internationally, on the surface of common process or in their deepest structures.

Such discussions will not pre-empt the perspective examined here but rather alert us to failings incorporated in law; for, certainly, there are several kinds of crises taking hold of the legal experience, some more profound and devastating, others subtle and downplayed yet powerfully establishing the background for tangible and more ringing hardships. These latter demonstrate the paradigm of the departure of justice from Justice as discussed in part I: the concept of Justice within a legal order refers to posited laws as a whole, pursuing the realisation of the human rights argument and individually serving or at least respecting its values. In what Ward defines as the modern condition - that is the prominence of 'the cold calculation of the market and the brutal unsentimentality of the law' - the idea of law, 'of rules and regulations and rights' has replaced the idea of Justice in legal and political thought.¹⁶¹ This premise encompasses the following problems at present:

1. – It seems like the greatest threat to human rights is human rights itself. It is a powerful rhetoric that its appeal to humanity permeates all sectors of activity¹⁶² and attains enormously flexible capacities. Thus attempts to tame human rights have been fierce, on both the ideological and the structural front; relativism reflects the first, the inclination to lock human rights in

¹⁶¹ Ward (2003) 1 – 2.

¹⁶² Hare (1989) 148 - 149, alerts to dangers of abusing the appeal to human rights and of demagoguery; when human rights are loosely used as 'an all purpose political weapon,' they are deprived of force – and credibility.

state action modules alludes to the second.¹⁶³ The indefinite scope for extending the outward reach of human rights in practice has triggered conservative mechanisms in the systemic arrangement and interoperability of laws. As a consequence, otherwise realisable potentials in the application of law have been considerably phased down.

1.11 – The almost non-existent enforceability within international and most regional regimes and the reluctance of nation states to fully abide by international obligations mark this problematic at top level. Even states that bear no substantial objections against the human rights content of treaties take reservations.¹⁶⁴

1.12 – From there, the part of international human rights instruments is constrained domestically to assist in the interpretation of constitutional rights. Hence, some jurisdictions recognise in treaties only a weak, persuasive reference point equal to the use of foreign court decisions,¹⁶⁵ thus secluding locally the receptivity towards meanings discussed in international fora.¹⁶⁶ Others engage closely with international laws,¹⁶⁷ while under tighter regimes, like the European, references to treaties become direct and stronger. Regardless of the approach, within these exercises law loses ontological focus on substantive human rights and turns to constitutionality in recognition of function.

1.13 – Eventually, in national settings procedural mechanisms replace the human rights discourse when arguing the administration of legal activity. The term human right is neutralised, taken for a supplementary synonym to constitutionality or exiled to the sphere of moral dogmatism.

1.14 – Overall, the plausibility of structural limitations nourished the plausibility for devaluating humanity in practised juridical decisions making.

¹⁶³ *Hammer* (2007) 115, on systemically harmful to the practice of human rights understandings.

¹⁶⁴ *Moravcsik* (2000) assesses the opposition of states to the binding effects of treaties in the development of international human rights regimes.

¹⁶⁵ *Kumm, M.* 'Democratic Constitutionalism Encounters International Law' in *Choudry* [ed.] (2006) 278.

¹⁶⁶ *Supra* 2(II)[3.3.2].

¹⁶⁷ *Supra* 165, 279 – 280, discusses the South African Constitution.

1.2 – Systemic “compression”, of course, cannot be solely explained by the internally developed dynamics of distrust; nor is it the full narrative of crisis, which requires demonstration of a significant turning point. Hence, the crisis in discussion exhibits, apart from a phenomenon of shrinkage, a situation of comparison and collision between human rights and other advancing trends in law.

1.2.1 - In human rights we recognise the first phenomenon of globalised law; that is law moving, from national, to international arrangements and finally to global presence. The process which describes the human rights’ rise to prominence in the last global stage builds a parallel tale to the civilizational tradition, centred on the circulation of constitutional jurisprudence and norms. Here the liberal constitution forms the common denominator, first modelling the shaping of international human rights treaties (‘national to international’); then, meanings in constitutional practice expand globally due to the influence of international human rights law on contemporary constitutional drafting and adjudication¹⁶⁸ (‘international to global’).

However, in recent years human rights appears withdrawing where subsequent waves of globalised law have expediently advanced. Hence, the development of international public security laws, following the call against terrorism, has on many levels countered human rights.¹⁶⁹ In parallel, global market-oriented legal regimes, backed by transnational mobilisations within bodies and agencies like the WTO and WIPO, have subsumed large areas of social life, fusing the rules of private economic activity and traditional public law meanings. The efficient performance of these rising orders naturally depends on human rights being on the one hand neutralised, on the other excluded from assumed spheres of private regulation. As a consequence, human rights are withdrawn even deeper into the sphere of constitutional practice, as noted above.¹⁷⁰

1.2.2 - The thinning of human rights describes the danger of their transforming from norm to exception, waiting in the queue until other

¹⁶⁸ *Sheppele, K.* ‘The Migration of Anti-constitutional Ideas’ in *Choudry* [ed.] (2006) 350.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Supra* 2(II)[3.3].

interests have been conciliated.¹⁷¹ Hesitation in the face of sometimes vague contingencies and politically indeterminate conditions¹⁷² creates fragile entrenchments – easily subverted.

2. – The pressures exercised on human rights are straining. They certainly do not characterise an intended project, but rather a cluster of interoperating processes that, combined, induce collateral effects of cumulative gravity. We may discern ideological undercurrents which are consistently interfering with the character, scope and exercise of human rights, as well as with their structural deployment. However radical, such repercussions are carried out internally, and their depth escapes the critique of the juridico-political instance.

2.1 *The Case of Economic Liberalism* - Classic liberalism, promoted modernity's enshrining of human rights in the face of despotism. The current advance of liberalism (*neo-liberalism*, in that sense that it gives even more weight to market economy on a global scale as a matter of political deontology and juridico-social structure) pushes individual autonomy to its furthest end, outside the sphere of state influence. Private property rights and contractual freedom are envisaged as the ultimate means for economical and thus political self-determination.¹⁷³ On this platform neo-liberalism professes an ideal, thrusting policies and regulatory solutions away from welfare and moral utilitarianism economics and all attached normative arrangements.

The neoliberal positions leak easily into and blend in naturally with the classical liberal roots of civil society and modern constitutionalism. However, championing a pure-matter economic vantage point and delivering a political outset of 'state regulation that best facilitates the global movements and profit of capital,'¹⁷⁴ they bring into conflict the basis of incorporated social and moral justice principles; even more so when their

¹⁷¹ *Williams* (2007) 133.

¹⁷² For example, the ECHR provides for national laws to restrict human rights 'as is necessary' in the abstract 'democratic society' and 'in the interests of national security, public safety' and 'for the protection of health or morals.' The elasticity of 'national security' or 'morals' could easily excuse countless reductions in applied human rights.

¹⁷³ *Trebilcock* (1993) 10.

¹⁷⁴ *Hardt & Negri* (2004) 280.

implementation deviates from its own ideal destination. The following points attempt to round up critically the overall perspective:

2.1.1 - The increased reliance on free speech and its infusion with economic meanings poses a major characteristic of the neo-liberal scope of liberty. Even in classical liberalism, freedom of speech acquires prominent place as counterweighing the ‘power hungry executive’ with criticism and public debate and promoting democracy (the guarantor of autonomy) through the exchange of ideas.¹⁷⁵ Yet, the economic-political changes in the US context during the 1980’s, that favoured the prominence of the market society and privatisation, pushed the judicial broadening of the First Amendment far beyond classical comprehensions, to encompass ‘commercial advertising and campaign contributions.’¹⁷⁶ In this widening of speech, monetary expediencies came on a par with the values of humanity, in a qualitative rupture with the initially envisaged political utility in the democratic institutional setup.

2.1.2 - Individual autonomy requires not only freedom from external constraints but also, after egalitarian liberalism, ‘access to economic opportunities and resources’ for realizing ‘non-demeaning, self-fulfilling life choices;’¹⁷⁷ in several contexts, the combination of lack of choices and unilateral contractual regimes threatens to lock economically weaker groups in unending power relationships.¹⁷⁸ Since liberal autonomy holds to the ideal that private decision making lies outside public scrutiny,¹⁷⁹ such relations tend to be isolated from the critique of values.

It is thus that the liberal perspective blocks horizontality, contributing to the shrinking of constitutional reach regarding human rights; or, at least, its difficulty to overcome in practice the ideological barrier of state action, blurs its insights into potentials for horizontal application.¹⁸⁰ At the same

¹⁷⁵ Kelley & Donway “Liberalism and Free Speech” in Lichtenberg [ed.] (1990).

¹⁷⁶ Yamaguchi (2002) 119.

¹⁷⁷ Trebilcock (1993) 243.

¹⁷⁸ To quote Poulantzas’s criticism on the general political ideology of liberalism, its individualism ‘goes hand in hand with its totalitarianism’; (1978) 219 – 220.

¹⁷⁹ Tushnet (2003) 89.

¹⁸⁰ *Ibid.* 90 – 93, points to several jurisdictions’ political systemic choice of limiting their horizontal flexibility.

time, we could equally argue that judiciaries are pre-empted against being comfortable with recognising general human rights effects in legal relationships that are defined upon economic exchanges.

2.1.21 - We may also argue about aberrations of autonomy under the contemporary fashion of liberalism, through the latter's advertised contributions in the post-modern rights discourse. For example, privacy promotes autonomy as a social value, where we may consider it as a practiced 'system of nuanced social norms'¹⁸¹ that facilitates unhindered association with people. However, the current trend finds privacy being preconceived under rights schemata that are framed by the antinomy between the state and the individual; the autonomy input of privacy transforms into an individualised sense of disengagement from others,¹⁸² which blends more conveniently with the economic liberal vogue in political power. This, in turn, pushes commonly practised conceptions of privacy deeper into this repetitive recycling of isolation meanings.

2.1.3 – On the other hand, the narrower economic scope of neo-liberalism, projected onto domestic juridico-political realities has managed to bring dignity at odds with liberty, creating cracks in the global discussion of human rights.¹⁸³ Traditional liberalism perceived dignity in essence as the freedom to form opinions, which needs to be respected. Now, the contradiction between dignity as empowerment and dignity as constraint has been amplified in several jurisdictions, to picture protection of dignity as the means to state interference.

2.1.4 – One may find that neutrality, liberalism's security against the exercises of arbitrary power, is coming eventually at odds with the rule of law in systemic terms.¹⁸⁴ Nevertheless, modern orders are constitutionally biased in favour of economical neutral positions, presupposing these as part

¹⁸¹ *Schoeman* (1992) 6.

¹⁸² *Raab, C.* 'Privacy, Democracy, Information' in *Loader* [ed.] (1997) 164.

¹⁸³ For example, *Whitman* (2004) discusses the dichotomy of privacy norms between American and continental as deriving from contrasting social and political ideals.

¹⁸⁴ *Tushnet* (1983) argues that the rule of law cannot function as ideally neutral where it requires to follow previous rules; *Radin* (1993) 147, identifies further this ground where 'the normative basis of liberalism resists reduction to formal rules,' contradicting the 'important liberal commitment' to the ideal of the Rule of Law.

of their systemic nature.¹⁸⁵ The negative practical impact of neutrality on the exercise of rights under market liberalism becomes palpable in their subscribing to economic power: speech is free and easily distributed for those who can afford to; access to judicial defence all the same. In this sense, the judicial system is in practice posited against the economically disadvantaged.

2.1.5 - The economic paradigm believes in the increase of general welfare through the system of exchanges, where parties' preferences are amplified; however, in essence it is not backed by any concrete theory or criteria on either the formation or the measurement for individual welfare success of those preferences.¹⁸⁶ Eventually, as indeterminate aims clash within the economic sphere 'there is no fraternity between liberty and equality.'¹⁸⁷

2.1.51 - Efficiency in the sense of overcoming market failures is the mantra of the economic perspective. The market fails for whom, though? In the liberal rhetoric we find the market being a beneficiary platform towards common development aligned to utilitarian aspirations; in contemporary consumer markets, though, of concentrated production and distribution (monopolies/cartels), market efficiency, and thus most regulatory projects attached to it, end up identifying with the interests of the few main players. Reversely, assessing market failures on the gross revenues of the few and for the purpose of regulating, results in misconceptions about the market and society.

Reasonably someone would object that even under monopolies the exchange practice between producer and consumer performs well; however, modern liberal economists recognise that – apart from resulting to economic failure – monopolies constitute tyranny.¹⁸⁸

2.1.52 - Market society, as the argument goes, works against human flourishing, for it values people and relationships for their monetary worth,

¹⁸⁵ *Sunstein* (1993).

¹⁸⁶ *Trebilcock* (1993) 147; furthermore, *Poulantzas* (1978) 128, imputes social failures to the original civil society concept, its indicating of specific autonomy of the political precluding its reasoning from covering the deeper interference of the economic structure with society.

¹⁸⁷ *Hare* (1989) 122.

¹⁸⁸ *Friedman* (1962).

rather than for their ‘intellectual, emotional and social strengths and contributions.’¹⁸⁹ Instead, the universal market rhetoric commodifies these latter, turning them into tradable objects. Commodification means that personal attributes are viewed as private properties and may turn into fungible objects, i.e. alienable goods:¹⁹⁰ ‘replaceable with money’ and passing ‘in and out of the person's possession without effect on the person.’ In this respect, Radin poignantly contests that freely commodified social interaction out-values its non-commodified analogues, first in market terms and from there in practical understandings where market value pre-empts general understandings over quality.¹⁹¹

2.1.6 - If there is no demand in the market, a property has no value. Human contact should not be intimidated by this market logic, since the two are seemingly irrelevant to each other. However, in market-oriented legal systems what fate awaits human rights values without value?

2.2 *The Case of Positivistic Fixations* - Enlightenment and classical liberalism pursued reason, sense and sensibility in law;¹⁹² but were soon betrayed by their own proclivities of rationality and epistemic abstraction: justice and humanity were sacrificed to the ‘surety of law’, leading to today’s fetishist obsession with rules, procedure and, more apparent, *unreasonably* excessive court action.¹⁹³ The argument does not turn against the particular theoretical stream. It rather indicates two derivative trends, one being the bureaucratising of legal thinking and the second the glorification of isolated systemic treatment of knowledge.

2.2.1 – The issue of horizontality raises fewer questions over its origins and more over the persistent denial it receives. The rise of positivism has been accredited as contributing historically to the gap opening between discussing private relationships and the general discussion on civil rights and

¹⁸⁹ *Trebilcock* (1993) 39.

¹⁹⁰ *Radin* (1987) 1880.

¹⁹¹ *Ibid.* 1912 – 1913, discussing the effects of prostitution on society’s devaluing appreciations of body integrity and sexuality in general, where ‘all sexual relationships will become commodified.’

¹⁹² *Ward* (2003) 19.

¹⁹³ *Ibid.* 20.

liberties.¹⁹⁴ However, as fundamental rights evolved alongside with the human rights rhetoric, they were soon enriched with the social and economic perspectives; it was then that the rights of humanity, suggesting a distinctive discourse basis of showing respect towards human beings, contested partial detachment of their juridical understanding from the politicised antinomy between state and individuals.

Nevertheless, no few jurisdictions simply refuse in legal practice to deliberate the circumstances of human disquiet, their adherence to state action doctrines taken for fidelity to posited law.

2.2.11 – Despite appearances, the sway of the positivistic position in neutralising the horizontal human rights scope is not genuine. We ought to remember that legal positivism endorses the thesis that legal orders depend on factual circumstances and not on evaluative considerations;¹⁹⁵ thus has been refused access to rights that have not been constitutionalised or that could not be reasonably extracted from private law arrangements (e.g. notions of public policy). However, the existence of a recognised human right constitutes a factual circumstance. It could be thus contested that such evocative interpretations that consistently permit exercises only against state authorities, realise more than anything else ‘evaluative considerations’ about the nature and performance of human rights.

2.2.12 – We may instead observe that in such circumstances it is the *per se* fact of positivisation which distracts practice from engaging with the substance of matters at hand. The background feature of the entrenchment by the state authority draws attention from the content and character of the right or freedom under question, turning eventually into the fact undergoing legal examination.¹⁹⁶ Courtroom debates seem incapable of perceiving the human rights argument as an overarching theme outside the cage of constitutional

¹⁹⁴ Starck, C. ‘Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court’ in *Friedmann & Barak-Erez* [eds.] (2001) 100 – 101, noting how early codifications and enmity towards preceding domination of natural law absolutism distanced basic rights from legal relationships between private individuals.

¹⁹⁵ *Nino* (1991) 11.

¹⁹⁶ For example, *Radin*’s analysis of property disputes presents instances where positivistic consciousness pre-empts significantly the flexibility of legal thought in its negotiating of rights; (1993) 170 – 172.

formulism, to the degree that lawyers cannot accept that legal discourse not subscribing to detailed systematicity and to particular typological modes might ever exist. In this sense, the existence of horizontality, as an issue, could be partly attributed to the intense sensibility of given legal societies to their positivistic insecurities.

2.2.2 – We ought to consider the positivist position not as inimical towards human rights, especially where the above propounded account of humane Justice was shown to accept it as an essential practical component. Instead, it appears as if certain treatments of positivism in the legal profession magnify the self-serving aspect of the technical process, stripping off from it all cognition of contextual development. The observation that state action deliberations might be frequently “missing the forest for the trees” deals with a mild only symptomatic instance: the contemporary legal experience is largely populated by procedural “distractions” that subvert the consciousness of Justice, as the means become an end in themselves.

2.2.21 - Growing in complexity, modern societies require increased sophistication and organisation in regulatory modes – a need allegedly motivated by the powerful dialectic of efficiency and the rising modes of economic organisation, which circulate it.¹⁹⁷ We observe the technical development of law enrolling managerial rationales for its internal administration, for attuning complicated deployments of rules and for classifying and organising systemic subdivisions. The levels of skill demanded for deciphering such intricate layouts and securing their effectiveness, necessitate, in turn, the services of studious attendants of the legal process. The transformation of law into a strenuously self-absorbed process finds lawyers performing as managers and, in the long run, refining their awareness of the systemic setup within a bureaucratic modus operandi.

For the purposes of this particular enterprise, positivistic rationalism, with its attention to facts, inspires and permeates structurally the underlying comprehensions of the legal profession. Bureaucratic appreciations of law are foremost expressed in the preoccupation with procedural modes and

¹⁹⁷ *Collins* (1982) 114.

furthermore externalised by misplacing the annotated separation thesis as between facts and values. Blind subscription to posited representations, without developing parallel critical understanding of the values platform, fails to distinguish the symbol from the signified, the decorum and sound of language from the meanings it projects. This masking of the connection between the form of law and its origins poses a guise of the broader fetishism of law argument.¹⁹⁸

2.2.22 – Without needing here to go deeper into its Marxist basis, legal fetishism refers broadly to lawyers valuing ‘the importance and necessity of law’ over social order.¹⁹⁹ Fetishism is manifested in attitudes of reverence towards the form and, also, in presumptions about law becoming the basis of social life, precisely due to the fact that several social relationships are generally understood only within legal frameworks.²⁰⁰

2.2.23 - Legal fictions become facts that supersede all other experienced accounts of life and reasoning; even more as such appropriations count heavily within internal interpretations of legal meanings. Hence, law is meticulously divided into discrete areas and branches (e.g. Contract Law, European Law, Family Law etc) that are primarily embedded in legal scholarship and education to then determine procedure, behaviour and decision making in legal practice. Such specialisations methodise the further discussion of meanings under the weight of a merely descriptive taxonomy!

This becomes brutally subversive in the treatment of human rights by practitioners. Reference to human rights transmits understanding of either Human Rights Law in the international context or assertions within Constitutional Law procedures. Practice in most occasions – e.g. during civil law disputes - disregards invocations to the human rights argument as inappropriate and completely out of context.

2.2.3 – Under these conditions the project of Justice is being further undercut symptomatically and on multiple levels.

¹⁹⁸ *Balbus* (1977) 574, 582 – 583.

¹⁹⁹ *Collins* (1982) 10 – 13.

²⁰⁰ *Ibid.* 97.

2.2.3.1 - The same positivistic perceptions can preset the inefficiency of judiciaries opposite to defective legislative choices. Plausibly, partisan administration of justice is neither desirable – an argument used fairly to an extent by exceptionalists.²⁰¹ However, a judiciary, satisfied with procedural validity that blatantly disregards fundamental principles and overlooks actual disturbances in the body of established values, procures socio-political debasement and juridical destabilisation - at least to that part that we understand the rule of law being shaped in interdependence with specific principles.

2.2.3.2 – At the end of the day, even human rights practice itself realises a fetishist fixation. Frameworks of institutional protection have ritualised human rights in endless expansion and proliferation of content, which inevitably draws intense criticism. Rights in the socio-political arena are subject to negotiation; constant dispute and transformation within procedural modules affect the embedded humanity discourse by tuning it to desire, the forwards-pushing force behind the expansion of rights.²⁰² In these terms, the content expansion issue can be attributed to positivist fetishism, its juridically powerful structures and the obsession with textualising all legal modes in detail, since contemporary legal orders decline reasoning with questions over expanded human rights content unless the authority of text is within sight.

2.2.4 – My submission here goes that far to deny the existence of anything called Human Rights Law. Awareness of Justice, in the beginning of the 21st century, suffices for contesting that there is only one law which enshrines human values and their deriving principles. By constructing something separate as such, we mock, on the one hand, human rights and, on the other, we degrade law as if it did not abide in general by humanity; like it belonged to another, alien sphere of process. This is precisely what we mean when speaking of the dehumanisation of law.

²⁰¹ *Supra* 2(II)[3.3.2].

²⁰² *Douzinis* (2000) 261, reflecting elsewhere that 'desire is always the desire of the other' signifying the 'excess of demand over need.'

2.3 – Combined together, the excesses of neoliberalism and positivism are amplifying the intensity and inevitability of certain modes of thought. For example, on the basis of neutrality, a court will not distinguish between poor defendants and rich plaintiffs; it will examine whether the prescribed procedural objectives are well served. Here, injustice is presented as a rational solution; concerns about those suffering or found unequal within the equality of process are dismissed as threatening moral precepts.

3. - Considerations of the weak and unfortunate do not lie outside the positivist stream which was adopted in Justice. On the contrary, where process contemplates over maximum and minimum penalties, or where an option for exceptions and exemptions is unambiguously prescribed in the letter of law, there is clearly no doubt of a requested assessment of circumstances, ordained by humane sensibility.

The crisis of human rights is, then, fully revealed as ideologically dominated choices in legal decision making undermine Justice. The crisis unfolds further, where legal systems fail to prevent direct subordination of human rights to ideological interferences.

3.1 – Endemic inconsistencies in issues like horizontality and exceptionalism emerge clearly as contextually consequential rather than fundamental. At the same time, globalisation in law locks out human rights comparative thinking, while regulatory solutions to economic and security risks are fervently exchanged. The crisis expands and its symptoms spread. Regarding the ongoing inquiry in law, though, we ought to be more perceptive of their legal dimensions; that is, identifying instances which concretise legal shortcomings rather than direct political will or praxis.

Therefore, the fact that slavery has not been fully eliminated globally does not really tell anything insightful about law and human rights. On the contrary, the presence of slavery in the human condition under different guises of servitude, as it has been legitimised internally and internationally across different orders that *precisely* enshrine human and freedom values, brings to the fore genuine legal failures. Generally, scarcity in resources and its exploitation within power relationships simulate serfdom; legally, this

becomes an issue when the law structure facilitates and retains such regimes in private relations.

This problematic forms the platform, on which human rights will be investigated in the following Chapters.

4. – To recapitulate this long examination of the human rights argument and its fate, human sense and experience was reflected in moral beliefs to generalise upon an (assumed) primordial principle of Justice. The latter, by opposing dominant exercises of authority, inspired the long evolving Natural Law and Rights discourse. Alongside such political and legal meditations a humanitarian rhetoric was formed, having gradually its demands rationalised by institutionalised justice and established through modern formulations of the human subject.

Both the ideological legacy of the universal ideal and the outlook of Justice that it envisages are set in contrast to practices, which (post)modern law utilises for containing human properties in its formulaic subjectivities. We may assess the logic, which was employed for allocating human rights to legal subjects, upon its contemporary results: it wavers between, first, a fetishist viewpoint over the social role which posited laws play, where the human element surfaces via obsession with inhumane procedural apparatuses; and, second, a materialistic attitude when treating the supporting ideological nexus, as objectifying access to rights by following sterilised managerial techniques. Therefore, to what degree are the human dimensions and their dynamic being reduced in size within such systematisations?

The lesson of history is that there is nothing sacred or conclusive about humanity's definitions, neither its scope is eternal.²⁰³ The various expressions of legal humanism today reflect subjective political discourses and, in this sense of political adversity, they confer incompatibility and disunity. This prospect feels uncomfortable, whereas humanity is embarking

²⁰³ *Douzinas* (2000) 187 – 188; *Nino* (1991) goes that far to argue that humanity's attachment to rights is coincidental, giving the impression to the observer that the former conditions the latter.

upon identity-challenging journeys, into unchartered societal experiences,
framed by cold digital contexts.

3. Virtuality and the Online Human

‘A cyborg is a cybernetic organism, a hybrid of machine and organism, a creature of social reality as well as a creature of fiction.[...] [T]he boundary between science fiction and social reality is an optical illusion.

[...] In a sense, the cyborg has no origin story in the Western sense - a 'final' irony since the cyborg is also the awful apocalyptic telos of the 'West's' escalating dominations of abstract individuation, an ultimate self untied at last from all dependency, a man in space.’²⁰⁴

In the previous Chapter, special attention was given to constructing a clear conception of the real, human subject, as being integrated within and constituted by law. In essence, the entire thesis revolves around subjects: subjects of law, subjects of online actions (or reactions) and their unification, with “humanity” forming the connecting conceptual bond between the two categories. However, beyond the humanity link, the legal and the online subjects share a striking feature: fundamentally, they are equally artificial; they both come “alive” in somehow virtual structures that promote and support communal life, the one regulating it, the other providing it with a communications facilitator.

Note how the cyborg acquires prominence where boundaries blur. The legal and the online subjects blend together nature and artificiality, social

²⁰⁴ Haraway (1991) 149 – 151.

reality and fiction, humanity and one or the other form of technology. Online, the human becomes one with the network machine, with the computer code and the representations that this builds. In law, the human fuses with personhood, is being reconstructed in logic and symbolic language, and then she becomes part of the regulatory apparatus.

Pessimist visions of the future depict nightmarish worlds run by automata, warning us against the dehumanising effects that technology is gradually imparting.²⁰⁵ At this point, we might summon the rather bemusing thought of the legal subject as a cyborg life-form that loses its soul and turns into a robot, once the human element has been removed from the mechanisms of rules. The ‘human element’ here signifies the material and intellectual interests of a humanly organised society, such as ‘the pursuit of happiness’ or the ‘avoidance of pain’. Without its direct and indirect connections to humanity, the legal subject becomes a hollow non-entity, performing pointlessly without any other ends in the horizon apart from the effectiveness of its own performance.

The merging of humanity with the technology of law generates interesting discussion potentials, which unfortunately cannot be fully pursued here. However, this last image of a legal subject without humanity connoted largely the dehumanisation of law, which the final part of Chapter 2 alerted us to; in addition, it allows parallels to be drawn over the critical part played by humanity in such manifestations of the cyborg paradigm. Law is a contingent machine that will easily turn into an empty robotic shell, unless humanity manages to keep constantly its presence active within the symbiotic unity of practical life and regulation.

Fusion with technological contexts can acquire other imagery that may again be projected on law. We cannot overlook the conceptual resemblances between the structure of law and online life: both artificial; modelled upon a subjective representation of living; both becoming alive by hosting a thriving, socially coherent humanity. The linking element is their capacity to create a virtual space where interaction acquires meaning. We may call

²⁰⁵ *Mansfield* (2000) 148.

virtuality the experiential depth which determines humanity's immersion within the given context. Law is a virtual normative construction to which we ascribe similar importance to the natural physical reality.

Working implicitly with these parallelisms and connections, this Chapter utilises an unorthodox manner for dealing with the thesis's underlying technical problematic: new contexts of human activity emerge; forms of human subjectivity appear that, inconveniently, law finds to be technically incompatible with those which it already facilitates in its systemic practice; therefore, if humanity is where that is. Following on from the analysis of a (postmodern?) human rights perspective, a second thematic pillar is built upon comprehending involvement with virtual environments; but this is an even more straining task, requiring first to observe the structures of online relationships, where societal, psychological and political metamorphoses circumstantially occur.

Part I investigates in general the formalisation of human subjectivity under the systemic knowledge of sciences and humanities – the original virtualities which humanity has created to reason with existence and willingly submitted itself to. Here the individual and her complex personal and social composites are taken apart and then put back together, as trans-disciplinary elaborations try to fit the mystery of existence in terminologies and logical schemata of universal appeal. Part II makes an apparently inconsistent brief jump to the Internet's communal evolution. The broken narrative comes together in Part III, where persons and identities described in Part I and seemingly left behind in Part II, are discovering their online reflections; the meaning of virtuality makes (unexpectedly) a full circle.

I. Of Subjects and Persons

In Chapter 2 I insisted on the conceptual melding of personal experience in law that human rights chased in the legal subject; on bringing the real person and its passions into compatibility with the abstract ontology of law. Such a project, besides its political and theoretical dimensions, was

heavily informed by the procedural problem of switching between contexts, i.e. of moving from the natural experience to posited laws. Transfer of an item/entity from one domain to another field of cognition struggles with confusion of tongues and limitations in receptivity (not to mention extreme dysfunction in reciprocity, if that should ever be called for). Note that as such we identified the circumstances regarding the physically self-evident human; hence, for his distant, almost phantasmal online aspect and whatever claims this could bring before law, the problem will be even more strenuous; the case weaker.

The problem is, certainly, one of conversion. The calculus of law requires the analysis of perceptions of life accumulated at first-hand into recognisable and almost elementary logical components; only then it can reset, rebuild and finally be able to embrace them into its functional ontology. Thus, facing the challenge of linking Internet contexts with the human subject, we need to methodically re-synthesise the Net users' experiential understandings of online humanity within basic, symbolic structural patterns. The task at hand looks beyond law, resting upon a trans-disciplinary review of three main constituent properties (*subject, identity and the self*) to construct a conception of personality that should equally encompass online projections of the human being and facilitate their translation into technical legal conventions.

1. On Subjects – The subject, as the *par excellence* conceptual header of activity schemas, constitutes the key element in the formulation of (onto)logical correlations; this particular notion was exemplified in the previous Chapter while outlining the subject's operative importance within law.

We need neither restate the subject's artificial character as a convention, the product of a thinking process, nor examine in relation how the attribution of subjectivity depends on societal contexts.²⁰⁶ Where law, though, opposes linking subjectivity to-and-fro general manifestations of human activity on

²⁰⁶ In this sense, for *Foucault* (1988) 50 – 51, 'the subject is constituted through practices of subjection [...] on the basis [...] of a number of rules, styles, inventions to be found in the cultural environment;' *Althusser* (1971) equates subjectivity to subjection to the ruling ideology.

grounds of fundamental logical impossibility, we turn to arguing for the ultimately basic idea of a conceptual subject that logical thinking imprints universally in all perceived (thus conventionally) subjectivities.²⁰⁷

1.1 - Precisely due to its central position in the formal logical process, the abstract and ontologically instrumental subject transcends the multiplicity of its incarnations. Its operation is replicated across a long line of domains and contexts (like language, science, social institutions and even the law or culture)²⁰⁸ where the logical form schemata have been utilised for deciphering human thinking and activity on the basis of a common logical – and in thus structural - denominator.²⁰⁹

1.1.1 – For example, the involvement of the subjects of law and of grammar with their respective systemic surroundings exhibits similar patterns: the subject is in a position *to do*; such an action can be either reflexive (as declarative of subject's features or attributes) or transitive; many actions may be linked together in conditional dependence upon each other, in confluence with each other etc.

1.1.2 - The example relates to how separate spheres of representation tune on well with each other. Agreed, the two demonstrated contexts differ greatly in content; moreover, it may be easily contested that signs and propositions of law borrow a great deal from linguistic arrangements, thus justifying similarities. However, the point made here is the simulated dynamics of life, distilled in logical forms to be then recreated in a structured manner. In the rules of logic a specific cognition model is systematised and distributed that

²⁰⁷ This explanation of the subject essentially appeals to the Kantian 'Schema', *Kant* (1993) 142 – 148. In short, we may understand schemata as the 'conditions for the possibility of experience' (*Pippin* (1982) 129) found in 'the ability to use the same words' for referring 'to an indefinite number of different things,' *Bowie* (2003) 217.

²⁰⁸ *Mansfield* (2000) 3, summarises four broad usages of the subject (subject of grammar; politico-legal subject; philosophical subject; and subject as human person) not before admitting that 'it is probably impossible to produce an exhaustive list of the way the term subject defines our relationship to the world.'

²⁰⁹ *Hegel* (1991) 239 defines and contains three features that could sustain e.g. a Platonic concept of subject, in his Concept ('*Der Begriff*'): universality, particularity and singularity; in this *purely logical* 'Concept as such' he introduces 'the formal concept of the Concept *in abstraction from its existence as psychological ego, historical subject or juridical person,*' *Laurentiis* (2005) 88 (emphasis added).

permeates our experiences with receiving and analysing knowledge to thus render the subject a universal agency signifier for reasoning with.

1.1.3 – Therefore, subject-hoods entering territory new or foreign to their own contexts should not encounter compatibility problems, at least on that basic level where the subject exists in its bare archetypical form to indicate an action qualifier. Equally to a dot on a blueprint, the minimal subject merely pinpoints the logically summarised capacities for interaction internal and external to itself; we may safely assume that as such the subject is reproduced within any context that human reasoning perceives and analyses.²¹⁰

1.2 – Plausibly, however, as the subject engages with particular contextual surroundings, complexity layers are added onto the minimal representational schema, impeding of the transfer from one setting to the next. The contextualised subject becomes qualitatively distinctive; its attributes inevitably more content-related.

We may take onboard the subject's standing as an autonomous entity that is defined through the relationships it develops in space and time with other objects. The previous Chapter's discussion, on the shaping of subjects and rights in law, gives us a taste of how subjectivity and contextuality are formalised through the relational module: access to rights instates an entity as a legal subject and, vice versa, the subject holds entitlements that appeal to its distinctive (subjective) character. The subject's placement in the grammar rules of language provides an even more iconic illustration for the general paradigm.

1.3 *Crouching Tiger, Hidden Subject* – Moreover, empirical observations of subjectivity may reach conclusions of no lesser value. The spatial and temporal development of subjects may be understood with the assistance of comparatively tangible terms.

²¹⁰ A good example is presented in *Saussure's* famous semiotic comparisons to chess-pieces, (1966) 110; the fact that figures of any resemblance are deployed on the board (e.g. sets of mythological creatures or of sitcom characters) does not affect with the rules and movements of the signified chessmen (bishop, knight, pawn etc), *Mansfield* (2000) 40.

1.3.1 - Thus, A is the subject of an action since externalising observable behaviour. A tiger, in its natural habitat, follows instincts and develops skills according to the overarching ecosystem blueprint. From there we extract the subject 'hunter', existing due to its relation with another object 'prey'.

This leads to a new question: what happens when the tiger is captured and moved to an artificial environment (such as a zoo)? Does it stop being a hunter? The answer is that it remains the subject 'tiger': despite the domesticating programming it might undergo, it is still carnivorous and if the opportunity arises it will hunt down other animals – although, not as skilfully as in the jungle.

1.3.2 - The same problem of interpretation reappears in the problem with online participants and law. Does what we call *online self* lose its legal identity – in terms of subjectivity - as a human? Indeed, there appears to be actual subject that is involved in interaction, but does it exist as a legal subject?

Similar questions continue on the same line: to what degree is the notional construction of a 'hunter' applied to a tiger moving from its designated habitat to e.g. a circus? The tiger may kill either to feed or because of instinct but it does not – and possibly cannot anymore - behave in hunting patterns that identify it in its original habitat. On reflection, one may ask to what degree the conception of the human individual - the citizen, under state law – is being protected, when the person enters closed structures that escape conventional regulations. The online manifestation of the self enters a setting dominated by digitised apparitions of the offline reality; the letter of law may not find there stable ground for stepping in.

1.3.3 – Hence, assuming that such performative intervention of law is requested in recognition of online subjects, formal subjectivity compatibilities alone do not suffice for building a solid transitory mechanism towards the legal subject. The online subject in question has raised the stakes from the start.

2. On Identity - The position and performance of subjects in relation to other entities is determined by characteristics that separate them as acting entities

and sharpen their specific existences in context. Therefore, subjectivity stems from the apprehension of differentiating meanings that operate within the given order of things to become recognisable as such – what we might call identification factors. For the subject the meaning of identity lies in the process of distinguishing its features by virtue of matching them with attributable qualities (identification), to thus signify how it becomes more or less unique (identity).

Identity distributes roles that, once granted, objectify in our eyes the abstract rules that control the given setting. To offer a crude example, a generalised conceptualisation of nature, where the mightier species survive upon preying on others, acquires substance for the observer the moment a yellow-furred carnivorous feline in black stripes enters the picture to claim the part of the hunter.

Moreover, the contextually significant identity of the subject precedes further categorisations that, in this respect, follow in direct definitional dependence. Continuing with the same example, before analysing our creature's hunting behaviour (the identity 'hunter' being contextually significant here) we first need to identify it as being a tiger; even beyond, the tiger is a feline, a mammal, an animal and so on. We realise here that identities attain to additional compositional depths, usually through implied ontological substrata.

2.1 *Conceptualisation* – Thus, the concept of identity presents substantive and semantic complexities that, depending on the circumstances which call upon our each time analysis of identity, increase proportionally the difficulty in pinning it down accurately, since usually they coalesce. The subjectivity setup we have been developing here interrelates logically structured settings (law) with experiential breeding grounds of identities (i.e. humanity, online life). In this manner, our endeavours towards framing an identity constant to further elaborate on are foreordained to look into multiple faculties and, to start with, notable parameters which define not only the meaning but also the creation of identity.

2.1.1 Identity Relations – The most basic readings of identity look on a relation of equality. For logicians, identity describes a *relation* that ‘each thing bears to itself and to no other thing.’²¹¹ In mathematics it represents the equality between two expressions that holds regardless of all permissible sets of values that the included variables will manifest²¹² (therefore, where $x=x$ and additionally $x=a+b+y$ and $x=z*c$, then $a+b+y=z*c$). Under such terms, identity relations surface as *symmetric* ($x=y \rightarrow y=x$), *transitive* ($x=y$ and $y=z \rightarrow x=z$) and, more than anything, *reflexive*.²¹³ One (conclusive) logical investigation expands the above module of equalities between different qualities: although different in *sense*, both the *Morning Star* and the *Evening Star* refer to the same object, *planet Venus*.²¹⁴

2.1.2 Temporo-spatial identity - Logic also questions whether changes (e.g. with the passing of time) remove the underlying character of sameness.²¹⁵ The riddle of identity change has been also preoccupying philosophy since the beginning of modernity.²¹⁶ After Locke, consciousness is the underlying feature of personal identity, surpassing substance and notions of soul;²¹⁷ memory serves as the connecting factor between the past and the present of the conscious human being.²¹⁸

2.1.3 Identity in Society – The sociological discourse translated identity and individuality into socio-political self-awareness, in terms of group-belonging.²¹⁹ Social studies, especially in the second half of the 20th century, scrutinised thoroughly the shaping of identities in relation to the contexts of

²¹¹ Zalabardo (2000) 79.

²¹² *The Oxford English Dictionary*.

²¹³ Whitehead & Russell (1910) 178; Carney (1970) 162 – 163.

²¹⁴ Frege (1960) 56 – 78; Klenk (2008) 364 – 366.

²¹⁵ Hawley (2001) 9 – 36; Priest (2000) 70 – 77.

²¹⁶ Perry ‘Problem of Personal Identity’ in Perry [ed.] (1975).

²¹⁷ ‘An Essay Concerning Human Understanding’ Chapter xxvii, in Locke (1794) 325 – 367; Yaffe, G. ‘Locke on Ideas of Identity and Diversity’ in Newman [ed.] (2007).

²¹⁸ Williams (1973) 1 - 18; Hughes (1975); Perry, *Supra* 216, 16; Kihlstrom, Beer & Klein ‘Self and Identity as Memory’ in Leary & Tangney [eds.] (2003) 71 - 72; as pointed out in e.g. Mackie (1976) Chapter 6, Helm (1979) 179 – 180 and Atherton (1983) 273, the connection between personal identity and memory has been widely attributed to Locke, though his theory did not set out the point explicitly.

²¹⁹ Goffman (1963) (stigmatisation and the interpellation of personal identity by social identities); Elias & Scotson (1994) (the self-construction of identity in urban environments through community relationships and the divide between the ‘established’ and the ‘outsider’); Bauman & May (2001) 30 – 35.

culture, nationality, race and gender; they confronted the societal creation of subjectivities and its burdening of social identity (as noted above in passing);²²⁰ and ventured even deeper into psychoanalytical explanations of the societal structure, in an ongoing response to the works of Freud and Lacan. These analyses have reached as far as to challenge the inherent or ‘fixed’ (e.g. by biological and psychological predispositions) character of identity.²²¹ Modernity’s project of re-anchoring humanity was seen collapsing in the face of an uncertain future:²²² identity appeared fractured,²²³ fluid, ‘multidimensional and amorphous.’²²⁴ This post-modern radicalising of politico-social critique pursued in addition its own reality checks with identity. In this respect, Castells perceives identity as the internalised cultural reflection of the network society.²²⁵ Discerning ‘legitimising’, ‘resistance’ and ‘project’ identities,²²⁶ he also defines ‘footloose identities’, an understanding of globalised ‘information labour’ that contemporary cosmopolitanism has facilitated on a large scale.²²⁷

2.1.4 Framing Identity – Specific aspects from this quick interdisciplinary examination can turn into necessary elements in our relevant conceptualising of identity.

2.1.4.1 - The fundamental logical understandings of identity are filling in where the previous discussion on subjectivity failed to respond fully to the persisting question of transferability. One needs to think of two entities *different in sense*, the online and the offline, looking at each other through a computer screen: both of them refer to the same heavenly body - not planet Venus in this case but a very distinctive human self. Therefore, if under law online subjectivities provide for a weak case to comprehend, legal subjectivity, in a transitive deployment of relations, identifies with the human entity to identify, in turn, with the latter’s online activities that

²²⁰ *Supra* 206.

²²¹ Jewkes & Sharp ‘Crime, Deviance and the Disembodied Self: Transcending the Dangers of Corporeality’ in Jewkes [ed.] (2002) 2.

²²² Mansfield (2000) 163; Young (1999) 47.

²²³ Haraway (1991) 155 ff (discussing on the basis of femininity).

²²⁴ Jewkes & Sharp, *Supra* 221.

²²⁵ Castells (1997) 6.

²²⁶ *Ibid.* 7 – 12 and 355 – 357.

²²⁷ Bell (2007) 65.

constitute the online subject; symmetrically, the online subject identifies with the subject in law.

2.1.4.2 – The circle of relational readings closes with the reflexive perspective contributing in outlining the continuity of identity. There the various stages in an entity's temporo-spatial progress - the relation to past positions - are compared: the capacity to dismiss a relation between two seemingly different entities as symmetrical and to prove that they instead stand in a reflexive association, establishes sameness. However, without the

Identity here reaches at an impasse when explaining continuity. It appears incomplete without the self's internal performance to reflect on the subject's memory narrative and to connect transfers between contexts, which is analysed in the next section.

Continuity, on the other hand, refers also to a qualitative reading of that record of characteristics which identify and thus separate an entity from its environment; or, in the same sense, which allow that entity to be absorbed by its surrounding setting.

2.1.4.3 – In such qualitative terms speak the socio-cultural inputs and feedbacks about the determination of identity, acknowledging the shattering impact of contemporary reality on it: overcrowded societies, commercially commodifying and, at the same time, commodified, burdened with galloping technological evolution, bombarded with information and symbols, politically and ethically outracing the expectations of modernity. Social studies traced and proved connections between late modernity's lifestyles and the shaping of individual and group identities, the point being that, in there, genuine construction of identity takes place and not mere allocation of social roles.²²⁸

2.2 Digitalisation – Our destination, the construction of *digital identity*, responds to this kind of realisation within representational electronic

²²⁸ Social roles (e.g. being a parent, a worker, 'a neighbour [...] a union member [...] and a smoker at the same time) are defined by norms structured by the institutions and organisations of society', their influential weight upon people's behaviour becoming a matter of negotiation between individuals and institutions. Identities, are stronger sources of socially purposive meaning 'for the actors themselves, and by themselves, constructed through a process of individuation;' at the end, identities organise the meaning, while social roles the function; *Castells* (1997) 6 – 7.

structures and environments. Depending on the hosting communications conduit's interface and representation breadth, sets of information data (meaning both forwarded natural language understandings and the actual computer code) are attributed with describing individual subjects or entities and 'their relationships to other entities.'²²⁹ Thus, digital identity refers to the signifier component²³⁰ as well as to the construction process of experience 'in digitally mediated ways.'²³¹

The notion of *online identities* takes the same concept one step further. Topping the evident technological artificiality of digital settings, social networks emerge, pretending to be intellectual ecologies that lie outside of, yet evolve in parallel to the offline world. Online identities formed in them reflect offline personal and social identity motifs, additionally invoking a distinctive element (missing from "pure" digital identities) of second level social consciousness: representations are constructed for human users, exclusively in the meta-narrative (*virtual*) of the given social networking interactivities. The manner in which all these come to pass is explained in the next parts of this Chapter and in more contextual detail in the case studies of Chapter 4.²³²

2.3 From Identity to Personification – This brief outline of digital and online identities mirrors sharply the elements which highlighted our conceptualisation basis.

Within online contexts, the use of the term *persons* (or, alternatively, *personae*) is commonly preferred to 'identity'; that happens neither accidentally nor due to linguistic confusion: the 'person' marks out the created impression of autonomous individual existence on the Internet; or at least, if not "autonomous", experienced as a separate, parallel "incarnation". This reconfiguration of language has the perceived dimensions of online participation being reassessed, as we make the passage from the ontological

²²⁹ Windley (2005) 8.

²³⁰ That is, regarding digital identities, the manageable records of personal data; *ibid.*

²³¹ Palfrey & Gasser (2008) 19.

²³² *Ibid.* 17 – 37, illustrate the general setup of developing online identities across multiplicities of social networking tools.

component ‘identity’ to internalised imitations of life that aim higher, at the composite and complex sense of ‘personality’.

Analyses of identities involve as above relational appreciations of unit entities and groups. On the other hand, discussing the ‘person’ summons much wider and multi-layered arrangements of meanings. At the end of the day, an identity may be understood as the shell of a person: once endowed with *consciousness* it turns into a *self-aware* entity. Hence, the ‘person’ approach includes, evidently, the narrower ‘identity’ scope’s examinations into symbolic properties and relationships across social formations, but also deploys further looks into the internal intellectual and emotional mechanisms, which animate the entity in question.²³³

3. Person of Self – The online personality metaphors that we are focusing on, simulate the unsettling complexity which characterises human beings - the *real* persons:²³⁴ they are externalised through infinite combinations of those traits and behavioural patterns that synthesise personality. Needless to repeat here, the descriptive grammar that was utilised in view of online identities may not suffice for explaining these ontologically enhanced and concrete subjectivities.

The ontological significance of separating the *symbolic* human person from the *per se* (biological) human *being* frequently dominates discussions

²³³ At this point, we should be reminded that law, quite similarly to the process of outlining online identities, extracts its archetypical subjectivity patterns from the infinity of expressions which constitute social reality; it models from them the creation of various artificial persons that as *instrumental* metaphors facilitate social interaction. In the case of legal persons, though, the ratifying intervention of civil institutions makes up for any logical gaps in the narratives of personhood. By contrast, even if considered to be practically ‘instrumental’ in the same general sense that all digital identities are, online identities alone seem, at first glance, less than likely to bring about a convincing personhood representation. Apart from the institutional support, online identities lack other inherent capacities in analogy. According to what was previously discussed about identity, where all forms of legal subjectivity are conceived as sets of legal relationships with the given social and economic life, they essentially constitute statements of legal identity. Especially regarding artificial legal entities, one may even argue that the legal person and the legal identity are one and the same thing, since the existence and the character of the former are exclusively defined in terms of how it is conceptually related to its surroundings in the context of law (e.g. the corporation).

²³⁴ In his approach to virtuality, *Shields* (2003) marks a significant terminological distinction of degree between the ‘real’ and the ‘actual’ (or ‘concrete’): in the former are also included ‘real idealisations’ (dreams, memories etc), while the second adheres to taken-for-granted events and ‘actualised ideas’.

amongst scholars. For us, the question whether the former (i.e. the symbolic) is depending and shaped by the latter, opens relevant ethical questions: in transferring personhood from the anthropological level to practised knowledge systems (e.g. the normative, religion etc), the separation often results in instrumentalists accounts of personality; however, dynamics of this kind may have problematic social repercussions, as for example in racially biased readings of political personality,²³⁵ or in designations of life that relate to the existence or not of cognition capacities.²³⁶

However, the *conceptual* human person, which the various subjectivities attempt to recreate (and sometimes replace), transcends such challenges with ideological neutrality; for a core of essentially abstract faculties define it, with the aim of picturing the human entity *in being* and nothing more or less than that. Therefore, apart from featuring identity and self-consciousness, the human person is also *capable of reasoning* and, finally, *persists through time*. Overall, persons become perceivable upon the coherent interdependence of these characteristics; the concept of the *self* plays pivotal role in animating the factual externalisation of this unity, i.e. the individual human being

3.1 Two Views of Self - Hence, the idea of a ‘self’ is projected in two main expressions – the second apparently adopting a stronger identity-related perspective: (i) the self reflects an internal and enduring unity of thoughts into one consciousness; and (ii) the self signifies perception of individuality in relational counter-reference (*difference*) to the surrounding settings. Otherwise, we could also crudely describe the self as one’s own experience of existence through his reflective cognition of being.

²³⁵ Slavery presents again the most elaborate example of humans considered to be ‘beings’ but not ‘persons’ on the basis of their racial origin.

²³⁶ As May (2004) summarises, an anthropological view according to Catholic theology sees the human person as ‘a living human body, and, conversely, a living human body is a human person’; this stands opposite to popular bioethics opinions that “for an entity to be regarded as a person, it must have developed at least incipiently exercisable cognitive capacities or abilities” (human person / human being dualism, with ‘being’ addressed as almost identical to the “body” and lacking of a conscious subject). These forms of clashes stop being intellectual the moment they infiltrate active social oppositions and develop legislative orientations, as in the cases of abortion and euthanasia.

3.1.1 - In the first of the two approaches, the self's properties and operations transcend the human mind's descriptive capacities to that point where they become inconceivable in physical terms. In modern thought, perception of the self has been extracted from its ontological interaction with the world of ideas and material things, rather than from an assumed spiritual nature.²³⁷ We may refer to Descartes' earlier finding of the self in the 'immediate conscious experience of thinking';²³⁸ or, on the other hand, to the Lockean perspective that the person 'can consider itself as itself, the same thinking thing in different times and places.'²³⁹ This latter evolved to understanding self as a logical construction defined in terms of memory²⁴⁰ and to explanations of psychological continuity.²⁴¹ In other discussions the self is considered to be a fusion of identities.²⁴²

3.1.2 – The second formulation adheres more to the sociological vantage point - and fundamentally to Mead's works - for defining the self as a product of social interaction that develops 'in the process of social experience and activity;' the self's reflexivity 'distinguishes it from other objects and from the body.'²⁴³ For Mead this experience evolves in relation to the 'me', 'the organised set of attitudes of others which one himself assumes,' and the 'I', 'the response of the organism to the attitudes of the others'.²⁴⁴ The main idea that surfaces here is that the self receives its own symbolic representation within everyday interaction modules, through reflexive mechanisms.²⁴⁵

²³⁷ In search of an answer to the enigma of the self's nature, classic Western thought and Eastern teachings alike, identified the *soul* with the primal essence of the self. An initial commitment to the idea of the soul's incorporeal status in the West, was later replaced with condemning the connection self/soul, when reason attacked on ideas taken for being historically connected with ecclesiastical dogmas.

²³⁸ *Kihlstrom, Beer & Klein, supra* 218.

²³⁹ *Shoemaker* (1997) 284.

²⁴⁰ *Grice* (1941) 340.

²⁴¹ *Parfit* (1984) 204.

²⁴² *Parfit, D.* 'Personal Identity' in *Perry* [ed.] (1975) 211 and 215 - 220.

²⁴³ *Mead* (1934) 135 – 136.

²⁴⁴ *Ibid.* 175.

²⁴⁵ *Stryker* (2008) 17 and 24.

Although within the sociological and psychological fields of inquiry, analyses of the self become inevitably labyrinthine,²⁴⁶ we are aiming here at a very specific theme. The self is organised upon the gathering of multiple identities²⁴⁷ that each ‘is tied to aspects of the social structure.’²⁴⁸ While the self, in the sense of the whole person, commits to ‘psychological centrality,’²⁴⁹ interaction is being conducted between its separate identities (roles and memberships) and their responding groups or organizations in society;²⁵⁰ thus, as several and diverse interaction modalities operate simultaneously, the self reflects upon ‘it self’ this multiplicity as one indivisible experience, while moving between modalities easily and ‘with very little thought.’²⁵¹

3.1.3 – This dualistic explanation of the self provides a schematic ground, a conceptual understanding of the development and function of the self, from where we may start figuring out a rounded depiction of personality.

3.2 *The Selfless Person of the Selfless Law* – We may assume the presence of some kind of perceptive self inside all conscious beings that determines behavioural reactions.²⁵² As interaction settings, however, move to higher levels of abstract representation, the process of placing the self into context becomes correspondingly more complex: the margins for describing ‘being’ and ‘activity’ submit to the symbolic limits of the available technical language.

Hence, in the case of legal systemic (re)construction, law seems to be lacking genuine insights for conceiving the meaning of self.²⁵³ Due to innate explanatory limitations, law can reduce the concept of person in its internal

²⁴⁶ Leary & Tangney (2003) 3 – 14, report an already large diversity of opinions coming out of mainstream scholarship developments within the short period of a century.

²⁴⁷ Stryker (2008) 21.

²⁴⁸ Burke & Stets ‘A Sociological Approach to Self and Identity’ in Leary & Tangney [eds.] (2003) 132.

²⁴⁹ *Supra* 245, discussing also in brief theories where ‘the internal dynamic of selves’ seeks ‘to restore equilibriums when identities are threatened by external events.’

²⁵⁰ Note that these theories address identities and roles tautologically, contra Castells, *supra* 225.

²⁵¹ *Supra* 248.

²⁵² Quinton (1962) modestly attempts to bridge spiritual understandings of the soul with contemporary identity theories.

²⁵³ Actually, the *existing* language of law (as this has been *allowed* to develop until now) does not include cognitive devices for translating the self into “regulatory matter”.

developments of meaning. Note here the significance of preserving rich and untampered meanings that Castells associates with healthily performing social identities.²⁵⁴

Broadly speaking, the rational person becomes apparent by externalising his innate decision making capabilities. Can these externalisations, though, affect our comprehension of the concept of person and even mistakenly replace it? For law, personality is a signifier for exercises of individuality – the fixation of modernity *par excellence*. However, law perceives the person from what the person *does* rather than from what this otherwise *is*: law itemises individuality empirically through systemically translatable behaviour, i.e. the socially functional result of the decision making process. In this respect, personhood is granted to selected subjectivities (e.g. corporations, associations) that reproduce adequately the condition of individuality in rules, as this has already been *experienced* in civil and economic life.

Our insofar discussion – including the examination of the human subject in the previous Chapter - suggests that individuality stems from the internal capacity of entities to decide and direct their own actions with cognition. This capacity is represented precisely by the idea of the self. Hence, while a reasonable negotiation of personality in future law-making discussions should certainly rely on the empirical input for drawing its inferences, it ought not to reject outrightly the argument of the self.

4. The Personhood Trap – This Part of the Chapter opened with the question whether our aspirations to project online humanity on the technical apparatus of law are realistic. We assumed the person becoming an ontological device that would bridge the two contexts. The above cross-disciplinary overview of ongoing subjectivity, identity and self scholarly projects lead to rather broad, over-inviting categorisations. Here, we are facing one last obstacle in our task, for these categorisations might render the as necessitated stable definition of personhood inconveniently unattainable: whereas within the historical continuity of societies, *personhood* means

²⁵⁴ *Supra* 228.

ultimately *empowerment*, strong disagreements, over where should limits apply to the inclusion of entities under the “personhood” concept, are bound to surface. In essence, the riddle of what constitutes personality involves more than resolving technical and ontological incompatibilities.

4.1 - Attention is drawn again to the use of language, where the semantic construction of the person takes place. From what has been explained so far, such expressions should extract their meanings of purpose from the applied reasoning in normative frameworks and, ideally, filter theoretical as well as moral endeavours – especially where the axiological concern of humanity in personality is involved.

In general, the condition of being a person is described as either *personality* or *personhood*. The difference between the two words appears linguistically insignificant, while most dictionaries usually do not draw a clear line between the two. The distinction does not, though, simply satisfy a grammatical caprice: ‘personality’ shows relevant capacity to perform as a person; ‘personhood’ indicates the existence of an order of things, within which the person is formally established as such. Therefore, when a pet simulates human characteristics or behavioural patterns we may say that ‘this dog has personality,’ avoiding soundly, though, any references to such a thing as personhood.

Law has embraced various instances of legal persons. The terminological difference between personality and personhood gains more weight in the purely legal argument. Entities may be naturally able to exhibit in action the behavioural characteristics that prescribe subjectivity without, though, attaining personhood. Therefore, despite bearing the maximum of qualifying personality traits - even dwarfing in their showing of humanity those artificial creations that we call ‘legal persons’ - they are barred from entering law’s personhood circle. These are well-known facts and appeal to law’s standard systemic setup.

4.2 - Coming back to the notion of online persons, for its detractors it is built on a double illusion, made up of, first, the experiential mistake of mixing virtuality with reality and, second, the intellectual misconception that casual

social involvement opens automatically the door to personal entitlements in law (an almost similar argument to the one used by positivism against natural rights). These viewpoints hold that there do not exist separate online entities as such, and, even if they indeed had, their nature and the socio-economic contexts where they are developing²⁵⁵ cannot justify granting them with legitimate personality; with legal subjectivity.

Opposite to this form of legal orthodoxy and conservatism, one could argue that law has already inserted fictions under the umbrella term ‘personality’ that might appear shocking to those unfamiliar with the circumstances and motives which reasoned their legal personification in the first place; therefore, qualifying now one more candidate in law seems to be a trivial matter. What I am contesting here to be a paradox of convention can be stressed out via a crude example: a child is as much a person as her parents; similarly, an 18th century slave bore every natural aspect of a person as his owner. Yet, law bestowed on neither of the two complete personality: while both the child and the slave are in practice permitted to proceed as agents with actions which the letter of law reserves for ‘persons’, the former (child) is considered of limited legal capacity, whereas the slave as of virtually none at all. On the contrary, maritime laws elevate ships to the status of legal persons, as carriers of duties and entitlements; estates (i.e. gatherings of assets and funds) become independent bodies in the form of foundations; and corporations are protected under human rights laws.²⁵⁶

Elements like self-awareness, that naturally accompany in our common comprehension the person entity, are evidently missing from such *de jure* creations, unless we are to identify them with, e.g. in the case of boats, the ship-owners’ personal interest in maintaining the sailing property’s financial integrity. Arguably, this reasoning takes as many liberties as the proposal for offering personhood (or some other lesser degree of legal subjectivity) to online identities. By cross-examining the given examples of

²⁵⁵ *Infra* 3(III), in reference to temporality and commercial online settings.

²⁵⁶ *Hartmann* (2002) expounds a lengthy polemic against the corporations’ inclusion in personality protection, noticing their enjoying of privileges systemically reserved for natural persons – which natural persons are not.

children, slaves and ships, we come eventually to realising that personhood articulates the reinvention of the intuitively understood concept of the person, in realisation of specific social, political, economic and even ideological interests. Personhood is mainly a convention, serving the needs and values that come to pass as priorities of the societal instance.

4.3 – Legal scarcity not being the real issue, the establishing of the “personhood qualifier” is loaded with motivation that appears to a degree biased; in the case of slavery, we could talk of ‘injustice’ within mechanisms of law that conspicuously ignored humanity and were instead wilfully personifying trade interests. When discussing online subjects, whereas the urgency of humanity is not at full sight yet and, more importantly, the argument of injustice is still incomplete, the role played by political will and power in framing and prioritising legal preferences emerges decisive.

In law, the given definition of personhood as ‘empowerment’ translates into ‘legitimacy’. All things considered, legitimisation in legal praxis marks a purely political decision.

5 - Our present endeavours to fix a connection between online existence and personhood, follow inevitably the broader understanding of the latter being the instrumental gateway to legitimacy. Regardless of the interpretative breadth it might receive under philosophical enquiries, the person performs substantively as an institution of political intent, social function and legal formalisation.

Even if that is the case, though, questions such as “is identity persistent,” “is the self reflexively influential,” and “what are the depths of the self’s vulnerability” transform overall into a realistic assessment of personhood, to reveal there the value of the triptych of subject, identity and self for its pragmatic dimensions and scope. In this sense, the insofar suggested solution to the riddle of the person lands closer than expected to law’s comparatively finite thesis: by building step by step correspondence with personhood on the points of subjectivity, identity and self, the conceptual device of personality, which we analysed throughout this Part, primarily provides *argumentative access to legitimacy* (the same way the

human rights argument performed in the previous Chapter, regarding legal subjectivity). It might be retaining an ample theoretical perspective and receptiveness, and addressing all potential personality models with flexibility and tolerance, yet it adopts strong practical disposition (and sense) to sort out its most problematic - from the combined viewpoint of social reality and practised law - findings.

The relevant perspective of potentially applied law comes into closer focus later, in Part II of Chapter 6, to juxtapose the online projections of users with legal personalities. Here, the discussion will instead proceed with justifying legitimate interests for the argument of personality in view of online settings. The following Part explains the nature of general participatory interests that emerge from Internet structures, where Part III reviews personality in precise association with those interests.

II. The Internet Experience

The online human, like other conceptualisations of products of the post-modern global political, economic and cultural order, has challenged empowerment in law. On the outside, it is rather easy to dispute that what it stands for is nothing but a passing voguish trend, which will, eventually, cool down and vanish; will be absorbed by the mundanity of continuously enriching offline lives with technological phantasmagorias.

The *cyberspace*²⁵⁷ *ideal* – defined, in brief, by information infinities and humanity’s metamorphosis in motifs of digital metaphysics - acquired popularity across the pioneers of the early computer networks, back in the days when the TCP/IP protocol was first introduced to realise the global “Internet”. It envisaged a lifestyle alternative, carrying enthusiastic hopes that the next step into the evolution of human cognitive morality was now

²⁵⁷ The term was famously created by science fiction author W. Gibson conceptualising information spaces that could be entered by disembodied consciousness and through computers; opposed to this ‘Gibsonian’ conception, ‘Barlovian’ cyberspace is understood as the space that computer networks create; *Jordan* (1999) 20.

reachable with the aid of technology.²⁵⁸ Users pertained to deploy personality traits within communications modules, imagining bodies of transferred data hosting their now expanded intellects across the “living” network. The reason behind that impression was possibly the onscreen “emptiness”, the visual silence of words and unrealistic, pixelised images that were hanging heavily over monochrome backgrounds. In substance, the Internet experience was nothing more than received information causing changes on the users’ monitors; however, the mesmerising simulation of space that those frugal displays build (in conjunction with the unprecedented sensation that the physical self perceived, when, with the touch of a key, his conscience would cover long distances at the speed of light) created the impression that *virtual bodies* were taking shape, travelling like digitised cosmonauts between computer systems.

The virtual body awareness changed radically with the arrival of the World Wide Web (‘WWW’ or ‘the Web’). The real world colonised and finally took control over the “vision”, making it more approachable to the increasingly incoming masses of users that were seeking to simulate offline practicalities rather than conforming to charming science fiction apparitions. Yet the virtual body concept did not die, it simply adapted; its close connection with the mind and the emotional world of the user retained its important role in formations of active international *technosociality*.²⁵⁹ Before expanding upon this communications aspect I will deliver a concise historical and structural account of the evolving computer network.

1. A Short History of the Net - Information lies in the heart of every communications network. Information, as in “content”, holds at face value the primary role, that of a knowledge end; seen, though, as module of constant activity, i.e. the flux of intelligence between actors who share similar interests, it turns equally valuable. The organised circulation of messages promotes further purposes and gathers together groups of similar or

²⁵⁸ Hunter (2003) 442 – 443 (cyberspace as ‘the modern equivalent of the Western Frontier’); Loader (1997) 1 – 7 (reads quickly through the rise and fall of the ‘mystification’ era).

²⁵⁹ Escobar, A. ‘Welcome to Cyberia: Notes on the Anthropology of Cyber-Culture’ in Sardar & Ravetz [eds.] (1996) 112.

neighbouring interests. Intriguingly, what had been perceived as the “means” may easily become the “ends”.

This is, precisely, the meaning of the information revolution, which the Internet’s inception entailed: the Net’s general worth resides *not in the qualitative breadth* of exchanged knowledge but in the *capacity* to store and – either directly or indirectly - retrieve that knowledge. Moreover, the Internet hosts access to thematically distinguished activities and areas of knowledge. The ongoing fascination with the Internet derives from the expanding networking power of digitised information. For this reasons, it quickly emerged as a good in itself, shadowing the actual services it carried out at the time.

1.1 - The early public Internet was developed on the two basic axes of education and small scale commercial access. Universities allowed connection and hosted the majority of information conduits. The private sector offered regional data exchange structures and links to the until then offline channels. Online operations included exchange of e-mails, newsgroups and elementary entertainment platforms, like chat lines and Multi-User Dungeons (MUDs).

During this “primordial” period one can locate cyberculture in its purest formalistic expression, that of profound awareness of electronic citizenship becoming an alternative state to living in the real world. Self-regulated online communities were set up to facilitate virtualities, where the cyberspace ideal found fertile ground for application. For its inhabitants these online premises resembled more or less Locke’s state of nature, life as a digitised “paradise”. Exactly as in Locke’s theory, these circumstances would later change once proprietary rights were secured on the Internet.

1.2 - The introduction of the user friendly Web acquired landmark significance. It established a radical new online mentality that, apart from apparent technological improvements such as easy browsing interfaces and attractive graphical representations, it installed new structural and operational communications experiences. Perception of the Internet, its mechanisms and regulatory potentials, adapted at large to the visual, iconic

system of the Web; most notably, ICANN²⁶⁰ would be later on assigned with administering URL addresses and *Internet domain names*, emphasising indirectly an online metaphor of land that was projected on the spatial virtuality of webpages.²⁶¹ Back at that time, the Net renounced any pretences of the preceding digital elitism and opened wide its doors to the public; business naturally followed if not leading this new wave.²⁶² Commercial exploitation of the new frontier was divided into traditional access providing, real-world markets that stationed posts on the Web and, finally, exclusively online setups.

1.2.1 - The latter exposed the Net's innovative character and wild prospects. Particularly successful within this line of commerce were services that were offering free content access (similar to aerial television channels) and profiting from hosting advertisements. Search engines (valuable tools for investigating the enormity of online information), Web portals and free email providers maximised the Internet's utility and pointed both users and the market alike to new directions.

1.3 - However, with the Internet's galloping popularity and expanding usefulness, typical offline conflicts found alternative battlegrounds. Lacking any central monitoring authority or censoring control, the network's wealth consisted mainly of material freely uploaded at the users' taste and discretion. Unedited opinions, pornography and representations of commercially owned icons were travelling across the sea of data. Soon, issues such as info-terrorism and the unauthorised use of protected trademarks or copyrighted material invited the lawyers in.²⁶³

1.3.1 - The attention of states was drawn to practices which would either threaten or infringe national regulations and policies. The intervention of state law was received with mixed reactions, where the attempts to forestall

²⁶⁰ Internet Corporation for Assigned Names and Numbers; there is a number of additional technical, coordination and management organizations that operate under loose governmental or inter-governmental supervision and are assigned with administering protocol and software standards, *García* (2009) 22 – 24.

²⁶¹ *Hunter* (2003) 453 – 454, exhibits topographical metaphors as spatial terminology of online activity that have also been appropriated in US litigation, *infra* 1016.

²⁶² *Kennedy* (2001) 453.

²⁶³ *Ibid.*

elusive – due to the medium’s nature - substantiations of unwelcome activities were found to be indirectly overriding civil liberties. The wave of Net ‘fundamentalism’²⁶⁴ was particularly felt in the US, as users joined forces with business to stand against compromises in online freedoms. Since the first clashes in courts,²⁶⁵ the two sides have been entangled in a war, governments seeking to promote offline control, the opposite camp fighting back on grounds of privacy and freedom of speech.

Arguably, the distinctive language of defence of liberties under American law, combined with the Net’s factual birth and evolution due to US initiatives, helped spreading across the network’s global population the impression that rights were to be sought out and guaranteed mainly opposite to government intervention. This spirit of libertarianism, heavily influenced by the ideals of economic liberalism, motivated the gradual erection of the online infrastructure and dominated the character of relationships formed between its participants.²⁶⁶

1.4 - With the passing of time, the Internet was transformed into a gigantic bazaar and entertainment venue. On the one hand, inter-seas marketplaces, like *amazon*, made their first bold steps, while news providers, streaming media and – not surprisingly – the sex industry stormed the scene; on the other, black markets came on the rise. In parallel, peer-to-peer (P2P) networks became the new controversial fashion for exchanging music files, to the intellectual property rights owners’ great dismay; the much discussed case of *Napster*²⁶⁷ and its mushroom-like spawning successors (e.g. *Kazaa*, *Grokster* etc) underlined a different aspect of the Internet culture, which initiated intense legal reactions.

With the burst of the *dot-com bubble*²⁶⁸ the Net’s commercial orgasm reached a balance; it became obvious that even cyberspace had certain limits. Online exchange markets and auction sites rolled into the picture, filling

²⁶⁴ *Ibid.* 457.

²⁶⁵ *Infra* 5(I)[2.1.2].

²⁶⁶ *Infra* 6(III)[1.] comment on the conditioning of the online meta-nature.

²⁶⁷ *Infra* 5(I)[2.1.4.3].

²⁶⁸ The rapid rise of stock-market investments in Internet sites and IT during the late 1990’s ended in the sudden decline of prices in 2000, which hit most upstart tech companies and led the relevant market to mild recession, at least until the advance of Web 2.0.

demand gaps and relaxing at the same time the preceding supersaturating commercial phenomenon.

1.5 - The Internet of the early 21st century explored what might be addressed as *owned freedom*: free online services or hosting facilities that require small fees provide users with access to a large number of applications oriented to entertainment. A new boost has been given to promoting individual audio, visual and text creativity on extensive networking platforms. The Web also hosts evolving knowledge projects (*wikis*) that are developed with the written contributions of participating users. This overall phenomenon, marked also by the omnipresence of web-based social networking platforms, was popularised under the term *Web 2.0*, to signal the socio-cultural overturning of established methods of service providing and using. Internet-based ‘collaboration and content creation’ has pointed towards a dynamic reinterpretation of online social participation and awareness.²⁶⁹ Web 2.0 enhances the productive input of the society of users in common information flows and technologically it integrates societies in advanced shared experiences of content manipulation.²⁷⁰

2. The Internet Participation Paradigm – The Web facilitates best the online mass-participation paradigm. In essence, for most people the Web *is* the Internet, concentrating most aspects of daily networking activity and breeding the culture of the information society. Therefore, this section analyses the paradigm by following, mainly, a representation of the Web, for the sake of simplicity and common understanding. However, several indicated instances of Net functionality are not web-based and run as independent applications (like Microsoft’s *Live Messenger* and, most notably, *Virtual Worlds*).

2.1 – Users may purchase access to the Internet from a commercial Internet services provider (ISP); otherwise, access can be granted under employment relationships, participation in an educational institution etc. From there

²⁶⁹ *Burri-Nenova* (2007) 1691.

²⁷⁰ *Zittrain* (2008) 123.

though, access to the Web is fundamentally free and open for everyone, requiring nothing more than basic browsing software (“browser”).

2.1.1 - The Internet is often acknowledged to be a gigantic information conduit. All operations are practically based on the manipulation, storage and transfer of information. Hence, viewing a website includes (i) an original author having uploaded content on a webpage via (ii) storing the information in electronic form, either on a supporting online service’s storage hardware or on the abstract network of computer systems (“cloud”); (iii) a user locating the information and reading it. This last part is a bit more complicated than what it seems; technically, the user’s browser requests permission from the service for transmitting data to the user’s computer, where the information is reconstructed in its original form as displayable content.

2.1.11 - As service we may understand any systematic storage, transfer and manipulation resource arrangement, offered to the public. Our entire Internet experience is based on such services:

2.1.11.1 - communications methods (emailing, message boards, Web forums and real-time chat and video conferencing, e.g. *Skype*);

2.1.11.2 - content hosting services, from blogging platforms (e.g. *livejournal* or *blogger*) to file-sharing sites for textual, musical, photographic and audiovisual material;

2.1.11.3 – content display platforms, as in news services, knowledge banks and archives (*The Internet Archive*, *Project Guttenberg*, *Wikipedia*.), and music and audiovisual streaming (online radio, television etc.);

2.1.11.4 – online retailers and e-commerce facilitators, including stores like *amazon.com* and *iTunes*, auction platforms (notably *eBay*), and payment intermediaries (e.g. *PayPal*, *RBS WorldPay* etc.);

2.1.11.5 - social networking services (*Twitter*);

2.1.11.6 – search engines, performing general information retrieval (in the vein of *Google Search* and *Yahoo!*), focussing on narrower research and business sectors (*Lexis Nexis*), or tracing other services as part of professing

a specific project (e.g. *expedia.com* contacts comparative searches on airline websites to present and sell travel packages).

2.1.11.7 – online game platforms, many of which offer Massive Multiplayer Online Gaming (MMOG) interfaces and large capacities for simultaneous, real-time playing.

2.1.12 - Service use can be free for everyone (e.g. the BBC website); conditional upon registration (for example, *hotmail* accounts); or requiring both registration and fee payment.

If incorrect log-in details are entered, or the service website diagnoses any kind of incompatibility with the user's Internet address,²⁷¹ then access to the online platform and hosted content is denied; or, at least, several operations cannot be performed, where the existence of a personal account conditions the capacity to manipulate information.

2.1.13 – Through the service, information can be (re)created and exchanged between users, either internally (e.g. comments sections of web-forums, messaging between *facebook* accounts) or externally (messages sent between different email providers, news feeds etc). Hyper-linking falls under the external exchange mode, as connections to other sites and sometimes the actual communicated content are allowed to be embodied in transmissions or web-pages (e.g. videos from the *YouTube* service being embedded on *facebook* profiles).

2.1.2 – Overall, the Web performs along the logic of establishing a public space which expands by being allocated to private operators (online services providers or OSPs). Essentially, it forms a cluster of services, where each single web-page may be holding the function of a gateway to further interoperating subservices, or simply serve as rented space for a static content setup.

2.1.21 - With the overwhelming majority of websites offering access free of charge and generally minimum - if not at all - interference with user activity, one may alternatively address the Web as manifesting either a communal

²⁷¹ Examples include access restricted within specific countries or red-flagging of identified users due to previous malicious behaviour.

societal model²⁷² or an expanded marketplace. The arguments backing either depiction are equally sound.

2.1.21.1 - The marketplace position picks services as the departure point for understanding the Internet. Note that online services require maintenance expenses. Where in most cases their engagement with the online public is not built on traditional commercial exchanges, revenue derives from advertising and, rarely, donations. This sponsorship model follows loosely traditional mass media economic solutions, websites resembling to an extent privately owned public broadcasting networks (e.g. *ITV* in the UK).

2.1.21.2 – While the online public does not participate directly in this economic schema, websites capitalise on the flow of visitors. In this sense, the communal deployments of the public develop in parallel to the market structure and kind of intertwine with it.

2.1.21.3 – On the other hand, the behavioural patterns that the public follows in communicating may be interpreted as constructing an alternative market order. In this understanding, information forms the main capital and is being valued in the communications contexts and the artefacts built around it (e.g. sociability, culture, education, economic life). This economic reading does not replace the basic communal understanding of the online public, but rather melds into it, providing a supplemental analysis of internal mechanisms of trust and reputation.

2.1.3 – Most online enterprises concentrate more than just a few of the previously noted and other functions into versatile operation platforms. For example, personalised *Google* accounts provide electronic mailing, chat, voice conferencing, news and blog feeds, storage space, document processing, photo and video sharing. In combination with fully integrating dynamic Web 2.0 tools, the utility significance of such activity centres increases, where, gradually, personal development and daily life tasks emigrate from offline to online contexts.

2.1.31 – To the point, Benkler identifies a networked information economy, referring to the ‘decentralised individual action’ which cheap technological

²⁷² However, it is wrong to assume that the Internet, or the Web more specifically, is a community; Newey, A. ‘Freedom of Expression’ in *Liberty* [eds.] (1999) 30 – 31.

means have allowed to evolve in large scale cooperation and coordination projects of information and cultural production.²⁷³ In this schema, not only productive community processes claim influence over the offline society by flooding it with the multiple alternative capitals they create; also, the individual's positive personal reflection of his active involvement in these phenomena and their impacts enhances all previously established understandings of the information society, and the socio-political development dependent upon it.

2.2 A Structural Appreciation of the Web – In these descriptions of the Internet, the development of relationships is defined by information (as both a circulated item and a communications flow) first on the level of service providing; second, in terms of content management, as producers release information on the network or content hosts will make storage and distribution possible through their services; third, in the traditional sense of communications exchanges between agents.

2.2.1 - Structured upon practices of exchange and distribution, this web of relationships is manifested in vertical and horizontal patterns.

2.2.11 - From the viewpoint of the service model's structural primacy, verticality is built from the dependence of users (or subservices) on access gateways and distribution points. The arrangements between distribution points and between users create structural horizontality.

2.2.12 - On the other hand, if we use content management as a guide, most relationships are conceived as horizontal, apart from those where proprietary claims over deployed content create power effects.

2.2.1.1 - Crucial, then, appear the alternative meanings of information. If communication takes the stage, then on top are found those who enable participation in the Net, by providing access, and those who do not inhibit participation in their trafficking of communications. By contrast, acknowledging information as an object reiterates the premise of verticality starting from those who provide content and moving down to the receiving public.

²⁷³ Benkler (2006) 3.

2.2.2 - At a first glance, the absence of traditional physical bonds with state entities incarnates in Web relationships the perfect market arrangement. The entire setting is defined by the proliferation of exchanges, it enshrines personal autonomy and, where concerns are raised over its effectiveness, it seems capable of regulatory self-adjustment through market mechanisms of competition and the utilisation of preferences.

2.2.3 - Power relationships are not taken off the digitised map. Economic theory considers them necessary and markets competent for preventing cases of over-growth to dominance that would upset the setting's balance. If, however, we put into perspective both of the above approaches to verticality, we understand that structurally the digitised market of ideas is not that free and that it submits to actual power centres. Therefore, access providers within the digitised setting condition the variety of modes of exchange, since they may at will manipulate them; they may become stronger the closer they encompass additionally content production and management. OSPs may exert considerable control over the online setting, their position as masters of the digitised land bringing them on par with territorial states inside the Web context. This metaphor and its practical consequences are analysed below.

2.3 On Communities - The network's global character and those innovations which advertised the online model were the proximal cause behind the upright popularity of groups residing exclusively on the Internet. Users of personal computers would either join already existing communities or create their own, encouraged by offered or foreseen developments in communications interfaces. The online commercial infrastructure and the cultural diversities, which the Internet concentrates, have reached such enormity in numbers and sizes that are rendering practically impossible any attempt to map the variant online geographies.

2.31 - However, we may distinguish two norms governing the formation of "virtual communities".²⁷⁴ The first one draws its character from a shared

²⁷⁴ The research of *Welman & Gulia* makes a strong statement of proof regarding online communities (particularly those addressed here as 'intellectual'), where the character of community for online formations has been contested due to e.g. lack of in-person involvement or little resemblance to traditional community notions; 'Virtual communities as Communities' in *Smith & Kollock* [eds.] (1999) 167 – 193.

intellectual interest of online participants.²⁷⁵ Thus we may refer to *intellectual virtual communities* in the cases of informal online political organisations and fandom focused on generic trends or particular artistic works, e.g. a *Harry Potter* books fan club. Group identity is acquired through expressed personal inclinations.

2.32 - In *functional virtual* communities, on the other hand, membership derives from participation through a single application platform. Exercised by registering with the selected online software setup, this type of association is exemplified by the social networking *Facebook* and the video sharing *YouTube* websites.

2.33 *Online States / Online Nations* - Fundamental differences in the exhibited formation bases may generate in practice operational conflict between the two models. To understand this potential one might draw upon a contrast between *nations* and *states*. Where states constitute regionally restricted legal formations, nations are broader in their geographical expansion and dependent on deeper cultural bonds that their participants share to distinctively separate them as ethnical groups.²⁷⁶ Functional communities resemble *states*: pinpointing their online locus at specific servers or IP addresses, they submit to fundamental operational rules, set in the launching software's computer code.²⁷⁷ Similarly, intellectual communities resemble *nations*. Although group members rely upon a functional community as a means of gaining network access (citizenship), they adhere to collective basic characteristics, tastes and intellectual qualities that define their shared bond (nationality) beyond the procedural mechanisms of online localities.

Such an online metaphor of intersecting citizenships and nationalities is sketched out that, in reflection of the context from where it draws its inspiration, it may further replicate relevant patterns of antagonisms and

²⁷⁵ *Benkler* (2006) 12 – 13, refers to 'communities of interests' that develop – and potentially evolve – in cluster-like network formations; *Newey, supra* 334,17 (pointing to the gathering process of informal communities); *Jenkins* (2006) 27 (on communities of the knowledge culture, their form and spreading).

²⁷⁶ E.g. the distinction between the state of Israel and the Jewish nation.

²⁷⁷ *Castronova* extracts the citizens/government relationship in reference to Lessig's often quoted 'code is law'; 'The Right to Play' in *Balkin & Noveck* [eds.] (2006) 83.

clashes. Hence, restrictions that apply within a country to citizens of specific ethnical origins, oppressions against groups of diverging ideological or sexual orientations and, finally, withdrawal of citizenship (the most extreme and grievous measure that a state can impose) may be manifested within online structures. This viewpoint stands out as quite bold, thus requiring clarifications on the meaning of state which we try to establish here as a valid parallel.

2.3.1 *A Treatment of the State* - Tsatsos pinpoints to common confusion over terminological semantics. There is a clear distinction between state as power (in German, *Staat*) and state as an organised entity (from the Greek *polis* and the Roman *civitas*). The first direction presents the ‘institutionalised and systematised production and enforcement of the will of those with power over a social group’; historically, with the development of traditional monarchy, the state starkly contrasted from society, elaborating the definitive paradigm of relationships between governing and governed. The other approach to the term “state” is more expressive of an ‘on the whole experiential phenomenon of one order, a system of societal cohabitation,’ best mirrored in the ideal of civil society. We may conclude, following Tsatsos’ line of thought, that what we perceive as a state is a combination of the traditional exercise of power and the module of social formations into organised entities.²⁷⁸

2.3.1.1 - Classic legal theory has expounded various definitional elements of the state; three have repeatedly surfaced as the most prominent:²⁷⁹

2.3.1.11 *Population* - The manner, in which the people are conceptualised as part of the state, depends predominantly on the regime’s character; this may be exemplified simply in the difference between addressing them as either ‘citizens’ or ‘subjects’ and the political outcomes that this entails in practice. The principal interests and focus of public law follow accordingly, as well as the breadth and potency of rights and duties.

The economic point of view offers an alternative basis for a definition, by which the people of the state are connected through the total

²⁷⁸ Tsatsos (1985) §6.

²⁷⁹ *Ibid.* 72 – 79 after Jellinek’s influential definitions.

of ‘economic activities and procedures that aim to satisfy human needs and are thus associated with the pursuit of shared or competing objectives.’²⁸⁰ The creation of relationships of dependence and power on this premise leads to a significant shift, denoted by the replacement of the term ‘people’ – traditionally associated with understandings of the state through the authority which sovereigns exercise over the masses – with the broader ‘society’, precisely for delineating populations as exchange-focusing concentrations of individuals and thus arranging states into market conceptions.

2.3.1.12 Territory - This is the country (land) over which the state does not exercise a proprietary right (*dominium*) but its sovereignty (*imperium*). It is the physical space wherein relationships between governments and governed are developed. The term *jurisdiction*, on the other hand, intellectualises the meaning of space by expanding enforcement of sovereignty’s will beyond the geographical limits of the territory, in relation to other sovereign entities.

2.3.1.13 Effective government - The concept indicates compliance with particular standards that needs to be exhibited on various levels. One main axis involves attaining internally legal coherence, as in establishing an authority for issuing laws and regulating activity; moreover, its performance should be effective, laws should be reliable and binding with the passing of time.²⁸¹ In relation to external actors (e.g. other states), an effective government is one which represents competently its primary interests and the people.

2.3.1.2 - Another element that is usually added to the list of main constituents, is the ‘primordial constitutive power,’ or, in other words, the self-empowered sovereignty: the state is by definition the sole governing subject authorised with exercising power (and monopoly of coercion) over its own affairs.

The aspect of exclusiveness in power has found equal justification in both the old monarchic dicta that God bestows the king with authority and social contract rationales alike, where people empower their leaders; at the same time, its convincingness might be justifiably curtailed by these

²⁸⁰ *Ibid.* 80 – 81.

²⁸¹ *Ibid.* 83.

presumptions of conditioned legitimacy. Furthermore, in the modern political reality, states that voluntarily submit to norms and rules of international laws are, as a consequence, obliged to abide by particular deontology charters and standards when dealing with their citizens (or subjects).

2.3.2 *The Online Functional State* - Despite the number of similarities the metaphor may openly converse, a direct re-pronunciation of functional online communities as states would blatantly overlook other fundamental conceptions separating the two contexts. Nevertheless, the point raised here is that both cases illustrate *de facto* power structures, operationally autonomous and internally governed, that, additionally, maintain recognition of their independence against unjustified external interferences - where they are part of broader regulatory orders.

2.3.21 - At first glance, whereas functional communities are by definition restricted to the limits of their software platforms, they fail to fully realise the idea of a state territory equivalent to the principle of a ‘well-defined physical locus.’²⁸² We could distinguish between hard-core centralised “states” that are based on servers, and other models that use software clients to spread their processes across interconnected computers with greater fluidity, yet less concrete character (P2P networks provide a fairly graphic example for the latter); by doing so they do not present structural stability. It may be argued that the potential for an actor to exercise control over such vague machineries depends highly on the existence of nodal points, where concentrations of information activity are constantly passing through and which could be treated as locality references; whoever owns access to these traffic points is automatically granted with power over the community’s underlying functional processes.²⁸³ Obviously, centralised server-ran setups, on the other hand, maximise controlling and monitoring potentials.

2.3.22 - This distinction amongst functional communities uses technical grounds, as explained, but also the organisational models that each time

²⁸² Rodgers (2003) 14 – 18, explores the conceptualisation of the state, from the ‘representational abstraction’ of the territory that “absorbs” all activity sectors in geographical understanding to framing spatiality upon the ‘multiplicity of social relations.’ Under such light, the ‘physical locus’ may be replaced by interconnected operations on the online service.

²⁸³ Lessig (2006) 93 – 94, builds the example of ISP/OSP power in hypothetical practice.

apply. Hence, on a second level, we speak in different terms when referring to online services (e.g. e-mail providers), where the owner/administrator acquires status equal to a sovereign, than when addressing Net-based cooperation modules (like P2P networks). Although it is not rare for exercises of power and control to emerge in the latter, in the first case we encounter full administrative subjection of the functional community's activities to its *ex natura* undisputed leader, comparable to traditional monarchy.

2.3.23 - It seems fitting for a functional community to constantly seek the preservation of its operational integrity as a means for sustaining smooth and enduring performance. Moreover, regardless the degree it appears isolated from the real world due to its focus, the more users it attracts into its circle of activities the higher becomes its impact on real-world economy and its commercial value is increasing.²⁸⁴ Therefore, calls for policies or other assurances for protection acquire substantial weight. In this light and in respect of the state metaphor, relationships between owners and users replicate the premise of internal affairs management, while online “foreign affairs” and “international politics” are manifested in relation to communications and intervening practices from external entities, such as other services or individuals. Various means are at the online service's disposal towards protecting its interests, where informal communications channels recreate diplomatic conduits between states or technical measures against the flux of incoming and outgoing information resemble embargos or fortifications. In addition, though, actual legal proceedings may be erected to contest rights against real-world infringements; those regulations which the legal system reserves activate online an International Law metaphor.

2.3.23.1 - Along these lines the citizenship analogue takes shape, where for every internal violation against the service's terms of use participants are

²⁸⁴ The list of examples is endless: advertisers of off-line products compete for space on prominent free communications services, like *hotmail*; search engine *google* entered the stock exchange market in 2004, becoming one of the most successful online enterprises; social network *MySpace* was bought by media giant *Fox Broadcasting* in July 2005 for US\$ 580 million for being used as an exclusive promotional portal; *the virtual world of Second Life* has attracted and features ads by commercial giants like *Nike*, *McDonalds* etc; *infra* 4[II](2.3.2).

penalised accordingly – for example, account suspensions or restricted access to service features. The ultimate (and most “repugnant”) form of penalty is exclusion from the service, which, again, equates to removal of citizenship and deportation.

2.3.24 – The online sovereign’s authority derives from the proprietary right over the service;²⁸⁵ and, resembling in spirit social contract theories, it governs online participants by right granted in the agreement of their participation. As far as relationships between providers and users are developed, the functional community’s government might be anything between laid back and strict or “good” and “bad” – the latter measured in terms of effectiveness. What bad ruling leads to is waves of digitised refugees immigrating to another land in search of satisfying their online needs; translating thus framed virtualised politics in commercial terms, moving to a competitor’s online service.

2.3.3 - Our virtual citizenships and nationalities, despite referring to offline conceptualisations, are built on the structural realism of the Internet. Between functional and intellectual, like their real-world counterparts, one refers to a posited establishment and to individuals’ imposed registering with an organised entity, the other to an identity element that its carrier bears inherently and may express at any time at his will (for example, like one following his nation’s traditions). Moreover, though, citizenship expresses a strong bond of jurisdictional dependence installed by the formalities of law, while nationality describes a cultural and anthropological institution (which, however, law does not disregard and may reform by protectively seeking its distinction from citizenship).

3. The Virtual – By observing most human activity contexts²⁸⁶ including Internet relationships, we may conclude that the effective delivering of the virtual does not rely on convincing visual representations but rather on the systematic treatment of symbols and traits as constituent meanings of reality.

²⁸⁵ Alluding to the medieval “landed nobility”.

²⁸⁶ *Boellstorff* (1008) 19.

3.1 - Anything that can be used to ‘intervene in the world to affect something else, or what the world can use to affect us,’ feels real.²⁸⁷ That much can also be said in relation to the flowing feedback we receive from our interactions with online agents and settings. The cyberspace metaphor (or ‘fallacy’ for lawyers)²⁸⁸ jumped out of the spatialisation of such real relationships. Generally, spatiality imports ‘a metaphoric characterisation of spheres of activity, opportunity structures and agendas, which have the effect of creating boundaries analogous to those of “real” physical spaces.’²⁸⁹ Besides cyberspace impressions, these ideas delineate virtuality within the broader common experience of Internet communications; that is, framing a sense of personal placement within the organisation of information as space.²⁹⁰

3.1.1 - For the purposes of semantics, the virtual denotes what is almost real.²⁹¹ However, virtualities affect our lives in a very real manner: culture, law or money, they all become real in essence. Therefore, the virtual has been contrasted with the tangible ‘concrete’ and, further on, the ‘actual real’, being, though, differentiated to the abstract.²⁹² In this respect, virtuality gets to signifying real spaces that do not exist within the physical reality.²⁹³

3.1.2 – The experienced online spatiality is ‘constituted via the interactions between and among practice, conceptualisation, and representation,’²⁹⁴ shaping a space of spaces and experiences. As such count the social, the political, the economic and the cultural – to name the strongest online motifs – in the manner that they are embodied in interactive symbols across dynamic successions of screen displays. We are entering the virtual space by anchoring our personal embodiment in the signifiers of interactivity. As the virtual becomes a daily process, it is through mundane activities that virtuality becomes reality and through our willingness to rely on its

²⁸⁷ *Hacking* (1983) 146.

²⁸⁸ Usually referring to the now considered outdated notion in law of ‘cyberspace as space’; *Reed* (2004) 1, 218; *Hunter* (2003) 447; *Cohen* (2007) 211, 225 – 226; *Kerr* (2008) 2.

²⁸⁹ *Rodgers* (2003) 10.

²⁹⁰ *Jordan* (1999) 25.

²⁹¹ *Boellstorff* (2008) 19.

²⁹² *Shields* (2003) 22 – 29; It has been pointed out that all communication forms take place between these categories, involving ‘the concrete (voice, inked letters), the virtual (coded meaning)’ and ‘the abstract (ideas),’ 33.

²⁹³ *Jordan* (1999) 1.

²⁹⁴ *Cohen* (2007) 236 (reflecting Lefebvre).

effectiveness for doing so;²⁹⁵ the lack of stability from our daily lives is sought out in digital virtuality, realising another instance of what we broadly define as ‘postmodern condition’.²⁹⁶

3.1.3 – At the same time, though, nothing implies that these contexts are not human. On the contrary, the use of the digital virtual reveals our most representative characteristics as humans – the same way that the uses of culture or law do so;²⁹⁷ even more, if we are to consider involvement with online settings marking the attempt to digitally reinvent representations of the self, at one’s own personal discretion. Online communities, with users investing in participation, give evidence of that, their compressing of the socialising process intensifying virtual reconfigurations of self meanings.

3.2 - In reference to digital technologies contexts, virtuality has become synonym to ‘simulation’.²⁹⁸ This tautology often misconceives virtuality for artificiality: the two notions, despite similar and frequently overlapping, are not identical. The virtual is set up on artificial structures, but it mainly denotes the enactive modalities where reality expands parallel to physical space; artificiality simply imitates reality and indicates what is created.

To that extent, electronic virtuality and artificiality communicate two different ideas. There is hardly anything unreal in the social experience which the former aims at. For example, harassment²⁹⁹ and stalking³⁰⁰ in virtual settings have a very real hold on users. The means for gaining control over or for disrupting another’s online presence, to the point of affecting her offline existence, are so pervasive and persistent, that stimulated feelings of fear are genuine and lasting. Thus, simulation denotes the facilitation of spaces that invite real human experience (for either good or bad).

3.3 – In virtuality humanity comes to terms with its capacity to transcend physical reality and to actualise the conceptual parameters of experience

²⁹⁵ *Shields* (2003) 114, exemplifies the ‘trivialisation of online environments’ upon ‘virtual dating’, online pornography, ‘relationship advice’ and game simulators, which all signal the virtual reality’s becoming mundane.

²⁹⁶ *Ibid.* 115.

²⁹⁷ *Boellstorff* (2008) 5.

²⁹⁸ *Shields* (2003) 46.

²⁹⁹ *Jordan* (1999) 108.

³⁰⁰ *Joseph, J.* ‘Cyberstalking: an International Perspective’ in *Jewkes* [ed.] (2002) 105 – 125.

within practice. Therefore, when entering digitised settings, bodies become virtual by organising themselves into subjects,³⁰¹ space turns into a framework of links between entities, and so on. In many ways, the virtual sets a template for understanding life.³⁰²

3.31 – For such reasons, a successful virtual interface is one aiming at stimulating human perception, not at reconstructing physical reality to the fullest potential of available technologies.³⁰³

3.32 - At the same time, with regards to online settings, it becomes clear that whoever controls the communications interfaces has increased hold over the framing and circulating of virtual meanings. These notions of control and power to exclude evoke a virtuality parallel to law: humanity relies on the conceptual subjectivity tool for contesting its affairs within the legal context; if, for any reason, subjectivity is intercepted or denied, humanity is radically prevented from surfacing.

3.4 – ‘Communication’, ‘control’ and ‘socio-technological hybridity’, they are all thematic aspects of a particular analytical strand that points back to the use of the “cyber” prefix. The online virtual brings forth a representation of cyberspace in close contextual attachment to the heuristics of cybernetics³⁰⁴ and to socio-cultural insights into cyborg entities. The Internet is not the cyberspace; the latter, though, dispensed at last with the legal fastidiousnesses and over-enthusiastic technocultural tenets, is understood as the former’s innate virtual space of communications between persons. It may be considered as ‘the collective consciousness of the information society’ and, for that reason, a new public sphere.³⁰⁵

Summarising, online participation is permeated by two subsequent layers of power structures, the first being, obviously, the technical Internet infrastructure, the second the ground of interconnected online services of which the virtual stems. It is in this sense that modules of the traditional

³⁰¹ *Shields* (2003) 27 – 28 (quoting Colebrook).

³⁰² *Ibid.* 32.

³⁰³ *Hansen* (2006) 28.

³⁰⁴ As ‘the study of control at a distance through devices,’ *Lessig* (2006) 3.

³⁰⁵ *Jørgensen & Lindholt* ‘Internet Access as a Global Public Good’ in *Andersen & Lindsnaes* [eds.] (2007) 327.

cybernetics analyses but also descendant accounts on the union between new technologies and societies – we should mention Castells’ and Haraway’s as relevant – project a strong hold over experiences of interaction with(in) virtual spaces.

Between the shared sense of public sphere and the underlying power frameworks, we may start examining the idea of personality’s online development.

III. The Virtual Human

There should be no confusion. The true value of the Internet lies not in the mere providing of access to knowledge but in relationships clusters evolving on and through the broader information structure. Thus the element of online participation outshines interactivity.³⁰⁶

From its inception, the ‘Internet community’ concept was apprehended by two contrasting visions, one optimistically celebrating ‘new places of assembly that will generate opportunities for employment, political participation, social contact, and entertainment’, the other predicting individuals being ‘trapped and ensnared in a “net” that predominantly offers new opportunities for surveillance and social control’ and ‘new forms of social obfuscation and domination.’³⁰⁷

As humanity’s habitats transform, the technical terms of social engagement are being rewritten, inviting us to contemplate the human person in its responding developmental trajectories of self and identity.

1. The Self Online - There have been described two – arguably complementary – notions of self: the self as an experiential dimension and as a narrative construction.³⁰⁸ It is not difficult to imagine either manifesting on online spaces. The Net appears to its participants as a non-stop experience of confluent communications events. Moreover, we may detect a metaphor

³⁰⁶ Jenkins (2006) 137, draws the distinction between ‘participation’ as ‘shaped by cultural and social protocols,’ and ‘interactivity’ as referring to ways that technologies give responsive feedback to users.

³⁰⁷ Smith & Kollock (1999) 3 – 4.

³⁰⁸ Zahavi (2005) 103 – 132.

where online, in settings defined by sequences of text and imagery, the conception of self as a narrative becomes literal: the authorship of the self is taking place as being written in software code and displayed onscreen.

1.1 - Self-consciousness as a starting point preconditions one's objectifying of herself in virtue to her social relations to others.³⁰⁹

1.1.1 - With regards to social relations, whereas technologies throughout history have shaped and interrelated forms of selfhood and community,³¹⁰ computer technologies come frequently under attack as projecting social images of physical isolation. At the same time, though, we find them evoking 'intense interaction with other people,'³¹¹ the expanding clusters of functional and intellectual communities on the Web provide sufficient evidence for that part.

On the other hand, in Bourdieu's works, group priorities and values are understood as symbolic and cultural capitals that individuals accrue; beyond that, the subject's range of possible behaviour is produced by its political context.³¹² The open-ended Web construction, as well as closed application networks, performs exactly in this manner: the resident political setting is built upon the online public's collective treatments of virtual symbolic space and circulations of cultural artefacts. Self-consciousness reflects the thus set flow of values and responds by further appropriating it accordingly.

1.1.2 - The objectification of the self draws from these processes, by contrasting one's own general plan of action against her impressions of the surrounding setting. Its conclusion, however, may present a few novel outcomes when compared to offline standards. For example, the online capacity to creating multiple pseudonymous profiles for one user, scatters the subject; it encumbers her collecting of consistent social input, not to mention her subsequent using of this latter towards objectifying herself in return.

³⁰⁹ *Ibid.* 216, citing Mead.

³¹⁰ *Boellstorff* (2008) 32, offering the invention examples of the wheel and the book.

³¹¹ *Turkle* (1995) 60.

³¹² *Mansfield* (2000) 124.

1.2 – Images of the online self being spread across numerous online accounts and diverse information channels, reflect ideally the paradigm of the post-modern perplexity of the self. Formerly individuality was defined in relation to groups whose parts cannot be separated; now it designates ‘a person whose parts cannot be separated.’ As conceived, the particular transition heralds a significant ‘cultural and political event.’³¹³

2. Online Identity – Usually, identity online is presented as a non-fixed, ‘ephemeral, fluid entity’ that is ‘open to constant negotiation, change and manipulation’.³¹⁴ Such traits confer equally advantageous and disadvantageous performances, enabling on the one hand freedom and liberation, bearing also, though, fraudulent and malicious behaviours.

These impressions, however, appear to idealise the generally transgressive faculties of online identity, overlooking mainstream common experiences. Hence, younger generations of users perceive online spaces as regular parts of their habitat and pursue in there recognition for their achievements, as they do offline. Second, the mental baggage of ‘real-world’ power relations slips online, inhabiting ideas about identity formation.³¹⁵ Finally, within the contextually given, identity construction is pre-empted by resident empirical referents that appeal to common online practices and by hardware restraints.³¹⁶ To make a point, identity does not necessarily involve open-ended or abstract potentialities.

In this respect, identities are built and rather fixed in the interplay between communities; or in lasting choices made by users. Although preceding offline ideas about the multiplicity of identities may seem now to be reinvented and expanded (mainly due to more personal options being available to users), the online information structure breeds additional power relations that impose further, distinctive to the context, functional burdens. Moreover, the fact that online services are institutionalised, either at origin or by performance in a setting (e.g. university email accounts, profiles with

³¹³ *Baddeley, S. ‘Governmentality’ in Loader [ed.] (1997) 72.*

³¹⁴ *Jewkes & Sharp, supra 282, 8.*

³¹⁵ *Loader (1997) 14.*

³¹⁶ *Lyon, D. ‘Cyberspace Sociality’ in Loader [ed.] (1997) 32.*

well-known market services), affects decisively the processes of both constructing and communicating agency, making them far less elusive.³¹⁷

2.1 - Identity management invites inferences from ‘information projected in conduct, activities, possessions and property;’ perception of identity and its frequently changing characteristics depend on the memory of the observer.³¹⁸

Memories, though, are ‘by definition virtual’, in the sense of procuring real ideations about the past.³¹⁹ The actualisation of the memory virtual in the present of the digital virtual refers largely to the art and process of simulation.³²⁰ In consideration of the social spatiality of online networked spaces, the simulation aims at integrating reality in interactivity; it picks fixed nods to recreate the process of experienced contact from the viewer’s point. To that extent the simulation invests in incomplete virtual representations, leaving gaps to be filled by the viewer’s personal experiences.

2.2 - In its virtual dimension, the networked space is not abstract. Moreover, it is produced and experienced by beings embodied under the same representation methods and modes that make it apparent onscreen.³²¹ The embodied self emerges from the same virtual universe of services, accounts and communities; it is imprinted in the user’s creations, cues and self-presentation styles - like emails, signatures, self-descriptions and digital depictions.³²² Identity flows between those spaces, across which the networked - and networking, at the same time - self is manifested. In this sense, online identity turns mainly into a creation of available resources, i.e. the characteristic online indicators and the capability to manipulate them via software interfaces during exchange of communication.

2.2.1 - The way we project online our digital bodies (‘body image’) is considered derivative of our apprehension of the self – the same way the

³¹⁷ *Ibid.*

³¹⁸ *Deighton, J.* ‘Market Solutions to Privacy Problems?’ in *Nicoll et al.* [eds.] (2003) 138 – 139.

³¹⁹ *Shields* (2003) 38.

³²⁰ *Ibid.* 39 – 43.

³²¹ *Cohen* (2007) 243.

³²² *Jordan* (1999) 66 – 68; *Donnath, J.* ‘Identity and deception in the virtual community’ in *Smith & Kollock* [eds.] (1999) 28, 30 (focussing on writing styles and statements of identity through the use of items).

physical body is mobilised into postures.³²³ The body image is communicated through personal expression, either deliberate or subtle and unintended;³²⁴ either way, our online communicated contributions create impressions of *how* we are, and indirectly of who we are.

2.2.11 - Radin insisted on personality depending both ‘on the ability to embed in contexts and on the ability to break out of contexts,’ a schema she subscribes to the capacity of persons to change their surroundings and commitments through the things which surround them and define them as persons.³²⁵ According to her theory of self, the person resembles an arrangement of two concentric circles, the inner taking the self’s endowments and attributes, the outer its products and possessions.³²⁶

The “inside” and “outside” properties of personality are not always kept on a perfect disjunction.³²⁷ In view of online personality, the outside elements function as identification but at the same time, due to the peculiarities of the setting, they are properties in the narrow sense – i.e. objects. This schema intensifies Radin’s point of contexts’ capacity to alienate the person from the self where the lines separating subject from object blur.³²⁸

2.2.12 - A basic component of online identity is its ‘elastic connection’ with the offline identity. Certainly, the communicated forms of the former do not identify with the latter, although their effective management of online resources stretch out a space for identity to “manoeuvre” and work around its self-representation.³²⁹ The nature, however, of online resources which allow that kind of liberty and to construct multiple online variations of the person, means, more than anything else, that we can embrace - or be trapped by - online symbolic contexts as a way of life.³³⁰

³²³ Hansen (2006) 50.

³²⁴ Donnath *supra* 322, 36 (in line with Goffman’s distinguishing of ‘expression given’ from ‘expression given off’).

³²⁵ Radin (1993) 23.

³²⁶ *Ibid.* 25.

³²⁷ *Ibid.* 10.

³²⁸ *Ibid.*

³²⁹ Jordan (1999) 67.

³³⁰ Turkle S. ‘Tiny Sex and Gender Trouble’ in *Liberty* [eds.] (1999) 232.

2.3 – In consideration of the further development and externalisation of the self, online identity is ‘a group project’.³³¹ Under social identity theory, individuals define their identities by membership in various groups or through the idiosyncratic attributes that distinguish them from others;³³² thus they develop in terms of group membership a sense of social and personal, respectively, cognition. From the latter derive all subsequent processes of identity ‘construction, maintenance, and change’ as reflections of knowledge, causality, responsibility etc.³³³ Collective identities are perceived as providing social and psychological compensations for ‘subordinate statuses that sustain systems of inequality.’³³⁴ Thus users pursue in the vastness of online communities to counter the marginalising, suppressions and exclusions which physical space imposes on their lives.³³⁵

2.3.1 - On a different level, participation appears to be a long exercise in symbolic interactionism: users ‘attach symbolic meaning to objects, behaviours, themselves, and other people, and they develop and transmit these meanings through interaction;’³³⁶ information objects are perceived and treated in meaning, not in their actual properties; identities ‘locate a person in social space by virtue of the relationships’ that they imply, forming ‘strategic social constructions.’³³⁷ Most important within this perspective, emerge electronic icons, links, and, generally, digital representations, to which online communities apply the function of language for circulating specific meanings.

2.3.1.1 – Expanding the authorship of the self idea, these practices, as melding within the streams of information, reveal the structural role of language. Language is now reconfiguring reality, not simply representing

³³¹ Crawford, S. ‘Who’s in Charge of Who I am?’ in Balkin & Noveck [eds.] (2006) 199.

³³² Howard (2000) 368 – 369.

³³³ *Ibid.* 370.

³³⁴ *Ibid.* 385.

³³⁵ Mentioning should be made to the subcultural deployment of most online communities, which largely falls outside the present discussion scope. In true subculture fashion, online groups form ongoing interpretations of the basic cultural frameworks of age, class, gender and ethnicity, and as closely connected to the modern market society (general discussion in Young (1999) 89 – 92), but mainly under the influence and within the characteristic shifts of Internet virtuality (e.g. cross-border permeability, pseudonymity etc).

³³⁶ *Supra* 332, 371.

³³⁷ *Ibid.*

it.³³⁸ Constitution of subjectivity takes place with the use of the online language by the participants of the community themselves.³³⁹ The lingual artefacts of the virtual space become evidently the means of communicational and social production.

2.3.2 - Identity equals reputation, where it constitutes the community's reflection of one's personal life course;³⁴⁰ in this sense, community life shapes identities. In the end, where an offline person maintains several online personae, this multiplicity of identities is further determined through the total self experience of interaction with each of the various online setups. But, to return to the previous comment, the individual persona develops primarily through identity shaping mechanisms that reside within the particular setting.³⁴¹ In a said setting, and maybe more intensively in a closed functional one, virtual reputation turns into a significant form of capital, which is returned with recognisability within the community and all the benefits or disadvantages going with that.³⁴²

2.3.3 - Intriguingly, within online communities, the under offline terms considered anonymity poses the reinvention of the self into virtual eponymy; aliases or anonymous but characteristic behaviours make someone recognisable.³⁴³ Anonymous and pseudonymous conduct is a hallmark online feature, pursuing privacy, considerably free expression and speech, and preventing unwelcome backlashes from the virtual into the offline existence.³⁴⁴ Understandably, pseudonymity is seen partly as constituent of social empowerment.³⁴⁵

2.3.3.1 - Neither anonymity nor pseudonymity guarantee concealment the way they make it sound. Anonymous action can still be located, and any insofar disclosed information, e.g. a specific trail of online activities, may be easily traced to a specific anonymous "dot" on the virtual map. Moreover,

³³⁸ Lyon, *supra* 316, 27 (on Mark Poster's 'second media age').

³³⁹ *Ibid.* 28.

³⁴⁰ Boellstorff (2008) 122.

³⁴¹ Crawford, *supra* 331, 201.

³⁴² Castronova (2005) 116.

³⁴³ Jordan (1999) 75.

³⁴⁴ Donnath, *supra* 322, 51; Jewkes & Sharp, *supra* 221, 2.

³⁴⁵ Turkle (1995) 12.

typical online norms will compromise the veil of pseudonymity, the Net layout stretching across cross-referring, partial or full identity verification points;³⁴⁶ thus, off-line jurisdictions seem not discouraged from scrutinising issues of real-world defence against intangible virtual infringers.³⁴⁷

2.4 – The Internet evolves, where, generally, mass media have supplanted tradition in showing life possibilities and in providing the cultural matrix wherein contemporary societies are nurtured.³⁴⁸

The actual and the virtual selves are mutually constituted; users perceive their virtual bodies as parts of their personality, regardless their separating the virtual setting from their offline actuality.³⁴⁹ Virtual identities are gradually becoming inseparable to ‘real’, in the same sense that e-commerce passes as ‘indistinguishable to commerce’.³⁵⁰ The experiences, accomplishments and failures of the online personality have the same effects on the psyche as any offline engagement,³⁵¹ arguably deriving from the combination of group integration and effort.

For participants it is the sharing of information, not the transmission of content *per se*, which binds ritualistically communities together.³⁵² Various elements of identity shaping, and personae to a great extent, may be considered parts of that ritual.

3. Persona – The online persona projects the virtual body of the user participating in virtual communities. Broadly it comprises of (i) the functional body image, i.e. the allocated or created external appearance, through the interface of the each time access service’s computer code; (ii) the social body image, that is the behavioural interaction which the self constructs in response to the virtual status of the single persona within the community it belongs to; (iii) the self consciousness, the psyche of the user

³⁴⁶ Edwards & Howells ‘Anonymity, Consumers and the Internet’ in Nicoll *et al.* [eds.] (2003) 215 – 222.

³⁴⁷ *Infra* 5(l)[2.1.8].

³⁴⁸ Boellstorff (2008) 122.

³⁴⁹ *Ibid.* 121.

³⁵⁰ Crawford, *supra* 331, 198.

³⁵¹ Castronova (2005) 113.

³⁵² Jordan (1999) 109 (citing Stephen Jones).

that collects feedback from the offline experience and from communications he is engaging in through other online personae he might have developed.

3.1 - The safest approach to comprehending the digital body is the service account; a profile created within a functional community. Therefore, in this category fall e.g. *msn* or online game accounts, and the operating digital “body” is perceived either as an onscreen textual indicator, like names and descriptions, or as a graphical representation. The user makes the persona body unique, decides on name, appearance, distinctive features and thereafter activates the cyborg’s online presence.

3.1.1 - From its Sanskrit roots, the term ‘avatar’ indicates an entity incarnated within a different to its primary field of existence setting.³⁵³ On the Internet we refer to avatars in view of depictions that users employ to ‘concretise’ their presence in given communications channels; on the Web these representations are usually two dimensional icons, while in three-dimensional setups the visage of self is constructed accordingly. An avatar, then, poses a creation made of virtual resources, a recognisable, stable identity mark.³⁵⁴

3.1.1.1 - Avatars, as modalities for experiencing virtual selfhood,³⁵⁵ play an important role in user psychology. On the one hand, the user may become bound to the avatar, as Radin indicated in reference to Hegel (i.e. placing one’s will in an object, actualises the abstract personality).³⁵⁶ Then we may consider the online involvement background to understand avatars as focal points of reputation.³⁵⁷

3.1.1.2 - Psychological impacts (even traumas) considering the treatment of avatars are reportedly very real.³⁵⁸

3.2 - Electronic personae become detached from the real world, not only due to the use of nicknames: within the boundaries of private services a persona does not mark the straightforward digitised representation of its user but a

³⁵³ *Klang* (2004) 390.

³⁵⁴ *Jordan* (1999) 59.

³⁵⁵ *Boellstorff* (2008) 129.

³⁵⁶ *Radin* (1993) 7.

³⁵⁷ *Klang* (2004) 397.

³⁵⁸ *Lastowka & Hunter* (2004) 66 – 68.

provisionally supplied contact line. Although the connections with the user remain explicit during the performance of interactive tasks, terms of service (ToS) as provided by OSPs in online access agreements convey strongly a self-regulated regime, which pronounces uncontested ownership over both space and internally performed activity.

3.21 - Closed functional communities in the vein of MUDs and MMOGs (examined in the next chapter), which are oriented to fictional make-believe interactive environments, place an additional reclusive layer between their conception and off-site³⁵⁹ influences.

3.2.1 - A single user can create and maintain multiple personae, on the same or several different platforms; or he may opt for adopting an identity of the opposite gender. Questions over such instances, that are becoming common online, are usually raised from the external observer's perspective, seeking to set the account straight for virtual settings and in compliance with standards of offline agency.

However, as long as the intellectual element is continuously and vividly represented through the EP's dealings, the user feels personally entitled to utilise the as developed persona's uniqueness, and - provided that such practices are technically feasible- to express it beyond the access server for the purposes of participating in off-platform developed groups; in other words, to utilise reputations acquired within functional communities across intellectual communities.

3.3 – The connection between persona and selfhood is well-epitomised in the psychological research and conclusions of Turkle. For Turkle, participation in online communities forms an identity reconstruction work in progress.³⁶⁰ The post-modern fragmented self is attempting to retribalise in front of computer screens and users are trying to 'build a self by cycling through many selves.'³⁶¹ There, the unitary self, through virtual manifestations of

³⁵⁹ As *Taylor* (2006) 234, indicates, the term off-site defines 'out of game and non-game owner sponsored space.'

³⁶⁰ *Turkle* (1995) 177.

³⁶¹ *Ibid.* 178.

multiplicity, maintains in terms of a continuum 'its oneness by repressing all that does not fit.'³⁶²

Screen personae provide opportunities for self-expression that evolves into becoming behavioural vehicle for working on actual life issues. Specifically, pseudonymous virtual personae usually perform as means toward the self's psychological projection and reflection.³⁶³ The virtual body signifies a distinct public face, no more than the physical body can be separated from our human sense of self. As we immerse in worlds of 'graphical representations and words,'³⁶⁴ the gathering of associations which e.g. a personal web-page involves, becomes the truest representation of the inner self.³⁶⁵ Hence, upon the persona are fulfilled potent online personality agencies.

4. - While technologies shape individual and community identities, we are reminded that they are not neutral constants³⁶⁶ in the social process (technological determinism); neither, though, fully subject to 'social or cultural forces' (socio-cultural constructivism).³⁶⁷

Virtual space is understood as individualist; yet online communities are built 'from individuals confronting their individuality',³⁶⁸ whose feelings of commitment towards their communities can eventually transcend their identity autonomy.³⁶⁹ The significance of online communities lies in their capacity to deny exclusivity to local discourses in the understanding of identities and constructing of moral critiques; especially intellectual communities are justified via confirming further 'the positions already taken by self-referential local discourses of ethnicity, region, gender or sexuality.'³⁷⁰

³⁶² *Ibid.* 260 – 261.

³⁶³ *Ibid.* 192.

³⁶⁴ *Ibid.* 180.

³⁶⁵ *Ibid.* 258.

³⁶⁶ Cohen (2007) 250.

³⁶⁷ Schroeder R. 'Virtual worlds and the social realities of cyberspace' in Loader [ed.] (1997) 94.

³⁶⁸ Jordan (1999) 60.

³⁶⁹ *Ibid.* 6.

³⁷⁰ Lyon, *supra* 316, 31.

4.1 - Social space is constructed through and across clusters of relations; in doing so, though, it also internalises myriad levels of background activity behind each of those relations. Thus the online virtual reproduces economic, political, cultural spaces, which at first glance seem unrelated to its development.³⁷¹

If we look mainly into functional communities, not all are on the same level; some are more popular, others receive better financial backing, others, finally, happen to be on better terms with infrastructure providers. Moreover, communities develop internal inequalities between participants, in terms of e.g. experience, fame, interface skill etc.

The full weight of this techno-social structure falls upon and is at the same time filtered through the single participant's virtual experience, deciding further involvement and action taking.

4.2 - The development of power online draws from the same co-calculation between the determinants of technology and humanity.³⁷²

4.2.1 - To review previous depictions of power relations, the Net is by construction layered.³⁷³ Theoretically, the ultimate power resides in controlling the backbone physical space of computers and servers.

Viewing the means used for creating the personae representations of identity, one may plausibly reflect that online governance is 'essentially bound up with the creation, maintenance and contestability of the metaphors, icons, symbols and mores which influence the conduct of computer-mediated communication.'³⁷⁴ Under more pragmatic terms, whoever holds power over individual and social identity construction tools (texts, images, interfaces etc), either by providing them or by owning them, is automatically in a superior position of social control (for example, operators of content services and information gateways that are not necessarily server-based, i.e. cloud-computing).

³⁷¹ *Rodgers* (2003) 18.

³⁷² *Jordan* (1999).

³⁷³ *Fairfield* (2005) 1076.

³⁷⁴ *Loader* (1997) 11.

4.2.2 - Practices of users in virtual space constitute forms of production, since the manipulating of information that takes place for purposes of communication is in essence a work of transformation.³⁷⁵ Participation in knowledge communities sets the ground for various forms of communal production that have been contested to form a collaborative power existing alongside the power which states exert over citizens and that corporations exercise over consumers.³⁷⁶

Antecedent mass communication systems (e.g. cinema, television etc.) were strictly hierarchical; cultural information was propertised and immersed into one-way mechanisms of production and consumption.³⁷⁷ The decentralised communicative structures of the Internet challenged that mainstream, and, by providing means for easy manipulation of information, they summoned behaviours across communities that are frequently paralleled to the ‘grassroots’ temperament, due to their folklore-like free dissemination, appropriation and creative reproduction of information. From this context emerged a widespread information commons phenomenon.³⁷⁸

4.3 – The following paragraphs examine two different illustrations, where the discussed virtual developmental frameworks and power structures might be placed within cohesive explanatory configurations.

4.3.1 *The Net as a City* – The first arrangement interprets broadly virtual space through the metaphor of modern urban environments.

4.3.11 - Conventional appreciations of the city depict a ‘site of determinacy’, ‘the iron cage where human behaviour is programmed, where the mass of humanity is channelled and pummelled through the urban grid of suburbs, downtown, offices, factories, shopping zones and leisure facilities.’³⁷⁹

4.3.12 - Contrasting these notions, emerged the idea of the city as an arena of choice, ‘a labyrinth of potential social interactions, an encyclopaedia of

³⁷⁵ The text here alludes to the use of a distinction between structures and class practices in *Poulantzas* (1978) 87. Under the same scope, the relation between the online functional instance, which brings users together, and the productive practices that it facilitates cannot be conceived under similar terms: structural instances do not directly constitute practices.

³⁷⁶ *Jenkins* (2006) 256 (citing Pierre Lévy).

³⁷⁷ *Cahir J.* ‘Why People Give Information Freely’ in *Lenk et al* [eds.] (2007) 283.

³⁷⁸ *Ibid.* 284.

³⁷⁹ *Young* (1999) 10.

subculture and style,' where 'a multiplicity of roles can be played.'³⁸⁰ The urban setting is perceived in genuine post-modernist sense as a fertile matrix, which delivers immediacy, a rich variety of subcultures and styles, and, more importantly, pluralistic and voluntaristic dynamics for the individual's self-actualisation.³⁸¹

4.3.13 - The city metaphor has already been employed by cybercultural studies and fiction, primarily to dilate on themes of urban social polarisation. These perspectives address openly the problematic of creating online zones,³⁸² the exclusion of online populations from virtual 'city centres' and their marginalisation in digital suburbias.

The downtown parallel here plays the most significant of roles: the Internet is a city whose centre is increasingly privatised 'as capital encroaches [...] into what was previously public space;'³⁸³ at the same time, access pathways are carefully arranged (i.e. interoperability connections between leading online services), tightly secured and monitored. This 'mallification' of the public squares and streets of the Internet demands further the exclusion of the 'homeless' into peripheral, 'collapsed' communities, or into small scale but isolated copies of the central model (the noted suburbias).³⁸⁴ However, the marginalised populations still perform within the main economy, as 'flexible' workforce and mainly as consuming masses.³⁸⁵

4.3.1.1 - All these interpretations of the city emit images of emancipation as well as of exclusion. Persons are trapped in the urban architecture and their lifestyles follow sometimes unwillingly its shifts. At the same time they are offered infinite cultural opportunities for designating their identity imprint. As it has been suggested, though, such forms of urban multiculturalism are

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.* 11.

³⁸² The same fears were popularised by *Lessig* (1999) in giving a structural explanation of the coded architecture of the Internet and its capacity to traffic access preventively.

³⁸³ *Burrows, R.* 'Virtual culture, urban social polarisation and social science fiction' in *Loader* (1997) 38.

³⁸⁴ *Ibid.* 38 – 39.

³⁸⁵ *Ibid.*

an illusion; in substance, it is the market that connects society under consumer citizenships.³⁸⁶

4.3.2 *Multitude* - Another look into the online experience suggests the concept of the *multitude* as reinvented by Negri and Hardt, in reflection of late modernity's globalised community; Internet life is largely considered both a component and a manifestation of the latter.

4.3.2.1 - While not defined directly, the multitude designates an active social subject, which internalises various multiplicities in being articulated globally, under a connective topology and topography of the multicultural, political and economic (i.e. labour) dynamics of the collective of common populaces.³⁸⁷ Understanding of the concept is incomplete without its correlative opposite of the *Empire*, the global imperialistic phenomenon of biopolitical power exercise that has dominated late modernity.

4.3.2.11 - The term Empire posits an over-encompassing constitutional order, non-centralised in apparent structure, yet consolidating its incentives; it implements a flexible, horizontal systemic structure which transcends national borders. The Empire confers an ethico-political dynamic, primarily expressed as a unitary power, which maintains social peace through the construction of norms and the far-reaching production of legitimacy.³⁸⁸ The neo-liberal economic perspective is profoundly integrated within the economic-political trajectory of the Empire; by pushing onwards the project of global capitalism it contributes to structurally enforcing the foundations of the Empire. Along these lines, are also incorporated vague notions of politically antagonistic appearances that cultivate constant calculating of threats and thus recycle prolonged states of crisis management (e.g. ongoing generic appreciations of “global terrorism”).

4.3.2.12 - The multitude projects a similarly post-modern understanding of contemporary humanity as a whole, which is presented conscious of and defined by – in terms of identity – its expanded internal pluralities of nations, races, cultures etc; such differences become feature of its internal

³⁸⁶ Young (1999) 89 (citing Russell Jacoby).

³⁸⁷ Hardt & Negri (2004) 99 – 102.

³⁸⁸ Hardt & Negri (2000) 11 – 14.

composition. Anthropologically, the organisation of the multitude is therefore conceived as ‘a multiplicity of singular forms of life’ who ‘*at the same time* share a common global existence.’³⁸⁹

4.3.2.13 – What the multitude produces is common, and becomes the basis for further future, expansive production.³⁹⁰ Communication sets the characteristic example towards comprehending this production meaning: we communicate on the basis of languages, symbols, and commonly shared relationships, all which, in return, we transform as a result of our actual communications processes; ‘the common is produced and it is also productive.’³⁹¹ Habits reflect another main productive relation course within the same paradigm, produced and reproduced in common interaction. To recap, the multitude conception meditates upon the production of social organisation by almost exclusively the populace agency itself.³⁹²

4.3.2.2 - In this part of the discussion, the ontological arrangement of the multitude is of particular interest. Our analysis so far misses an explanatory platform for the online public: a “community of communities” backdrop for the identity-shaping mechanisms, which spread across the interrelated functional and intellectual online social associations. The Internet structure is declined outright that role, not forming itself a community of shared values but rather a common enterprise.³⁹³

4.3.2.21 - The multitude - or at least the online representation of the multitude - provides a fitting discourse basis for interpreting the online public. It outlines the global dimensions of the online commonalty of users; it addresses the consciousness of this commons’ social, national and cultural multiplicities; it grounds online participation as a circular, productive and developmentally reflexive process. Finally, the idea of production in the multitude responds well to the overall perspective of communally created virtual spaces.

³⁸⁹ *Hardt & Negri* (2004) 127.

³⁹⁰ *Ibid.* 197.

³⁹¹ *Ibid.*

³⁹² *Ibid.* 336.

³⁹³ *Supra* 272.

4.3.2.22 - Especially in online contexts, the example of communication turns genuinely into the main productive force of the common. Users' online living is defined and created through the shared manipulation of the online language of symbolic artefacts and software code.

4.3.2.3 – Principally, the multitude is a class concept; within a defining juxtaposition of otherness, it brings forward the globally “ruled” as the Empire’s correlative opposite. The Marxist undertones might mislead into perceiving the multitude in a tautology with the proletariat. The two should not be confused: the multitude replaces the traditional working-class, and its claims over the means of production, with those oppressed by the Empire and its supranational economic-political side-projects.³⁹⁴ In the conceptualisation of Hardt & Negri, the information era is constructed upon appreciations of immaterial labour that transform this latter into a massively exploitable resource and deprive the multitude of a decent living via systematic appropriating of its common production.

4.3.2.4 – In these contexts, the economic representation of language as a performative and collaborative device indicates automatically a form of immaterial labour. Language also connecting and realising the immaterial production of the common,³⁹⁵ the exploitation potentials increase conspicuously regarding the language-based online public, threatening to cut it off from its sole means towards self-affirmation and development. These matters are demonstrated in the next Chapter, and analysed in conceptual relevance later, in Chapter 6.

5. – Reviewing humanity’s adventurous transformations in virtuality, they all synopsis symptoms of a ‘culture of simulation’ where people are ‘comfortable with substituting representations of reality for real.’³⁹⁶ At the same time, though, our virtual masks mean steps toward ‘reaching a deeper truth about the real.’³⁹⁷

³⁹⁴ Lotringer S. forwarding *Virno* (2004) 14.

³⁹⁵ *Hardt & Negri* (2004) 201.

³⁹⁶ *Turkle* (1995) 23.

³⁹⁷ *Ibid.* 216.

We ought to be aware that cyberspace does not mean freedom; left to itself it can become a 'perfect tool of control.'³⁹⁸

Finally, the same settings relate to alternate comprehensions that may generate confusion and, eventually, conflict. For example, the facebook community sees different functions and identity shaping potentials in a YouTube link to a video than what the lawyers of media conglomerate Viacom perceive.

³⁹⁸ *Lessig (2006) 4.*

4. Case Studies: Virtual Worlds

‘In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province. In time, those Unconscionable Maps no longer satisfied, and the Cartographers Guilds struck a Map of the Empire whose size was that of the Empire, and which coincided point for point with it.’³⁹⁹

In the following parts of this thesis, we build a mosaic of reported excesses from the relevant online diversity of settings, where the shifts in the social and cultural fabrics of our era are mirrored across the online tapestry representing them. This might remind us of one of Baudrillard’s observations on the cartographers of the Empire allegory,⁴⁰⁰ that the simulation absorbs the territory covered by the map. Online participation in communities fills in for gaps left in the physical experience, by adding more options to existing offline potential for participation. In the end, the question whether the virtual is parallel to or expands the real gives rise to aporia: the various virtual reflections of humanity speak of the constant, real human need for social identity. This has to be seen in context with the spawning phenomena of loss and alienation across the socio-economic architectures of physical existence,

³⁹⁹ Borges ‘On Exactitude in Science’ (1999) 156.

⁴⁰⁰ Baudrillard (1994) 1 – 3.

since ‘communities in the sociological sense became hard to find in real-life.’⁴⁰¹

The chapter presents exemplars of online activities. The experience of digitised realms we are interested in balances the real and the virtual; or, following Shields, the *concrete* and the virtual. It is important to highlight this terminological difference: we may argue that essentially the virtual is in no sense unreal, since it *is* happening and has the power to affect at least that part of the individual participant which we address as the ‘self’. However, its impact is felt beyond the sphere of individual psychology and perception, giving rise to broader commercial, public life⁴⁰² and thus regulatory interests.

1. Virtual Worlds

1. Worlds in Virtual Space - Users enter virtual worlds (VW) for entertainment purposes, taking advantage of a range of available options to engage in leisure activities. The most popular forms of these artificial environments allow multiple users to interact both with each other and with computer generated entities.

1.1 - The representations of imagined physical landscapes that VWs aim to impress on users require the use of various techniques, through which the illusion of space is created. Natural language was the first means to be employed; words transmitted descriptions of items, persons and settings in a manner similar to literature that at that time sufficed to deliver basic semblances. As technology was advancing, graphical images were soon added on computer screens and representational models upgraded from 2D to 3D, from static illustrations to movement-enabling interfaces. Development entails that there exist margins for further improvements. For example, the use of sounds enhances the sense of spatial ‘depth’; the distance of supposed events from the user’s virtualised point of view is indicated through increases and decreases in volume. Cubitt⁴⁰³ summarised the character of VW simulations in four elements: (i) the primacy of navigation and movement;

⁴⁰¹ Hobsbawm (1994) 428.

⁴⁰² Fairfield (2005) 1059.

⁴⁰³ Cited in Shields (2003) 60 – 61.

(ii) smoothness or unity of the digital environment, including computer-generated representations of users; (iii) a single point of view over the VW, reserved for the user and representing subjectivity in the digitised scene;⁴⁰⁴ (iv) implied off-screen places, seemingly extending space, ‘though it can neither be seen nor accessed.’⁴⁰⁵ In other words, VW follow technical and representational progresses in the broader field of video games, sharing with them the goal of maximising contextual “realism”.

Similarly, another important feature of these landscapes is their persistency. VWs pertain to continuity through time: the world continues to exist with or without the individual participant being logged in. Things that happen in the setting are bound to produce normally irreversible changes that users will find there when entering again, unless something else occurred during their absence and produces additional changes. Participants are part of a living environment, which they assist in reshaping through their actions.

In his definition of VWs, Castronova adds interactivity to physicality and persistence, to be used as glue:⁴⁰⁶ the artificial setting can be accessed simultaneously by large numbers of users; one’s command inputs (actions) affect the command results of others⁴⁰⁷ – virtually “felt” by them in either the short or the long run.

Therefore, VWs are developing as both spatial and temporal representations.

1.1.2 - The contemporary form⁴⁰⁸ of VW has also been labelled ‘avatar space’, due to the widespread dominance of interface styles where users can control their characters ‘on the screen in real time.’⁴⁰⁹ The concept of online avatars has already been explained; today’s VWs, however, have developed highly sophisticated avatar models through the use of a wide variety of software tools. Users may create step-by-step the appearance of their graphic

⁴⁰⁴ *Ibid.* 62; Hayles (1993) 82.

⁴⁰⁵ *Supra* 403.

⁴⁰⁶ Castronova (2005) 80; Castronova, however, insists more on persistence being the ‘most innovative feature of synthetic worlds’ that transforms them into “persistent state worlds” (term borrowed from the creators of *Ultima Online*; Castronova (2001) fn 2).

⁴⁰⁷ Castronova (2001) 6; cited also in Saunders (2007) 191.

⁴⁰⁸ Current VWs continue a trend previously dominated by text-based MUDs.

⁴⁰⁹ Lessig (1999) 11.

representations; they are either allowed to combine facial and bodily features, retrieved from in-world libraries, or change at will the parameters of replicated characteristics. In the very same sense they may opt for gender, skin colour and age different from their real one. Avatars, though, may recreate humanity via more complex software operations and functions, performing on the conceptual level as carriers and in practice as transmitters of emotions. In order to simulate through *digitised mimicry* (i.e. meanings and codes of conduct that have been imported from the physical context) it followed that avatar designs in their majority had to remain faithful to anthropomorphic models. The initial absence of actual body language and facial expressions in cyberspace led to the wide use of emoticons; advanced VWs have developed further by enabling a broad range of gestures to be recreated by avatars. Avatars can express cheerful or sad moods to another, they may smile, hug, send kisses, wave, bow, dance and taunt; and these are only a sample, as more behaviour representations are being constantly added to the already existing ranges.

1.1.3 – Returning to the point of spatiality and temporality, we need to mention the networking effects of activity being imprinted upon the VW setting and how they impact on other participants. Unless a specific attribute is communicated in effect between all human agents, such a world cannot be considered as ‘persistent’; in order to circulate this communication, a common reference frame is required, that of the shared participation experience. Experience as a framework denotes both the knowledge and understanding of the distinctive setting (its peculiarities and ongoing changes that take place within) as well the organic collective of participants, between whom that information may be meaningfully exchanged.

The virtual representation facilitates the community and, in turn, the latter enlivens the former. Structurally, the symbiotic relationship between the human and the machine is now transcending the individualised visualisation of the avatar/cyborg,⁴¹⁰ in this melding of two collectives: one of a concentration of users and one of a systematised cluster of virtual

⁴¹⁰ *Lastowka & Hunter* (2004) 63 – 64, see ‘avatars as cyborg entities that combine the controller and the representation into a single social unit.’

entities (landscapes, items, monsters etc.) that are embedded within interoperating software functions. Hence VWs are developing as spatial and temporal *habitations*.

Of course, VWs and similar notions of representation include ontologically human participation: for a representational performance, to be perceived as such, it needs to be stimulated across human receivers. Within simulations of landscapes, formed and breathing communities will constantly create and, in continuation, will carry on their internal histories, parallel to the setting's temporal persistence. The inbuilt social continuities (for example, *which* user did *what*, along with *whom* else and in *which part* of the VW etc) do not simply build internal circles of fame; mainly, they make the virtual world go round as much as computer software does by their circulating of narratives and meanings. Hence, these settings evolve into *virtualised cyber ecologies*.

1.2 Game Mechanics - Down to its basics, running a VW comprises system software and a mainframe computer. The software is written with the sole purpose of supporting the particular setting. The ideas and internal narratives of the virtual creation are first integrated in a world blueprint, a digital map. The software takes over, putting into motion all such arrangements, like the spatial placement of entities, the “physical laws” that apply to the representation (for example, gravity, entities’ “physical” density etc), as well as patterns of automated sequences that users are expected to activate (e.g. throwing a stone to a sleeping lion will wake it up and the lion will attack).

The sum of these operations is taking place on powerful computers owned by the OSP. The combination of system software and computer mainframe is called game server. Game servers are “open” to network connectivity, receiving simultaneously input from the bulk of the online participants’ computers.

In order to participate, the individual user must run on her computer a software component (‘game client’), which is compatible with the game server’s system software: the client reads the server’s complex processes and

translates them for the user on her screen according to her virtual point of view.

Any sort of world or individual change is being tracked by and stored on the game server. The fluxes and alterations of information are accessible by and transmitted to the interconnected participants' systems at any given moment, upon request through the user's virtual activity.

1.2.1 Market Mechanics - The OSP maintains the game server, making sure that the service performs smoothly, continuously and free of both software and hardware implications. VW services take the form of online applications, where participation is either free or subscription-based (usually monthly). Users in most commercial MMORPGs will need to have purchased the game client before joining the online service. Currently most subscription-based VWs offer a 10-day free trial; after that period, the user must renew game time by making a payment.

Bandwidth issues and bottlenecks, created by large numbers of game clients simultaneously connecting to the game, have been resolved through the use of multiple game servers. In essence, the OSP duplicates the original digital map package of the VW across several servers (therefore, basic game storylines will be exactly the same on every server). The commercial utility of the online service is thus maximised.

Developing and, even more, running a VW constitutes a rather costly enterprise.⁴¹¹ Understandably, the available means for financially supporting online VW operations vary accordingly. Therefore, the circumstances appear self-evident in subscription-based VWs and where the game client is distributed on the market. During the account creation stage, users send their credit card numbers and thus create a monthly transaction. Where client downloading and participation are free, though, VWs follow alternative methods for securing revenue: other online settings have adopted the advertising method which is most commonly used by websites, i.e. hosting real-world commercial messages;⁴¹² others have introduced voluntary

⁴¹¹ *Castronova* (2005) 132 – 133.

⁴¹² *Book* (2004) 11 – 26, observes that a VW may even be 'created for the sole purpose of extending brand awareness to a target audience.'

revenues, income from users in return of providing extra virtual features, e.g. personal virtual items; and there also exist mixed perspectives, also inspired by social networking websites, which allow for separate premium participation accounts on subscription basis.⁴¹³

A final aspect refers to the legal costs of getting involved in large, possibly international markets. The global appeal of a game service can be analysed in countless possible legal disputes with individuals residing in different states - each of a different legal system. Suing and getting sued on a variety of more or less significant reasons belongs to the daily work of any online service. OSPs can turn against misuses of their games or contractual breaches (both areas are explained below). Conversely, games are finding themselves on the defence not only on similar or anticipated grounds but also for any imaginable tort claim.⁴¹⁴

1.2.2 Legal Mechanics- End Users Licence Agreements (EULAs) form the contractual basis for the use of software and, further on, for access to game content servers (participation in the online service). Mainly, EULAs define the off-game relationship between users/consumers and OSPs, while an additional list of Terms of Service (ToS) regulate in-game behaviour, as well as certain trans-contextualising appropriations of game content.

In VW research, the EULA/ToS package has been frequently addressed as a metaphor for the VWs' constitution;⁴¹⁵ not without good reason: fundamentally, EULAs reconstruct an entire normative order that springs from the relationship with the distinguished virtual environment. They condense the pivotal principles of virtual existence, that is the values and rules that could not be transferred into software code and require the participants' active consent.

When users enter virtual spaces they are required to read the EULA and ToS texts. By clicking on an onscreen "I Agree" button indication at the bottom of the page, they give full, unreserved consent to the terms presented

⁴¹³ General discussion by *Castronova* (2005) 54 and 129 – 131.

⁴¹⁴ <OUT-LAW, 03/04/02>; <*Xinhua* News Agency, 12/05/06>; <*Courthouse News Service*, 24/06/09>.

⁴¹⁵ *Jankowich* (2006) 10.

and are allowed to proceed with joining the VW. Through a phantasmal choreography that simulates Social Contract theories, the online citizen enters the virtual society.

The EULA at present though, hardly lives up to aspirations of creating a modern constitutional equivalent: it constitutes a standard-terms mass consumer contract. Hence, as conceptually not negotiated, it rather resembles an imposed sovereignty declaration, by which all denizens of VWs abide. Indeed, most online communities will express the idea that software licence agreements are single-handedly building power structures across the Net: the enduring practice of the contractual format grants software licensors absolute control. At the end of the day, software *is* the means to digital existence and its authorising feels like lending living time. For such reasons, software licences, in general, have been fiercely criticised⁴¹⁶ for the allegedly excessive manner, in which they pursue to guarantee the viability of mass market distribution.

1.3 – Activities within functional communities interrelate to the growth of cultural phenomena that ultimately become apparent through the creation and networked proliferation of intellectual communities, as seen in the previous Chapter. VWs radiate with developments of behavioural trends along these lines and have reinvigorated the playing field for psychology research, social theories and cultural studies.⁴¹⁷ However, beyond what seems like another instance of late modernity's preoccupation with the cyborg, we quickly find the reproduction of the mundane and socially familiar 'situated being'⁴¹⁸ inside a far from otherworldly virtuality that descends into the sphere of the pragmatic and the concrete.

The interoperating technical, social and economic structures which shape VWs, designate initially the kind of behavioural patterns that are positively *expected* between participants and computer-generated entities; for example, a virtual sword will be used to kill a digital monster; VW-

⁴¹⁶ Gomulkiewicz & Williamson (1996) 336, surveyed the literature on the subject for citing over-whelming numbers of EULA-criticising publications.

⁴¹⁷ Balking & Noveck (2006); Taylor (2006); Boellstorff (2008)

⁴¹⁸ Cohen (2007) 213, in a different context.

participants should engage in idle chatting. Aberrations from what is expected can be neither accurately predicted nor avoided, yet may be reasonably *anticipated*: a player will cheat by enhancing with the use of unauthorised computer code the digital might of the sword he yields; participants will verbally abuse each other.⁴¹⁹

In light of this, constant reflective changes in EULAs and ToS texts can be easily understood.⁴²⁰ The aptly coined neologism ‘EULAw’ expresses the idea of a new philosophy of regulation: a ‘centralized process of lawmaking, through a form of nonnegotiated, infinitely modifiable, proprietor-friendly regulation.’⁴²¹ Measured against the OSPs’ expected, “regular” behavioural standards, conduct in VWs is checked first exclusively within the boundaries of the functional community and then against the interchange between functional and intellectual communities. EULAw in general has been dutifully following these instances in shaping rules, to the extent of attempting on occasions to transgress the ‘magic circle’⁴²² that supposedly separates virtual settings from real world’s mundanity. In these contexts, the factual regulatory breaking of the magic circle is of particular interest to law. Again, the empirical inputs of social studies and cultural research lead legal understanding where the ‘boundaries between our world and the synthetic worlds of cyberspace’ are critically fading.⁴²³

1.3.1 *On VWs as Functional Communities* – The common thread which ties together all VWs – regardless of the setting being a game or purely a social venue - is found in the feature of persistence. Persistence stimulates occupation with the VW, makes it sedulous and thus interesting; otherwise, a stagnant VW sinks into indifference. Perception of persistence is at first glance achieved through changes in the artificial environment; however, the primary expression of continuity lies in the personal progress of the individual participant. Following the pen-and-paper role-playing games

⁴¹⁹ *Infra* 4(II)[1.3.1.1].

⁴²⁰ *Gervassis* (2004) (generally on changing EULA expressions); *Jankowich* (2006) 7 – 8.

⁴²¹ *Jankowich* (2006) 9.

⁴²² *Castronova* (2005) borrows the term from Huizinga’s 1938 important socio-cultural work ‘*Homo Ludens*’ and adapts it for the needs of the MMORPG context; 147 – 148.

⁴²³ *Castronova* (2005) 48.

tradition, experience scores form the basic progress indicator in MMORPGs. Thus, game characters become stronger, develop skills or superhuman abilities etc, the more the user plays them and achieves setting-related objectives.

However, MMORPGs are also treasure-oriented and accumulation of virtual assets constitutes a core game element. Game prizes manifest as either game equipment (battle gear), which enhances game character power, or as virtual gold, which will be, again, used for purchasing better equipment.⁴²⁴ Social worlds are also accustomed to the virtual items' importance. Items are used as either ornaments for building more impressive avatar appearances⁴²⁵ or as stimuli for the simulation experience, e.g. a beautifully decorated virtual room where one can play Billy Holiday songs on a virtual gramophone.

Therefore, inside the VWs' magic circle, participation evolves around maximising the social currency of avatars, either within competitive game contexts or in view of social interaction (which, in any case, carries along an undertone of competition). Improvement, reputation, attractiveness and similar other factors, confer in-world advancement, and are realised with the help or through the effective appropriation of virtual assets. Hence, in-world purposes move in a circle from the building of stature to claiming virtual property and back.⁴²⁶

1.3.1.1 Functional Sociability – Permeated by interactivity, VWs push participants towards developing social channels. We may define as functional any form of in-world sociability which is organised at avatar level; Avatars in a social setting may loosely get together for the sake of forming a circle of virtual friends;⁴²⁷ they may even form groups under these conditions, e.g. friends of the Lambada Cocktail Bar – a virtual hangout;

⁴²⁴ Reuveni (2007) 266.

⁴²⁵ Lastowka & Hunter (2004) 10.

⁴²⁶ Castronova (2005) 113 – 114, explaining the distribution of status in the MMORPG formula. Elsewhere, he points out how personal reputational capital solves problems of item scarcity, in favour of characters who have built a good name in the VW, 116.

⁴²⁷ Castronova (2005) 63, observes that VWs, in general, are more about (i) chatting, (ii) teamwork and (iii) involved action is rather schematic and thus far less attractive to e.g. first-person shooting games.

groups of interests develop in reference to virtual existence. On the other hand, in MMORPGs game characters usually band together under the banner of a guild, which denotes either a shared profession (e.g. blacksmiths, smugglers, leatherworkers etc) or, more simply, a team offering companionship and assistance to its members; understandably, by joining a guild the game character enters an in-world brotherhood metaphor, through which most of the underlined personal goals become easier to attain on the premises of constant teamwork.⁴²⁸

1.3.1.11 – Note that intimate interactions occur between individuals in due course; personal discussions unfold involving actual world lives, meanings and identities.⁴²⁹ At a basic communications level, the actual flows into the virtual.

1.3.1.2 – Functionally delineated purposes and socialising, since the early MUD days, put practices of property exchange between participants of virtual platforms on the map.⁴³⁰ Advanced social interaction necessitated the gradual evolution of property systems, factually facilitated by OSPs with the installation of in-world play-money currencies. Thus, the arrival of virtual markets was just a matter-of-course.

These patterns of social interaction and accumulation/exchange of property show actual economic superstructures taking shape within VWs. Avatars price and sell items or even their services (for example, help with a task) on a supply and demand basis. Once VWs started becoming more conscious of the inherent economic dynamics, official market-places, bazaars and auction houses emerged to facilitate trading between avatars.

These in-world systems are as fallible and vulnerable as any real-world economy: inflation phenomena can simply disarray the interwoven social balances. From a point of view internal to the VW, random exploits of which participants can take advantage, i.e. design mistakes or software bugs, may produce unwelcome disruptions in the circulation of virtual

⁴²⁸ *Klang* (2004) 390.

⁴²⁹ *Lastowka & Hunter* (2004) 27.

⁴³⁰ *Ibid.* 35 -37; *Lessig* (2006) 10 -11.

currencies.⁴³¹ But that only tells half the story about interference with VW economies.

1.3.2 *On Intellectual Communities beyond VWs* – Virtual life does not stay contained within the premises of VWs. It is discussed and narrated between human actors like any other form of (identity) experience. Similarly, it may even be exploited commercially.

Online intellectual communities, in a world highly mediated by its own cultural phenomena and communication technologies, are gathered around areas of shared interest. By mere existence, a VW needs to launch an official discussion forum, which we sometimes may and sometimes may not accept as part of the functional community: it is indeed ran by the OSP, on the official game website, full participation is conditioned by logging in with a game account, yet it is also accessible to regular Internet users; thus, it interacts with people interested in the VW but who are not part of the current membership. Additionally, on this kind of forums players are interacting from different servers of the same game, i.e. in the strictest sense, from different functional communities.

Unofficial discussion groups expand even further the parameters of formal disaffiliation with the functional community, since anyone motivated by the shared interest may register with them. They may spawn everywhere, on any online venue; hence, broader communities, not being restrained by functional operations, stretch between several online sites of meeting (e.g. social networking platforms, random forums etc). We may safely claim that the Internet is practically running on the huge diversity of intellectual/cultural affiliations, which determine centres of attraction for the sum of interconnected users.⁴³² User-created content, inspired by specific VW settings,⁴³³ is spread across the multiplicity of hosting online services.

⁴³¹ *Grimmelmann, J.* 'Virtual Power Politics' in *Balkin & Noveck* [eds.] (2006) 146 – 147.

⁴³² *Castronova* (2005) 43-44, describes the Web experience of intellectual association with MMORG content, where users maintain broad knowledge bases over game puzzle solutions and character development guides; he also makes an empiric point on the generated emotional attachment to the VW and the community.

⁴³³ Apart from peripheral to games content, numerous of those user-created websites are dedicated to distributing essential information on how to play through MMORPGs and solve game puzzles; *Humphreys* (2005) 41.

These forms of user expression linger close to creativity broadly called fanfiction, yet should be also understood in reference to the available interface modules and tools, which are widely distributed to online users.

1.3.2.1 *Fanfiction & Fanart* – Fan fiction (or ‘fanfic’) is born from ‘fandom’, the world of aficionados and enthusiasts.⁴³⁴ Tushnet’s definition of fanfic speaks of written creativity in any form that ‘is based on an identifiable segment of popular culture, such as a television show, and is not produced as “professional” writing.’⁴³⁵ In other words, fanfic stands for amateurish approaches of the “what if” nature to dramatic or literary work.

The “what if” question does not only play with narratives that the original authors of books, movies and other popular fictional creations did not explore, but also with the form of published works. Therefore, next to short stories of fanfic stand art (‘fanart’), songs and parodies based on the original material of interest. As a rule, fanfic and fanart do not involve commercial aspirations, aiming only at the pleasure of friends of the original cultural material.

The term fandom, on the other hand, was often used for marginalising fanatic friends of science fiction and fantasy.⁴³⁶ VW-centred intellectual communities do not stand far away from those earlier subcultural stereotypes. The difference, however, lies in today’s socially pervading presence of the fandom: consumerism and new technologies emancipated the participatory fandom in all its forms, from the sci-fi geek to the avid follower of a football team. Postmodernity has prompted cultural consumption ‘as an active use’ and consumption is always a form of production where people continually re-appropriate, through cultural practices, the signification of meanings and mediated objects;⁴³⁷ so much more, when these are circulated globally.

Technologies offered the means to make the cultural answer straightforward. Whereas communication lies in the core of intellectual

⁴³⁴ MacCardle (2003) 435.

⁴³⁵ Tushnet (1997) 655.

⁴³⁶ Jenkins (1992) 12 – 16.

⁴³⁷ Coombe (1998) 104 (bringing together de Certeau and Willis).

communities, expression is the means around which these develop; and expression itself varies. From that point of view, steps beyond the narrow boundaries of fanfic and fanart lies the Net, and more accurately Web 2.0, which enables communication in aesthetically diverse forms.

1.3.2.2 *Interface* – Web 2.0 entailed tool-oriented participation, in the sense that communities started discovering their focus through their capacity to get involved with next generation interfaces, rather than the actual thematic content. Traditionally fans would be so inspired by socially distributed meanings – be that politics, culture etc - that they would be nevertheless motivated to create; now, users are offered such a diversity of exciting tools that in order to utilise them they retrace their themes of interest, first individually then by connecting with like-minded persons. The recent growth of intellectual communities stands firmly upon the discovery and wide distribution of, easy to use and imaginative in the offered potentials, expression means.

The most popular web services of this kind provide an idea of the construction, circulation and expansion of expression. Visual and audio forms are disrupting the monopoly of the text⁴³⁸ and may deliver equally strong statements of opinion and cultural attachment (and belonging). From mere computer icons representing popular culture figures (which users adopt as identity signifiers on forums) to remixed soundtracks and videos, intellectual communities mark thus their presence across the web. In that sense, any online facilitator (i.e. services like forums, video or picture exchange platforms) carries inherently the dynamic of performing similarly to public message boards: a collage of announcements and pictures of diverse origins that each one appeals to particularly interested groups within the broader community. In this new age of the prevalence of artefact culture, communities reach out through the appropriation of recognisable symbols as cultural production, which they redistribute into their main language form.

⁴³⁸ *Lessig* (2008) 68 – 69, underlines how in contemporary communications pathways, '[t]ext is today's Latin' as the masses – and this is not an exclusively online phenomenon – communicate through TV, movies and music in either referential or symbolic use.

VW intellectual communities will often record their in-world experience on video format and distribute it on services like YouTube; or will use game software to produce short films (“machinima”),⁴³⁹ of usually humorous content. Importantly, through such services activities that once might have taken place on the fringes of cultural (re)production and consumption ‘are increasingly normalised’⁴⁴⁰ and cultural/community association is becoming widely visible.

The role of Web 2.0 in providing tools and accessibility has been discussed extensively over the parallel example of parody:⁴⁴¹ media remixes⁴⁴² and image reworking, with the help of software like Photoshop,⁴⁴³ have empowered indirect political expression where this was not possible and where it would otherwise have remained isolated.⁴⁴⁴ Ultimately, intellectual communities, by utilising the language of remixed cultural nods and symbols⁴⁴⁵ (mainly deriving from in-world content) formulate their online identity and active presence.

1.3.2.3 Extrovert Economies - Utility and commodity are notions which permeate involvement with VWs, since the purposes and practices of real commercial life are simulated in virtual marketplaces. Moreover, without distinct win or lose scenarios, VWs are designed to promote the avatars’ building up in-world skills and social value - enduring goals which are attainable through the acquisition and use of virtual items and currencies.⁴⁴⁶

At the same time, from an external point of view this entire conception is nevertheless placed within the common social and cultural setting, where utility and commodity dominate the shaping of our behaviours. Not only exchange practices come naturally along with social

⁴³⁹ Jenkins (2006) 156 – 158; Hayes (2008).

⁴⁴⁰ Jenkins (2006) 275 – 276.

⁴⁴¹ *Ibid.* afterword chapter, on the reworking of mass media for alternative purposes, 271 – 294.

⁴⁴² Lessig (2008) 68 – 83.

⁴⁴³ Jenkins (2006) 233, argues that the act of circulating the image where political thought has been embedded is no less an act of citizenship than writing a letter to the editor of a newspaper or distributing campaign leaflets.

⁴⁴⁴ *Ibid.* 293.

⁴⁴⁵ Lessig (2008) 103.

⁴⁴⁶ Kane, S. ‘Virtual Property, Real Law’ in Bethke & Hoffman [eds.] (2008) 34.

interaction, but, also, our liberal politico-economical education tends to sharpen our awareness to opportunities.

Thus it should not be surprising that soon, utility-oriented intellectual communities started spreading online. “Utility” here draws meanings from multiple situations: first, where users do not desire to spend more time in advancing game characters and hire people to play for them;⁴⁴⁷ second, where gamers quitting the VW, do not want nonetheless to relinquish their in-game achievements without receiving some form of compensation; and third, where the prospect of profiting by either initiating or mediating exchanges as such lies within reach.

Game items and characters flooded online auction sites, to that point where they even attracted the attention of traditional media: the revenues from sales of virtual properties reached such heights that it was difficult to believe the actual nature of the transactions’ objects. Users with active virtual lifestyles organised their in-game productivity to make off-game monetary earnings. In analogy to the persistency with which they engaged into serious profit-making, some of these operations would become more organised than the rest, evolving the harvesting of virtual assets (‘farming’) to professional occupation.⁴⁴⁸ The selling of virtual currencies for real-world money crowned this niche market;⁴⁴⁹ currency exchange websites have thrived upon transactions between “virtual sweatshops”⁴⁵⁰ and users.⁴⁵¹

Most interestingly, this intersection of functional with intellectual communities re-articulates cultural sharing into commercial phenomena. VW economies communicate openly with external dynamics; they invite broad outside interferences from the “real” which they in turn affect.⁴⁵² On realising the inherent potentials of such “cross-worlds” flows, scholarly

⁴⁴⁷ And thus circumventing the requirement of gameplay for levelling up, *Garlick* (2005) 428.

⁴⁴⁸ *Lessig* (2008) 177 (on hybrid economies).

⁴⁴⁹ *Castronova* (2005) 44, gives an introductory account of the virtual-to-real market mechanisms, remarking that ‘[i]n this market, the value of time to obtain items and avatar powers is directly reflected in a higher Earthly price.’

⁴⁵⁰ *Infra* 4(1)[2.1.2].

⁴⁵¹ Note that several worlds have incorporated some kind of real money exchanging to virtual currency feature, which, however, on the basis of disproportionate rates (e.g. \$10 equal to in-game \$500) and limited allowances, performs more like as if purchasing game items – a regular minor revenue resource for most free online games.

⁴⁵² *Castronova* (2005); *Balkin & Noveck* (2006); *Taylor* (2006).

research began in the fields of economics, anthropology and sociology, stirring legal curiosity. They mainly bypass, though, the essentially overarching paradigm of tomorrow's social construction, which the Net, being a mirror of trends, strongly hints. Our future acquires flesh and bones in the commercialisation of the intersection of community modes.

2. Worlds in (Legal) Conflict - Now we turn to instances which exemplify best how the general setting that was described in the previous section has interacted with "real-world" law. The cases I am referring to here have frequently been used in VW studies, each manifesting a characteristic paradigm of law's involvement with VWs, raising questions where legal practice in viewpoints and language was challenged and tantalised alike by virtual experience.

2.1.1 - From their start, online markets external to VWs where game characters and virtual property were sold or auctioned, attracted negative responses from OSPs. Back in April 2000, *Sony Online Entertainment* (SOE), the online publisher of *EverQuest* (at that time, probably the most popular MMORPG of the western hemisphere) was the first to request the assistance of leading online-auctioneers eBay in banning the sale of game goods on their website.⁴⁵³ Ever since, OSPs have acted against online auctions. Game developers uniformly identified as justification for such actions the potentially damaged integrity of their games:⁴⁵⁴ when virtual material is being reserved for off-site auctions, players are prevented from participating in the in-game mechanisms of property acquisition.⁴⁵⁵ Another reason, cited

⁴⁵³ <CNet, 10/04/00>.

⁴⁵⁴ Bartle, R. 'Virtual Worldliness' in Balkin & Noveck [eds.] (2006) 47.

⁴⁵⁵ Turbine Entertainment Software Corporation, publishers of *Asheron's Call*, posted such a down-to-earth explanation on the game's official discussion forum, back in May 2004 and after they had notified eBay to remove auction listings for the sale of accounts/character and in game housing: 'Many housing auctions are run by brokers who deprive players from being able to acquire housing through legitimate in-game means; many account sales end up being recalled by the original player, causing grief to the buyer and creating a difficult situation for customer service. [...] Please be reminded that your end user license agreement and/or code of conduct prohibits the commercial sale or transfer of the game [...] because they cause the most harm to the game and the community;' <<http://forums.ac.turbine.com/showthread.php?t=8566&highlight=ebay>>.

by SOE, was the prevention of fraudulent sales, which were expected to lead defrauded users to turn against the OSP.⁴⁵⁶

Online auction houses were one way or the other forced to comply, despite recognising the circumstances as unclear, from the substantive law's viewpoint, and not particularly convincing.⁴⁵⁷ Nevertheless, the topic of auctions of virtual items and game accounts has dominated the discussion, not so much the proprietary core of the OSPs' claims, but the extents of exclusivity with which property is aggressively contested by OSPs across the broader spectrum of online activities. Moreover, it has turned into a frequent (and rather fashionable) news feature of techno-social flavour.

The impact of news reports cannot be downplayed. On one hand, the fact that major news agencies report what is transpiring about VWs indicates recognition of actual large scale socio-economic appeal and practice. On the other, it has arguably invited more friction: users discovered additional real-monetary value, whereas OSPs are facing growing public unease about their role and power over an apparently flourishing side-market. Therefore, exclusions of auctions from eBay and other similar venues did little towards dampening these online markets, whilst game publishers intensified the hunt of unauthorised sales. As a result - and most online game discussion boards bear evidence of it - OSPs proceed with disciplinary measures against users once they have perceived the slightest indication of their games being used as profit making devices.

2.1.2 - In 2002, Blacksnow Interactive, an auction clearinghouse,⁴⁵⁸ adopted a rather questionable model for setting up serious business. They organised a small round-the-clock "farming" operation, hiring low-paid unskilled Mexican labourers to play Mythic Entertainment's⁴⁵⁹ *Dark Age of Camelot* (DAoC) in rotational shifts, and selling later any acquired virtual assets for real world money. When Mythic claimed infringements on copyright and

⁴⁵⁶ Garlick (2005) 429.

⁴⁵⁷ <The Observer, 04/02/07>.

⁴⁵⁸ The events surrounding the Blacksnow incident are described in more detail in Lastowka & Hunter (2004) 39; Taylor (2006) Ch.5, n 4, 174; Dibbell J. 'Owned!' in Balkin & Noveck [eds.] (2006) 137 – 140.

⁴⁵⁹ Since 2006 Mythic is a subsidiary of the video games giant Electronic Arts (EA).

attempted to terminate Blacksnow's activities, the latter fought back with a lawsuit. They complained against unfair business practices and interference 'with "prospective economic advantage" to the plaintiffs.'⁴⁶⁰ The Blacksnow case was not destined to set the first legal precedent on MMORPG assets, as it was settled in favour of Mythic. During the proceedings, though, the California District Court had the chance to examine an arbitration clause included in the EULA and affirmed its validity.⁴⁶¹ In the aftermath of the conflict at court, thereupon alterations in DAoC's EULA were to the point:

'Joint or shared ownership or use of an account by more than one individual natural person is prohibited. Playing the game is intended for the entertainment, enjoyment and recreation of individual natural persons, and not as corporate, business, commercial, or income-seeking activities. Except as expressly permitted by the current EUALA, accessing the system and/or playing the game for commercial, business, or income-seeking purposes is strictly prohibited.

The buying, selling, or auctioning of characters, character attributes, items, currency, or objects whether through online auctions (for example eBay), newsgroups or postings on message boards, and/or any offer or attempt to do so, constitutes a violation of this EUALA as well as the Dark Age of Camelot™ rules of conduct.'

Apart from reflecting the disputed issue, the structural development in the EULA phrasing reinstated robustly the entertainment corporations' standing viewpoint on universal ownership over online/in-game content, against the practices of acquisition and distribution, which had initially allowed the unauthorised online trading market of game assets to flourish. Here we observe the de facto authority of the EULA attempting to exceed the boundaries of the functional community as advertising of selling in-game property is banned even from other, external online settings.

⁴⁶⁰ <CNet, 07/02/02>.

⁴⁶¹ *Blacksnow Interactive et al v Mythic Entertainment Inc.*, U.S. District Court, Central District of California, May 10 2002, Judge Hon. G. Taylor.

2.1.3 - In 2000 an *EverQuest* gamer, inspired by the setting of the online world of Norrath, posted to an unofficial and non-commercial fan-site a short story based on her character, developed in-game. SOE proceeded to terminate her account, arguing negative impact on the gaming community due to relating disturbing descriptions of violence to the game. On later occasions, though, SOE representatives commented on the matter at hand and referred to the use of intellectual property protection in pursuing their rights to ideas, characters and derivative works beyond the functional community's operational boundaries.⁴⁶²

EULAs have consequently made steps forward regarding issues of fan-fiction and fan-art. The current standard phrasing attempts to capture with blanket terms the entire online variety of derivative works, going as far as to prohibit several user practices which are very unlikely to infringe commercial interests, as undisputable instances of breach:

'You may not copy, distribute, rent, lease, loan, modify or *create derivative works, adapt*, translate, perform, display, sublicense or transfer any information accessible through the system [...] *Any attempt to engage* in any of these prohibited activities, whether successful or not, shall constitute a material breach of the EUALA and will result in sanctions...'⁴⁶³ (emphasis added)

Accordingly, the EULAs of MMORPGs prescribe absolute ownership on fan-fiction that has been sent in good faith to any Internet sites operated by the game owner, under standards proliferated widely across the industry for dealing with user-created content.⁴⁶⁴

'We may take any action with respect to your content if we believe it may create liability for us or may cause us to lose (in whole or in part) the services of our ISPs or other suppliers. You hereby grant

⁴⁶² Taylor (2006) 139 – 145.

⁴⁶³ Extracts from Mythic's *Warhammer Online* US EULA, section D.

⁴⁶⁴ It seems that this very particular phrasing formula has entered the grammar of most online EULAs, where user-created content could theoretically produce conflict between individuals and original copyright owners. The as quoted text was initially found on Blizzard/Vivendi's *Battle-Net* website and was also included in SOE's *EverQuest* license agreement; re-entering it on an online search engine returned with more than a hundred of similar results, to signify an apparently established standard-term across the industry.

to us a worldwide, perpetual, irrevocable, royalty-free, sublicenseable (through multiple tiers) right to exercise all intellectual property rights, in any media now known or not currently known, associated with your content.’

2.1.4 - In December 2003, the Beijing Second Intermediate Court was the first in the world to rule that a game owner should restore a player’s lost virtual property (game weapons),⁴⁶⁵ finding the *Arctic Ice* company ‘liable because of loopholes in the server programmes that made it easy for hackers to break in.’⁴⁶⁶ Despite the substantive differences in the diversity of national regimes and legal systems, the *Li Hongchen v. Beijing Arctic Ice Technology Development Co.* case introduced an international precedent, on rationales of consumer protection and identifying ‘player controlled game resources as private virtual property.’⁴⁶⁷ The Chinese court recognised limited user entitlements both to unhindered participation (which the game company couldn’t safeguard) and to game content, in accordance with the provisions of the agreed EULA. It concluded that where substantive financial damage occurs it’s for both parties’ future interest to preserve game balance.

As it might have been expected, the Arctic Ice decision initiated in China a growing number of similar lawsuits against game companies.⁴⁶⁸

2.2 – These challenges, in more than one ways, have pre-empted the parameters of later VW-related legal conflict. It is difficult not to see the general interests and concerns they touched upon - the persistent polemics of the entertainment industry in the late 20th and early 21st centuries ringing louder. All this also raises questions of Internet participation, its breadth and limits, more or less informed by the culture of online experience and the practised theories of personality’s ‘cyber’ reconfiguration. Finally, it becomes worth examining the legal apparatus that is used, the proposed and practised interpretations of the rule of law.

⁴⁶⁵ *Fairfield* (2005) 1084 – 1085.

⁴⁶⁶ <China View, 11/02/2004>; <TechNewsWorld, 19/12/03>.

⁴⁶⁷ *Castronova* (2005) 166; <*BigKid.com.au*, 22/12/03>.

⁴⁶⁸ <China View, 28/04/04>.

However, these issues are best understood as projections. VWs contest to be something new and may be possibly changing the way of life for the Web 2.0-conscious generations. Reconstructed under law's dogmatic reasoning though, they reiterate familiar discourses of (intellectual) property and expanded contractual regimes. As VWs rebuild dominant societal schemata in small scale and discard the bulk of contextual detail, they also generate a miniature of the legal problems, which now look sharper and in focus due to the setting's reduced complexity.

II. Two Virtual Experiences

This part examines in detail two different VWs regarding (i) their offered participation experience, (ii) the canvas of societal modes they host and (iii) their legal language of choice. Attention is required where these three areas blend with each other and with structurally predetermining off-world actualities.

1. A World of Warcraft - The setting of Blizzard's MMORPG *World of Warcraft* (WoW) exemplifies the tradition of the fantasy genre, adapting into 3D avatar space the successful Warcraft franchise. Players enter under one of two warring factions that claim territories across the VW's map; they create male/female characters according to familiar archetypes within the genre, such as warriors, holy knights, wizards etc. The game itself uses most notable features of pen-and-paper role-playing games, such as adventuring, exploring and undertaking treasure-hunting or monster-killing quests - either individually or along with other players. Additionally, WoW has incorporated arenas where the opposing factions compete against each other. The results of clashes in those battlegrounds are reflected on game-character advancement.

Socialising turns into a prominent game element. The most rewarding game quests demand team effort, which requires co-ordination of different in-game professions and specialisations.⁴⁶⁹ Moreover, game progress mechanisms

⁴⁶⁹ For example, an attack squad comprises of melee warriors, long range fighting archers and spell-casters and healers.

maximise social integration through auction markets, where players sell game rewards for virtual gold or purchase enhanced equipment (e.g. swords, armours etc) for upgrading their characters' combat and survival skills. Finally, players may join guilds, to receive help with tasks (like killing monsters and completing quests) and to share virtual resources or knowledge. In other words, personal achievements rely heavily on interacting with the VW's social setting.

1.1 - Questions over what is “legitimate” or “legal” may emerge at first contact with a VW, as this participant observer account of WoW reflects. Having downloaded the game from the *www.worldofwarcraft.com* website for a 10 days' free trial, when I first ran WoW, subsequent EULA and Terms of Use (ToU) texts greeted me, asking me to agree to the onscreen contractual content before entering the VW. After a quick reading through standard online legalese, and without having spotted anything conspicuously outside the typical EULA grammar in either texts, I entered the game.

1.1.1 *Love's Labour Lost* - For an entire week I played dedicatedly, halfway trying to “level up”⁴⁷⁰ the game character I had created and halfway caught under the spell of the game.⁴⁷¹ With the expiration of the free-trial period, I rushed into ordering the standard game CD-ROM from a UK-based online retailer. To my great frustration, once I had received the product, the included game client authentication key would not reactivate the account I had opened. It transpired that I had been playing on a US server – following my logical reliance on the popularisation of ‘.com’ websites and not downloading initially the game from a corresponding ‘.eu’ site; on the contrary, the game copy I had purchased provided compatibility only with servers based in Europe. Note that I *might* have been aware of regional zoning if I had *thoroughly* read the full EULA and ToS texts (where, actually, explicit mentioning of regional markets does not exist and is only indirectly implied).

⁴⁷⁰ Levels are gaming progress indicators, gained by score and experience. With the addition of each level, characters become stronger and acquire new skills.

⁴⁷¹ WoW has received certain notoriety across gamers' communities as considered to be so well-made and appealing that it is highly addictive.

I had already spent a good many hours building up progress with my game-character to the allowed maximum.⁴⁷² There was no problem with returning the purchased copy to the retailer and receiving a refund; the issue was one of transferring the fruits of my labours to my region's servers. I contacted the game company in the US (since the developed account was registered there) via both email and phone communications. The delayed written reply I received offered a rather unsatisfactorily compact explanation.⁴⁷³ On the phone, despite not fulfilling my expectations, customer services experience excelled in convenience and sincerity: the discussion was casual; the responding Blizzard's customer advisor reasoned cultural and legal incompatibilities between different regions.⁴⁷⁴ Being himself a WoW player, he showed sufficient understanding of my issues and concerns with the game-character progress so far, to the extent of suggesting that I should purchase the US version of the game from low-pricing retailers. I found his comment quite impressive: not only came it into conflict with the company's - apparently strict - policy of regional divisions but, additionally, our conversation was taking place on the customer services telephone lines, which Blizzard was presumably monitoring! Regarding my query, I was informed that the company does not delete characters and keeps all relevant data stored for whenever the user decides to (re)activate the game account. Thus, under normal circumstances, my in-game achievements were indefinitely safe.

1.1.2 - WoW constitutes possibly the largest online entertainment enterprise of its kind in the world, with over 10 million subscribing customers. Understandably, the bulk of communications with the latter exceeds proportionately the manageable ideal for either a software developer or a game-service operator.⁴⁷⁵ Brought into a position combining both these roles, such a company requires a well-structured and effective operational system

⁴⁷² The trial version allowed up to a level 20 progress, a rather high limit for first time players.

⁴⁷³ See *Appendix VI*.

⁴⁷⁴ For example, Chinese servers do not run software displaying bones and skeletons, after censorship was placed over these features on cultural grounds; <Reuters, 10/7/07>.

⁴⁷⁵ That is the main reason that the service has broken down to regional divisions.

for liaising with the public and, in most cases, deciding over attended matters.⁴⁷⁶

Regarding game issues, communication is conducted through (i) the official game's discussion forums (where gamers and in-game administrators alike are represented via their game characters' identities); (ii) emails; and (iii) phone customer care contact centres. Blizzard's advisors, when interpreting the company's policies to users, are in most instances de facto assigned with decision-making duties, as it will become clearer further below, where reported incidents of account banning are examined.

1.1.2.1 - My first direct communication with the OSP was answered in writing and applied an indirect, yet genuine, normative decision; albeit an unsatisfying one, not for responding negatively to my request, but due to its exclusive forwarding of generalising policy notification statements.

Reasoning legitimises a decision before others, appealing to common rationality standards that are drawn in reference to a shared social sense. At the same time, however, a decision marks an act of legitimacy in itself: where authority is *ad hoc* summoned for resolving a pending matter ('authority' here meaning both an entity invested with power and institutionally established knowledge resources), the decision is automatically legitimised by virtue of process.

In relations between socially active entities, the manner, in which a decision is being delivered, mirrors whether two parties are conversing horizontally or whether the one delivers his/her unquestionable will over the other. When a course of reasoning does not require anterior meeting of minds for validation, but is in advance taken to be absolutely true, then the underlined relationship between the two actors involved transforms into a power relationship – delineated either by one's expressed dependency on another's decision or by the will with which the decision will be enforced, indifferent whether there are still conflicting understandings over the decided facts or not. Picturing a bipolar schema, the more a decision moves away from *ratio* - from reason as 'patterns of ideas whose strength to bind and convince [...]

⁴⁷⁶ Mulligan & Patrovsky (2003), general analysis in Chapter 11.

comes from their logical persuasiveness [...] or rational coherence'⁴⁷⁷ - it shifts closer to expressions of *voluntas*, i.e. to the unchallengeable statements of a sovereign coercive will.

1.1.2.2 - Customer services are a costly and tricky business. Limitations on the extents communications may become over-personalised reduces firstly costs for the OSP (which are reflected on the customer's monthly subscription) and, second, reduces exposure to various misinformation risks.⁴⁷⁸ In analogy with the number of subscribers, each incoming issue and request needs to be seriously addressed and decided over, the soonest possible; and most of the times, emerging matters between users and OSPs evolve into threads of consequentially exchanged debating messages. Thus, brief emailed answers, seemingly standardised, help in keeping the system going on. Practically, it is almost impossible to keep everybody completely satisfied.

However, beyond these complications, representing the relationship provider/customer as a horizontal deployment proves to be ontologically deficient. The necessary growth of *voluntas* over *ratio* in individualised decision-making mechanisms marks a turn to hierarchical communications modules, which place accordingly parties opposite to each other.

1.1.3 – The game's phenomenal success⁴⁷⁹ has financially assisted Blizzard in implementing an organisational model and expanding its human resources: continuous technical support, specialised help-lines and large numbers of in-game administrators (who also participate in the game's official discussions forums and deal with individual matters). It is, of course, to their best

⁴⁷⁷ Cotterrell (1995) 317.

⁴⁷⁸ Mulligan & Patrovsky (2003) give examples of ineffective management over the users' expectations by providing uncertain or inaccurate answers, of sluggish reactions to incoming requests and questions and of hesitant handling of relationships between users; in all cases, in-game communities are quick to misinterpret and to reflectively adopt and spread trends that in the long run disrupt the VW's smooth functioning.

⁴⁷⁹ At the time I entered the VW, WoW had already been the most popular MMORPG 'accounting for 54% of the subscription market in 2006, generating revenue of \$471m,' from Screen Digest's Western World MMOG Market 2006 review, <<http://www.screendigest.com/reports/07westworldmmog/pdf/07westworldmmog-pdf/view.html>>; <Blizzard Entertainment, 24/07/09>.

interest to keep the customer base satisfied, to acquire and also to retain subscribers.⁴⁸⁰

We may link the positive customer experience with the positive VW denizen/citizen experience. Good administration in a VW does not differ at all to good administration in the actual world. One may draw parallels of the political development of socio-economic relations, government and, finally, the human use of human beings. However, planning and aspirations for good administration often end up in bad exercises in governance. Hence, particular faults in e.g. Blizzard's overall decision making performance are not endemic to the relevant setting but rather instances that signify general societal and juridico-political crises, which are structurally determining, have been transferred to and are organically embedded in the smaller scale context.

1.1.4 Community – The more than 10 million subscribers worldwide⁴⁸¹ (a number which equals e.g. the population of Greece) should not be considered as all being gathered simultaneously on one huge online platform. As previously explained, players are allocated to game servers (called “realms” in WoW) that each may host a maximum of players between 25,000 and 35,000.⁴⁸² A realm constitutes an exact duplicate of the original game conceptualisation (i.e. the combination of game mechanics, virtual geography and storylines). Pre-empted by its format, the functional community takes shape within and is attached to only one of those realms. On the contrary, intellectual communities follow WoW in its broader “cultural phenomenon” sense, spanning between realms.

1.1.4.1 – Social interaction aims at supporting the objectives of the goal-directed focus of the game and at satisfying the participants' communitarian needs within the vastness of virtual activities and landscapes. These are the

⁴⁸⁰ Mulligan & Patrovsky (2003) Chapters 5 and 11.

⁴⁸¹ <BBC, 11/05/09>.

⁴⁸² At the time of writing, the most overcrowded US realm was counting 36,669 subscribers and the second 32,355; in the main bulk of realms populations were ranging between 25K and 13K. In Europe the two most populated realms were counting approximately 28,000 each, while the average realm counted maximum number of players between 22K and 8K. Data retrieved from the unofficial WoW community resource WarcraftRealms.com, <<http://www.warcraftrealms.com/>>.

main axes on which we can understand WoW functionality that is how the community works within the closed platform.

Game characters in individual realms, while pursuing experience scores and the accumulation of treasure, temporarily form small adventuring bands and in the long run join the larger and more persistent guilds. Within such virtual and social localities, identifiability turns into an important signifier for the game personas: the virtual society will reflect a player's demeanours back at him. In other words, as virtual microcosms recreate mechanisms of social exclusion and inclusion, game characters' reputations interact with the functional organism which in return will respond in approval or disapproval.⁴⁸³

The value which projects a character's social existence as a rumour, as a legend, or as a playground bully becomes eventually apparent when the player contacts Blizzard, or when Blizzard contacts her. Mainly the ToU, and additionally common ethical sensibility, require particular in-game behavioural restraints. Suspected violations are usually reported to the in-game administrators by other players, or the former will act as appointed referees while monitoring the game.

When an issue emerges, the functional communities are activated outwards; that is mainly on Blizzard's official game forums or other online paths. Players from other realms join in discussions over pending or already taken decisions. In most cases, administrators do not show reluctance over explaining the opinions they hold. They will not indulge into endless disputes, but will still shed as much light as possible over thorny questions. Incidentally, this meeting of different realms on Blizzard's forums marks the first stage of the intellectual community's activation.

1.1.4.11 – Of course, perceptions, apprehensions and definitions of violations indicate a further problematic where the merging of real life and virtuality again dominates. Undesirable activity is divided in game cheating and behavioural derivations. The first category refers to gaining in-game advantages by interfering with the game's software; the second are particular

⁴⁸³ *Castronova* (2005) 113 – 117, on the distribution of status inside synthetic worlds.

practices and expressions which are deemed harmful for the gaming experience and other players. In-game advantages are discussed further below;⁴⁸⁴ they regard, in general, the development of game skills and the accumulation of WoW gold and enhanced virtual items. Any gaining that does not abide by the normal gaming procedure is considered to be unfair.

Behavioural trends, on the other hand, are broadly extracted from the tradition of the modern Western socio-cultural vocabulary. Offensive, ‘unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable’⁴⁸⁵ language is not acceptable when chatting and when naming characters; or, at least, it falls within the absolute discretion of Blizzard to decide. Similarly, players may not ‘harass, threaten, stalk, embarrass or cause distress, unwanted attention or discomfort to any user of the game’.⁴⁸⁶ Practically, these behavioural stipulations abide by the common formula upon which the content of codes of internal practices and conduct is drafted. Note that, game code includes text filters, which means that, at the user’s discretion, inappropriate words will appear as gibberish on game chatting modes.

Here we see the absolute monopoly which the OSP reserves in determining on occasion the ethical criteria against which deviant behaviours are judged. Moreover, “jurisdictional” borders may extend beyond the VW, in that sense where users may proceed outside the game with any of the above aberrational activities against other users, e.g. via email. It seems plausible that where such harassing communication is based on and aims at in-game relationships, the OSP may warn or take action within the game against reported perpetrators. Such issues raise crucial legal questions, yet are largely mitigated by the OSP’s societal (and economic) accountability: by the will to preserve a positive image to the consumer public through decision making.

⁴⁸⁴ *Infra* 4(II)[1.3.1.1].

⁴⁸⁵ *WoW US ToU* 9 (A) and (B)(i).

⁴⁸⁶ *WoW US ToU* 9 (B)(vi).

1.2 EULA – Without doubt, such issues draw heavily upon the presence and function of *a* law, i.e. the effective performance of a regulatory measure upon which are practically balanced the forwarded ideas of administration. When users enter WoW for the first time, and, from there on, whenever Blizzard updates the VW setting or upgrades the game servers, they are requested, before playing, to read and approve the subsequently onscreen-presented EULA and ToU texts. Note that the software does not allow clicking on the “I agree” button unless the user has scrolled down the textual representation window to its bottom; thus is assumed evidence of the player’s reading of both texts to their full length.

1.2.1 General - The WoW EULA begins with clarifications in capital letters and warding off the legal danger of users not having been prompted to read the entire text. Not long ago, a statement was added to previous agreement versions for reminding users that they are only licensed to run software: they do not own it.⁴⁸⁷

Placing the US next to the European EULA we begin seeing structural legal differences between two diverging politico-economic regimes. The US language gets straight to the point, soundly regulative and pragmatic; its terms are delivered in repetitive staccatos of commanding legalese that waste no breath in laying down the situation for what it is: “if you do not agree, you are not permitted to install the game.” The ornate style of the European version, by contrast, allows at some point even pleasantries to infiltrate the flux of the OSP’s bold restrictions, pretending on occasion to be mildly “suggestive”; it appears reserved and more interested in exhibiting a casual, less rigid, face. As I will explain in more detail shortly, the (striking) difference in attitudes serves purposes discovered in the proliferation of

⁴⁸⁷ “THIS SOFTWARE IS LICENSED, NOT SOLD.” At least until late 2008, this phrase had not been included in the European EULA. The issue of software use marks a persisting dispute between users and OSPs, where the former claimed their purchasing of the game in its physical manifestation of the CD ROM as similar to buying a music CD. OSPs, on the contrary, proceeded with strongly refuting such claims, predicting dangers of misappropriated and exploited original software code if purchasers were left with the impression that the game developer was implicitly giving the green light.

judicial arguments over the trans-national expansion of commercial communications and services.⁴⁸⁸

In general, the software programme and its subsequently incorporated updates, relevant printed materials and online or electronic documentation, as well as ‘any and all copies and derivative works of such software program and materials’ are defined to be ‘copyrighted works’ (which means that software and mentioned material are all protected as original author’s work). The online role-playing game service is subject of the separate ToU agreement.⁴⁸⁹ Finally, ‘[a]ny use, reproduction, modification or distribution of the Game not expressly authorized by the terms [...] is expressly *prohibited*’ (emphasis added).

1.2.2 Licensing - With regards to running the game software on their computers, users concede to ‘a limited, non-exclusive license and right to install.’ That speaks of use only according to the agreed dictates of the OSP, which are then deployed in detail: users will not ‘in whole or in part, copy, photocopy, reproduce, translate, reverse engineer, derive source code from, modify, disassemble, decompile, or create derivative works based on the Game;’ they are allowed to make one copy of the Game and electronic users’ manuals ‘for archival purposes only’;⁴⁹⁰ they will not run cheats, such as hacks and automation software (“bots”), to undermine software performance for gaining in-game advantages, and they will not use scanning software that intercepts ‘or otherwise collects information from or through the Game or the Service, including without limitation any software that reads areas of RAM used by the Game to store information about a character or the game environment’;⁴⁹¹ generally, users should not ‘modify or *cause to be modified* any files that are a part of the Game Client’ (emphasis added).⁴⁹²

The majority of these limitations defer to technical interference with the software. Additionally, though, are also provided against economic

⁴⁸⁸ Generally, not all jurisdictions covered under the European EULA exhibit the same tolerance to the contract’s terms.

⁴⁸⁹ *WoW US EULA 3*.

⁴⁹⁰ *WoW US EULA 2(A)*.

⁴⁹¹ *WoW US EULA 2(B), 2(D) and 2(G)(b)*.

⁴⁹² *WoW US EULA 2(E)*.

exploitations of the software *through* the game. Users will not ‘exploit the Game or any of its parts’ [...] ‘for any commercial purpose, including’ [...] ‘for gathering in-game currency, items or resources for sale outside the Game; or performing in-game services in exchange for payment outside the Game.’⁴⁹³

1.2.3 Property and Ownership - Past experience of the MMORPG industry is built on the dualistic approach to ownership, both physical and intellectual, which the EULA and the ToU set up between them.

1.2.3.1 - It may be argued that at first glance the writing of the EULA implies that a permitted physical transfer of the original software copy results also in transferring of the game-account;⁴⁹⁴ note, however, that the latter transfer checks with unauthorised commercial practices, which the gaming industry usually chases down and are, anyway, covered by other parts of the agreement.

The concession to transferring is delivered within a very particularly framed general statement of software licensing;⁴⁹⁵ a powerful articulation that, expressly repeated, guarantees that OSP rights precede any subsequently granted freedom to user activity. Understandably, the importance which OSPs have unearthed in describing their relationship with consumers/users as different from selling software appears crucially defining. Therefore:

‘All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses,

⁴⁹³ *WoW US EULA 2(C)(b)-(c)*; such, as mentioned, in-game services include “hiring” a higher level character to escort the player through quests and battles; the player moves fast through game stages using the hired character as a bodyguard.

⁴⁹⁴ *WoW US EULA 4(B)*.

⁴⁹⁵ *Ibid.* The EULA carefully settles disputes that have developed in time between online gaming communities and game publishers by deploying a legal interpretation of the service experience as temporary access to on-screen displayed content (at least, if we are to understand licensing in a literary sense).

methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard;⁴⁹⁶ (emphases added).

The combination of licensing software operations with declarations of absolute ownership over the software application platform, its elements and activities, creates an over-protective cluster which performs outwardly: in order to ensure the integrity of the described online service object, which in addition evolves along both incoming and outgoing communications between the game and the world, its surrounding exteriors need to be neutralised – in legal terms. That also necessitates the partial relinquishment of user's otherwise general rights, handed over to the OSP's discretion.

In any case, if not made lucid via the EULA blanket clause, the ToU go to a greater extent for setting – literally – the account straight:

'You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game.'⁴⁹⁷

Actually, the ToU repeat, now enriched, the ownership clause as found in the EULA, adding 'user accounts', 'transcripts of the chat rooms',⁴⁹⁸ 'character profile information' and 'recordings of games played' that use the game.⁴⁹⁹ The abandoning on the user's part of all such possible claims is completed in an overarching and very strong acceptance statement of the OSP's absolute proprietary power over the account and its contents.⁵⁰⁰

1.2.3.2 The European agreement includes almost unedited the content of the US EULA section, to the point that it submits partially copyright regulation to responding US laws; of course, the important difference to the "original" text emerges by omitting references to traditional "title" and "ownership"

⁴⁹⁶ *WoW US EULA 4(A)*.

⁴⁹⁷ *WoW US ToU 11, Ownership/Selling of the Account or Virtual Items*.

⁴⁹⁸ Chat is accordingly defined as '[c]ommunicating in-game with other Users and Blizzard representatives, whether by text, voice or any other method;' *WoW US ToU 9(B)*.

⁴⁹⁹ *WoW US ToU 4, (Ownership)*.

⁵⁰⁰ *WoW US ToU 7, (No Ownership Rights in Account)*: 'NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN THE ACCOUNT, AND YOU FURTHER ACKNOWLEDGE AND AGREE THAT ALL RIGHTS IN AND TO THE ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF BLIZZARD.'

rights: the ownership statements of the European EULA falls solely under the intellectual property mode.

The European ToU, from their first section, detach legally the user from the account, using shorter phrasing⁵⁰¹ compared to the “no ownership” claim in the US version. Account transfers violate the agreement and, in any case are not recognised;⁵⁰² the inclusive ownership statement is transferred from the US to the European ToU.⁵⁰³

1.2.4 Law - In response to provisions of its ownership regime, the EULA places the game under the protection of ‘the copyright laws of the United States, international treaties and conventions, and other laws,’⁵⁰⁴ without indicating further details on the as treated content of law. The License Agreement itself is in general governed by the law of the State of Delaware and ‘without regard to choice of law principles;’⁵⁰⁵ expressly excluded is the application of the U.N. Convention on Contracts for the International Sale of Goods (CISG).⁵⁰⁶

If informal negotiations over controversy or claims related to the EULA fail, dispute resolution is bindingly (i.e. by virtue of the agreement)⁵⁰⁷ sought through arbitration.⁵⁰⁸ The terms of arbitration place only individuals against the OSP; thus, neither joined, class-action based or representative of other persons nor of the general public action is allowed into the resolution process.⁵⁰⁹ Further clauses build up the legitimacy of the arbitration proceedings, in view of the nature of the disputed issues, of the validity of the arbitration award and, mainly, of the broader compliance with US federal

⁵⁰¹ *WoW Europe ToU I(1), Accessing the Service*: ‘Notwithstanding anything to the contrary herein, you acknowledge and agree that you shall have no ownership or other property interest in the Account.’

⁵⁰² *WoW Europe ToU I(5)*.

⁵⁰³ *WoW Europe ToU XV, (Ownership)*.

⁵⁰⁴ *WoW US EULA 4(A)*.

⁵⁰⁵ *WoW US EULA 15(F), (Governing Law)*.

⁵⁰⁶ United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3; see next Chapter.

⁵⁰⁷ *WoW US EULA 15(B), Binding Arbitration*: ‘YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL.’

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *WoW US EULA 15(C)(1-3), Restrictions*.

laws.⁵¹⁰ From the overall negotiations/arbitration framework are excluded disputes that seek ‘to enforce or protect, or concerning the validity of’ either the user’s or the OSP’s intellectual property rights, disputes that are ‘related to, or arising from, allegations of theft, piracy, invasion of privacy or unauthorized use’ and claims for injunctive relief.⁵¹¹

The arbitration locus is left at the discretion of US residents; for non-US residents, it is set at the County of Los Angeles, California. Nevertheless, any dispute ‘not subject to arbitration (other than claims proceeding in any small claims court) [...] shall be decided by a court’ within the above mentioned jurisdiction.⁵¹² Additionally, local laws apply to consumers from the other jurisdictions that are covered by the US game-servers, if they do not opt for the prescribed arbitration scheme; in that case, domestic courts are expected to interpret the EULA with giving maximum effect to its terms and conditions.⁵¹³

Apart from a few scattered references (e.g. in its ‘liabilities’ section), the main European agreement does not go to any special lengths for appointing an exclusive legal framework or a specific legal forum. Only the ToU text subscribes its application to the user’s country of residence legislation.⁵¹⁴

1.2.5 Warranties and Liabilities - In the US format of the WoW EULA, the publisher’s responsibility over the software product’s condition and performance is almost totally abolished,⁵¹⁵ offering OSPs margin for dealing with dissatisfied consumers, under the commercial principle of good faith

⁵¹⁰ *WoW US EULA* 15(B).

⁵¹¹ *WoW US EULA* 15(D)(1-3), *Exceptions to Informal Negotiations and Arbitration*.

⁵¹² *WoW US EULA* 15(E), *Location*.

⁵¹³ *WoW US EULA* 15(F): ‘(For) customers who purchased a license to the Game in, and are a resident of, Canada, Australia, Singapore, or New Zealand, other laws may apply if you choose not to agree to arbitrate as set forth above; provided, however, that such laws shall affect this Agreement only to the extent required by such jurisdiction. In such a case, this Agreement shall be interpreted to give maximum effect to the terms and conditions hereof.’

⁵¹⁴ *WoW Europe ToU XIX (Miscellaneous)*.

⁵¹⁵ *WoW US EULA* 11 (*Limited Warranty*): ‘THE GAME (INCLUDING WITHOUT LIMITATION THE GAME CLIENT AND MANUAL(S)) IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF CONDITION, UNINTERRUPTED USE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. The entire risk arising out of use or performance of the Game (including without limitation the Game Client and Manual(s)) remains with the user.’

and practices of market self-regulation and rectification. A supplementary clause functions, however, as a legal failsafe mechanism, covering jurisdictions where such ‘exclusion or limitation of implied warranties’ does not apply.

The European version exhibits a similar attempt to exonerate the game owner,⁵¹⁶ albeit with several differences in the use of language. Hence, the responding section of the EULA⁵¹⁷ bears the title ‘Additional Manufacturer’s Guarantee for the Game Client,’ instead of the “Limited Warranty” which presides over its US counterpart; additionally, most limitations appear toned down or even removed. In this part, the European EULA abstains in spirit from actually contesting exclusivity of legal effects.

Moreover, whilst the US text breathes intensively with persisting OSP concerns, the European EULA appears more user-centric by picking a rather descriptive perspective over the commercial transaction to replace condensed concentrations of liability exclusions with – arguably simplified – step-by-step elaborations of the user’s rights. In other words, the former reaches great extends while covering *against any possible* grounds on which the OSP *would be* considered liable, whereas the latter states the *furthest limits* which *should apply* to users’ contact with the product and the service. The difference acquires more meaning as the agreements move structurally deeper into service-related liabilities.

There, the US version disclaims emphatically any derivative form of OSP liability, placing, at the same time, the user in the position of renouncing (by agreeing with the license) any derivative legal claim that may emerge from association with the game.⁵¹⁸ Damages to virtual objects or substantial losses

⁵¹⁶ *WoW Europe EULA 12*: ‘Blizzard Entertainment will, [...] at its sole discretion 1) correct any defect, 2) replace the Game, or 3) refund your money.’

⁵¹⁷ *Ibid.*

⁵¹⁸ *WoW US EULA 12 (Limitation of Liability, Indemnity)*: ‘NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE OF ANY KIND ARISING OUT OF THE GAME OR ANY USE OF THE GAME, INCLUDING WITHOUT LIMITATION LOSS OF DATA, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER DAMAGES OR LOSSES BLIZZARD SHALL NOT BE RESPONSIBLE FOR ANY INTERRUPTIONS OF SERVICE, INCLUDING WITHOUT LIMITATION ISP DISRUPTIONS, SOFTWARE OR HARDWARE FAILURES, OR ANY OTHER EVENT WHICH MAY RESULT IN A LOSS OF DATA OR DISRUPTION OF SERVICE.’

from personal game accounts can under no circumstances be restored or retrieved.⁵¹⁹ The OSP is expressively set outside any technically, economically or socially accruing responsibilities⁵²⁰ that lie beyond its providing of the original game software and service in accordance with the technically limited and certified operational standards; and even then, the free of defects operation of the service is, expressly, not warranted.⁵²¹

Such exhaustive exclusions are missing from the European agreement. On the contrary, although a certain limitation is agreed against applying to claims of tort, liability emerges as an issue of degree that refers to either intention or negligence from the part of the OSP, hence, proportionally inescapable.⁵²² Further on, the text views a further possibility of considering the OSP liable, as far as ‘in case of death or personal or physical injury according to statutory law’ and where reasoned in a court of law,⁵²³ another potential of ‘slight negligence’ is also, under strictly laid down conditions, visible.⁵²⁴

1.2.6 Monitoring and Access to Users’ Systems - In several parts of the agreement, the user is required to abstain from infringing activities that can be realised only with the running of circumventing programs (‘unauthorised third party program’). In order to preserve the running of the game intact, the

⁵¹⁹ ‘NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE TO PLAYER CHARACTERS, VIRTUAL GOODS (E.G., ARMOR, POTIONS, WEAPONS, ETC.) OR CURRENCY, ACCOUNTS, STATISTICS, OR USER STANDINGS, RANKS, OR PROFILE INFORMATION STORED BY THE GAME AND/OR THE SERVICE;’ *ibid.* Also, liability is disclaimed with regards to ‘loss or damage’ to (virtual) inventories and user profile information; *WoW US ToU*, 15(B), (*Limitation of Liability*).

⁵²⁰ *WoW US EULA* 12.

⁵²¹ *WoW US ToU*, 14, (*Warranty Disclaimer*): ‘BLIZZARD DOES NOT WARRANT THAT THE GAME OR THE SERVICE WILL BE [...] ERROR-FREE, THAT DEFECTS WILL BE CORRECTED, OR THAT THE GAME OR THE SERVICE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. BLIZZARD EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE, AND NON-INFRINGEMENT.’

⁵²² *WoW Europe EULA* 13 (*Limitation of Liability*).

⁵²³ ‘If you acquired the media containing the Game Client in Germany or Austria or if you access the WOW servers from the territory of Germany or Austria or in such other countries where local laws would apply, Blizzard Entertainment may also be liable in case of death or personal or physical injury according to statutory law where Blizzard is adjudged to be responsible for such death or personal or physical injury;’ *ibid.*

⁵²⁴ *Ibid.*

EULA lays out terms of monitoring users' computer systems, hardware and personal data.⁵²⁵ The ToU amplify considerably the applied meaning of monitoring: users' chat sessions may be monitored, recorded, reviewed or even modified;⁵²⁶ the OSP may also disclose any personal and affiliated technical information to state agencies without prior notice.⁵²⁷ The user/consumer grants her consent with regards to all mentioned instances.

The European EULA approaches more cautiously the delicate issue of clandestine invading of home systems. For example, in discussing patches and software updates, it underscores extensively the importance of utility and need in the contested activity for the benefit of both the user and the game, before stating that such operations will take place without the users' knowledge.⁵²⁸ At first, the ToU copy overtly from the US clauses the technical extent of monitoring of user's systems,⁵²⁹ but stating different reasons: "non-personal" data are retrieved 'in order to make certain demographic assumptions regarding' WoW users;⁵³⁰ extensive system components are being accessed '[i]n order to assist Blizzard',⁵³¹ only 'for the purpose of identifying "cheaters" and for no other reason.' Subtly, the complete agreement framework prescribes deeper and detailed identification monitoring.⁵³² Finally, disclosure of such information to governmental authorities and to third parties is provided in explicit abundance by EU laws.⁵³³

⁵²⁵ *WoW US EULA 6 (Consent to Monitor) and 17(B).*

⁵²⁶ *WoW US ToU 17(D).*

⁵²⁷ *WoW US ToU 17(C):* 'Blizzard may, with or without notice to you, disclose your Internet Protocol (IP) address(es), personal information, Chat logs, and other information about you and your activities: (a) in response to a request by law enforcement, a court order or other legal process; or (b) if Blizzard believes that doing so may protect your safety or the safety of others.'

⁵²⁸ *WoW Europe EULA 9, (Patches and Updates).*

⁵²⁹ *WoW Europe ToU XVII,1 (Acknowledgements).*

⁵³⁰ *WoW Europe ToU XVII, 4.*

⁵³¹ *WoW Europe ToU XVII, 5.*

⁵³² *WoW Europe ToU XVII, 3:* 'Blizzard Entertainment has the right to obtain certain identification information about your computer and its operating system, including the *identification numbers of your hard drives, central processing unit, IP addresses and operating systems, for identification purposes without any further notice to you.*'

⁵³³ *WoW Europe ToU XIX:* '[I]n the event that Blizzard Entertainment is contacted by governmental authorities and/or parties seeking information or legal redress against you for a violation committed by you or alleged to have been committed by you involving your use of World of Warcraft, Blizzard Entertainment will cooperate fully with all governmental authorities ensuring an adequate level of protection as required under Article 25 of European Directive 95/46/EC, and any lawful orders of the court with regard to the release of

1.2.7 Derivative Works – EULA texts prohibit users to develop derivative works within the software context.⁵³⁴ The European ToU include an additional paragraph prescribing that the OSP ‘expressly reserves the exclusive right to create derivative works’ based on the game, without providing further definitions.⁵³⁵ The user ‘may not create derivative works’ without the prior express, written permission of Blizzard. It can be argued that this clause covers not only software derivative works, but also e.g. machinima. This changed to some extent when Blizzard adopted a new machinima policy in 2007, allowing appropriations of WoW properties under the condition that they will be limited to non-commercial purposes.⁵³⁶

Nevertheless, the ownership statement⁵³⁷ feels competently set for covering further cultural appropriations of game material. It actually warns against unauthorised misappropriations in e.g. fan-art, without though looking into particular measures against users.⁵³⁸

Indications of the OSP’s perspectives are found on Blizzard’s legal department webpage.⁵³⁹ These are mere guidelines for using copyrighted material on fan-sites or for the purposes of producing remixes, machinima etc. Some lines about material that is not used for commercial purposes are not drawn particularly clear.⁵⁴⁰ In general, though, the approach appears

information that relates to you and your use of World of Warcraft, including but not limited to user Internet Protocol (IP) addresses, associated personal information and all other user information on file.’

⁵³⁴ While fan-fiction poses the characteristic instance of derivatives as works based on previous creations, in computer games derivative works include ‘mods’ (modifications by users that have games either fully transformed or structurally changed, e.g. new maps, characters etc.) or versions of an online game ran on other to the publishing company’s servers.

⁵³⁵ *WoW Europe ToU* III, 1.

⁵³⁶ Hayes (2008).

⁵³⁷ *Supra* 564.

⁵³⁸ However, there hovers ambivalence over how ‘licensors may protect their rights in the event of any violation’ of the EULA and in respect of material, listed as owned by the OSP. The ToU texts imply that the OSP may (legitimately) sue for copyright infringement, but may as well at the same time, by considering the farfetched example of fanart to be a breach of contract, terminate the game account.

⁵³⁹ <<http://us.blizzard.com/en-gb/company/about/legal-faq.html>> and <<http://eu.blizzard.com/en-gb/company/about/legal-faq.html>>.

⁵⁴⁰ The response to writing novels based on Blizzard games is negative, commenting that Blizzard ‘reserves the right [...] to ensure that only [...] officially licensed and approved material is created.’

community conscious and friendly.⁵⁴¹ Nevertheless, these guidelines have not been incorporated in either the EULA or the ToU texts.

1.2.8 - The complete agreements set contains scattered descriptions of unwelcome user action, which, by picturing experiences familiar to the setting, indicate characteristically instances of breach; for example, power-levelling services paid in real world money. There is nothing wrong, neither in principle or in function, with that; the problem emerges from the intentionally over-general terms, which aim at pre-empting similar instances. Interpretative misapplication of EULA clauses may hit users while the agreement does not come down overwhelmingly powerful on the OSP decision maker, who also drafts the text and changes it at will at any time.

1.3 Within this normative framework, Blizzard develops an ongoing relationship with the community. The EULA and ToU analysed so far do not give the complete picture of the internal regulatory narrative, and thus could understate the power of other determinative narratives of the OSP and community connection. As explained, community does not simply refer to individual functional “kernels” (e.g. the populace of the Blackrock realm on WoW’s American servers) but to the broader social and cultural reach of involvement with WoW. For instance, the game’s official website provides for a good starting point for engaging with the diversity of works which are developed within the online intellectual communities. Blizzard host links to fansites and user created content, like fanfic and fanart. Additionally they offer game material that can be appropriated by fans e.g. WoW-themed website construction kits; they retain and keep alive the community bond.

Virtual world literature frequently (and consistently) invokes an insider’s distinction in the OSP entity between publisher and game developer.⁵⁴² Developers as a rule come from gamer and online user backgrounds; they are the intellectual community’s members that are acquiring actual knowledge of both sides of the story, coming into the

⁵⁴¹ For example, Blizzard host a “letter” to WoW “machinimators” on their community pages, underlining amongst others the non-commercial use requirement and relations with content-hosting websites; <<http://www.worldofwarcraft.com/community/machinima/letter.html>>.

⁵⁴² Generally in *Mulligan & Patrovsky* (2003); *Taylor* (2006); *Balkin & Noveck* (2006).

position to realise firsthand how activities which individual players consider to be misdemeanours can cumulatively harm the continuation of the VW. However, developers and designers are not administrators. The necessary allocation of problem solving tasks between departments of different expertise ends often in practice with the OSP, as a whole, appearing static when dealing with users.⁵⁴³ Thus OSPs switch occasionally between addressing either the “community” or their “customers”, each different disposition allowing the roles of managers, lawyers and game designers to surface alternatively. Let us not, though, create a false image of internal struggles where these do not exist: the whole entity of the OSP abides by overlapping ideologies that mobilise its actions simultaneously within multiple contexts.

On the other hand, WoW constitutes a privileged case of a second generation VW. The game service is rather a latecomer that benefited much from the experience of its predecessors, the likes of the already mentioned *Ultima Online* and *EverQuest* MMORPGs. By the time of its market release, the Information Society had made the passage from the WWW to the Web 2.0 era, a great deal of reflection into online services’ policies had taken place. The bulk of chronic problems in relationships between OSPs and gamers had been re-evaluated from multiple angles. WoW has to a large extent stood up to the challenge; its enormous success and its smooth integration of the community give sufficient evidence.

These are the positive qualities and background, which, juxtaposed with the scattered cacophony of (unexpectedly) ambivalent EULA clauses and controversial OSP decisions make WoW an ideal example for this research, by fleshing out the instance for the persistent paradigm of private administration’s arguable shortcomings. And what a private administration this is, one which has managed to retain effective communications lines with its virtual citizens.

1.3.1 – Now, reports of disputes have been circulated across the community and the various online news agencies. While we might not be in position to

⁵⁴³ Gomulkiewicz (2004) 692 – 694.

fully scrutinise the facts in the following accounts of events for their validity or to guarantee the reporters' *bona fide* impartiality, we are dealing with stories that have been around for a while, prominently placed on websites of high traffic, and, yet, not publicly discredited or refuted by Blizzard/Vivendi.

1.3.1.1 – Early in 2006, Blizzard banned over 5,400 accounts and suspended 10,700 more for using third-party programs (“bots”) to farm gold and items.⁵⁴⁴ Blizzard had apparently received a large amount of incoming reports and allegedly had investigated in response. The community's reaction was largely positive as announcements of more bans were being released.⁵⁴⁵

1.3.1.11 Online commentary, however, questioned the problem of “gold-farming” itself and that it should have been more effectively dealt with by going after the “big players” in the online market, the thousands of websites that practice selling virtual gold.⁵⁴⁶ Sales of gold and power-leveiling services thrive online and, apparently, gold-farming means professional business in countries like China.⁵⁴⁷ However, as the next Chapter explains, particular limits are posed on companies like Blizzard against chasing legally gold-farmers; these constraints, though, did not apply to a WoW player, who raised a class action lawsuit against one of the largest virtual property sellers⁵⁴⁸ that ended in a settlement in his favour.⁵⁴⁹

1.3.1.12 - Following the strong stance against in-game cheating,⁵⁵⁰ the game software would scan users' computers for discovering use of unauthorised background programs.⁵⁵¹ Users disputed not being provided with details on the obtained system information or the channelling of that information by

⁵⁴⁴ <WoW's official news, 12/4/06>.

⁵⁴⁵ <Kotaku, 13/06/09>.

⁵⁴⁶ <Virtually Rich, 30/04/06>.

⁵⁴⁷ Heeks (2008); Jin, Ge 'Chinese Gold Farmers in the Game World', *Consumers, Commodities & Consumption* newsletter, Vol. 7, No. 2, May 2006; <Times, 23/09/06>.

⁵⁴⁸ <Virtually Blind, 09/11/07>.

⁵⁴⁹ *Hernandez v. Internet Gaming Entertainment, Inc.*, No. 07-21403 (S.D. Fla), settled on 26/08/08.

<<http://www.bannerwitcoff.com/patentarcade/docs/Hernandezv.IGEJointStipulation.pdf>>.

⁵⁵⁰ The Anti-Cheat Policy of WoW, apart from being scattered throughout the EULA and the ToU, it is also available on one single webpage for consulting it in advance, <<http://www.wow-europe.com/en/policy/anticheat.html>>; interestingly, separate compact explanation of the anti-cheating utility's operation is available only on WoW Europe.

⁵⁵¹ <CNET, 12/8/05>.

and beyond the OSP.⁵⁵² In the past, SOE had done the same with their *EverQuest* game, without alerting gamers; after angry reactions they were forced to deactivate their scanning software.⁵⁵³ Blizzard's representatives have argued that their scanning differs to SOE's in being spelled out in the EULA; as users are bound by their agreeing, consumer's privacy rights are not circumvented but consciously relinquished.

1.3.1.13 - Blizzard/Vivendi would later move extra-judicially against a maker of such bot software;⁵⁵⁴ in response, *MDY Industries* filed a lawsuit seeking a declaratory judgment that they do not violate Blizzard's intellectual property rights by selling the contested programme.⁵⁵⁵ The district court decided in favour of the OSP.⁵⁵⁶ The decision was appealed; the Ninth Circuit agreed partly with MDY but, more importantly, it ruled that players using bot software, while breaching the EULA they do not commit copyright infringement just because the OSP's terms have prescribed so. The case was remanded to the district court.⁵⁵⁷

1.3.1.2 - In another case,⁵⁵⁸ Vivendi/Blizzard and the Entertainment Software Association (ESA) were repeatedly sending notice and takedown requests to eBay,⁵⁵⁹ ordering the termination of auctions of an unofficial gaming guide to *WoW*.⁵⁶⁰ Allegedly, they were claiming intellectual property rights infringements of copyright and trademark. Responding to subsequent suspensions of his eBay accounts, the eBay seller - and author of the

⁵⁵² <<http://archives.neohapsis.com/archives/dailydave/2005-q4/0085.html>> (an example of email communication between user and support staff; the OSP representative points out the logical conundrum in the matter at hand: disclosing accurate information on scanned system parameters would basically open backdoors to exposing game servers).

⁵⁵³ <*CNET*, 5/4/00>.

⁵⁵⁴ <*BBC*, 16/07/09>.

⁵⁵⁵ <*Virtually Blind*, 23/03/08>.

⁵⁵⁶ *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 2008 U.S. Dist. LEXIS 53988, (D. Ariz. Jul. 14, 2008).

⁵⁵⁷ *MDY Industries v. Blizzard Entertainment* (9th Cir. Dec. 14, 2010) <<http://www.ca9.uscourts.gov/datastore/opinions/2010/12/14/09-15932.pdf>>.

⁵⁵⁸ *Brian Kopp v Vivendi Universal Games, Inc., Blizzard Entertainment, Inc., and Entertainment Software Association*, litigation summary on the website of the Public Citizen Litigation Group, <<http://www.citizen.org/litigation/forms/cases/CaseDetails.cfm?cID=209>>.

⁵⁵⁹ The process invoked section 512 of the Digital Millennium Copyright Act (DMCA), explained in detail in the next Chapter.

⁵⁶⁰ <*Public Citizen Litigation*, 24/3/06>.

disputed book - filed a court complaint in the California federal court.⁵⁶¹ Eventually, the parties settled, with the companies withdrawing their claims and allowing re-listing of the guide on eBay.⁵⁶²

1.3.1.3 – Another interesting story⁵⁶³ has been debated by a WoW user in Europe. According to the exhaustively detailed account of events on his webpage,⁵⁶⁴ he had purchased a gaming keyboard,⁵⁶⁵ released by international peripheral-devices manufacturer *Logitech*. Such keyboards automate short combinations of keystrokes (“macros”) and for technological compatibility reasons they preinstall a system software component on users’ computers. WoW’s scanning application detected that interoperation of software instigated the user as using unauthorised hacking software to engage in “botting” (i.e. automated playing for the purpose of goldfarming). Blizzard/Vivendi immediately suspended the account indefinitely. Thus was initiated an exchange of communications: the user would send long emails asking details and explaining his alleged circumstances; the OSP’s addressees would reply with frugal adamant and impersonalised statements - that is, neither answering to the points raised, nor revealing any actual insights into the personal case nor showing any sign of having actually investigated it (in those emails there was not a single reference to the keyboard matter). Thus, the game account was apparently high-handedly banned without prior warning and, moreover, without sufficient reasoning given.

1.3.1.31 – This shows the largely negative understanding of the management of massive normative coordination systems and the bureaucratic demeanours which are practiced therein. Capturing in essence a paradigm/metaphor of bad government,⁵⁶⁶ the user’s general complaint revolved around the

⁵⁶¹ The original lawsuit available at <<http://www.citizen.org/documents/003-Complaint.pdf>>.

⁵⁶² <*Public Citizen Litigation*, 9/6/06>.

⁵⁶³ <*The Inquirer*, 16/03/2006>.

⁵⁶⁴ <<http://infernix.net/wowban/>>.

⁵⁶⁵ Gaming keyboards differ to traditional keyboards in design, being modified to support ergonomically the hand co-ordination of gamers.

⁵⁶⁶ There is a difference between defining the circumstances of “bad government” to “bad administration”. For one thing, administration is logistically assessed on the basis of managing resources and presented productivity; government refers to political relationships of control over a public.

application of such demeanours to a nominally horizontal relationship, which transforms into a persistent power inequality module. The main point here is not the analogy between the OSP's privileged position with a state government, but rather the infusion of rules in the community as instances of bureaucracy (which confirm the alleged simulation). From the personal experience I described further above, my first communication with the OSP gave similarly the chillingly familiar impression of dealing with any real-world state administration department. Relating to the current example, electronic correspondence felt more like attempting to keep a conversation with a pre-programmed cola-vendor - i.e. a limited answering module, delineated by ticking boxes.

Contemporary policies of common procedure appear more and more reductionist, where certain levels of automation and generalisation are pursued expediently. Despite encouraged by promises of democracy in state administration and guarantees of high quality customer care in business-to-consumer relationships, the growing influx of demandingly personalised communications are met by outsourced problem-solving agencies with reluctance to dig deeper into individual circumstances. Moreover, decision-making mechanisms turn inaccessible in practice. Such themes in procedural modalities give pragmatic form to Kafkaian bureaucracy, regardless of their placement within state government or private sector settings. In this sense, we need to perceive bureaucracy as the disposition of the organised system of administration towards the individual.

1.3.1.32 - One of the main principles of systemic efficiency requires dealing with the public without “wasting” valuable time and human resources. Bureaucracy realises the furthest end of that mantra, where effectiveness is idealised by strict attainment to procedure; it denies broader interference of case by case considerations, preferring to narrow down several isolated incidents and fit them within one, be it tried, mode of procedural resolution.⁵⁶⁷ While not necessarily negative in itself, bureaucracy institutionalises deterrents in social action. Citizens of a state “x” will hardly

⁵⁶⁷ *Merton* (1968) 253.

accept enthusiastically a new government measure; in fact, they are expected to protest against governmental decisions with loud complaints. Struggling, however, with bureaucratic operations in the legitimate means of political resistance,⁵⁶⁸ the scattered, demoralised individuals submit, in the end, to the initial will of their government.⁵⁶⁹

1.3.1.33 - Looking back at the narrated account, the EULA posits a fairly general rule; the OSP received automated feedback, suspected breach and applied without concessions that general rule to very specific circumstances. According to the user, the application of the rule by the OSP lacked transparency and evaded his particular requests for explanatory reasoning. Nevertheless, the decision passed without further debates.

The utilisation of wooden language and the actual exclusion of the individual from discussions over his future standing in the community create genuine instances of the bureaucracy effect. Thus, the user claimed on his website unwillingness to take further action, simply because he was utterly convinced that in the aftermath there was little hope – if any at all - to penetrate the one-sided procedural set-up. Accordingly, members of the expanded WoW community that were alerted to the incident commented heavily against,⁵⁷⁰ had even similar stories to share, yet at the end of the day they admitted dishearteningly the futility of trying to contest the applied closed decision modules.

1.3.1.4 – In 2006, a US player started advertising her gay-friendly guild, looking for new recruits.⁵⁷¹ An in-game administrator issued a warning that posting of such content violates the ToU and she (the player) and her guild were facing banning. The user challenged Blizzard's claims and publicised her case on several WoW online discussion forums. In-game gay pride marches took place on various servers, while two guilds that were also known as “gay friendly” wrote open letters, criticising the OSP.

⁵⁶⁸ One needs to consider the expenses, protocols and timeframes that burden access to civil services, where government action should be blocked.

⁵⁶⁹ Merton (1968) 256 - 260, transfers bureaucracy's dysfunctions in its relationships with the public.

⁵⁷⁰ <Digg, 15/03/2006>.

⁵⁷¹ The description of events here is mainly extracted from <BBC News, 13/02/09>.

Eventually Blizzard apologised to the player and reviewed some relevant aspects of their policy, including a promise to train employees, who monitor play and forums, for addressing such matters with sensitivity.⁵⁷² Initially, they had responded that talking about e.g. religious, sexual or political affiliations in the game⁵⁷³ invites, actually, verbal abuse by less disciplined users.⁵⁷⁴ The player's attorney counter-claimed that, although the OSP's awareness is laudable, they 'cannot issue a blanket ban on any mention of sexual orientation or gender identity.'⁵⁷⁵

1.3.1.41 - The substantial weight, which the incident exhibits, lies in the infiltration of the functional by the intellectual communities, rather than in the actual storytelling of how another LGBT rights challenge was fought and won: a participant, who had felt wronged, spread her assertion across the intellectual community, i.e. WoW-related discussion forums, possibly social networking websites etc; players were bestirred outside the functional community, within the expanded cluster of communications circles that grow outside the MMORPG but, yet, keep WoW in their heart of interests; The combined external and internal activities procured change in the VW: normativity changed its "orientation".

One could argue that the OSP had been merely annoyed. VWs are one of the latest hypes in tech-news coverage; the whole incident might have partly escalated to receiving negative advertising. Indeed, there would be no harm done for Blizzard if they conceded in principle - as they eventually did - to greater flexibility of perspective. Even under this model scope, though, such a decision is again political; it examines the sum of exercised pressures, foresees evolving clusters of implications and measures everything together towards forming the least unwelcome solution.

⁵⁷² <msnbc, 15/02/06>.

⁵⁷³ <Kotaku, 30/01/09>.

⁵⁷⁴ Blizzard's original response, as reprinted on *boingboing*, 'World of Warcraft: Don't tell anyone you're queer', 27/01/09, <<http://www.boingboing.net/2006/01/27/world-of-warcraft-do.html>>: 'While we appreciate and understand your point of view, we do feel that the advertisement of a "GLBT friendly" guild is very likely to result in harassment for players that may not have existed otherwise. If you will look at our policy, you will notice the suggested penalty for violating the Sexual Orientation Harassment Policy is to "be temporarily suspended from the game." However, as there was clearly no malicious intent on your part, this penalty was reduced to a warning.'

⁵⁷⁵ <Kotaku, 6/2/06>.

There is no need to remark the self-evident: in VWs politics is inevitable. One coding authority affects with its decisions large communities of interests.⁵⁷⁶ Here surfaces an unspoken dynamic, where the political paradigm inside the contained virtuality is redrawn closer to the complex dimensions it acquires in actuality.

2. Living a Second Life - ‘Second Life is a free online virtual world imagined and created by its Residents. From the moment you enter Second Life, you’ll discover a fast-growing digital world filled with people, entertainment, experiences and opportunity.’ This is how Linden Lab, the original creators and facilitators of SL, describe the VW on the official SL website, while elsewhere as a ‘form of shared experience, where individuals jointly inhabit a 3D landscape and build the world around them.’⁵⁷⁷ More or less, these statements provide a rounded summary of the case at hand. However, SL early adopted and advertised one feature that radically differentiated it from preceding free VWs and to commonly exercised policies in the relevant industry: users are allowed to ‘retain real-world intellectual property rights to their virtual creations.’⁵⁷⁸

2.1 SL’s function as a social environment connotes the absence of a main script or storylines. Naturally, this does not strike off the other narratives and meanings which underlie thematically participation in the VW as functional community or may resurface through the processes of the latter.

2.1.1 Technical Infrastructure - In its technical essence, SL constitutes a gathering of subsequently arranged chat-rooms (thus the VW is also referred to as the “grid”),⁵⁷⁹ which, with the decisive help of immersive visual representations, melded into a pseudo-spatial continuity: from “above” the

⁵⁷⁶ *Castronova* (2005) 151.

⁵⁷⁷ Linden Lab website at <<http://lindenlab.com/about>>.

⁵⁷⁸ *Ondrejka, C.* ‘Escaping the Gilded Cage’ in *Balkin & Noveck* [eds.] (2006) 169; understandably, with this particular move SL transcended the isolating circle which other VWs attempt to build with contracts and it ‘allowed real-world law to reach into the virtual world.’

⁵⁷⁹ Apparently the term’s meaning is dual, since it also connotes the running of SL on a grid of computers.

virtual world looks like a mosaic of blocks of land (each one, in terms of the simulation, equal to 512m²), a ‘cluster of clusters.’⁵⁸⁰

Participants may roam the endless scenery which is actually created by other users: well over ninety nine percent of SL content is created by users.⁵⁸¹ Interactive tools that have been embedded into the software application allow the shaping and manipulation of 3D items; additionally, users have access to an easy to comprehend scripting language with which they may interfere with the computer code. Therefore, SL residents are offered the freedom to re-create their allocated spaces: they decide over the landscape’s morphology; raise buildings; design avatar appearances and clothes; programme routines that allow avatars to further naturalise their behavioural representations on the screen; they may even insert ideas which would have otherwise been profitable even outside the virtual setting.

2.1.2 Socio-economic Superstructure - With the absence of game scripts and the constitutive role played by creativity, the item-based social space character of SL has pushed its development towards distinctively inclusive modules of social association and to economic structures of genuine internal production and redistribution.

2.1.21 - SL has transformed into a large experimentation ground where various aspects of the social and personal identity concepts are being explored. Community formation is realised in either communication channels (called ‘groups’) or events/gatherings within the pseudo-spatial representation.⁵⁸² Groups focus on a broad spectrum of interests that may refer to either in-world or ‘real-world’ themes, identity perspectives and likes or dislikes. Events are not exclusively defined by the interests and activities of groups; they are driven by SL’s inherent socialising modalities that permit easy browsing of the VW, and are attached to the each time signified – in representational terms – performance of the virtual land; for example, a nightclub, an interplanetary station, Amsterdam’s red-light

⁵⁸⁰ Evans (2007) 57.

⁵⁸¹ Ondrejka *supra* 578, 163.

⁵⁸² Boellstorff (2008) 183 – 185, distinguishes between official groups (in the sense of the guild as mentioned previously) and groups in a broader informal sense that perform as subcultures across SL.

district, ancient Rome, an actual replica of the twin towers⁵⁸³: the community is attracted by and follows the landscape's symbolic function, that being a music venue, a make-believe entertainment capsule, a cyber-sex bazaar, a learning platform or a memorial.

2.1.22 - Within such richness of stimuli and impressions to be received, participants are encouraged not only to experiment with their appearances and the offered multiplicity of socio-cultural potentials, but also to bring down restraints, which have been imposed by physical limitations,⁵⁸⁴ gender,⁵⁸⁵ race and other socially disqualifying factors in the real world. At the end of the day, in this imitation of life they may project inner natures with far less fear of stigmatisation. This is nothing new to VW contexts, having always been the most self-evident selling point of virtual settings of pseudonymity; here, though, it is expressed in tighter social narratives and through more convincing onscreen representations.

2.1.23 – User-generated content (UGC) creativity lies in the centre of SL's lively socio-cultural pluralism, but most notably forms the object of an intensively active economy (thus termed aptly by Boellstorff 'creationist capitalism'⁵⁸⁶). This characteristic SL economy moves *officially* (with the permission and active promotion of the OSP)⁵⁸⁷ along the previously explained two axes of internal and external development. Therefore, internally, UGC and in-world services are traded for the VW's micro-currency, the Linden dollar (L\$); externally, the OSP has authorised and runs a continuing exchange flow between real-world money and Lindens.

2.1.3 - Sociability and wealth interweave, much like in real life. In SL, though, this coupling occupies central part in the involvement process, since virtuality can reach only that far: to capture impressions of the living

⁵⁸³ *Ibid.* 200.

⁵⁸⁴ Boellstorff deploys numerous examples of virtual involvement broadening social networks for people with physical disabilities, where 'online embodiment could act as a means to regain agency', *ibid.* 135 – 137.

⁵⁸⁵ *Ibid.* 138 – 144.

⁵⁸⁶ '[I]t is a social order constituting relationships between persons through what are held to be prior acts of individual creativity—in the case of Second Life, through building,' *ibid.* 100.

⁵⁸⁷ '[T]he Second Life world resides and offers the tools for business, educators, nonprofits, and entrepreneurs to develop a virtual presence', Linden Lab webpage <<http://lindenlab.com/>>.

experience and fragments of an intellectualised appreciation of it. In this sense, virtual life highlights the meanings which one discovers while zooming in sub-systemic connections and procedures of the actual life.

2.2 - A first look at SL's website gives the impression that Linden promises virtual tourism in an open-ended version of Disneyland. That is not the case.

Firstly, unlike Disneyland, Linden distributes land in their "theme park" through selling-like operations;⁵⁸⁸ second, SL features as its main attraction participation in massive redistributions of intertwining market and social capitals. The official SL figures, even where arguably misleading,⁵⁸⁹ stand out impressive.⁵⁹⁰ The economic statistics data show high levels of hosted commercial consumption, implying directly an equally high volume of supporting virtual production of artefacts and, thus, in analogy suggesting the existence of an overactive social structure that preconditions this lively market. However, in a world like SL, traded consumables do not respond to satisfying basic human needs – simply, there is no one to starve due to lack of virtual food; neither are commodities targeted at implementing individual development along a backbone narrative (as in the case of WoW, where new equipments help characters to progress and complete tasks). Therefore, SL commerce serves primarily *itself*, in parallel, of course, reference to settings of creativity and intense social exchange.

⁵⁸⁸ This had been an illustrative argument in litigation against Linden, attempting to bring down notions of separation between the VW and real life; original complaint *Bragg v. Linden Research, Inc* to the West Chester District Court in Pennsylvania at 17, 04/10/07 <http://lawy-ers.com/BraggvLinden_Complaint.pdf>.

⁵⁸⁹ For example, as SL residents are also counted curious users that join the platform for a short period of time; <*Wired Magazine*, 15.08>.

⁵⁹⁰ To present a recent sample, during the first ten days of September 2009, 585,668 users logged in and 42,702,768m² of virtual land were sold by residents. Through August 2009 the monthly total transaction count reached 28,830,768 L\$; 473,553 virtual customers spent in-world money, ranging between 1L\$ to 1,000,000 L\$; 67,843 unique users had positive monthly Linden dollar flow (PMLF), out of whom 374 showed PMLF between \$2000 and \$5000 USD and 219 more than \$5000 in-world business profits (statistics extracted from SL's website <<http://secondlife.com/statistics/economy-data.php?>>>).

During the second quarter of 2009, user-to-user transactions totalled \$144 million USD; \$29 million USD were exchanged on SL's main currency exchange website (Lindex); the web marketplace for SL virtual goods, reached gross sales of 372 million Linden dollars (\$1.4 million USD); additionally, voice services between residents totaled 3.2 billion minutes (data extracted from <*Second Life blogs*, 12/08/09>).

Note that the approximate exchange rate on Lindex was, at the time, L\$259.00 / US\$1.00.

Overall, SL users are invited to community-shaped processes of creativity, socialising and economy, rather than to experience predetermined presets.

2.2.1 - Having wandered for a while within SL, the first striking image that a visitor will have received is the (often disproportionate) diversity in imaginative, frequently surreal, landscapes. The item-creating interface of the application allows users to build, twist and combine 3-D shapes towards altering the face of the virtual environment and composing architectural constructions. The theme is creativity, which is further channelled into providing on one hand the already mentioned symbolic function of the landscape, on the other into creating the moveable tokens upon which social and commercial exchange can be symbolically structured.

2.2.11 – Land “ownership” essentially equips the resident with creative flexibility; that is the capacity to set up and preserve landscape changes and, further on, to host social events by altering the surroundings in a suitable and supportive manner. The virtual environment turns into a stage setting; yet, within a symbolic space the stage setting itself achieves the status of instrumental expression background, as the invested imagination and creativity in erecting setups, determine the shape, character and development of socio-economic communications conduits. Therefore, we are openly acknowledging means of expression that convey more of the will and true nature of the individual self that conventional text-based languages fail to either project or expand upon. The act of reshaping the virtual environment definitely constitutes expressional empowerment, where such privileges in the “true”, physical plane are granted only to the few powerful and to state actors.

2.2.12 – There is no reason here to describe in detail the extent to which SL residents re-imagine the VW: flying islands, hallucinogenic houses, steampunk theme parks, vintage nightclubs – the list can go on indefinitely. The same can be said for “movable” virtual property, the props which users create for enhancing to the furthest their virtual interactions: “skins”, hairstyles, clothes, accessories, vehicles, “magic” items, common items like

cutlery, virtual appliances; they are all items being distributed across SL and used by residents for enriching their virtual existence. More importantly, items perform as signifiers, reflecting the individual participant's desired state of being and also transmitting likes and dislikes as a communications proposal and statement.

2.2.13 – These effects are manifested even more strongly in the second branch of UGC – that is poses, animations and “gestures”: animations add movement to immovable shapes; poses grand avatar body with behavioural postures; gestures combine multiple of these elements (and even sounds) to animate avatars with body language. In essence, users fill the gap between the virtual raw material and the ideal illustration of a realistic world: one of a world defined by the multiplicity of “living” artefacts.

2.2.2 – We need to concentrate on how deeply creativity affects social contact. In a VW that, unlike WoW, is taking shape exclusively through the work of users, virtual ornaments claim complex social utility, not a mere decorative part. Virtual artefacts put in effect functions that openly indicate personal or group moods, viewpoints and identities. The key presence they assert is built upon an act of instrumental determinism, whether unconscious or planned: their existence in a space of symbols filters ideals of social interaction, realises these latter as a factual consequence and thus models accordingly virtual life.

A few examples will clarify aspects of this process: an exhibition of digital paintings by avant-garde musician and artist Brian Eno; exhibitions of photography; live performances by grassroots, unsigned or even famous musicians; real time lectures and speeches by academics and politicians; competitive gaming spaces; education venues and playgrounds; gatherings of religion diasporas;⁵⁹¹ islands designated for LGBT communities, where they can meet and discuss; and there is sex, SL hosting adult playgrounds for experimenting with romance, pairing and relationships.⁵⁹²

⁵⁹¹ *Boellstorff* (2008); *Zack* (2007) 229 – 231; *Chin* (2007) 1314.

⁵⁹² ‘Sex in synthetic worlds is real; the courtship is real, the passion is real, the orgasms are real’; *Castronova* (2005) 171. *Boellstorff* (2008) 160 – 174 describes in extent the variety of sexual activity in SL and focuses particularly on themes of emotional attachment and immersion, even love.

Such expressions and events could not have been possible if residents had not secured on a permanent basis appropriately designated (and transformed) virtual spaces; or if they lacked the capacity to recreate a convincing interactive experience with props that instrumentally incorporate computer code processes into emulating any possible property and phenomenon (e.g. mass, movement, plasticity, gravity, refraction, to mention a few only) encountered in physical reality. Furthermore, virtual “skins”, clothes, poses and gestures are combined together in resemblances of humanity and sexuality to reproduce at a meta-level of communication the rules of attraction, themes of cultural multiplicity and socio-political statements.⁵⁹³ SL constitutes a global environment which like Web 2.0 is inclusive and based on dynamic tools,⁵⁹⁴ yet transcends the static character of the latter with real-time (“synchronous”) animated projections of the self. To that extent, the experience itself becomes truly liberating, in a fashion that balances between game play (i.e. a make-believe representation without serious consequences in real life) and actuality (i.e. emotional immersion).

2.2.3 – The blending of creativity and sociability is further channelled onto public display in the countless virtual shopping malls and nightclubs of SL.

2.2.31 – The plenitude of virtual products is dizzying. Users create clothes, accessories and gimmicks and distribute them through stores. In some cases we are talking of creator-owned shops, which are rented by land owners; in other cases, the land owner resells items which creators provide; it is not rare, though, for virtual companies to hire creators on a permanent basis or freelancers to complete a creative task on their behalf and from there to take care of product redistribution to virtual outlets.

The incentive of popularity in contexts of socialising motivates consumption of the most dazzling, convincing and imaginative virtual products. At the same time, the best advertisement for purchasing improved

⁵⁹³ *Boellstorff* (2008) 229, reminds us of the “conspicuous consumption” concept of status marking, which the showing off of expensive virtual items implements in SL. Here, the relevance between appearance and sociability projects status differentiation under the terms of this “creationist capitalism”.

⁵⁹⁴ SL has gradually incorporated real-time speech and in-world broadcast live radio-stations where in e.g. a dancing club environment there’s direct communication between the DJ and the gathering of avatars.

virtual items over outdated products can be traced in daily socialising activities: in the largest of SL venues, avatars wearing the best and rarest items (i.e. expensive due to *intended* scarcity) draw most of the other residents' attention; socialising is after all what users seek in a VW like SL.

2.2.32 – We have already defined the aims and importance of SL land acquisition. Thus, the mechanisms of land distribution outline a formidably lucrative business. Real estate operations, selling, renting and auctioning land are found in the heart of the virtual economy. Moreover, retaining territories provides Linden Lab with necessary revenues.⁵⁹⁵

2.2.33 – Paid services set up the last aspect of the SL economy worth pointing out here. In-world employment may include not only the creation of standard content but also agency. Like the real counterparts after which they are modelled, virtual representations of business rely on agency for, mainly, practical reasons.⁵⁹⁶ In all cases, employed residents develop those skills that will assist them in succeeding in their positions; the difference to MMORGs like WoW lies in skills not derived from elements in software, reflective of a game character's progress, but from the actual user's capabilities to communicate with the social setting and to use the tools which the VW's application interface provides.⁵⁹⁷

2.2.4 - The SL experience interconnects sociality, economy and creativity⁵⁹⁸ in circular movement. Each axis supports the other two and, mutually, it acquires substance and meaning through their as ongoing practised intervention. This triptych context allows us a vantage point from where reports and research data from SL are not read as separate instances of the economic aspect or the social and so on, but as impressions from the projected functional systemic whole.

⁵⁹⁵ Boellstorff (2008) 216.

⁵⁹⁶ The functional simulation of a SL area, for example a multi-store or a club, requires juggling with many tasks that are distributed amongst different individuals. Candidate workers are even required to present CVs and demonstrate their in-world skills.

⁵⁹⁷ Employment features male and female escorts, DJs, game hosts and cheerleaders, fashion designers etc; Malaby (2006) 151-152 and 158, gives another example of a notary public in SL; Ondrejka (2007) 41, explains the most vital employment sector of in-world developers.

⁵⁹⁸ Creativity connotes the combination of participation in culture and labour - the latter in a far broader sense than the production of market capital, addressing the ongoing human effort as an act of interpretation and exchange; Malaby (2006) 148.

Of main interest is not *why* the dominant logics and systems of the real world are being reproduced so vividly by the virtual society; that is, attention is not drawn to the process through which the virtual society is preconditioned by e.g. modernity's political and consumerist experience; this should indeed be an extremely valuable discussion, though not within the present research focus. What comes forward here is *how* the virtual society perceives, *in parallel* to the physical existence experience, the reproduced symbols in the constructed instrumentality and ethics domain; how it evaluates these symbols and alters them socially.

2.3 – On this basis, the intersection of in-world developments with the real world is seen with a different eye. Certainly there are no surprises reserved for the reader who is now familiar with e.g. online auctions and OSPs banning gamers' circulation of knowledge across the web; yet, SL claims there its own idiosyncrasies, due to the distinctive operational character of its societal dynamics and production. The nodes where the virtual and the actual cross paths, stretch out particularly the pragmatic value of economy (the last branch in the above triptych), in its revitalising the other two axes, i.e. of creativity and active sociability.

2.3.1 - Engaging actively with the virtual market can turn up quite rewarding in real terms.⁵⁹⁹ Making a living by selling virtual items was the issue which initially kindled academic scholarship interest in VWs. With SL the topic has taken a different direction, since the legitimacy of selling items is not in general disputed; moreover, the OSP facilitates online currency exchange gateways⁶⁰⁰ – not all of them ran by Linden.⁶⁰¹ Hence, the terms are different, in principle, to the debated MMORPG-related practices.

2.3.11 - Profits from taking up professionally creating and selling SL content have reached outstanding heights, e.g. \$1000 - \$1900 USD per week, according to reports.⁶⁰² There always exist the exceptional individuals, like the SL resident/virtual estate entrepreneur whose in-world holdings had

⁵⁹⁹ *Ondrejka (2007) 32.*

⁶⁰⁰ *Supra 590.*

⁶⁰¹ Such online resources are authorised to proceed with converting between US\$ and L\$.

⁶⁰² <*BusinessWeek*, 01/05/06>; <*Wired*, 08/02/06>.

reached, only back in 2006, an estimated of \$1 million USD;⁶⁰³ today her business has expanded in both SL and other VWs, occupying significant numbers of real-world workforce.⁶⁰⁴ Comparing, though, those whose virtual incomes exceed the real-world minimum monthly salary against the total number of active SL participants, it becomes more than obvious that expectations of virtual-into-real profits do not make up for the rule. Nevertheless, even in occupying the lower percentage, those cases confirm the fact that the potentials we are discussing are not hypothetical but real.

2.3.12 - Off-world opportunities may also emerge from effectively utilising VW creativity. For example, an individual designed, scripted and distributed in SL a game which innovatively combined Bingo and the arcade puzzle Tetris. In the VW the game turned into such a craze that a real-world publisher signed a licensing contract with the original developer for releasing the application on game consoles, personal computers and mobile phones.⁶⁰⁵

2.3.2 - Discussing economy raises questions over the real-world commerce's reaction to VWs. Off-world advertising in VWs has already been mentioned. The growing media-buzz in technology-affiliated circles led several real-world business giants to enter SL.⁶⁰⁶ The subsequent impacts of this flow on the VW and on the off-line existences of its residents, as well as the gained benefits, are yet to be assessed. Apart from where utilising SL facilities as personnel training sandboxes or as extravagant cyber-conference settings,⁶⁰⁷ commercial stakeholders' participation sounds rather like a publicity stunt⁶⁰⁸

⁶⁰³ Kane, *supra* 446, 44; <Anshe Chung press-release, 26/11/09>; <FT.com, 22/11/06>; <Wired, 20/11/07>

⁶⁰⁴ Anshe Chung Studios <<http://acs.anshechung.com/introduction.php>>.

⁶⁰⁵ Evans (2007) 56 – 57; Malaby (2006) 141 – 142; <CNN.com, 28/04/06>.

⁶⁰⁶ Boellstorff (2008) 218 – 219; Malaby (2006) 153, on the Wells Fargo bank buying a SL island; Coca Cola entered SL mainly for the hype, <Wired Magazine, 15.08 >.

⁶⁰⁷ <Immersive Workspaces, 23/06/09>.

⁶⁰⁸ The long list of companies which have made their presence notable in SL include IBM (computer hardware and software), Dell, Intel (computer hardware), Toyota (cars), Armani (clothe designing brand), Reebok (sportswear manufacturers), the BBC and Warner Brothers (media studio); Kane, Sean 'Virtual Property, Real Law' in Bethke & Hoffman [eds.] (2008) 36; a list of companies that have entered SL so far on the *Second Life Business Communicators Wiki* <<http://slbusinesscommunicators.pbworks.com/Companies-in-Second-Life>>; <paidContent.org, 14/12/06>; <BBC News, 12/05/06>; <BusinessWeek, 27/11/06>; 'How the Second Half Lives', 15/02/07 on American Marketing Association's *Marketing News*, pp. 12 -14.

for ‘visibility and profit’⁶⁰⁹: neither direct analogy nor financial reflection appears between these actors’ off-world professed activities and their virtual presence and products. On the other hand, the market recognises particular value in advertising and the circulation of branding; as an online commentator observed, having a VW presence ‘will soon be as normal as having a web address.’⁶¹⁰

Even where companies do not explicitly maintain virtual outlets, designs of their original works and media make it into SL in digitised form through the assistance of in-world specialist creators and promoters.⁶¹¹ At the sides, though, misappropriations of real-world brands - i.e. creating and distributing branded items without having any ties with the actual holders - have grown rampant.⁶¹²

2.3.2.1 – Other similar projects include actual states opening virtual embassies in SL that operated as information portals for culture and tourism;⁶¹³ politicians promoting their campaigns on SL⁶¹⁴ or holding press conferences;⁶¹⁵ residents transferring unofficially on the VW existing political campaigns.⁶¹⁶ These are signifiers of actual political exchange in virtual terms. Their importance is measured only upon the impression that the community “conflates”, which the participant internalises and communicates, rather than on their materialising of any actual or virtual political dynamic.

⁶⁰⁹ Boellstorff (2008) 127.

⁶¹⁰ <Virtually Blind, 04/05/07>.

⁶¹¹ The Electric Sheep Company (AOL, the NBA, Nissan, Sony BMG Music) and Rivers Run Red (BBC, SKY News, Penguin Books, Adidas, Vodaphone) are examples of companies which generate real-world money by providing services in SL; <CNet, 03/04/06>; according to the Rivers Run Red website, their line of work involves relating the original content to virtual life <<http://riversrunred.com/company/about-us/>>.

⁶¹² *Supra* 610; Nike, Gucci and Ferrari are the brands more frequently found on the virtual market.

⁶¹³ To mention few, Maldives, Sweden and Estonia were the first three countries to open official ‘embassies’ in 2007 <Times, 24/05/07>; <BBC, 29/01/07>; <Estonian Ministry of Foreign Affairs, 06/12/07>.

⁶¹⁴ French far-right politician Jean-Marie Le Pen’s decision to open offices in SL, during his presidential campaign in 2007, raised, at first, eyebrows and then virtual protests; <The Alphaville Herald, 09/12/06>; <guardian.co.uk, 20/01/07>.

⁶¹⁵ <Second Life Insider, 10/07/07>; <The Alphaville Herald, 10/07/07>.

⁶¹⁶ Boellstorff (2008) 224 – 225.

2.3.3 – The VW is placed in a position where residents perceive constant porosity between the closed setting and the actual reality, including the SL-related ‘nebula of online content’ (intellectual communities’ activities on forums and blogs) and noted migrations and exchanges between SL and other VWs.⁶¹⁷ For some, these factors contribute in delineating virtuality as the starting point for re-advancing actuality, not only in terms of financial opportunity and success, but also by mirroring in-world reputations. Moreover, SL occasionally performs as the test-ground where the online public’s reactions to alternative ideas, introduced in virtual forms of conduct (i.e. mainly sociality), are first sampled.

For the majority of residents, the prospect of real-world profiting through their SL activities looks remote. Their attachment to the functional community is built on their acknowledging of SL’s performance as a multi-levelled expression playground, wherein forming consistent and lasting relationships and associations is possible. Thus, the common resident experiences SL’s ‘creationist capitalism’ not in actual commercial terms but as a key element in producing and retaining societal coherence. Trust in these mechanisms of networking gives shape to identities, and aspects of these identities, in turn, escape into the actual world via the previously mentioned online communications channels.

Virtual life gives birth to entities and proceedings which operate on SL and determine the resident’s societal perspective of identity, as this latter floats between physicality, actuality and virtuality. To an extent we have to consider virtual institutions, for example the performance of a notary public in SL.⁶¹⁸ These affect the circulation of social and cultural capitals in SL but they also offer a built-in promise of possibly interacting with the off-game legal actuality, if need arises. We may acknowledge their role as institutions properly in the same manner that we can take seriously virtual currency, when it takes a step further away from functioning as “Monopoly money” (i.e. for the purposes of a “game”).

⁶¹⁷ *Ibid.* 242.

⁶¹⁸ *Malaby* (2006) 157 – 158.

The other nodal point where the virtual and the actual are crossing paths is, obviously, the EULA of SL.

2.4 Due to the unusual nature of the service and its comparatively relaxed disposition towards software properties, SL retains only a ToS text, which can be found on the official website. For the same reasons, licensing of software does not come along with excessive weight of prohibitive conditions as e.g. in the case of WoW.⁶¹⁹ The text's presence is more discreet; only rarely - when its terms change (and not every time updates are installed) - it will appear onscreen before the user launches a SL session. Of course, this overall attitude should not be mistaken for relinquishment of ownership over the software.

2.4.1 General – ToS in parts rely on possibly changing policies and values, which are found scattered on SL's website⁶²⁰ rather than in the actual text. Linden Lab is free to proceed with amendments to terms at any time, in its sole discretion and without prior notification – although bearing the obligation to inform timely.

SL is described as a 'multi-user online service,' comprising of technical elements and applications that are carefully defined in their combined effort to bring together the SL experience. Interestingly, the websites are officially part of the VW-defined service: website use falls under the same terms that regulate in-world behaviour.⁶²¹ Users are allowed to access the audio-visual representation and other users' contributions (where available).⁶²²

In overall, Linden Lab holds the role of a service provider only and accepts that as such it does retain to very limited control over the VW; thus, the OSP 'may allow people to interact online regarding topics and content

⁶¹⁹ Although, restrictions apply in compliance with market standards against overtly deviant uses of software; *SL ToS* 3.1 and 4.2.

⁶²⁰ *SL ToS*, Opening: 'This offer is conditioned on your agreement to all of the terms and conditions contained in the Terms of Service, including your compliance with the policies and terms linked to (by way of the provided URLs) from this Agreement'; also, *SL ToS* 1.7, 4.1 and 6.1 respectively, in reference to pricing lists, community standards regarding participants' age and privacy policy.

⁶²¹ *SL ToS* 1.1.

⁶²² *SL ToS* 1.3 par 1; usually, separate terms of service apply to a website that forms a communications nod with the Web and may develop different to the in-world service uses, *Jankowich* (2006) 31.

chosen by users of the service’ and ‘does not regulate the content of communications between users or users’ interactions with the Service.’ Linden Lab claims little interference with ‘quality, safety, morality, legality, truthfulness or accuracy’ of such aspects.⁶²³

2.4.2 Property and Ownership – Therefore, users ‘can alter the service environment on a real-time basis’⁶²⁴ and ‘can create Content on Linden Lab’s servers in various forms.’⁶²⁵ They ‘retain any and all applicable copyright and other intellectual property rights with respect to’ content they create when using the service, whereas under law they have such rights.

However, Linden Lab is automatically granted by the user ‘a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and license’ to circulate UGC. This means, apart from the evident representations of virtual items that client software operations materialise across the VW to users, an additional right to ‘use and reproduce (and to authorize third parties to use and reproduce)’ UGC ‘in any or all media for marketing and/or promotional purposes in connection with SL.’⁶²⁶ This is content which Linden Lab uses to advertise SL by circulating depictions of user creativity. Nevertheless, the user may in writing ask discontinuation of such distributions, although compliance is not fully guaranteed.⁶²⁷ Also, Linden Lab may delete ‘any or all’ of the user’s content from the SL servers, for ‘any reason or no reason.’⁶²⁸

The user relinquishes all patent rights over UGC within the service in favour of other users interacting with it but also agrees that he will not make claims against Linden Lab or other users when his patents are allegedly infringed.⁶²⁹ This clause should be referring to UGC in the algorithmic form of computer code, as residents scribe by use of SL’s simple in-world

⁶²³ *SL ToS* 1.2.

⁶²⁴ *SL ToS* 1.2.

⁶²⁵ *SL ToS* 3.2, par. 2.

⁶²⁶ *SL ToS* 3.2 par. 2 (a).

⁶²⁷ *Ibid.*

⁶²⁸ *SL ToS* 3.2 par. 2 (b).

⁶²⁹ *SL ToS* 3.2, par. 3.

computer language;⁶³⁰ if patentability of software arrangements per se was therein endorsed, users could theoretically weaken Linden Lab's exclusivity over their software, and hinder other users from replicating particular programme routines. However, this necessary specification on the nature of patents is missing and the provision may easily misfire by e.g. preventing protection of business-method patents⁶³¹ or of invention models and processes first designed in prototype form on SL; thus the clause may contradict the broader statement over UGC protection.

An additional section lays down rules of compliance with the US Digital Millennium Copyright Act, covering alleged copyright infringements by users.⁶³²

2.4.21 - At the same time, personal accounts are explicitly excluded from the protected sphere of users' intellectual property. Even though accounts, considered in their personae dimensions, are implied to be creations of users, they do not fall under the category of UGC.⁶³³ Apparently Linden Lab fears ownership claims over their servers; therefore, users do not own any data stored there, 'including without limitation any data representing or embodying any or all' of UGC.⁶³⁴ The concern against this latter clause argues to what extent the digital data are constitutive of the UGC as its only available expressions.

Furthermore, Linden Lab may delete from their servers 'in whole or in part at any time for any reason or no reason, with or without notice' user accounts and their content data, including UGC and accumulated currency, 'in Linden Lab's sole discretion.'⁶³⁵

⁶³⁰ Francis, T. 'IP Rights and Licenses Within Virtual Worlds: Second Life', New York State Bar Association, Intellectual Property Law Section newsletter (*Bright Ideas*), Vol. 16, No. 3, 15 (Winter 2007).

⁶³¹ *Ibid.*

⁶³² *SL ToS* 4.3.

⁶³³ *SL ToS* 3.3.

⁶³⁴ *Ibid.*

⁶³⁵ *SL ToS* 5.3.

2.4.3 Currency – The ToS clarify the status of Linden dollars as ‘in-world fictional currency’, ‘a limited licence right’ which is not redeemable for monetary value by Linden Lab.⁶³⁶

Then, though, the text comes across particular difficulties. LindeX (the “currency exchange” aspect of SL, which performs as a SL webpage) is described as administration of ‘transactions among users for the purchase and sale of the licensed right to use Currency.’ The terms “buy” and “sell” are defined as transferring and receiving for the consideration of users to use the licensed right, while another set of terminology is further built upon these descriptions, like “buyer”, “purchase”, “sell order”.⁶³⁷ The OSP appears struggling with clustering over-detailed provisions, trying mainly to maintain the fictional character of the Linden dollar. Thus, no mentioning is made of “real-world” money, and the ToS are further securing full control of SL’s currency exchange mechanisms,⁶³⁸ although references to law violations like fraud⁶³⁹ pinpoint to the inevitable linking between game and actual money.

2.4.4 Law – The OSP may resolve disputes between users, only if requested to, but ‘will not make judgements regarding legal issues or claims.’⁶⁴⁰

The relationship between user and Linden Lab is governed by the laws of the State of California and ‘without regard to conflict of law principles’ or the CISG.⁶⁴¹ *Exclusive* jurisdiction for disputes is appointed to ‘courts

⁶³⁶ *SL ToS* 1.4.

⁶³⁷ *SL ToS* 1.5 par 1: ‘Notwithstanding any other language or context to the contrary, as used in this Agreement and throughout the Service in the context of Currency transfer: (a) the term "sell" means "to transfer for consideration to another user the licensed right to use Currency in accordance with the Terms of Service," (b) the term "buy" means "to receive for consideration from another user the licensed right to use Currency in accordance with the Terms of Service," (c) the terms "buyer," "seller," "sale" and "purchase" and similar terms have corresponding meanings to the root terms "buy" and "sell," (d) "sell order" and similar terms mean a request from a user to Linden Lab to list Currency for sale on the Currency Exchange at a requested sale price, and (e) "buy order" and similar terms mean a request from a user for Linden Lab to match open sale listings with a requested purchase price and facilitate completion of the sale of Currency.’

⁶³⁸ *SL ToS* 1.5 par 2: ‘You agree and acknowledge that Linden Lab may deny any sell order or buy order individually or with respect to general volume or price limitations set by Linden Lab for any reason. Linden Lab may limit sellers or buyers to any group of users at any time. Linden Lab may halt, suspend, discontinue, or reverse any Currency Exchange transaction (whether proposed, pending or past) in cases of actual or suspected fraud, violations of other laws or regulations, or deliberate disruptions to or interference with the Service.’

⁶³⁹ E.g. *SL ToS* 6.1; see below under “Law”.

⁶⁴⁰ *SL ToS* 5.1.

⁶⁴¹ *SL ToS* 7.1.

located in the City and County of San Francisco, California.’ For such purposes, Linden Lab is still ‘allowed to apply for injunctive or other equitable relief in any court of competent jurisdiction.’

An optional arbitration section is included in the ToS, ‘for injunctive or other equitable relief, where the total amount of the award sought is less than ten thousand US dollars.’ Note that resolution via arbitration had been binding, until recently when US courts ruled the agreement unconscionable.⁶⁴² Nevertheless, ‘any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.’⁶⁴³

2.4.4.1 The text makes exact references to local jurisdictions only with regards to defining majority age for registration with the service⁶⁴⁴ and ruling void liability limitations that are set by the ToS.⁶⁴⁵ The cross border operation of SL is addressed cautiously in the closing provisions:

‘Linden Lab makes no representation that any aspect of the Service is appropriate or available for use in jurisdictions outside of the United States. Those who choose to access the Service from other locations are responsible for compliance with applicable local laws. The Linden Software is subject to all applicable export restrictions. You must comply with all export and import laws and restrictions and regulations of any United States or foreign agency or authority relating to the Linden Software and its use.’

2.4.4.2 Apart from that, there are scattered references to applicable laws with regards to financial exploitation of SL (e.g. fraud);⁶⁴⁶ entitlements to intellectual property rights;⁶⁴⁷ the use of service;⁶⁴⁸ reverse engineering of the

⁶⁴² *Infra* 4(II)[2.6.1].

⁶⁴³ *SL ToS* 7.3.

⁶⁴⁴ *SL ToS* 2.2.

⁶⁴⁵ *SL ToS* 5.4 par 2 and General Provisions par 3: ‘If any provision of this Agreement shall be held by a court of competent jurisdiction to be unlawful, void, or for any reason unenforceable, then in such jurisdiction that provision shall be deemed severable from these terms and shall not affect the validity and enforceability of the remaining provisions.’

⁶⁴⁶ *SL ToS* 1.5.

⁶⁴⁷ *SL ToS* 3.2 par 1: ‘You retain copyright and other intellectual property rights with respect [...] to the extent that you have such rights under applicable law;’ *SL ToS* 3.2 par 4: ‘[Y]ou are solely responsible for understanding all copyright, patent, trademark, trade secret and other intellectual property or other laws that may apply to your Content hereunder;’

software (it may be permitted);⁶⁴⁹ disclosing personal information to tax authorities and law enforcement agencies.⁶⁵⁰

2.4.5 Warranties and Liabilities – Consciously Linden Lab broadens its liability limitations, since its commercially adventurous spirit pays back with exposure to a variety of risks, most notably those liberties which users take for granted and may excessively abuse.

Thus, users should not expect compensation in relation to UGC,⁶⁵¹ scheduled or unscheduled service interruptions,⁶⁵² account termination⁶⁵³ or to digital parallels to *force majeure* (external errors, viruses etc).⁶⁵⁴ Linden Lab has no liability based on its management or deletion of currencies,⁶⁵⁵ its deleting of UGC,⁶⁵⁶ and other users' failure to comply with intellectual property laws.⁶⁵⁷ The OSP is released from any dispute between users, retaining only a right (not an obligation) to resolve disputes.⁶⁵⁸ Linden Lab disclaims any guarantees of value, 'cash or otherwise' attributed to VW data⁶⁵⁹ and 'provides the Service [...] on an "as is" basis.'⁶⁶⁰ Finally, the OSP lays down expressively an overarching liability disclaimer⁶⁶¹ and users agree,

⁶⁴⁸ *SL ToS* 4.1 par 2: '[Y]ou agree that you shall not [...] take any action or upload, post, e-mail or otherwise transmit Content that violates any law or regulation' or 'that would violate any right or duty under any law.'

⁶⁴⁹ *SL ToS* 4.2.

⁶⁵⁰ *SL ToS* 6.1: 'Linden Lab will not give any of your personal information to any third party without your express approval except [...] to comply with tax and other applicable law' and 'to law enforcement [...] in connection with criminal investigations and other investigations of fraud' [...] 'as required by law.'

⁶⁵¹ *SL ToS* 1.3 par 2.

⁶⁵² *SL ToS* 1.6.

⁶⁵³ *SL ToS* 2.6.

⁶⁵⁴ *SL ToS* 5.4 par 2.

⁶⁵⁵ *SL ToS* 1.4 and 1.5 par 2.

⁶⁵⁶ *SL ToS* 3.2 par 2 (b).

⁶⁵⁷ *SL ToS* 3.2 par 3 (ii).

⁶⁵⁸ *SL ToS* 5.1.

⁶⁵⁹ *SL ToS* 5.3 par 2.

⁶⁶⁰ *SL ToS* 5.4: 'Linden Lab [...] disclaims all warranties or conditions of any kind, written or oral, express, implied or statutory, including without limitation any implied warranty of title, non-infringement, merchantability or fitness for a particular purpose.'

⁶⁶¹ *SL ToS* 5.5: 'IN NO EVENT SHALL LINDEN LAB OR ANY OF ITS SHAREHOLDERS, PARTNERS, AFFILIATES, DIRECTORS, OFFICERS, SUBSIDIARIES, EMPLOYEES, AGENTS, SUPPLIERS, LICENSEES OR DISTRIBUTORS BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION ANY DAMAGES FOR LOST PROFITS, ARISING (WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE) OUT OF OR IN CONNECTION WITH THE SERVICE (INCLUDING ITS MODIFICATION OR TERMINATION), THE LINDEN SOFTWARE, YOUR ACCOUNT

in case they have breached the agreement, to hold harmless Linden Lab, its affiliates and other users from damages, liabilities, claims and expenses.⁶⁶² Despite some self-evident virtues, like the indemnification of other community participants, this latter provision overlooks the possibility of having ‘alleged breaches’ decisions being disputed by users over the OSP’s impartial or not interpretation of implicated facts.

2.4.6 – This unconditioned decision making freedom of the OSP is repeated several times across the text. At vital points, as already observed, this acquires excessive weight, e.g. account suspension or termination ‘for any or no reason.’⁶⁶³ The authority of Linden Lab to make judgements over unwelcome user behaviour reaches in-world and off-world actions alike, as personal email communications are being indirectly regulated like they had been conducted *through* and *on* SL.⁶⁶⁴

As often noted, ToS that deny users’ rights in data on SL servers or place virtual currency under licensing and Linden Lab’s right to fully manage, regulate or eliminate currency ‘in its sole discretion’,⁶⁶⁵ are sending confusing messages to the public.⁶⁶⁶ For one thing, clauses that license use only, sit next to terms granting intellectual property rights; furthermore, the

(INCLUDING ITS TERMINATION OR SUSPENSION) OR THIS AGREEMENT, WHETHER OR NOT LINDEN LAB MAY HAVE BEEN ADVISED THAT ANY SUCH DAMAGES MIGHT OR COULD OCCUR AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. IN ADDITION, IN NO EVENT WILL LINDEN LAB'S CUMULATIVE LIABILITY TO YOU FOR DIRECT DAMAGES OF ANY KIND OR NATURE EXCEED FIFTY DOLLARS (US \$50.00).’

⁶⁶² *SL ToS* 5.6.

⁶⁶³ *SL ToS* 2.6.

⁶⁶⁴ *SL ToS* 4.1 par 2: ‘[Y]ou agree that you shall not: (i) take any action or upload, post, e-mail or otherwise transmit Content that infringes or violates any third party rights [...] that violates any law or regulation [...] Content as determined by Linden Lab at its sole discretion that is harmful, threatening, abusive, harassing, causes tort, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable [...] Content that contains any viruses, Trojan horses, worms, spyware, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information [...] that would violate any right or duty under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under nondisclosure agreements)’ and ‘any unsolicited or unauthorized advertising, or promotional materials, that are in the nature of "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation that Linden Lab considers in its sole discretion to be of such nature;’ (emphases added).

⁶⁶⁵ *SL ToS* 1.4.

⁶⁶⁶ *Moringiello* (2008) 5 – 6.

SL website and the OSP's advertising communications⁶⁶⁷ have loudly represented residents as if "owning" virtual land and assets.⁶⁶⁸

2.5 – In relation, a change of wording on SL's website was noted in late 2007:⁶⁶⁹ where SL had been a '3D online digital world imagined, created *and owned*' it was now only 'imagined and created by its residents.' At the time of the change, SL was at the peak of its popularity, which had been gradually escalating, with Linden Lab consistently communicating an image of a VW, where technical definitions like "user's access" and "participation" acquire, more than one, parallel meanings, ever since 2003 and their celebrated rupturing from dominant motifs in the VW industry.⁶⁷⁰

According to online commentary this change of words responded to a judicial conflict between Linden Lab and a user.⁶⁷¹ Several similar alterations in the OSP's policies and the ToS text have been adopted, in view of law, agencies attached to it, online practices and public opinion.

2.5.1 - In July 2007 Linden introduced a new policy⁶⁷² halting all virtual casinos and gambling joints in SL (a thriving activity in the VW).⁶⁷³ According to news reports this change was a result of alleged investigations of law enforcement authorities into SL,⁶⁷⁴ especially since according to US law gambling is illegal. The community's reactions were mixed,⁶⁷⁵ mostly remarking that legislation of one jurisdiction was enforced across a setting that otherwise advertises its international demographics.⁶⁷⁶

2.5.2 - Linden Lab intervened again with resident activity by 'removing any virtual ATMs or other objects that facilitate the operation or facilitation of in-world "banking," i.e., the offering of interest or a rate of return on L\$

⁶⁶⁷ 'We started selling land free and clear, and we sold the title, and we made it extremely clear that we were not the owner of the virtual property,' (CEO and founder of SL): <*The Guardian: Games Blog*, 14/06/05>.

⁶⁶⁸ *Supra* 666.

⁶⁶⁹ <*Terra Nova Blogs*, 22/10/07>.

⁶⁷⁰ *Ondrejka, Cory* 'Escaping the Gilded Cage: User-Created Content and Building the Metaverse', in *Balkin & Noveck* [eds.] (2006) 169.

⁶⁷¹ *Infra* 4(II)[2.6.1].

⁶⁷² <*Second Life blogs*, 25/07/07>.

⁶⁷³ <*The Inquirer*, 26/07/07>.

⁶⁷⁴ <*CNet*, 03/04/07>; <*TechCrunch*, 04/04/07>.

⁶⁷⁵ <*BBC Pods & Blogs*, 27/07/07>; <*The Alphaville Herald*, 28/07/07>.

⁶⁷⁶ Back in May 2007 SL had '7 million registered users with more than 70% of them outside the United States', *Ondrejka* (2007) 30.

invested or deposited.’⁶⁷⁷ The incident which pre-empted drastic OSP interference involved the declared insolvency of an unregulated virtual bank,⁶⁷⁸ which had been promising inflated interest rates; eventually, its investors lost a total equivalent of \$750,000 US dollars.⁶⁷⁹ Linden forced regulation into finance of SL, presumably predicting real-world governmental intervention.⁶⁸⁰ Following the ban on gambling, SL residents claimed that the VW increasingly resembled the real world.⁶⁸¹

2.5.3 – The most recent development in policy changing has seen the introduction of age verification in SL.⁶⁸² Being debated for years as a point of ongoing opinion polarity (circulated also as “identity verification”)⁶⁸³ this course of action isolates⁶⁸⁴ content ‘that is sexually explicit or intensely violent or depicts illicit drug use.’⁶⁸⁵ If we should look for a main underlying objective, that is definitely not the protection of minors, since SL servers were always categorised as either PG (“Teen Areas”) or Mature. Certainly, doubts over the real age of a mature account holder can be justified. The policy aimed at receiving expressed consent of adult residents to be exposed to explicit content.

However, the account verification process is requiring users to relinquish partly anonymity by providing their real names and copies of documents like passport, driver’s license and national ID card. The other alternative sees setting up a ‘payment relationship with Linden Lab’ via either a certified credit card or a verified paypal account.⁶⁸⁶ Questions over reliable data protection have been raised or over the alleged equalising of

⁶⁷⁷ <Second Life blogs, 08/01/08>.

⁶⁷⁸ <Wired, 15/08/07>.

⁶⁷⁹ <Wired, 09/01/08>.

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Supra* 677 (in the comments section).

⁶⁸² Analysis of the at the time being implemented new policies on the official <Second Life Blogs, 12/03/09>.

⁶⁸³ <Second Life Blogs, 29/08/09>.

⁶⁸⁴ Linden Lab proceeded additionally with the “geographical” separation of adult content from the virtual “mainland” of mature and PG regions, *supra* 682.

⁶⁸⁵ *Second Life Support Knowledge Base*, ‘Maturity ratings: an overview’ <<https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=6010>>.

⁶⁸⁶ *Second Life Support, Knowledge Base* <<https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=6362>>.

personal financial credentials to personal identification as indirectly *forcing* users to create a payment relationship with the OSP (whereas simple SL participation is otherwise free). Similar concerns have been pointed out in view of WoW and commercial MMORPGs that before allowing the installation of trial game versions they require from users credit card numbers as confirmation. Linden Lab has consistently supported the viewpoint that identity verification helps building trust in the VW.⁶⁸⁷ Again, however, these processes do not prevent fraudulent use of personal identification documents by e.g. minors.

2.5.4 – Finally, in April 2010 Linden Lab redrafted completely the ToS text, granting users, in the process, with permission to take snapshots and make machinima for fair use. The licence to capture and use in-world displays of UGC falls under plausible restrictions, where permissions are required from virtual “land owners” and “captured” avatars; moreover, reproduced works should not violate general intellectual property and other in-world policies.⁶⁸⁸

2.6 - SL litigation has so far arrived in small numbers, despite the conflation of virtuality with actual entitlements to virtual properties promising numerous possibilities for emerging legal disputes. Nevertheless, these conflicts shape significant precedents, in both legal and virtual community terms.

2.6.1 - Linden Lab terminated the account of a SL resident, who had allegedly violated the ToS (by using an exploit in the computer code) to make an advantageous purchase of land. The user sued the OSP, claiming that by cancelling his online account they denied him access to virtual assets associated with it.⁶⁸⁹ Eventually the dispute was confidentially settled, but not before the District Court, dealing with the litigants’ claims, had decided that a mandatory arbitration clause in the ToS was unenforceable and the agreement a contract of adhesion. Moreover, the Federal judge looked into

⁶⁸⁷ *Supra* 683.

⁶⁸⁸ Linden Lab Official: Snapshot and machinima policy <http://wiki.secondlife.com/wiki/Linden_Lab_Official:Snapshot_and_machinima_policy>.

⁶⁸⁹ *Lawrence* (2008) 509 fn 25.

preceding VW interaction sufficient minimum contacts to support specific personal jurisdiction.⁶⁹⁰

2.6.2 - SL has its very own adult entertainment mogul, a Florida-based businessman who had created and been selling a virtual bed that allows avatar-animation to recreate sex positions; the item was the first of its kind and immensely popular. Another resident started selling a closely similar product for 1/3 price of the original. The first user raised a copyright action, also requesting the real identity of his in-world - allegedly unfair - competitor to be revealed.⁶⁹¹ The plaintiff's company, Eros LLC, subpoenaed the OSP, online payment intermediate PayPal and AT&T, as the fictitious defendant's ISP.⁶⁹² The individual in question, who was eventually named, did not respond to the copyright infringement claim, as prescribed by Federal Rules of Civil Procedure, and a default judgement was thus entered.⁶⁹³ The case concluded in settlement between the parties.⁶⁹⁴ A lawsuit of similar object, co-filed by Eros LLC and other five SL creators and retailers, reached also a settled judgement by consent;⁶⁹⁵ the defendant consented to compensate for profits he received from unauthorised infringement and, also, to reveal to the plaintiffs his SL and PayPal transactional records, plus to inform plaintiffs on any future alternative accounts he may create in the VW.⁶⁹⁶ Only recently, Eros LLC sued Linden Lab for direct and secondary intellectual property infringement;⁶⁹⁷ according to their claims, Linden knowingly facilitates and provides tools that allow in-world merchants to copy and sell Eros creations.

⁶⁹⁰ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Penn. 2007); <*Virtually Blind*, 01/06/07>.

⁶⁹¹ <*Times*, 04/07/07>.

⁶⁹² 'Eros v. Leatherwood Update - Default Entered', <*Virtually Blind*, 29/11/07>.

⁶⁹³ *Eros LLC v. John Does*, Case No. 8:07-cv-1158-T-24TGW, 16/11/07, Florida Middle District Court <<http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv01158/202603/15/>>.

⁶⁹⁴ <*Virtual Blind*, 14/03/08>.

⁶⁹⁵ *Eros, LLC et al v. Simon et al*, Case No. 1:2007cv04447. 4/12/07, New York Eastern District Court <http://virtuallyblind.com/files/ecf.nyed.uscourts.gov_cgi-bin_show_temp.pdf>.

⁶⁹⁶ <*Virtual Blind*, 03/12/07>.

⁶⁹⁷ <*Wired*, 17/09/09>.

III. Worlds Beyond

Although there are more than a hundred diverse VVs running online, the WoW and SL cases summarise adequately the case on two basic axes: the first is marked by the grading between hard and soft commercial setups; the contrasting MMOG and socialising venue operations delineate the second. In this last part of the chapter, mentioning to other VVs is made only in passing and in order to round up the paradigm. A few generalisations upon the regulatory approximation of online virtual environments will form a bridge with the coming up analysis of law in Internet contexts.

1. Worlds Apart – It is not long until with ubiquitous computing we are being surrounded by the presence of the Internet and the Map will engulf the Empire. For example, GPS car navigators already direct our real-world movements according to instructions displayed on their screens. As virtual environments evolve along these patterns with tremendous ingenuity and migrate to mobile technology platforms, we may also soon expect the merging of simulations: of those recreating reality with those reimagining it.

1.1 - The virtual universe of Entropia constitutes a *sui generis* example of VV in combining the entertainment instrumentality of MMORPGs with the actual economic incentives that SL most prominently facilitates. While by virtue of the EULA users relinquish their rights to the OSP, they receive direct entitlements to exploiting their in-game acquisitions for real-world money.⁶⁹⁸ Entropia allows users to retrieve virtual earnings from real-world cash machines;⁶⁹⁹ only on the surface of facilitated trade practices, sales of virtual artefacts or areas have been featured on news reports for their high figures in equivalent earthly currencies.⁷⁰⁰ Entropia Universe has also been granted a license by the supervising Swedish Financial Authority to operate as a real-world bank.⁷⁰¹ In that sense, Entropia has moved steps forward into becoming a setting that enhances the coming together of the virtual with the actual.

⁶⁹⁸ Sheldon (2007) 768.

⁶⁹⁹ <BBC, 02/06/06>.

⁷⁰⁰ <BBC, 17/12/04>; <BBC, 25/10/05>.

⁷⁰¹ <BBC, 20/03/09>; however, according to a recent press release by MindArk, the developers of Entropia, the plans to start the bank have been on hold for lack of funds.

1.2 - In spring 2005, SOE introduced their own platform to facilitate legitimate exchanges of virtual items from their MMORPGs for real money. The decision received mixed reactions; some saw ‘a ploy to turn the tables’ in a losing battle against WoW;⁷⁰² others heralded for its promise of an officially sanctioned market.⁷⁰³ Independent of the undertaking’s success or not, the specific move suggested a new perspective of operations, where the focus is transferred from individual VWs to platforms run by one company and which allow users to transfer properties between different settings; in addition, it conceptualised the possibility of summoning similar settlements in relationships between other sectors of the entertainment industry and consumers/public.

1.2.1 - Expanding the same logic, enterprises the likes of currency exchange stations that trade virtual cash⁷⁰⁴ between unrelated VWs, hint that the economic incentive reserves inherent dynamics for promoting functional interconnectivity of platforms.

2. Under the Text – Concluding the empirical presentation of the EULA culture, we find the latter deeply embedded across online contexts, in a manner where it propagates normative uniformity and regulatory unity through the standardisation of terms. A particular illustration or idea of customary behaviour transforms into widespread law that each VW unit realises with little only divergences from the general rule. Hence, the phenomenon of ‘EULAw’ transcends individual instances of VWs, as separate digitised contractual normativities create in unison a consistent secondary legal order. This regime draws juridico-political prowess from the socio-economic pervasiveness that VWs contest broadly across and beyond intellectual communities.

2.1 - EULAs and ToS are aligned with the dominant grammars of online contractual governance, which in turn reproduce structurally shuffles in the

⁷⁰² Yoon (2005) 24; compare with Blizzard’s consistent policy against out-of-game sales.

⁷⁰³ Kennedy (2009) 4.

⁷⁰⁴ Apart from prominent examples of unauthorised operators that currently dominate the secondary market, a short-lived Gaming Open Market had been tolerated and even supported by some OSPs, <BBC, 07/01/04>; recently another site was launched, partnering up with game publishers like SOE and Acclaim, eliminating there the question of violating bans on sales as included in EULAs, Kane & Duranske (2008) 10.

contemporary political reality that follow the ascension and needs of commercial liberalism. Contractual freedom delivers conceptually the platform where commercial enterprises submit the will to protect uninhibitedly their interests, through clear and direct expressions. The practice of VW EULAs represents best a philosophy that promotes contracts into becoming “entrance tickets” to isolated zones of perfect private control over relationships between business and customers; the creation of virtual geographies enhance the internal reception of this template for users.

2.1.1 – Therefore, rights waivers constitute a fixed point in EULA phraseologies. Even since first generation VWs, they have been consistently reaching out to pre-empt all possible associations of users with content classified under the rationales of intellectual property as either ‘derivations’ or ‘acquisitions’.⁷⁰⁵

2.1.2 - Moreover, OSPs may take more decisive steps against online circulation of VW-related communications than their typically excessive IPR claims, like in employing explicit restrictions against off-world disclosing discussions between users and VW representatives.⁷⁰⁶

2.1.3 - While ToS describe undesirable behaviours in reference to conventional criminalities, they ignore any form of fiscal or virtual compensation for attacked user accounts and data that have been damaged or lost.⁷⁰⁷ The only available remedies are those prescribed by the EULA as in the right to terminate the agreement and, in that case, to recover prepaid access fees.⁷⁰⁸

2.11 – Overall, it could be argued that because of a few salient incidents, OSPs might worry too much about protecting themselves and thus overestimate the likelihood of rather rare events.⁷⁰⁹

2.2 - Surprisingly, clauses of OSP exclusivity over fan-fiction and UGC seem less ambiguous in VW contexts than when applied by traditional content

⁷⁰⁵ *Reuveni* (2007) 263, on the SOE EULA of EverQuest.

⁷⁰⁶ *Jankowich* (2006) 34, reports clause 18 from the EVE Online ToS: ‘You may not publish private communications from CCP, their agents or representatives or EVE Online volunteers without authorization.’

⁷⁰⁷ *Chin* (2007) 1324.

⁷⁰⁸ *Sheldon* (2007) 771.

⁷⁰⁹ *Hillman & Rachlinski* (2002) 444.

hosting websites. The terms of such services, which are otherwise widely heralded for supporting and investing in independent user culture, occasionally suggest even more direct commercial appropriation of uploaded user content by the service operator and for his own financial benefit.⁷¹⁰

2.2.1 - Note that Blizzard's adopting of a community-friendly machnima policy had actually been predated by Microsoft, who under the capacity of game publisher had issued new 'Game Content Usage Rules'.⁷¹¹ Microsoft was already allowing independent productions without requiring licensing fees payments. Under the new rules, though, licensees were permitted to store their machinima on third-party websites, like *YouTube*, and even post their works on 'web pages with advertising'.⁷¹² Original content owners in general oppose strongly such circulating of derivative works, considering that website owners are indirectly exploiting commercially their creations, as competitors.

2.3 – Finally, the SL analysis highlighted another feature, which is inherent in the browse-wrap mode for presenting terms and formulates further the breadth of the discussed commercial intent. On many occasions the regulations-pool is not simply limited to the EULA and ToS texts, but may stretch across clusters of interconnected documents. As these extended rules cover also peripheral to in-world activity areas, they build up additional levels of normative complexity. For example, the EVE Online VW features separate rules tables for Forum and Chat, website use, Ban Policy etc., totalling nine documents.⁷¹³ This type of complexity generates sophisticated regulatory structures, yet increasingly multilayered and more difficult for users to get in touch with as a whole. Structures of rules become dense, bringing closer the simulation of bureaucratic governance, accompanied by

⁷¹⁰ For example, *YouTube ToS* 8.1(A): 'Rights you licence - When you upload or post Content to YouTube, you grant to YouTube, a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display, and perform that Content in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats [and through any media channels].'

⁷¹¹ *Hayes* (2008) 569.

⁷¹² *Ibid.* 572.

⁷¹³ *Jankowich* (2006) 17 – 18.

the considerable expansion of the OSP rule over user behaviour outside the VW.

3. Above the Game - In reference to VWs, facts about online participatory psychology are encased within two widely manifested strands. As pointed out,⁷¹⁴ actual and virtual lives conflate: the immersion factor and, mainly, users' personal involvement with the social setting lead to identity (con)fusion.⁷¹⁵ Secondly, continuous association to the VW through attachment to virtual items fosters 'endowment effects',⁷¹⁶ as users become personally invested in virtual artefacts that 'they perceive as belonging to them.'⁷¹⁷

3.1 - User communities have argued that participants deserve rights to VP, in possible purposive connection to either engaging with sales practices or strengthening their personal ties with game accounts. The most commonly used justification draws from the Lockean labour-desert theory, proposing that users have invested time and effort in acquiring virtual items and developing their avatars.⁷¹⁸

3.1.1 – Phenomena of cropping profit from participation have developed the idea that VWs are real, blurring significantly the lines between virtuality and actuality.⁷¹⁹ One way of looking into that, develops with the 'creationist capitalism'⁷²⁰ logic of SL and with Entropia's commercial activities;⁷²¹ that is where OSPs forge 'understandings of money and labour' in collaboration with users.⁷²² The other viewpoint follows, of course, the as professed unauthorised out-of-game sales and the proliferation on the off-game market of such business (external economies).

⁷¹⁴ *Supra* 4(l)[1.3.1.11].

⁷¹⁵ *Turkle* (1995) 185 – 186; *Lastowka & Hunter* (2004) 64.

⁷¹⁶ Behavioural economics research has addressed as such the persistent state of cognitive bias that causes people to 'overvalue assets that they have acquired in relation to those that others own,' *Lastowka & Hunter* (2004) 36.

⁷¹⁷ *Ibid.*

⁷¹⁸ *Ibid.* 46 – 48; *Horowitz* (2007) 450; *Garlick* (2005) 424, argues that at the sides the sense of entitlement draws also from parallel relationships that users develop with the setting, for example VW improvements that comply with feedback from direct discussions between participants and OSPs.

⁷¹⁹ *Boellstorff* (2008) 211; *Bradley* (2007) 4 – 6.

⁷²⁰ *Supra* 593.

⁷²¹ *Sheldon* (2007) 782.

⁷²² *Boellstorff*, *supra* 719.

3.1.2 - In the relevant literature the profiting of some residents has been over-emphasised, to the point of pronouncing inaccurate generalisations about the prospects and socio-economic functionality, which are promised to VW users as a category. Economic potentialities carry along a peculiar historical and political charm, which could not escape the obsession of some authors and the media: claims on the distribution of wealth that manage to succeed under the same terms that the each time ruling class governs society, reserve further potentialities for significant political changes. This position in respect of VWs is not wholesale rejected here, since it partly supports one of the main arguments in the thesis' conclusion. However, common presentations of the virtual society and the opportunities it offers acquire almost fetishist relationship with the conditioning of societal development upon proprietary understandings. Of all denizens of VWs it is only a small percentage that has acquired some kind of profit through their virtual undertakings.⁷²³

3.1.3 – Claims of connection with virtual items have been counter-argued with the limited “life-span” of VWs. This line of reasoning holds in principle true. Note, though, that VWs fall within a consumer-services model, where the legitimacy of account-holders' interests is neither preconditioned by nor assumed on permanency.⁷²⁴ Moreover, while less successful VWs come and go, many settings have persisted,⁷²⁵ due mainly to the support of their long-lasting participants.

3.2 – In addition, the premise of reputational capital maximises attachment to a specific virtual functionality. This is one more piece of evidence for discussing how VWs transform into local monopolies: like clubs, once members join them is difficult then to leave, due loss of achieved network values and also to switching costs.⁷²⁶

⁷²³ *Chin* (2007) 1305 – 1306; *Boellstorff* (2008) 213 (most SL residents earn enough money to pay their monthly fees for “owning” land).

⁷²⁴ For example, bank accounts, telephone lines etc.

⁷²⁵ Even on the Asian market exist VWs that have been continuously operating for more than ten years; *Yoon* (2005) 15.

⁷²⁶ *Castronova* (2005) 139 – 140.

4. Beyond the Virtual - The real power of OSPs lies in their control over computer code, where they can factually embed their rules of the VW.⁷²⁷ This internal ‘freedom to evolve the VW’ cannot be held back by any contractual stipulation or out-of-game regulation. The infrastructure keeps the functional community alive (and the spawning intellectual communities together); in that sense the relationship between participants and network administrators resembles the relationship between citizens and government.⁷²⁸

4.1 - Players may influence OSPs to change policies (as already seen) or technical elements of the VW.⁷²⁹ These power and counter-power relationships are difficult to comprehend clearly in direct reference to offline political terms due to lack of equivalent modalities. The impact of one player’s threatening to terminate her relationship with the OSP is almost insignificant; on the contrary, the user will think twice before relinquishing her temporally built up in-game wealth and reputation.⁷³⁰ If a group of players put pressure and publicise their protests on online fora the OSP will more likely think the commercial reputation of the VW and appear approachable. However, the results of such conflicts also depend on the each time VW, its commercial and geographical scattering on the market, and on whether its administration sits closer to the publisher or to the designer end of the OSP entity. Largely, the greater the extent that debates or decisions made with regards to functional community activities expand over intellectual communities, their range stretching to groups even less affiliated with the VW, the more the practised virtual politics turn into actual, their effects experienced outside VW lives; this marks out another shibboleth for OSPs, who need in parallel to consider their gaming decisions as factually political!⁷³¹

4.2 - On these terms has been discussed the spillover effects of VWs: how their outwards spreading through communities creates macro-level impacts

⁷²⁷ *Bartle, supra 454, 43.*

⁷²⁸ *Castronova, supra 339, 83.*

⁷²⁹ *Bartle Supra 454, 45* mentions the example of the removal of player-versus-player from Ultima Online.

⁷³⁰ *Grimmelmann, supra 431, 155.*

⁷³¹ *Castronova (2005) 127.*

of social, cultural and even economic character,⁷³² even affecting the ‘daily lives of people who have no idea what the Internet is.’⁷³³ Hence, discussing impacts here involves far more substantial, widespread and temporal phenomena than a mere exceptional occurrence of the virtual’s moving into the actual.⁷³⁴

5. Inside the Actual - VWs are not games; at least, no more than the Wembley Arena is in itself a game. The specific argument contests that the conflation of online sociality with entertainment, obviates ‘the consequential forms of intimacy, community, and political economy in virtual worlds.’⁷³⁵ In this sense, even where a VW is written to be a game, its socially constructive function ought not to be diminished.

Assume, though, that gaming constitutes the sole determinant towards participation; regulatory interest in VWs is valid as in any games of outreaching social and economic significance. Sports constitute the most obvious example. Outside interventions with the internal norms (game play, foul) appear awkward⁷³⁶ if not ridiculous; sports associations assume charge of organising the closed system of leagues and such competitions. However, when a goalkeeper throws a match at a penalty shot, minutes before the end of a football game and because a gambling syndicate has paid him, the intervention of state authorities is plausibly inevitable.⁷³⁷

Claims that VWs generally enjoy regulatory isolation downplay the position of the virtual within the legal actual. As it has been acutely observed, VWs are not immune to state regulation since it is by the power of law (contracts) that their modes of governance are made up.⁷³⁸ One may consider the hypothesis that avatars in a VW discuss their plans for a

⁷³² *Castronova* (2005) 49 – 50; additionally he refers to the example of Korea, the only country to have ‘reached saturation in high-speed Internet’, where the ramifications of involvement with online games are bleeding into the ethical and normative offline life, 265 – 266.

⁷³³ *Ibid.* 50.

⁷³⁴ For example, the SL fashion designer whose designs were featured in the “real world”, *Papagiannidis et al* (2008) 613.

⁷³⁵ *Boellstorff* (2008) 22.

⁷³⁶ *Kane & Duranske* (2008) 11 – 12, underscoring the manner in which injuries in sports differentiate to bodily harm in the general regulatory order.

⁷³⁷ *Bartle, Richard, Supra* 454, 50.

⁷³⁸ *Balkin, J.* ‘Law and Liberty in Virtual Worlds’ in *Balkin & Noveck* [eds.] (2006) 91.

terrorist attack, or other kinds of real-world criminal activity; EULA and ToS clauses already provide for surrendering user information if requested to state authorities, without receiving the user's approval.⁷³⁹

Therefore, laws of the actual can flow into the virtual as comfortably as the virtual is in position to exchange various forms of capital with the actual. The few so far examples of VW-related litigation have indicated so much.

Thus opens an entirely new question: how will the law of the now covered Empire perceive and treat its discovery of the simulation of life on the overlapping Map.

⁷³⁹ Zarsky, T. 'Privacy and Data Collection in Virtual Worlds' in *Balkin & Noveck* [eds.] (2006) 218 – 220.

5. Online Relationships under the Scope of Law

‘Where a man’s word goes, and where his power of perception goes, to that point his control and in a sense his physical existence is extended.’⁷⁴⁰

Humanity’s exploratory endeavours will always end up in legal settlements of legal character. Historical common sense attests to the truth of the statement, which is repetitively confirmed by the practices of empires and nations, of past and present indifferently: wherever humankind may reach or whatever it may touch - oceanic depths, mountain tops, polar desolations or the coldness of space - it does not take long for regulatory frameworks to emerge.

The *need to control* stands between the event of discovery and law’s application, motivating conceptually the latter and in consequential relation to the former. This need seeks empowerment over newly found territories. In analogy, the notion of empowerment may take different forms, becoming more palpable when discussed in physical terms, and – especially - in view of colonial and imperialist contexts: access to natural resources, exploitation

⁷⁴⁰ Wiener (1954) 97.

of market opportunities, establishment of strategic positions over macro or micro-relations and so on. All manifestations underlie the socio-economic potentials which discovered real or figurative geographies may spurt. The ensuing political clashes and violent conflicts between competing actors are eventually resolved through bilateral, regional or global agreements.⁷⁴¹

1.1 *Three twists* – Albeit invented, and thus resembling neither lands, physical laws nor mathematical domains, which already exist in nature and simply wait to be discovered or rationalised, the Internet simulated the problem of discovery—with a few twists. First, in form it encompasses unaccountable communications channels and paths that could have been claimed, had they not been remaining undetectable and largely unknown. The Net exhibits inter-changeability and randomness in both size and the forming of data transfer routes, which are determined mainly by how the bulk of interconnected computers are arranged on each given moment of communication.

Second, information comprises the Internet's elusive substance matter. The twofold meaning of information indicates technically electronic data transmissions and, simultaneously, communicated knowledge as such. Therefore, online contexts, which are practically made of information in its dualistic nature, call for mixed appropriations.

Third – and plausibly most frequently brought into juridical attention – Internet operations can reach at their minimum other conventional media's maximum number of communicated jurisdictions. In a way, the digital non-land does not wait to be discovered: rather, it can cross national borders uninvited. The additional question of who governs the Net under such circumstances was raised over similar parameters.

1.1.2 – Nevertheless, a major part of the issue concerning Internet's inter-changeability is resolved by focusing on fixed network nodes (e.g. service providing gateways) instead of attempting to trace unstable information paths. Then, the cross-border character bears nothing frighteningly new, when compared with legal issues of preceding telecommunications modes

⁷⁴¹ Examples include resolutions and instruments in reference to international waters, Antarctica, space etc.

(telephony, radio, television etc.). As for the noted information “dilemma”, it can be positively pre-empted by a “compound” scope that acknowledges on the single transmission the actual unity of interests in the infrastructure and in the communicated content respectively, methodically treating each separately.

In the long run, problems in this nature of discovery and the application of law are becoming trivial. This is a lesson that the evolving Internet is frantically trying to teach us: problematic regulation stems but from the furthest “geographical” extents, which the need to control claims necessary, in an act of self-affirmation. In the end, territories are, indeed, not found, they are made.⁷⁴²

1.2 - The entire problematic of Internet-related legal initiatives sits uncomfortably with the principal concerns of this thesis. Firstly, with regard to the human rights question, the doctrine has several major issues to resolve with waves of progressive changes within the dominant legal instrumentalities, so much for moving on confidently with specialised regulatory “newcomers” that are constantly surfacing from virtual contexts. On the other, the thematic detachments of VWs from reality (i.e. the creation of game playing realms) usually surround them like membranes, within isolated “bubbled”, but porous, existences.⁷⁴³

Then, ‘Internet law’ has evolved and developed unevenly, not only due to the three “twists” it involves, but also to the intertwining regulatory perspectives that each of the Net’s structural components has brought into the final mix. Computers, software, telecommunications, technical infrastructures, text, images and audio reproduction, all qualify as such staple components that, by contributing to the experiential construction of the Internet, opened doors to diverse legal perspectives.

1.2.1 - Reviewing the Net’s legal narrative from the 1980s until today, we may break it down into successive stages.

1.2.1.1 - In the beginning there were cautious attempts to establish links between digital networking and computer/software law. Communications

⁷⁴² Ford, R. ‘Against Cyberspace’ in *Sarat et al.* [eds.] (2003) 151.

⁷⁴³ *Castronova* (2005) 147.

perspectives (particularly that of telephony) played initially a minor role, coming, however, gradually to the fore as networks grew larger and exceeded national borders.

1.2.1.2 - The Web's inception changed terminally the rules, implementing novel understandings over interpersonal dealings, and thus introduced an entirely new methodology for handling and circulating information artefacts and explosively expanded the horizons for commercial conduct.

At the time, fascination and mystification, as well as overenthusiastic futurology which alternated with grim doomsaying closer to the end of the millennium, created a hype which saw to the emergence of an almost separate branch of law: "cyberlaw". Legislation would be drafted in the names of 'new technologies' and the 'information society', focusing exclusively on the Internet. A new wave of technophile lawyers in academia and scholarship embraced and supported the trend. The e-commerce boom took the lead during that period, followed by freedom of expression challenges, as posed in the new medium, and the first court battles over intellectual property rights.

1.2.1.3 - Recently, as time has passed since the initial impact and the dust has silently settled, the web revolution has almost been "regularised". Talk of cyberlaw is downplayed in view of conventional - yet enduring and stable in the dominant systemic conscience – branches of law, which are now methodically taking over, each dividing and absorbing cyberlaw into their legal production lines.

1.2.2 – Seen next to the similar experience of the cyberspace ideal's progressive "dissolution", the rise and fall of cyberlaw speaks of a coming of age tale for the alternative cyborg metaphor about the symbiotic form of law and the Net user, without necessarily reaching a definite conclusion. Arguably, if we take onboard notions of political determinism, the gradual shifting from upstart, Internet-centred legislative motifs to the heavy grammar of bulky traditional flows in law seems now inevitable. However, the collective socio-legal memories are still fresh: the experience of the "cyberspace years" was embedded in the expanded communities of

networking “cyborgs” and the rhetoric of its desiderata is still inhabited. More accurately, major part of that rhetoric was injected at the time in the letter of laws and has been retained there.

In juridico-social terms, VWs evolved within and in parallel to this legal reality (or should we say ‘virtuality’?), riding the Net speedboat down the development lane. The legal understandings of participation, over which OSPs and users will either agree or disagree, simply certify the recent past’s narrative of law, reflecting it in the reasoning they display.

Getting familiar with all contextually implied terms of connection, interaction, and conflict (and even aggression), presupposes a good grasp of the legal dimensions of the Web 2.0 era. Relationships between online stakeholders have transformed radically under the pressure of market, political and cultural forces; in this respect, the idiosyncrasies of Web 2.0 societies promote very specific legal meta-texts, which in turn become dominant formulas. Thus, those overarching narratives need to be reviewed, before turning to the legal preoccupations of VWs that the previous Chapter indicated. And in the meantime, the human rights phantom observes silently from a distance.

I. Law for the Real

1. What, Who, How, Where and Why - The effect which the cyberspace fallacy delivered upon legal queries over the Internet was to slant their focus towards first asking “where”: ‘is cyberspace a different space?’ ‘Does the Internet exist outside our world?’ On top of such bewilderment, one can only imagine how far the illusions of VWs would have taken us, were we to succumb to them in a similar way.⁷⁴⁴

1.1 Questions - Rather, it is more appropriate to first establish contact with online environments through questions about “what” and “who”, i.e. by identifying entities and *how* these interrelate. Hence, we may start by asking ‘*what* is the Internet’ and, then, ‘*who* is there’ – with the question of *where* arriving later, deriving from the initial diagnostics over the examined setting.

⁷⁴⁴ *Cohen* (2007) rightly warns against escapism tendencies in VW studies.

In a similar fashion, legal investigations move down from general to specific online matters and interests.

1.2 Answers - Answers can be equally powerful to questions: it was the early definitions of the Internet in court decisions and statutes that predetermined the angle, from which later legal activity was set to approach the online setting. Lawyers, as dutiful crafters of language, pay excessive attention to wording; to what “is” and to what “is not” in the text.

In the same vein, legally instrumental responses to the nature and operation of the Net, as well as to the terms of participation in it, established dominant themes in the meanings of the information society, which the law was to take in and nurture from there and on.

1.3 – It is becoming clear that, similar to any other continuing legislative project, the production of online-aware laws is systemically patterned upon gradually outgrowing causalities. One way to understand how the latter commonly perform is found in the regular checks of internal coherence and consistency, upon which the endurance of legal systems is procedurally tried and kept within operational line.⁷⁴⁵ This process, in its forward movement, relies on the succession of questions of law upon answers upon previous questions of law and so on.

Placing US initiatives opposite the European legal perspective provides for the plausible comparative scope, those parallel developments in legislative responses to information networks problems presented as an opportunity to counterweigh the juxtaposed regulatory proliferations, even to observe them colliding. Proceeding with this kind of pure systemic comparison, one will without doubt conclude over the merits of neighbouring logics of law, through the form and reasoning of deployed rules.

However, it has become common sense that law, in its posited purposive artificiality as a superstructural tool, is anything but a closed system and its guiding causalities are asynchronous rather than mechanically sequential. Enter the question of *why*, when observing the various systemic operations of law in their processing of the online interactions reality:

⁷⁴⁵ *MacCormick* (2005).

qualitative subservience to political, economic and ideological choices determines the articulation of questions and answers over “who” and “what”. Thus, legal causalities stop working in exclusively internal systemic terms and perform as conduits for preferred external intents.

Thus, the evaluation of the national and international legal frameworks, which dealt with advancing online interactivities, needs to be alert enough to discern competently the extent and - most importantly - the character of the anticipated socio-political interferences with decision making.

1.3 – Legal publications, especially handbooks, circulate a particular mindset for categorising developments in Net-related legislative practices. Without a doubt, popularising the use of certain taxonomies plays an instrumental role in establishing consistent study of law across scholarship. However, determinism and predisposed methodological divisions in the established Internet Law research⁷⁴⁶ could drift the following retrospective of laws down a stream that could entail a disrupting effect upon the continuity of law’s political reading. In contrast, my approach attempts to a mere chronologically linear enumeration of laws, accompanied by summarised comments.

2. The Internet in US Law – The process of law-making in the United States exhibited ordinary legal systemic development: civil court disputes or public reaction to Internet life necessitates or provokes (depending on the occurring circumstances) the intervention of legislative mechanisms, towards settling apparent irregularities in the text of law. Individual US states have shown different degrees of reflexivity to socio-economic change, whereas the Federal perspective usually, but not always, recapitulates the scattered trends. Rather, judicial dialogue between state, district and federal courts provides a more concise and complete picture.

2.1 Foundations - State monopoly in networked information had persistently cultivated public fears of misuse for concealed governmental agendas. That theme was meant to be consistently recycled through time, fired up by the Western liberal

⁷⁴⁶ Textbook classifications slice down the study of Internet laws in plausible areas of focus - mainly Privacy, Intellectual Property, Content/Liability and E-Commerce.

democracy's concerns about state control and intrusion. Not surprisingly, one of the first pieces of Internet-conscious legislation was the Electronic Communication Privacy Act (ECPA) of 1986,⁷⁴⁷ which, addressing privacy concerns, protected providers of electronic communications services against unauthorised government access to emails and stored data.⁷⁴⁸ Incidentally, nationwide raids by the US secret services that investigated data piracy, switched on active cyber-libertarianism in the discussion of law.⁷⁴⁹ Nevertheless, the truest early conceptions of computer networks appeared in relation to criminal activities,⁷⁵⁰ an area mainly covered by the Computer Fraud and Abuse Act (CFAA) of the same year.⁷⁵¹

Predictions of massive social integration in a digital world, or of computer threats that might be spreading online, appealed more to futurology.⁷⁵² And again, those one-dimensional appreciations of technology and innovation, largely cultivated in the printed media, slowly prepared the ground for actual online challenges. However, the revolution never occurred the way in which it was imagined: even where alert, legislators and lawyers were caught unsuspecting of the sudden and contextually scattered manifestations of the galloping online problematic.

Moreover, there had been early attempts to establish that 'information, and perhaps even ideas, are property for the purpose of general criminal law provisions,'⁷⁵³ within contexts of intense commercial antagonism.

2.1.1 - Cyber-law literature would frequently refer to the *Cubby v. Compuserve*⁷⁵⁴ and *Stratton Oakmont Inc. v. Prodigy Services*⁷⁵⁵ cases, as early and fairly publicised litigation that had addressed the problematic of

⁷⁴⁷ 18 U.S.C. §§2510-22, 2701-11, 3121-26.

⁷⁴⁸ The second being the Computer Fraud and Abuse Act of the same year, 18 U.S.C. §1030; this at the time regulated unauthorised access to government computers and was later broadened to include private systems protection.

⁷⁴⁹ The events surrounding the case of *Steve Jackson Games, Inc. v. United States Secret Service* 36 F.3d 457 (1994) inspired the birth of the Electronic Frontier Foundation (EFF), a non-profit advocacy group that has ever since starred in most Net-related court battles.

⁷⁵⁰ *Hunter* (2003) 475.

⁷⁵¹ 18 U.S.C. § 1030 (1986); the Act has been subsequently amended several times and most notably under the 2001 Patriot Act framework, incorporating through the years clearer appropriations of the Internet.

⁷⁵² 'The 1990's - What Will They Hold?', *US Focus* column, *Computer Law & Security Review*, Vol. 6 (1), 40 - 41 (July - August 1990).

⁷⁵³ *Hammond* (1992) 155.

⁷⁵⁴ 766 F Supp 135 (SD NY 1991).

⁷⁵⁵ 1995 NY Misc., 23 Media L Rep. 1794.

communicating online content. Both cases involved the dissemination of information, tying in trends of reaction to online interactivity with juridico-social understandings: messages that had been posted on online discussion forums, created controversy as allegedly defamatory and led to taking court action against ISPs. Arguably, the grounds for suing determined the treatment which both cases received by the respective court decisions, i.e. the crucially instrumental matter of whether ISPs should be considered liable for hosted content. Although reaching contrasting conclusions,⁷⁵⁶ the two court decisions shared the idea of filtering offline-reserved realities for publishing in the multi-participatory Internet setting.

The legal dimensions of the Internet, according to those early approaches, were formed upon the structural conception of the freely flowing information, the recognition of its responding facilitators within the information industry⁷⁵⁷ and, finally, estimations of the socio-economic risks which surrounded such enterprises.⁷⁵⁸ At the federal level, a clear procedural standard for liability needed to be agreed upon.

In parallel, a plausible qualitative question mark was following the now omnipresent transmissions of onscreen material, which not only did not appeal to the likings of every accessing person, but, moreover, untrue information might be distributed, harm inflicted more easily to the reputations of referred to individuals and, further on, transmitted content could be generally found offensive or obscene. Of course, no universal consensus exists on what constitutes indecent content. In the US, although obscenity was limited to sexual material, each State applied through its laws

⁷⁵⁶ Over the question of whether an ISP should be addressed as either a mere distributor or a fully responsible publisher of information, the *Cubby v. CompuServe* court leaned towards the first option, while the decision in *Stratton Oakmont. v. Prodigy* pointed out publisher's liability. More in Edwards 'Defamation and the Internet' in Edwards & Waelde [eds.] (2000) 262; Rowland & MacDonald (2000) 432.

⁷⁵⁷ *Cubby v. CompuServe* at 140.

⁷⁵⁸ In *Prodigy* the court agreed with *Cubby* over the public role of such service operators, yet it observed that the position to control information combined with previous statements by the provider in question over their capacity to edit content turned the scales against them; *Stratton Oakmont. v. Prodigy* at 12 – 13.

different community standards.⁷⁵⁹ That was demonstrated in the *United States v. Thomas*⁷⁶⁰ case, which evolved into a jurisdictional issue (is the quality of material to be judged according to where this is stored or according to where it is viewed?) whilst disputing, in essence, conflicting ethical standards between the states of California and Tennessee.

2.1.2 - The Communications Decency Act (CDA), as part of the 1996 Telecommunications Act surfaced from such litigation background.⁷⁶¹ Two sections underlined the Act's intended function. One aimed at immunising ISPs against civil and general liabilities in tort emerging from offensive content posted by users.⁷⁶² The other section, which still receives mention as an example of a clumsy and thus failed attempt to legislate morals on the Net, prohibited the knowing transmission of obscene or indecent messages to recipients under the age of 18.⁷⁶³ In a monumental court battle, which found private sector giants and free speech campaigners fighting side by side, the US Supreme Court struck down the controversial s223.⁷⁶⁴

Attempts to resurrect CDA's ethical grammar were resisted. For example, a Children's Online Protection Act (COPA)⁷⁶⁵ was ruled too broad in its using of community standards for defining what harmful material is⁷⁶⁶ and, remaining unenforced, it gradually withered.⁷⁶⁷ Interestingly, the settlement proposed by the COPA pursued to measure protection of minors by Web's standard commercial life.⁷⁶⁸ Thereafter, further federal legislative takes, such as the Children's Internet Protection Act (CIPA)⁷⁶⁹ have been more indirect: the CIPA conditioned federal funding for libraries and schools

⁷⁵⁹ Before the Net, the definition of obscenity was determined on a community-by-community basis, within individual states, according to *Miller v. California* 413 U.S. 15, 24 (1973); *Harper* (2002) 277 – 279.

⁷⁶⁰ (1996) 74 F 3d 701 (6th Cir).

⁷⁶¹ *Harper* (2002) provides a complete account of preceding content-based restrictions in regulations and of the CDA/COPA debates.

⁷⁶² 47 U.S.C. Sec. 230 and, particularly, 230(c).

⁷⁶³ 47 U.S.C. Sec. 223.

⁷⁶⁴ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁷⁶⁵ Pub. L. 105 – 277, 112 Stat. 2681 (1998), codified at 47 U.S.C. §231.

⁷⁶⁶ *American Civil Liberties Union v. Ashcroft*, 535 U.S. 564 (2002).

⁷⁶⁷ <EFF 21/01/09>; government subpoenas had unsuccessfully used COPA litigation to receive data of search engine queries, as in *Gonzales v. Google*, 234 F.R.D. 674 (N.D. Cal. 2006).

⁷⁶⁸ *American Civil Liberties Union v. Reno*, 217 F.3d 162, 165 (3d Cir. 2000).

⁷⁶⁹ Pub. L. 106-554, 114 Stat. 2763A-335 (2000).

for providing Internet access upon having installed filtering software, and thus passed the constitutionality test.⁷⁷⁰

Nevertheless, the general topic of minors and the Internet has attracted diverse legislative attention. The Child Pornography Prevention Act (CPPA) had been enacted as early as the CDA, aiming to extend ‘the federal prohibition against child pornography to sexually explicit images’⁷⁷¹ that, although not using minors, were produced using computer-generated images appearing to be children (e.g. via morphing technologies). The main target intent of the CPPA was online circulation of images. The US Supreme Court examined several aspects involved, for example the possible impact of the CPPA on arts and movies,⁷⁷² before, eventually, striking down sections of the Act as overbroad and unconstitutional.⁷⁷³ On a completely different vein, the Children's Online Privacy Protection Act (COPPA)⁷⁷⁴ applied to commercial websites collecting online personal information from children under 13. According to the COPPA, websites need to provide notices of their policies, relevant information to parents and are also required to obtain "verifiable parental consent" before collecting, using or disclosing personal information from children.

2.1.3 - Those provisions of the CDA, which remained in effect and immunise site owners from ‘defamation (libel) suits for user-supplied content in posting such as blogs and chat,’⁷⁷⁵ have been consistently upheld.⁷⁷⁶ Additionally, a standing judicial reasoning apparatus for assessing liabilities in other areas beyond defamation was built around them. Thus, the protection has been raised in view of state cause of action against a broad range of claims, varying from negligence to contracts and even to criminal matters,

⁷⁷⁰ *United States v. American Library Ass'n*, 539 U.S. 194 (2003).

⁷⁷¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 1396 (2002).

⁷⁷² *Ibid.* at 1397.

⁷⁷³ *Mota* (2002) 86 – 93, noting that currently ‘virtual child pornography is not banned.’

⁷⁷⁴ Pub.L. 105-277, 112 Stat. 2581-728 (1998).

⁷⁷⁵ *Landy & Mastrobattista* (2008) 47.

⁷⁷⁶ *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-53 (D.D.C. 1998); *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816 (2002); *Universal Communications Systems, Inc. v. Lycos, Inc.*, 2007 WL 549111 (1st Cir. 2007).

while on the federal level it has even been applied to civil rights claims.⁷⁷⁷ Yet, notable exclusions were prescribed opposite to federal criminal law, electronic communications privacy laws and intellectual property law.⁷⁷⁸

2.1.4 - Along the same lines of content distribution, the next big issue involved proprietary conflicts over online material. The “WWW” era meant large influxes of interconnected users and radical interface advances in user-friendly audio-visual transmissions. Original texts would be massively copied as easily as being intact, without requiring their authors’ permission, while images and audio files were turning into a shared possession for Net participants.

Whereas technology had taken the lead, lawyers and courts took years to understand prior cries of computer and software industries for protection against hackers.⁷⁷⁹ Now, however, those newer areas were converging with the music and other entertainment consumer markets, allowing meanings to meld easily and regulatory attempts to comprehend how, behind the digital smoke screen, interests were being simply reproduced. The music and the film industries were lobbying vigorously against the incoming waves of copying technologies.⁷⁸⁰ Still, we may observe that when traditional media conglomerates started expanding their services online, their interests suddenly became self-contradictory. The US side of the Internet grew within and at the same time contributed to fomenting this generating of the new regulatory regimes.

2.1.4.1 – A No Electronic Theft (NET) Act,⁷⁸¹ in 1997, first adapted obligations to the TRIPS agreements and criminalised non-commercial distribution of copyrighted works on the Internet. The Digital Millennium Copyright Act (DMCA) of 1998⁷⁸² updated further US copyright law to new technologies and online contexts and implemented the WIPO Copyright and

⁷⁷⁷ *Noah v. AOL Time Warner, Inc.* 261 F. Supp. 2d 532 (E.D.Va. 2003), aff'd 2004 U.S. App. LEXIS 5495 (4th Cir. 2004).

⁷⁷⁸ 47 U.S.C. Sec. 230(e)(1-4).

⁷⁷⁹ *Gantz & Rochester* (2005) 118.

⁷⁸⁰ *Ibid.* 118 – 119, attacking on the industry's earlier attempts to have personal copies for noncommercial use penalised; *Drahos & Braithwaite* (2002) 132 and Chapter 11.

⁷⁸¹ Pub. L. 105-147, 111 Stat. 2678 (1997).

⁷⁸² Pub. L. 105 – 304, 112 Stat. 2863 (1998) (codified at 17 U.S.C. §1201 et seq.).

Performances and Phonograms Treaties, plus other international conventions.⁷⁸³ The main reformations it invoked was the prohibition of circumventing technological means, which have been installed for blocking violations of copyrighted works, and the distinguishing ‘between direct infringement and secondary liability of ISPs.’⁷⁸⁴

On the notice and takedown provisions of s512, which were added with the DMCA to Title 17 of the US Code, the commercial politics of the Net are being exemplified, not only with regard to their initial enactment, but, mainly, in view of the manner and frequency in which they are realised in practice.

2.1.4.11 - Content hosting OSPs were being held liable for copyright breach due to material displayed by users.⁷⁸⁵ Codifying the judicial decision in *Religious Technology Center v. Netcom On-Line Communications Services*,⁷⁸⁶ the DMCA was heralded by OSPs for providing a reasonable ‘Safe Harbor’ for ‘passive’ and ‘automatic’ storage actions of which service providers have no actual knowledge. Exclusion from liability requires demonstration of the latter, understanding that the OSP does not receive direct financial benefit due to the infringement and, finally, that once notified from the copyright holder the OSP takes down the material in question.⁷⁸⁷

2.1.4.12 - The “notice-and-take-down” procedures of the DMCA were planned to operate as a liability neutraliser: an intellectual property holder that feels her rights to be infringed may send a notice to a content-hosting website that user material infringes copyright and is not licensed; the contacted company is expected to communicate with the user and if no response comes back they may take offline the disputed content. If the user provides a “counter-notice”, asserting that the material does not infringe, the

⁷⁸³ DMCA 1998 s102(a)(4): ‘An “international agreement” is (1) the Universal Copyright Convention; (2) the Geneva Phonograms Convention;(3) the Berne Convention;(4) the WTO Agreement; 5) the WIPO Copyright Treaty;(6) the WIPO Performances and Phonograms Treaty.’

⁷⁸⁴ *Reed & Angel* (2003) 210.

⁷⁸⁵ For example, *Playboy Enterprises Inc v. Frena* (1993) 839 F.Supp. 1552 (M.D. Fla.), which had been established as the measured standard.

⁷⁸⁶ 907 F.Supp. 1361 (N.D. Cal. 1995).

⁷⁸⁷ 17 U.S.C. s512(c)(1)(A)-(C).

website notifies the right holder and is required, fourteen days later, to upload the debated content – unless the alleged copyright holder sues the user.⁷⁸⁸ Note that where these rules apply to OSPs that do ‘not receive a financial benefit directly attributable to the infringing activity,’⁷⁸⁹ the online service should not have been charging access to the allegedly infringing content.

2.1.4.2 - At the same time, the Copyright Term Extension Act (CTEA)⁷⁹⁰ extended copyright duration to 70 years after the death of an author, or if work-made for-hire for a company, 120 years from creation or 95 years from publication. The Disney Corporation and the Motion Picture Association of America (MPAA) had heavily lobbied for the successful extension, including “campaign contributions” to members of Congress.⁷⁹¹ Notably, flagship Disney characters were about to enter the public domain only just after 2003.⁷⁹² The constitutionality of the Act was challenged, especially in view of the public domain, though unsuccessfully.⁷⁹³ Similar attempts were mobilised against the CTEA and the Uruguay Round Agreements Act (URAA) that were retroactively reclassifying as “copyrighted”, works that had already fallen into the public domain.⁷⁹⁴ Although these claims were initially dismissed,⁷⁹⁵ the constitutionality challenge against URAA's restorations was upheld recently.⁷⁹⁶ These developments, of course, are not directly related to Internet law, but several of the major key points over Net participation defer to the involved argumentation and will be discussed later on.

⁷⁸⁸ The present account provides simply a rough outline of rules that are deployed in more detail in legislation, e.g. whereas providing penalties of perjury for giving false statements.

⁷⁸⁹ 17 U.S.C. s512(c)(1)(B).

⁷⁹⁰ Pub. L. No. 105 – 298, 112 Stat. 2827 (1998) (codified at scattered sections of 17 U.S.C.).

⁷⁹¹ <Associated Press, 17/10/1998>.

⁷⁹² *Ibid.* Note that only copyrights were expiring; Disney trademarks were not being affected.

⁷⁹³ *Eldred v. Ashcroft*, 123 U.S. 769 (2003); see *Lessig* (2004), Chapters 13 and 14 (a detailed account and commentary); *Lange & Powell* (2009) 114 – 124 (commenting on the Court's take on copyright opposite to the First Amendment).

⁷⁹⁴ In US patent case law the principle of no restoration from the public domain explicitly exists; *Golan v. Gonzales* debated its proportional transfer over to copyright.

⁷⁹⁵ *Golan v. Gonzales* No. 01-B-1854, 2005 U.S. Dist. LEXIS 6800.

⁷⁹⁶ *Golan v. Holder*, 2009 WL 928327, 90 U.S.P.Q.2d (BNA) 1202 (D. Colo. 2009); <CIS, 03/04/09>.

2.1.4.3 Litigation - The Napster case constitutes a judicial landmark of global juridico-political importance. From the legal point of view, it initiated internationally a long lasting snowball effect in the reasoning and practices of domestic laws, essentially marginalising appropriations of the exchange culture that the Internet interface signified. In effect, its social ramifications are interpreted in view of the rise of today's IP empires, in how they are casting their shadow over the circulation and collaborative development of information. The Napster case delivered a first official statement of outlawing P2P networks in a manner which predetermined in social conscience the stigma of their function as tools primarily intended for piracy.

With Napster it was made apparent that the DMCA safe harbour provisions would not apply to P2P platforms.⁷⁹⁷ Further litigation continued with methodically taking apart all socio-technological defences that had preempted legal relationships between copyright holders and technological interface facilitators. Such a defence was mainly provided by the *Sony Betamax* case,⁷⁹⁸ which was decided in the early 80s, after debating whether manufacturers of video recorders were encouraging copyright infringements of televised broadcasts. Back then, the Court had held that no evidence of such encouragement existed by the offer of the VCR machine on the market alone, and, moreover, the 'machines were capable of significant non-infringing uses.'⁷⁹⁹ In the post-Napster era, providers of P2P technology were relying on the *Sony Betamax* reasoning as the leading authority to avoid liabilities.⁸⁰⁰

In contrast, the US Supreme Court in *MGM v. Grokster*⁸⁰¹ adopted the view that not only P2P software did not constitute neutral technological means, but also it had no other purpose than "inducing" infringing acts in

⁷⁹⁷ Notably, Napster lost the case since its operation followed a centralised pattern, indexing on the company's main servers its users' collections of mp3 audio files. Napster's servers created, and made available to users, a searchable central directory of links to all user music collections.

⁷⁹⁸ *Sony Corp. of America v. Universal Studios, Inc.* 464 U.S. 417 (1984).

⁷⁹⁹ *Blakeney* (2005) 8.

⁸⁰⁰ *Ibid.* The main difference to the circumstances addressed in *A&M Records v. Napster* was founded in the abandonment by second generation P2P systems of the centralised operations model, which Napster had followed, by their adopting of the general character of loose networking software tools.

⁸⁰¹ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd* 545 U.S. (2005).

relation to copyrighted sound recordings, whereas the developer knew that illegal file exchanging would be the software's aim.⁸⁰² The Court in *Grokster* added inducement to US copyright law as the final category of infringement. It is argued that while the "inducement" doctrine's 'application and limits [...] are still not clear', it constitutes an important extension of copyright law.⁸⁰³

The *Grokster* case, together with the subsequent Australian Federal Court's ruling over *Kazaa*,⁸⁰⁴ sent a message to P2P software developers worldwide. The passage from detecting liabilities across the various online social manifestations to investigating the actual technology's self-evident capacities to *potentially* circumvent marked a teleological jump, a significant change in regulatory decision-making. In this respect, as a commentator observed, despite the domestic differences in the definitions and applications of law, both the *Grokster* and *Kazaa* cases clearly turned the focus 'from the characteristics of the product to the conduct and intention of the maker and supplier.'⁸⁰⁵ The impact and trend which the legal event proliferated is explained further below in its global juridico-political dimensions; here, it suffices first to add that *Grokster* completed the circle which had opened with *Napster* and, second, to suggest that legal developments over P2P networks do not refer to their isolated casuistry, but to broader socio-legally systematised sensibilities.

2.1.5 - Website links not leading from one site to the original content host's homepage ("deep-linking") and thus bypassing advertising and multi-purposing logging-in processes⁸⁰⁶ on the destined site's main page also

⁸⁰² *Mota* (2005) reports the full progress in litigation from *Sony Betamax* to *Grokster*.

⁸⁰³ *Landy & Mastrobattista* (2008) 18.

⁸⁰⁴ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242. *Kazaa* became the most popular file-sharing application after the fall of *Napster* in 2001. Thus its original developers, a company from the Netherlands, as well as its subsequent Australian owners, Sharman Networks (incorporated in the Vanuatu Republic) were targeted with several copyright-related lawsuits. Amidst settlement attempts with the major record labels in several jurisdictions, the Australian Court decided that *Kazaa* was being promoted as a device objecting infringements of copyright, where users would make copy of and communicate sound recordings without the license of the rightful copyright owner.

⁸⁰⁵ *Blakeney* (2005) 9.

⁸⁰⁶ Logging serves several goals, from providing security, to identifying a site's clientele and keeping track of access to the site's webservices, e.g. viewing online content of the *Washington Post*.

stirred up legal activity.⁸⁰⁷ Similar issues emerged in respect of “framing”, that is when pages are designed to link to another website but include their own page display over or around the destination page (e.g. the resulting representations on Google Image Search).⁸⁰⁸ Owners of linked websites raised court action, seeking, in essence, to prevent bypassing of advertising headers. Whereas law’s normative rationality would not have Net traffic forced to register with the narrow teleology of commercial websites, the latter resorted to distorting the reasoning of copyright⁸⁰⁹ for neutralising independent intermediaries.⁸¹⁰

2.1.6 - Semi-technical appropriations of Web traffic posit a different regulatory problematic, which was arguably contained with success within the legal discussion over domain names. The structural development of the Web under a very distinctive representational logic (as systematically popularised in the shape and operations of web-browsing applications) narrowed down the common perception of online socio-economic interactivity and utility into the familiar name-based taxonomies of website addresses. The legal treatment, which such an indexing module invites, relies on the external symbolic order than dealing with the actual technical infrastructure and the complex algorithmic syntax of Internet protocols. Understandably, the weight of interest for law moved from managing information trafficking mechanisms to proprietary comprehensions.

⁸⁰⁷ For example in *Ticketmaster Corp. v. Tickets.com, Inc.* 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000), aff’d 2001 U.S. App. LEXIS 1454 (9th Cir. 2001), deep linking was allegedly copying protected information, in the sense that Tickets.com were tampering with the exclusivity of information on the Ticketmaster website. The Court found deep linking to be permissible when the user is aware of the linked-to site’s identity; after all, source confusion confers ‘a trademark rather than a copyright concern,’ *Landy & Mastrobattista* (2008) 39.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Futuredontics Inc. v. Applied Anagramic Inc.*, 45 U.S. P.Q. 2d 2005 (C.D. Cal. 1998); the plaintiff contested that framing constituted the infringing creation of a derivative work.

⁸¹⁰ *The Washington Post Co. v. Total News, Inc. et al.*, No. 97 Civ. 1190 (S.D.N.Y. Feb. 20, 1997); the case was settled whereas plaintiffs had claimed that framing of news stories by the defendants constituted, amongst others, misappropriation, copyright infringement, federal trademark dilution, trademark infringement and false designation of origin.

Thus, a domain name is ‘an alias which facilitates the human use of computers,’⁸¹¹ consisting ‘of a second-level domain’ (the host, e.g. “facebook”) ‘followed by a top-level domain’⁸¹² which describes the nature of the enterprise (the domain, e.g. “.org”, “.com” etc). For businesses, domain names become ‘critical to brand identity’⁸¹³ drawing their market value from their representational function on the web. The term “cybersquatting” described bad faith registrations of domains by individuals or companies, who held famous names for ransom and aimed at selling them to legitimate trademark owners for large sums.⁸¹⁴ Since domain names appealed to resembling trademarks, cybersquatting instances were initially dealt with under trademark laws. The Anticybersquatting Consumer Protection Act (ACPA)⁸¹⁵ amended the Trademark Act, making illegal ‘abusive registration and use of the distinctive trademarks of others as Internet domain names, with the intent to profit’ from associated goodwill.⁸¹⁶ The defence of fair use, again, counterweights the Act’s bad faith requirement.

2.1.7 - Producing effective legislation against unsolicited email (“spam”) had been a thorny issue for a long time, since certain lines needed to be drawn between free expression and privacy concerns⁸¹⁷ and, obviously, spammers are not easy to locate and identify. The 2003 Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) set standard rules for commercial emails, although with no particular success.⁸¹⁸ The Act broadly penalised spam and provided for coordinated action between federal bodies and the private sector. Additionally, it outlawed harvesting of email

⁸¹¹ *Interstellar Starship Servs., Ltd. v. EPIX, Inc.* 983 F. Supp. 1331, 1335 (D. Or. 1997), *rev’d*, 184 F.3d 1107 (9th Cir. 1999), 125 F. Supp. 2d 1269 (D. Or. 2001) (motion to compel production), *aff’d*, 304 F.3d 936 (9th Cir. 2002).

⁸¹² *Brookfield Communications Inc. v. West Coast Entertainment Corp.* 174 F.3d 1036, 1044 (9th Cir. 1999).

⁸¹³ *Landy & Mastrobattista* (2008) 92.

⁸¹⁴ *Ibid.* 93 – 94.

⁸¹⁵ Pub. L. No. 106 – 113, 113 Stat. 1501 (1999) (codified as amended at 15 U.S.C. §§ 1114, 1116, 1117, 1125, 1127, 1129).

⁸¹⁶ *Shields v. Zuccarini*, 254 F.3d 476, 481 (3d Cir. 2001).

⁸¹⁷ Constitutional considerations had been explored e.g. in *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) and *Ferguson v. Friendfinder*, 94 Cal. App. 4th 1255 (Cal. 2002).

⁸¹⁸ *Landy & Mastrobattista* (2008) 483.

addresses, address generators and automated email account registration techniques.

However, the CAN-SPAM Act has been ever since its enactment under fire for being, among other reasons, unrealistically formalistic, for ‘pre-empting state legislation’ where that could prescribe stronger protection, and for disempowering citizens from suing ‘spammers directly or through class action lawsuits.’⁸¹⁹ More significantly, from the Act’s focus on commercial practices were excluded other forms of spam that are ‘designed to harm the recipient’⁸²⁰ (“malware”).

Regardless of the effectiveness of the CAN-SPAM Act, the combined actions of users, ISPs and OSPs under state or federal laws have brought forward through the years significant in numbers and substance court activity against spamming practices.⁸²¹

2.1.8 – Lastly, mention should be made to what we may call the ongoing battle for anonymity. The structure of online services allows for commenting anonymously and pseudonymously on forums, websites etc. CyberSLAPP⁸²² and so called ‘John Doe’ lawsuits aim at lifting the anonymity veil of authors of allegedly defamatory comments, by exerting pressure on users and indirectly on ISPs.⁸²³

2.1.8.1 - In the absence of federal law, several states have already introduced anti-SLAPP statutes, discerning strategic abuse of legal procedures. Protected speech content includes controversial political statements but also remarks on activities of large corporate players that become public concern.⁸²⁴

⁸¹⁹ <Wired, 23/01/04>.

⁸²⁰ *FTC* (2005); *FTC* (2007).

⁸²¹ *CompuServe v. CyberPromotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *America Online, Inc. v. CN Productions, Inc.*, No. 98-552-A (E.D. Va. 1998); *Hartford House, Ltd. v. Microsoft Corp.*, No. CV778550 (Santa Clara Sup. Ct. Jan. 28, 1999); *Earthlink, Inc. v. Doe*, No. 01-cv-2097 (N.D. Ga. 2001); *Earthlink, Inc. v. Krantz*, No. 01-cv-2098 (N.D. Ga. 2001); *Earthlink, Inc. v. Smith*, No. 1: 01-cv-2099 (N.D. Ga. 2001); *MonsterHut Inc. v. PaeTec Communications Inc.*, No. 107189-cv-2001 (Sup. Ct. Niagara Co. 2001), aff’d, 294 A.D.2d 945 (4th Dept. 2002); *People of the State of New York v. MonsterHut, Inc.*, (N.Y. Sup. Ct., Feb. 3, 2003); *MySpace, Inc. v. theglobe.com, Inc.* (C.D. Cal. February 28, 2007).

⁸²² SLAPP stands for “strategic litigation against public participation.”

⁸²³ Rowland, D. ‘Free Expression and Defamation’ in *Klang & Murray* [eds.] (2005) 68.

⁸²⁴ *Ibid.*

2.1.8.2 - In ‘John Doe’ lawsuits, aggrieved parties direct subpoenas against ISPs, requesting to reveal the anonymous speakers’ identities.⁸²⁵ ISPs may comply but may also side with their customers and alert them to quash the subpoena.⁸²⁶ The cases of *Dendrite v. John Does*⁸²⁷ set the rules for protecting the identities of online posters, yet without establishing absolute protection, since competing values (and courts have on occasions determined supremacy of the rights of suing commercial actors) may justify disclosure.⁸²⁸

2.1.8.3 – As Froomkin bitterly notes, however, ‘the greatest threat to communicative anonymity’ could arrive with the legal campaigns to strike down digital piracy, since these (e.g. the DMCA notice-and-takedown process) provide the means to bypass standard ISP immunities of content-sharing services and render the latter ‘contributory copyright violators’.⁸²⁹

3. The Internet in European Law - In Europe the factors which mostly determined the formation of laws are the general liberalisation position, which the EU carried out and applied to telecommunications,⁸³⁰ and the influential impact of US Internet laws.⁸³¹ This section will, again, focus on general EU laws, rather than on solutions adopted by Member States (even though these frequently respond to Internet challenges way ahead of the regional framework and equally - or even more- effectively).

3.1 – Chronologically, the Data Protection Directive 95/46/EC⁸³² was the first seemingly Net-conscious legislative act of the EU to be adopted, in the sense that it addressed the reality of processing and filing of personal

⁸²⁵ Froomkin, M. ‘Anonymity in the Balance’ in Nicoll et al. [eds.] (2003) 26 – 27.

⁸²⁶ *Ibid.*

⁸²⁷ *Dendrite International, Inc. v. John Does 1 through 14*, 342 NJ Super. 134, 775 A. 2d 756 (2001).

⁸²⁸ Froomkin, *supra* 825, 28.

⁸²⁹ *Ibid.* 42.

⁸³⁰ García (2009) 43, recognising the inevitability of gradually abandoning public monopolies and in accordance with the EC Treaty.

⁸³¹ Thus we may consider the combination of legislation and ensuing jurisprudence. See also, Tambini et al. (2008) 28.

⁸³² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

information through electronic systems and networks.⁸³³ The Directive, in conjunction with the Council's 1981 Convention on Data Protection,⁸³⁴ set the foundations of data collection, principles which automatic processing of information relating to individuals should follow, crystallising the conceptualisation of the right to privacy as in the ECHR. Judicial development⁸³⁵ assisted in implementing this, regularly referred to as, "right to data".⁸³⁶

3.1.1 - A well-known advancement, which derived from the Directive,⁸³⁷ was the 'Safe Harbor Agreement',⁸³⁸ between the EU and the US,⁸³⁹ with a view to connecting the comprehensive legislative approach of the former and the self-regulatory approach in the latter⁸⁴⁰ and regarding the gathering of data from transatlantic commercial transactions. The main precept, underlying 'Safe Harbor', was to prevent the unauthorised leaking of European consumers' information across the US market nexus. Organisations that comply with the 'Safe Harbor' privacy requirements do not face regulatory hindrances from EU jurisdictions when dealing with European customers. Note that 'Safe Harbor' obligations of US organisations include placing a dispute resolution system for investigating and resolving individual complaints to verify compliance; *Blizzard*, who run *WoW*, have declared their adhering to the 'Safe Harbor' principles.⁸⁴¹

3.1.11 – Recent reviews and studies have pointed to several 'Safe Harbor' compliance problems,⁸⁴² notably the lower number of participants than the one presented in public and, crucially, the selection of independent dispute

⁸³³ For example, recital (47) of the Directive's preamble recognises electronic mail as means of data transmission.

⁸³⁴ Convention no. 108 of the Council of Europe, of January 28, 1981, for the Protection of Individuals with regard to Automatic Processing of Personal Data.

⁸³⁵ With the *Lindqvist* case, C 101/01 (2003), the ECJ transferred the Directive's principles onto websites.

⁸³⁶ *García* (2009) 87.

⁸³⁷ Articles 1(2), 25 and 26 over transborder dataflows.

⁸³⁸ Commission Decision 2000/520/EC of 26 July 2000; not to be confused with the safe harbour provisions of the 1996 DMCA.

⁸³⁹ *Charlesworth* in *Edwards & Waelde* [eds.] (2000) 106 – 119, chronicles extensively the negotiations background and principles of the "Safe Harbor" compromise.

⁸⁴⁰ *Rowland & MacDonald* (2000) 382.

⁸⁴¹ *Blizzard Entertainment Online Privacy Policy* <<http://us.blizzard.com/en-us/company/about/privacy.html>>.

⁸⁴² *Connolly* (2008).

resolution providers⁸⁴³ that are not affordable for ‘ordinary consumers to utilise.’⁸⁴⁴

3.1.2 - Quite early, the data protection framework was supplemented by Directive 97/66/EC,⁸⁴⁵ which aimed at setting rules and placing the user of electronic networks in the picture for said purposes.⁸⁴⁶ By adapting this latter law, Directives 2002/58/EC⁸⁴⁷ (ePrivacy Directive) and 2006/24/EC⁸⁴⁸ enriched the protection perspective for electronic communications, pinning it down within the online context.

Generally, though, the overall framework, even from the days of the 1981 Convention, includes exceptions, which with the latest legislative additions tend to expand proportionately. Thus, exceptions are allowed if necessary in a democratic society⁸⁴⁹ on grounds of national security, defence, public security,⁸⁵⁰ national or EU economic interests,⁸⁵¹ public safety and suppression of criminal offences.⁸⁵²

3.2 – Officially, EU law incorporated rules with regard to digital signatures before a US federal act was actually signed.⁸⁵³ Directive 1999/93/EC⁸⁵⁴ was the result of negotiations between the broader commercial sector and

⁸⁴³ As in ‘Safe Harbor’ Principle 7 – Enforcement and Dispute Resolution.

⁸⁴⁴ *Supra* 842, 14.

⁸⁴⁵ Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

⁸⁴⁶ *Rowe* (1998).

⁸⁴⁷ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications); replaced Directive 97/66/EC of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

⁸⁴⁸ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

⁸⁴⁹ Convention no. 108 Art 9 (2).

⁸⁵⁰ 95/46/EC Art 13 1(a)-(c).

⁸⁵¹ 95/46/EC Art 13 1(e).

⁸⁵² Convention no. 108 Art 9 (2)(a).

⁸⁵³ The Electronic Signatures in Global and National Commerce Act (E-SIGN), Pub.L. 106-229, 14 Stat. 464, 15 U.S.C. ch.96, was enacted on June 30, 2000.

⁸⁵⁴ Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

governments,⁸⁵⁵ in pursuit of establishing a reliable standard (as first established in the US Uniform Electronic Transactions Act of 1999). All these laws contained general statements as to the validity of electronic signatures⁸⁵⁶ as a functionality factor.

3.3 – The main legislative tool for online conduct was drafted in the provisions of Directive 2000/31/EC.⁸⁵⁷ The Directive sought ‘to contribute to the proper functioning of the internal market’⁸⁵⁸ regarding information society services. Thus, it approximated provisions relating to ‘the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements’⁸⁵⁹ and court actions.

Intermediaries are excluded from liability when services perform as mere information conduits, such as in cases of caching, and, when users’ content is being hosted, while all in good faith necessary measures have been taken.⁸⁶⁰ ‘[I]nformation society service providers’ are not obliged ‘to monitor the information which they transmit or store’⁸⁶¹ thus achieving distance from the sphere where involvement with online content becomes qualitatively direct. Those provisions appear heavily informed on similar exceptions in the US CDA and the DMCA. The broader use of standard Codes of Conduct (as in ‘ToS’) by online enterprises is, in overall, necessitated; incidentally, these should adhere to the protection of minors and human dignity.⁸⁶²

3.4 – Materialising in its turn the then recently developed WIPO regime and its focus on digital settings, Directive 2001/29/EC (Copyright Directive)⁸⁶³ aimed primarily at maximising harmonisation amongst member States in

⁸⁵⁵ Most electronic signatures laws, for example, follow after the UNCITRAL Model Law on Electronic Commerce of 1996; *Reed & Angel* (2003) 341.

⁸⁵⁶ *Hogg, M.* ‘Secrecy and Signatures’ in *Edwards & Waelde* [eds.] (2000) 45.

⁸⁵⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

⁸⁵⁸ *Ibid.* Art 1(1).

⁸⁵⁹ *Ibid.* Art 1(2).

⁸⁶⁰ *Ibid.* Articles 12 – 14.

⁸⁶¹ *Ibid.* Art 15(1).

⁸⁶² *Ibid.* Art 16(1)(e).

⁸⁶³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

view of the Internet's impact.⁸⁶⁴ First, a right of making available to the public⁸⁶⁵ is introduced, next to the rights of reproduction,⁸⁶⁶ distribution⁸⁶⁷ and communicating to the public.⁸⁶⁸ Relevant exceptions and limitations to copyright are presented exhaustively, as narrowed down in specific categories,⁸⁶⁹ and even then, they apply only in 'certain special cases'.⁸⁷⁰

The Directive also takes a broad approach against the act and means of technological circumvention,⁸⁷¹ embracing all direct and indirect infringement potentials.⁸⁷² It does not specify whether measures that states will take in view of its implementation⁸⁷³ should be of civil, administrative or criminal nature.⁸⁷⁴ That gap was halfway covered by Directive 2004/48/EC⁸⁷⁵ which includes civil measures and remedies.⁸⁷⁶ The last created a 'Right to Information' for right-holders to force judicially service providers to disclose to them personal information of allegedly infringing users.⁸⁷⁷ Moreover, empowerment of right-holders to seize private equipment and assets by virtue of potential risk only without the other party having to be heard,⁸⁷⁸ as well the apparent widening of the Directive's breadth to include non-commercial violations,⁸⁷⁹ have raised controversy. In most of those cases, combined with the Copyright Directive, intermediaries do not enjoy immunity.⁸⁸⁰

⁸⁶⁴ *García* (2009) 167, fnt. 211.

⁸⁶⁵ *Supra* 926, Art 3(2).

⁸⁶⁶ *Ibid.* Art 2.

⁸⁶⁷ *Ibid.* Art 4.

⁸⁶⁸ *Ibid.* Art 3(1).

⁸⁶⁹ *Ibid.* Art 5(1)-(4).

⁸⁷⁰ *Ibid.* Art 5(5).

⁸⁷¹ *Ibid.* Art 6(3).

⁸⁷² *Ibid.* Art 6(1) & 6(2).

⁸⁷³ *Ibid.* Art 8.

⁸⁷⁴ *García* (2009) 186.

⁸⁷⁵ Directive 2004/48/EC Of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

⁸⁷⁶ *Lucchi* (2005) 147, discussing also early drafts of the Directive that proposed harmonisation of criminal proceedings.

⁸⁷⁷ Dir 2004/48/EC Art 8.

⁸⁷⁸ *Ibid.* Articles 7 and 9.

⁸⁷⁹ *Ibid.* Art 2(1).

⁸⁸⁰ E.g. Dir 2004/48/EC Articles 11 and 9(1)(a) and Dir 2001/29/EC Art 8(3).

3.5 – In 2001 the Council of Europe⁸⁸¹ produced a mechanism of international co-operation and standardisation through its Convention on Cybercrime.⁸⁸² The Convention provided against a spectrum of offences, relating to the confidentiality, integrity and availability of computer data and systems;⁸⁸³ computers (forgery⁸⁸⁴ and fraud⁸⁸⁵); content (child pornography);⁸⁸⁶ and ‘offences related to infringements of copyright and related rights.’⁸⁸⁷ Moreover, the issue of corporate liability was addressed.⁸⁸⁸

An ‘Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems’ saw the light shortly after.⁸⁸⁹ Note that, non-European states became signatory members of the Convention, the majority of which (like the US) did not endorse the Protocol.⁸⁹⁰

3.6 – Yet, infrastructure is the area, which has been worked out the most via the extensive striving to realise policies of liberalised telecommunications. As a result, the Internet had been for long caught in a complex web of Regulations and Decisions, where unaccountable pieces of legislation deliberated topics such as ‘interoperability’ and ‘networks’.

A wave of laws, led by the 2002 Framework Directive,⁸⁹¹ entered simultaneously the scene with the intent to regulate exclusively electronic communications networks and services.⁸⁹² With the 2002 Directives, EU law

⁸⁸¹ Within the actual EU framework supplements the Convention with secondary legislation. Decisions 2005/222/JHA of 24 February 2005 on attacks against information systems and 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet, were drafted with an exclusive Internet-focusing scope on mind.

⁸⁸² Convention no. 185 of the Council of Europe, of November 23, 2001.

⁸⁸³ *Ibid.* Articles 2 – 6.

⁸⁸⁴ *Ibid.* Art 7.

⁸⁸⁵ *Ibid.* Art 8.

⁸⁸⁶ *Ibid.* Art 9.

⁸⁸⁷ *Ibid.* Art 10.

⁸⁸⁸ *Ibid.* Art 12.

⁸⁸⁹ ETS no. 189 of the Council of Europe, of January 28, 2003.

⁸⁹⁰ *Vic, D.* ‘Regulating Hatred’, in *Klang & Murray* [eds.] (2005) 45.

⁸⁹¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, *Official Journal L 108*, 24/04/2002 P. 0033 – 0050.

⁸⁹² Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive); Directive 2002/22/EC of the European Parliament and of

settled down a specific reference field, where objectives of crude infrastructural liberalisation overlap with cognition of the Internet's societal power: a principle of 'universal service'⁸⁹³ that sets a minimum of availability on the market to all European users without discrimination,⁸⁹⁴ 'interconnection' and 'access' for all market undertakings in the market as the means of healthy competition for the benefit of users,⁸⁹⁵ and, finally yet not directly, Net neutrality.⁸⁹⁶

3.7 *Of Things to Come* – The EU legislative perspective remains consistent in furthering the project of liberalising the access services front as in amending the framework rules.⁸⁹⁷ The latest 'Telecoms Reform Package' of infrastructure regulations had sought out in addition to address substantive matters. Thus, the legislative proceedings were considerably stalled as the drafting was brought under fire for sanctioning users with Internet disconnection on the basis of copyright infringements.

3.71 – The latter openly followed the moderately ascending 'three-strikes-down' approach. France was the first to introduce a controversial law that enforces long-term disconnection from the Internet, without legal recourse, after a user has been warned twice for allegedly illegal file-sharing.⁸⁹⁸ The law had been found unconstitutional for violating civil liberties and fundamental principles of judicial presumption of innocence. Eventually, the

the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

⁸⁹³ *García* (2009) 48 explains the dual meaning of this principle as both good quality and reasonable prices for users.

⁸⁹⁴ *Ibid.* 68.

⁸⁹⁵ *Ibid.* 56 – 57.

⁸⁹⁶ *Ibid.* 28, derived Net neutrality from the combination of 2002/21/EC Art 8(3)(b) (common regulatory framework) and 2002/19/EC Art 12(1)(g) (access and interconnection), before these were amended in 2009; post the introduction of the Telecoms Package (next paragraph) the will to neutrality is expressed stronger in 2002/22/EC Articles 20(1)(b) and 22(3).

⁸⁹⁷ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/22/EC, 2002/58/EC and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws; Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC.

⁸⁹⁸ Loi n°2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet.

Constitutional Council validated the statute, on condition that disconnections would require judges to sign them off.⁸⁹⁹

The UK moved towards the same direction with the recent Digital Economy Act (2010), although the featured provisions of ‘technical measures’ for suspending accounts appear milder in comparison. In the aftermath of the Enactment, two of the U.K.’s largest ISPs have asked the High Court to review the Act, to that extent this might be violating users’ privacy rights and online communications stability.⁹⁰⁰

3.72 – After lengthy negotiations over the Telecoms Package, the amended Framework Directive included a paragraph that requires Member States to respect fundamental rights and freedoms of natural persons when taking measures regarding access to and use of electronic communications.⁹⁰¹ The insertion was hailed as a victory for user rights. However, as pointed out in commentaries, the general statement of principles provides for a deontological rather than a pragmatic regulatory prospect. In essence, the door to ‘three-strikes’ measures is still open and the text does not concern restrictions by private actors.⁹⁰²

3.7.1 - Notably, few jurisdictions have attempted the entrenchment of Internet access as part of their domestic fundamental rights orders. Of these approaches others operate again on abstract deontological levels,⁹⁰³ others objectify circumstantially technological instances to the degree that they abandon the universalisability of basic rights statements.⁹⁰⁴

4. Facing the Answers of Law – Returning to the inquiries that opened this part’s analysis, we may place the consequential significance of the above legislative expressions within perspective, that is, to comprehend the

⁸⁹⁹ Conseil Constitutionnel - Décision n° 2009-590 DC du 22 Octobre 2009.

⁹⁰⁰ <BBC, 08/07/10>.

⁹⁰¹ Art 1(3a).

⁹⁰² <EDRI 05/11/09>.

⁹⁰³ *Greek Constitution* Article 5A(2): ‘All persons are entitled to participate in the Information Society. Facilitation of access to electronically handled information, as well as of the production, exchange and diffusion thereof constitutes an obligation of the State [.]’

⁹⁰⁴ *Decree 723/2009 of the Finnish Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service*, section 1(1): ‘The minimum rate of downstream traffic of a functional Internet access [...] is 1 Mbit/s;’ the right to ‘universal service’ bestows the obligation to providing broadband access to the State and ISPs alike.

structural mandates for reshaping online participation narratives that law has imparted.

Arguably the key instances in the development of Internet-related law were the CDA and the DMCA. This is not an axiom, drawing from the US origins of the Net or from the apparent global exporting of US rules: rather, the CDA and its judicial adventures marked the first legal episode to reach directly into the substance of Internet communications. The DMCA, on the other hand, apart from being one of the first legislations to incorporate the WIPO Treaties, was deeply influenced by the intense lobbying of the US-based international music and movie industry giants. To that point, the Act contributed in pre-emptying appreciations of the Internet experience under IP meanings and it formed the pretext upon which an entire normative culture was developed to govern controversially online interactions.

4.1 - The CDA, as much as the reasoning which struck it down, submitted to the one-dimensional schema of perceiving the Internet as a traditional information conduit. This understanding gave little space for developing breadth of legal imagination for informing conceptually freedom of expression (crucially summoned during the CDA and all thereafter relevant litigation) with alternative meanings of the interactive, transforming, and interchanging human existence. Thus, the playfield for interpreting legally the emerging means was downright limited to an apparent opposition between the citizens' right to participate in commerce and state-enforced morals and ethics. This juridical initiative constructed connotations of the online public interest that functioned well at the time in court but, simultaneously, might have barred the legal discourse from envisaging socio-technologically precise articulations.

4.1.1 - Law questioned whether onscreen material was offensive or not: it bypassed subtly the true "what", i.e. whether onscreen activity was now outdated and revolutionising common understandings of how information was to be used and experienced. Actually, "information", in the opted for legal terminology, denoted the (marginally distortive) typecasting of transferable, exchangeable and, ultimately, *consumable* data as the uniform

expression for communicating onscreen material. Identity parameters which the online public might be deriving from interacting with online content were plainly overlooked, surprisingly, even by those defenders of civil liberties that reconsider freedom of speech in search of fresh perspectives and phraseologies. Within these lines, the battle for online content was lost before it had even begun, the vigorous copyright claims coming later on to place a tombstone over re-designating socio-political existence⁹⁰⁵ under “digitised” terms.

4.1.2 - The law struggled to perceive and reason with online contextualities. Instead of using as a starting point for analysis the community sensibility which Internet denizens had developed and been practising (i.e. the cyberspace ideal), it relied on the vocabulary and competitive subtext of legal procedures for extracting a normative response: one systemically (and systematically) preoccupied with *how* the newly discovered “virtual lands” were to be *distributed* amongst all interested parties. We need to examine this disposition.

4.1.21 - We may draw parallels that appear anything but coincidental, by being reminded of how systemised humanity has treated nature. Forests, for example, seen as resource of raw material and land opportunity schemes, were heavily exploited, until humans realised impending dangers in the process and started declaring national parks or protected natural areas.

4.1.22 - Despite artificial, the Internet poses a similar setting, a social communication ecology where the dryly entrenched “information” stands out as the raw material metaphor. Motivations for exploiting it are blinding us from fully appreciating the larger societal eco-system. Only when knowledge, social implementation of identity, and other, less visible to us now, values, which lie within the global online connectivity, will be barred destructively to the survival of the *hoi polloi*, only then will it finally become clear how our initial choice of a legal mindset was largely mistaken.

4.1.23 - Policy makers, including legislators, fail to realise the impacts. They cannot see the forest for the tree when they systemically reproduce

⁹⁰⁵ In the sense of setting up alternative spaces where socio-political injustices within vertical and horizontal citizenships *could* be more easily chased up to be, hopefully, rectified.

proprietary regulatory logics. The vastness of the forest is reduced the moment one makes the start by declaring that the *any tree can belong* – indifferent to whom. This marks a radical transformation in our approach to the given landscape, the ontological presence of property now dominating our engaging with physical experience. Property methodises human contact according to its inherent logical preset and is thus imposing limits to imagining alternative approaches to interaction. Therefore, proprietary understanding crucially monopolises and undercuts comprehension, even more when considering the central role it attains in the traditions and institutions that have undertaken the task of societal development.

4.1.3 - Even though inspired by democratic insights, no matter how strongly submitting to the ideal and principles of liberty, the question of *how* the Internet should be *distributed*, which the CDA case posed in its heart, ascribed directly to possessory rationales. Distribution predicates proprietary appreciation towards the given interaction space, the participation experience and its constituents. Thus, subsequent developments in Internet laws were ontologically determined by this take on the online society, namely, a consistent systemic reproduction of a very specific attitude, which prescribes that entities can be possessed and thus manipulated, landscapes and nodes should be owned, or else none should exist outside the only comprehension module that law can utter. From that point law production and practice have shown that Net access and participation became matter of discussion and decision in exclusively proprietary terms of possession and ownership.

4.2 - This leads directly to the DMCA. The Act made apparent the general direction which the will of law intended politically the implementation of IP legislation to follow.

4.2.1 - As an online commentator observed, despite representing a ‘balance between the rights of copyright holders, the needs of ISPs, and the ability of people to make fair use of copyrighted materials,’ the measures which the DMCA introduced, especially the ‘notice-and-takedown’ system, are working in favour of copyright holders.⁹⁰⁶ The case of the unofficial gaming guide to

⁹⁰⁶ <Security Focus, 03/04/06>.

WoW alludes to a dense web of mechanisms that, combined, impose hindrances to experiencing the Internet as a genuine conduit to social and personal development via the exchange of information.

4.2.11 - Online life is established upon the circulation of copies of information, hosted in the form of links, text, images and audio works; this is, precisely, the foundation upon which the operation of Web 2.0 has been conceived as a multimedia experience. The majority of DMCA ‘cease and desist’ complaints are actually targeting content hosting services the likes of weblogs or YouTube, where users communicate via appropriating cultural artefacts. Being reminded of the chilling effects which the ‘takedown’ notices procedure initiates, as well as of the legal and financial inequalities between those parties usually involved in these scenarios, is crucial in developing an understanding of the law as it stands and its purposive focus. The mechanisms themselves smile on actors with superior legal and financial resources. They are drafted in such a manner that they simply marginalise the individual user. On the other hand, content hosts intermediaries are usually in the unpleasant position of being bombarded by bulks of complaints and law suits and thus they are de facto opting for adopting a neutral stance and are complying with the DMCA process. Furthermore, as it was contested in courts,⁹⁰⁷ the requirement of a ‘good faith belief’⁹⁰⁸ from copyright owners when complaining about hosted material is not accompanied by an objective standard. Thus, a complaint may overlook lawful use and yet no liability be applied for improper infringement notification, where the copyright holder does not ‘knowingly materially’ misrepresent that ‘material or activity is infringing,’⁹⁰⁹ even though his assessment was unreasonable, based on mere suspicion or rushed.⁹¹⁰ In the meantime, the host intermediary who relies on the apparent good faith of the complaining party must comply, while alleged

⁹⁰⁷ *Rossi v. Motion Picture Association of America Inc* 391 F.3d 1000 (9th Cir. 2004).

⁹⁰⁸ 17 U.S.C. s512(c)(3)(A)(v).

⁹⁰⁹ 17 U.S.C. s512(f).

⁹¹⁰ *Rossi v. MPAA Case Review* by Laura Edgar, *Electronic Business Law*, Vol. 6 (1), 15 (2005).

infringers, in case of mistakes, could suffer economic loss without cause for redress.⁹¹¹

4.3 - The EU legislative project shows even less aspirations towards building up a comprehensive insider's treatment of the Internet, preferring to pursue consistently its constructing of trans-state market trafficking. The more, however, the outside perspectives engulf exclusively Internet activity the more they lock down the latter in pre-emptive normative modules, which may not come adequately into compliance with online operational logics. EU law has ventured with little legal imagination and thus less daringly into analysing the premises of online participation. That is arguably shown in legislative delays over technical issues surrounding online behaviours that end up in adopting US solutions (e.g. liability models, e-commerce etc).

4.3.1 - For example, three elements have underpinned network regulation, 'the guarantee of free competition, the management of limited resources and the protection of users.'⁹¹² As it will be explained in the last part of this Chapter, protection of users aligns with familiar ethical standards in EU policies rather than proceeding with a politically informed account of access to online information. Hence, the plans for revising the 1989 Television without Frontiers legislation in view of Web TV aimed at regulating product placement where children might be affected, tobacco products were promoted or consumers were directly encouraged to purchase or rent goods or services.⁹¹³ Directive 2003/33/EC bans advertising and sponsorship of tobacco products in cross-border media, including websites etc.

The lack of substantial insights into actual online civility from such approaches has opened gaps in the body of laws, exposing the integrity of the information society to several unexpected attacks. It is one thing to admit that e.g. the scope of the E-commerce Directive did not include liabilities for linking⁹¹⁴ - an easily rectifiable regulatory shortage - and quite another to realise that cumulative legislative efforts have eventually left users without

⁹¹¹ *Ibid.*

⁹¹² *García* (2009) 32.

⁹¹³ 'EC Supports Tighter Regulation on Web TV', *Electronic Business Law*, Vol. 7 (1), 5 (January 2005).

⁹¹⁴ *German Federal Supreme Court BGH*, Decision of 1 April, 2004, I ZR 317/01.

substantial guarantees for their unhindered access to the Internet. These circumstances present an interpretation of the controversy over the latest Telecoms Reform Package. At the same time, as occasional national policies are not adequately counterweighed, domestic laws produce socially stalling results regarding access to and use of the online setting.⁹¹⁵

4.4 – On the other hand, the rise of IP law has become integral within the overall legislative development. Itemisation of information and thus its proprietisation has been probably inevitable, as commercial exploitation of communicated content entered the stage. IP signals a popularised understanding pretext for appropriating onscreen representations and the kind of regulatory aesthetics that frames (and, in reverse, was framed by) the exchanges of creative investments between the online and the offline settings (in unaccounted forms including music, news, data, games etc). At the same time, in resetting objects as rivalrous goods, it represents a conscious decision to create scarcity.⁹¹⁶

4.4.1 - Domestic and international IP laws follow a stream installed by the TRIPS agreements and later reaffirmed in the WIPO treaties, and one that has been much criticised for shifting away from the public interest and ‘towards the monopolistic privileges of IPR holders.’⁹¹⁷ Those international instruments synchronised the concept of intellectual property with the needs of systematic intellectual production in the global market, and with the demands of increased mass media distribution to protect enormous investments in branded entertainment.⁹¹⁸ Therefore, TRIPS first obliged member states to provide for criminal procedures in cases of trademark counterfeiting and copyright piracy, requiring imprisonment penalties and sufficient fines for providing a deterrent.⁹¹⁹

4.4.2 - The ensuing globalised rewriting of IP laws brought closer together the US and the European civil law notions of copyright.

⁹¹⁵ For example, Greek Law N.3037/02 had awkwardly banned all online games in an attempt to prevent online gambling.

⁹¹⁶ *Mazziotti* (2008) 16.

⁹¹⁷ *Khor, M.* ‘Rethinking Intellectual Property Rights and TRIPS’ in *Drahos & Mayne* [eds.] (2002) 203.

⁹¹⁸ *Jenkins* (2006) 141.

⁹¹⁹ *Drahos & Braithwaite* (2002) 182.

4.4.21 - The former nurtures the Anglo-American common law conceptions of copyright and pursues utilitarian considerations in the Constitution:⁹²⁰ the exclusivity of the property right provides creators with incentives to produce for promoting science ‘and useful Arts.’⁹²¹

4.4.22 – Europe has long subscribed copyright to author’s rights as founded in the Berne Convention, that is, the right to safeguard such aspects of the work as its integrity, and to control its copies - in the economic sense.⁹²² Direct constitutional protection is provided only for a fundamental right to IP in general,⁹²³ that may be ‘subject to exceptions for the pursuit of the public interest.’⁹²⁴

4.4.3 – However, the recent wave of EU copyright Directives shows straightforward concern with ‘the strengthening of the European copyright industry in a competitive global market.’⁹²⁵ For example, in the preamble of Directive 2004/48/EC the legislator asserts at length how strong IPR enforcement is ‘of paramount importance for the success of the Internal Market’ and urgently necessitated, for otherwise ‘innovation and creativity are discouraged and investment diminished.’⁹²⁶ Eventually, in scope and purposes, similarities to the dispositions of the DMCA become overtly evident.⁹²⁷

4.4.4 - Such protection of IP online has been subject to continuing disagreement, since its aggressive facilitation of exclusivities collides openly with the needs of ‘broad distribution and sharing of knowledge,’ and over the very same value strands of creativity and progress.⁹²⁸ These matters are explained in the following parts and in the next Chapter.

⁹²⁰ *Spinello & Bottis* (2009) 95.

⁹²¹ US Const. art. I, §8, cl.8.

⁹²² *Spinello & Bottis* (2009) 69.

⁹²³ ChFR Art. 17.

⁹²⁴ *Mazziotti* (2008) 237 (citing Art. 1 of Protocol No. 1 of ECHR).

⁹²⁵ *Supra* 922, 95.

⁹²⁶ Recital (3).

⁹²⁷ *Lucchi* (2006) 80 – 81.

⁹²⁸ That was one of the side challenges faced by the UN World Summit for the Information Society (WSIS), which did not manage eventually to dispel the underlying problematic and tension; *Kuhlen, R.* ‘Knowledge and Information – Private Property or Common Good? A Global Perspective’ in *Lenk et al.* [eds.] (2007) 220.

II. Laws for the Virtual

Several legal dynamics come together to shape the character of the regulation of VWs. Some of them derive naturally from the overarching context, i.e. the broader Internet-related legislations. Others come into play due to VW setups being directly committed to commercial practices - hence the prominence of contract and commercial laws; some, finally, are conjured contractually, whereas their influence would have otherwise been far lesser (notably, the intellectual property rhetoric).

Participation in VWs practically “lands” in law. Like with computer games before and even with computer technologies in general,⁹²⁹ law applies in a piecemeal fashion, and that is wherever links between participation and existing regulation can be first comprehended then identified as suitable.

The general problematic of how law reaches participation in VWs was explained in previous Chapters. The following sections illustrate the building of an idiosyncratic legal regime: “idiosyncratic” not exactly because of the noted originalities in the regulated subject matter, but rather due to its developmental trajectory and the potential it holds within the specific juridico-political conjuncture in time.

1. The Rule of Contract –The familiar practical and normative perplexities that Internet communications yield, initiated quickly widespread reliance on contracts for regulating the use of web services and participation in online application platforms. Law-making institutions faced the challenge of accommodating the utility of contracts to the increasing demands of procedural e-commerce realities, their responses revolving around (i) the compliance of online agreement formalities with the traditional triplet offer-acceptance-consideration, and (ii) dispute resolution. Local juridical perspectives, however, were unprepared for the frequency and diversity of legal counter-solutions, which in its entirety the over-active globalised setting would generously introduce on every occasion of cross-border engagements.

⁹²⁹ *Tunney* (2001) reflects upon similar past debates over the possibility of *sui generis* regulation for computer games and even computer technologies as a whole.

Despite the shortcomings of this arrangement, standard ToS and EULAs still make for the plausible regulatory tools, offering the flexibility to overcome imposed dysfunctions with privately decided settlements. Yet the same advantageous trait can easily transform into a subversive factor: the case studies indicated possible lapses, which some would argue that they are persistently haunting the application of contract law to online settings.

1.1 “Dissecting” the EULA – By name, the End-User Licence Agreement reveals the specific contractual disposition’s gravity points.

1.1.1 Licensing - Software licensing assigns a limited use right over a copyrighted software work,⁹³⁰ which, in the case of VWs, is restricted within the intended entertainment function that the software’s operation principally facilitates. Therefore, the game software supports the persisting illusion of a very particularly imagined and thus represented interactive setting: the licensee agrees to run this software, solely for gaining access to the interactive experience of the online service as decided by the OSP. The second leg of this scheme is contractually realised by agreement with the required ToS/ToU. Understandably, if one wants to interpret the boundaries of licensing in relation to a particular software operation, the ToS that expressively determine the limited use by reference to presiding service performance must also be considered.

The “non-exclusive” licence differentiates substantially the licensee to the owner. Whereas EULAs insist on their non-exclusive character, the purchasing user is neither considered nor treated in terms of rights as an owner.⁹³¹ Moreover, licensing legitimises the customer in using software, an activity which it further shapes at the actual owner’s will by setting a structure of imposed restrictions.

1.1.2 Agreement - EULAs adhere basically to the “click-wrap” licensing model. Its enforceability was first contested in US courts, adjudicating on

⁹³⁰ In the following paragraphs, generally on software licenses from *Reed & Angel* [eds.] (2003) 46-55 and 200.

⁹³¹ The distinction of licensing from selling software conditions proper use of the client software as the means for extending temporally the validity of access to the VW, *Reuveni* (2007) 291.

“shrink-wrap” agreements⁹³² on software purchases.⁹³³ Later, when online “click-wrap” agreements came into judicial focus, successive US decisions approved of their validity.⁹³⁴ The principles of commercial and contractual freedom in US legal doctrine allow parties to include in their agreements and put into force between them any terms or conditions that adhere to legitimate private law restrictions.⁹³⁵ Thus, appropriate limitations of liability may come in as acceptable.

“Click-wrap” licences consist of extensive collections of terms with content that is non-negotiable by individual customers. In favour of consumer protection, the 1993 EC Directive on the Unfair Terms in Consumer Contracts⁹³⁶ prescribes scrutiny of such agreements in view of 'significant imbalance in the parties' rights and obligations' and under the general concept of 'good faith' - omnipresent in the continental Civil Law tradition.⁹³⁷

1.1.3 End-User – In essence, the licensing statement intensifies limits, which first sets implicitly the ‘End-User’ identifier. The term does not simply indicate ‘the ultimate purchaser’⁹³⁸ of the software product; it aptly dissociates common users from the application on the market-reflecting

⁹³² The term derives from the act of tearing a plastic seal on the opening of software packages. The licence, which described terms of use, was either on the box or inside it. On the seal there was an indication that by tearing it (the plastic seal) the consumer was expressing his full consent to the sum of included terms. For more details, *Casamiquela* (2002) 476 – 481; *Goodman* (1999) 319 – 323 and 332 – 337; *Lemley* (1995) 1241 – 1248 (an earlier account of the practice); *MacManis* (1999) 174, 175.

⁹³³ In the landmark case of *ProCD v Zeidenberg*, 86 F 3d 1447 (7th Cir. 1996), the court disputed the enforceability of licences only where the prescribed terms and conditions become objectionable within the generic contract law context.

⁹³⁴ In *Compuserve v Patterson*, 89 F 3d 1257 (6th Cir. 1996) it was agreed that the manifested intent to comply with the terms of an online offer constitutes an enforceable contract. Specifically regarding the 'click-wrap' model, the Court in *Hotmail Corp. v Van Money Pie, Inc.*, 1998 WL 388389 (N.D.Cal.), held that violating terms of accepted online agreements entitle contracting parties to claim breach. Moreover, service providers are entitled to proceed in terminating accounts if such actions are included in the list of ToS and are estimated as necessary.

⁹³⁵ As such are limitations to civil rights and freedoms like expression, movement etc. For example, in employment contracts employees are usually held liable even after the termination of their work relationship with employing companies, for revealing trade secrets to market competitors. However, contractual freedom does not cover “excessive” arrangements, e.g. contractor’s consent to murder.

⁹³⁶ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

⁹³⁷ Council Directive 93/13/EEC, Art. 3(1).

⁹³⁸ *Universal Computers (Systems) Ltd.v Datamedia Corp.*, 653 F. Supp. 518, 521 (D.N.J. 1987).

criterion of consumption. This logic considers all users to be consumers and all consumers vice versa users, locking the meaning of “user” in a tautology that excludes all works made with or through the use of the marketed software from being classified on a similar level of “creations”. The end-user only consumes and never produces.

1.2 Laws of the EULA - Contracts of ‘uniform and inflexible’⁹³⁹ terms fulfil a key function in contemporary B2C mass markets,⁹⁴⁰ accounting for more than ninety-nine percent of contracts that govern routine and important transactions alike, from bus tickets, package receipts and electric toasters to automobile purchases, consumer credit and insurance.⁹⁴¹ By function, standard-form contracts offer practical⁹⁴² and ethical advantages in such business models⁹⁴³ that made their transferring to online contexts quite evident.⁹⁴⁴

1.2.1 - In EULAs the conflict between the US and EU jurisprudential perspectives over online transactions is amplified, where either contexts reserve different scrutiny of fairness regarding standard-form contracts and, secondly, they expose diametrically opposite attitudes to consumer protection.

1.2.11 – The European approach is directly set upon consumer electronic contracting, with the E-Commerce Directive excluding the particular trend from its general ‘coordinated field’⁹⁴⁵ to transfer it intentionally into *ad hoc* regulatory spheres. In agreement with a previous Distance Selling Directive,⁹⁴⁶ the protective measures of ‘the consumer’s member state of

⁹³⁹ *Burke* (2000) 290.

⁹⁴⁰ *Oakley* (2005) 1048.

⁹⁴¹ *Slawson* (1971) 529.

⁹⁴² *Burke* (2000) 289; *Maxeiner* (2003) 111, 113; *Goodman* (1999) 325 – 326.

⁹⁴³ *Hillman & Rachlinski* (2002) 437 – 440.

⁹⁴⁴ *Gomulkiewicz & Williamson* (1996) 341 – 361, identify the value of EULAs in their (i) being efficient for mass market distribution, (ii) being informative and (iii) allowing software publishers to offer rich varieties of use-related rights.

⁹⁴⁵ Dir 2000/31/EC Art 2(h) defines as coordinated field the ‘requirements laid down in Member States’ legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.’

⁹⁴⁶ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts.

residence' always take priority.⁹⁴⁷ From there, framework control is mainly assumed by the Unfair Contract Terms Directive as dealing with non-negotiated terms of standard-form consumer contracts.

1.2.12 - On the contrary, US law lacks of a similar systematisation over unfair terms,⁹⁴⁸ and, not differentiating between B2B and B2C contracts,⁹⁴⁹ its mandatory minimum level of consumer protection is much lower.⁹⁵⁰ Courts generally enforce standard-form contracts, except when they believe that 'businesses have gone too far',⁹⁵¹ in which case they bar those terms that offend public norms.⁹⁵² It has been observed that current treatments tend to investigate unfairness in contract formation defects rather than in the unbalanced allocations of liabilities and rights.⁹⁵³

Potential abuses are reviewed under the doctrines of unconscionability, restatement, and reasonable expectations.⁹⁵⁴

1.2.12.1 - Unconscionability examines 'oppression and unfair surprise' 'as a matter of law' mainly in sales of goods contracts⁹⁵⁵ – without other types of contractual agreements being necessarily excluded.⁹⁵⁶ A dichotomy has been recognised between procedural (i.e. unconscionable conduct in the contract-making process⁹⁵⁷) and substantive unconscionability (i.e. deficient bargaining process and manifestly unfair terms).⁹⁵⁸

1.2.12.2 - Restatement⁹⁵⁹ tests the state of mind of the term-drafting party, whether they were expecting that the taker of the contract would not have assented if she knew that the writing 'contained a particular term'.⁹⁶⁰ In fact,

⁹⁴⁷ *Farah* (2009) 6 – 7.

⁹⁴⁸ *Oakley* (2005) 1061.

⁹⁴⁹ *Maxeiner* (2003) 115.

⁹⁵⁰ *Winn & Webber* (2006) 4.

⁹⁵¹ *Hillman & Rachlinski* (2002) 455.

⁹⁵² *Ibid.* 456.

⁹⁵³ *Burgess* (1986) 263.

⁹⁵⁴ *Oakley* (2005) 1062 – 1063.

⁹⁵⁵ U.C.C. § 2-302.

⁹⁵⁶ *Maxeiner* (2003) 117.

⁹⁵⁷ *Burke* (2000) 305.

⁹⁵⁸ *Hillman & Rachlinski* (2002) 457; *Oakley* (2005) 1063.

⁹⁵⁹ Restatement (Second) of Contracts § 211(3) (1981).

⁹⁶⁰ *Burke* (2000) 304.

under the restatement provisions vendors do not expect customers to either read or understand standard-forms.⁹⁶¹

1.2.12.3 - Finally, the reasonable expectations doctrine suggests that terms lying ‘outside what a party might reasonably expect’ should not be enforced.⁹⁶² Such expectations measure with the consumers’ experience, objective interpretation of the contract’s contextual aims and operation⁹⁶³ and the policy it lays down.⁹⁶⁴

1.2.13 – In principle, EULA enforceability should also check with the oversimplified click-wrap format’s compatibility with traditional conceptions of acceptance - in other words, does clicking the “I Agree” onscreen button legitimise the process? But this shibboleth has long time now been bypassed, with the auspices of successive court decisions and the tacit approval of Internet legislation,⁹⁶⁵ becoming of no particular concern here.⁹⁶⁶

1.2.2 – The typical EULA and ToS contractual narrative, which the majority of VWs replicates, is summarised upon the following principal points:⁹⁶⁷ (i) full OSP ownership of VW content and derivative user-created content;⁹⁶⁸ (ii) full OSP discretion in deciding over user activity and account issues; (iii) in disjunction submission of legal disputes to either the OSP’s locale or to arbitration; and (iv) maximum limitation of OSP liabilities. The uniformity of terms - in disposition within the agreement and, further on, in form across

⁹⁶¹ *Das* (2002) 485.

⁹⁶² *Maxeiner* (2003) 120.

⁹⁶³ Restatement and the reasonable expectations doctrine apply more frequently to insurance contracts, *Hillman & Rachlinski* (2002) 458 – 459.

⁹⁶⁴ *Burke* (2000) 300.

⁹⁶⁵ E.g. Directive 2000/31/EC Art.10(1) and recital (37) of the preamble.

⁹⁶⁶ Incidentally, outside the electronic format, the use of standard forms has preoccupied legal scholarship over whether it imports a valid acceptance module; *Eisenberg* (1995) 240.

⁹⁶⁷ This generalisation draws from scattered online commentary and news reports, from my personal empirical research and from the survey of forty-eight VWs in *Jankowich* (2006).

⁹⁶⁸ The marketed idiosyncrasies of Second Life lead to forming the obvious exception to the rule, lowering the rigidity of OSP ownership statements. Despite foreshadowing one of the thesis’ major conclusive remarks on positive steps towards reframing relationship modules between OSPs and users, the divergence from the practised canon can be here considered as only slight, as far as the posited fairness criteria of law can investigate.

the industry - follows the mass consumer market's practised alertness to uncalculated risks, particularly to juridical risks.⁹⁶⁹

1.2.21 – For law, contractual validity reflects fairness. Broadly speaking, a definition of “fairness” can reach levels of ambivalence and elusiveness similar to delineating “justice”. Unfairness describes modes of conduct in the preparation and presentation of standard-form contracts that may disrupt the ethics, operability and credibility of market relationships. The juridico-political understanding of the potentially affected sphere perceives in the foreground the need for procedural balance and stability and, further on, the preservation of those greater social values which the rule of law ultimately guards.

The overall premise posits that the bargaining process should not be ‘unduly one-sided’ and that contractual terms ought not to produce ostensibly oppressive results.⁹⁷⁰ In this sense, contractual validity tests examine whether standard-form terms are presented clearly and comprehensively, in a manner that gives the receiving party the opportunity to read them in advance. In addition, the general rules apply, i.e. contracts made under duress,⁹⁷¹ contrary to public policy or involving sales of basic rights should not be enforced.⁹⁷²

1.2.21.1 – US unconsionability deploys a higher threshold,⁹⁷³ where courts require proof of both its substantial and procedural components.⁹⁷⁴ While it allows flexibility in considering fairness, it does not provide for a certain standard upon which a solid policy regarding contracts can be consistently followed. In contrast, the EU Directive achieves this, albeit with rigid formalisation limiting its own reflexes against unpredicted future developments.

⁹⁶⁹ *Kessler* (1943) 631 – 632; thus standard-form contracts attempt to either exclude or control the ‘illogical factor’ in litigation where courts may be swayed to ‘decide against a powerful defendant.’

⁹⁷⁰ *Schmitz* (2006).

⁹⁷¹ *Tunick* (1998) 102 – 103, presents basic examples of promises extracted under duress.

⁹⁷² *Trebilcock* (1993) 32, on instances upon which justice systems generally deny enforcement of contracts.

⁹⁷³ *Oakley* (2005) 1062.

⁹⁷⁴ *Schmitz* (2006) 75; *Lemley* (1995).

1.2.22 – EULAs and ToS reproduce the non-negotiable, “take-it-or-leave-it” fashion of their paper-world counterparts, with standardised, long and detailed legal jargon.⁹⁷⁵ Addressing the demands of mass consumer markets, they are drafted to ‘meet the needs of many people’ – not of individuals – but in a manner reflecting the ‘interests of the party with the superior bargaining power’, which happens to be the one drafting of terms.⁹⁷⁶ As previously with shrink-wrap licences,⁹⁷⁷ this contractual attitude hits close to be seen as imposing a contract of adhesion,⁹⁷⁸ i.e. a contract that manifests such inequality that it will likely attract scrutiny for unfairness.⁹⁷⁹

1.2.22.1 – Specific mentioning should be made to the “browse-wrap” contract. Here the licence includes hyperlinks to terms outside the main agreement text, which the OSP considers of equal binding effect nevertheless. One could argue that the latest instalment of the SL ToS surfaces as a browse-wrap contract, since it presupposes agreeing to several scattered service policies⁹⁸⁰ that are laid out and explained on different web-pages.⁹⁸¹

1.3 *Standard-Terms in Digital* - Faced with their limited comprehension of digitised environments, courts have eagerly relied on the assumption that existing contract doctrines can ‘sensibly resolve disputes arising in electronic contracts’.⁹⁸²

1.3.1 - Where the status of standard-forms as genuine contracts has been reasonably contested for not conforming to traditional consent-giving, it has been counter-suggested that such terms perform actually as warnings, and as

⁹⁷⁵ Hillman & Rachlinski (2002) 468.

⁹⁷⁶ Oakley (2005) 1053.

⁹⁷⁷ Goodman (1999) 320 – 321.

⁹⁷⁸ Jenkins (2004) 10.

⁹⁷⁹ ‘The contract of adhesion was first isolated as a transaction type by French jurist Raymond Saleilles’ who identified ‘pre-formulated stipulations in which the will of one party dominates the transaction’ without the genuine consensus of the other party; Burgess (1986) 256.

⁹⁸⁰ For example, the “Adult Only Content” ratings, the Community Standards, the Intellectual Property Policy, the recent Snapshot and Machinima Policy etc.

⁹⁸¹ Jankowich (2006) presents the problematic of multiple policy documents as primarily an issue of complexity and understanding, 16 – 20. We should not overlook the fact, however, that separate policy documents guarantee better explanation of meanings otherwise piled into the mass of EULA jargon.

⁹⁸² Hillman & Rachlinski (2002) 486.

such they provide contract issuers with a subsequent legal advantage:⁹⁸³ out of court, they pre-emptively project a presumption of legitimacy which deters raising of legal action; in litigation, they formulate the starting point for judicial interpretation of the contract's content.

1.3.11 - Generally, that consumers comprehend the nature and force of standard terms within common commercial contexts to thus trust reasonably to be bound by them⁹⁸⁴ constitutes the strongest presumption of implied consent. With click-wrap agreements assent is broadly indicated, especially where scroll-to-bottom technical solutions (as in the case of the WoW EULA) advocate that the user had the opportunity to review the text.⁹⁸⁵ Moreover, EULA and ToS terms are usually found in advance on the VW's website.⁹⁸⁶

1.3.2 - In early EULAs, localising jurisdiction in favour of the game company was zealously pursued, while, at the same time, the gaming services were inviting in users from foreign settings that are less than inclined to accept such territorial narrowing down and by mere virtue of commercial contracts. Apparently, such tensions culminated between the US online gaming industry and the increasing numbers of EU-based consumers. With the improvement of Internet connections and the growth of gaming markets, OSPs have either conceded that certain legal concessions on their part are unavoidable, guaranteeing the service's cross-border legal compatibility, or have sliced regionally the offered service, as in the case of WoW.

Thus, the agreement's *inter partes* effect, structured upon almost total exclusion for the OSP from any possibly arising obligations,⁹⁸⁷ allows for partial compromises in clauses like 'some states do not allow the foregoing limitations of liability, so they may not apply to you' (conciliating directly markets governed by state protectionism).

⁹⁸³ *Slawson* (1971) 544 – 545.

⁹⁸⁴ *Hillman & Rachlinski* (2002) 492.

⁹⁸⁵ *Oakley* (2005) 1051; *Reuveni* (2007) 289.

⁹⁸⁶ This is the main difference to "cash now, terms later" methods of the replicated shrink-wraps, *Reuveni* (2007) 288.

⁹⁸⁷ *WoW US EULA 12*: 'IN NO EVENT WILL BLIZZARD BE LIABLE TO YOU FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES.'

Nevertheless, EULAs (as well as online ToS) naturally localise jurisdiction rather than subscribe to the 'forum-shopping' option, which potentially exposes service operators to scattered legal attacks and would drag them through tremendous court expenses. This is why OSPs have attempted to standardise the long-distance alternative of arbitration, setting up, where possible, mandatory proceedings.⁹⁸⁸

1.3.3 - Rule 'elaboration and clarification' falls within the apparently arbitrary discretion of OSPs;⁹⁸⁹ the threat of account termination being present, few OSPs provide 'a clear sense of the judicial or punitive process involved';⁹⁹⁰ user content may be deleted by the OSP at any time, without notice and even without given reason.⁹⁹¹

1.3.4 - The general argument in favour of one-sided contracts holds that they offer protection against consumers' opportunistic behaviours,⁹⁹² a point that on several instances makes sense with regard to users' exploiting their relationships with VWs. However, whereas deeming the EULA valid as an adhesion contract requires investigating its market context,⁹⁹³ this latter is being written in more complex terms than conventional economic perspectives are prepared to address.

1.4 – Regarding EULAs outside the VW context, the adhesive character of the format has been judicially confirmed, upon basic grounds of both procedural and substantive unfairness.⁹⁹⁴ An agreement was not binding, where the full text was not viewable but 'a reference to the existence of license terms on a submerged screen.'⁹⁹⁵ Choices of forum clauses have also been invalidated for either submitting consumers who have suffered only minimal damages to remote jurisdictions⁹⁹⁶ or for violating public policy.⁹⁹⁷

⁹⁸⁸ Analysis of B2C arbitration structure systems in *Drahozal & Friel* (2002) 360 – 362.

⁹⁸⁹ *Jankowich* (2006) 20.

⁹⁹⁰ *Ibid.* 34.

⁹⁹¹ *Ibid.* 35.

⁹⁹² *Bedchuk & Posner* (2006) 828.

⁹⁹³ *Radin & Wagner* (1998) 1311.

⁹⁹⁴ *Comb v. PayPal, Inc.*, 218 F.Supp.2d 1165 (ND Cal. 2002).

⁹⁹⁵ *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Circ. 2002).

⁹⁹⁶ *Hillman & Rachlinski* (2002) 490, referring to concerns expressed in *Williams v. America Online, Inc.*, 2001 WL 135825 (Mass. Super. Feb. 8, 2001).

⁹⁹⁷ *Scarcella v. America Online*, 4 Misc. 3d 1024A (N.Y. Civ. Ct. Sept. 8, 2004).

Finally, the substantially superior bargaining power of the drafting party may have brought the agreement closer to unenforceability.⁹⁹⁸

1.4.1 – Such instances would have assisted in framing a clearer US unfairness paradigm, if not for the lack of uniformity of standards across states, preventing generalised approximations.⁹⁹⁹ The baselines for fleshing out the overall perspective as it applies in practice are nevertheless adequately drawn along the following points:

1.4.11 – waivers of fundamental rights are in principle not considered sufficiently valid if imposed by a EULA since the latter lacks the negotiation requirement that such serious relinquishments necessitate;¹⁰⁰⁰

1.4.12 – conversely, it is doubtful whether strong federal laws like the Copyright Act can pre-empt EULAs;¹⁰⁰¹ on the contrary, courts seem favourable towards clauses that force users into abandoning rights of fair use¹⁰⁰² or their under law rights to various forms of UGC;¹⁰⁰³

1.4.13 – however, states do not share consensus over the enforceability of exculpatory clauses¹⁰⁰⁴ and to that degree neither over the furthest ends that one-sided terms may stretch beyond limits made plausible by federal statutes.

1.4.2 – Though not comparable in numbers, European litigation over EULAs has presented more consistent responses under the Unfair Terms Directive regime. In France 36 different terms of the transferred standard US licence¹⁰⁰⁵ were held to be violating domestic consumer unfairness laws¹⁰⁰⁶ as

⁹⁹⁸ *Gatton v. T-Mobile USA, Inc.* 152 Cal. App. 4th 571 (2007): ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’

⁹⁹⁹ Law relies on ‘the ad hoc decisions of individual courts in individual cases to review particular clauses,’ *Oakley* (2005) 112.

¹⁰⁰⁰ *Jenkins* (2004) 10.

¹⁰⁰¹ *Casamiquela* (2007) 491 – 492, on the disagreement over whether the Act should and can pre-empt private agreements.

¹⁰⁰² *Landy & Mastrobattista* (2008) 56, refer to licences restricting the limited fair use right of reverse engineering, which had been established in *Sega Enterprises Ltd. v. Accolade Inc.* 977 F.2d 1510 (9th Cir. 1992); *Bowers v. Baystate*, 320 F.3d 1317 (Fed. Cir. 2003) decided that EULAs can prevent its exercise. *Hayes* (2008) fnt 60, cites *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005), where the Blizzard’s EULA and ToU were found able to contract away a fair use defense in respect of software reverse engineering.

¹⁰⁰³ This expanded EULA enforceability perspective applies in essence the *ProCD v. Zeidenberg* precedent and even extends it considerably, *Hayes* (2008) 574.

¹⁰⁰⁴ *Vacca* (2008) 50 – 54.

¹⁰⁰⁵ *Winn & Bix* (2006) 182 – 183.

did terms of the same EULA that ‘related to contract acceptance by virtue of visiting a website,’ to ‘modifications of the contract’¹⁰⁰⁷ and to liability disclaimers were invalidated.¹⁰⁰⁸ In Germany, major server and software providers were judicially bound to cease-and-desist declarations and to pay fines each time they repeated violating terms by simply translating their American EULAs.¹⁰⁰⁹

1.5 – The few VW EULA cases that have reached the courts can indicate only prospective decision paths and interpretations of law.

1.5.1 – In *Bragg v. Linden* the mandatory arbitration clause of SL was found to be substantively unconscionable for subjecting average consumers to unreasonably burdensome dispute resolution processes,¹⁰¹⁰ combined with the excessive powers that ToS grant Linden Lab with over deciding contractual breach and terminating accounts. The law requiring both substantive and procedural unconscionability, the court held the latter in the OSPs superior bargaining power, where no alternative VWs to SL where participants can acquire property rights existed on the market.¹⁰¹¹ Hence, the court reasoning over unfairness derived from appreciating an illustration of the current VWs market.

1.5.2 – The findings of the Chinese Arctic Ice decision extracted from the contractual relationship the OSP’s obligation towards the subscriber: commercial contracts as juridical tools confer good faith expectations in market contexts that operate both ways. Indirectly the court recognised the user’s right to the account being kept intact, at least to that part where the OSP is reasonably expected to guarantee and provide this.¹⁰¹²

¹⁰⁰⁶ *UFC Que Choisir v. SNC AOL Bertelsman Online France* Tribunal de grande instance Nanterre, Ordonnance of 20 February 2001, Register Number: 01/00381, minute: REF/2001/466; CA Versailles, 14th chamber, 14 Mars 2001.

¹⁰⁰⁷ *Oakley* (2005) 1070.

¹⁰⁰⁸ *UFC Que Choisir v. SNC AOL Bertelsman Online France* Tribunal de grande instance Nanterre, 1e ch. A, June 2, 2004, Gaz. Pal. 2005, 2, pan. jurispr. 1334–35, Brigitte Misse & Celine Avignon (Fr.).

¹⁰⁰⁹ *Maxeiner* (2003) 164 – 166.

¹⁰¹⁰ I.e. arbitration costing higher than common court action and jurisdictional exclusivity for cases involving small only sums of money; *Christ & Peele* (2008) 3.

¹⁰¹¹ *Ibid.* 2.

¹⁰¹² *Fairfield* (2005) 1084 – 1085.

1.5.3 – The *MDY v. Blizzard* case¹⁰¹³ deliberated the significant matter of the EULA’s reach in overriding federal copyright law. According to law, owners of software copies are permitted to make other copies for personal use¹⁰¹⁴ and either resell or lend their copy (‘first sale’ doctrine).¹⁰¹⁵ The appeal struck down the first ruling, which by agreeing that players do not own the purchased copy and are merely licensed to use it, had indirectly simulated EULA breach to copyright infringement.

1.6 – The developmental trajectory of individual and community consciousness in the Internet-mediated society is determined by the experiential interaction with online platforms, entities and artefacts and by the imparting of the Internet’s practical ethics. Chapter 3 discussed such processes amounting to the formation, broader circulation and, finally, establishment of meanings and values.

We may reasonably assume that where legal systems are not yet well-integrated with net-based societal values, functional and intellectual overtones of VW participation lie way beyond the comprehension of conventional judiciaries. Thus, the vocabulary of the examined relevant laws is formed around economic relationships and subjectivity notions like the ‘consumer’ and conceptions of social justice and public policy that reflect at best basic understandings of the offline systemic civility.

However, the intersection of our insights into online life with knowledge of VWs, allows specific concerns to be identified: interests in virtual personae, avatars and assets; integrity of online accounts in terms of content and continuity of communications; association with the social and cultural capitals that are circulated amongst functional and intellectual online communities; restrictions and terminations of all involved activities at the absolute discretion of OSPs. These are issues to which users relate directly, yet fail to come into ontological compatibility with our current legal reality and are thus plausibly excluded from evaluations of EULAs and ToS.

¹⁰¹³ *Supra* 4(II)[1.3.1.13].

¹⁰¹⁴ 17 U.S.C. § 117.

¹⁰¹⁵ 17 U.S.C. § 109.

1.6.1 - Deciding over their legal significance presupposes being in position to trace the links connecting the virtual with the actual values rhetoric. This particular undertaking identifies with exploring the premise of online human subjectivity to its furthest ends and is openly addressed in the second and third parts of the next Chapter.

2. Virtual Property – The question of online virtual property (VP) does not draw meaning from the semantics of topological metaphors, which assist our daily visualising of Internet involvement and which even law has reproduced en masse.¹⁰¹⁶ Instead, as it has been suggested, a consistent treatment of virtual property envisages the palpability of online types of computer code that manage to perform as persistent, rivalrous and ‘interconnected’¹⁰¹⁷ data resources. Examples of such forms include URLs, domain names, email accounts and websites.¹⁰¹⁸

Regarding VWs, VP refers either to onscreen representations turning into tangibility signifiers for users to complete their melding into virtual societies or to the range of MMORPGs artefacts that have spawned secondary online markets.¹⁰¹⁹ Neither perspective is incompatible with the above conceptualisation of VP: beyond the illusion of onscreen images, virtual items are nevertheless computer code,¹⁰²⁰ at the discretion of users to interact with, appropriate or transfer.

2.1 - The idea of VP has appealed to many as becoming the key factor in penetrating the barriers of absolute control which OSPs have placed around VWs, in the sense that it could justify users’ possessing of virtual items and ownership of UGC. Actually, the claim of VP has often been seen as recourse against contractual alienation.¹⁰²¹ Several suggestions have been made. For example, the relation of the user with the VW may be seen as leasehold, where virtual items become usufructs. By drawing parallels to

¹⁰¹⁶ *Hunter* (2003) 472, argues of courts’ spatial treatment of Cyberspace in the extensive uses of terminologies like ‘web, net, sites, access, trespass, navigating, visiting, transport.’

¹⁰¹⁷ *Fairfield* (2005) 1049 – 1050, coins the term “interconnectivity” to cover both concepts of data location within a network ‘(and thus susceptibility to network effects)’ and of interactivity.

¹⁰¹⁸ *Ibid.*

¹⁰¹⁹ ‘Virtual Gaming Worlds Test Boundaries of Intellectual Property Law, Panelists Say’ *News column, Electronic Commerce & Law Report*, Vol. 11 (6), 143 (2006).

¹⁰²⁰ *Saunders* (2007) 232.

¹⁰²¹ *Fairfield* (2005) 1052.

actual-world usufructs, the issue of impermanency, with which one might object to the juridical tangibility of virtual property, appears easily overcome.¹⁰²²

The commonly reported user claims to VP have been refuted on the same Lockean treatise they have relied on. Therefore, following Locke's thesis that one makes property of what 'he removes out of the state that nature hath provided, and [...] hath mixed his labour with, and joined to it something that is his own',¹⁰²³ counterarguments address two main contradictions in the VP-related assertions: (i) privately-owned VWs hardly present a commons where unclaimed properties exist in 'a state of nature'; and (ii) the meaning of 'labour' as an act of appropriating goods from the common does not comply with facilitated as intended VW contexts.¹⁰²⁴

Nevertheless, the above problematic introduces another dimension to the issue, differentiating between VP as such (game items, virtual lands etc) and as "malleable" raw material for creating genuine UGC.¹⁰²⁵ This distinction involves more of those settings performing in the vein of SL and leads directly to the discussion further below, in the section about IP.

2.2 - From a juridical viewpoint, notions of cyberproperty have merged on the Internet with traditional legal schemas to recreate electronic equals to trespasses to chattels. According to such accounts, web and email service owners 'have absolute rights to exclude others from electronic interaction with their equipment.'¹⁰²⁶ Such references made to 'access' and 'interaction' connote interference with both material and semi-material properties (i.e. servers and stored data respectively). Such substantive degree of physicality allows property laws from actuality to invade virtuality. In other words, even where the assets in legal discussion are indicated via symbolic terms of virtual weapons and land.

¹⁰²² *Lastowka & Hunter* (2004) 42 – 43.

¹⁰²³ *Locke* (1988) 288.

¹⁰²⁴ *Horowitz* (2007) 451 – 452.

¹⁰²⁵ *Ibid.* 453 – 454.

¹⁰²⁶ *Carrier & Lastowka* (2007) 1484.

2.2.1 – In the VW and law scholarship the question of criminality was raised and dismissed with regard to stealing items within game contexts.¹⁰²⁷ However, where misconduct reaches beyond virtuality and triggers actual criminal liabilities,¹⁰²⁸ involved losses and damages to virtual items may lead directly to judicial remedy. Regulatory responses of this calibre and of explicit proprietary accent have developed in south-eastern Asian jurisdictions.

2.2.11 - In South Korea where video games are extremely popular, authorities make frequent arrests on grounds of hacked or fraudulently acquired virtual property. The intense judicial activity is not backed by specific property rules but zigzags between antitrust and consumer protection laws. In overall, practices of sales have been held to be legitimate, yet OSP ownership has never been doubted in this framework.¹⁰²⁹

2.2.11.1 – South Korea’s Supreme Court has ruled that VW currencies are on par with “real-world” money, acquitting gamers charged of selling virtual assets – earned in the normal course of playing - for money.¹⁰³⁰ The decision indirectly decriminalises game service enterprises associated with out-of-game sales but is also estimated to enabling OSPs to trade directly game content and currency.¹⁰³¹

2.2.12 - The rapidly growing MMORPG market, but also the development of profitable gold-farming operations, has analogously contributed in China towards forming serious appreciations over virtual property values. These jurisprudential inclinations became clearer in the light of the Arctic Ice case. Eventually, virtual theft is on many accounts considered punishable.¹⁰³²

¹⁰²⁷ *Lastowka & Hunter* ‘Virtual Crime’ in *Balkin & Noveck* [eds.] (2006) 121 – 135.

¹⁰²⁸ *Kerr* (2008) 11, narrates the case of a teenager who was arrested for tricking users of the Habbo Hotel VW into giving away their login details to steal virtual items from their accounts.

¹⁰²⁹ *Fairfield* (2005) 1087 – 1089.

¹⁰³⁰ <*CNet News* 19/01/10>.

¹⁰³¹ <*Korea Intelligent Technology Times* 12/01/10>

¹⁰³² *Supra* 1029, 1084 – 1086.

2.2.13 - Among Asian jurisdictions, Taiwanese legislation has more actively encompassed virtual property by objectifying it and protecting it against fraud, in view of both its personal user account and monetary values.¹⁰³³

2.2.2 – These perspectives are not foreign to western legal grammars in their philosophy and pursued practical disposition. The premises of objectification in legal actualisations of MMORPG data and accounts converge with the noted judicial utilisations of trespass metaphors. The truly instrumental meeting point, however, lies in normative frameworks subsuming shared commercial principles of service integrity and of trust between business and customers and rearranging these into basic regulatory reasoning. Therefore, reinstating the content of an account to its former status in cases of evident negligence of service operators, or recognising damaging interference of third parties with data that constitute online accounts, may form reasonable expectations for one to hold onto in markets operating under the Rule of Law.

However, this latter presupposition is exposed to further juridico-political checks with shuffles that commercial forces regularly sponsor. For example, the broad liability disclaimers and clauses that force users to relinquish potential rights in EULAs attempt to antagonise social expectations;¹⁰³⁴ they are thereupon assessed over the counter-standard of socio-commercial rationality that they nurture.

2.3 – Property per se receives little regulatory attention in mainstream analyses of the legal implications of VWs, for it was quickly superseded by the sophisticated rhetoric of the IP approach (coming up next). The tendency holds true even more for instances of general legal production that reverted to IP in order to delineate appreciations of data.¹⁰³⁵ Instead, the Asian “traditionalistic” focus on VW accounts simplifies aspects of the general legal treatment that might be in need of being partly levelled down,

¹⁰³³ *Ibid.*

¹⁰³⁴ *Vacca* (2008) 50 – 51.

¹⁰³⁵ Intentionally left out from the presentation of laws in Part I, the commonly adopted juridical scope addresses data as content, while collections of data fall generally under copyright protection rationales. The creation of separate database rights in Europe (with Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases) took this perspective one step further.

especially when considering the heavy outset of contractual rules and the complexities raised by forcing in IP law interpretations of virtuality.

3. Intellectual Property - Checking with the expanded commercial and technical settings, application of IP laws is straightforward. The various elements that communicate VWs towards the market are safeguarded by trademark laws. Furthermore, several patents have been issued as relevant to virtual spaces (in the US),¹⁰³⁶ covering from operational apparatuses that are used for constructing virtuality's illusion¹⁰³⁷ to modules embedded within it, e.g. ghost object for a VW,¹⁰³⁸ advice-tracking in VWs,¹⁰³⁹ financial institutions and instruments in a virtual environment,¹⁰⁴⁰ securing contracts in VWs.¹⁰⁴¹ At the same time, a considerable number of patent applications are currently pending.¹⁰⁴²

The long-developing relationship between computer games and copyright has featured, first, articulations of games as computer programs and, second, classifications of audio and visual elements under a broader view where games become works more or less similar to films.¹⁰⁴³ The principles of copyright law are summarised in the owners' exclusive rights to perform in public a work, adapt it, make copies of it and issue them to the public. Such creations range in expression from books and poems to mundane cooking recipes.¹⁰⁴⁴ The virtual setup of visual, textual and sound sequences and the source code, which serves as its backbone, meet

¹⁰³⁶ Patentability of VWs may have turned into an unfair competition pre-emptive strategy, *Gatto et al.* (2009).

¹⁰³⁷ *Virtual space apparatus with avatars and speech*, US Pat. 5736982, issued 7 Apr 1998; *Network game system having communication characters for conversation changing into action characters for action gaming*, US Pat. 5827120, issued 27 Oct 1998; *Method of and system for minimizing the effects of time latency in multiplayer electronic games played on interconnected computers*, US Pat. 6042477, issued 28 Mar 2000; *System and method for enabling users to interact in a virtual space*, US Pat. 7181690, issued 20 Feb 2007.

¹⁰³⁸ US Pat. 6229533, issued 8 May 2001.

¹⁰³⁹ *Video game environment that tracks help and advice provided to other player characters*, US Pat. 7572187, issued 11 Aug. 2009.

¹⁰⁴⁰ US Pat. 7645194, issued 12 Jan 2010.

¹⁰⁴¹ US Pat. 7666095, issued 23 Feb 2010.

¹⁰⁴² *Kane & Duranske* (2008) 14.

¹⁰⁴³ *Tunney* (2001); *Reuveni* (2007).

¹⁰⁴⁴ *Story, A.* 'Don't Ignore Copyright, the 'Sleeping Giant' on the TRIPS and International Educational Agenda' in *Drahos & Mayne* [eds.] (2002) 131.

copyright's requirements of originality and creativity in such fixed forms,¹⁰⁴⁵ rendering unquestionable the protection that VW developers enjoy under law and from this contextual viewpoint.

3.1 – Conversely, the margins for justifying assertions of users' contributory authorship remain questionable. Fixed game items (VW 'chattels' as 'items put in place by game designers',¹⁰⁴⁶) lie evidently outside the reach of users' claims.¹⁰⁴⁷ Contesting the connection between the user and his avatar in relation to virtual acquisitions and components fails also to present a valid legal position:¹⁰⁴⁸ within either loosely or tightly predetermined game scripts, arguments of co-authorship lack in legal validity.¹⁰⁴⁹ The prospect of IP protection for users' avatars is not eventually unfeasible but it is certainly restricted by the premises of current ownership regimes as well by the functional constraints of VWs that disallow interoperability with other software platforms.¹⁰⁵⁰

3.2 - However, OSPs tend to overstretch the legitimacy of their IP entitlements. Therefore, despite the strong objections of the industry and its representatives,¹⁰⁵¹ out-of-game sales of game properties do not constitute copyright infringement;¹⁰⁵² they might be attacked on different rationales,

¹⁰⁴⁵ *Reuveni* (2007) 274 – 275.

¹⁰⁴⁶ *Burri-Nenova* (2009) 3.

¹⁰⁴⁷ *Garlick* (2005) 437; virtual representations of items that abide by the game developers' design constitute copyrightable work in software code.

¹⁰⁴⁸ Users' contributions to creating characteristics of avatars are rather pre-empted by selection templates that VW software incorporates; *Supra* 1083.

¹⁰⁴⁹ The major argument against co-authorship is vindicated by the decision in *Midway Manufacturing Co. v. Artic International, Inc.* 704 F.2d 1009 (7th Cir. 1983), that playing a video game is no more participation and a creative process than changing television channels, *ibid*. The response asserts that today's highly interactive and sophisticated games differ tremendously from the games at the time of the Midway decision, especially considering environments like SL; *Garlick* (2005) 437 – 439; *Benkler* (2002) 389 – 390.

¹⁰⁵⁰ *Slavitt* (1998) 618 – 629, builds an extensive paradigm of legal fiction, where the VW avatar contests forms of IP protection that are associated with the broader notion of the 'fictional character'; these include name, characteristics, character narratives (copyright and trademark) and personality (publicity rights, trademark). However, she envisions her character as crossing between virtual online settings and protection is utilised not as the means to differentiate from the OSP's hold on accounts but to defend against competition by other avatars.

¹⁰⁵¹ *Supra* 1019.

¹⁰⁵² *Garlick* (2005) 450; *Yoon* (2005) 18; *Reynolds, R.* 'Hands off My Avatar!' in *Bethke & Hoffman* [eds.] (2008) 147.

but, certainly, copyright does not offer the legally precise solution to the problem.

3.2.1 - Most expressions of such arbitrary interpretations have found their way in EULAs, mainly misplacing the fear of VW copyright protection being directly threatened if users would have ever legitimised their access to UGC.¹⁰⁵³

3.2.11 – It has been argued that UGC may be granted copyright protection ‘with no requirement of formality.’¹⁰⁵⁴ In parallel, law provides for plausible general exceptions to the original author’s (i.e. VW designers) exclusive right to a creative work, like in fair use defences which serve the public interest.¹⁰⁵⁵ In this respect, users are allowed to claim ownership of independent works they produce outside the developers’ ‘prefabricated tools and images’¹⁰⁵⁶ and, as long as they abide by law’s prescribed limits, to appropriate creatively copyrighted works from virtual spaces. Thus derivative works, like machinima, that incorporate existing copyrighted assets, even where they would otherwise require permission from the original work’s owner, are not found in violation of copyright as long as they can exhibit one form of fair use or the other.¹⁰⁵⁷

3.2.2 – Controversially expansive interpretations are characteristically exhibited in EULA clauses preventing users’ ownership of e.g. typed dialogue (chat) in the VW or on the service’s forums, or requiring their full transferring of rights to UGC and works like fan-fiction and fan-art to OSPs.¹⁰⁵⁸

3.2.3 – As previously noted, whilst shrink-wrap licenses in the US have been found not to be pre-empted by the U.C.C.¹⁰⁵⁹ it has been argued for the

¹⁰⁵³ *Jankowich* (2006) 37; such fears are generally identified with the ‘fan-fiction problem’, i.e. the entertainment industries’ concerns that derivative authors might sue the original creators in case the latter implement plot elements created by the former, *Hayes* (2008) fnt 34.

¹⁰⁵⁴ *Miller* (2003) 438.

¹⁰⁵⁵ *Reuveni* (2007) 270 – 271.

¹⁰⁵⁶ *Ibid.* 284, uses literary works (e.g. a poem) as a main example to mark the distinction from software interface-generated creations, like avatar depictions.

¹⁰⁵⁷ *Hayes* (2008) 568 – 569.

¹⁰⁵⁸ *Ibid.* 38; *Supra* 1053.

¹⁰⁵⁹ *Burri-Nenova* (2009) 13; *MacManis* (1999) 184, disagrees that the effort to present specific precedents as settling the question of pre-emption are ‘woefully misleading’.

potential of overarching legislation to neutralise EULA clauses prescribing limitations to the users' IP rights.¹⁰⁶⁰

3.3 – Conclusively, the present investigation should have opened by enquiring the reasons for the expanded IP discourse becoming an overarching theme when discussing VWs. Arguing in proper terms of IP reserves in the long run contingencies in the most formal aspects of law, that promise undermining effects for the market and the public's participation in online platforms alike.¹⁰⁶¹ As in any general property argument, the IP viewpoint opens the door to commodification by transforming constituent elements of an interaction mode into tradable and eventually exploitable assets. Contrary to a general expectation that in any social setting item exchanges will inevitably occur, IP facilitates an additional layer of reasoning that manipulates access to ownership on a deeper level than mere physical possession. The argument of "ownership by origin" contests a penetrating moral hold over social relationships that IP rationalities realise in palpable normative constructions. Where OSPs used first IP in combating the commodification of out-of-game sales,¹⁰⁶² their weapon backfired by introducing users to over-encompassing understandings of creativity and thus related proprietary ethics.

4. – The analogy with sports teases with the possibility of formally institutionalised gaming activities. For a fact, video-gaming "Olympics" and such competition tournaments are being held worldwide.¹⁰⁶³ Winners are usually awarded large sums of money;¹⁰⁶⁴ the involved socio-economic implications find instances of game-fixing triggering legal proceedings.¹⁰⁶⁵

¹⁰⁶⁰ Reuveni (2007) 292 – 296, analyses two pre-emption possibilities, where either state law-governed contractual provisions conflict with the federal Copyright Act or causes of state law action in the same form raise constitutional concerns. Regarding both scenarios, the Act has been interpreted as guaranteeing copyright's promoting of public good 'over and above other interests.'

¹⁰⁶¹ *Bartle* (2004) 21, addresses three awkward issues: (i) players of limited legal capacity (e.g. minors) granting rights via EULAs to OSPs; (ii) users as authors of virtual creations under the Berne Convention and moral rights as basic human rights; and (iii) judicial interference over contractual unfairness may harm game integrity.

¹⁰⁶² *Ibid.*

¹⁰⁶³ *World Cyber Games* is considered to be the main international tournament <<http://www.wcg.com>>.

¹⁰⁶⁴ <*BBC Click*, 29/06/07>.

¹⁰⁶⁵ <*1up*, 17/05/10>.

The example of Korea shows that professional “e-sports” associations are not far from becoming represented and incorporated within official institutional orders.¹⁰⁶⁶ From there, professional sports litigation indicates the allowed extents that external regulation may reach and alter in-game order.¹⁰⁶⁷ These structures foreshadow the judicial intervention not being precluded by gaming contexts once the socio-economic conditions are met.

The second regulatory possibility involves taxation over virtual acquisitions. Again, the prospect has been openly contested¹⁰⁶⁸ in view of online gambling activating in many jurisdictions income revenue mechanisms. Most probably accountable would be found currency exchanges from virtual to actual cash that VWs like Entropia facilitate; or even earnings from out-of-game sales.¹⁰⁶⁹ Such potentialities may be simply weathered through the application of levies to cashing out mediated by OSPs, as already applying to online marketplaces (e.g. *amazon*, *eBay* etc). Nevertheless, taxation prospects remain currently open;¹⁰⁷⁰ the argument has gained popularity with those questioning, or at least testing the regulatory isolation of VWs.

5. - Arguably, the online omnipresence of contracts has deterred alternative treatments of VWs,¹⁰⁷¹ to the extent of having taken onboard a selected few normative appreciations. Furthermore, the internationalisation of agreement models across sectors and their approval by laws creates a customary secondary law and makes permanent specific regulatory expectations.¹⁰⁷²

A source of issues which current structures of laws have not been prepared to address lies in the creation and circulation of online social

¹⁰⁶⁶ The Korean e-sports Association (KeSPA) <<http://www.e-sports.or.kr/>>.

¹⁰⁶⁷ *Chein* (2006) 1069 – 1073, discusses professional football and golf court cases to underline the interchangeability of contexts regarding athletes’ actions within the game.

¹⁰⁶⁸ *Dibbell* (2006) chronicles his anecdotal attempt to make a living for a year on earnings made by selling virtual items with the intent to try the response of the US Income Revenue Service mechanisms.

¹⁰⁶⁹ *Castronova* (2005) 244; *Camp* (2007); *Lederman* (2007); *Seto* (2008).

¹⁰⁷⁰ *National Taxpayer Advocate* (2008) 213 - 216 discusses openly possibilities and proposals with regards to taxing VWs.

¹⁰⁷¹ *Fairfield* (2005) 1050.

¹⁰⁷² Could not help but to draw an analogy with *Hammer's* (2007) understanding of customary international law and how states’ perceived obligation to follow it eventually binds it within their positive laws structures, 51 – 52.

meanings. These dimensions of virtuality evolve around existing application platforms - including VWs, but most commonly network infrastructures like *facebook*, *twitter* etc; yet, as explained regarding intellectual communities, they cannot be blueprinted in advance and thus directed by the owners of online services. They demonstrate the tendency of expanding in largely unpredictable patterns, depending on the (at the time) circulated appropriations of communications modules (i.e. what use and what social, cultural, political or economical significance different communities attach to applications like content host services). Law might be in position to put restraints into place, intercepting such practices; IP legislation responses to online behaviours exemplify best this premise but also its limitations – ontological and practical alike.

The narratives of identity formation suggest a probable field for regulation, taking also into account the online circulation of involved capitals between the various community configurations. The term ‘capital’ here is again used in the sense of a market metaphor, whereas social participants exchange and use resources towards their development within given spaces. However, an economical understanding of capital might assist in speeding up acceptance of disputed properties by thus predisposed legal structures. The examples of out-of-game sales of virtual items speak of necessitated regulatory interventions or shifts in judicial interpretations where law valued online activity on economic grounds.

That as far as we consider law following the economic trajectory; otherwise, legal systems are prepared to deliberate issues of online identity and related political, cultural and essentially human capitals, if they were to activate scopes already embedded within the regulatory systemic hierarchies of contemporary democracies. There, judicial evaluation gives priority to serving ultimately different ends and the capacities of the recent wave of Net-related legislation to facilitate Justice are put to the test.

III. The Riddle of Human Rights

A truly puzzling faculty of Internet laws lies within their capacity to be interpreted dualistically, as either products or not of human rights

conscious systemisations. This is a logical problem in modernity, since human rights ideals were historically filtered into democracy and constitutional citizenships. Thus, it is difficult to certify over a particular legislative instance if the rule of law is subscribing directly to a human rights ideal, where otherwise conscious choices have been made in the applied language of law that downplay across the legal systemic entity the impacts of such an over-reaching rhetoric.

Modern constitutionality has replaced human rights with civil liberties, a term which, divested of the broader philosophical breadth, responds to the needs of the systemic structure of law, i.e. the relationships between state and citizen(s) within a particular jurisdiction. In doing so, law frequently confuses the two, sometimes rejecting the existence of a human right if the constitutional apparatus does not provide for civil rights action, others opting out of the connection.

From this angle, assessing almost two decades of Internet legislative production upon its compliance with the imperatives of human rights that democratic states emphatically advertise in their domestic and international dealings, signals the relevant affordances which law as a deliberate means carries along.

1. US Federal legislation is strategically aimed at uniting states over those matters requiring common course; otherwise, each state may differentiate its applied legal scope (we addressed the example of consumer protection in contract laws).

1.1 - The CDA and its descendant laws pursued protection of children from harmful material. The scope of these approaches could be seen as equally aligned to both an expanded human rights rationale¹⁰⁷³ and to conservative

¹⁰⁷³ Art 17 of the *United Nations Convention on the Rights of the Child* (access to information from mass media): '[...] States Parties shall (e) encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.'

morality; however, evidence from the legislative background points more to the latter.¹⁰⁷⁴

1.2 - Far less ambivalence surrounds IP-related laws, since their problematic failed to come to par with the human rights concerns which are expressed in common property laws. The DMCA built up judicial mechanisms that are affordable to few: the provided copyright protection setup was planned to benefit industrial production. Furthermore liability limitations exist mainly for defending the economic activity of Internet services against the influxes of litigation opposite to copyright owners who allege online violations of copyright. In short, the law arguably supports preferentially a version of copyright more contained and targeted than in the Copyright Clause or as envisaged in e.g. the generic term ‘moral rights’ (which, in any case wanes in popularity in the US legal tradition).

1.2.1 – The present criticism is not aimed at condemning “evil corporations” but at alerting worriedly to legal presets that treat unequally unequal social *forces* and *classes* (i.e. not simply “actors” anymore); that transform the law into a classification tool. The DMCA, like all similarly minded legislations, reconstructed the legal framework for material property in intellectual terms, where misappropriation of property in general is considered to be a crime. The major difference to property, however, lies in the distribution and commodification of IP: whereas in realistic terms the acquisition and protection of material property refers to all citizens, we need to contemplate on how much of a socially universal value, one that deems such protection to justify rigid criminalisation, we can pragmatically appoint IP with.

1.2.11 – Whereas everyone can have a property such as a table, a wallet or personal valuables, criminalisation answers directly to public law concerns, serving to settle social disorder. If we were, though, to enquire how many social participants, in a given Western society, would benefit from the capacity to raise and pragmatically utilise an IP claim against others, we would have to look outside the masses of common citizens.

¹⁰⁷⁴ *Godwin* (2003) Chapters 9 and 10; *Harper* (2002); *Mota* (2002 – 2003); *Myers* (2006); Moreover, the language which promoted these laws made little effort to even imply the connection with human rights, whether by using potent references to constitutional rights.

1.2.12 - In protecting exclusivity in commercial exploitation, such legal systematisations are *sui generis* specialised in supporting identified sectors of economic life and are thus not responding to the needs and values of the broader human citizenship.

1.2.13 - However, they are neither effectively set up on a separate level of business or competition law, since they are actively posed against the public and infiltrate the public law sphere: IP laws prescribe criminalisation and excessively increased fines that equalise the individual user with the incorporated business competitor. This constitutes a unique and at the same time distinguishing trend of modern law, which is in consequence transformed first into “post-modern” and, eventually, in “post-human” law. Despite modernity’s declarations of serving humankind, priorities are being redrawn and aggravated *criminalities* are established to vindicate the economic interests of leading conglomerates, which precisely due to their dominance in media and entertainment markets are perceived to be those mostly exposed to multiple IP attacks. Systematisations are erected to criminalise in favour of the few who are not defined socially by their humanity but by their economic function; those criminal laws prescribe more onerous penalties than e.g. in regards to common theft or even to serious bodily injury: we are discussing legal regimes that not only turn protection into punishment¹⁰⁷⁵ but also construct societal classification through the operation of law upon the sanctification of capital. Stealing a poor man’s savings and leaving him to die of starvation seems less severe than “illegally downloading” a few dozens of songs from the Internet.¹⁰⁷⁶

1.2.2 - Such laws that criminalise on a preferential scale that oversteps the values of humanity become openly and aggressively inhuman.

1.3 - The focus of the 1999 ACPA lies within protecting online consumers from misleading websites. Consumer protection appeals to regulation acting

¹⁰⁷⁵ ‘How would we treat [...] the bike that is really a phone bike-thief bait bike that explodes when someone tries to take it for a ride?’ Weiss (2004) 233.

¹⁰⁷⁶ In *Capitol Records, Inc. v. Thomas-Rasset* \$1.5 million in damages were held against a woman for sharing online 24 songs; similarly, *Sony BMG Music Entm't v. Tenenbaum* involved sharing 31 songs (appeal pending on damages); *Nicholds* (2009); *Cross* (2010); *Edwards* (2010); *Jamar* (2010).

in the interests of citizenship when participating in economic and commercial settings, and only as such it may summon the human rights discourse; thus, it depends on the each time utilised perspective of consumer protection to recognise or not a genuine expression of human rights. The ACPA, however, is preoccupied with unfair registrations of domain names, chasing them up in the name of the confused consumer; in essence, though, the protection scope serves the online commercial activities of famous brands and people. On the contrary, surfacing as a kind of “trademark law simulation” the ACPA does not address instances where e.g. the names of common individuals are claimed by others as domain names, maintaining a commercial scope as exclusively reserved for business.

1.4 - Within the 2003 CAN-SPAM Act, however, the take on consumer protection materialised human rights considerations. The consumer was acknowledged in his human dimensions; any potential harm he might have suffered was assessed outside the definitional spectrum of market terms.

At the same time, though, where the Act has been persistently criticised over its shortcomings outnumbering the apparent benefits,¹⁰⁷⁷ the prospect of proceeding with the necessary amendments has not been met with equal interest and thus remains uncertain.

2. - As informed by economic concerns, the EU legal framework has always primarily been set upon regulating the internal market, yet conflict and interference with the juridical sphere of citizenship becomes inevitable: in essence, fundamental freedoms and rights are exposed to the operations of the market. Human rights always constrained EC action in its legal teleology, without, though, posing a direct rights source under Community law.¹⁰⁷⁸ Nevertheless, the EC Treaty and the bulk of Directives in their preambles declare earnestly their attachment to the general requirements of the ECHR¹⁰⁷⁹ (which the ECJ has also been enforcing for some time);¹⁰⁸⁰ the

¹⁰⁷⁷ *Supra* (I)[2.1.7].

¹⁰⁷⁸ *Craufurd-Smith* (1997) 92, noting that the four basic freedoms which the EC Treaty established (free movement of goods, services, persons and capital) are affiliated to economy implementation.

¹⁰⁷⁹ Treaty of the European Union, Art. 6: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and

Treaty of Lisbon strengthened this connection in pursuing binding effects for the ChFR.

2.1 *The Consumer as a Structural Imperative* - Several EU Directives, including most Net-related statutes, capture the individual person within the instrumental term ‘consumer’,¹⁰⁸¹ to invite positive and negative alike appreciations of their dynamic to promote human rights.

2.1.1 - The approach that one would take in good faith picks for point of departure the previous discussion on human rights within the European framework. There, the notion of consumer cannot be conceived outside the premises of citizenship, which reserves a circle of powers and rights for enabling the persons’ functioning within society and economy. Therefore, human rights scrutiny of as such prescribed commercial performance does not lie outside proportion. The EU appears to be projecting protections of the natural person from the continental institutional tradition on its position on consumers.¹⁰⁸²

2.1.2 - Conversely, the consumer is a construction valued under rules for a harmonised market and invests in the rule of law for making valid judgements first within the commercial context¹⁰⁸³ before being able to extract from there the benefit of the human user. Where internal market law has monopolised the parameters of social activity, the extensive replacing of the ‘individual’ or the ‘user’ in legal texts by a straightforward economic

Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’

¹⁰⁸⁰ *Van Gend en Loos v. the Netherlands* case 26/62 [1963] ECR 1 (first confirmation of citizens’ rights in applying Community Law); *Stauder v. City of Ulm* case 29/69 [1969] ECR 419 (direct reference to fundamental rights and enforcement of the ECHR). Note that the Court has recognised further fundamental rights in reference to constitutions of Member States; some of these belong in the ‘traditional’ sphere (e.g. dignity, freedom of religion, respect of family life), while others speak the politico-economic reality of the market (freedoms of competition, trade, industry and profession); main case law listed under 2.1.0 (‘Respect for fundamental rights in the EU’) of the *European Parliament Fact Sheets* (2004 edition) <http://www.europarl.europa.eu/facts_2004/2_1_0_en.htm>.

¹⁰⁸¹ For example, Dir 2000/31 defines as consumer a natural person who uses an information society service, yet acts ‘for purposes which are outside his or her trade, business or profession’, Art 2(e).

¹⁰⁸² EU legislation has for some time taken ‘to heart’ consumer protection, *Mak* (2008) 430.

¹⁰⁸³ Effective consumer protection has been openly acknowledged as the intended means for earning fidelity in the internal market, *ibid.*

representation, neutralises other meanings of participatory identity, that being political or cultural.¹⁰⁸⁴

2.1.3 – A middle solution between these two streams seems less likely, unless we consider legislation realising the second, negative approach and courts materialising the first at the same time. This perspective seems paradoxical: a legal systemisation is being constructed in order to regulate external conflicts, while taking onboard the presupposition of an ongoing internal institutional conflict! Of course, one might perceive this as a variation on the theme of the separation of powers: is it not paradoxical the hybridism of the state, where the judiciary keeps in check the executive while the latter appoints the members of the former? Here, however, is suggested a fundamental confusion of principles in the legal praxis; an *ab origine* schizoid and wasteful arrangement of legal resources and actions, where laws are being enacted with the expectation to be struck down for being incompatible with humane Justice.

2.1.3.1 – The other way around this logic, which probably hits close to the current framework reality, condones the negative approach by relying on courts to blunt the severity of its social impacts. Thus, in practice the consumer identifies with the juridical means for discussing human rights within the economically reasoned setting.

2.1.4 – Even within this last conciliatory outline, which takes the furthest possible distance from the negative disposition towards the use of the term ‘consumer’, one cannot escape being overwhelmed by a pessimistic realisation about the underlying structures. EU legislative production over the Internet remains fixed in the economic objective which it further imposes on national laws. The terms of entry to and exit from online contexts are primarily determined in accordance with the market regulation mentality.

2.2 *European Commodification* - Regardless the guarantees for judicial reviews under the recently expanded socio-political scope for fundamental rights application, social online participation, for a fact, acquires its

¹⁰⁸⁴Helberger (2008) 386, noting in copyright literature the enclosure of the concept consumer in ‘the individual whose main interest is maximum consumption at the cheapest possible price.’

existence and palpability in EU legislation singularly, as a matter of commerce.

2.2.1 – Of the instances of law, the infrastructure Directives of 2002 exemplify affluently the noted ideological metamorphosis of the information society. Where in previous years the semantics of ‘universal access’ would effortlessly be perceived to be signifying a right to information for everyone, the term ‘universal’ is conceived upon the omnipresence of the principle of free competition across framework legislations; ‘access’ is defined upon participation in market mechanisms. In particular, under the Framework Directive’s notions of users’ access, a right to enter online settings is locked in the consumer template, to thus mark distinctively the juridical absorbing of political, social and cultural subjectivities by the functional economic module.

2.2.2 – On the other hand, Directive 2000/31/EC reaches great lengths in constructing a competent representation of Internet participation that leaves no real margins for discussing the parameters of online life outside its commercial dimensions. All possible discourses, developing around the relationships of groups and individuals with information artefacts, are pre-empted in the regulatory process by its over-encompassing perspective over the deployment and distribution of online content.

2.2.3 – A relevant example of pre-emptive effects poses the mechanism of the Copyright Directive. It prohibits the adoption of copyright exceptions others than those it includes, thus interfering with Member States’ developing of their cultural policies.¹⁰⁸⁵ States lack the flexibility to rewrite the domestic terms of engagement with information where such action would possibly interfere with economic understandings of copyright, which are now presiding. Note that alternatively the Copyright Directive is known as the ‘Information Society Directive’, an acceded signifier to the circulated hold of commodification over society’s dealings with information and knowledge.

2.2.4 – The argument being expounded here is that the Internet-related aspects of EU legislation do not promote human rights as a matter of

¹⁰⁸⁵ *Mazziotti* (2008) 38, who also points, though, that thus is achieved the purpose of harmonising national legislations, 115.

underlying principle of community law and they neither comply with it ontologically. Their effects might overlap with the aspirations of Justice; yet they subscribe the definition of social relations to a different language and treatment framework that detracts the litigation reasoning and practice. Under conceptions of citizenship, the social participant *is* ‘empowered’ and reserves ‘duties’ from other entities; here, instead, the person *acquires* ‘privileges’ and others bear ‘obligations’ towards him in a direct contractualisation of civic life. In this notion of commodification, if one cannot afford the market of basic privileges he will suffer degradation and indignation. The human rights doctrine had drawn the lines against turning fundamental social values into tradeable goods; now laws seem to have the growing tendency of crossing them.

2.3 – There are other lines of humanist considerations emerging with regards to the same sets of laws. For example, liberalisation under the 2002 Directives was empty of social concerns, entrusting entirely the market’s discretion with such issues as online access in remote areas or to disadvantaged populations.¹⁰⁸⁶ The existing systemic manifestations of the Justice argument meet there substantive obstacles in entering judicially such privatised contexts.

2.3.1 - Even more strikingly, enquiries into the administration of human rights are frequently deflected by dominant streams of risk assessment and management that have entered legislation – or, arguably, they have in turn incorporated it.

2.3.1.1 - The effects of commercial risk in the forms and attitudes of laws were addressed in Part I. EU law has matched the US stance in stretching out copyright criminalities - which flatly means placing barriers over the common modes of online interaction, as precipitated by the capacity to manipulate information artefacts. The Copyright Directive has been criticised for going further than the DMCA e.g. in criminalising directly even mere

¹⁰⁸⁶ *García* (2009) 60.

possession of anti-circumvention means, irrespective of mitigating circumstances or exceptions in the fashion of fair use.¹⁰⁸⁷

2.3.1.2 - The Data Retention Directive of 2006 attempted to strike politically a balance between freedoms and effective crime investigation¹⁰⁸⁸ – incited mostly by fresh memories of terrorist attacks.¹⁰⁸⁹ Even under the legal regime which preceded Directives 2002/58/EC and 2006/24/EC, ECtHR case law had already indicated loopholes and weaknesses in the mandatory retention of traffic data¹⁰⁹⁰ and ‘detrimental effects on the respect of privacy.’¹⁰⁹¹ The package of specific law enforcement practices in the new laws has arguably amplified existing problems;¹⁰⁹² according to others, it legitimately and ‘adequately protects’ the right to privacy.¹⁰⁹³

2.4 – These concluding evaluations do not charge on EU legislation, alleging oppression of human rights; and there is neither issue discussed of human rights values having been excluded from the European priorities. The contested point here is the structural inability of Internet laws to facilitate the discourse in question: online life is found juridically enclosed within a meanings structure where countering the application of human rights as unreasonable has become possible.

3. - The limitations of the US and EU legislative schemata perform preventively in conjunction with the key parameters of the constitutional problematic, seen in Chapter 2. The human rights argument is omnipresent within the context of injustice, where the demand for Justice is consequently invoked. Yet, its grasp on the practice of law is waning. Amongst the main reasons we may point to is the transformation in law of injustice itself, its meaning perceived in the mistreating of rules that subverts the legal procedure and not in analysing the manifestations and sources of suffering.

¹⁰⁸⁷ *Spinello & Bottis* (2009) 96.

¹⁰⁸⁸ Preamble of Dir 2006/24/EC, recital (9).

¹⁰⁸⁹ The bomb attacks in Madrid, 2004, and London, 2005.

¹⁰⁹⁰ *Goemans & Dumortier* ‘Enforcement Issues – Mandatory Retention of Traffic Data in the EU’ in *Nicoll, et al.* [eds.] (2003) 161 – 183.

¹⁰⁹¹ *Ibid.* 178.

¹⁰⁹² <OUT-LAW, 09/04/08>.

¹⁰⁹³ *Bignami* (2007).

In law, these are phenomena accompanied by a prefix “post-”, although we cannot identify for sure the suffix that will label them continuants of one of the familiar legal narratives. Not that it makes any difference: the important feature is the step into this void that lies beyond our social and ethical trust in law. The ongoing fetishist stripping off of this apparatus’ interpretative prowess of all human and social concerns, allows us to settle with acknowledging post-human law.

3.1 – At the same time we discuss “post-” human subjectivities. The post-modern subject is presented as a set of data, in both senses of content and transferable or stored information. It thus arrives, sitting next to modernity’s subjects, i.e. the emancipated man and the legal person. This constitutes the next challenge for humanity: we may see the latter either transforming or being eliminated; persevering in the glyphs of symbolic space or dissolving into the currents of electronic information.

3.11 - Anonymity/pseudonymity has been recognised as a signifier for this new subject, politically and factually alike: factually, like a buoy on the surface of the sea of information, it indicates the human existence in the depths. Politically, it realises modernity’s aspirations for human emancipation into the organised society’s processes. However, the striving to protect anonymity has been undermined by criminalities taking advantage of it and thus attacked on such grounds.¹⁰⁹⁴

3.2 – Which leads to contesting the condemnation of the risk management discourse in the previous sections as unfair; for many of the previous arguments detached values pursued under risk assessment from the human rights sphere. One of the pathologies of risk society is the marketing of threats, the overexposure of hazards as the justification for implementing specific policies. There is no question of whether safety and security constitute values under the human rights scope. We need to place, however, risk management within proportion in the political dimensions it seizes.

3.2.1 - First of all there is a qualitative difference between talking about the value and protection of life and the manner in which EU laws, for example,

¹⁰⁹⁴ *Eneman, M.* ‘The New Face of Child Pornography’ in *Klang & Murray* [eds.] (2005) 29.

pursue to eliminate commercial communication about smoking and alcohol from mass media; or between speaking of children's rights and the CDA as an expression of moral imperatives. Human rights utilise human rights as a concept to promote a relevant value; in the above examples, the value itself is being utilised in order to promote a political belief.

3.2.2 - Risk representations involve an intended socio-political act of promotion; that is the reason they attract negative criticism, for it is not always clear whether risks have intensified or simply the given view of them. The issue of security consists one of the most attacked strands of the digital age, since the consistent argument of threats has legitimised invasions to personal spaces and information. Risk implies the constant and aggressive prioritisation of one value as part of a political agenda; human rights adopt a passive, holistic theorisation over the relevant set of values.

3.2.3 – Therefore, from the perspective of human rights the intensification of a selected few values undermines the unity of humanity. That is why a risk policy, while serving perhaps a human value, contradicts at the same time human rights in principle.¹⁰⁹⁵ We need to differentiate negative notions of risk management to genuine crisis situations (e.g. natural disasters, war victims etc), especially where the former are openly aligned to identified political and economical agendas.

3.3 – Under this assumption, the crisis of copyright is also artificial, an area of risk that necessitated subsequent interventions of law. In principle IP rights are necessary for innovation and consistent with the norms of justice.¹⁰⁹⁶ Boyle remarks that most copyright policies perceive almost axiomatically the Internet as a threat and have realised responding laws.¹⁰⁹⁷ This mindset perceives technological freedoms as risks for the industry and turns them into a controlled infrastructure of communications channels.¹⁰⁹⁸ Moreover, such are the cultural and technological circumstances which

¹⁰⁹⁵ For example, in the wake of the 9/11 terrorist attacks, the US Patriotic Act justifies unequivocal investigative measures on terrorism being 'acts dangerous to human life'; *Roach, K.* The Post-9/11 Migration of Britain's Terrorism Act 2000' in *Choudry* [ed.] (2006) 379.

¹⁰⁹⁶ *Spinello & Bottis* (2009) 2.

¹⁰⁹⁷ *Boyle* (2008) 82.

¹⁰⁹⁸ *Ibid.* 62.

condition society's daily dealings with information that the shaping of these new laws breeds litigation where individuals face multinational entities.¹⁰⁹⁹

4. – Within this setting we return to our initial question, the resolution of the human rights argument in privately operated online setups and VWs in specific. Apart from human rights two other discourses have dominated the legal outline of this investigation, namely intellectual property and contractual unfairness. Their unity in the regulatory tool of the EULA carries along a powerful political and economical charge that permeates the suggested discussions over legal application. As noted, Justice faces considerable obstacles in reaching out through the posited structures of laws; the riddle of human rights objectifies further the capacity to negotiate with the dynamics that the end-users licence agreement represents, taking also into account the cultural and political backgrounds.

4.1 - To an extent, licensing refers to times when neither software nor copyright protections existed for acts of end-usage.¹¹⁰⁰ The updating of copyright laws supposedly settles exclusivities and fair uses within generally agreeable limits; in fact, copyright laws have undergone impressively frequent updates in the past fifteen years. Nevertheless, EULAs persist on pushing the copyright owners' agendas beyond the standard outline of constraints, to the degree the principle of contractual freedom permits them to do so and judicial precedents concede. As the case may be, unilateral contractual obligations leave virtually no impacts on law. From there, the question is whether standardisation within a sector superimposes contractual normativity over existing regulation and prohibits the public from exercising otherwise legitimate uses of copyrighted material; or, similarly, whether the standard terms of an online service in a dominant position do not create *erga omnes* effects beyond the allowances of the law.

On the other hand, for a long time courts have been reluctant in face of standard-form terms to sacrifice principles of contract law and freedom of

¹⁰⁹⁹ *Jenkins* (2006) 142.

¹¹⁰⁰ *Mazziotti* (2008) 58 – 59.

contract to ‘dictates of justice or social desirability.’¹¹⁰¹ The intellectual property perspective and the apparent lightness of virtual life might push them even further away from feeling burdened to restrain contractual regimes, where they perceive incoming impacts as even less relevant or threatening to the dominant static conceptions of societal order. The next Chapter confronts at length the plausibility of such viewpoints.

4.11 – (Privacy seems to be the HR stronghold in EU law, proving capable in courts of prevailing over IP rights and over private interest in closed settings, like employment relationships.¹¹⁰² It is objected, though, that private codes of conduct could deflect interference of the human rights regime in the latter relationships,¹¹⁰³ which brings us back to the degree that EULAs could be penetrable).

4.2 – Beyond the surface layer of discrepancies in legal practice, the riddle confronts the deeper ideological impacts on the capacities of social perception and critique. The absence of other usable values vantage point apart from the market sterilises our considerations of law, and the future of the civil discourse is pre-empted towards one direction. For example, such impacts of US laws on courts lead to market-centred interpretations of fair use; that is, fair use is being measured primarily upon whether the industry suffers any harms and not on what actual user’s rights it serves.¹¹⁰⁴ Discussion not conditioned at all by humanity towards decision making, discards humanity from its conclusions.

In juridico-political consequence, the contemporary democracy project is structured upon protecting economic activity rather than humanity directly, and this is the point raised with regards to the values depletion in juridical tools. Continuing the same example, Boyle keenly observes that practice has both intentionally and unconsciously transformed US fair use from limitation

¹¹⁰¹ *Kessler* (1943) 637; *Lemley* (1995) 1285 – 1286, for a summary of the underlying theoretical problem in view of licensing

¹¹⁰² *García* (2009) 82; however, *Mazziotti* (2008) 238, points out that ECtHR case law involving copyright has shown instances, where, under art. 8 of the ECHR, ‘rights of others’ may justify restrictions on privacy.

¹¹⁰³ *Ibid.* 86.

¹¹⁰⁴ *Mazziotti* (2008) 142, in reference to cases like *Napster* and the more recent *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

‘on the exclusive rights of the copyright holder’ to affirmative defence in copyright infringement cases.¹¹⁰⁵ The gap between the rule of law acknowledging the industry as primary restrained by the social, cultural, moral etc needs of the public and requiring individual members of the public to prove that their actions do not subvert the interests of the industry is huge; for it transforms proportionately the content of public interest: in the second case it is identified to the interests of the industry, while in the first it checks with broader societal principles. Attention to serving economic prosperity, even though it now looks like benefiting only few corporations, may in the (very) long run pursue and deliver genuinely “happiness” for everyone; in the meantime though it more likely proliferates suffering, by depriving the justice process of socially sound criteria, and thus civil society of humanity.

5. – The opening of the Chapter alluded to the enclosure and exploitation of territorial discoveries. Regarding the Internet, the meaning of discovery denotes not the invented network but the online human communications: the Net has materialised our manipulation of knowledge in our daily social, cultural and political processes!

Ascribing palpable dimensions to online participation opened the door to measuring the parameters of interaction through physical analogies. The virtual construction of space and territoriality, constituting in essence the act of discovery, was followed by the conquest perspective, that including the stage of exploration, the development of proprietary impressions and, finally, enclosure – privatisation.¹¹⁰⁶ Internet-related laws undertake this last task, IP law substantiating the rhetoric for seizing symbolic space, electronic contracts established in power to secure the inviolability of private regimes on a one-to-one basis.

The need to control on this occasion, though, is internally directed. The system is not seeking out its expansion, like in the case of the colonial powers of the old, but makes an introspective move. This is hardly a self-disciplinary exercise, though: as explained in Chapter 3, the online land

¹¹⁰⁵ Boyle (2008) 66.

¹¹⁰⁶ *Ibid.* expounds the ‘second enclosure movement’ argument about the enclosure of the intellectual commons, brought up also in the next Chapter.

stretches across abstract geographies of social relationships, identity meanings and knowledge exchanges; exploitation of natural resources in the fashion of imperial management leads to depletion, ecological damage and suffering; the harvesting of social and cultural spaces under the newly entrenched notions of commodification may easily recreate the unwelcome aspects of the paradigm. Therefore, the challenge of resisting juridically the incoming streams of laws in seeking symmetry between social effects and economic intent runs down into the same reasoning channels with the riddle of human rights – in parts, identifying with it.

6. Justice Online

The case studies illustrated characteristically under which terms OSPs confront virtual communities by deploying the formality exterior of law as a pre-emptive mechanism: the grammar of IPR and the contractual device form its main supporting pillars. It is questionable whether the contained argument of law is adequately or even appropriately represented. This Chapter considers the associated intellectual property claims, their roots and position within the broader systematisation of laws. It then examines the general legal implications that EULAs impose on virtual interactions and beyond.

In contrast to the current legal ethos of intellectual property and contracts, we may raise questions of “humanised” assertions. These are not necessarily coming into sheer conflict with the former. Rather, they constitute constructive counter-arguments in an attempt to realign the terms of regulatory balance with the actual philosophical and ideological backdrop that generated contemporary laws. Corporate lawyers, in their pursuit of

expedient and striking results, tend either knowingly or not to distort the inherent ethos, and EULAs often testify to shortcomings manifested in this fashion.

1. Virtual Persons in Law & the “Notorious” Human Rights Position – It should now be clearer how a human rights problematic contrasts the above stance. The former translates online personae into personality projections of users, the latter understands personae on proprietary grounds.

1.1 Two Approaches – Frequently, users on VW-focussed online forums tend to extract personae ownership from the invested time and effort in developing online identities.¹¹⁰⁷ The alternative that we might propose to this prominently “user-friendly” conception sees virtual entities that reside in online settings claiming partial autonomy, as a consequence of their strong manifesting of independent personality. These two “ownership” and “personality” positions convey broader interdisciplinary perspectives that one needs to address carefully, before entering the narrower and more pragmatic language of law.

Despite notably diverging in their use of theoretical foundations - semi-pragmatic (labour) the one, metaphysical (autonomous existence) the other respectively - their argumentative developments intertwine upon challenging critically the same online establishments and power structures that have been fire-walled behind expressions of (intellectual) property and contractual formalities.

With this in mind, it is plausible to test the two approaches as contestants, within the framework of rival legal ideologies that have dominated the regulatory treatment of the Internet. Priority is given here to a critical evaluation of existing laws, wherein virtual persons are founded in property and personality potentials. These potentials are then investigated in connection with the ongoing discussion over the proprietary entitlements of OSPs and the normative orders, which EULAs install.

¹¹⁰⁷ This concept draws from the ‘Lockean labour-desert theory’ (as *Lastowka & Hunter* (2004) apply it to VWs when discussing users’ claims to virtual property, 46) in combinations with another Lockean assumption, that as ‘every Man has a Property in his own Person’ ‘an individual’s labour also belongs to that individual’ (*Drahos* (1996) 42).

1.2 *One Origin* - Where does the human rights argument fit within these juxtapositions? First of all, I have already pointed to widespread formalistic understandings that are strategically reducing its application in the practices of justice.

Today's regulatory forms have been and are being built with the human rights normative schema embedded deep inside their constitutional foundations: that is a tight core of principles that structurally abide by a particular hierarchy. Neither the glorified contractual freedom nor the advanced proprietary entitlements' models discussed here would have ever been granted without the politically effective correlation between the human rights doctrine and modernity's democratic legalisation. The minimum underlying *logic* of the human rights normative conceptualisation is thus being constantly replicated both within and through all subsequent additions of laws, where the origins of civil liberalism lie in human rights reasoning.

1.3 *Talking Human Rights* - Under this light, I am drawing the human rights discourse from the conceptual breadth it claims across the continuity of the broader phenomenon of applied law, rather than from typologies, which tagged as "human rights law," perform exiled in a distant sphere of limited interaction with the common legal dialectics of everyday life, as if playing the part of the legal system's "compassion alibi".

Yet, let there be no misunderstanding that by convenience of abstract humanitarian dicta, e.g. the universal reach of the human being's sacredness, regulatory realism should be manipulated into sanctioning any imaginable novelties, like deconstructing Internet laws to accommodate user presumptions over their virtual modes of existence. My treatment of human rights highlights that vigorous *institutionalised reasoning*, which has predetermined (and rationalised) vertical and horizontal relationships within the liberal, democratic legal orders of our era. I am sided with the belief that the human rights ideological revolution conditioned the modern legal establishment; the latter - as it stands - cannot be perceived or conceived without affirming the former as its bedrock, as the source wherein the legal

empowerments that social and economic actors enjoy today were born and justified in principle.

Therefore, while the arguments in the following part reflect most of the examples of debated OSPs power from the previous chapters, they do not dispute the VW owners' actual entitlements over virtual properties. The lines, then, should be drawn clearly: the issue is *not the rightful dominium which OSPs may exercise over their creations, but the imperium they impetuously confer when dealing with users*, that is, the pseudo-regulatory attitudes they have been allowed to lay on with the tolerance – if not “encouragement” – of the supervising global legal establishment.

1.3.1 Risk vs. Legal Objectivity - On many accounts, the contextual relevance with heated risk discourses appears strong: as mentioned elsewhere,¹¹⁰⁸ the latter pressingly suggest - and succeed in imposing - limits to civil liberties, in view of broader social and economic concerns over security. Here, the circumstances reveal a new variation of *commercial risk*, which pleads highly probable damages to narrow commercial interests. The surfacing form of risk management moves steps beyond the generally observed pathologies of the risk society experience, since not only it downsizes freedoms, but it also grants respective right-holders with entitlements to expanded empowerment. Thus forwarded readjustments to the priorities of law and the order in which principles should be pursued, crucially affect the *objectivity* of law. In this very specific respect, considering that modernity has been loudly attesting the source and content of its representative values and legal identity within the concept of human Justice, the task at hand lies in pointing out where socially blind commercial aspirations of mere accommodation and opportunity cross the lines with their attempts to get the best of legal formalities and to subvert regulatory technicalities.

1.3.2 - Before proceeding to the main analysis, it is appropriate to indicate a number of important themes that will become visible shortly.

1.3.21 - First, while empowerment of individuality had initially been envisioned as the main condition of reaching general prosperity, now it is

¹¹⁰⁸ *Supra* 2(III).

turning against the development of individuals (and forms of socialising between individuals).

1.3.22 - Second, the terms of market competition have advanced towards appointing non-commercial actors (consumers) with equal to industry competitors' duties; the broader regulation of human contact is now also being gradually reconfigured under modalities of analogous orientation.

1.3.23 - Finally, the presence of the political should be appreciated moderately and in proportion: the political is not the ultimate legal determinant, yet its powerfulness should not be underestimated.

1. The Virtual and the Law

1. A Brief Look at the Legal Outset of Virtual Worlds - VWs appear difficult to capture under definitive regulatory approximations. They digest multiple contexts that, in conjointly animating these very structures, become inseparable from each other: they are online services. The ones examined here have, moreover, a commercial focus: they exploit unique, recognisable fictional themes and participation is privately ruled by contracts. Therefore, relationships between participants and owners belong *ex definitione* to the private law sphere, and any VW object is in essence data on (and of) privately owned servers. At the same time, several VW objects may be "enriched" (in virtual value or content) with the (subscribing) participants' initiative and effort. VW entities/items abide by their respective underlying fictional theme, which in turn is the materialisation of an original idea. Similarly, the original ideas of participating users are crafted on VW entities/items.

All these are features of direct legal interest that one may extract from standard VW settings. Some of them, however, are to a certain extent fluid, as explained below.

1.1 Appointed Law - Behind the diversity of interwoven comprehensions of VWs, a legal backbone of three main organising components - (i) property rights, (ii) intellectual property rights and (iii) contract law (specifically consumer contract relationships) - represents the VW premise according to

those regulatory mechanisms that allowed it to formally be installed and function in the procedural legal reality.

1.1.1 - At the same time, though, this makes sharply visible a structural imperative. Even outside legal analysis, the full range of circumstances, attributes and agency relationships which are being created as both internally and externally linked to VWs, are directly modelled on an *ontological, conceptual order that is originally found in law*, indeed a western universalised regulatory model. This structural imperative dictates that in a world normatively orchestrated by instructing concepts such as “legal subjects”, “rights”, “private relationships” and “property”, little space is left for erecting and indeed imagining alternative man-made architectures. In this sense, independent of jurisdiction and independent from the diversity of underlying VW themes, all activities relevant to VWs have inevitably reproduced the above triptych in both substance and form. Wherever you go, and no matter how different, all VWs repeat one “syntax of law”.

1.2 Negotiated Law - A second level of reading, extracts legal findings from the dialogue between virtual society and law. In contrast to the previous understanding, which acknowledges instances of structural determinism, this offers a different angle from which law is seen as negotiable content in future legislation and judicial decisions. User-invested labour in VW accounts, the online participants’ alleged production of intellectual property and, further on, the contested official recognition and entrenchment of a virtual public, all are issues that emerge in response to social realities. As their impact becomes more widespread and generates economic tensions, these conflicts are growing in juridico-political significance.

The prospect of negotiating does not look into exposing legal process to radical “external” critiques of what the next generation of law ought to be. It is not informed on techno-naturalist moral tenets. It rather takes an internal perspective of what the law “ought to become”, when actual and present conflicts of interests in society search for a balanced resolution, within the existing and posited regulatory forms. Hence, negotiation exhibits an equally practical problematic to the previously defined triptych.

1.21 “Fluidity” - However, the ideal conditions towards an effective legal negotiation require clear and stable initial understanding parameters. The novel concept of virtual identity, claiming a central position in discussions over virtual involvements, shows social infancy and elusive offline presence that generate uncertainty over its properties and value. Hence, it does not inspire confidence to start with seeking out derivative legal conceptualisations.

This negative impression of fluidity, however, is far less complex than it may appear, as it speaks nothing new about how emerging identity schemata operate within given social systems and challenge the status quo of meanings. For the purposes of law, the virtual identity challenges existing juridico-political modules for rationalising society, since it opens new doors towards readjusting the procedural reasoning and ethos. Acceptance of the immigrant or of the racially different and even the economic conception of consumer potentially upset law’s traditional perceptions over society, interaction and citizenship. Hence, facing virtual identity, the law is being requested to build connections with a new form of otherness, one developing deeper at the structural level of meaning.

2. Socio-Political Effects of Private Law - VW owners enter the stage having secured specific legal privileges, like commercial integrity, proprietary protection and contractual freedom in the course of their businesses. Little, though, has been predicted within legal formalities for the kind of social interpretations, which common online practices challenge. Therefore, owners feel justifiably uncomfortable with gaps that emerge with increasing frequency contextually and law fails to capture. They answer by *enforcing legal interpretations*, i.e. they take measures which ownership allows them to (e.g. exclusion from VW) on the *presumption* of full legitimacy. For example, the case studies revealed that intellectual property is being nominally utilised and its legally prescribed content is conveniently readjusted. Here we may speak of expressions of vigilantism in the meta-use of legal language, in the interpretational activity which VW owners realise in

order to swiftly and - as they perceive this - legitimately address the problems at hand.¹¹⁰⁹

2.1 *The Power of the Desires of Power* - Within the given ontological reality of laws we perceive the transubstantiation of the desires of two camps (owners and users) into forces of equal judicial calibre that are being contested against each other as potential legitimate assertions to existing rights concepts. Only one of the duelling assertions will be awarded with validity through the law-making process. At the same time, both of them are demanding to redesign the order of rights at the convenience of the particular hierarchy of values that each represents. Hence, the resulting law will be ideologically positioned closer to one of the initially competing sides, appointing a shift in the socio-political balance with becoming the next regulatory standard. In other words, a law that designates in further detail the distribution of rights but is, also, rooted in a decision that favours one out of two antagonising private groups, is also inserting into the system of rules a procedural element that will ideologically perform partially and at the expense of fairness.

Plausibly this is, in general, the chief societal purpose of contemporary law, to reflect continuously and genuinely the shuffling in social dynamics. Such viewpoints, however, are surrendering the law-making present and future of *humanly aware societies* to pure market fatalism, while they crucially understate the extreme factual vulnerability of legislative preferences vis-à-vis the political influences and pressures that business and commercial lobbies exert.¹¹¹⁰ The spreading popularity across the globalised political context of the idea that the means of securing any palpable form of progress are (or even “must be”) defined in compliance with the “neoliberal vision,” has led to prioritising economic instrumentality and commercial

¹¹⁰⁹ In acting as such, they resemble governments that promote decisions they favour politically under the guise of emergency, thus overcoming legislative and judicial latency, as well as any political opposition. The effect of political and economic inequality is being characteristically simulated online: at least temporarily, immediate reaction is discouraged, while individuals seeking out court justice come across a series of practical hindrances that stand between them and the state.

¹¹¹⁰ *Drahoš & Braithwaite* (2002) discuss this precise point in view of the contemporary world intellectual property regime.

functionality, when seeking to establish within regulatory technicalities the guarantees of an effective societal organisation plan.

In this game of battling desires, where transformation into legal rights is the trophy, the desires of the powerful not only find it easier to claim victory but also the law distils their political importance into entrenchments of the highest degree of protection within the legal systematisation of principles. Therefore, desires of profit are emerging as equals to human/social needs, such as life or dignity. Through law, the desires of the capitalist minority are being established as ultimate global needs.

2.2 Power through democratic law-making - The above implies the advance of a contemporary “*de jure*” dictatorship of the bourgeoisie. Strong as this assertion may appear, the practices of modern democracy seem to lack convincing synchronisation between political visions and juridical ideals. The democratic promise entails for law an all-inclusive, participatory legislative schema that is being developed within correspondingly designated institutional frameworks. The conceptual identity of this schema is outlined with the use of such notions as “procedural transparency”, “open social dialogue” and so on. Our *experience* of democratic reality, however, speaks of decisions that are being planned and frequently reached behind closed doors, rarely discussed with all the mainly affected parties. Of course, the democratic project may be genuinely activated at a later than the legislative stage: society will politically challenge legislative prospects or the competent judicial authorities will scrutinise a new law’s fidelity to constitutionalised principles of democracy. Yet, the mere *possibility* that such interventions, deemed characteristic to the conceptual order of democracy, *should* operate does not by itself suffice for outweighing standing, politically real facts: mainly that the originally drafted content of already enacted laws reflects more of the occurring desires/needs of those that have easier (i.e. more or less *personal* - due to their economic power) access to lawmakers.

2.21 - The same power inequalities may also be considered as affecting, albeit indirectly, with the alternative law-making module, i.e. when the

social decision is institutionally formulated for the first time by the Common Law judiciary. An antagonistic instance between groups of private standing will rise from a previously unregulated dispute area to entrust its resolution, and thus the introduction of a new law, to the impartial judgements of civil courts. Under the pretext of the courts absolute neutrality, socio-economic inequality is set to culminate in judicial inequality.¹¹¹¹ More resources lay at the discretion of the economically privileged party for building over-efficient court strategies on a one-on-one basis.

2.2.1 - Either scenario mirrors in our VW examples the inexorable certainty that inside law the OSPs' proprietary positions are surfacing stronger, while the counter-matched values that users call to their aid will *de facto* wane in potency and impact.

2.3 – Hence, the modern law-making framework cannot evade notions of political fatalism in the vein of “the law is a directed tool”. Let us assume, however, that no further involvement of the political needs to be taken into account and a purely legalistic perspective would suffice for providing from there on a realistic look into the development of the discussed subject matter. From this viewpoint, the circumstances of conflict are being represented as disputes between equals that submit to private law reasoning and action: both sides claim their legitimate interests and bring forward arguments and counterarguments, in expressions that qualify for performing and are being cross-examined under the standard modalities of law. The standard-form contract constitutes the characteristic example of such a “qualified expression”.

2.3.1 - Even in respect of this strictly rationalised depiction of reality, power-related course of action may undermine the perception of fairness. For instance, commercial online services, like VW ownership and management, stand only for one amongst the youngest and thus (for now) smaller sectors of the broader immaterial property production industry. The latter, in general, is systematically championing the idea of exclusivity in production

¹¹¹¹ *Supra* 2(III)[2.1.4].

and distribution, presuming it upon *de jure* authorisations.¹¹¹² When not having succeeded in satisfactorily influencing law-drafting proceedings, the industry *actively demands* posterior readings of law to be in total agreement with that particular conviction of exclusivity, using its *de facto* acquired position to exercise power over communities (who in the meantime have connected deeply their activities with the commercial product) for proliferating its wants.

2.3.11 - In the society of legality, power takes advantage of transparent formal mechanisms to heavy-handedly establish its one-sided impressions of legitimacy as undisputable conditions. This is best demonstrated in reference to contracts, the core legal tool in commercial practice.

2.3.1.11 - Within contracts the human will is transformed into formal reality: first, this is where free and democratic inter-personal development is legitimised and, second, legality in (trans)actions is guaranteed. Backed by the plausibility of their massively commercial character, however, EULAs and all standard-form contracts excuse themselves out of the most complex stages of the contractual module to shrink down the latter into “take it or leave it” offer-packages. Hence all sense of dialogue over the shared legal experience with customers, users, the masses and, eventually, a society that has been globally pushed towards adopting commercial over-dependence is effaced. Differentiating approaches to alternative legal “can dos” are strictly rejected. Additionally, organised and co-ordinated action by an entire commercial sector could produce sets of terms and conditions that universally simulate in compliant normative webs. Thus, practice is allowed by law to contradict modernity’s original master plan for democratic, humanitarian societies, an aim entrusted to the same laws backing it! Power is being allowed to infiltrate impartial systematisations of rules. Inequalities are becoming sharper as law is steered by purposive micro-economic scopes.

2.3.2 - The private law claims of one side acquire increased weight through essentially political processes: either they climb up to more advanced positions for influencing law-making discussions or, in fear of control loss,

¹¹¹² *Drahos & Braithwaite* (2002); *Lessig* (2008); *Lange & Powell* (2009).

they are projected in stern expressions of power over communities, thus affecting directly the meanings of the common legal experience. By connecting any partial attack on their integrity to threats against the prevalent economic structure's stability (i.e. crying out commercial risks), they convey an argument that works convincingly across the international political stage, where the spirit of rules gets analogously compromised.

2.3.21 - This tendency, in its broader dimensions, engenders two conditions: (i) values and claims that originate to societal dimensions lying outside the economic perspective are gradually becoming more vulnerable; and (ii) the phenomenon of law escapes its traditional institutional domains or even excludes them.

2.4 - Conventional discussion of the desires of parties in power, builds on an image of an aggressive beast that encroaches on humanist morality's conquests across the spectrum of law. Meta-developments of rights, however, which emerge from the opposite side (such as post-modern expressions of "free avatars") can equally stir up disquiet about the admissible boundaries to desire. Where is eventually drawn the dividing line between actual needs and mere desires?

On the one hand, the desires of the powerful are being prioritised as needs inside contemporary juridical systems of principles. On the other, when looking at demands that are based on the human rights call, desire in the guise of need creates more desire. It evolves in self-reflecting hunger for desire: when establishing a right, our rights culture tends to turn progressively anything possible into a legal claim.¹¹¹³

Therefore, where we discover rich soil for scrutinising indicated legal dispositions for their profound association with power, we should, at the same time, keep the barrier high against profane intrusions of insatiable proliferations of rights. These may stretch too far the ethical stigma of humanity, pushing it over to its limits and towards its possible degradation. This specific aspect should be constantly kept in mind when addressing VW-related rights talks.

¹¹¹³ *Douzinas* (2001) 200.

3. On Intellectual Property - Users tamper with online artefacts in search of distinguishing their virtual identities, in manners that are not always welcome by VW owners, e.g. the selling of virtual items constitutes allegedly “copyright infringement” and fan-fiction “IP violation”. Whereas terminating or suspending online accounts expresses the owners’ actually naturalised privilege, decisions of exclusion are regularly justified on the pretext of IP. Corporate ownership has invested much in the IP rhetoric for maintaining control, when other lines of reasoning have fallen short of building the necessary defensive connection with law. Regardless their in-game-held superiority position, the owners’ decision to resolve any contractual relationship with the user requires incontestable legitimacy; hence the frequent use of IP justifications. However, this practice is exclusively reflecting corporate wants, and is cultivating distorted understandings of IP: as explained, negative impacts are first felt socially and then across the progressively transforming legal discourse.

The task of pointing out one by one apparent controversies in the projections of IP, which the case studies highlighted, involves, from the legal perspective, the obvious danger of getting distracted by the scattered instances of domestic IP regulations.¹¹¹⁴ The actual focus of legal interest looks beyond how the corporate commercial culture, through the use of the global market, is systemising actively the reproduction of IP’s importance across societal orders.

VWs show only an aspect of the broader IP protection interference with the public’s appreciation of mass culture. The phenomenon itself preceded long enough Internets’ inception. However, the manner, in which online communications are being forwarded and manifested, has initiated more robust activity from the owners of intellectual property side. As reasons, we may highlight the turning of IP violations into popular cultural trends (for example, large communities, like file-sharing networks, are formed in pursuit of systematic copyright infringing) but also how the

¹¹¹⁴ For instance, the majority of case studies material referred to particularities bred within the US jurisdictional context.

Internet has made easier to observe infringement methods in action and objectify them (i.e. locate them) for the purposes of taking legal action.

Excesses that big corporations justify in the name of IP have created disliking towards it:¹¹¹⁵ it is easy to demonise an abstract idea for its shortcomings in practice.¹¹¹⁶ Yet, it should not be forgotten that the introduction of IP protection marked a crucial turning point towards the social and economic proliferation of creativity and invention.¹¹¹⁷ Regardless what legal formalisations corporate interests have so far managed to standardise internationally, the field is still fertile, and social dialogue has not yet reached a dead end. In this sense, much has yet to be contested in litigation and future legislation, since the original supporting theoretical foundation of IP in its core has lost neither its clarity nor potency. The problem with contemporary IP law is that it has vigorously pushed forward axiomatic acceptances of those purposes that it now gives the impression of solely existing for serving across markets and society relationships. The short range of options prescribed in such acceptances has framed implementation of IP law within extremely narrow and limited functional orientations. Eventually, prevailing policies of the moment drive the IP protection experience, rather than our societal faith to creativity and its responding collective values.

These are matters that should not be taken lightly: can we make, at this point, such collective values claims, as if they constituted a universal absolute that defies boldly the dual obstacle of relativism in cultures and societies? Are the one-sidedly promoted instances of IP protection lying necessarily outside the scope of those values? Such questions are the guiding thread for the complex undertaking of putting these values in context, starting immediately with a brief examination of the nature and externalisation of IP in thematic proportion.

¹¹¹⁵ *Coombe* (2003) 1173; *Ginsburg* (2002) 61; *Spinello & Bottis* (2009) 1 – 2.

¹¹¹⁶ 'The dangers ... flow from the relentless global expansion of intellectual property systems rather than the individual possession of an intellectual property right'; *Drahos & Braithwaite* (2002) 5.

¹¹¹⁷ Yet, in the example of imperial China, *Drahos* (1996) 15, observes that the absence of IP or a customary equivalent have not historically prevented particular societies from systematically achieving 'spectacular outcomes in science and innovation.'

3.1 - While the term “intellectual property” could be criticised as being flawed in imagining equal ownership parameters to those applying to physical objects, an intellectual property right describes essentially a *relation* between individual subjects regarding an object. Understandably, then, which objects constitute property is a matter of convention: the idea of “intellectual” property and the circumstances that gave birth to it, show plainly that property is a phenomenon of system¹¹¹⁸ and a product of the subjective.

3.1.1 - Intellectual property rights are ‘rights which are created for and exist within market contexts.’¹¹¹⁹ Divisions in copyright, trademarks, patents, trade secrets and publicity rights¹¹²⁰ respond to such continuous expansions that spawn more detailed and thorough legal treatments.¹¹²¹ IP law has covered a long distance since the earlier “romantic” author meanings,¹¹²² which, after all, were initially entrenched for disallowing others from using *commercially* one’s work without expressed approval.

3.1.11 - Even where forms of IPR are seemingly credited to or inspired by calls for active preservation of non-commercially experienced local or national cultures, the need for protection in most instances addresses the exploitation of cultural elements by organised profit making.¹¹²³ Despite having incarnations in many jurisdictions with stronger interests in the integrity of ‘creations and expressions of the intellect’, the institutional exercises of IP protection aim eventually at regulating distribution – a notion

¹¹¹⁸ *Drahos* (1996) 73.

¹¹¹⁹ *Ibid.* 119.

¹¹²⁰ Note that the notion of a right to personality in such contexts sets a defence against one’s image and likeness being exploited commercially; that is personality attributes acquire protection only in view of their already having market value.

¹¹²¹ *Lange & Powell* (2009) 65.

¹¹²² *Coombe* (2003) 1172.

¹¹²³ That is where either (i) limits have been applied to cultural elements, otherwise free and accessible to all, or (ii) cultural elements have been subverted in commercial use for the purposes of mass-entertainment (e.g. mythological figures like Hercules or Thor) raising reactions in their culturally domestic settings. *Coombe & Herman* (2004) discuss the characteristic dispute between Maori tribes and the toy manufacturers Lego Corporation, over the commercial appropriation of Polynesian language and culture by the latter.

that, at least when referring to relationships between private actors,¹¹²⁴ acquires meaning only within markets.¹¹²⁵

3.1.12 – In this respect, we might be alerted to the possibility of market logic monopolising our regulatory appreciation of the human intellect’s creations; delivering cultural and aesthetic values to commodification.

3.1.2 – The suggestion by Marx that the institution of property originates to the ‘productivity of labour’¹¹²⁶ finds quickly an apt reflection in intellectual property, particularly in view of sectors like the film industry, software development and game designing. Contemporary IP draws little from the earlier moral rights of the author basis: creators submit the product of their intellect to giant corporations, boosting the latter’s profits. Thus, intellectual property laws protect the rights of owners, not of original creators, who often transfer ownership to their corporate employers by virtue of the ‘operation of doctrines of employment law.’¹¹²⁷

A core theme in Marxian theory surfaces here, since creative labourers in the information and entertainment industries are being alienated from the product of their intellectual work.¹¹²⁸ We are further invited to understand creative labour in two different dimensions: labour that poses the obvious metaphor to handwork (i.e. utilising the intellect in modes of systematic production) and creative work that improves with innovation the means of production for capital’s (the industry) interests.¹¹²⁹

3.1.21 - One may observe in recent IP laws (especially those realising the dictates of global harmonisation schemes, like TRIPS) the increasing transition from *in strictu sensu* authorship to corporate ownership. The economic and legal complexities of mass-markets, especially with regards to producing composite multi-levelled works, seem to require so. This legitimate alienation of creators, combined with the social expanding of

¹¹²⁴ Conversely, in relationships between the state and its citizens, distribution subscribes to the limits of political tolerance as implemented by mechanisms of censorship.

¹¹²⁵ Otherwise, folklore lacks of the protections which are reserved for privatised knowledge: indigenous works are being continuously ripped-off by the industry, with the auspices of the Western copyright sense; *Story, supra 1044*, 138 – 139.

¹¹²⁶ *Drahos (1996)* 97.

¹¹²⁷ *Ibid.* 99, including relationships between authors/performers and publishers.

¹¹²⁸ *Ibid.*

¹¹²⁹ Generally, *ibid.* 104 – 113.

creative labour, marks a change of direction from the natural right reasoning, which justified protection of IP in the first place.

3.1.22 - Moreover, the IPR discourse appears frequently trapped in confusion and self-contradiction, its initial moral justification embodied prominently in the laws of several jurisdictions (particularly in Europe) and the transforming corporative incentive getting at the same time more and more ground across the juridico-political institutional experience.

3.1.3 - Intellectual property is not about the idea but about its expressions. The identity of the intangible object becomes known for the purposes of the law through physical objects. Physical property has boundaries, even conventional; in IP we do not have that. Many physical items may constitute variable expressions of the same idea, which, in the end, is not clearly defined. Drahos explains that ‘very different physical objects [...] can be said to share the same identity in intellectual property law because they all imitate the same abstract object.’¹¹³⁰ Such connoted richness in the expressions of one original idea gives to the intellectual proprietor considerable power.¹¹³¹

3.2 Power in IP - The power, which property contests over others, equals, in essence, to sovereignty, where ‘dominion over things is also *imperium* over our fellow human beings.’¹¹³² The intellectual property parallel may simulate the power effect – or even rearticulate it more radically.

3.2.1 - First of all, the basic appreciation of “property”, as referring to legal relationships between entities, applies to all modalities wherein the original conception is further reconstructed. As a consequence, the inherent, in the property concept, power inequalities will also be thereafter replicated. Power is founded upon the capacity to exclude others from the object of property, and is exercised either through active deterrence (as in graphical depictions of “no trespassing” signs) or by negative promises of social and financial reductions. The degree of exercised power depends largely on the each time

¹¹³⁰ *Ibid.* 155.

¹¹³¹ We may also consider instances where one item encompasses two or more ideas. For example, the MMORPG character envelopes ideas from the setting’s scenario and a structural archetype of game entity in accordance with unique game designing parameters.

¹¹³² *Cohen* (1927) 13.

property object's *value*, a schema that concentrates more meanings than the monetary market value. In fact, the latter projects at the last instance the overall societal value of the object in question and its capacity to turn commercially into a *necessity*. From there, dependence on objects transcends to person-dependence relationships.

3.2.2 - The performance of IP rights entails that an original idea can expand its legal protection across the multiplicity of the physical manifestations it *may acquire*¹¹³³ and accordingly broaden the initially set field of “protection relevance”. Increasing proportionately, both in numbers and in sectorial breadth and depth, the opportunities for exercising power turn into command platforms that extend beyond the single, originally developed material (re)production of the idea, which now appears rather circumstantial and comparatively finite in its prospects for financial profit.

3.2.3 - Once we have correlated the fictional incorporeal objects of IP with their intrinsic nature of being *information*, the influence of IP in daily life is revealed omnipresent in full splendour, since information is nothing less than ‘the daily lifeblood of human agents as communicating beings.’¹¹³⁴ Information is the multifaceted capital that both responds to and represents best post-modernity: it constitutes the resource of knowledge, which, in turn, is seen as the key to the accumulation of know-how, to planning and realising action and to finding solutions. Permeating society, economy and culture, information becomes the uncontested currency of power.¹¹³⁵

3.2.31 - Judicially, access to the informational capital (and thus to all other forms of capital linked to it) is decided through identity judgements over written, painted, sculpted or even hummed indications of possible IP infringements.¹¹³⁶ Drahos remarks that these judgements are ‘pragmatic and based on conventions’ and, lacking of an undisputed “intellectualised” metric

¹¹³³ With licensing the entertainment industry has prolifically established merchandising commercial practices, which see variations in the medium and the representation for retelling the idea – for example, a literature character - and exploiting it across several additional sectors in production and marketing – e.g. toys, comic books, movies, video-games, branding on food and clothes etc.

¹¹³⁴ Drahos (1996) 171.

¹¹³⁵ Jordan (1999); Drahos & Braithwaite (2002); Negri & Hardt (2004).

¹¹³⁶ Drahos (1996) 151 – 156.

of evaluation, they use abstract objects. Hence, in legal practice, decisions on the circulation margins of information are crucially built on fictitiousness.

3.2.32 - Moreover, this object-based understanding of the appropriation of power implies that, through the as such shaping of identities of objects, are affected indirectly the identities of individual persons, as well as the broader classes of those permitted to receive and transmit information.¹¹³⁷

3.2.4 - The importance of information is maximised on an electronic network made exclusively of information, where information is the means and the ends of personality manifestation and development. In every single onscreen representation or audio sequence coming out of the users' computer speakers is realised an abstract idea, which originally belongs to someone. Network content comprises exclusively of created objects. With a notable exception being where initial content creators voluntarily denounce their proprietary rights in favour of the online public, Internet life performs in its entirety under private ownership. Hence, our discussion on the interference of property with public life and the power structures that evolve in relation, emerges definitional for the online setting, including further both an examination of the affiliated socio-legal superstructure and a retelling of the traditional Marxist infrastructure thesis.

3.3 IP and Culture - The burdens that contemporary IP law places on our access to the public sphere, come into sharper focus with regards to culture, which involves much more than the earlier cyberspace cultural appropriations. In fact, laments over the apparent loss of the cyberspace ideal mark only the failure to realise the initial techno-cultural promises. The ongoing Internet developments have signified the actual transfer of culture and identity formation into zones of private management, along with their gradual separation from traditional public spaces.

3.3.1 - The EverQuest fan-fiction incident, while not having formed any kind of precedent,¹¹³⁸ hinted possible future conflicts between functional and

¹¹³⁷ 'The very fact the global system of property regulates access to abstract objects means that it has the potential to separate some individuals from those objects,' *ibid.* 88.

¹¹³⁸ Additionally, in the aftermath of the narrated events, all involved parties ended up expressing embarrassingly their regrets for their individual share of responsibility; *Taylor* (2006) 139 – 145.

intellectual online communities. Any such conflict would naturally evolve on the premises of cultural life, the latter standing as a phenomenon of societal bonding. The general conceptualisation of the intellectual community performs in the online world as a personality development matrix. It represents the equivalent of a societal circle, which acquires shape with the passing of time, as individuals go through the various stages of their personal and professional lives. People gather experiences and information and form groups of contacts with whom they feel to be best associated. Personality development is indissolubly attached to unhindered participation in cultural life.

3.3.2 - Culture, as a phenomenon of dissemination and establishment of knowledge, performs on a referential basis. Consider folklore: legends of the old, songs, painting and sculpting methods, have been for ages crossing territorial borders and travelling from one generation to the other through processes of retelling, redevelopment and derivation. This is how peoples inherit their fairy tales, their King Arthurs, their local music traditions, their unique ecclesiastical iconography styles: the elements that constitute distinctive cultural identities from which individual personalities will stem.

Today's mythologies are built and proliferate by means of mass communication: television and cinematic fictions, pop music "classics" and the iconisation of film and sports stars, are the most common examples.¹¹³⁹ In the old communal tradition, social participants communicate with each other via the continuing use of references to a shared knowledge bank that includes a wide range of cultural properties, these belonging either to the sphere of the political, of religion, of entertainment and so on. Until the 20th century this was the dominant model for participating in the shaping of the popular, the folks' culture. The change arrived with the massive commercialisation of culture. This shift invited, inevitably, regulatory interventions that repeated the logic of market contexts. Thus shaped, the body of IP law is under constant attack for its negative interference with offline cultural life,¹¹⁴⁰ precisely because it acts prohibitively against the circulation of culture. The

¹¹³⁹ *Lange & Powell* (2009) 170.

¹¹⁴⁰ *Coombe* (1998); *Drahos & Braithwaite* (2002); *Klein* (2005); *Lange & Powell* (2009).

online setting increases the potential for interference with cultural development: as web communications are realised via object-based interfaces, any exchange of information – meant as either form of content – is bound to violate to a lesser or greater degree a third party’s proprietary sphere.

3.3.3 – It is on the premises of culture where identities take shape. Anthropological understandings of *heritage* present the most characteristic examples of such processes, where community life is explained in terms of its developmental dependence on *national* and *cultural heritages*. Within these contexts groups and individuals search for, discover and pick up defining elements for building up their distinctive intellectual associations (connections and differences) with the experienced societal totality. We are talking about a *culture pool* (simply known as “shared tradition”, “shared cultural background” etc) from where personal and interpersonal developments retrieve their starting points and further utilisable intellectual materials; at the same time, it provides group semantics with distinctive vocabularies. Today’s culture pools, thanks to the pervasive effect of mass communications, are rather composite and rounded in bringing together “the culture of the people” in its past and present forms,¹¹⁴¹ i.e. *folklore* and the *popular culture*: the (post)modern human individual receives her cultural heritage both vertically (tradition) and horizontally (contemporary social life).

3.3.4 - In this sense, communities utilise systems of references¹¹⁴² for their developmental purposes that perform on the level of an *intellectual commons*.¹¹⁴³ These essentially evolutionary societal operations depend on

¹¹⁴¹ “The culture of the people” is the historic use of the term “popular culture”. Essentially this is where folklore is met: ‘popular culture and folklore are twin bodies joined at the heart and head, popular culture looking to the present and past, folklore viewing reality from the past to the present;’ *Browne* (2005) 25-26.

¹¹⁴² After all, each specific culture forms essentially a system of references. The meanings of our tokens of culture come from the reference, not the content; *Lessig* (2008) 74.

¹¹⁴³ The idea of intellectual commons has received several treatments. For example, *Lessig* (2006) 198, defines as commons ‘a resource that anyone within a relevant community can use without seeking the permission of anyone else’ on the conditions that it either belongs to the public domain or use permissions have already been granted. *Drahos* (1996) 54 – 56, moves further away from the presumption of a public domain; his intellectual commons consists of ‘those abstract objects which remain open to use’ (accessibility meaning the

the richness of the culture pool, guaranteed by the uninhibited access to a fertile public domain. Yet, management of popular culture is being concentrated in the hands of a small number of IP holders, whose power is growing through their self-evident capacity to monopolise control over means of mass culture. The part which rigid IP laws play there is crucial, since (i) public domain knowledge material is increasingly becoming branded and (ii) socialising and information sharing do not proliferate anymore exclusively on the basis of verbal but of advanced, *synthetic* communications forms that expand across symbolic spaces (i.e. conventional media and the Internet).

3.3.4.1 - The domination of branded culture across referential public knowledge can conjure up legitimate exercises of censorship. The effect, however, appears ironically self-negating. Brands, having ascended to icon status, reach to the ultimate signifier's performance, to becoming synonymous with their marketed product's category. They then order silence, demanding all references to the celebrated icon to cease and desist – unless the brand permits so. For instance, the expression “Barbie doll” has evolved into a widespread connotation that, reflecting the popular doll as both a symbol object and a social phenomenon, conveys particular meanings.¹¹⁴⁴ This is a viewpoint which *Mattel* (the manufacturers of Barbie doll) did not share when suing against references to their best-selling product, blurring instances of social commentary with enunciations of strict IP law.¹¹⁴⁵

capacity to appropriate the abstract object); an entity that the collective human labours 'over all time' construct. He also makes a connection with English law's commons as 'rights of common held by persons in relation to another's land.'

¹¹⁴⁴ 'Barbie has been labeled both the ideal American woman and a bimbo. [...] She remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon' – Judge Kozinski in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002); 'Barbie: 1. a proprietary name for: a (type of) plastic doll in the form of a slim, shapely, young blonde-haired woman. 2. A woman who is likened to a Barbie doll, esp. in being pretty or shapely but passive, characterless, or unintelligent' – The Oxford English Dictionary; discussed also in *Coombe* (1998) 66 – 67 and *Dreyfuss* (1990) 397.

¹¹⁴⁵ Courts have even turned down Mattel's motions against such references in commercial communications, e.g. *Mattel, Inc. v. MCA Records* - discussed in *Klein* (2005) 180 – 182; or against visual artistic appropriations of the Barbie icon, as in *Mattel Inc., v. Walking Mountain Productions*. 353 F.3d 792 (9th Cir. 2003) and *Mattel, Inc. v. Pitt*, 229 F. Supp. 2d 315, 318 (S.D.N.Y. 2002); *Tushnet* (2007) 278 – 280; *Coombe & Herman* (2001) 930 - 933.

3.3.4.2 - The flow of information that gives form to humanity's shared cultural wealth, can be even more preventively controlled. News and media conglomerates have the discretion to block unique audio-visual footage of significant historical events from being used in public domain, independent or competition-made documentary feature works.¹¹⁴⁶ Especially in view of recent copyright extensions in US and EU laws, rights to withhold can last a long period of time. Furthermore, unprecedented phenomena of *damnatio memoriae* started making sporadic appearances in the circulation of information, where, for example, blurred images in televised broadcastings remove branded material from the viewers' sight. While, on the one hand, authorised uses and licence fees apply to deliver the realism of fair market competition, the thought, on the other, that appreciation of knowledge, information and history by the masses depends largely on trade willingness and practice is uncomfortable.¹¹⁴⁷ State-imposed censorships are being replaced with commercial exclusivities.

3.4 Expanding Protection Over Off-Game Interaction - Similarly, the study of VW caught up with multiple references to IP rights in EULA texts that are attempting to control off-game patterns of player behaviour (that is, other than the selling of virtual items). It is important to stretch out such uses of the term "off-game", where targeted individual actions bear no substantial impact on the VW's integrity to be considered as violating participation within the virtual setting. "Off-game" are those activities, which take place outside both the functional boundaries of the VW software application and any of the undertaken pretences in fictional settings (i.e. in-game roles in MMORPGs). This is why fan-fiction and most appropriations of UCC provide for a powerful dialectics, as widespread and socially functional meanings of culture intersect with IP law applications heavily promoted by the industry.

¹¹⁴⁶ *Melville* (1970) 1197 – 1200, discusses *Time, Inc. v. Bernard Geis Associates* 293 F. Supp. 130 (S.D.N.Y. 1968) over the use of the Kennedy assassination film.

¹¹⁴⁷ While we feel familiar with one-liners like "History is written by winners", is History now being written by merchants?

3.4.1 – As seen, the EverQuest incident did not announce any ascending trend of high-handed OSP “enforcement”. On the contrary, together with reports of other similar incidents, it apparently shook the industry (as it had shaken users) into re-evaluating their online cultural consciousness and becoming more tolerant towards fan-made creations and UGC. These gradually readjusted policies may now not necessarily indicate the OSPs’ actual understanding of cultural phenomena, but imply, at least, their slow realising that beyond the fully commercially tuned information market exists also the information market’s social awareness and cultural deployment in the intellectual online communities’ incarnating digitally the political and juridical “public”.

3.4.2 - Expressions in the vein of online fan-fiction convey an intimate creative passion, which is born within the cultural superstructure, is recreating the personalised effect of entertainment and shares the latter informally with same-minded users. Under the combined scope of human rights, such activity can be interpreted both as developing one’s personality and as participating in 'the cultural life of the community'.¹¹⁴⁸ Although of frequently debatable quality, such amateur textual or graphic material and the nature of its dissemination pose negligible harm to the credibility of marketed services and brands. Primarily, it bears little relevance – if not at all – with the called in rationales for applying hard-core IP protection. At the end of the day, it does not even fulfil the requirement of commercial threat for activating particular IP protection. Yet rights holders summon IP laws for converting expressions of commercial regulatory intent (like “reputation damage” which acquires meaning in market competition) into metaphors of personal defamation.

3.4.21 - The incentive behind this disposition of protected value affirms the online dimensions of the private sector’s general tendency to overrate brand ownership. Hence, references by the public to copyrighted material or registered trademarks without prior authorisation are expressly prohibited. However, the free distribution of commercial symbols, like trademarks or

¹¹⁴⁸ Articles 29§1 and 27§1 of the Universal Declaration of Human Rights, respectively.

slogans, through the media and towards the masses, has constituted an important factor in the development of post-modern culture, from Warhol's illustrations of Campbell soup cans and iconic celebrities, to commonly shared cultural references (like the "Barbie Girl") which breed within communities and thus nurture the latter's continuing evolution.¹¹⁴⁹

3.4.22 - Drahos believes that in all IP laws robust proprietary beliefs are exemplified in action. Trademark law, specifically, moves a step further with over-inclusive approaches to branding and trademarks. Whereas categories of trademark signs have been expanded to cover everything perceivable by the basic human senses, 'Harley Davidson can seek registration for the sound of their motorbikes and BP for their colour green,' he addresses bitterly the consequence that 'trademarks become tradeable entities in their own right' and serve neither the consumer nor the public interest, but solely the interests of their owners.¹¹⁵⁰

3.4.23 - The increased exclusiveness, which corporations contest over the ownership of culture, places considerable barriers over the access to culture by the commons. This is at least how Taylor perceives the online setting, questioning at the same time whether public space exists within virtual environments.¹¹⁵¹ Her concerns reflect Klein's view that 'the extension of multinational branded space and the commodification of culture' precede the collision of consumerism with citizenship,¹¹⁵² as well as Coombe, who, in her analysis of corporate cultural ownership in symbolic spaces, observes that 'increasingly, holders of intellectual property rights are socially and juridically endowed with monopolies over public meanings and the ability to control the cultural connotations of their corporate insignias (trademarks being the most visible signs of their presence in consumer culture).'¹¹⁵³

3.4.3 - If anything else, our participation in the online public sphere is primarily depended on using the protected creations of others, in either

¹¹⁴⁹ Generally, *Jenkins* (2006); *Lessig* (2008).

¹¹⁵⁰ *Drahos* (1996) 204. Remarkably, even the 'shape, configuration or design of the product itself – the cut of a child's dress, for example' may be contested as distinctive mark; *Lange & Powell* (2009) 25, citing *Wal-Mart Stores v. Samara Bros.* 529 U.S. 205 (2000).

¹¹⁵¹ *Taylor* (2006) 127.

¹¹⁵² *Ibid.*

¹¹⁵³ *Coombe* (1998) 26.

communicating through the circulation and manipulation of branded and copyrighted works (images, names, icons, text extracts etc.) or in utilising owned communication platforms and interfaces.

4. On End User Licence Agreements – Regarding EULAs, the issue of what constitutes technically a valid or invalid contractual term is decided in accordance with local or regional legal standards, and there are no universal rules, unless of course we bring into the equation *ad hoc* drafted international treaties. Understandably, the Internet has maximised the parameters of legal ambiguity in international conflict of laws, since greater numbers of people across the globe engage with the big online services that are based in the few notable commercially developed jurisdictions. From this perspective, judicial resolutions face the common difficulties of online disputes in general. Few solutions may be anticipated from the – helpfully - much narrower VW context or have even been already offered, like in the regional slicing up of VW services. However, such contextually particular suggestions leave the core of the actual Justice problem intact.

4.1 *The juridico-political problem repeated* – The neo-liberal experience of market evolution is being delivered through the strengthening of private agreements, which should cunningly outmanoeuvre certain trade-hindering effects in pre-existing – mainly protectionist - legal settings. Whereas one jurisdiction or the other might had attached humanist values to the now contractually circumvented sets of rules, the deregulation process plausibly endangers these values.¹¹⁵⁴

The unrestricted rise of EULAs – and mass-consumer contracts in general – marks the same intensified conflation of the political and legal realms, which the previous section explained in respect of IP law systematisations. Commercial competition and economic power-struggles determine popular directions in the (re)formation of laws and, eventually, what societal affordances the resulting bodies of laws will foster.

The weakness of this capitalist justice is openly exhibited with the forced compromising of the underlying ideal of human Justice. While the

¹¹⁵⁴ *Supra* 2(III)[2.1].

latter is not a direct prerequisite of capitalist justice, it stands out symbolically as the foundation of the modern liberal society: in the conscience of liberal democracies, human Justice pre-conditions historically and morally our capitalist *modus operandi*. Hence, we may consider as “weakness” the ideological confusion which noted juridico-political expressions procure due to their in principle self-contradicting dispositions, a confusion that in the face of greater discrepancy between what law ‘*supposedly* is’ and ‘what *actually* is’, could escalate into deeper institutional crises.

4.11 - Moving back into EULA territory, these theorisations propose a starting point for reconstructing the legal discourse of contracts. Hence, the goal is set at probing the limits of contractual freedom within context, where normative performance and function remain realistically of primary concern, yet a considerable degree of socio-political awareness and sensibility ought to be retained. Crucially persistent debates over the attitudes and impacts of standard-form consumer contracts remain relevant, and so do research and scholarship insights into the social and legal implications which emerge from general involvement with online community modules and VWs in specific.

4.2 *Unfairness in general* - EULAs make undoubtedly an easy target, being commonly accused of unfairness, of vitiating any plausible sense of commercial liability and of misrepresenting the law with false assumptions of copyright. For their critics, they reinstate online a particular contractual model that might have outgrown its intended commercial purpose. While agreeably functional, the practices of mass market contracts form socially counter-productive normative conditions, since, under the present circumstances, consuming masses and social formations are one and the same: where products and services constitute decisive elements towards individuals’ integration into public life, terms of agreement turn, in reality, into terms towards social inclusion. Public life itself is a complex schema, organised upon intertwining political, cultural and commercial systemic structures, developing further its existing offline meanings while expanding into online modes of engagement.

Even without invoking the considerations that a levelled conception of online public life entails,¹¹⁵⁵ the position into which EULAs bring the participant/consumer opposite to the spectrum of extenuatory circumstances that are reserved for the VW owner, reflect in overall the latter party's concerns and intended interests. Along these lines, though, notions like "unfairness" and "liability", which emerge as important criteria, appear impedingly nebulous.¹¹⁵⁶ Especially unfairness, seems to be inviting overt moral evaluations of its legal standing, whereas its applied standards vary from one jurisdiction to the other.

4.2.1 - Understandably, "contractual unfairness" appears flexible enough to accommodate any subjectively adopted social viewpoint in looking at or experiencing law. The dominant appreciation of unfairness in the common grammar of contract laws¹¹⁵⁷ appeals to measuring inequalities between the bargaining powers of contracting parties. In the majority of its incarnations, this unfairness criterion flags instances of expressed coercion and of fraudulent or deceptive practices. Thus, the broad discussion about unfairness is grounded at safeguarding the market's internal operational integrity. Fairness becomes synonym to contractual formalism, which in turn guarantees peace of mind by fostering efficiency.¹¹⁵⁸

In this respect, however, 'bargaining inequality' undercuts the evaluation of contractual unfairness, as commercial efficiency does not suffice for wrapping up the entire problematic in question. Truly, the objective of maintaining market order may ultimately serve fundamental principles and social values. The inequality criterion, however, pre-empts in practice the unfairness discussion by enclosing it within limited commercial

¹¹⁵⁵ That is taking into account the globally increasing degree of the Internet's penetration into the social, economic and cultural spheres (to mention a few), in parallel to infinite mutual exchanges that take place between the online and the offline, and between the virtual and the actual.

¹¹⁵⁶ *Drahozal & Friel* (2002) 364.

¹¹⁵⁷ *Petty & Hamilton* (2004) 153 – 154, make general parallelisms and draw matches between the US and the EU perspectives.

¹¹⁵⁸ The efficiency argument has been repeatedly used by economics scholars, who fear of 'unpredictable determinations of unconscionability' in US contract law; *Schmitz* (2006) 97 – 98.

meanings. The *Bragg v. Linden Research* case showed such an example,¹¹⁵⁹ where the court's reasoning for affirming adhesion of the EULA was based on the existence or not of a competitive market rather than on relationships and ties which the user had actually built within the specific VW.

4.2.11 - In other words, the utility found in the criterion's pragmatic assessments towards restraining ambiguity and over-expansive interpretations, fences out equally legitimate and technically valid evaluations of unfairness.

4.2.2 – Of course, the extent to which fairness comes closer to being identified with market efficiency differs among jurisdictions. But even where the strongest manifestations of that connection have prevailed for the long term, the resident legal structures might render their weakening easier than what other regimes are widely seen to be delivering. In this sense, assumptions that under consumer protection the bargaining inequality criterion performs with greater elasticity for taking onboard social considerations, first of all overlook the economic reconfiguration of society and human relationships, which is otherwise imparted in consumer protection laws.¹¹⁶⁰ Importantly, they disregard existing legal mechanisms, where the exclusivity with which over-reaching efficiency doctrines review the entire contractual relationship and its social consequences can be counterweighed: at the end of the day, the rules of contractual formation constitute neither a closed nor a complete and harmonised system.¹¹⁶¹

4.2.3 – The point here is not to dismiss the “mainstream” connotations of contractual unfairness, but to reassert that their administration is not necessarily informed or honest. Facing the online contractual reality of EULAs, as these turn into *de facto* law for online participation, a balanced account of unfairness should serve adequately the systemic requirements of general coherence and consistency. That means, where modern legal structures have been (politically) rationalised upon human rights values, the

¹¹⁵⁹ *Supra* 5(II)[1.5.1].

¹¹⁶⁰ *Supra* 5(III)[2.1].

¹¹⁶¹ *Kessler* (1943) 638.

protection of private investment and market stability, fairness should be in position to realise and tie together all such considerations.

4.2.31 – Seemingly, though, the prospect threatens to drag current unfairness standards back to a state of indeterminacy. It will be seen shortly how criteria of unfairness that are now aligned to commercial efficiency need not to be rewritten or to shift far away from their insofar professed foci, but simply to be more open to tuning in to the ‘justice of the community.’¹¹⁶² Hence, reasonable inferences of supplemental unfairness parameters, made under the light of social circumstances that have been standardised within their prescribed contexts, are at least attainable.

4.2.32 – Still, with regard to EULAs that “regulate” participation in VWs, this develops further into a two-fold problematic, which courts can be expected to face in the future. Hence, next to discussing contractual terms that contravene already set out rules, unfairness may be called forth in view of potential legal recognitions of users’ virtual identities, and to be possibly measured opposite to their ties to personality, online social and economic instrumentalities, even their marketed value - if that would, one way or the other, ever come into play.

4.3 Unfairness in Reference to Existing Legal Settings – Checking with various national laws, the EULA, as an imposed contract of adhesion, is arguably ‘lacking in voluntariness for purposes of the waiver of constitutional rights.’¹¹⁶³ This means that terms/rules might not be accessible before purchasing the actual software¹¹⁶⁴ or paying entrance fees for online participation, terms/rules may change without user notification,¹¹⁶⁵ liability

¹¹⁶² *Ibid.* referring to the available margins for common law rules to enable courts to realise ‘the dictates of social desirability.’

¹¹⁶³ *Jenkins* (2004) 10, first cites US cases where a First Amendment rights waiver was required to be ‘knowing, voluntary, and intelligent’: *Charter Communications Inc. v. County of Santa Cruz*, 113 F. Supp. 2d 1184, 1191 (N.D. Cal. 2001), *D.H. Overmyer v. Frick Co.*, 405 U.S. 174 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972); then in connection with adhesion contracts: *Isbell v. County of Sonoma*, 21 Cal. 3d at 69-70 (1978). He additionally argues that ‘since most EULA’s are written in a very general fashion and do not expressly set out the constitutional rights that are being waived’, the ‘knowing and intelligent’ part of the test would not be met, citing *County of Ventura v. Castro*, 93 Cal. App. 3d 462, 471 (1979).

¹¹⁶⁴ *Reuveni* (2007) 301.

¹¹⁶⁵ *Sheldon* (2007) 770; *Jankowich* (2006) 13 – 14, points to additional test failure (the significance of which has been underplayed by US courts), where technical presets on web-pages prevent pre-printing of terms for further careful consideration.

exemptions can be extreme and onerous for the consumer/user, and so on. In this respect, the general conditions for testing the validity and enforceability of EULAs as standard-form software contracts are well-known.

Particularities emerge in view of the provided online service and the VW setting, where the additional lists of broad - and thus ambiguous- ToS exercise behaviour control; for example, users can be punished for breaching the catch-all clause “spirit of the game”.¹¹⁶⁶ The content of these participation terms, apart from also being non-negotiable, falls within the OSPs’ exclusive interpretational discretion.

4.3.1 Liability Limitations & Jurisdiction Issues - EULA clauses that specify jurisdiction aim to benefit the OSP by both securing advantageous local laws and to disallow the uncontrollable territorial scattering of litigation – thus shrinking considerably relevant costs.¹¹⁶⁷ For individual consumers this obviously means long distance travelling and disproportional expenses, in case a dispute arises between them and the OSP. Let us not forget that in pragmatic terms matters involving VW participation fall under small claims procedures. Moreover, favourable laws for the OSP suggest probably an already tried out court jurisprudence that is less than likely expected to undercut the order and temperament of terms that are included in the contract. Facing these odds, users/participants are practically prevented from challenging OSPs’ decisions over access to and use of the service.

4.3.1.1 - Under EU law, ‘standard form contract terms that impede consumers’ rights of redress are invalidated as unfair.’¹¹⁶⁸ That should cover not only binding arbitration clauses and strict jurisdictional exclusivities,¹¹⁶⁹ but also a wider range of liability exemptions – loss of VW accounts and data, in the sense of the Chinese case, appearing as the most likeable candidate.

4.3.1.2 - Across the Atlantic, the shaping of the litigation process in accordance with market-oriented policies has consistently called the courts’

¹¹⁶⁶ *Jankowich* (2006) 44.

¹¹⁶⁷ *Das* (2002) 487.

¹¹⁶⁸ *Winn & Webber* (2006) 213.

¹¹⁶⁹ In view of Council Directive 93/13, art. 6, § 2, *Oakley* (2005) 1067.

favourable disposition towards mandatory clauses, since these are expected to provide incentive for online retail businesses' growth.¹¹⁷⁰ Nevertheless, binding unilateral selections of forum may be found on occasions inappropriate,¹¹⁷¹ albeit under quite narrow requirements.¹¹⁷²

The lesson learned from the judicial dismissal of SL's mandatory arbitration clause is that thus endorsed restrictions to dispute resolution do not lie outside the perspective of US unconscionability. But then the court's directly commercial reasoning¹¹⁷³ left unpromisingly no margin at all for any other line of argument to enter.

4.3.1.3 – All things considered, neither market efficiency nor consumer protection legal scopes offer ground for addressing directly VW interests. One weighs relationships and liabilities through understandings pre-mediated by the values of healthy and effective competition while the other pursues societal balance in the operations of commercial structures. Consumer protection cannot expand its social discussion beyond the fixed market setup and explore productively on its own further evaluations of social meanings.

Thus, a large number of liability exemptions found in EULAs and ToS refer exclusively to VW circumstances, which have not yet been assessed in social and economic content and importance and, as a result, their legal coverage is otherwise pending.

4.3.2 Account Termination - Account terminations plausibly subscribe to the judgement of service operators. Yet more unilaterally submitted terms are vividly portrayed in connection. For instance, the *Warhammer/DAoC* EULAs

¹¹⁷⁰ *Winn & Webber* (2006) 211 - 212; *Dražozal & Friel* (2002) 359.

¹¹⁷¹ Mainly, under state laws of consumer protection and public policies, *Cormier Anderson* (2007) – citing *Dix v. ICT Group, Inc.*, 125 Wash. App. 929 (Wash. App. Div. 3, 2005), *petition for cert. granted*, 155 Wash.2d 1024 (Wash. Nov, 30, 2005) (No. 77101-4) and *America Online, Inc. v. Superior Court*, 90 Cal. App.4th 1, 4 (Cal. App. 2001). Along these lines, in *Scarcella v. America Online, Inc.*, 4 Misc. 3d 1024(A), 798 N.Y.S.2d 348 (2004), forum-selection clauses regarding small claims processes were found contravening public policy.

¹¹⁷² *Argueta v. Banco Mexicano, S.A.* 87 F.3d 320 compiled the Supreme Court's gradual construal of the exception: 'a forum selection clause is unreasonable if (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power, (2) the selected forum is so "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court," or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought.'

¹¹⁷³ *Supra* 5(II)[1.5.1].

reserved for the VW owner the authority to simultaneously terminate related game accounts.¹¹⁷⁴ According to these terms, *Mythic/EA* would be promiscuously entitled, for example, to ban from the game an Iowa high-school student, on grounds that his brother's account operating in a San Diego college has been terminated due to breach, since both game registrations are paid through a shared parent's credit card.

Here, unfairness of EULA contractual provisions has not been tested exclusively within consumer protection frameworks. The Court in the US *Hotmail* case¹¹⁷⁵ held that termination takes place only when deemed necessary. In practice, game companies feel entitled to ban accounts under any subjectively apprehended occurrence of breach, an attitude which is eloquently mirrored in most EULA texts.¹¹⁷⁶ As Jankowich observes, regulations resemble in complexity a thick web, where, in most given cases, users are likely to understand neither the reasons for disciplinary action, nor the true nature of the dispute.¹¹⁷⁷ Practically, any OSP interpretation suffices for reasoning termination.

Of course, private law empowers excluded users with the right to debate in court the circumstances that led the agreement to its end and whether the owner acted in a rightful manner or not, as in any other online or off-line contractual discharge. Such litigation, however, in conjunction with EULA-imposed jurisdictional limitations, can be excessively problematic.

Where the disposition and effect of unfair terms appear theoretically reversible by court authorities, practical inequalities emerging from the agreements *per se* – e.g. mandatory resolution locus - have discouraged users so far from pursuing such a precedent.

¹¹⁷⁴ *Mythic/EA EULA* 2(G); note that the specific clause have been persistently present through the years in the US Version, while nothing similar has been included in European incarnations.

¹¹⁷⁵ *Supra* 934.

¹¹⁷⁶ While reviewing regulations of 48 virtual worlds, *Jankowich* (2006) 45, calculated that 75.00% of the combined EULA and ToS texts allow 'proprietors to terminate participants at the proprietors' discretion.'

¹¹⁷⁷ *Ibid.* 19, touching upon the possibility of exclusion as an expression of disapproval (as in the EverQuest fan-fiction example).

4.3.3 *Claims Combining Property and Intellectual Property* - IP law appropriations in EULA clauses (notably copyright) might as well be flirting with the phantom of unfairness.

4.3.31 - For one thing, they generate informal *inter partes* enforceability, as OSPs, on the basis of what the law allegedly entitles them to, postulate breach of the EULA/ToS, which leads to account termination. However, these claims of IP rights are not conveying the true picture of posited law: arguably, they (i) high-handedly distribute false representations of law, as the industry circulates and standardises at will in EULAs specific impressions about their rights; (ii) impersonate boldly the letter of IP law; and (iii) bring forth a second layer of unfairness, where pretences to IP law exclusivities reach beyond the consumer status of users' to interfere with their further participation in the online society.

4.3.32 - These considerations derive from two different settings for the rule of law. The first portrays the insofar assimilation and posited expressions of IP by legal institutions. The other theorises the "anticipated" rule of law, as legislatures and courts give indications of how they perceive the public's daily online involvements. In several jurisdictions it has been adjudged that public policy concerns reason against agreements, which deliver absolute control over IP works.¹¹⁷⁸ Thus perceived policy tests would place EULAs under compliance evaluation opposite to society's underlying body of principles, which the rule of law is eventually charged with materialising.

Therefore, both of these settings converge for examining contractual unfairness in respect of IP representations in EULAs and ToS. The capacity of the EULA to neutralise completely all of users' IPRs is tested against the posited setting. The moulding of a formally valid public policy reasoning, on the other hand, articulates the human subject of the information era and weighs the individual's and the public's rights to information. Largely, these contemplations mirror the analysis of the previous section over the socially and culturally restraining impacts of IP, and may even complement the argument against arbitrary exclusions and bans from online settings.

¹¹⁷⁸ *Reynolds, supra 1052*, 148.

4.3.3.1 – Regarding contractual enforceability, the legitimacy of termination is conditioned upon the proper application of law. In other words, the question is whether freedoms of contractual and private will can override rules that are part of mandatory law. Like all other derivatives of property, IP performs socially several key roles and thus its limits in law are carefully laid down: in specific, the *erga omnes* effects of IP law and the boundaries between private exclusivity and public use. Hence, EULAs cannot restrict IP uses which are enshrined by law for everyone: such contractual terms would be found groundless before a court and could constitute copyright misuse.¹¹⁷⁹

4.3.3.11 - Doctrines of IPR misuse in the US derived from antitrust and competition policies,¹¹⁸⁰ and have acquired clearer meaning and applicability mostly in patent law.¹¹⁸¹ Federal case law brought gradually copyright misuse doctrines into existence,¹¹⁸² where privately conducts may be found to violate the public policy that was originally embedded in copyright.¹¹⁸³ Such misuse, however, may be judicially exercised only in defence¹¹⁸⁴ rather than perform as a pro-active tool.

4.3.3.12 - No European equivalent of misuse exists at the moment. It has been argued that either articles 17 and 54 of the Charter of Fundamental Rights could give rise to limitations, in view of the public interest or of abuses and of excessive exercises of granted rights respectively.¹¹⁸⁵

4.3.3.2 - At the same time, EULAs appear oblivious to the various fair use frameworks and defences that copyright and trademark laws feature. They also remain silent with regards to non-commercial treatments of VW material by users. One interpretation for this stance is that where the letter of law is well-implied and commonly known there is no need for the contract to repeat

¹¹⁷⁹ *Ibid.* 149 – 150.

¹¹⁸⁰ *Fromm & Skitol* (2003).

¹¹⁸¹ Patent misuse makes more sense in anti-competitive terms, where patent exclusivities place rigid restrictions over the development of entire sectors, e.g. pharmaceutical and health industries.

¹¹⁸² *Mazzone* (2006) 1087 – 1088, discussing *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990) and following cases, fn 269. Note that claims of copyright misuse are not supported by explicit statutory expressions.

¹¹⁸³ *Ibid.* 1028, coining the term *copyfraud* for ‘claiming falsely a copyright in a public domain work.’

¹¹⁸⁴ *Ibid.* 1089.

¹¹⁸⁵ Analysis from French IP law literature, reviewed in *Samson, Talvard et al* (2009) 9 – 10.

it. The argument is not particularly convincing, since EULA texts repeatedly and consistently define all the responding OSP rights in reference to law, without leaving any areas uncovered.

4.3.3.21 - At least, most agreement texts include broad presuppositions of invalid or inapplicable EULA terms, if found contradicting local procedural and substantive laws; regulations about users' IPR ought to be included.

4.3.3.3 - In the same light, the lack of commercial interest and the implicit disclaiming of ownership in material reworked by fans/users, should amply deflect the variety of EULA attacks on amateur fan-made works, or on other as such classified "derivative works" that are being developed within the same circle of intellectual communities' activities. In practice, however, OSPs scrutinise the widespread blurring of the fair use requirements by turning against online hosting services and websites (e.g. social networks, video sharing etc).¹¹⁸⁶ EULAs display over-absorbency towards all potential forms of UGC, in the same manner that creative labourers are alienated from all their IP rights, which are automatically transferred to the software publisher. Generally, licensing may legitimatise assertions over UGC in favour of the OSP, to the fair extent, however, where it does not realise substantial abuse of the IP right and its social function.

For example, claims over 'transcripts of the chat rooms' bring interestingly into question the limits of ownership - which, notably, EULA texts expand beyond the mere "intellectual" aspect of property. Under the information era regime, consumers¹¹⁸⁷ are also accounted for being producers, and that holds true in many different contexts.¹¹⁸⁸ The premise of online content does not treat only one-way flowing productions, but also interactively shaped information. In other words, the nature of networking means that this amalgam of technically and socially interoperating factors upsets the waterproofing of VW occurrences, which OSPs attempt to accomplish with EULAs. When participants engage in dialogues that produce

¹¹⁸⁶ *Supra* 5(I)[2.1.3] & 5(II)[1.2.7].

¹¹⁸⁷ *Barnhizer* (2006) 95.

¹¹⁸⁸ *Ibid.* (viewing into the users/consumers productivity dynamics an added-on potential for actively contributing to legal production in the information based contractual scenery).

e.g. a poem or a new joke, ownership of the facilitating virtual venue cannot – and *should not* – extend over users’ statements or verbal exchanges.

4.3.3.4 - The issue of commercial potentiality as emerging from the users’ involvement with VWs is slightly more complex to be resolved through licensing settlements presented in advance, i.e. before the user understands in practice (i) *when* and *how* she might experience a creative burst during the online socialising process, (ii) *what* belongs legitimately to her and (most importantly) (iii) *how* and *where* she might make capital out of it – or, at least, associate it publicly with her person. This is exactly where the representations in EULAs and ToS are arguably not fully understandable by users, where contractually the user is misguided into agreeing exclusion from her rights.

Attempts to regulate self-evidently generated practices of acquisition and distribution between players have been marked by feeble wording, leading to notional paradoxes, at least from a purely linguistic legal perspective.¹¹⁸⁹ Traditionally exercised property rights over game items and accounts are presumably conflated with IP claims, while game material, like avatars, is alternately acknowledged as either sets of electronic data found on the access server or owned ideas that have been transformed into computer code.

In general, when off-site trading practices were exploiting more and more the amplitude of online shadow markets, game companies seemed hesitant to pick up a decisive position on classifying the diversity of “game content” under either the property or the intellectual property domains. Instead, ToS have been allowed to move from one legal area to the other, or to combine them both in exhaustive legal descriptions. This definitional instability materialised a teleological approach in expressing the game industry’s logical aspirations to cover every possible content related dispute that might arise. The apparent reason behind importing into EULAs a supplementary intellectual property rule next to the all too clear property set-up for game material, was the fear that players could possibly claim co-

¹¹⁸⁹ Gervassis (2004).

authorship.¹¹⁹⁰ In the same sense was also called the expanded deployment of ToS in search of legal efficiency beyond the premises of traditional property.

Newer EULAs discarded the discussed ambiguities with accurate writing and balanced transition from property to intellectual property, wherever this is deemed as appropriate. However, in its entirety the gaming sector, based exactly on these equivocally mixed rationales, refuses to appoint even a minimum of moral entitlements to users, apart from what is strictly designated for the ‘subscribed customer’ status.

4.4 Conclusions on EULAs as they are in law - EULAs are frugal in the number of substantive expectations they convey. Releasing an online VW implies automatically excessive pressure and numerous risks for developers and publishers, most notably issues of commercial survival that prioritise a ‘duty to maximise shareholder value.’¹¹⁹¹ From this viewpoint, one can argue that the shaping of actual socio-political power over users occurs, to a degree, unbeknownst to OSPs. On a second level, EULA drafting follows after particular sequences of commercial development, production and distribution, to materialising several persistently common flaws, which plague the industry: legal production performs usually detached from the actual business implementation,¹¹⁹² being additionally affected by time urgencies and shadowed by calculations over the in parallel increasing legal costs.¹¹⁹³

The examination of this “EULAw” model discloses concentrative normative dispositions in the converging regulation of “real”, “virtual” and “post-virtual” (i.e. game narratives) circumstances. The over-encompassing textual fusion of game behaviours, business and privacy policies with appropriations of law¹¹⁹⁴ affects directly the judicial currency of legal expression. First, unstable in-game values interfere with the contract outset and its compliance with laws that reflect solely real-world standards. Second,

¹¹⁹⁰ *Supra* 5(II)[3.1].

¹¹⁹¹ *Jankowich* (2006) 8.

¹¹⁹² *Gomulkiewicz* (2004) 692.

¹¹⁹³ *Ibid.* 693, reminding also that the EULA is one of many emergency projects, which are running at the same time and require the attention of the company lawyer.

¹¹⁹⁴ *Jankowich* (2006) 10.

ToS dispute extensively the legal identity of game content by mixing references to property and intellectual property, without providing though for the appropriate references to legal authorities. Finally, game companies disproportionately put forward IPRs as a sufficient justification basis for regulating further involvement of registered players with Internet communities.

On the other hand, any attack centred on the EULAs' massively contractual character *per se* would have more likely fallen into unavailing, trivial theoretical labours, had it aspired to displace the most (if not "the only") reliable contractual model, through which market realism has sought to facilitate the needs of massive commercial production and distribution - offline and online alike. After all, the model has widely gained recognition for its evident practical and ethical advantages. Instead, thus driven motivation should direct its efforts upon deciphering the overall aims and functions of contractual fairness institutions, in order to elaborate the prospects for optimising the existing criteria.

II. The Virtual Humanity in Law

The critique of Justice points to the pretexts of commercial risk, which the information and entertainment industries appeal to for justifying exploitations of IP and contract laws. The human rights argument faces certain difficulties in bringing these observations and conclusions on level ground with the procedural requirements of legal practice. VW contexts burden the legal discussion with additional intricacies, which primarily relate to the legal representation of virtual subjectivity.

We could expect law to address with hesitancy and, possibly, embarrassment the implied merging of human and virtual subjectivities. Surprisingly, however, the issue involves less of legal instantiations of the cyborg and more of noted problems with delivering the output of the human rights discourse in contemporary legal praxis.

1. – The endeavour to bring out the human subject is, first, bedevilled by the overall legal conditioning of online participation and then by the virtual settings' resident technicalities of subjectivity.

1.1 - The human subject needs to be re-synthesised in a manner that it can speak the language of formal law and equally confer the nascent idioms of VWs. The analyses from previous Chapters now reveal those factors which, combined, facilitate its formation: (i) the communicated legal terms of participation; (ii) the terms of factual participation; (iii) the factual legal terms of participation; (iv) social function and breadth of the online application (VW) in use; and, finally, (v) the degree of the user's personal involvement (identification/*tautisis*/immersion).

1.1.1 - Under the first category (i) we find the participation agenda as promoted by EULAs: this is a private contractual relationship between service provider and consumers, governed by the former and for the duration of which the latter are allowed to run particular software, join the interactive online platform and use the service's storage facilities.

1.1.2 - So far, factual participation has shown that the individual virtual entity "externalises" the will of the anonymous/eponymous user in such a manner that it acquires its very own hypostasis, both within and outside the virtual world, becoming an autonomous reputation mark across intellectual communities.

1.1.3 - On the broadly recognised *utility value* that this socially perceived itemisation of the personality unit may further claim,¹¹⁹⁵ depends heavily its institutional acceptance and legitimisation. Thus take shape the participation terms which we may call 'factual-legal'.

1.2 - Our collective legal tradition presents numerous "personality" devices that in time have been qualified as such due to the transactional normalisation effects pursued in their crafting. It can be argued that as exhibited in practice in most cases, it is initial dysfunctions and gaps within the each time legal system that generate the birth of "another", distinctive

¹¹⁹⁵ For example, the *celebrity* and the *branding of the celebrity* are phenomena which were produced through complex socio-economic mechanisms with the assistance of the media superstructure. Arguably, the legal conceptualisations of personality in the creation of personality rights as rights to publicity and in court battles such as *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL and *Douglas v Hello! Ltd* [2005] EWCA Civ 595 relates rather to a separate class of social units/agents. Hence, what makes such instances legally distinctive and interesting is their utility in a particular setting, which invests social interest in specific individuals to harvest economic interest.

legal personality category, rather than the pressure of an addressed social need. The incapacity to deal legally with persistent socio-economic occurrences promotes the inclusion of new legal personalities. Personification then is the tool that in the equalisation with the natural person seeks out to bypass dead-ends, found within the ordinary operation of Law.¹¹⁹⁶

1.2.1 - It is a double-edged question whether the case at hand contests a significant utility value or if judicially we are reaching to one of those dead-ends that necessitate solutions in personhood.

1.2.11 - With respect to the second issue, we may here acknowledge the lack of precise regulatory mechanisms to deal with the thus increasing transformation of private environments into *de facto* public spaces. The platform term, which would describe the discussed human involvement in virtual settings and would carry along our inquiries over the reinstatement of the human rights argument opposite to noted local interpretational shortages in constitutional readings, is missing. Perhaps such invisible nod in the language of law could be indicated by defining legally the traits of manifested involvement.

1.2.12 - Therefore, the virtualised re-appropriation of the human subject does not need proposing new legal inventions. Since the question is set essentially upon confirming the connections between humanity and its online agency - and not over constructing the attribution of the former to the latter in new, independent forms - conventional approaches (i.e. meanings that could be reached by contemporary judiciaries) should come up to the task.

1.3 - Reviewing, however, the degrees of online immersion, the functional evolution of virtual environments and the emergence of real legal implications in VW, leads to asking what is *exactly*, in legal terms, the online persona? There is no question of whether *someone* exists legally there, as it has been accepted in the various 'John Doe' cases. The final resolution of this technicality, for either punishing wrongdoers or protecting against wrongs done, should occur only once the connections between humanity and

¹¹⁹⁶ The ship and the corporation make for ideal examples.

virtuality will have been firmly clarified in the collective legal consciousness. At present, we may consider the online persona as the closest identification mark to the combination of the legally capable entity and personal human agency. For the remaining discussion, any distinction between online accounts and VW characters is intentionally omitted as substantially irrelevant to the arguments at hand.

2. - The existing breadth of legal conceptualisations is offering three basic options:

2.1.1 – (a) *Property object*: At first glance, this direction comes into agreement with the order of things, which OSPs visualise. Nevertheless, it does not endorse the exclusivity that OSPs assert. The account is conceptualised as a mixed product, comprising on the one hand of the host’s software interface and original input of ideas and the user’s unique contributions on the other. These contributions, though, do not extend over predetermined VW elements (e.g. character development in accordance with an existing game script); they are elements that reflect personal intellectual investment, as explained in Chapter 3: social circles and reputation, associations, innovative ideas and artistic creations.

2.1.1.1 - Otherwise, the Chinese court case set an ontologically reasonable alternative in attributing items and game character traits to the user in return of the amount of insofar paid subscription fees. Hence, within the rules of commercial relationships is rationalised an entitlement to possessions, defined timely and qualitatively by personal achievements within analogously rented spaces.

2.1.2 – (b) *Extension of the self*: The online agent is taken for an individual unit, which, although defined in relation to its virtual dealings, it is attributed straight to the reflected human user. In other words, it is treated as an identity alias.¹¹⁹⁷ Thus, the legal system for all its purposes perceives the signified human being and builds on this basis its connections with the digital signifier. A deeper attachment is constructed, where interference with

¹¹⁹⁷ Understandably a human can have several aliases, on either different or in the same virtual settings.

the persona does not count as involvement with property but with the person herself.

2.1.3 - (c) Autonomous online person: This is a rather far-fetched prospect, yet not totally rejected, for the same reasons that ships have been admitted to the “personality club” or companies have appeared before courts contesting human rights. The autonomisation of the virtual unit appeals to the increased functional reliance of modern legal superstructures on agency modalities. Legal subjectivity is attuned to the entities’ capability for acting as rational subjects, for making decisions and experiencing the consequences.

2.2 – Concerns about the legal feasibility of these three variations are only secondary here,¹¹⁹⁸ as the spotlight is mainly set on investigating the capacity to interconnect human rights reasoning with standardised models of legal experience. The task unfolds into a two-layered reading.

2.2.1 - On the first layer are developed the ties that bind together each of the three versions with the human subject.

2.2.1.1 - The least problematic version (b) is simply reversing the already applied in practice reasoning of presuming the existence of individual human wrongdoers behind online agents (i.e. 'John Doe' cases); hence, the “invisible” human is acknowledged as present for the purposes of all involved legal matters, and not only regarding criminalisation. This variation reserves its own share of ambiguity, since more than one persons could be operating under a single online signifier; yet, neither the online nor the legal settings fall short of solutions.¹¹⁹⁹

2.2.1.2 - In the bold terms of version (c), the independence of the online entity to pursue rights (and obligations) is recognised on account of the mechanisms that attribute legal personhood. A simulation of the natural person is established, for the procedural ends which law pursues, having access to civil liberties/fundamental rights, wherever this may logically

¹¹⁹⁸ The reservations, with which any of the three suggested proposals could in practice be blocked, adhere rather to the sphere of political volition than to valid fears over their incompatibility with the order of laws. At the end of the day, this is not a matter of legal technicality but of legislative – essentially, political – will.

¹¹⁹⁹ Hence, in analogy with general pseudonymity issues, we may consider the option of single online identities registering with multiple offline persons, and, further on, the distribution of liabilities amongst the latter (as it happens with legal persons like companies).

apply to the case at hand. Where does humanity lay in this “procedural” artefact? It is *implied* by all given expressions: Law rationalises humanity upon the reverberation of its integral interests as being expressed through continuing and consistent social, political and economic activity.¹²⁰⁰ The main objection against version (c) involves the enlargement of the circle of human subjects that law permits¹²⁰¹ and those major adjustments, which follow towards harmonising the existing systemic practice of laws. Moreover, one may inquire how this concept of personhood can tackle with bots, the online agents that are being reproduced by automated software processes.

2.2.1.3 - The general theoretical background of property suggests logical questions in respect of the structural relation between the first and the other two appropriations. Personality has been contested as being the reinstatement of one’s ownership over his own body and attributes. From this standpoint, both versions (b) and (c) could be considered expansions of version (a). However, such rationalising of personality on the basis of property compromises severely modern human rights cognition: although historically fundamental in the development of modern law, it does not respond with today’s ontological appropriations in law. Therefore, we should not submit e.g. the right to liberty to a habeas corpus logic, which served well humanity and citizenship at times of struggle against absolute despotism, yet itemises dully our evolved legal understandings.¹²⁰² The definition of humanity does not need the ground of property anymore. On the contrary, property may now be fully articulated and supported as the derivative of humanity, the latter explained *through* but *not by* the former. Version (a) is about one human being as existing in multiple contexts; version (b) views the virtual setting as a parallel sphere, where the inter-connected human actors contest their rights over their virtual investments (a form of assets’ management); finally, in

¹²⁰⁰ Teubner (2006) discusses generally attributions of legal personality to ‘flows of communications,’ arguing that ‘it is attribution of communicative events to an entity as “its” acts and the attribution of rights to an entity that transforms this entity into an actor,’ 497 – 498.

¹²⁰¹ *Ibid.* pinpointing also to dangers in setting up self-referential actors.

¹²⁰² Yet, the reasoning foundation of habeas corpus logic could surface in contesting one’s access to his avatar (and in this example versions (a) and (b) are possibly conflating).

version (c) property becomes autonomous, yet autonomised because of active human directing.

2.2.2 – The first layer performs as a substratum, outlining the parameters of integral connection between humanity and virtual involvement as *ontologically* informed by law. On the second (outer) layer is developed the human rights logic, which the operation of law should employ.

2.2.2.1 - It is unclear what area the human rights reasoning may cover in version (a) and under which terms it may be activated as surpassing the apparent ownership exclusivity condition. An ongoing argument, which the Chinese court case set also on the map of practice regarding virtual property, suggests that a user acquires particular rights over virtual items in *recognition* of invested time and money, and not 'in return', which subscribes strictly to the logic of the private exchange. The user turns to the state (the only branded guarantor of human rights) looking not for compensation but for assurances that any *personal* effort or achievement will not be left unprotected.¹²⁰³ For that part that he has utilised the interactive software tool for developing the onscreen “raw material” into something unique, the user ought to receive a minimum of relevant entitlements.

An additional appreciation of self-development is reflected on the itemisation of online accounts as virtual objects. The virtually “tangible” content of the account turns into a stable nod, which the user pursues to appropriate in order to gain access to the information space. The information space here denotes a function performed exclusively under virtuality, and beyond the common monistic appropriations of “knowledge spaces”: the information space is continuously active and interactive; a dialogical form of knowledge, not a static library. This argument is rooted in the same rationales, which champion human rights to leisure, education and association, and it gives priority to gaining hold on the means that objectify and lead to such ends within virtual physicalities.

¹²⁰³ This line of thinking projects expectations from the rule of law, where modern citizenship is experienced in a sense of finality: the individual invests in the over-celebrated triumph of Justice, subconsciously linking it with the juridico-political success of human rights.

2.2.2.2 - Similar interest in the concept of the account surfaces in version (b), although here the idea of the virtual nod transforms from an instrumental appropriation of property into an abstract tautological arrangement between the human entity and the online account.

The account becomes integral to the human personality, since through the account the individual is allowed to contest her existence as a human within the online environment. While we could in general discuss relevant notions of e.g. freedom of speech, the user account within well-established VWs realises distinguishable expressions of the rights to associate with others, to maintain identities, to exchange knowledge and – why not – to play.¹²⁰⁴ However, virtuality is being transcended: association, identity and knowledge are all referring to circumstances that construct virtual biographies¹²⁰⁵ inside artificial spaces and, yet, they are all pursuing ends that primarily respond to and define the “real” self. Thus emerges a scope for personal development, which is determined by the to-and-fro crossing of the barriers separating virtuality from reality.

Identification of the human with the account promotes the importance of access opposite to oligopolies of privately owned VWs, finding in online communications platforms an equal to where a town square prescribes the local community’s sole gathering point.

2.2.2.3 - The autonomous entity of version (c) could be contesting similar goals, if not for maintaining closer attachments to the virtual context and looking into the limited range of human rights protection that law reserves for legal persons. The evidenced assumption that the online account is being operated by a human actor, substantiates the entity as an autonomous subject and equips it with legal assertions to humanity traits. In this sense, it fully simulates the human being in the challenges that it raises. Hence, it may contest the right to express its opinion freely, it may even contest “spatial” endurance against being terminated partially and light-heartedly.

¹²⁰⁴ *Castronova, supra 277.*

¹²⁰⁵ *Teubner* (2006) 515, recognises learning and accumulation of experience for online personifications, where 'hybrids are full-fledged biographies, histories of experiments between humans and non-humans that do influence social and political life.'

2.3 – All three examined conceptualisations of legitimate access for the human subject to virtuality converge in becoming arguments against *ex parte account* terminations; against virtual executions, which are decided by virtue of procedural expedience or of legal technicalities (i.e. contract discourse) to excuse the relinquishing of human Justice. Justice, on the other hand, appears confined in constitutional schemata of 'state vs citizen', following obscurely formulated ideas of institutional economy in law. Institutional economy normally determines the limits that a developing legal argument is allowed to reach in practice; when being informed by severely fractional legal aims and understandings, however, it results in generating conceptual confusion and formalising regulatory irregularity.

III. Justice and the Virtual Public

The next step involves the positioning of the virtual human subject in contextual relation to both the gradual idealisation of law within the development of human Justice and the juridico-political circumstances which besiege online participation.

1. A Treatment of Nature, The Public and The Private – The concept of virtuality challenges several key features of the original “real” setting, not only in its online manifestations of malleable electronic ecologies, but also since reality itself – and anything else we might perceive as part of it – confers another artificiality.¹²⁰⁶ The (social, legal, economic etc) normative artificiality of the “real” starts from power-engendered appropriations of physicality (i.e. property and sovereignty) and evolves into complex, abstract superstructures. As the Justice retrospective in Chapter 2 suggested, the crude physical basis and the highest levels of superstructural abstraction are connected through fundamental concepts and meanings, which, while being of mediating function, act as bottom-up determinants: “nature”, “public space” and “private sphere” were notably distinguished in the course of that discussion.

¹²⁰⁶ *Supra* 3(II)[2.4], discussion on the various types of virtuality.

Nature is challenged by virtuality, transformed by technology and its conditioned experiencing by users.¹²⁰⁷ The shape of online geographies and pseudo-natural laws are written in software code, yet scribed – i.e. structurally determined - by the intersecting multiplicities of real-life superstructural elements (markets, politics, legalities etc.): thus this *meta-nature*¹²⁰⁸ constitutes an environment made of filtered systematisations! Virtual life denotes a second level of a complex superstructure, where participants are combining their empirical apprehensions of both nature and meta-nature into perception of personal capacity to function within the setting, i.e. perception of personal identity.

Reflecting upon this adaptation of nature by virtuality, one may rediscover the basic conceptual constituents which formulate “nature”, being now more aware of historically impinging influences upon this latter’s juridico-political appreciation. On the same tapestry are also redrawn the persisting demands of human Justice, which perceives human existence as a multifaceted unity that remains largely unaffected by the particularities of meta-natural digitised contexts.

1.1 Nature - Once I have acquired a book I may then feel and I am free to give it away or sell it: the fulfilment of my actions depend on the recipient’s desire for the item in question. The intersection of such possessions, wants and transfers weaves the behavioural patterns of everyday functional human activity. That is the familiar amalgam of nature’s physical freedoms and built-upon-them normative commonalities that combined all together form a single plausibility: the world as we know it and as we empirically expect it to work.

¹²⁰⁷ The modules which shape users’ experience of online communications form a kind of establishment: email platforms, forums, chat-rooms – this is the *nature* of online communications, and anyone who enters the Internet has his mindset tuned to this operational logic.

¹²⁰⁸ In other words, the artificial nature parallel of the general online setting is created (conditioned) upon the off-line superstructure of the material realm: nature is made of physical matter; the meta-nature is constructed of rubrics and instrumental apprehensions of nature, transformed with the use of computer code into *meta-natural laws* (e.g. the fluxes of data transfers forming an equivalent to the law of gravity). Interestingly, in the virtual physicality of the meta-nature our society’s legal superstructure is being reproduced as a “material” component.

This appreciation is embedded in the shared societal conscience of human beings. The evolving “law of man”, even during its historically most extreme instances, simply could not – and rationally would not - defy self-evident facts about community life. Indeed, law could punish or normatively prevent transfer of possession; but not tackle with the physical transfer itself. Hence, beyond discussions over “natural” or “human rights,” nature signifies the simple dimensions of the communal physicality setting. To a certain extent, the self-evident character of nature eludes the intellectual setup of law. It ridicules the latter’s attempts to place it within unattainable constraints.¹²⁰⁹

1.2 *Natural Origins of the Public and the Private* – Moreover, the way humans perceive the physical world has shaped the conceptual foundations of organised society by conditioning heavily its underlying reasoning ethics, which were transmuted into law. There we can locate the origins of the public and the private spheres; the processing of the two in law articulated humanity’s cognition of something already intimate and palpable, definitely not marking any original discovery. The soil on which one stands, the air she breathes, the view she has of the sky: these connect the individual’s existence with the here and now and, unless one higher authority does not want that person around, they have to be maintained. Thus is perceived the individual human entity’s *private sphere*. When more human units are needed to perform in groups, the idea of shared space is materialised, in order for them to both exist individually and interact with each other. When transferred into larger social formations which expand beyond single lifetimes, shared space turns into developing, *public space*.

1.2.1 - The regime in power, regardless how despotic or not, would have also offered public space to communities as a prerequisite of social functionality. In addition, rulers would grant some form of a private sphere minimum, wherein individuals should at least be able to pursue their self-

¹²⁰⁹ Therefore, even if the book had not been initially legally obtained, nothing stops the possessor from giving it physically away. The law may perform as a behavioural deterrent, punish the illegal transfer and enforce the return of an item’s possession to its rightful owner; it cannot, though, cancel the actual physical acquisition.

preservation.¹²¹⁰ We may observe that the content of the public and private spheres has been enriched in time as societies add more institutional complexity over the nominal value of the person monad: first, individuals/subjects were deemed necessary to exist (thus “do not kill them”), then their survival was linked with productivity in the contexts of workforce and warfare (“allow them a small piece of land to live on and thrive bodily”). Finally, they turned into active participants in the complicated political and economic production (civil liberties).

1.2.2 - The twofold interpretation of existence being both nature and private sphere is bonded with the experiential perception of public space and at the same time it equally exercises influence over the latter. Existence as nature denotes the pragmatic yardstick that determines what is self-evident in relation to our physical self. At the same time, existence as private sphere exhibits the results of a long societal process where circumstances that derive from “natural” existence are filtered into normative institutions.¹²¹¹ The domestic/family environment (the Aristotelian *οἶκος*) was first socially sanctified and then legally protected.

This interference of that which is considered to be self-evident with public activity is openly demonstrated in the book example: with regard to physicality, the actions as such of possession and transfer of the book are so perfectly positioned within spatial and temporal proximity that they would have been averted only if natural laws had stopped performing as we know them. Within this context we can perceive control over one’s own self. In all similar cases, we are discussing an unsurpassable actuality, which no human-made device or rule can stop.

1.2.3 - The intellectualisation of activity (‘virtuality’) marks the first alteration to the seemingly absolute rule that “no one can stop my thoughts from becoming voice.” I cannot turn my thoughts into speech if the right

¹²¹⁰ Of course, as *Teubner* (2006b) 331, indicates, in feudal societies ‘human individuals were always transcended in the estate or in the corporation’ since the at that time modality of justice ‘regulated the relations’ and ‘the natural hierarchy between the *partes majores*.’

¹²¹¹ This movement ‘from natural to social, from unwritten to written’ was championed by Enlightenment and is best represented by Rousseau’s secularising rhetoric; *Goodrich, P.* ‘Contractions: Rousseau in the Year Two Thousand’ in *Carty* [ed.] (1990) 59 – 60.

words have not been invented yet. Language, here, is the artificial foundation, a communicative and simultaneously communicated structural process, where words constitute projections of items and events. Language sets for a subtle representation of virtuality;¹²¹² an implicit setting in everyday life that simulates meanings through interacting symbols.

Moreover, we realise the twisted manner in which language reflects this restating of nature: the thinking process is the self (i.e. the private sphere), which is utilising words from the language. Language, in turn, constitutes the public space metaphor, wherein words exist, are taken by individuals, rephrased and then returned to the shared sphere.¹²¹³

1.3 *Virtual Public* - Circumstances become more complex within artificial environments, the likes of which are stemming from the Internet. Artificiality indicates, for certain, a creation ascribed to someone: in the affirmation of virtual creation, the bonds of ownership become stronger. For example, in offline privately authorised access (e.g. leasing, trespassing of land), we understand activity as taking place in borrowed space and for borrowed time. The owner, however, does not have total control over physical matter or natural laws. On the contrary, in created settings, spatial and temporal controls over virtual nature can be maximised to their fullest desired potentials. This is precisely the prospect which VWs (and in a lesser extent the Net as a whole) realise.

1.3.1 – Internet accounts resemble bank accounts. Imagine the virtual body as a single safe deposit box in the bank's vaults. Indeed, what a person keeps in the box are several personal belongings, a family heirloom or an original piece of art. As we are zooming out from the one box, thousands of other boxes, in the bank building's vaults, come into view; then gates of steel, making sure that all boxes are secure, isolated; then the entire building. Suddenly, one day, imagine that building being destroyed, vanishing into thin air. Both materially and commercially, the bank ceases to exist.

¹²¹² Language is a representation. From this point, we may start contesting that law is also a virtuality.

¹²¹³ We may also observe that words have to be invented and also agreed by everyone upon their shared semantic. The convention of language marks the transition from an anarchic state of nature to reason.

When thinking in material terms, it is difficult to imagine any judiciary suggesting that, since the bank was built and its services provided by only one person (creator and owner), the decision of that person to destroy wilfully his building cancels all obligations of returning therein stored personal belongings or of offering compensation.¹²¹⁴ It appears equally difficult to believe how the same legal order that agonised to simulate abstract items to physical properties in IP laws can possibly deny the participants' personal contribution in the structure of online services; or, how personal time and financial investment in VW accounts acquire lesser, close to zero importance. Probably, the absence of impending financial benefits from the B2B and B2C industries' proximal horizons discourages the launching of legal parallels between bank and online accounts.

The paradox in this metaphor of accounts was never an issue for the Chinese court.

1.3.2 *Public Space as Public Order* – Presumably, in its counterweighing of the litigants' roles and powers, the court indicated the borderline territory between user and OSP: a landscape of legal relationships, shaped by the reciprocal unfolding of entitlements and obligations between the two sides. Simultaneously, the court defined private spheres, in the sense of ascertaining for either party a certain circle of legal protection and the minimum and maximum ranges for outreaching action. Therefore, the space which develops between the two opposite spheres internalises the important regulatory function of keeping them distinguishable and separate. This sense of public (as neutral) space transforms instrumentally into *public order*, rather than crystallising commonly digested notions of public availability and access.

1.3.2.1 – This reading into the reasoning *behind the reasoning* of the Arctic Ice case aims at the undetected function of public spaces to contain and order the intersubjective breadth of law.

¹²¹⁴ Compensation is given in return to lost or damaged valued assets. The deleted online account is not a *strictu sensu* valued asset, yet it may be comprised of such assets. This formed part of the Chinese Court's reasoning, *supra* 4(1)[2.1.4].

1.3.2.11 – For example, a hypothetical Western neoliberal criticism of the decision would have naturally attacked the court’s protectivist attitude and interference. Yet, it should have read between the lines similar findings about the nature of public order, but expressed under its idiosyncratic ideological scope. For the neoliberal, the Chinese state intervened by opening the floodgates for scattered litigation to object virtual items, and placing particularly heavy burdens on the domestic online gaming industry. In addition, the state made apparent its opposition to deregulation and free development of B2C relationships, foretelling further oppression against the market’s expansion. Where the state draws lines, beyond which private activity is not desirable, private relationships cannot reach the full potential of socio-economic production that neoliberals envisage. Public order as such prohibits private spheres from expanding their ranges over intermediary spaces that are designated as off-limits (i.e. the public space, as granted by the state’s decision-making monopoly) and, thus, from engaging with other actors.

1.3.2.12 – We termed intermediary zones ‘public space’, whereas other conceptualisations might describe more aptly their role, such as Habermas’s public sphere.¹²¹⁵ In any case, regardless of summoning the ‘public space’, ‘sphere’, ‘forum’ or ‘domain’, we are referring to an area of empowerment for all, where exclusivities are neutralised. The trait of spatiality links with the virtual space of relationships, rather than with actual physicality. Such public space arrangements materialise the conceptual outline of the norms which prescribe the smooth performance of public life.

Institutionally, representations of public space bear the effects of law. Their deployment recreates the resident design of law, incorporating liberties according to the constitutional foundation of principles and values, and instructing boundaries to participation in compliance with the order of lesser legislation. They thus project a static yet objective image of the underlying law.

¹²¹⁵ *Habermas* (1991) 27 – 31.

1.3.2.13 - The demonstrated transcending of public space into two conflicting ideas about public order signifies how polarised ideologies perceive antithetically the same intersubjective limitations. Therefore, public order (i) ('protectivist') looked into establishing order between social actors, by blocking the excessive juridico-social desires of commercial forces; respectively, public order (ii) ('economic-liberal') reviewed the same tale as a narrative of oppression, which is doomed to turn into socio-economical deceleration.

1.3.2.2 – The interpretation of the case appeals also to the public/private distinction. Although frequently criticised as dated, this has been frequently summoned in recent years, precisely to advocate horizontal applications of human rights. On the other hand, mention of other modular dualities in the legal apparatus (i.e. entitlements/obligations) further indicates the parameters which frame ontologically the dichotomy. The public/private schema is manifested in common practices of law through such binary legal contextures, which it inescapably assimilates. The manner in which the arrangement between entitlements and obligations shaped our reading of the Chinese case, exemplifies this best.

1.3.3 *Public and Private* - The distinction between private and public needs to be perceived as *reasonable*, not as *justified* (excused), *offered* or *inherited*. That is the mistake lawyers make in reproducing ardently, at the expense of Justice, the historically iconic, yet politically deceiving “state vs. individual” stereotype. Such decisively divertive treatments trap law into building social contingencies.

1.3.3.1 – The origins of the separation of private from public (and even of the creation of public spaces) may be explained as a political reflection on the balance of power between societal determinants.

1.3.3.11 – When states monopolised power, the demands of liberty were plausibly directed against the “sovereign” or the “government”. The distinction became palpable, though, acquired meaning and form, inside the realm of human feelings and rationality: experiences of suffering, pain and denial of self-development were the circumstances that started the fires of

intense social clash, fused political competition and, finally, led to recognitions of rights in law. The right to belong to a public and respect to the private sphere expressed initially a humanist claim against the *par excellence* forms of authority and oppression.

1.3.3.12 – The private sphere defined, essentially, the necessary minimum space required by the individual person in order to exist under the rule of society’s supervising powers. In the case of humanity, “existence” is far more than just a state of being: it denotes connection with the self, and rationality becoming the axis on which life is perceived and analysed. Thus, for this human, “existence” is synonymous with “dignity” with respect to life.

The public is the wider space wherein such existence can be conceived, guaranteed, secured. In this respect, public and private retain a symbiotic relationship, where each is included into the other. Once its access to the public is totally cut, the private loses its meaning as such – it transforms into something different that calls for an alternative description of its properties.

1.3.3.13 – Therefore, the distinction formulates unity, rather than delineating a strict dichotomy.¹²¹⁶

1.3.3.2 – Conceptualisations of access to power hold also the key to evaluating the duality upon how it responds to society in practice.

1.3.3.21 - When Western political consciousness identified state governance with threats to liberty,¹²¹⁷ modern legal thinking switched aims from empowering human beings against despotic exercises of power to pursuing passionately the liberal ideal of the “private individual” - to that excess of relegating all ‘non-institutional actors to the discursive realm of the private.’¹²¹⁸ Informed on economic-liberal understandings, the public/private duality was engaged within the state/individual opposition.

¹²¹⁶ This comprehension echoes *Habermas’* ‘bourgeois public sphere’, which may be conceived ‘as the sphere of private people who come together as a public,’ (1991) 26.

¹²¹⁷ Modern constitutional tradition over limitations to governments was formulated when 17th and 18th centuries’ perceptions took statist absolutism for the primary threat to individual liberty; *Horan* (1976) 848.

¹²¹⁸ *Rodgers* (2003) 54.

1.3.3.22 – An uncritically endorsed state/individual instantiation carries the danger of subjecting public spaces and human beings to abusive exercises of private power. There, the public/private dialectics are altogether neutralised due to the apparent absence of state action. That oppressive power does not constitute state exclusivity, is openly dealt with in the Marxian thesis, along with its connections to exploitation. Marxists easily detected in the various levels of industrialisation and commercial proliferation the next, evolved stage of social feudalism.¹²¹⁹ Ownership of the means of production entails the bottom-up spreading of social domination, from the material structure all the way to the superstructure.

1.3.3.23 – These readings suggest alternative interpretations of the information revolution’s juridico-political development. The propertising of the intellect, and the austere protective regimes (private knowledge empires) which surround it, rejuvenate feudalism in framing ownership of the means of knowledge and social production mainly by controlling information in all kinds and shapes,¹²²⁰ that is, ownership of the means to “everything” on virtual space, and especially in VW contexts.

1.3.3.3 – Redistributions of economic power in liberal societies undercut profoundly the political tradition of the distinction and expose its misapplied praxis as threatening to humanity’s development. The online analogy exhibits even more sharply these circumstances, where the conditions of existence are administered, in the form of information, by private actors on market rationales. Freedom becomes more virtual than the onscreen artificial environments, for it shrinks into the limited consumer options which information and entertainment oligopolies create.

This does not comply with an ideal of public where individual personality and group identities may be freely developed. Ironically, even the

¹²¹⁹ *Poulantzas* (1978) 25 – 33.

¹²²⁰ *Drahos & Braithwaite* (2002) coin information feudalism the global regime of redistribution of property rights that involved ‘a transfer of knowledge assets from the intellectual commons’ to ‘private monopolistic power; there citizens trespass ‘on knowledge that should be the common heritage of humankind,’ 2 – 3 and 219.

free-market ideal finds the prerequisites towards its realisation being fundamentally and substantially disrupted.¹²²¹

1.3.3.4 – Therefore, following the discussion on virtual nature and its “laws” and from there the normative communication of information space between online participants, a juridico-politically over-encompassing idea of the virtual private builds on the rational human being’s tolerance (i.e. personal limits) to his surrounding totality of socially active agents. The virtual public, on the other hand, ontologically projects the above spatial understanding of common material, intellectual and social resources and communications, its developmental scope pronouncing direct attachment to Justice.¹²²²

Representations of an identity-constructive virtual public promote reconfigurations in the social practice, which come into conflict with the commercial reality of VWs and of private closed settings in general.

1.3.4 Participation – Voluntary entrance into a setting expresses the intent to expand the private sphere’s outer boundaries, either towards fusion with other spheres or for incorporating more space. In our natural existence, we have no choice but to participate in this world and we pursue to secure more and more rights: as pain and suffering become inextricable elements of daily life, the intensity and decisiveness of political struggle are increased and experienced impasses heighten the fighting spirit’s sense of immediacy. On the contrary, where varieties of participatory space are available, the terms of urgency are in reverse analogy downplayed. Manifestations of the marketplace speak the language of demand and offer, spark internal competition and realise their commercial ethics through “take-it-or-leave-it” freedoms.

1.3.4.1 – We may argue, however, that markets thrive on the circumstances of natural existence. To be more accurate, they permeate and exploit social interaction, which aims at securing the means for sustaining human needs.

¹²²¹ *Friedman* (1962).

¹²²² While this direction at first glance contradicts economic interests in general, in practice it blocks commercial oligopolies.

Therefore, participation as voluntary action appears ambiguous and thus open to interpretations.

1.3.4.11 - It suffices to consider the differences between the traditional countryside pub and a gentlemen's club in London. Both venues belong to private owners and patrons choose whether to enter or not. In the first case, though, how many alternatives exist for the village resident to socialise with the local community? The landlord, who - despite pubs being formally known as "public houses" - is not the state, acquires substantive hold over the local social life.

1.3.4.12 - The apparent availability of options at the other end of the spectrum and the freedom of choice to enter the big city club is countered by pressing mixtures of factors which reflect constant readjustments in the *modus vivendi* and goals of social groups – e.g. the "hottest spot", or the club whose members get a professional status boost. We could discuss "demand" and "offer" performing under ideal conditions of "healthy competition", if not for the existence of *de facto* monopolies. The modern social environment is willy-nilly transformed into commodity, since it is deeply embedded within the capitalist mode of production.¹²²³

1.3.4.2 – Social space, and for that matter the powerful discourse surrounding the concept of sociability,¹²²⁴ is mediated on one hand by property and is rooted in economic relationships on the other.

1.3.4.21 – Following the analysis of 'affective immaterial labour' offered by Negri and Hardt and its biopolitical impacts on information economies,¹²²⁵ Prada reads in the expanding social media 'the design of forms of human relationships' forming the 'primary instrumental base of the new economic production.' In his own words, '*the new industries, increasingly oriented to pleasure and entertainment, and to the computerised production of "intangible" goods and information, are really producing contexts of*

¹²²³ Poulantzas (1978) 13, designates *mode of production* not relations of production in a strict sense, but a specific unity 'of various structures and practices which, in combination, appear as so many instances or levels,' including the economic, political, ideological and theoretical.

¹²²⁴ Simmel (1971) 127 – 140.

¹²²⁵ (2000) 292 – 293.

interpretation and assessment, forms of identification and membership, interpersonal behaviour and human interaction.’ In today’s context, ‘the concept of production’ aims at ‘the production of sociability itself.’¹²²⁶

1.3.4.22 – Any private initiative to produce or host a social process is linked to the public, either by function or through invitation to participation. Understandably, laws concretising our ethical and practical approaches to the private sphere formulate plausible limits. That balance is compromised by private spaces that pursue via marketing their performance to dominate sociability across the broader context. Hence, different to e.g. a millionaires club in Boston, publicly pervasive private platforms such as Facebook or, for that matter, over-hyped socio-commercial products like WoW, require different criteria for assessing participation and free choice.

1.3.4.3 – Critique of terms of inclusion and exclusion ought arguably to be different in cases of privatising parks, town-squares or public utilities. However, if we take into account the present discussion and the social omnipresence of branded culture¹²²⁷ there is no issue of “publicising” private spaces where the public social space is being privatised.

2. Virtual Jurisprudence – Reassessing the overarching understandings which frame judicial interpretation, and thereafter the practical perspective of Justice, allows us to consider anew the treatment of facts within the decision-making matrix. The commercial characteristics of spaces, services and creations/products are elements difficult to excise from their social productiveness and, thus, from their increased public function. Liberated, though, from pre-digital technical understandings of the context, we may approach VWs (and online settings) with responsive structural insights. This take needs not to be hostile towards the market: on the contrary, it sets more realistic appreciations of the online market’s needs and differentiates creatively the latter’s operations to pre-emptive offline models.

The question over applying Justice breaks into confronting traditional barriers when applying human rights in private spaces and, alternatively,

¹²²⁶ Prada (2006).

¹²²⁷ Coombe (1998); Klein (2005); Jenkins (2006).

interpreting understandings of the online cultural and communicated ('virtual') public.

2.1 – The preventive effect of the public/private dichotomy on adjudication has been severely criticised where contradicted by reciprocal fluxes between the structures and practices of public and private laws,¹²²⁸ and for pulling the focus from human rights and the exercises of power on the human.¹²²⁹

2.1.1 - Discussions about VWs and law frequently summon the US *Marsh v. Alabama* case,¹²³⁰ where a company town had 'assumed all of the major functions of a municipality' and was thus simulated to the state for obeying constitutional values.¹²³¹ Note that in 1996 an analogy against AOL's apparent monopolistic hold on email communications was turned down.¹²³² US courts have refused state action against privately owned public utilities.¹²³³ While the *Marsh* court refused to extend its reasoning to shopping malls, lower courts have held these latter to be public spaces.¹²³⁴ Places of public accommodation (e.g. inns, theatres, transportation hubs, even private clubs) may not discriminate against their customers.¹²³⁵ Exclusions from private clubs can be attacked when found malicious or in bad faith.¹²³⁶

2.1.2 - Problematically, resolving the public role of a private actor bars usually courts from discussing substantive social values matters.¹²³⁷ On the other hand, courts have accepted the public functioning of private spaces without summoning issues of constitutionality or the rights of involved parties, by simply investigating their public-calling nature.¹²³⁸ Such decisions

¹²²⁸ *Berman* (2000) 1279 – 1281.

¹²²⁹ *Hammer* (2007) 90.

¹²³⁰ 326 U.S. 501 (1946).

¹²³¹ *Balkin*, *supra* 738, 98.

¹²³² *Cyber Promotions v. AOL* in *Yen* (2000) 68 – 69.

¹²³³ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

¹²³⁴ *Berman* (2000) 1304; *Balkin*, *supra* 738, 99.

¹²³⁵ *Ibid.* 103; *Gardbaum* (2003) 422.

¹²³⁶ *Abrams & Hoffman* (1974).

¹²³⁷ *Berman* (2000) 1284, on *Cyber Promotions v. AOL*.

¹²³⁸ *E.g. Doe v. Bridgeton Hospital Association*, (1976) 366 A 2d 641 (SCNJ).

remind us that property is in general restricted by its unique common-calling character, a public interest.¹²³⁹

2.1.3 - Public policy as a private law principle has succeeded in the past to deliver the weight of human rights, when these had not been yet “inscribed”, by resolving conflicts between contractual agreements and freedom of expression or human dignity.¹²⁴⁰ The use of public policy considerations in judgements, though, fails arguably in practice to distinguish between utilitarian or distributive objectives and the public element.¹²⁴¹

2.1.4 - Conventional civil laws consider self-evident that tenants enjoy the fruits of the land, especially if they have laboured towards producing them. The similar Lockean conceptualisation does not work very well in environments like WoW, since participants do not mix their labour with a commons to claim rights over virtual properties.¹²⁴² SL, on the other hand, features an element of commons, yet Linden has not actually released the VW to the status of ‘commons’ and participation takes place under contractually granted permission. Several solutions have been suggested in literature. For instance, a ‘reasonable right of access’ to virtual property in common law, would perform as a minimal possession of license to enter the VW, under conditions similar to entering public venues.¹²⁴³

Such dilemmas do not question the landowners’ rights to be selective.¹²⁴⁴ It seems, though, that examples in legal literature involve mainly individual proprietors in textbook discrimination cases; the problematic of VWs (and of the contemporary information industry in general) stretches into complex market relationships and commercial oligopolies. To distinguish between the private or not character of a venue surfaces as trivial where community values are being threatened.¹²⁴⁵

¹²³⁹ Reichman, A. ‘Property Rights, Public Policy and Limits of Legal Power to Discriminate’ in Friedman & Barak-Erez (2001) 250.

¹²⁴⁰ Barak in Friedmann & Barak-Erez [eds.] (2001) 36.

¹²⁴¹ Reichman, *supra* 1239, 250.

¹²⁴² Sheldon (2007) 761.

¹²⁴³ *Ibid.* 774 – 776.

¹²⁴⁴ Reichman, *supra* 1239, 256 – 257 (addresses the stalemate between the public and the individual landowner’s personal development – and dignity).

¹²⁴⁵ Lastowka & Hunter (2004) 60.

2.2. – The alternative public problematic faces the ‘enclosure’ of symbolic space, where corporations increasingly intercept the public’s access to ‘community spaces and cultural capital’ and property-based claims creep into social relationships.¹²⁴⁶ The public space is transferred into private venues – as in the parallel of privatised city centres¹²⁴⁷ - and community relations become object of plausible exploitation.

2.2.1 Public Production - As the concept of the public itself transforms, since most public resources are being privatised, Hardt & Negri¹²⁴⁸ suggest it ought to be rejuvenated - perhaps on the basis of the common.¹²⁴⁹

The Net facilitates its public space where subjective and objective identities are constructed.¹²⁵⁰ The Internet audience describes people accessing and participating in the same information, rather than as passive recipients of broadcast outputs.¹²⁵¹ From the increasingly privatised Net stems a new folk culture.¹²⁵²

Noting the distinction between ‘mass culture’ (production category) and ‘pop culture’ (consumption mode), media scholarship insists that as the materials of mass culture are widely distributed and consumed, popular culture defines ‘what happens as mass culture gets pulled back into folk culture’¹²⁵³ – practically, a different cultural economy. Corporations have sought to market branded culture everywhere, mainly to children; when the public returns with appropriating the same artefacts at their own choosing, these re-circulations are considered a threat to the industry’s economic interests.¹²⁵⁴

¹²⁴⁶ *Humphreys* (2005).

¹²⁴⁷ *Supra* 3(III)[4.3.1].

¹²⁴⁸ (2000) 301.

¹²⁴⁹ (2004) 204.

¹²⁵⁰ *Howard* (2000) 383.

¹²⁵¹ *Rodgers* (2003) 50.

¹²⁵² *Benkler* (2006) 15 (a brief explanation of the transparency and malleability of this culture).

¹²⁵³ *Jenkins* (2006) 140.

¹²⁵⁴ *Ibid.* 142.

Corporate and grassroots need not be taken into conflict; they may converge, reinforce each other and create more rewarding relationships between media producers and consumers.¹²⁵⁵

2.2.2 Public Goods - Information and culture feature non-rival characteristics, leading to understanding them as ‘public goods’.¹²⁵⁶ They also present cumulative development; new content builds on existing material.¹²⁵⁷ There we can assess the significance of SL not in comparison to other VWs but in comparison to projects like Wikipedia. The software becomes the tool of group not of individual creativity.¹²⁵⁸

Public goods do not fit well in capitalist economy since their production does not bring profit.¹²⁵⁹ On the other hand, knowledge is an impure public good – meaning that it can be propertised for the purposes of profit-making.¹²⁶⁰

2.2.3 Public Domain - The public-private distinction has long hidden the concept of the common – especially in the Anglo-American legal tradition.¹²⁶¹ Understandings of the public domain in recent legal reformations are still attached to pre-Net truths.¹²⁶² Arguably, the Net’s economic value as a commons is underestimated, where it could ensure ‘meritocratic competition among content providers.’¹²⁶³

For some the public domain takes shape after IPR exclusivities are satisfied; for others, it demands protection as an ‘affirmative entity.’¹²⁶⁴ Boyle parallelises the public domain to the environment: the latter poses a conception that was shaped and defended only once proprietary practices interfered heavily with natural space.¹²⁶⁵ He calls ‘second enclosure’ the movement of state-backed privatisation ‘of the intangible commons of the mind,’ of ‘things that were formerly thought [...] or outside the market

¹²⁵⁵ Jenkins (2006) 18.

¹²⁵⁶ Benkler (2006) 35 – 36.

¹²⁵⁷ *Ibid.* 37 – 38.

¹²⁵⁸ Benkler, Y. ‘There is No Spoon’ in Balkin & Noveck [eds.] (2006) 185.

¹²⁵⁹ Drahos & Braithwaite (2002) 42.

¹²⁶⁰ *Ibid.* 215 – 216.

¹²⁶¹ Hardt & Negri (2004) 202.

¹²⁶² Lessig (2006b) 56.

¹²⁶³ Zittrain (2008) 79.

¹²⁶⁴ Lange (2003) 465 – 466.

¹²⁶⁵ Boyle (2008).

altogether.’¹²⁶⁶ He contests the erosion of the public domain, as e.g. few works have moved from copyright into the public domain for decades, patents extent to include lifeforms and fair use in areas such as parodies is being undermined.¹²⁶⁷

2.3. – Looking at the interoperation of functional and intellectual communities, this juridical reading reveals, at last, the disrupting of the virtual public by the legal practices which govern VWs.

2.3.1 *IP* - Intellectual communities circulate fan-works and other content as signifiers of common interest, the same way we communicate offline our interest in TV series, musicians or football teams without fear of breaking any laws. Information production is by definition a social practice, as involving the efforts of more than one person.¹²⁶⁸ The disarmingly simple economic definition of human capital is ‘knowledge embodied in people;’ thus, IP rights to knowledge overlap with humanity.¹²⁶⁹

For the purposes of IP law, the range of immaterial labour’s products is wide, including from knowledge and information to relationships and emotional responses – ultimately, social life.¹²⁷⁰ Different to the labour itself – which is institutionalised under market or employment relationships – its products are immediately social and common, constituting instantly (through communication) commonly lived experiences.¹²⁷¹

Immaterial production is created constantly in social organisms, in collaboration between the pasts and presents of their members. These knowledges, relationships and forms of communication become common to society, a ‘kind of raw material’ which ‘increases with use.’ Hardt and Negri locate there the expropriation of the common, i.e. the private appropriation of the commonly produced value.¹²⁷² Intellectual artefacts are valuable due to their easy reproduction and circulation; paradoxically, the same

¹²⁶⁶ *Ibid.* 45 (alluding to the enclosing of the commons, as it occurred in England between the 15th and 19th centuries).

¹²⁶⁷ *Hunter* (2003) 500 – 501.

¹²⁶⁸ *Cahir, supra* 377, 275.

¹²⁶⁹ *Drahos* (1996) 179 – 180.

¹²⁷⁰ *Hardt & Negri* (2004) 108 – 107.

¹²⁷¹ *Ibid.* 114.

¹²⁷² *Ibid.* 146 – 150.

characteristic turns into a security risk that demands exclusivities through law.¹²⁷³

The contemporary institutional ecology fits the needs of the industrial info-economy.¹²⁷⁴ Under the industrial model of production in mass-mediated culture, large organisations control large inventories and ‘integrate new production with reutilisation and recycling of inventory.’¹²⁷⁵ Laws fixated with the industrial understandings of producers undervalue the contributions of online participants, as much as contributions coming from the public domain. Where the new wave of copyright laws has been found consistent with constitutional values, it slowly transpires that private censorship via copyright enforcement escapes freedom of expression constitutional obligations.¹²⁷⁶ In that and many more senses copyright turns into a social lock.¹²⁷⁷

In the digital world, where copying is a daily routine and integrated in Internet interfaces,¹²⁷⁸ every use of content constitutes practically copyright violation.¹²⁷⁹ Laws like the DMCA reflect one-sided interests and establish litigation inequalities, placing individuals against the major industry players.¹²⁸⁰ Copyright laws pose, at large, the problem that they might be interpreted as either aiming at correcting market inefficiencies, and thus allowing contractually relinquishments of rights, or being concerned primarily about the public good.¹²⁸¹ One way of looking into it argues that by establishing such OSP exclusivities EULAs decrease public good.¹²⁸² At the end of the day, both policy strands have every good reason to object to absolutist EULAs.¹²⁸³

2.3.2 EULAs/ToS – Therefore, if interference with contractual freedom requires a good reason, this is competently provided in this sense and,

¹²⁷³ *Ibid.* 180.

¹²⁷⁴ *Benkler* (2006) 57 – 58.

¹²⁷⁵ *Ibid.* 181.

¹²⁷⁶ *Austin* (2007) 341.

¹²⁷⁷ *Drahos & Braithwaite* (2002) 184.

¹²⁷⁸ *Boyle* (2008) 51.

¹²⁷⁹ *Lessig* (2008) 100.

¹²⁸⁰ *Jenkins* (2006) 141 – 142.

¹²⁸¹ *Reuveni* (2007) 295, on US legislation.

¹²⁸² *Ibid.*

¹²⁸³ *Ibid.* 306.

additionally, in our continuing juridical reading of the virtual public, where privatisation of public life and space takes place.

Essentially, EULAs/ToS are governance tools. OSPs, however, pertain to treating issues associated to VWs exclusively under a customer services understanding.¹²⁸⁴

Business, in general, know that consumers ‘reliably, predictably, and completely’ fail to read standard terms,¹²⁸⁵ seemingly finding that the cost of ‘reading, interpreting and comparing’ terms, practically outweighs any product use.¹²⁸⁶

From a viewpoint, breaches of promises are justified opposite to oligopolies; enforcement of such contracts constitutes the state guarantor of a cartel.¹²⁸⁷ OSPs are kind of forming an oligopoly, when standardising particular terms across the industry; such practices instantiate coercion¹²⁸⁸ upon the class of users.¹²⁸⁹

The narrow two-party perspective of typical private law case-by-case adjudication in consumer contract disputes is not well situated to address the kind of coercion that structural monopolies exercise;¹²⁹⁰ getting rather indirectly at ‘unfairness perpetrated on a mass basis,’ it has been proven inefficient in practice.¹²⁹¹

The courts, conscious of their ‘limited ability to distinguish exploitation from sensible business practices,’ consider more preferable solutions of judicial reliance on market discipline, rather than rushing into terminally detrimental interference to market relationships.¹²⁹²

It has been submitted that contested terms of adhesive contracts are valid if justified upon serving the public interest.¹²⁹³ The most controversial

¹²⁸⁴ *Castronova* (2002) 34 – 35.

¹²⁸⁵ *Hillman & Rachlinski* (2002) 432 – 433.

¹²⁸⁶ *Ibid.* 436.

¹²⁸⁷ *Tunick* (1998) 114; *Fried* (1981) 107 justifies the no-enforcement position on ‘economic inefficiencies’ that the unequal bargaining power of monopolies promote.

¹²⁸⁸ This was indirectly reflected in the ‘no alternative’ which the court found in *Linden v, Bragg*, *Supra* 5(II)[1.5.1].

¹²⁸⁹ *Trebilcock* (1993) 91 – 93.

¹²⁹⁰ *Ibid.* 101.

¹²⁹¹ *Braucher* (2007) 13.

¹²⁹² *Hillman & Rachlinski* (2002) 444 – 445.

¹²⁹³ *Burgess* (1986) 272.

interpretation of this difficult criterion proposes measuring the economic effects on the public against the benefits to society as a whole.¹²⁹⁴ Even back in the 1940s, Kessler remarked bitterly that, when court examine thus adhesive contracts, they ‘prefer to convince themselves and the community that legal certainty and "sound principles" of contract law should not be sacrificed to dictates of justice or social desirability.’¹²⁹⁵ Justice is not impossible, especially within the elasticity of common law; however, discussions about Justice ‘are hardly profitable.’¹²⁹⁶

2.3.3 Power - The legalistic approach to Justice examines whether private entities become institutionally equal to states. Otherwise, in the Weberian tradition, monopoly in the use of force is mainly required.¹²⁹⁷ So far we have discussed power oligopolies that seemingly do not match traditional enforcement, yet are embedded in politico-economic mechanisms, where their enforcement is monopolised. Such understandings of *de facto* monopolies do not satisfy modern lawyers; this incapacity to reconsider law pragmatically, demonstrates the nature of legal fetishism and its shortcomings.

2.3.3.1 - Computer code is digital law and structurally powerful.¹²⁹⁸ Whereas ‘acquiring more knowledge at our disposal we acquire greater capacity for control,’¹²⁹⁹ knowledge represented as information artefacts entails IP power being exercised across information spaces and possibly annexing public domain territories. Participation in converging media expresses a counter-power to those exerted within commodity capitalism over consumers.¹³⁰⁰

The Internet decentralises and allocates power to scattered fields of influence. Similar to patterns of global rule that develop across online “national” and “global” citizenships, functional localities are linked together

¹²⁹⁴ *Ibid.* 273.

¹²⁹⁵ Kessler (1943) 637 – 639.

¹²⁹⁶ *Ibid.*

¹²⁹⁷ Nozick (1974) tried to tackle with the issue when analysing the dominant protective agency, only to concede to weakening the Weberian condition, 117 – 118.

¹²⁹⁸ Lessig (2006).

¹²⁹⁹ Hammer (2007) 26 – 27.

¹³⁰⁰ Jenkins (2006) 256.

in interdependence – arguably, closer than ever;¹³⁰¹ power is internally exercised, communicated through intellectual communities and thus weaving webs of intertwining control spheres.

2.3.3.2 - In view of market settings, from the economic analysis' side one-sided contracts are not that high-handed.¹³⁰² This changes online as services permeate digital existence.

The use of adhesion contracts is arguably entangled in monopoly power.¹³⁰³ Not only EULAs/ToS constitute a format monopoly: the adhesion contract is nonetheless a conveyor of power that 'enables to control relationships across a market,'¹³⁰⁴ used typically by 'enterprises with strong bargaining power'¹³⁰⁵ and not between equals. EULAs impose private feudal orders¹³⁰⁶ that can extend deep into the social space. Especially in information space, the contract seals power over the self. Arguably, standard-forms are not contracts: without exchanges of promises, the terms are embedded in the product - a one-sided lasting hold¹³⁰⁷ that "runs" with the product.¹³⁰⁸

Privatisation of the social space leaves open the possibility of exclusions. Exclusion is posed in the shape of a remotely implied, yet constant threat.

2.3.4 *No Exit* - Inclusion and access gain in importance over autonomy and ownership for delivering personal freedom in the online network economy.¹³⁰⁹ Exclusion generally passes for a punishment form. With regards to computer systems, euphemistic wordings such as 'withdrawing of access privileges' encapsulate the meaning of exclusion as returning something previously 'granted' rather than losing something rightfully available.¹³¹⁰

2.3.4.1 - Online socialising seeks to fill the gaps of the off-line environment. In Hobsbawm's reading of the late twentieth century, where traditional

¹³⁰¹ *Shields* (2003) 83.

¹³⁰² *Bedchuk & Posner* (2006).

¹³⁰³ *Burgess* (1986) 257.

¹³⁰⁴ *Rakoff* (1983) 1229.

¹³⁰⁵ *Kessler* (1943) 632; *Rakoff* (1983) 1176.

¹³⁰⁶ *Kessler* (1943) 640 (generally on standard-form contracts).

¹³⁰⁷ *Burke* (2000) 308.

¹³⁰⁸ *Radin & Wagner* (1998) 1312 – 1313.

¹³⁰⁹ *Hoeland, A.* 'German Law' in *Blanpain* [ed.] 2002, 174 – 175 (quoting Rifkin).

¹³¹⁰ *Jones* (2000) 16.

communities collapse, identity is invented; its choice is ‘predicated on the essentialist notion of no choice’¹³¹¹ in the face of cultural agonies and dead-ends. The postmodern condition magnifies this sense of loss and the need to inclusion. Belonging to online communities is ordained by notions of ‘no choice’, intensified by the absence of offline communal life and by the relative cultural weight that virtual spaces emit toward all directions. Marginalised groups use the Internet and VWs for establishing self-defined and self-determined spaces, in manners unavailable in physical space;¹³¹² race, age, gender, sexual preferences are all considered as such socially effective barriers.

2.3.4.2 - Elimination in VWs can be quite permanent;¹³¹³ perhaps expanded, where VW ownerships overlap.¹³¹⁴ The time and subscription fees (and additional payments) invested in participation, along with the intangible wealth of social capital create attachment and make the insistence that exit is the only legal solution to look unfair.¹³¹⁵

On a different level, VWs are monopolies like local clubs:¹³¹⁶ buying the software client and – mainly - paying subscription fees locks membership. Switching to other VWs involves high costs, including non-transferable networks of associations and reputation. Original VW creations privatise the communication channels of social space, exploiting the social capital which users invest in contact with the community locus.

3. – Overall, this approach seems taking many liberties in mixing together different jurisdictional perspectives that as such ought not to be examined side by side. One may argue that the standardisation of an over-jurisdictional Justice position is thus highly invasive. Neither morality nor standards for legal judgement are universal or relative; nonetheless, ‘this does not mean we cannot criticise a society’s practices or judgements.’¹³¹⁷ Here, precisely,

¹³¹¹ *Young* (1999) 164.

¹³¹² *Rodgers* (2003) 46.

¹³¹³ *Jankowich* (2006) 36.

¹³¹⁴ *Ibid.* 48, (in his survey 37.50% amongst VWs had the same owner with at least one other).

¹³¹⁵ *Balkin, supra.* 738, 88.

¹³¹⁶ *Castronova* (2005) 139 – 140.

¹³¹⁷ *Tunick* (1998) 219

the argument of Justice does not look at jurisdictions but examines critically an expanded society. The standards for the combined ethical and legal judgement are neither random nor lack of broader understanding of social practices. In the end, our use of the reading of Justice follows the practices of the global rule; where the application of a single regulatory model is forced across all nations, without regard to or interest in the local fundamental values.

This is the lesson we learned and now we put it into practice, yet on different terms: not for placing humanity under general classifications - such as 'global consumer' - that lead to social enclosure, but for liberating it. In this case, liberation for humanity means *developing as a whole those discussion terms that will allow it to be heard.*

7. And the (Virtual?) Life Goes On...

*'To be a machine, to feel, think, know good from evil like blue from yellow...'*¹³¹⁸

In the case of modernity, philosophical, cultural or political principles would 'reinvent and reinvigorate humanity' by replacing the failing traditions of the old; post-modernity describes the shattering of this project, either optimistically or pessimistically.¹³¹⁹ In Young's words, the movement from modernity to late modernity is one from a world of assimilation and incorporation to one which separates and excludes; on the other hand, the market forces have generated constant rise in our expectations of citizenship and have 'engendered a widespread sense of demands frustrated and desires unmet.'¹³²⁰

¹³¹⁸ *La Mettrie* (1977) 71.

¹³¹⁹ *Mansfield* (2000) 163.

¹³²⁰ *Young* (1999) 1.

For Foucault the passage from Classicism to modernity was given in the divorce of language from representations – the autonomisation of language from describing objects.¹³²¹ Post-modernity follows a reverse course – the rise of communication through the constant use of intersecting representations. If modernity has indeed been the era of the subject¹³²² what does it imply for post-modernity? ‘Inter-subjectivity’ suggests a possible course; the questions about the fate of humanity, though, remain open.

The Internet, in its pluralistic and decentralised deployments, projects postmodernity and, at the same time, offers a kind of redress to its condition. Where traditional political and social institutions (citizenship, community, identity) experience various stages of crisis, the Net responds to exclusion insecurities and the need to reconfigure apparently damaged contexts.

The freedom of the information environment holds a greater promise towards proliferating democracy as a common practice.¹³²³ One way to look at that in effect is the widespread access to writing ‘in forms other to writing,’¹³²⁴ like Web 2.0 tools. The other is through connectivity, the actual greatest contribution of the Internet from the political, cultural and economical viewpoints alike.¹³²⁵ For the younger generations the Internet is integral part of their habitats; from escape and facilitating counter-spaces, virtuality is becoming a more consistent socio-political factor in daily living.¹³²⁶

1. - Not losing track of these overarching conditions, the proposed (re)solution here intends to keep the logic of the private law relation between OSPs and users intact. At the same time, it argues that qualitatively new forms of protection for the “consumer” need to be developed.

Where ‘good faith’ and other such fairness clauses have been held to soften the harshness of the market, the ways that they have been interpreted by courts over the years show that they fall short of what is required. In

¹³²¹ *Bowie* (2003) 216.

¹³²² *Ibid.* 8.

¹³²³ *Benkler* (2006) 2.

¹³²⁴ *Lessig* (2008) 107.

¹³²⁵ *Ibid.* 89.

¹³²⁶ *Shields* (2003) 98 – 101.

particular, the courts focussed on those situations where unequal bargaining power and inefficient markets raised doubts about the "voluntariness" of the transaction, thus confirming rather than mitigating, the freedom of contract ideology of private law. They also had the undesirable consequence, for a global medium like the Internet, to fragment the interpretation of rules due to different local understandings of "fairness".

What is suggested here is to use these widely recognised fairness clauses in a much more substantive and indeed aggressive way. As argued throughout this thesis, restrictive practices by VW providers have a negative impact not just on the individual user, but through limitation of information exchange have much wider undesirable causal implications. They potentially undermine the existence of a healthy public sphere that is crucial for communal self-expression by superimposing the rationality of private law. But in our picture, the relation between VW provider and customer has sufficient similarities to the relation between state and citizen to allow the law to re-frame the relation, not as a public law relation as such, but as one with sufficient similarities to permit horizontal application of human rights law. We can thus use, as a heuristic device at least, concepts and notions from human rights discourse, currently neutered as defensive mechanisms against states only, to give substance to the "good faith" or "fairness" element of contract law.

As argued in Chapter 2, this does not lead to a parochial and inconsistent application of the law, as the underlying concepts are global and universal in nature; in the same way, in which political rights are "inalienable" and cannot be fully waived through contracts, however "voluntary", this approach also imposes natural boundaries on the ability of customers to waive certain rights vis-a-vis the service provider. Radin's idea of incomplete commodification and market inalienability gets thus substance when applied to intangible and virtual aspects of personality, where she speaks only of the most physical aspects of it (body organs and sex). As argued in Chapter 6, over-zealous protection of IP rights has a negative impact on the wider production of culture and the public sphere, giving

further support for the legitimacy of a substantive good faith interpretation informed by human rights as communal goods.

1.1 - It is important here to stretch out that the VW and gaming industries fall under a different to the music and film industries category (maybe until now). We need to repeat here that developers and large part of the sector's management are users and gamers coming from the same online communities. The major point which the thesis attacked on is the *systemic structures* and their producing of dehumanising governance regimes.

Hence, the thesis concludes with two overviews and one insight. The first summary looks back at the market context which facilitates the new technology but mainly promulgates structural transformations for law and society. The second looks briefly at virtual properties and the realisation of Justice. The final part prepares the setting for future research by inquiring the existing dynamics.

1. The Virtual and the Law

1. - In Friedman's ideal of free-market (which formed the heart of neoliberalism) competitive capitalism promotes political freedom in separating economic from political power.¹³²⁷ Political freedom means 'no coercion by fellow man.'¹³²⁸ Hence, monopolies inhibit effective freedom by denying alternatives. Consumers' coercion by sellers or employees' coercion by employers is prevented by the presence of competition and market alternatives.

We may point to failings in the practice of this otherwise seminal work, and in contextual relation to the so far addressed issues. First, economic power *absorbs* political power, and markets perform as class producing mechanisms. Second, market societies quickly succumbed to relative statism (ironically, like Soviet communism, which Friedman disdained precisely for that reason). Third, monopolies are replaced by oligopolies that operate on the pretext of competition. Finally, without

¹³²⁷ (1962) 9.

¹³²⁸ *ibid.* 15.

limiting voluntary exchanges overexposed social and human values to commodification.

1.1 – The replacing of bureaucratic norms and values with those of the market does not imply ‘the disappearance of power, control and inequality.’¹³²⁹ Early objections to the ‘marketplace of ideas’ pointed that real markets ‘always interpose’ between e.g. writers and readers, skewing the ‘delivery of viewpoints in an unfair and unequal way.’¹³³⁰ Moreover, the danger is visible, for those who cannot pay to participate in the exchange of ideas, to be excluded from the main platforms.¹³³¹ This may lead from visions of ‘digital democracy’ to reinforcing inequalities and the emergence of ‘information aristocracies;’¹³³² the digital divide is giving place to participation gap concerns.¹³³³

1.1.1 - Economic systems are always embedded in social relations;¹³³⁴ the market entails the danger of embedding social relations in the economic system.¹³³⁵

Economic practices create classes. Social relations consist of class practices; the connections forming there can be only of domination and subordination.¹³³⁶ Poulantzas designated power as the capacity of a social class to realise its objective interests;¹³³⁷ he kind of discredits the Weberian problematic that power equals to legitimacy, as narrowly normative.¹³³⁸ Our analysis in the previous Chapter pointed to a combination of the two, the latter setting the regulatory outline of the former. Legitimacy authorises administrative exercises, which develop into managerial bureaucracy. As in the case studies, a hard-worked out online identity might be terminated by

¹³²⁹ Frissen, P. ‘The Virtual State’ in *Loader* [ed.] (1997) 124.

¹³³⁰ Newey, *supra* 272, 28.

¹³³¹ Braithwaite *et al* ‘Copyright I’ in *Liberty* [eds.] (1999) 128.

¹³³² Carter, D. ‘Digital democracy or information aristocracy?’ in *Loader* [ed.] (1997) 134.

¹³³³ Jenkins (2006) 23.

¹³³⁴ Polanyi (2001).

¹³³⁵ *Ibid.* 60.

¹³³⁶ Poulantzas (1978) 86.

¹³³⁷ *Ibid.* 104.

¹³³⁸ *Ibid.* 105.

VW clerks who work in policy compliance departments and pertain to different interpretations of values.¹³³⁹

1.1.2 - OSPs exercise control that states could only dream of.¹³⁴⁰ For the effects of online privatisations we discussed how the market marginalises communities with regards to the downtown metaphor¹³⁴¹ and the usurpation of the virtual public's rights – including access to their social space production.

1.1.3 - As discussed in Chapter 3, the multitude is a class concept.¹³⁴² On the premises of class determination through struggle, its online conceptualisation takes shape through biopolitical exercises of power (at once economic and political) over online participation and resources used in common; opposite to disruptions in its accessing productively the latter, which are mainly forwarded by exclusivities.

1.2 – On the second and third failings, when the industry calls upon statist monopoly of force for imposing oligopolistic economic interests, it marks the first blow to the free market and the principles of human flourishing it supposedly idealises.

1.2.1 - Private ownership of resources can be beneficial. It definitely offers more flexible management than conventional institutional administration.¹³⁴³ Yet, markets rely on exclusivity systems for the exchange processes to perform:¹³⁴⁴ even from the economic point of view, restrictions to information allocate poorly resources in society and lead to inefficient market operation.¹³⁴⁵ The interventions of the information and entertainment industries in the formation of laws and the restructuring of the online society is deeply political and of hegemonic nature.

1.2.2 – The belief that private agreements improve the welfare implications of exchanges¹³⁴⁶ is discredited in the majority of standard-form contracts.

¹³³⁹ Crawford, *supra* 331, 205.

¹³⁴⁰ Boelstorff (2008) 231.

¹³⁴¹ Burrows, *supra* 383, 38.

¹³⁴² Hardt & Negri (2004) 103.

¹³⁴³ Hunter (2003) 502.

¹³⁴⁴ Trebilcock (1993) 9.

¹³⁴⁵ Boyle (2008) 40.

¹³⁴⁶ Trebilcock (1993) 15 – 16.

Structural contractual coercion is the problem that Fried pointed to in the standardisation of contracts across industries which follow oligopolistic practices.¹³⁴⁷ Market monopolies/oligopolies sit most frequently behind the creation of contemporary subordination relationships.

1.3 – Generally, subordination as serfdom is embedded in the practical ideology of commodification frameworks. Employment relationships are usually examined as the areas where the boundaries between contractual labour and involuntary servitude are blurred.¹³⁴⁸ In the centre of such analyses are found approximations of slavery as a relation.¹³⁴⁹ Serfdom itself is indirectly tied to a “master” through a connection with land; our explanations on spatiality suffice here to expand on this relationship being built on alternative forms of “land”.

1.3.1 - The subculture of consumerism operates as inevitable imperialism, dominating cultural and social insights of communities.¹³⁵⁰ It permeates the space of choices and in direct combination with the limited availability of options locks choices of action.

1.3.2 – Furthermore, the argument of structural coercion, as well as the conflict of commodification with human rights, is exemplified in the French ‘dwarf tossing’ cases.¹³⁵¹ Local authorities had banned dwarf-throwing in local bars as being a practice against public order and disrespectful towards human dignity. The dwarfs actually challenged the original decision, claiming that they were not being treated as things, and that it was their *free* choice to claim an opportunity where there is relevant employment scarcity for “little people”.¹³⁵²

2. – This review synopsis the major problems which the contemporary socio-economic context generates in its attempt to manage new technological perceptions with the same ease that it (inadvertently) produces them. Some of the weaknesses are inherent; others are residual of imperialist

¹³⁴⁷ *Ibid.* 91 – 93.

¹³⁴⁸ *Friedmann & Barak-Erez* [eds.] (2001), Part IV, 283 – 328.

¹³⁴⁹ *Hare* (1989) 150 – 153, discussing also indentures.

¹³⁵⁰ *Young* (1999) 92.

¹³⁵¹ Conseil d’État statuant au contentieux, n°136727 et n°143578, lecture du 27 Octobre 1995.

¹³⁵² *Brownsword, supra* 108, 192 – 193.

appreciations regarding the use of resources in society. It is difficult within this setting for industries to embrace an interest in matters such as environmental protection or human rights.¹³⁵³

These conditions determine the involvement as much as the limitations of law. The market cannot regulate; the input of law is necessary. For example, ToS in practice are not legitimised by the mere fact of their popularity across the industry. On the other hand, however, it is also doubtful whether civil litigation processes can correct the market failures of cartels, which such contracts bring to the surface.¹³⁵⁴

II. Virtualising Justice

In a similar manner this Part evaluates briefly the aspect and potentials of property in response to the online and virtual lives respectively. The latter are then related to the platform conception of Justice, as used in this thesis, to impart an example of pursuing human rights under precisely that paradigm of economic and technological intersection which Part I summarised.

1. - Virtual property can be of significant value, considering the medical, biological, military, artistic etc advancements that can be developed on three-dimensional digital environments.¹³⁵⁵ On the other hand, the example of South Korea, where VWs have climbed to the top of the entertainment market¹³⁵⁶ indicates large scale revaluations of virtual items. The value of virtual property as rivalrous, persistent and interconnected code increases on the networking market. The example of the unique email account demonstrates these traits in action: it can be accessed by its owner from anywhere in the world and from any interconnected device – desktop, laptop, mobile phone.¹³⁵⁷

The appeal to exclusionary rights (chattels) on physical items (i.e. servers) is partly flawed in expanding over hosted information resources that develop independent of the original owner's control. The values of web-addresses and

¹³⁵³ *David & Hosein 'Privacy I' in Liberty [eds.] (1999) 69.*

¹³⁵⁴ *Trebilcock (1993) 251.*

¹³⁵⁵ *Fairfield (2005) 1051.*

¹³⁵⁶ *Ibid. 1061; Castronova, supra 7.*

¹³⁵⁷ *Fairfield (2005) 1053 – 1058.*

email accounts increase and decrease according to the network effects of the virtual space. Chattel exclusion rights could ‘protect too much or too little.’¹³⁵⁸

The original movement from commons to property was a convention aimed at social stability in private possession; today, social pressures to a reverse course from property to commons regarding certain categories of information resources lean on the same justification ground ‘towards a position of common benefit and accord.’¹³⁵⁹

1.1 - Maybe property does not signify the right approach to VW representations, and it comes along with its own cargo of problems in legal practice.¹³⁶⁰ It was perhaps first used by participants intuitively, to raise recognition of entitlements: property understandings frequently intertwine with human perceptions of justice.¹³⁶¹ OSPs have their share of responsibility there, like when SL recognised property rights to users, or when games attacked game-account sales by virtue of their IP rights on virtual items. Certainly, however, users’ possession claims to software images cannot threaten the OSPs’ IP rights.¹³⁶²

Another persistent problem poses the migration between settings. There it really becomes apparent that the user has no actual hold on virtual assets. From the combined scopes of law and infrastructure the potentials are limited. Perhaps some IP rights could be extracted from SL-like contexts,¹³⁶³ or some industry standards (e.g. virtual currency exchange) could facilitate transfers similar to when switching between phone-providers and retaining the same number.

Essentially, the issue remains personality as related to objects, like avatars, virtual swords etc. Avatars are not their users; they certainly support visual identification, point that arguably invokes the question of property. However, selling avatars on ebay barely involves selling the online personae

¹³⁵⁸ *Ibid.* 1075

¹³⁵⁹ *Cahir, supra* 377, 284 – 285, reflecting on Hume and Hayek.

¹³⁶⁰ *Carrier & Lastowka* (2007).

¹³⁶¹ *Radin* (1993).

¹³⁶² *Fairfield* (2005) 1096.

¹³⁶³ *Kane & Duranske* (2008) 14.

(nonetheless, it has been supported that players could seek IP protection for the personalities of their avatars).¹³⁶⁴ Confusion is an inevitable element when engaging with virtualities.¹³⁶⁵

2. – Sociologists have contested that data images and online personae are not easily correlated with the socially participating modern self, delivering instead postmodern notions cut-off from humanity.¹³⁶⁶ It is counter-argued that ‘the forms of selfhood and sociality characterizing VWs are profoundly human;’ the virtual human reorganises humanity, not in a “post” relationship of displacement but as co-constitution.¹³⁶⁷ VWs rework the virtuality that characterises human beings in the actual world.¹³⁶⁸ At the end of the day, most commercial game accounts are attached to real bank or paypal accounts. Chapter 6 described three juridical reflections for the human subject to access virtuality. Here we are completing this construction in reference to Radin’s theory, suggesting the connection between human personality and online account that underlies all three conceptualisations.

2.1 - Radin contests that unique individual identity requires contextual continuity, achieved in relation to ‘the environment of things,’ the social and the natural worlds. There she also founds her enmity towards commodification, which undermines personal identity by monetising personal attributes and relationships as well as moral commitments, alienating them eventually from the person.¹³⁶⁹

This is how she returns to property – a concept well-known in late modernity and thus accessible. Echoing the Hegelian approach, she rather dismisses the prospect of propertising personality, acknowledging potential dangers of commodifying it.¹³⁷⁰ She suggests that personal property can be self-invested with particular objects, as persons need contextual embeddedness,¹³⁷¹ like homes or phone numbers. Self-development requires resources: it is

¹³⁶⁴ *Sheldon* (2007) 762.

¹³⁶⁵ *Humphreys* (2005).

¹³⁶⁶ *Lyon, supra* 316, 22.

¹³⁶⁷ *Boelstorff* (2008) 29.

¹³⁶⁸ *Ibid.*

¹³⁶⁹ *Trebilcock* (1993) 25.

¹³⁷⁰ *Radin* (1993) 15.

¹³⁷¹ *Ibid.* 31.

expressed through relationships with discreet units (e.g. the wedding ring, family heirlooms), with the existence and availability of public spaces and it itemises stable future expectations.¹³⁷² Finally, in her approach to contract as alienation that leads to estrangement, properties that are important to personhood and community should not be commodified on the free market.¹³⁷³

2.2 - Radin's approach allows us to link persons with service accounts without losing track of the strands which the thesis has visited so far. Therefore, production of common knowledge and social relationships reserves for the virtual multitude the production of collective and individual subjectivities.¹³⁷⁴ There, personal development interoperates within and simultaneously reflects these communal processes. At the same time, the value of the productive virtual public emerges, its relationship with the person being built upon continuous interdependence between the participants of the online community.

2.3 – From a point of view, it is irrelevant whether, for the sake of formality, we are labelling the relationship with the account as possession or rented space, instead of more solid forms of ownership. Self-development is associated to the ongoing personal investment in the VW account and certain content aspects, sufficing the human person having legitimate access.

3. – Combing the virtual existence with the application of Justice, our understanding of the latter elaborated on the unity of the human rights argument within posited law, nevertheless public or private. There can be no “double-system”.¹³⁷⁵ Yet human rights is a complex grammar; through its political dimensions it has undergone its share of erosion. It needs to be rethought and reinstated realistically in view of noted transformations and implications.

The right to participation claims central role in the contexts we have examined; not only in its traditional political sense but, additionally, in the

¹³⁷² *Ibid.* 35 – 71.

¹³⁷³ *Ibid.* 200 – 201.

¹³⁷⁴ *Hardt & Negri* (2004) 151.

¹³⁷⁵ *Barak, supra* 53, 28.

socio-cultural meanings it develops and which, in return, reconfigure the dimensions and breadth of the former.¹³⁷⁶

3.1 – Regarding the overall question of Justice online, blind technology regulation can easily undermine civic freedoms.¹³⁷⁷ Apart from that, if, as Lange and Powell contest, in systems of law that prize freedom of thought and speech, exclusive rights in expression are intolerable,¹³⁷⁸ how should we deal with the broader undercutting effects of such exclusivities? The gradual rise of attention to property protection to coming on equal, arguably superior, terms opposite to safeguarding liberty¹³⁷⁹ has evolved into the systematic proliferation of IPR and their hold over communications and culture. The anti-piracy legislative campaign in the form of statutes like the DMCA undermines communicative anonymity.¹³⁸⁰ Similar impacts, but, obviously, in a smaller scale, reserves CyberSLAPP litigation. Strikingly, all instances feature judicial confrontations between individuals and powerful corporations.

3.2 - In private law human rights acquire their most authentic regulatory incarnation, since conflicting basic rights are brought in proper balance ‘while taking into consideration the public interest.’¹³⁸¹ State action, on the other hand, sets an issue which is not genuinely legal; it poses a legalistic formulation, yet it delivers openly an ideological fiction and choice.¹³⁸² However, the origins of state action are legal,¹³⁸³ found in the unsettling silences of constitutions.¹³⁸⁴ Its continuing treatment, though, in a tautological understanding of the public/private and state/individual distinctions, and in a manner arguably persistent, carries along fears of state interference with private economic development that represent most characteristically the economic-liberal strand.

¹³⁷⁶ *Jenkins* (2006) 268.

¹³⁷⁷ *Zittrain* (2008) 105.

¹³⁷⁸ (2009) ix.

¹³⁷⁹ *Radin* (1993) 14.

¹³⁸⁰ *Froomkin* in *Nicoll et al* [eds.] (2003) 42.

¹³⁸¹ *Barak, supra* 53, 29.

¹³⁸² *Graber & Teubner* (1998) 63 (a brief explanatory note, reasoning ‘the narrow view’).

¹³⁸³ *Berman* (2000) 1266.

¹³⁸⁴ *Barak, supra* 53, 42.

There is little to be said where legal circumstances pronounce unashamedly conscious political choices. The story is completely different when the same circumstances are represented as if delivering a politically objective study and analysis of legal facts. The thesis concludes with objecting to most state action applications, for their apparent subscribing to this second stream.

3.4 – Regarding how Justice registers with our entering into virtual domains, human dignity paired with contractual freedom carries the capacity to act both as empowerment and as constraint; if clarified, its potential can lead the online society to less debatable functional structures. By drawing authority from established principles (i.e. humanistic, constitutional and religious) rights are not assets to be sold; they have value in use but ‘not in exchange.’¹³⁸⁵ As such they are matters for regulation that cannot be left to the market to price.¹³⁸⁶

3.4.1 - Security – and we might associate to it generalised strands of risk-assessment – need not to compete the human rights perspective, whereas it can fit into a paradigm of human security where it develops alongside dignity.¹³⁸⁷

3.4.2 - The right to privacy suggests on the one hand a projection of property ideology, as above in the relationship with the online account, where the home empowers personality and becomes part of self-constitution.¹³⁸⁸ A second reading into privacy comes from the ECtHR, where ‘respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.’¹³⁸⁹

Privacy, however, is double-edged. If enshrined excessively it leads to isolation from the defence of freedom – which can only be exercised in public.¹³⁹⁰ Moreover, it stands too close with privatisation for constructing exclusionary platforms. The sense of defining humanity through privacy

¹³⁸⁵ *Deighton, J.* ‘Market Solutions to Privacy Problems?’ in *Nicoll et al.* [eds.] (2003) 139.

¹³⁸⁶ *Ibid.*

¹³⁸⁷ *Hammer* (2007) 101 – 102.

¹³⁸⁸ *Radin* (1993) 28.

¹³⁸⁹ *Niemietz v. Germany* (1992) 16 EHRR 97, at 29

¹³⁹⁰ *Raab, supra* 182, 158.

antagonises understandings of human rights based on traditional standards of nature; it facilitates an alternative individualistic basis.

3.4.3 - Where realised, a right to Internet access highlights the fundamental role that information society plays in individual and social development. We may further extend this basis to a claim to (online) communities, as a “resultant” entitlement. In relation to this, rhetorical operations of metonymy would allow the transfer of presumed human dignity to entities and environments contiguously connected to humanity.¹³⁹¹

3.4.4 – This last step takes us closer to our virtual existences. Whereas traditional law might not be in position to protect online identity from e.g. perfunctory exclusions,¹³⁹² recognising its traits would provide for more confided online development. Castronova has raised the prospect of a right to play.¹³⁹³ Suggestions of rights to participate and create in VWs, find these overlapping with freedoms of expression and association.¹³⁹⁴

3.5 – Of course, we should be aware of obvious dangers lurking nearby. While policies that aim at minimising the potency of human rights application in private spheres can be easily criticised for harbouring human and social debasement, they confer at the sides a fair point. The importance which postmodern humanity invests in rights for authenticating its existence carries the danger of turning any individual desire into rights.¹³⁹⁵ This trivialises the value of rights and would devalue the juridically represented humanity.

Nonetheless, the perspective of bringing Justice closer to our virtual lives serves best the coherence of our existence. Dignity and knowledge become good once we experience them. The same goes for the idea of a public domain, which offline surrounds us self-evidently and nurtures our well-being, then suddenly feeling like being taken away. These are issues that in the end cannot be taken lightly.

¹³⁹¹ Douzinas (2000) 258 – 260 (the metonymic extension of human nature to e.g. the foetus or the environment as identity construction).

¹³⁹² Crawford in Balkin & Noveck [eds.] (2006) 199 – 200.

¹³⁹³ In Balkin & Noveck [eds.] (2006) 68 - 85, summoning Articles 24 and 27 of the UDHR; Finnis (1980) 87, explains play and aesthetic experience as a basic forms of good.

¹³⁹⁴ Balkin, J. ‘Law and Liberty in Virtual Worlds’ in Balkin & Noveck [eds.] (2006) 88.

¹³⁹⁵ Douzinas (2000) 11.

III. Revitalising Justice

The starting point for our argument claimed the position that institutional structures justified on respect to humanity, should not be available for enforcing degrading treatments of humanity. In the course of the discussion certain concessions in the legal practice of human rights were directly attributed to the philosophy and the performance of the free-market.

It is not necessary to register with the belief that the market is harmful to society. However, its rhetoric of alienation is. The treatment of personhood in contractual relationships as an indirectly separable property, trivialises the conception of personhood and alienates the person, who is not seen as a whole but as the holder of a commodity.¹³⁹⁶ From there the losses vary in degree, climaxing ultimately with the degradation of humanity on the personal and the collective, in extension, levels.

Plausibly, we should not be speaking of dead-ends. The purpose of critique here is not to deliver reasoned expressions of disapproval, distress or even outrage, but in its elaborating and proposing of ideological resistance to demand radical transformations and alternatives where these are presented as if they were non-existent.

For one thing, in the limited settings that this thesis focussed on, the structures are not empty of alternatives; despite appearing locked under superimposed norms and practices that exclusively determine their development.

1. – There are certain facts that we can take on board from the overall discussion, and the feedback we received from VWs can be valuable. As Taylor's account of a gamer community being in close contact with MMORPG developers testifies,¹³⁹⁷ these contexts tend to be rather different to other sectors of the media and entertainment industries. In addition, we examined the case where Blizzard endorsed user-friendly machinima policies. Second, online communities can be exemplarily dynamic and take advantage of practised market perceptions: the Net is overflowing with daily stories of OSPs that negotiated their practices of absolutism once users had

¹³⁹⁶ *Radin* (1993) 201 – 202.

¹³⁹⁷ (2006).

been mobilised to reason as a social body with actions. Consider the story of the gay guild in WoW or, in more “actual” terms, how the social network facebook was recently forced to withdraw ambiguous privacy policies when users massively reacted.¹³⁹⁸

There is greater degree of direct communication but also shared understandings of the means. OSPs in the sense of developers are more integrated into the experience of users. These observations do not imply that a great change is necessarily on the way. Certainly, however, a different basis exists on which social – here, online – participation can be drafted in pursuing a practical sense of common good.

As common good we may accept ‘the factor or set of factors’ which as practical considerations give reason for collaboration amongst the community’s members, as individuals and as a whole alike.¹³⁹⁹ We may restructure this meaning in relationships between users and, at the same time, between functional and intellectual communities and the OSP. Understanding of the common good can reach beyond the MMORPG players’ enjoyment of playing and the OSP’s commercial activity. It may actually encapsulate both in pursuing to safeguard healthy mutual relationships, i.e. neither just the gaming aspect nor the profiting.

2. – Of course, another factor which we cannot overlook in this meeting of interests is the role of company lawyers. Where solutions are sought towards framing a new ‘social contract’, their input is as much inevitable as necessary and technically valuable.

Unfortunately, practice has taught us that we cannot expect from schemes like conventional EULAs to abide by the requirements of Justice, or at least of a practical deployment of Justice. The speculations, expectations and education of lawyers play a large part in the industry’s contractual shortcomings. It is in the technical dogmas that lawyers are used to profess that human users end up being treated as impersonal consuming machines.

Such predicaments have roots in noted problems within the industry and the dysfunctional coordination between developers and legal departments. When

¹³⁹⁸ <BBC News, 18/02/09>.

¹³⁹⁹ *Finnis* (1980) 154.

the feedback which targets at developers but is received by lower ranks of the game management hierarchy is delivered with its clarity of intent and meaning intact to lawyers, the prospects for VW regulation are definitely set on a more creative path towards deliberation. The point is that these structures while resembling states in dealing with large numbers of people and in bearing administrative attitude, their bureaucracy – though less principled in terms of institutional guarantees – is far more flexible and considerably approachable.

3. - For example EULAs/ToS could be “rebooted” to embrace the realities of online interfaces and, at the same time, respond genuinely to the contractual reasoning of ‘offer’, ‘consideration’ and ‘acceptance’. Replacing the endless lists of incomprehensible jargon, terms could be deployed in arrangements of either opt-in or opt-out selection boxes, personalising the agreement according to each user’s preferences.

The full participation terms in the contractual relationship with a given VW would depend on the individual user’s choices. The negotiated agreement could transform the subscription basis, the rights which users can transfer between “virtuality” and “actuality” or even the liabilities that each party is ready to bring in. The possibilities and benefits which the electronic means offer there are endless.

First of all, users would at least read more of the terms than with the current practices. Good faith would be revitalised and fidelity in the reliability of the agreement would increase - not to mention, trust in the market. More importantly, the rights of users would be negotiated with the ‘virtual rulers’ on a more democratic basis.

Without saying, such proposals are not without logical and moral traps in the detail or infallible. They promise, however, definite improvement, compared to the current and discredited click-wrap or browse-wrap standards. This prospect presents the opportunity for future research on a rather practical basis, informed though on the theoretical findings of this thesis. The perspective of Justice aims at instilling the ethics of treating human beings

humanly into our daily practices, these either being mundane and humble or the greatest and most noble.

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B. You may permanently transfer all of your rights and obligations under the License Agreement to another only by physically transferring the original media (e.g., the CD-ROM or DVD you purchased), all original packaging, and all Manuals or other documentation distributed with the Game; provided, however, that you permanently delete all copies and installations of the Game in your possession or control, and that the recipient agrees to the terms of this License Agreement. The transferor (i.e., you), and not Blizzard, agrees to be solely responsible for any taxes, fees, charges, duties, withholdings, assessments, and the like, together with any interest, penalties, and additions imposed in connection with such transfer.

5. Pre-Loaded Software.

The media on which the Game Client is distributed may contain additional software and/or content for which you do not have a license (the "Locked Software"), and you agree that Blizzard may install the Locked Software onto your hard drive during the Game Client installation process. You also agree that you will not access, use, distribute, copy, display, reverse engineer, derive source code from, modify, disassemble, decompile any Locked Software, or create any derivative works based on the Locked Software, until and unless you receive from Blizzard (a) a license to use that software; and (b) a valid alphanumeric key with which to unlock it. If you receive a license and a key from Blizzard, you may only unlock those portions of a single copy of the Locked Software for which you received a license. The terms of the End User License Agreement displayed after the Locked Software is unlocked will replace and supersede this Agreement, but only with regard to the Locked Software for which you receive a license. Notwithstanding anything to the contrary herein, you may make one (1) copy of the Locked Software for archival purposes only.

6. Consent to Monitor.

WHEN RUNNING, THE GAME MAY MONITOR YOUR COMPUTER'S RANDOM ACCESS MEMORY (RAM) FOR UNAUTHORIZED THIRD PARTY PROGRAMS RUNNING CONCURRENTLY WITH THE GAME. AN "UNAUTHORIZED THIRD PARTY PROGRAM" AS USED HEREIN SHALL BE DEFINED AS ANY THIRD PARTY SOFTWARE PROHIBITED BY SECTION 2. IN THE EVENT THAT THE GAME DETECTS AN UNAUTHORIZED THIRD PARTY PROGRAM, THE GAME MAY (a) COMMUNICATE INFORMATION BACK TO BLIZZARD, INCLUDING WITHOUT LIMITATION YOUR ACCOUNT NAME, DETAILS ABOUT THE UNAUTHORIZED THIRD PARTY PROGRAM DETECTED, AND THE TIME AND DATE; AND/OR (b) EXERCISE ANY OR ALL OF ITS RIGHTS UNDER THIS AGREEMENT, WITH OR WITHOUT PRIOR NOTICE TO THE USER.

7. Termination.

This License Agreement is effective until terminated. You may terminate the License Agreement at any time by (i) permanently destroying all copies of the Game in your possession or control; (ii) removing the Game Client from your hard drive; and (iii) notifying Blizzard of your intention to terminate this License Agreement. Blizzard may terminate this Agreement at any time for any reason or no reason. Upon termination for any reason, all licenses granted herein shall immediately terminate and you must immediately and permanently destroy all copies of the Game in your possession and control and remove the Game Client from your hard drive.

8. Export Controls.

The Game may not be re-exported, downloaded or otherwise exported into (or to a national or resident of) any country to which the U.S. has embargoed goods, or to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders. You represent and warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list.

9. Patches and Updates.

Blizzard may deploy or provide patches, updates and modifications to the Game that must be installed for the user to continue to play the Game. Blizzard may update the Game remotely including without limitation the Game Client residing on the user's machine, without the knowledge of the user, and you hereby grant

to Blizzard your consent to deploy and apply such patches, updates and modifications.

10. Duration of the "On-line" Component of the Game.

This Game is an 'on-line' game that must be played over the Internet through the Service as provided by Blizzard. You understand and agree that the Service is provided by Blizzard at its discretion and may be terminated or otherwise discontinued by Blizzard pursuant to the Terms of Use.

11. Limited Warranty.

THE GAME (INCLUDING WITHOUT LIMITATION THE GAME CLIENT AND MANUAL(S)) IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF CONDITION, UNINTERRUPTED USE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. The entire risk arising out of use or performance of the Game (including without limitation the Game Client and Manual(s)) remains with the user. Notwithstanding the foregoing, Blizzard warrants up to and including 90 days from the date of your purchase of the Game that the media containing the Game Client shall be free from defects in material and workmanship. In the event that such media proves to be defective during that time period, and upon presentation to Blizzard of proof of purchase of the defective media, Blizzard will at its option (a) correct any defect, (b) provide you with a similar product of similar value, or (c) refund your money. THE FOREGOING IS YOUR SOLE AND EXCLUSIVE REMEDY FOR THE EXPRESS WARRANTY SET FORTH IN THIS SECTION. Some states do not allow the exclusion or limitation of implied warranties, so the above limitations may not apply to you.

12. Limitation of Liability, Indemnity.

NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE OF ANY KIND ARISING OUT OF THE GAME OR ANY USE OF THE GAME, INCLUDING WITHOUT LIMITATION LOSS OF DATA, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER DAMAGES OR LOSSES. FURTHER, NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE TO PLAYER CHARACTERS, VIRTUAL GOODS

(E.G., ARMOR, POTIONS, WEAPONS, ETC.) OR CURRENCY, ACCOUNTS, STATISTICS, OR USER STANDINGS, RANKS, OR PROFILE INFORMATION STORED BY THE GAME AND/OR THE SERVICE. BLIZZARD SHALL NOT BE RESPONSIBLE FOR ANY INTERRUPTIONS OF SERVICE, INCLUDING WITHOUT LIMITATION ISP DISRUPTIONS, SOFTWARE OR HARDWARE FAILURES, OR ANY OTHER EVENT WHICH MAY RESULT IN A LOSS OF DATA OR DISRUPTION OF SERVICE. IN NO EVENT WILL BLIZZARD BE LIABLE TO YOU FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES. In no event shall Blizzard's liability, whether arising in contract, tort, strict liability or otherwise, exceed (in the aggregate) the total fees paid by you to Blizzard during the six (6) months immediately prior to the time such claim arose. You hereby agree to defend, indemnify and hold Blizzard harmless from and against any claim, liability, loss, injury, damage, cost or expense (including reasonable attorneys' fees) incurred by Blizzard arising out of or from your use of the Game. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitations may not apply to you.

13. Equitable Remedies.

You hereby agree that Blizzard would be irreparably damaged if the terms of this License Agreement were not specifically enforced, and therefore you agree that Blizzard shall be entitled, without bond, other security, or proof of damages, to appropriate equitable remedies with respect to breaches of this License Agreement, in addition to such other remedies as Blizzard may otherwise have available to it under applicable laws. In the event any litigation is brought by either party in connection with this License Agreement, the prevailing party in such litigation shall be entitled to recover from the other party all the costs, attorneys' fees and other expenses incurred by such prevailing party in the litigation.

14. Changes to the Agreement.

Blizzard reserves the right, at its sole discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this License Agreement when Blizzard upgrades the Game Client, effective upon prior notice as follows: Blizzard will post the revised version of this License Agreement on the World of Warcraft website, and may provide such other notice as Blizzard may elect in its

sole discretion. If any future changes to this License Agreement are unacceptable to you or cause you to no longer be in compliance with this License Agreement, you may terminate this License Agreement in accordance with Section 7 herein. Your installation and use of any of Blizzard's updates or modifications to the Game or your continued use of the Game following notice of changes to this Agreement will demonstrate your acceptance of any and all such changes. Blizzard may change, modify, suspend, or discontinue any aspect of the Game at any time. Blizzard may also impose limits on certain features or restrict your access to parts or all of the Game without notice or liability. You have no interest, monetary or otherwise, in any feature or content contained in the Game.

15. Dispute Resolution and Governing Law.

A. Informal Negotiations. To expedite resolution and control the cost of any dispute, controversy or claim related to this License Agreement ("Dispute"), you and Blizzard agree to first attempt to negotiate any Dispute (except those Disputes expressly provided below) informally for at least 30 days before initiating any arbitration or court proceeding. Such informal negotiations commence upon written notice from one person to the other. Blizzard will send its notice to your billing address and email you a copy to the email address you have provided to us. You will send your notice to Blizzard Entertainment, Inc., P.O. Box 18979, Irvine CA 92623, attn: Legal Department.

B. Binding Arbitration. If you and Blizzard are unable to resolve a Dispute through informal negotiations, either you or Blizzard may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. The arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and, where appropriate, the AAAs Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are available at the AAA website www.adr.org. The determination of whether a Dispute is subject to arbitration shall be governed by the Federal Arbitration Act and determined by a court rather than an arbitrator. Your arbitration fees and

your share of arbitrator compensation shall be governed by the AAA Rules and, where appropriate, limited by the AAA Consumer Rules. If such costs are determined by the arbitrator to be excessive, Blizzard will pay all arbitration fees and expenses. The arbitration may be conducted in person, through the submission of documents, by phone or online. The arbitrator will make a decision in writing, but need not provide a statement of reasons unless requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Except as otherwise provided in this License Agreement, you and Blizzard may litigate in court to compel arbitration, stay proceeding pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

C. Restrictions. You and Blizzard agree that any arbitration shall be limited to the Dispute between Blizzard and you individually. To the full extent permitted by law, (1) no arbitration shall be joined with any other; (2) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (3) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.

D. Exceptions to Informal Negotiations and Arbitration. You and Blizzard agree that the following Disputes are not subject to the above provisions concerning informal negotiations and binding arbitration: (1) any Disputes seeking to enforce or protect, or concerning the validity of, any of your or Blizzard's intellectual property rights; (2) any Dispute related to, or arising from, allegations of theft, piracy, invasion of privacy or unauthorized use; and (3) any claim for injunctive relief.

E. Location. If you are a resident of the United States, any arbitration will take place at any reasonable location convenient for you. For residents outside the United States, any arbitration shall be initiated in the County of Los Angeles, State of California, United States of America. Any Dispute not subject to arbitration (other than claims proceeding in any small claims court), or where no election to arbitrate has been made, shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

F. Governing Law. Except as otherwise set forth herein, this License Agreement shall be governed by, and will be construed under, the Laws of the United States of America and the law of the State of Delaware, without regard to choice of law principles. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. For our customers who purchased a license to the Game in, and are a resident of, Canada, Australia, Singapore, or New Zealand, other laws may apply if you choose not to agree to arbitrate as set forth above; provided, however, that such laws shall affect this Agreement only to the extent required by such jurisdiction. In such a case, this Agreement shall be interpreted to give maximum effect to the terms and conditions hereof. If you purchased your license to the Game in New Zealand, and are a resident of New Zealand, The New Zealand Consumer Guarantees Act of 1993 ("Act") may apply to the Game and/or the Service as supplied by Blizzard to you. If the Act applies, then notwithstanding any other provision in this License Agreement, you may have rights or remedies as set out in the Act which may apply in addition to, or, to the extent that they are inconsistent, instead of, the rights or remedies set out in this License Agreement. Those who choose to access the Service from locations outside of the United States, Canada, Australia, Singapore, or New Zealand do so on their own initiative and are responsible for compliance with local laws if and to the extent local laws are applicable.

G. Severability. You and Blizzard agree that if any portion Section 15 is found illegal or unenforceable (except any portion of 15(D)) that portion shall be severed and the remainder of the Section shall be given full force and effect. If Section 15(D) is found to be illegal or unenforceable then neither you nor Blizzard will elect to arbitrate any Dispute falling within that portion of Section 15(D) found to be illegal or unenforceable and such Dispute shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

16. Miscellaneous.

This License Agreement constitutes and contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements, provided, however, that this Agreement shall coexist

with, and shall not supersede, the Terms of Use. To the extent that the provisions of this Agreement conflict with the provisions of the Terms of Use, the conflicting provisions in the Terms of Use shall govern. The provisions of Sections 4(A), 6, 11-13, 15 and 16 shall survive the termination of this Agreement for any reason. If any provision of this Agreement is found to be unenforceable, that provision shall be severed and the remainder of the Agreement shall be given full force and effect.

I hereby acknowledge that I have read and understand the foregoing License Agreement and agree that by clicking "Accept" or installing the Game Client I am acknowledging my agreement to be bound by the terms and conditions of this License Agreement.

APPENDIX II - World of Warcraft – Terms of Use (US)

YOU SHOULD CAREFULLY READ THE FOLLOWING WORLD OF WARCRAFT TERMS OF USE AGREEMENT (THE "TERMS OF USE" OR "AGREEMENT"). IF YOU DO NOT AGREE WITH ALL OF THE TERMS OF THIS AGREEMENT, YOU MUST CLICK "REJECT." IF YOU REJECT THIS AGREEMENT WITHIN THIRTY (30) DAYS AFTER FIRST PURCHASING A LICENSE TO THE WORLD OF WARCRAFT SOFTWARE, YOU MAY CALL (800)757-7707 TO REQUEST A FULL REFUND OF THE PURCHASE PRICE. ONCE YOU AGREE TO THE TERMS OF USE AND THE END USER LICENSE AGREEMENT, YOU WILL NO LONGER BE ELIGIBLE FOR A REFUND.

Welcome to Blizzard Entertainment, Inc.'s ("Blizzard") "World of Warcraft[®]" (the "Game"). The Game includes two components: (a) the software program along with any accompanying materials or documentation (collectively, the "Game Client"), and (b) Blizzard's proprietary World of Warcraft online service (the "Service"). Your use of the Service is subject to the Terms of Use and the **End User License Agreement** (the "**EULA**"), incorporated herein by this reference, both of which you must accept before you can use the Game Client or the Service.

1. Grant of a Limited License to Use the Service

Subject to your agreement to and continuing compliance with the Terms of Use agreement, you may use the Service solely for your own non-commercial entertainment purposes by accessing it with an authorized, unmodified Game Client. You may not use the Service for any other purpose, or in connection with any other software.

2. Additional License Limitations.

The license granted to you in Section 1 is subject to the limitations set forth in Sections 1 and 2 (collectively, the "License Limitations"). Any use of the Service or the Game Client in violation of the License Limitations will be regarded as an infringement of Blizzard's copyrights in and to the Game. You agree that you will not, under any circumstances:

A. use cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience;

B. exploit the Game or any of its parts, including without limitation the Service, for any commercial purpose, including without limitation (a) use at a cyber cafe, computer gaming center or any other location-based site without the express written consent of Blizzard; (b) for gathering in-game currency, items or resources for sale outside the Game; or (c) performing in-game services in exchange for payment outside the Game, e.g., power-leveling;

C. use any unauthorized third-party software that intercepts, "mines", or otherwise collects information from or through the Game or the Service, including without limitation any software that reads areas of RAM used by the Game to store information about a character or the game environment; provided, however, that Blizzard may, at its sole and absolute discretion, allow the use of certain third party user interfaces;

D. modify or cause to be modified any files that are a part of the Game Client or the Service in any way not expressly authorized by Blizzard;

E. host, provide or develop matchmaking services for the Game or the Service, or intercept, emulate or redirect the communication protocols used by Blizzard in any way, for any purpose, including without limitation unauthorized play over the internet, network play, or as part of content aggregation networks;

F. facilitate, create or maintain any unauthorized connection to the Game or the Service, including without limitation (a) any connection to any unauthorized server that emulates, or attempts to emulate, the Service; and (b) any connection using programs or tools not expressly approved by Blizzard; or

G. disrupt or assist in the disruption of (i) any computer used to support the Service (each a "Server"); or (ii) any other player's Game experience. ANY ATTEMPT BY YOU TO DISRUPT THE SERVICE OR UNDERMINE THE LEGITIMATE OPERATION OF THE GAME CLIENT MAY BE A VIOLATION OF CRIMINAL AND CIVIL LAWS. You agree that you will not violate any applicable law or regulation in connection with your use of the Game Client or the Service.

3. Eligibility.

You represent that you are an adult in your country of residence. You agree to these Terms of Use on behalf of yourself and, at your discretion, for one (1) minor child for whom you are a parent or guardian and whom you have authorized to use the account you create on the Service.

4. Ownership.

All rights and title in and to the Service (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into the Game Client, transcripts of the chat rooms, character profile information, recordings of games played using the Game Client, and the Game Client and server software) are owned by Blizzard or its licensors. The Game and the Service are protected by United States and international laws, and may contain certain licensed materials in which Blizzard's licensors may enforce their rights in the event of any violation of this Agreement.

5. Establishing an Account.

Prior to (or in lieu of) creating a user account on the Service (a "WoW Account"), or using an existing WoW Account, you may be required to establish a separate account (a "Blizzard Account") on Blizzard's centralized account system. When creating these accounts, you may be required to provide Blizzard with certain personal information, financial information and an unused Authentication Key provided to you by Blizzard. You agree that you will supply accurate information to Blizzard when requested, and that you will update that information promptly after it changes.

6. Username and Password.

During the registration process, you may be required to select a unique username and a password (collectively referred to hereunder as "Login Information"). You may not share the Account or the Login Information with anyone other than as expressly set forth herein.

7. No Ownership Rights in Account.

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN THE ACCOUNT, AND YOU FURTHER

ACKNOWLEDGE AND AGREE THAT ALL RIGHTS IN AND TO THE ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF BLIZZARD.

8. Account Suspension/Deletion.

BLIZZARD MAY SUSPEND, TERMINATE, MODIFY, OR DELETE ACCOUNTS AT ANY TIME FOR ANY REASON OR FOR NO REASON, WITH OR WITHOUT NOTICE TO YOU. For purposes of explanation and not limitation, most account suspensions, terminations and/or deletions are the result of violations of this Terms of Use or the **EULA**.

9. Code of Conduct.

As with all things, your use of the Game and the Service is governed by certain rules. These rules (the "Code of Conduct"), maintained and enforced exclusively by Blizzard, must be adhered to by all users. It is your responsibility to know, understand and abide by this Code of Conduct. The following rules are not meant to be exhaustive, and Blizzard reserves the right to determine which conduct it considers to be outside the spirit of the Game and to take such disciplinary measures as it sees fit up to and including termination and deletion of the Account. Blizzard reserves the right to modify this Code of Conduct at any time.

A. Rules Related to Usernames and Guild Designations.

Each user will either select a character name or allow the Service to automatically select a character name at random. Additionally, users may form "guilds" and such guilds will be required to choose a name for the guild. When you choose a character name, create a guild, or otherwise create a label that can be seen by other players using the Game or the Service, you must abide by the following guidelines as well as the rules of common decency. If Blizzard finds such a label to be offensive or improper, it may, in its sole and absolute discretion, change the name, remove the label and corresponding chat room, and/or suspend or terminate your use of the Service. In particular, you may not use any name:

(i) Belonging to another person with the intent to impersonate that person, including without limitation a "Game Master" or any other employee or agent of Blizzard;

- (ii) That incorporates vulgar language or which are otherwise offensive, defamatory, obscene, hateful, or racially, ethnically or otherwise objectionable;
- (iii) Subject to the rights of any other person or entity without written authorization from that person or entity;
- (iv) That belongs to a popular culture figure, celebrity, or media personality;
- (v) That is, contains, or is substantially similar to a trademark or service mark, whether registered or not;
- (vi) Belonging to any religious figure or deity;
- (vii) Taken from Blizzard's Warcraft products, including character names from the Warcraft series of novels;
- (viii) Related to drugs, sex, alcohol, or criminal activity;
- (ix) Comprised of partial or complete sentence (e.g., "Inyourface", "Welovebeef", etc);
- (x) Comprised of gibberish (e.g., "Asdfasdf", "Jjxccm", "Hvlldrm");
- (xi) Referring to pop culture icons or personas (e.g. " "Britneyspears", "Austinpowers", "Batman")
- (xii) That utilizes "Leet" or "Dudespeak" (e.g., "Roflcopter", "xxnewbxx", "Roxxyou")
- (xiii) That incorporates titles. For purposes of this subsection, "titles" shall include without limitation 'rank' titles (e.g. , "CorporalTed," or "GeneralVlad"), monarchistic or fantasy titles (e.g., "KingMike", "LordSanchez"), and religious titles (e.g., "ThePope," or "Reverend AI"). You may not use a misspelling or an alternative spelling to circumvent the name restrictions listed above, nor can you have a "first" and "last" name that, when combined, violate the above name restrictions.

B. Rules Related to "Chat" and Interaction With Other Users.

Communicating in-game with other Users and Blizzard representatives, whether by text, voice or any other method, is an integral part of the Game and the Service and is referred to here as "Chat." When engaging in Chat, you may not:

- (i) Transmit or post any content or language which, in the sole and absolute discretion of Blizzard, is deemed to be offensive, including without limitation content or language that is unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or

otherwise objectionable, nor may you use a misspelling or an alternative spelling to circumvent the content and language restrictions listed above;

(ii) Carry out any action with a disruptive effect, such as intentionally causing the Chat screen to scroll faster than other users are able to read, or setting up macros with large amounts of text that, when used, can have a disruptive effect on the normal flow of Chat;

(iii) Disrupt the normal flow of dialogue in Chat or otherwise act in a manner that negatively affects other users including without limitation posting commercial solicitations and/or advertisements for goods and services available outside of the World of Warcraft universe;

(iv) Sending repeated unsolicited or unwelcome messages to a single user or repeatedly posting similar messages in a Chat area, including without limitation continuous advertisements to sell goods or services;

(v) Communicate or post any user's personal information in the Game, or on websites or forums related to the Game, except that a user may communicate his or her own personal information in a private message directed to a single user;

(vi) Harass, threaten, stalk, embarrass or cause distress, unwanted attention or discomfort to any user of the Game;

(vii) Participate in any action that, in the sole and absolute opinion of Blizzard, results or may result in an authorized user of the Game being "scammed" or defrauded out of gold, weapons, armor, or any other items that user has earned through authorized game play in the Game;

(viii) Communicate directly with players who are playing characters aligned with the opposite faction (e.g. Horde communicating with Alliance or vice versa); or

(ix) Impersonate any real person, including without limitation any "game master" or any other Blizzard agent or employee, nor may you communicate in the Game in any way designed to make others believe that your message constitutes a server message or was otherwise posted by any Blizzard agent or employee.

C. Rules Related to Game Play.

Game play is what World of Warcraft is all about, and Blizzard strictly enforces the rules that govern game play. Blizzard considers most conduct to be part of the Game, and not harassment, so player-killing the enemies of your race and/or

alliance, including gravestone and/or corpse camping, is considered a part of the Game. Because the Game is a "player vs. player" game, you should always remember to protect yourself in areas where the members of hostile races can attack you, rather than contacting Blizzard's in-game customer service representatives for help when you have been killed by an enemy of your race. Nonetheless, certain acts go beyond what is "fair" and are considered serious violations of these Terms of Use. Those acts include, but are not necessarily limited to, the following:

- (i) Using or exploiting errors in design, features which have not been documented, and/or "program bugs" to gain access that is otherwise not available, or to obtain a competitive advantage over other players;
- (ii) Conduct prohibited by the **EULA** or elsewhere in these Terms of Use; and
- (iii) Anything that Blizzard considers contrary to the "essence" of the Game.

10. Security of Login Information.

You are responsible for maintaining the confidentiality of the Login Information, and you will be responsible for all uses of the Login Information, whether or not authorized by you. In the event that you become aware of or reasonably suspect any breach of security, including without limitation any loss, theft, or unauthorized disclosure of the Login Information, you must immediately notify Blizzard by emailing wowaccountadmin@blizzard.com.

11. Ownership/Selling of the Account or Virtual Items.

Blizzard does not recognize the transfer of WoW Accounts or Blizzard Accounts (each an "Account"). You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game. You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in the Game, or any other attributes associated with the Account or stored on the Service. Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the "real world" of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for "real" money, or exchange those items or currency for value outside of the Game.

12. Changes to the Terms of Use Agreement or the Game.

Blizzard reserves the right, at its sole and absolute discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this Agreement at any time, including without limitation access policies, the availability of any feature of the Game or the Service, hours of availability, content, data, software or equipment needed to access the Game or the Service, effective with or without prior notice; provided, however, that material changes (as determined in Blizzard's sole and absolute discretion) will be disclosed as follows: Blizzard will provide you with notification of any such changes through a patch process, or by email, postal mail, website posting, pop-up screen, or in-game notice. If any future changes to this Agreement are unacceptable to you or cause you to no longer be in compliance with this Agreement, you must terminate, and immediately stop using, the Game and the Account. Your continued use of the Game following any revision to this Agreement constitutes your complete and irrevocable acceptance of any and all such changes. Blizzard may change, modify, suspend, or discontinue any aspect of the Game at any time. Blizzard may also impose limits on certain features or restrict your access to parts or all of the Game without notice or liability.

13. Termination.

This Agreement is effective until terminated. You may terminate this Agreement by terminating the Account and deleting the Game Client. In the event that you terminate or breach this Agreement, you will forfeit your right to any and all payments you may have made for pre-purchased game access to World of Warcraft. You agree and acknowledge that you are not entitled to any refund for any amounts which were pre-paid on behalf of the Account prior to any termination of this Agreement. Blizzard may terminate this Agreement with or without notice by terminating the Account as set forth in Section 8. The provisions of Sections 4, 7, 11 and 14-20 shall survive any termination of this Agreement.

14. Warranty Disclaimer.

THE GAME AND THE SERVICE ARE PROVIDED "AS IS" AND BLIZZARD DOES NOT WARRANT THAT THE GAME OR THE SERVICE WILL BE UNINTERRUPTED OR ERROR-FREE, THAT DEFECTS WILL BE CORRECTED, OR THAT THE GAME OR THE SERVICE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. BLIZZARD EXPRESSLY

DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OR USE, AND NON-INFRINGEMENT.

15. Limitation of Liability.

NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES, LICENSORS OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR DAMAGE OR LOSS OF ANY KIND RESULTING FROM (A) THE USE OF OR INABILITY TO USE THE GAME OR SERVICE INCLUDING WITHOUT LIMITATION LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION; (B) THE LOSS OR DAMAGE TO CHARACTERS, ACCOUNTS, STATISTICS, INVENTORIES OR USER PROFILE INFORMATION; OR (C) INTERRUPTIONS OF SERVICE INCLUDING WITHOUT LIMITATION ISP DISRUPTIONS, SOFTWARE OR HARDWARE FAILURES OR ANY OTHER EVENT WHICH MAY RESULT IN A LOSS OF DATA OR DISRUPTION OF SERVICE. IN NO EVENT WILL BLIZZARD BE LIABLE TO YOU OR ANYONE ELSE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES.

16. Force Majeure.

Blizzard shall not be liable for any delay or failure to perform resulting from causes outside the reasonable control of Blizzard, including without limitation any failure to perform hereunder due to unforeseen circumstances or cause beyond Blizzard's control such as acts of God, war, terrorism, riots, embargoes, acts of civil or military authorities, fire, floods, accidents, strikes, or shortages of transportation facilities, fuel, energy, labor or materials.

17. Acknowledgments.

You hereby acknowledge and agree that:

A. WHEN RUNNING, THE GAME MAY MONITOR YOUR COMPUTER'S RANDOM ACCESS MEMORY (RAM) AND/OR CPU PROCESSES FOR UNAUTHORIZED THIRD PARTY PROGRAMS RUNNING CONCURRENTLY WITH WORLD OF WARCRAFT. AN "UNAUTHORIZED THIRD PARTY PROGRAM" AS USED HEREIN SHALL BE DEFINED AS ANY THIRD PARTY SOFTWARE THAT, WHEN USED SIMULTANEOUSLY OR IN CONNECTION WITH THE GAME, WOULD CONSTITUTE A VIOLATION OF SECTIONS 1, 2

OR 9. IN THE EVENT THAT THE GAME DETECTS AN UNAUTHORIZED THIRD PARTY PROGRAM, BLIZZARD MAY (a) COMMUNICATE INFORMATION BACK TO BLIZZARD, INCLUDING WITHOUT LIMITATION THE ACCOUNT NAME, DETAILS ABOUT THE UNAUTHORIZED THIRD PARTY PROGRAM DETECTED, AND THE TIME AND DATE THE UNAUTHORIZED THIRD PARTY PROGRAM WAS DETECTED; AND/OR (b) EXERCISE ANY OR ALL OF ITS RIGHTS UNDER THIS AGREEMENT OR THE EULA, WITH OR WITHOUT PRIOR NOTICE TO THE USER.

B. WHEN THE GAME IS RUNNING, BLIZZARD MAY OBTAIN CERTAIN IDENTIFICATION INFORMATION ABOUT YOUR COMPUTER AND ITS OPERATING SYSTEM, INCLUDING WITHOUT LIMITATION YOUR HARD DRIVES, CENTRAL PROCESSING UNIT, IP ADDRESS(ES) AND OPERATING SYSTEM(S), FOR PURPOSES OF IMPROVING THE GAME AND/OR THE SERVICE, AND TO POLICE AND ENFORCE THE PROVISIONS OF THIS AGREEMENT AND THE EULA.

C. Blizzard may, with or without notice to you, disclose your Internet Protocol (IP) address(es), personal information, Chat logs, and other information about you and your activities: (a) in response to a request by law enforcement, a court order or other legal process; or (b) if Blizzard believes that doing so may protect your safety or the safety of others.

D. BLIZZARD MAY MONITOR, RECORD, REVIEW, MODIFY AND/OR DISCLOSE YOUR CHAT SESSIONS, WHETHER VOICE OR TEXT, WITHOUT NOTICE TO YOU, AND YOU HEREBY CONSENT TO SUCH MONITORING, RECORDING, REVIEW, MODIFICATION AND/OR DISCLOSURE. Additionally, you acknowledge that Blizzard is under no obligation to monitor Chat, and you engage in Chat at your own risk.

E. You are wholly responsible for the cost of all telephone and Internet access charges along with all necessary equipment, servicing, repair or correction incurred in maintaining connectivity to the Servers.

18. Equitable Remedies.

In the event that you breach this Agreement, you hereby agree that Blizzard would be irreparably damaged if this Agreement were not specifically enforced, and therefore you agree that Blizzard shall be entitled, without bond, other security, or proof of damages, to appropriate equitable remedies with respect to

breaches of this Agreement, in addition to such other remedies as Blizzard may otherwise have available to it under applicable laws. In the event any litigation is brought by either party in connection with this Agreement and consistent with Section 19, the prevailing party in such litigation shall be entitled to recover from the other party all the costs, attorneys' fees and other expenses incurred by such prevailing party in the litigation.

19. Dispute Resolution and Governing Law.

A. Informal Negotiations. To expedite resolution and control the cost of any dispute, controversy or claim related to this Agreement ("Dispute"), you and Blizzard agree to first attempt to negotiate any Dispute (except those Disputes expressly provided below) informally for at least thirty (30) days before initiating any arbitration or court proceeding. Such informal negotiations commence upon written notice from one person to the other. Blizzard will send its notice to your billing address and email you a copy to the email address you have provided to us. You will send your notice to Blizzard Entertainment, Inc., P.O. Box 18979, Irvine CA 92623, ATTN: Legal Department.

B. Binding Arbitration. If you and Blizzard are unable to resolve a Dispute through informal negotiations, either you or Blizzard may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. The arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and, where appropriate, the AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are available at the AAA website www.adr.org. The determination of whether a Dispute is subject to arbitration shall be governed by the Federal Arbitration Act and determined by a court rather than an arbitrator. Your arbitration fees and your share of arbitrator compensation shall be governed by the AAA Rules and, where appropriate, limited by the AAA Consumer Rules. If such costs are determined by the arbitrator to be excessive, Blizzard will pay all arbitration fees and expenses. The arbitration may be conducted in person, through the submission of documents, by phone or online. The arbitrator will make a

decision in writing, but need not provide a statement of reasons unless requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Except as otherwise provided in this Agreement, you and Blizzard may litigate in court to compel arbitration, stay proceeding pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

C. Restrictions. You and Blizzard agree that any arbitration shall be limited to the Dispute between Blizzard and you individually. To the full extent permitted by law, (1) no arbitration shall be joined with any other; (2) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (3) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.

D. Exceptions to Informal Negotiations and Arbitration. You and Blizzard agree that the following Disputes are not subject to the above provisions concerning informal negotiations and binding arbitration: (1) any Disputes seeking to enforce or protect, or concerning the validity of, any of your or Blizzard's intellectual property rights; (2) any Dispute related to, or arising from, allegations of theft, piracy, invasion of privacy or unauthorized use; and (3) any claim for injunctive relief.

E. Location. If you are a resident of the United States, any arbitration will take place at any reasonable location within the United States convenient for you. For residents outside the United States, any arbitration shall be initiated in the County of Los Angeles, State of California, United States of America. Any Dispute not subject to arbitration (other than claims proceeding in any small claims court), or where no election to arbitrate has been made, shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

F. Governing Law. Except as expressly provided otherwise, this Agreement shall be governed by, and will be construed under, the Laws of the United States of America and the law of the State of Delaware, without regard to choice of law principles. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. For our customers who

access the Service from Canada, Chile, Mexico, Argentina, Australia, Singapore, Thailand, or New Zealand, other laws may apply if you choose not to agree to arbitrate as set forth above, and in such an event, shall affect this Agreement only to the extent required by such jurisdiction. In such a case, this Agreement shall be interpreted to give maximum effect to the terms and conditions hereof. If you access the Service from New Zealand, and are a resident of New Zealand, The New Zealand Consumer Guarantees Act of 1993 ("Act") may apply to the Game and/or the Service as supplied by Blizzard to you. If the Act applies, then notwithstanding any other provision in this Agreement, you may have rights or remedies as set out in the Act which may apply in addition to, or, to the extent that they are inconsistent, instead of, the rights or remedies set out in this Agreement. Those who choose to access the Service from locations outside of the United States, Canada, Australia, Singapore, or New Zealand do so on their own initiative contrary to the terms of this Agreement, and are responsible for compliance with local laws if and to the extent local laws are applicable.

G. Severability. You and Blizzard agree that if any portion Section 19 is found illegal or unenforceable (except any portion of 19(d)), that portion shall be severed and the remainder of the Section shall be given full force and effect. If Section 19(d) is found to be illegal or unenforceable then neither you nor Blizzard will elect to arbitrate any Dispute falling within that portion of Section 19(d) found to be illegal or unenforceable and such Dispute shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

20. Miscellaneous.

If any provision of this Agreement shall be unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from this Agreement and shall not affect the validity and enforceability of any remaining provisions. This Terms of Use Agreement is the complete and exclusive statement of the agreement between you and Blizzard concerning the Service, and this Agreement supersedes any prior or contemporaneous agreement, either oral or written, and any other communications with regard thereto between you and Blizzard; provided, however that this Agreement is in addition to, and does not replace or supplant, the EULA. This Agreement may only be modified

as set forth herein. The section headings used herein are for reference only and shall not be read to have any legal effect.

I HEREBY ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THE FOREGOING TERMS OF USE AGREEMENT AND AGREE THAT MY USE OF THE GAME AND THE SERVICE IS AN ACKNOWLEDGMENT OF MY AGREEMENT TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS TERMS OF USE AGREEMENT.

APPENDIX III - World of Warcraft – EULA (Europe)

CAREFULLY READ THE FOLLOWING WORLD OF WARCRAFT END USER LICENSE AGREEMENT BEFORE DOWNLOADING OR INSTALLING THIS SOFTWARE PROGRAM. IF YOU DO NOT AGREE WITH THE TERMS OF THIS AGREEMENT, PLEASE DELETE THE SOFTWARE PROGRAM IMMEDIATELY AND ARRANGE TO RETURN THE GAME TO YOUR RETAILER.

WORLD OF WARCRAFT™ END USER LICENSE AGREEMENT

This software program on CD-ROM, and any files that are delivered to you (via on-line transmission or otherwise) to "patch," update, or otherwise modify the software program, as well as any printed materials and any on-line or electronic documentation (the "Manual"), and any and all copies and derivative works of such software program and materials (collectively, with the "Game Client" defined below, the "Game") are copyrighted works. All use of the Game is governed by the terms of this End User License Agreement ("License Agreement" or "Agreement"). The Game may only be played by obtaining from Blizzard Entertainment access to the World of Warcraft massively multi-player on-line role-playing game service (the "Service"), which is subject to a separate Terms of Use agreement (the "Terms of Use"). The Service includes the use of a voice over Internet protocol technology, which enables you to communicate orally with other users and which includes certain features to determine who to speak with (the "Voice Client"). Blizzard Entertainment, Inc. is your contractual partner for the performance of the Service. If your purchase of the Game included a period of "free access" to the Service, the Terms of Use agreement also governs your access to the Service during the period of "free access." The Game is distributed solely for use by authorized end users according to the terms of the License Agreement. Any use, reproduction or redistribution of the Game not expressly authorized by the terms of the License Agreement is expressly prohibited.

1. Grant of a Limited Use License. The Game installs computer software (hereafter referred to as the "Game Client") onto your hardware to allow you to play the Game through your account with the Service (your "Account"). Blizzard Entertainment, Inc. (herein referred to as "Blizzard Entertainment") hereby grants, and by installing the Game Client you thereby accept, a limited, non-exclusive license and right to install the Game Client for your personal use on one (1) or more computers which you own or which are under your personal control. All use of the Game Client is subject to this License Agreement and to the Terms of Use agreement, which you must accept before you can use your Account to play the Game through access to the Service. Blizzard Entertainment reserves the right to update, modify or change the Terms of Use for the reasons stated in Section 8 below. Changes to the Terms of Use will be notified and enter into force according to Section 13 below.

2. Service and Terms of Use. As mentioned above, you must accept the Terms of Use in order to access the Service to play the Game. The Terms of Use agreement governs all aspects of game play. You may view the Terms of Use by visiting the following website: <http://www.wow-europe.com/en/legal/termsofuse.html>. If you do not agree with the Terms of Use, then (i) you should not register for an Account to play the Game, and (ii) you should arrange to return the Game to the place where you purchased the Game within thirty (30) days of the original purchase.

3. Ownership. A. All intellectual property rights in and to the Game and all copies thereof (including, but not limited to, any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, any related documentation, and "applets" incorporated into the Game) are owned or expressly licensed by Blizzard Entertainment. The Game is protected by the copyright laws of the United States, international copyright treaties and conventions, and other laws. All rights are reserved. The Game may contain certain licensed materials, and licensors of those materials may enforce their rights in the event of any violation of this License Agreement.

B. In order to play World of Warcraft, you are required to establish a user account (the "Account") as described in the Terms of Use that is unique to you and non-transferable. To establish the Account, you will be asked to provide Blizzard Entertainment with an Authentication Key of the Game that is exclusively linked to the Account you have established with the Authentication Key. Therefore, Blizzard Entertainment does not allow you to transfer ownership of the Game Client to third parties.

4. Responsibilities of End User.

A. Subject to the Grant of License hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, reverse engineer, derive source code, modify, disassemble, decompile, or create derivative works based on the Game, or remove any proprietary notices or labels on the Game. Failure to comply with the restrictions and limitations contained in this Section 4 shall result in immediate, automatic termination of the license granted hereunder and may subject you to civil and/or criminal liability. Notwithstanding the foregoing, you may make one (1) backup copy of the Game Client and the Manuals.

B. You agree that you shall not, under any circumstances,

(i) sell, grant a security interest in or transfer reproductions of the Game to other parties in any way not expressly authorized herein, nor shall you rent, lease or license the Game to others;

(ii) exploit the Game or any of its parts, including, but not limited to, the Game Client, for any commercial purpose, including, but not limited to, use at a cyber café, computer gaming center or any other location-based site without the prior express written consent of Blizzard Entertainment;

(iii) host, provide or develop matchmaking services for the Game or intercept, emulate or redirect the communication protocols used by Blizzard Entertainment in any way, including, without limitation, through protocol emulation, tunneling, packet sniffing, modifying or adding components to the Game, use of a utility program or any other techniques now known or hereafter developed, for any purpose, including, but not limited to, unauthorized network play over the Internet, network play utilizing commercial or non-commercial gaming networks or as part of content aggregation networks; or

(iv) create or maintain, under any circumstance, any unauthorized connections to the Game or the Service. All connections to the Game and/or the Service, whether created by the Game Client or by other tools and utilities, may only be made through methods and means expressly approved by Blizzard Entertainment. Under no circumstances may you connect, or create tools that allow you or others to connect, to the Game's proprietary interface or interfaces other than those expressly provided by Blizzard Entertainment for public use.

(v) use the Voice Client for any unlawful purposes. In particular you shall not (i) eavesdrop, intercept or monitor any communication which is not intended for you, (ii) use any type of spider, virus, worm, trojan-horse or any other codes or tools that are designed to distort or otherwise interfere with the communication, (iii) use the Voice Client for any commercial communication, or (iv) expose any other user to communication which is offensive, harmful to minors, indecent or otherwise objectionable.

5. Parental Control. Parents can restrict the use their child makes of the Service by way of a parental control system. For further details please click [here](#)

6. Termination. This License Agreement is effective until terminated. You may terminate the License Agreement at any time by cumulatively (i) destroying the Game; and (ii) removing the Game Client from your hard drive; and (iii) notifying Blizzard Entertainment by mail of your intention to terminate this License Agreement to the following address: Blizzard Entertainment S.A.S., TSA 60 001, 78143 Vélizy-Villacoublay Cedex, France. Blizzard Entertainment may, at its discretion, terminate this License Agreement in the event of a significant breach of the terms and conditions contained herein, or the terms and conditions contained in the Terms of Use. In such event, you must immediately destroy the Game and remove the Game Client from your hard drive. Upon termination of this Agreement for any reason, all licenses granted herein shall immediately terminate.

7. Export Controls. The Game may not be re-exported, downloaded or otherwise exported into (or to a national or resident of) any country to which the

U.S. has embargoed goods, or to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders. By installing the Game, you are agreeing to the foregoing, and you are representing and warranting that you are not located in, under the control of, or a national or resident of any such country or on any such list.

8. Patches and Updates. Blizzard Entertainment shall have the right to deploy or provide patches, updates and modifications to the Game, as needed or as useful to: (i) enhance the gaming experience by adding new content to the Game, (ii) incorporating new features to the Game, (iii) enhancing content or features already in the Game; (iv) fixing 'bugs' that may be altering the Game; and (v) determining how you and other players utilize the Game so that the Game can be enhanced for the enjoyment of the Game's users; and (vi) protect you and other players against cheating; and (iii) make the gaming environment safer for you. These patches, updates and modifications to the Game must be installed for the user to continue to play the Game. For these purposes, Licensor may update the Game remotely, including, without limitation, the Game Client residing on the user's machine, without knowledge or consent of the user, and you hereby grant to Licensor your consent to deploy and apply such patches, updates and modifications to the Game.

9. Duration of the "On-line" Component of the Game and of the Voice Client. This Game is an 'on-line' game that must be played over the Internet through the Service, as provided by Blizzard Entertainment. It is your entire responsibility to secure an Internet connection and all fees related thereto shall be at your own charge. Blizzard Entertainment will use reasonable efforts to provide the Service all day, every day. However, Blizzard Entertainment reserves the right to temporarily suspend the Service for maintenance, testing, replacement and repair of the telecommunications equipment related to World of Warcraft, as well as for transmission interruption or any other operational needs of the system.

Blizzard Entertainment can neither guarantee that you will always be able to communicate with other users, nor that you can communicate without disruptions, delays or communication-related flaws. Blizzard Entertainment is not

liable for any such disruptions, delays or other omissions in any communication during your use of the Voice Client.

Blizzard Entertainment agrees to provide the servers and software necessary to access the Service until such time as World of Warcraft is "Out of Publication." World of Warcraft shall be considered "Out of Publication" following the date that World of Warcraft is no longer manufactured and/or distributed by Blizzard Entertainment, or its affiliates. Thereafter, Blizzard Entertainment may, in its sole and absolute discretion, continue to provide the Service or license to third parties the right to provide the Service. However, nothing contained herein shall be construed so as to place an obligation upon Blizzard Entertainment to provide the Service beyond the time that World of Warcraft is Out of Publication. In the event that Blizzard determines that it is in its best interest to cease providing the Service, or license to a third party the right to provide the Service, Blizzard Entertainment shall provide you with no less than three (3) months prior notice. Neither the Service nor Blizzard Entertainment's agreement to provide access to the Service shall be considered a rental or lease of time on or capacity of Blizzard Entertainment's servers or other technology.

10. No Responsibility for Individual Communication. You acknowledge that the content of the communication with other users through the Voice Client is entirely the responsibility of the user from whom such content originates. You may therefore be exposed to content that is offensive, harmful to minors, indecent or otherwise objectionable. Blizzard Entertainment is not liable for any such sort of communication of other users through the Voice Client.

11. Additional Manufacturer's Guarantee for the Game Client. In the event that CD-ROMs containing the Game Client were purchased in the European Union and they prove to be defective and provided you inform Blizzard Entertainment of such defect within (i) two (2) months from the day you detected such defect and (ii) within two (2) years from the date of the purchase of the Game, Blizzard Entertainment will, upon presentation to Blizzard Entertainment of proof of purchase of the defective media and the media itself, at its option 1) correct any defect, 2) replace the Game, or 3) refund your money.

This guarantee does not affect or restrict the statutory warranty claims that you may have against the retailer of the Game Client.

12. Limitation of Liability. As regards the online service provided by Blizzard Entertainment, for damages or compensation of unavailing expenditures, whatever the legal basis including tort may be, the following rules apply: Blizzard Entertainment may only be liable in cases of where it is adjudged that Blizzard: (i) engaged in intentionally damaging conduct; (ii) was grossly negligent; and/or (iii) is in breach of the requirements of the Product Liability Act according to statutory law. If you acquired the CD-ROMs containing the Game Client in Germany or Austria or if you access the WOW servers from the territory of Germany or Austria or in such other countries where local laws would apply, Blizzard Entertainment may also be liable in case of death or personal or physical injury according to statutory law where Blizzard is adjudged to be responsible for such death or personal or physical injury.

Blizzard Entertainment shall not be liable for slight negligence. However, if you acquired the CD-ROMs containing the Game Client in Germany or Austria or if you access the WOW servers from the territory of Germany or Austria, Blizzard Entertainment may also be liable for slight negligence if Blizzard Entertainment is adjudged to be in breach of a "material" contractual obligation hereunder. In such cases, Blizzard Entertainment's liability is limited to typical and foreseeable damages. In other cases Blizzard Entertainment shall not be liable for slight negligence.

13. Rights on Breach. The Game, Game Client, trademarks and copyrighted content contained therein and associated with the Game are the copyrighted property of Blizzard Entertainment, and, through the efforts of Blizzard Entertainment, has established substantial goodwill and recognition. In the event of a significant breach of the terms of this Agreement, Blizzard Entertainment reserves its right to take all legal actions which may be available to a licensor of intellectual property under the law to protect its rights in its property. In the event that Blizzard Entertainment is the prevailing party in any such actions, Blizzard

Entertainment shall see any and all rights that may be available to Blizzard Entertainment under the law to recover damages, costs of suit and its attorneys fees.

14. Changes to the Agreement. Blizzard Entertainment may, from time to time, post notification of changes to this License Agreement on the World of Warcraft website and will post the revised version of this License Agreement in this location, and may provide other notice which may include by email, postal mail or pop-up screen. By means of the notification Blizzard Entertainment will inform you about the fact that the License Agreement has been amended and shall point out that after expiration of one month following the notification your installation or use of the Game shall be deemed as consent to the modification or amendment. If any future changes to this License Agreement are unacceptable to you or cause you to no longer be in compliance with this License Agreement, you may terminate this License Agreement in accordance with Section 6 herein. The modified version of the License Agreement shall enter into force at the beginning of the second month following the notification unless Blizzard Entertainment has received a notification of termination from you by that time.

15. Miscellaneous. In the event that any provision of this License Agreement shall be held by a court or other tribunal of competent jurisdiction to be unenforceable, the remaining portions of this License Agreement shall remain in full force and effect. This License Agreement constitutes and contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements; provided however, that this agreement shall coexist with, and shall not supersede, the Terms of Use. To the extent that the provisions of this Agreement conflict with the provisions of the Terms of Use, the conflicting provisions in the Terms of Use shall govern. Sections 10, 11, 12, 13, 14 and 15 hereof shall survive the termination of this Agreement.

I hereby acknowledge that I have read and understand the foregoing License Agreement and agree that the action of installing the Game Client is an

acknowledgment of my agreement to be bound by the terms and conditions of the License Agreement contained herein.

APPENDIX III - World of Warcraft – Terms of Use (Europe)

WORLD OF WARCRAFT® TERMS OF USE AGREEMENT

IMPORTANT! PLEASE READ CAREFULLY!

Welcome to Blizzard Entertainment's massively multi-player on-line role-playing game, World of Warcraft® ("World of Warcraft"). World of Warcraft is the copyrighted work of Blizzard Entertainment, Inc., a corporation organized under the laws of the State of Delaware, its 'affiliates,' specifically including Blizzard Entertainment S.A.S., and/or its licensors (collectively, "Blizzard Entertainment"), and all use of Blizzard Entertainment's proprietary World of Warcraft on-line service (the "Service") is governed by the terms and conditions contained in this Agreement, including any future revisions implemented according to the procedure described in Section XIV herein (hereafter referred to as the "Terms of Use" or "Agreement"). This Agreement is in addition to, and does not replace or supplant, the End User License Agreement that accompanied the World of Warcraft software (the "EULA ") and to which the World of Warcraft software is subject. Any use of World of Warcraft not in accordance with the Terms of Use is expressly prohibited. You represent that you are a 'natural person' who is over the age of eighteen (18) years old, or over the age of majority in the country where you are a citizen, and agree to these Terms of Use on behalf of yourself and, at your discretion, for one (1) minor child for whom you are a parent or guardian and whom you have authorized to use the account you create on the Service.

I. Accessing the Service

1. To access the Service, you will be required to establish a user account on the Service. This may be either an account for the Service only (the "WoW Account")

or an account on Blizzard's centralized account system for various online games (the "Blizzard Account").

If you do not already have a Blizzard Account that may be extended to WoW, Blizzard may require you to open such Blizzard Account; if you already have a WoW Account the Blizzard Account will then replace the WoW Account (note that a "WoW Account," and a "Blizzard Account," are collectively referred to herein as an "Account"). When creating the Blizzard Account, you may be required to accept new terms of use in addition to these Terms of Use. You may have to provide Blizzard with certain personal information (which will be used in accordance with the Blizzard Privacy Policy [LINK]). Such opening of a Blizzard Account will not incur any additional costs.

In either case, note that in order to establish an Account, you must be a 'Natural Person,' who is the age of majority in the country where you are a citizen. Corporations, Limited Liability Companies, partnerships, or any other form of legal entity other than that of a "natural person" may not establish an account, and by accepting this Agreement, you hereby represent and warrant that you meet these eligibility requirements. In case you establish an Account for your child, you understand and accept that, it is your responsibility as the legal guardian to determine whether World of Warcraft is appropriate for your child. You may not share the Account with anyone, except that if you are a parent or guardian, you may permit one (1) minor child to use the Account when not in use by you. You are liable for all uses of the Account that has been enabled by you. Notwithstanding anything to the contrary herein, you acknowledge and agree that you shall have no ownership or other property interest in the Account.

2. To register an Account, you will be required to provide Blizzard Entertainment with:

- (1) your name, address and phone number;
- (2) the "Authentication Key" from the World of Warcraft Software you purchased;
- (3) the Authentication Keys from any expansions to the World of Warcraft Software you purchased, such as "The Burning Crusade," or "Wrath of the Lich King", to activate those expansions to the Account, and ;
- (4) accurate, complete, and updated billing information for payment of the Service subscription fee.

Failure to comply with the foregoing or to update the foregoing if your contact information or billing information changes shall constitute a breach of this Agreement, which may result in the immediate termination and deletion of the Account. As such, it is imperative that you provide Blizzard Entertainment with accurate, up to date information. In the event that Blizzard Entertainment learns that you have provided false or misleading registration information, Blizzard Entertainment reserves the right to immediately terminate and disable or delete the Account.

3. You hereby agree to pay all charges incurred by the Account, including applicable taxes, in accordance with billing terms for access to the Service that are in effect at the time that the fee or charge becomes payable. Your right to access to the Service is subject to any limits established by your credit card issuer, billing service, 'World of Warcraft Game Card Agreement,' or other payment methods authorized by Blizzard Entertainment. Blizzard Entertainment may, in its sole and absolute discretion, suspend or terminate your access to the Service and disable or delete the Account, if:

(1) payment cannot be charged to your credit card;

(2) your charge is returned to Blizzard Entertainment for any reason; or

(3) you use all of the allotted time that you have purchased to access World of Warcraft via a "World of Warcraft Game Card" or similar instrument.

If you have a balance due on the Account and you have provided Blizzard Entertainment with a credit card, you agree that Blizzard Entertainment can charge these unpaid fees to your credit card or debit them from your debit card, as applicable. You agree to reimburse Blizzard Entertainment for all costs and expenses incurred by Blizzard Entertainment in collecting payment due hereunder, including without limitation all bank or service charges, and any reasonable attorneys' fees.

4. During the registration process, you will be required to select a user name and a password that are specific to the Account (collectively referred to hereunder as "Password"). Your Password is to be kept confidential at all times and you are solely responsible for the security of your Password. You may not disclose your Password to anyone, or allow your Password to be used by anyone other than yourself and/or your one (1) minor child. Blizzard Entertainment is not responsible for any harm that may result to the Account (including without

limitation the deletion or modification of characters in the Account) as a result of a lost or shared password. The user name you choose shall be subject to the naming guidelines contained in this Terms of Use Agreement.

5. Blizzard Entertainment does not recognize the transfer of Accounts, and any unauthorized transfer of the World of Warcraft software will result in the permanent deletion of the Account attached to that software. You may not offer any Account for sale or trade, and any such offer:

(1) is a violation of this Agreement;

(2) may result in suspension or termination of the Account at Blizzard Entertainment's sole and absolute discretion; and

(3) will not be opposable to Blizzard Entertainment.

6. Unless otherwise stated herein, there are no refunds where the Account is terminated prior to the end of a subscription period; the Service will be available for your use until such time that the then-current subscription period expires.

II. Parental Control. Parents can restrict the use their child makes of the Service by way of a parental control system. Further information can be found here: <https://www.wow-europe.com/account/parental-control-schedule.html>

III. Limitations on Your Use of World of Warcraft. Your license to use World of Warcraft is limited by this Terms of Use and the World of Warcraft End User License Agreement which you were required to accept when you installed World of Warcraft. Limitations on your right to use World of Warcraft may include, but not necessarily be limited to, the following:

1. Blizzard Entertainment expressly reserves the exclusive right to create derivative works based on World of Warcraft. This means that you may not create derivative works based on World of Warcraft, without the prior express, written permission of Blizzard Entertainment.

2. Only Blizzard Entertainment or its licensees have the right to host World of Warcraft! Accordingly, you may not host, provide matchmaking services for, or intercept, emulate or redirect the communication protocols used by Blizzard Entertainment as part of World of Warcraft, regardless of the method used to do so. Such prohibited methods may include, but are not limited to, protocol emulation, reverse engineering, modifying World of Warcraft, adding

components to World of Warcraft, or using a utility program to host World of Warcraft.

3. You agree that you will not

(1) modify or cause to be modified any files that are a part of a World of Warcraft installation;

(2) create or use cheats, "mods", and/or hacks, or any other third-party software designed to modify the World of Warcraft experience;

(3) use any third-party software that intercepts, "mines", or otherwise collects information from or through World of Warcraft;

(4) allow players who are playing characters aligned with the "Alliance" faction to chat or otherwise communicate directly with players who are playing characters aligned with the "Horde" faction, or vice versa;

(5) buy or sell for "real" money or exchange gold, weapons, armor, or any other virtual items that may be used in World of Warcraft outside the World of Warcraft platform;

(6) let any third person (except for a minor for whom you opened the Account) play on your Account including, but not limited to, using so-called "power leveling services", i.e. paying a third person for playing on your Account; or

(7) play on the Account of a third person including, but not limited to, providing so-called "power leveling services";

(8) eavesdrop, intercept or monitor any oral communication which is not intended for you or use any tool designed to distort or prevent oral communication of the users.

Notwithstanding the foregoing, you may update World of Warcraft with authorized patches and updates distributed by Blizzard, and use authorized Third Party User Interfaces as set forth in Section XVII.7. below.

4. You may not institute, assist, or become involved in an attack upon any World of Warcraft server or otherwise attempt to disrupt the World of Warcraft servers. You may not institute any such attack which results in the disruption of any other player's World of Warcraft experience. ANY ATTEMPT BY YOU OR ANY OTHER PLAYER ON AN ACCOUNT TRACEABLE TO YOU TO DAMAGE WORLD OF WARCRAFT OR UNDERMINE THE LEGITIMATE OPERATION OF WORLD OF WARCRAFT IS A VIOLATION OF CRIMINAL AND CIVIL LAWS AND, SHOULD SUCH AN ATTEMPT BE MADE OR ASSISTANCE FOR

SUCH AN ATTACK BE PROVIDED, BLIZZARD ENTERTAINMENT RESERVES THE RIGHT TO SEEK DAMAGES FROM ANY SUCH USER TO THE FULLEST EXTENT PERMITTED BY LAW. You may not, whether intentionally or unintentionally, violate any applicable local, state, national or international law or regulation in connection with your use of World of Warcraft or the Service.

IV. World of Warcraft Rules of Conduct. As with all things, World of Warcraft is governed by certain Rules of Conduct ("Rules of Conduct") that must be adhered to by all users of World of Warcraft. It is your responsibility to know, understand and abide by these Rules of Conduct. The following rules are not meant to be exhaustive, and Blizzard Entertainment reserves the right to determine which conduct it considers to be outside the spirit of the game and to take such disciplinary measures as it sees fit up to and including termination and deletion of the Account. Blizzard Entertainment reserves the right to modify these Rules of Conduct at any time pursuant to Section XIV of this Agreement.

1. Rules Related to User Names. Each user will either select a character name or allow the World of Warcraft software to automatically select a character name at random. Additionally, users may form "guilds" and such guilds will be required to choose a name for the guild. When you choose a character name, create a guild, or otherwise create a label that can be seen by other players of World of Warcraft, you must abide by the following guidelines as well as the rules of common decency. If Blizzard Entertainment finds such a label to be offensive or improper, it may, in its sole and absolute discretion, change the name, remove the label and corresponding chat room, and/or suspend or terminate your use of World of Warcraft.

In particular, you may not use any name:

- (1) Belonging to another person with the intent to impersonate that person, including without limitation a "Game Master" or any other employee or agent of Blizzard Entertainment;
- (2) That incorporates 'swear' words or which are otherwise offensive, defamatory, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable;

- (3) Subject to the rights of any other person or entity without written authorization from that person or entity;
- (4) That belongs to a popular culture figure, celebrity, or media personality;
- (5) That is, contains, or is substantially similar to a trademark or service mark, whether registered or not;
- (6) Belonging to any religious figure or deity;
- (7) Taken from Blizzard Entertainment's Warcraft products, including character names from the Warcraft series of novels;
- (8) Related to drugs, sex, alcohol, or criminal activity;
- (9) Comprised of partial or complete sentence (e.g., "Inyourface", "Welovebeef", etc);
- (10) Comprised of gibberish (e.g., "Asdfasdf", "Jjxccm", "Hvldrm");
- (11) Referring to pop culture icons or personas;
- (12) That utilizes "Leet" or "Dudespeak" (e.g., "Roflcopter", "xxnewbxx", "Roxxoryou")
- (13) That incorporates titles. For purposes of this subsection, "titles" shall include without limitation 'rank' titles (e.g., "CorporalTed," or "GeneralVlad"), monarchistic or fantasy titles (e.g., "KingMike", "LordSanchez"), and religious titles (e.g., "ThePope," or "Reverend AI").

You may not use a misspelling or an alternative spelling to circumvent the name restrictions listed above, nor can you have a "first" and "last" name that, when combined, violate the above name restrictions.

2. Rules Related to "Chat", Interaction With Other Users or With Blizzard Entertainment Representatives. As part of the game, you may communicate with other users both in writing and orally. You may communicate orally by using a voice over internet protocol technology (the "Voice Client"). Communicating with other users and with Blizzard Entertainment representatives, in writing or orally, is an integral part of World of Warcraft and is referred to in this document together as "Chat". Blizzard Entertainment does not eavesdrop or monitor the content of your oral communication through the Voice Client. Your written communication may be subject to review, modification, and/or deletion by Blizzard Entertainment without notice to you. Additionally, you hereby acknowledge that Blizzard Entertainment is under no obligation to monitor Chat,

and you engage in Chat at your own risk. When engaging in Chat in World of Warcraft, or otherwise utilizing World of Warcraft, you may not:

- (1) Transmit or post any content or use any language, in writing or orally, which, in the sole and absolute discretion of Blizzard Entertainment, is deemed to be offensive, including without limitation content or language that is unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable, nor may you use a misspelling or an alternative spelling to circumvent the content and language restrictions listed above;
- (2) Carry out any action with a disruptive effect, such as intentionally causing the Chat screen to scroll faster than other users are able to read, or setting up macros with large amounts of text that, when used, can have a disruptive effect on the normal flow of Chat, or using tools that distort or interfere with oral communication of the users;
- (3) Disrupt the normal flow of dialogue in Chat or otherwise act in a manner that negatively affects other users including without limitation posting commercial solicitations and/or advertisements for goods and service available outside of the World of Warcraft universe;
- (4) Sending repeated unsolicited or unwelcome messages to a single user or repeatedly posting similar messages in a Chat area, including but not limited to continuous advertisements to sell goods or services;
- (5) Communicate or post any user's personal information in or on the World of Warcraft, or websites or forums related to World of Warcraft, except that a World of Warcraft user may communicate his or her own personal information in a private message directed to a single user;
- (6) Use bots or other automated techniques to collect information from World of Warcraft or any forum or website owned or administered by Blizzard Entertainment;
- (7) Harass, threaten, stalk, embarrass or cause distress, unwanted attention or discomfort to any user of World of Warcraft or to Blizzard Entertainment representatives;
- (8) Cheat or utilize World of Warcraft "exploits" in any way, including without limitation modification of the game program files;

(9) Participate in any action that, in the sole and absolute opinion of Blizzard Entertainment, results or may result in an authorized user of World of Warcraft being "scammed" or defrauded out of gold, weapons, armor, or any other items that user has earned through authorized game play in World of Warcraft.

3. Rules Related to Game Play. Game play is what World of Warcraft is all about. Accordingly, the rules that govern game play in World of Warcraft are taken very seriously by Blizzard Entertainment. Note that Blizzard Entertainment considers all valid play styles in World of Warcraft to be part of the game, and not harassment, so player-killing the enemies of your race and/or alliance, including gravestone and/or corpse camping, is considered a part of the game. Because World of Warcraft is a "player vs. player" game, you should always remember to protect yourself in areas where the members of hostile races can attack you, rather than contacting Blizzard Entertainment's in-game customer service representatives, referred to herein as "Game Masters," for help when you have been killed by an enemy of your race. Nonetheless, certain acts go beyond what is "fair" and are considered serious violations of these Terms of Use. Those acts include, but are not necessarily limited to, the following:

(1) Using or exploiting errors in design, features which have not been documented, and/or "program bugs" to gain access that is otherwise not available, or to obtain a competitive advantage over other players.

(2) Connecting, or creating tools that allow you to connect, to World of Warcraft's proprietary interface or interfaces, other than those explicitly provided by Blizzard Entertainment for your use.

(3) Using tools that hack or otherwise alter the World of Warcraft client or server software.

(4) Using software products that "packet sniff" or provide scripting and/or macroing to obtain information from World of Warcraft.

(5) Anything that Blizzard Entertainment considers contrary to the "essence" of World of Warcraft.

V. Character Migration. Blizzard Entertainment may, in its sole and absolute discretion, offer certain users the opportunity to move characters from a heavily populated "Character Migration" server to a server designated by Blizzard

Entertainment as a "Target Server." If you are offered the opportunity to migrate a character, please note the following:

1. If your character is a "guild master," it cannot be migrated to a Target Server.
2. You must have less than ten (10) characters on the Target Server in order to migrate a character to the Target Server.
3. Character migrations can only occur when the account that you utilize to play World of Warcraft is not in use.
4. You cannot migrate a character to a Target Server if the name of the character is already in use on the Target Server. If a character of the same name already exists on the Target Server, you will be given an opportunity to rename character as part of the Character Migration process. As always, the name must adhere to the naming conventions stated herein.
5. In-game mail sent by or in transit to the character that you intend to migrate will not be migrated to a Target Server.
6. All player auctions involving the character that you intend to migrate will be cancelled and the item, deposit, and the high bid returned to the bidder upon character migration. The item you placed for sale, or your "high bid," will appear in that character's mail when it reaches the Target Server. Note that Blizzard will not be responsible for the loss of in-game funds or items due to the character migration of either a "buyer" or "seller" to an auction house transaction.
7. A target character's friends list will not transfer to a Target Server.
8. A target character's guild affiliation will not transfer to a Target Server.
9. A target character's ignore list will not transfer to a Target Server.

VI. Account/Password Security. You are responsible for maintaining the confidentiality of your Password, and you will be responsible for all uses of your Password that result from your failure to maintain the confidentiality of your Password or from any other activity of you that enables third parties to use your Password. Also, note that the security of the Account is your responsibility. Blizzard Entertainment is not responsible in the event that the Account is "hacked," or if the Account or your computer is damaged by a virus, or for any other issues with your computer or the Account. If you think that the Account has been compromised, please contact Blizzard Entertainment Billing and Account Services, either through our Game Masters or by calling Blizzard

Entertainment's Billing and Account Services phone number, and Blizzard Entertainment will help you reset your Password, assist with billing issues, and offer basic suggestions for improving the Account security. If you report the Account stolen, hacked, or in any other way compromised, Blizzard Entertainment will suspend the Account while the matter is investigated. Following this investigation, Blizzard Entertainment will determine the appropriate course of action in its sole and absolute discretion.

VII. Consequences of Violating the Rules of Conduct. Blizzard Entertainment may, in its sole and absolute discretion, take whatever action it deems necessary to preserve the integrity of World of Warcraft. Violation of any of the Rules of Conduct set forth above may result in actions being taken by Blizzard Entertainment, effective immediately or at a time determined by Blizzard Entertainment, which may include without limitation:

1. Temporarily suspending your access to World of Warcraft,
 2. Permanently terminating your access to World of Warcraft (see Section XVI.2. below, or
 3. Account or character modification, including without limitation, reducing or removing experience points, skills, levels, in-game currency or items.
- Without limiting the foregoing, Blizzard Entertainment retains the right to decline service to any user who violates the World of Warcraft Terms of Use or the End User License Agreement.

VIII. Experience Reimbursement. First and foremost, nothing in these rules will ever place a "duty" upon Blizzard Entertainment to reimburse you by providing experience credit for any experience lost for any reason, unless such loss was caused by Blizzard Entertainment's negligence. That being said, Blizzard Entertainment may, at its sole and absolute option, determine to reimburse experience lost by players in certain extreme and unusual situations. For instance, Blizzard Entertainment may decide to reimburse experience lost in the event of a catastrophic server failure. In no event is Blizzard Entertainment obligated to provide any monetary reimbursement or monetary credit.

IX. Selling of Items. Remember, at the outset of these Terms of Use, where we discussed how you were "licensed" the right to use World of Warcraft, and that your license was "limited"? Well, here is one of the more important areas where these license limitations come into effect. Note that Blizzard Entertainment either owns, or has exclusively licensed, all of the content which appears in World of Warcraft. Therefore, no one has the right to "sell" Blizzard Entertainment's content, except Blizzard Entertainment! So Blizzard Entertainment does not recognize any property claims outside of World of Warcraft or the purported sale, gift or trade in the "real world" of anything related to World of Warcraft. Accordingly, you may not sell or purchase virtual items for "real" money or exchange items outside of World of Warcraft. Please note that Blizzard is entitled to and will prevent any such illegal sales.

X. Online Duration. The Game is an 'on-line' game that must be played over the Internet through the Service, as provided by Blizzard Entertainment Europe. It is your entire responsibility to secure an Internet connection and all fees related thereto shall be at your own charge. Blizzard Entertainment Europe will use reasonable efforts to provide the Service all day, every day. However, Blizzard Entertainment Europe reserves the right to temporarily suspend the Service for maintenance, testing, replacement and repair of the telecommunications equipment related to World of Warcraft, as well as for transmission interruption or any other operational needs of the system.

Blizzard Entertainment agrees to provide the servers and software necessary to access the Service until such time as World of Warcraft is "Out of Publication." World of Warcraft shall be considered "Out of Publication" following the date that World of Warcraft is no longer manufactured and/or distributed by Blizzard Entertainment, or its affiliates. Thereafter, Blizzard Entertainment may, in its sole and absolute discretion, continue to provide the Service or license to third parties the right to provide the Service. However, nothing contained herein shall be construed so as to place an obligation upon Blizzard Entertainment to provide the Service beyond the time that World of Warcraft is Out of Publication. In the event that Blizzard determines that it is in its best interest to cease providing the Service, or license to a third party the right to provide the Service, Blizzard Entertainment shall provide you with no less than three (3) months prior notice.

Neither the Service nor Blizzard Entertainment's agreement to provide access to the Service shall be considered a rental or lease of time on or capacity of Blizzard Entertainment's servers or other technology.

XI. Protection of User Information.

1. Blizzard Entertainment takes the protection of its user's personal information seriously, and abides by all applicable laws related thereto, including Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and any other relevant regulations and laws promulgated by your country of residence. Accordingly, Blizzard Entertainment shall take appropriate steps to prevent the disclosure of its user's personal information, including users' Account information, to a third party, except for in the following circumstances:

- (1) The settlement of service charges related to the use of the Service;
- (2) the preparation of statistics, academic research or market surveys in anonymous form;
- (3) compliance with specific provisions of any applicable laws and regulations expressly authorizing such disclosure or with any judicial decision imposing such disclosure; and
- (4) disasters, emergencies, or other Force Majeure events which are out of Blizzard Entertainment's control, as more fully discussed hereunder in Section XVII.9.

2. Blizzard Entertainment shall have no obligation to provide information related to a specific Account, even if requested from a user, except in cases when the procedure for identification of an Account and password is set forth at registration, and/or if the request is for the purpose of investigation under the relevant laws and regulations.

3. Blizzard Entertainment shall give notice of, and comply with, the World of Warcraft – European Union privacy policy, which shall govern the protection of the personal information of users of the Service, which can be found at **www.wow-europe.com/en/legal/**.

XII. Testing, Maintenance, and Other Potential Interruptions in the Service.

Blizzard Entertainment shall give users notice on the World of Warcraft "Home Page" located at <http://www.wow-europe.com/> prior to Blizzard Entertainment installing software upgrades, performing testing, or performing maintenance on the servers, data transmission lines, and other systems related to World of Warcraft, and/or in the manner set forth in Section XIV below whenever possible. Note that it is your responsibility to be aware of such notices, and you hereby acknowledge and agree that Blizzard Entertainment shall not be responsible for any damages which may arise from your failure to read and/or be aware of these publicly posted notices. Additionally, Blizzard Entertainment may be required to "shut down" one or more servers to repair the hardware, or software, related to World of Warcraft. While it is Blizzard Entertainment's intention to provide the Service all day, every day, you hereby acknowledge that Blizzard Entertainment reserves the right to temporarily suspend the Service for maintenance, testing, replacement and repair of the telecommunications equipment related to World of Warcraft, as well as for transmission interruption or any other operational needs of the system.

XIII. Refunds.

1. In the event that you are a "Standard End User," you will have the right, but not the obligation, to terminate the Service, or be provided with a "game time adjustment" to your Account in the event that the Service is suspended or interrupted for more than three consecutive days (72 hours) without Blizzard Entertainment providing prior notice of the suspension of Service as set forth above, unless the suspension or interruption in the Service is due to one of the following events:

- (1) A "Force Majeure" event, as defined in Section XVII.9. below;
- (2) Any suspension or interruption of the Service that is attributable to you, or to any other third party including without limitation, your internet service provider and any other user of the Service;
- (3) Any suspension or interruption of the Service in the event that Blizzard Entertainment's telecommunication providers fail to provide the telecommunication service required to host the Service through no fault of Blizzard Entertainment; and

(4) Scheduled maintenance, replacement, regular examination, and/or construction of equipment for the Service where Blizzard Entertainment posts prior notice of the pending interruption in the Service.

2. In the event that you are eligible for a "game time adjustment," Blizzard Entertainment shall credit your Account with four (4) times the amount of time that the Service was interrupted. Note that only current Accounts that are in "good standing" will be eligible for such a "game time adjustment." In the event that you choose to terminate the Service, you shall be entitled to a 'refund' subject to the following terms and conditions:

3. Only current Accounts that are in "good standing," shall be eligible for a refund. Accounts that are "suspended" by Blizzard Entertainment for "non payment," or for a violation of these Terms of Use, are not eligible for a refund.

4. In the event that you are eligible for a refund, and you pay a fee to utilize your Account for a fixed period of time ("Fixed Fees"), Blizzard Entertainment shall provide you with a "pro rata" refund in the same currency as the currency of payment equal to the Fixed Fees for the most recent billing period, less the daily charge for the Service multiplied by the number of days that the Service was available in that billing period.

5. If you purchased "game time" under a program that provided you the right to utilize the Service for a set period of time at a discounted rate ("Discounted Fees"), and you request that Blizzard Entertainment terminate your Account, Blizzard Entertainment shall provide a pro rata refund calculated by deducting from the Discounted Fees an amount equal to the monthly fee that is in effect at as of the date you request termination of your Account divided by 30, and then multiply that amount times with the number of days that you have utilized the Service in the billing period that you purchased for the Discounted Fees.

6. You are entirely liable for all activities conducted through the Account, and are responsible for ensuring that any other person who uses your World of Warcraft account is aware of the terms of and complies with this Agreement. In the event that you become aware of or reasonably suspect any breach of security, including without limitation any loss, theft, or unauthorized disclosure of your Password, you will immediately notify Blizzard Entertainment by calling Blizzard

Entertainment's Technical Support number or by e-mailing wowtech@blizzard.com to report the actual or suspected breach of security.

XIV. Our Administration of World of Warcraft; Changes to the Terms of This Agreement. Blizzard Entertainment may, from time to time change, modify, add to, supplement or delete the terms and conditions of this Agreement. If necessary or useful to enhance the gaming experience, to protect the players against cheaters, or if Blizzard Entertainment provides new services Blizzard Entertainment may change or modify access policies, the availability of any World of Warcraft feature, hours of availability, content, data, software or equipment needed to access World of Warcraft, the amount of, or basis for determining, any fees or charges for World of Warcraft, and institute new fees or charges for World of Warcraft. Those changes will be effective upon prior notice as follows: Blizzard Entertainment will post notification of any such changes to World of Warcraft on the World of Warcraft website and will post any revised Terms of Use in this location, and may provide other notice which may include by email, postal mail, pop-up screen, or in-game notice. If any future changes to this Agreement are unacceptable to you or cause you to no longer be in compliance with this Agreement, you may cease to use your World of Warcraft account and terminate the Account in accordance with Section XVI herein. After expiry of one (1) month following the notification the continued use of World of Warcraft by you will mean you accept any and all such changes. With the notification, Blizzard Entertainment will remind you that your continued use after the expiration of one (1) month following the notification means that you accept any and all changes. The modified version of the Agreement shall enter into force at the beginning of the second month following the notification, unless Blizzard Entertainment has received a notification of termination from you by that time. Subject to the conditions set forth in this Section XIV, Blizzard Entertainment may change, modify, suspend, or discontinue any aspect of World of Warcraft at any time or impose limits on certain features or restrict your access to parts or all of World of Warcraft.

XV. Ownership. All title, ownership rights and intellectual property rights in and to World of Warcraft (including without limitation any user accounts, titles,

computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into World of Warcraft, transcripts of the chat rooms, character profile information, recordings of games played on World of Warcraft, and the World of Warcraft client and server software) are owned by Blizzard Entertainment or its licensors. World of Warcraft is protected by the copyright laws of the United States, international copyright treaties and conventions, and other laws. All rights are reserved. World of Warcraft may contain certain licensed materials, and Blizzard Entertainment's licensors may protect their rights in the event of any violation of this Agreement.

XVI. Termination. This Agreement is effective until the end of the term it is concluded for, unless terminated earlier by either party under the following conditions:

1. You are entitled to terminate this Agreement under the conditions set forth in Section XIV and XVI herein, as well as for personal bankruptcy, imprisonment, hospitalization for a period exceeding three (3) months, or for any other legitimate reason as may be specified by applicable law or relevant court decision, subject to prior written notice by mail to the following address: Blizzard Entertainment S.A.S. - Support Clients - TSA 60 001, 78143 Vélizy Villacoublay Cedex, France
2. Blizzard Entertainment reserves the right to terminate this Agreement without notice, if you fail to comply with any terms contained in these Terms of Use and/or the World of Warcraft End User License Agreement. In case of minor violations of these rules Blizzard will provide you with a prior warning of your non-compliance prior to terminating the Agreement. If, however, your behavior is utterly unacceptable, in particular if it endangers the gaming experience of other players, Blizzard is not required to provide you with such prior warning. A behavior is considered utterly unacceptable in case of a serious violation of the Terms of Use and/or the World of Warcraft End User License Agreement. Serious Violation would include a violation of Section III above. Also, note that in the event that Blizzard Entertainment terminates this Agreement for breach of these Terms of Use, any right to any and all payments you may have made for

pre-purchased game access to World of Warcraft are forfeit, and you agree and acknowledge that you are not entitled to any refund for any amounts which were pre-paid on your Account prior to any termination of this Agreement.

XVII. Acknowledgements. You hereby acknowledge that:

1. WHEN RUNNING, THE WORLD OF WARCRAFT CLIENT MAY MONITOR YOUR COMPUTER'S RANDOM ACCESS MEMORY (RAM) AND/OR CPU PROCESSES FOR UNAUTHORIZED THIRD PARTY PROGRAMS RUNNING CONCURRENTLY WITH WORLD OF WARCRAFT. AN "UNAUTHORIZED THIRD PARTY PROGRAM" AS USED HEREIN SHALL BE DEFINED AS ANY THIRD PARTY SOFTWARE, INCLUDING WITHOUT LIMITATION ANY "ADDON" OR "MOD," THAT IN BLIZZARD ENTERTAINMENT'S SOLE DETERMINATION:

(1) ENABLES OR FACILITATES CHEATING OF ANY TYPE;
(2) ALLOWS USERS TO MODIFY OR HACK THE WORLD OF WARCRAFT INTERFACE, ENVIRONMENT, AND/OR EXPERIENCE IN ANY WAY NOT EXPRESSLY AUTHORIZED BY BLIZZARD ENTERTAINMENT; OR
(3) INTERCEPTS, "MINES," OR OTHERWISE COLLECTS INFORMATION FROM OR THROUGH WORLD OF WARCRAFT.

(4) IN THE EVENT THAT WORLD OF WARCRAFT DETECTS AN UNAUTHORIZED THIRD PARTY PROGRAM, BLIZZARD ENTERTAINMENT MAY

(a) COMMUNICATE INFORMATION BACK TO BLIZZARD ENTERTAINMENT, INCLUDING WITHOUT LIMITATION YOUR ACCOUNT NAME, DETAILS ABOUT THE UNAUTHORIZED THIRD PARTY PROGRAM DETECTED, AND THE TIME AND DATE THE UNAUTHORIZED THIRD PARTY PROGRAM WAS DETECTED; AND/OR

(b) EXERCISE ANY OR ALL OF ITS RIGHTS UNDER SECTION VII OF THIS AGREEMENT, WITH OR WITHOUT PRIOR NOTICE TO THE USER.

2. You assume the cost of all telephone and Internet access charges along with all necessary equipment, servicing, repair or correction incurred in maintaining connectivity to World of Warcraft's servers.

3. Blizzard Entertainment has the right to obtain certain identification information about your computer and its operating system, including the identification

numbers of your hard drives, central processing unit, IP addresses and operating systems, for identification purposes without any further notice to you.

4. Blizzard Entertainment has the right to obtain "non-personal" data from your connection to World of Warcraft in order to make certain demographic assumptions regarding the users of World of Warcraft without any further notice to you.

5. In order to assist Blizzard Entertainment to police users who may use "hacks," or "cheats" to gain an advantage over other players, you acknowledge that Blizzard Entertainment shall have the right to obtain certain information from your computer and its component parts, including your computer's random access memory, video card, central processing unit, and storage devices. This information will only be used for the purpose of identifying "cheaters," and for no other reason.

6. BLIZZARD ENTERTAINMENT DOES NOT WARRANT THAT WORLD OF WARCRAFT WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT WORLD OF WARCRAFT OR THE SERVICE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. Blizzard Entertainment expressly notifies you that it is not possible to develop complex software products that are completely free of technical defects. The contractually-specified characteristics of the software and the service to be provided by Blizzard Entertainment does not require that the software be completely free of programming errors but merely that the software be free of programming errors that materially impair its use.

7. The use of any "user interface" other than the user interface that is included in the World of Warcraft Software ("Third Party User Interface") is not recommended by Blizzard Entertainment, and you hereby agree to indemnify and hold harmless Blizzard Entertainment from all claims, damages, and other losses which may arise from your use of a Third Party User Interface. At such time that Blizzard elects to post a list of approved Third-Party User Interfaces on its website, you agree that you will use only those Third-Party User Interfaces approved by Blizzard, and that you will use no other Third-Party User Interfaces in connection with World of Warcraft.

8. You may not be able to access World of Warcraft whenever you want, and there may be extended periods of time where you cannot access World of Warcraft.

9. Blizzard Entertainment shall not be held liable for any delay or failure to perform under any circumstances resulting from causes outside the reasonable control of Blizzard Entertainment; including without limitation any failure to perform hereunder due to unforeseen circumstances or cause beyond Blizzard Entertainment's control such as acts of God, war, terrorism, riots, embargoes, acts of civil or military authorities, fire, floods, accidents, strikes, or shortages of transportation facilities, fuel, energy, labor or materials.

10. World of Warcraft requires the creation and retention of electronic files, including without limitation player characters, accounts, statistics, user profiles, weapons, armor, quests, loot, etc. ("Game Data"), which are stored by Blizzard Entertainment (for the avoidance of doubt, data concerning the players' use of the Voice Client is not stored). Keeping Game Data safe is a priority of Blizzard Entertainment. Blizzard Entertainment will use reasonable efforts to restore the Game Data, unless you negligently or intentionally caused the loss of the Game Data.

11. If and as far as necessary to operate the Service in accordance with the terms contained herein, in particular to keep a balanced and enjoyable gaming experience for all players Blizzard Entertainment reserves the right to modify or delete Game Data;

12. You are entirely liable for all activities conducted through the Account for which you are responsible, and for ensuring that any other person who uses your World of Warcraft account is aware of the terms of and complies with this Agreement. In the event that you become aware of or reasonably suspect any breach of security, including without limitation any loss, theft, or unauthorized disclosure of your Password, you will immediately notify Blizzard Entertainment by calling Blizzard Entertainment's Billing and Account Services number or by e-mailing wowtech@blizzard.com to report the actual or suspected breach of security.

XVIII. Limitation of Liability. As regards the online service provided by Blizzard Entertainment Europe, for damages or compensation of unavailing expenditures,

whatever the legal basis including tort may be, the following rules apply: Blizzard Entertainment Europe may only be liable in cases of where it is adjudged that Blizzard: (i) engaged in intentionally damaging conduct; (ii) was grossly negligent; and/or (iii) is in breach of the requirements of the Product Liability Act according to statutory law. If you acquired the CD-ROMs containing the Game Client in Germany or Austria or if you access the WOW servers from the territory of Germany or Austria or in such other countries where local laws would apply, Blizzard Entertainment Europe may also be liable in case of death or personal or physical injury according to statutory law where Blizzard is adjudged to be responsible for such death or personal or physical injury. Blizzard Entertainment Europe shall not be liable for slight negligence. However, if you acquired the CD-ROMs containing the Game Client in Germany or Austria or if you access the WOW servers from the territory of Germany or Austria, Blizzard Entertainment Europe may also be liable for slight negligence if Blizzard Entertainment Europe is adjudged to be in breach of a "material" contractual obligation hereunder. "Material" in this sense are obligations which are necessary for the fulfillment of the Agreement, the breach of which would jeopardize the purpose of this Agreement and the compliance with which you may generally trust in. In such cases, Blizzard Entertainment Europe's liability is limited to typical and foreseeable damages. In other cases Blizzard Entertainment Europe shall not be liable for slight negligence.

XIX. Miscellaneous. This Agreement shall be governed by and construed in accordance with the laws applicable in your country of residence. Those who choose to access World of Warcraft through the Service from other locations do so on their own initiative and are responsible for compliance with local laws, if and to the extent local laws are applicable. World of Warcraft, the Service and all related software is further subject to applicable export controls. The software utilized by World of Warcraft and/or the Service may not be downloaded or otherwise exported or re-exported:

1. Into (or to a national or resident of) Cuba, Iraq, Libya, North Korea, Iran, Syria or any other country to which the U.S. has embargoed goods; or
2. to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Deny Orders.

By using the Service, you represent and warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list. If any provision of this Agreement shall be unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from this Agreement and shall not affect the validity and enforceability of any remaining provisions. This Terms of Use Agreement is the complete and exclusive statement of the agreement between you and Blizzard Entertainment concerning the Service, and this Agreement supersedes any prior or contemporaneous agreement, either oral or written, and any other communications with regard thereto between you and Blizzard Entertainment; provided, however that this Agreement is in addition to, and does not replace or supplant, the End User License Agreement that accompanied the World of Warcraft software. This Agreement may only be modified as set forth in Section XIV. Also, note that in the event that Blizzard Entertainment is contacted by governmental authorities and/or parties seeking information or legal redress against you for a violation committed by you or alleged to have been committed by you involving your use of World of Warcraft, Blizzard Entertainment will cooperate fully with all governmental authorities ensuring an adequate level of protection as required under Article 25 of European Directive 95/46/EC, and any lawful orders of the court with regard to the release of information that relates to you and your use of World of Warcraft, including but not limited to user Internet Protocol (IP) addresses, associated personal information and all other user information on file. The section headings used herein are for reference only and shall not be read to have any legal effect.

I hereby agree that my use of the World of Warcraft service is an acknowledgment of my agreement to be bound by the terms and conditions of this Agreement.

APPENDIX IV - Second Life – Terms of Service

SECOND LIFE – TERMS OF SERVICE

Welcome to Second Life! The following agreement (this "Agreement" or the "Terms of Service") describes the terms on which Linden Research, Inc. ("Linden Lab") offers you access to its services. This offer is conditioned on your agreement to all of the terms and conditions contained in the Terms of Service, including your compliance with the policies and terms linked to (by way of the provided URLs) from this Agreement. By using Second Life, you agree to these Terms of Service. If you do not so agree, you should decline this agreement, in which case you are prohibited from accessing or using Second Life. Linden Lab may amend this Agreement at any time in its sole discretion, effective upon posting the amended Agreement at the domain or subdomains of <http://secondlife.com> where the prior version of this Agreement was posted, or by communicating these changes through any written contact method we have established with you.

THE SERVICES AND CONTENT OF SECOND LIFE

1.1 Basic description of the service: Second Life, a multi-user environment, including software and websites.

"Second Life" is the multi-user online service offered by Linden Lab, including the software provided to you by Linden Lab (collectively, the "Linden Software") and the online environments that support the service, including without limitation: the server computation, software access, messaging and protocols that simulate the Second Life environment (the "Servers"), the software that is provided by Linden Lab and installed on the local computer or other device you use to access the Servers and thereby view or otherwise access the Second Life environment (the "Viewer"), application program interfaces provided by Linden Lab to you for use with Second Life (the "APIs"), and access to the websites and services available from the domain and subdomains of <http://secondlife.com> (the "Websites"). The Servers, Viewer, APIs, Websites and any other Linden Software collectively constitute the "Service" as used in this Agreement.

1.2 Linden Lab is a service provider, which means, among other things, that Linden Lab does not control various aspects of the Service.

You acknowledge that Linden Lab is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. Linden Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service.

1.3 Content available in the Service may be provided by users of the Service, rather than by Linden Lab. Linden Lab and other parties have rights in their respective content, which you agree to respect.

You acknowledge that: (i) by using the Service you may have access to graphics, sound effects, music, video, audio, computer programs, animation, text and other creative output (collectively, "Content"), and (ii) Content may be provided under license by independent content providers, including contributions from other users of the Service (all such independent content providers, "Content Providers"). Linden Lab does not pre-screen Content.

You acknowledge that Linden Lab and other Content Providers have rights in their respective Content under copyright and other applicable laws and treaty provisions, and that except as described in this Agreement, such rights are not licensed or otherwise transferred by mere use of the Service. You accept full responsibility and liability for your use of any Content in violation of any such rights. You agree that your creation of Content is not in any way based upon any expectation of compensation from Linden Lab.

Certain of the fonts in the Meta family of copyrighted typefaces are used in Second Life under license from FSI FontShop International. You acknowledge that you may not copy any Meta font that is included in the Viewer and that you may use any such Meta font solely to the extent necessary to use the Linden Software in Second Life and that you will not use such Meta fonts for any other purpose whatsoever.

1.4 Second Life "currency" is a limited license right available for purchase or free distribution at Linden Lab's discretion, and is not redeemable for monetary value from Linden Lab.

You acknowledge that the Service presently includes a component of in-world fictional currency ("Currency" or "Linden Dollars" or "L\$"), which constitutes a limited license right to use a feature of our product when, as, and if allowed by Linden Lab. Linden Lab may charge fees for the right to use Linden Dollars, or may distribute Linden Dollars without charge, in its sole discretion. Regardless of terminology used, Linden Dollars represent a limited license right governed solely under the terms of this Agreement, and are not redeemable for any sum of money or monetary value from Linden Lab at any time. You agree that Linden Lab has the absolute right to manage, regulate, control, modify and/or eliminate such Currency as it sees fit in its sole discretion, in any general or specific case, and that Linden Lab will have no liability to you based on its exercise of such right.

1.5 Second Life offers an exchange, called LindeX, for the trading of Linden Dollars, which uses the terms "buy" and "sell" to indicate the transfer of license rights to use Linden Dollars. Use and regulation of LindeX is at Linden Lab's sole discretion.

The Service currently includes a component called "Currency Exchange" or "LindeX," which refers to an aspect of the Service through which Linden Lab administers transactions among users for the purchase and sale of the licensed right to use Currency. Notwithstanding any other language or context to the contrary, as used in this Agreement and throughout the Service in the context of Currency transfer: (a) the term "sell" means "to transfer for consideration to another user the licensed right to use Currency in accordance with the Terms of Service," (b) the term "buy" means "to receive for consideration from another user the licensed right to use Currency in accordance with the Terms of Service," (c) the terms "buyer," "seller," "sale" and "purchase" and similar terms have corresponding meanings to the root terms "buy" and "sell," (d) "sell order" and similar terms mean a request from a user to Linden Lab to list Currency for sale on the Currency Exchange at a requested sale price, and (e) "buy order" and similar terms mean a request from a user for Linden Lab to match open sale listings with a requested purchase price and facilitate completion of the sale of Currency.

You agree and acknowledge that Linden Lab may deny any sell order or buy order individually or with respect to general volume or price limitations set by

Linden Lab for any reason. Linden Lab may limit sellers or buyers to any group of users at any time. Linden Lab may halt, suspend, discontinue, or reverse any Currency Exchange transaction (whether proposed, pending or past) in cases of actual or suspected fraud, violations of other laws or regulations, or deliberate disruptions to or interference with the Service.

1.6 Second Life is subject to scheduled and unscheduled service interruptions. All aspects of the Service are subject to change or elimination at Linden Lab's sole discretion.

Linden Lab reserves the right to interrupt the Service with or without prior notice for any reason or no reason. You agree that Linden Lab will not be liable for any interruption of the Service, delay or failure to perform, and you understand that except as otherwise specifically provided in Linden Lab's billing policies posted **here**, you shall not be entitled to any refunds of fees for interruption of service or failure to perform. Linden Lab has the right at any time for any reason or no reason to change and/or eliminate any aspect(s) of the Service as it sees fit in its sole discretion.

1.7 In the event you choose to use paid aspects of the Service, you agree to the posted pricing and billing policies on the Websites.

Certain aspects of the Service are provided for a fee or other charge. These fees and charges are described on the Websites, and in the event you elect to use paid aspects of the Service, you agree to the pricing, payment and billing policies applicable to such fees and charges, posted or linked at <http://secondlife.com/corporate/billing.php>. Linden Lab may add new services for additional fees and charges, or proactively amend fees and charges for existing services, at any time in its sole discretion.

ACCOUNT REGISTRATION AND REQUIREMENTS

2.1 You must establish an account to use Second Life, using true and accurate registration information.

You must establish an account with Linden Lab (your "Account") to use the Service, except for those portions of the Websites to which Linden Lab allows access without registration. You agree to provide true, accurate, current and complete information about yourself as prompted by the registration form ("Registration Data") and maintain and promptly update the Registration Data to keep it true, accurate, current and complete. You may establish an Account with

Registration Data provided to Linden Lab by a third party through the use of an API, in which case you may have a separate, additional account relationship with such third party. You authorize Linden Lab, directly or through third parties, to make any inquiries we consider necessary to validate your Registration Data. Linden Lab reserves all rights to vigorously pursue legal action against all persons who misrepresent personal information or are otherwise untruthful about their identity, and to suspend or cancel Accounts registered with inaccurate or incomplete information. Notwithstanding the foregoing, you acknowledge that Linden Lab cannot guarantee the accuracy of any information submitted by any user of the Service, nor any identity information about any user.

2.2 You must be 13 years of age or older to access Second Life; minors over the age of 13 are only permitted in a separate area, which adults are generally prohibited from using. Linden Lab cannot absolutely control whether minors or adults gain unauthorized access to the Service.

You must be at least 13 years of age to participate in the Service. Users under the age of 18 are prohibited from accessing the Service other than in the area designated by Linden Lab for use by users from 13 through 17 years of age (the "Teen Area"). Users age 18 and older are prohibited from accessing the Teen Area. Any user age 18 and older who gains unauthorized access to the Teen Area is in breach of this Agreement and may face immediate termination of any or all Accounts held by such user for any area of the Service. If you reside in a jurisdiction where the age of majority is greater than 18 years old, you are prohibited from accessing the Service until you have reached such age of majority.

By accepting this agreement in connection with an Account outside the Teen Area, you represent that you are an adult 18 years of age or older. By accepting this agreement in connection with an Account for use in the Teen Area, you represent that (i) you are at least 13 years of age and less than 18 years of age; (ii) you have read and accept this Agreement; (iii) your parent or legal guardian has consented to you having an Account for use of the Teen Area and participating in the Service, and to providing your personal information for your Account; and (iv) your parent or legal guardian has read and accepted this Agreement.

Linden Lab cannot absolutely control whether minors gain access to the Service other than the Teen Area, and makes no representation that users outside the Teen Area are not minors. Linden Lab cannot absolutely control whether adults gain access to the Teen Area of the Service, and makes no representation that users inside the Teen Area are not adults. Adult employees, contractors and partners of Linden Lab regularly conduct their work in the Teen Area. Linden Lab cannot ensure that other users or any non-employee of Linden Lab will not provide Content or access to Content that parents or guardians may find inappropriate or that any user may find objectionable.

2.3 You need to use an account name in Second Life which is not misleading, offensive or infringing. You must select and keep secure your account password. You must choose an account name to identify yourself to Linden Lab staff (your "Account Name"), which will also serve as the name for the graphical representation of your body in the Service (such representation, an "Avatar"). You may not select as your Account Name the name of another person to the extent that could cause deception or confusion; a name which violates any trademark right, copyright, or other proprietary right; a name which may mislead other users to believe you to be an employee of Linden Lab; or a name which Linden Lab deems in its discretion to be vulgar or otherwise offensive. Linden Lab reserves the right to delete or change any Account Name for any reason or no reason. You are fully responsible for all activities conducted through your Account or under your Account Name.

At the time your Account is opened, you must select a password. You are responsible for maintaining the confidentiality of your password and are responsible for any harm resulting from your disclosure, or authorizing the disclosure of, your password or from use by any person of your password to gain access to your Account or Account Name. At no time should you respond to an online request for a password other than in connection with the log-on process to the Service. Your disclosure of your password to any other person is entirely at your own risk.

2.4 Account registrations are limited per unique person. Transfers of accounts are generally not permitted.

Linden Lab may require you to submit an indication of unique identity in the account registration process; e.g. credit card or other payment information, or

SMS message code or other information requested by Linden Lab. When an account is created, the information given for the account must match the address, phone number, and/or other unique identifier information associated with the identification method. You may register multiple accounts per identification method only at Linden Lab's sole discretion. A single account may be used by a single legal entity at Linden Lab's sole discretion and subject to Linden Lab's requirements. Additional accounts beyond the first account per unique user may be subject to fees upon account creation. You may not transfer your Account to any third party without the prior written consent of Linden Lab; notwithstanding the foregoing, Linden Lab will not unreasonably withhold consent to the transfer of an Account in good standing by operation of valid written will to a single natural person, provided that proper notice and documentation are delivered as requested by Linden Lab.

2.5 You may cancel your account at any time; however, there are no refunds for cancellation.

Accounts may be cancelled by you at any time. Upon your election to cancel, your account will be cancelled within 24 hours, but if you have paid for a period in advance you will be allowed to use the remaining time according to these Terms of Service unless your account or this Agreement is suspended or terminated based on our belief that you have violated this Agreement. There will be no refunds for any unused time on a subscription or any prepaid fees for any portion of the Service.

2.6 Linden Lab may suspend or terminate your account at any time, without refund or obligation to you.

Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.

2.7 Accounts affiliated with delinquent accounts are subject to remedial actions related to the delinquent account.

In the event an Account is suspended or terminated for your breach of this Agreement or your payment delinquency (in each case as determined in Linden Lab's sole discretion), Linden Lab may suspend or terminate the Account associated with such breach and any or all other Accounts held by you or your affiliates, and your breach shall be deemed to apply to all such Accounts.

2.8 You are responsible for your own Internet access.

Linden Lab does not provide Internet access, and you are responsible for all fees associated with your Internet connection.

LICENSE TERMS AND OTHER INTELLECTUAL PROPERTY TERMS

3.1 You have a nonexclusive, limited, revocable license to use Second Life while you are in compliance with the terms of service.

Subject to the terms of this Agreement, Linden Lab grants to you a non-exclusive, limited, fully revocable license to use the Linden Software and the rest of the Service during the time you are in full compliance with the Terms of Service. Additional terms may apply to use of the APIs or other separate elements of the Service (i.e. elements that are not required to use the Viewer or the Servers); these terms are available where such separate elements are available for download from the Websites. Nothing in this Agreement, or on Linden Lab's websites, shall be construed as granting you any other rights or privileges of any kind with respect to the Service or to any Content. You acknowledge that your participation in the Service, including your creation or uploading of Content in the Service, does not make you a Linden Lab employee and that you do not expect to be, and will not be, compensated by Linden Lab for such activities.

3.2 You retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and to other users of Second Life.

Users of the Service can create Content on Linden Lab's servers in various forms. Linden Lab acknowledges and agrees that, subject to the terms and conditions of this Agreement, you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service, to the extent you have such rights under applicable law.

Notwithstanding the foregoing, you understand and agree that by submitting your Content to any area of the service, you automatically grant (and you represent and warrant that you have the right to grant) to Linden Lab: (a) a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and license to (i) use, reproduce and distribute your Content within the Service as permitted by you through your interactions on the Service, and (ii) use and reproduce (and to authorize third parties to use and reproduce) any of your Content in any or all media for marketing and/or promotional purposes in connection with the Service, provided that in the event that your Content appears publicly in material under the control of Linden Lab, and you provide written notice to Linden Lab of your desire to discontinue the distribution of such Content in such material (with sufficient specificity to allow Linden Lab, in its sole discretion, to identify the relevant Content and materials), Linden Lab will make commercially reasonable efforts to cease its distribution of such Content following the receipt of such notice, although Linden Lab cannot provide any assurances regarding materials produced or distributed prior to the receipt of such notice; (b) the perpetual and irrevocable right to delete any or all of your Content from Linden Lab's servers and from the Service, whether intentionally or unintentionally, and for any reason or no reason, without any liability of any kind to you or any other party; and (c) a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive right and license to copy, analyze and use any of your Content as Linden Lab may deem necessary or desirable for purposes of debugging, testing and/or providing support services in connection with the Service. Further, you agree to grant to Linden Lab a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive, sublicensable right and license to exercise the copyright, publicity, and database rights you have in your account information, including any data or other information generated by your account activity, in any media now known or not currently known, in accordance with our privacy policy as set forth below, including the incorporation by reference of terms posted **here**.

You also understand and agree that by submitting your Content to any area of the Service, you automatically grant (or you warrant that the owner of such Content has expressly granted) to Linden Lab and to all other users of the Service a non-exclusive, worldwide, fully paid-up, transferable, irrevocable,

royalty-free and perpetual License, under any and all patent rights you may have or obtain with respect to your Content, to use your Content for all purposes within the Service. You further agree that you will not make any claims against Linden Lab or against other users of the Service based on any allegations that any activities by either of the foregoing within the Service infringe your (or anyone else's) patent rights.

You further understand and agree that: (i) you are solely responsible for understanding all copyright, patent, trademark, trade secret and other intellectual property or other laws that may apply to your Content hereunder; (ii) you are solely responsible for, and Linden Lab will have no liability in connection with, the legal consequences of any actions or failures to act on your part while using the Service, including without limitation any legal consequences relating to your intellectual property rights; and (iii) Linden Lab's acknowledgement hereunder of your intellectual property rights in your Content does not constitute a legal opinion or legal advice, but is intended solely as an expression of Linden Lab's intention not to require users of the Service to forego certain intellectual property rights with respect to Content they create using the Service, subject to the terms of this Agreement.

3.3 Linden Lab retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own. You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.

3.4 Linden Lab licenses its textures and environmental content to you for your use in creating content in-world.

During any period in which your Account is active and in good standing, Linden Lab gives you permission to create still and/or moving media, for use only within the virtual world environment of the Service ("in-world"), which use or include the "textures" and/or "environmental content" that are both (a) created or owned by Linden Lab and (b) displayed by Linden Lab in-world.

CONDUCT BY USERS OF SECOND LIFE

4.1 You agree to abide by certain rules of conduct, including the Community Standards and other rules prohibiting illegal and other practices that Linden Lab deems harmful.

You agree to read and comply with the Community Standards posted on the Websites, (for users 18 years of age and older, at <http://secondlife.com/corporate/cs.php>; and for users of the Teen Area, at <http://teen.secondlife.com/footer/cs>

In addition to abiding at all times by the Community Standards, you agree that you shall not: (i) take any action or upload, post, e-mail or otherwise transmit Content that infringes or violates any third party rights; (ii) impersonate any person or entity without their consent, including, but not limited to, a Linden Lab employee, or falsely state or otherwise misrepresent your affiliation with a person or entity; (iii) take any action or upload, post, e-mail or otherwise transmit Content that violates any law or regulation; (iv) take any action or upload, post, e-mail or otherwise transmit Content as determined by Linden Lab at its sole discretion that is harmful, threatening, abusive, harassing, causes tort, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable; (v) take any actions or upload, post, e-mail or otherwise transmit Content that contains any viruses, Trojan horses, worms, spyware, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information; (vi) take any action or upload, post, email or otherwise transmit any Content that would violate any right or duty under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under nondisclosure agreements); (vii) upload, post, email or otherwise transmit any unsolicited or unauthorized advertising, or promotional materials, that are in the nature of "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation that Linden Lab considers in its sole discretion to be of such nature; (viii) interfere with or disrupt the Service or servers or networks connected to the Service, or disobey any requirements, procedures, policies or regulations of networks connected to the Service; (ix) attempt to gain access to any other

user's Account or password; or (x) "stalk", abuse or attempt to abuse, or otherwise harass another user. Any violation by you of the terms of the foregoing sentence may result in immediate and permanent suspension or cancellation of your Account. You agree that Linden Lab may take whatever steps it deems necessary to abridge, or prevent behavior of any sort on the Service in its sole discretion, without notice to you.

4.2 You agree to use Second Life as provided, without unauthorized software or other means of access or use. You will not make unauthorized works from or conduct unauthorized distribution of the Linden Software.

Linden Lab has designed the Service to be experienced only as offered by Linden Lab at the Websites or partner websites. Linden Lab is not responsible for any aspect of the Service that is accessed or experienced using software or other means that are not provided by Linden Lab. You agree not to create or provide any server emulators or other software or other means that provide access to or use of the Servers without the express written authorization of Linden Lab. Notwithstanding the foregoing, you may use and create software that provides access to the Servers for substantially similar function (or subset thereof) as the Viewer; provided that such software is not used for and does not enable any violation of these Terms of Service. Linden Lab is not obligated to allow access to the Servers by any software that is not provided by Linden Lab, and you agree to cease using, creating, distributing or providing any such software at the request of Linden Lab. You are prohibited from taking any action that imposes an unreasonable or disproportionately large load on Linden Lab's infrastructure.

You may not charge any third party for using the Linden Software to access and/or use the Service, and you may not modify, adapt, reverse engineer (except as otherwise permitted by applicable law), decompile or attempt to discover the source code of the Linden Software, or create any derivative works of the Linden Software or the Service, or otherwise use the Linden Software except as expressly provided in this Agreement. You may not copy or distribute any of the written materials associated with the Service. Notwithstanding the foregoing, you may copy the Viewer that Linden Lab provides to you, for backup purposes and may give copies of the Viewer to others free of charge. Further, you may use and modify the source code for the Viewer as permitted by any

open source license agreement under which Linden Lab distributes such Viewer source code.

4.3 You will comply with the processes of the Digital Millennium Copyright Act regarding copyright infringement claims covered under such Act.

Our policy is to respond to notices of alleged infringement that comply with the Digital Millennium Copyright Act ("DMCA"). Copyright-infringing materials found within the world of Second Life can be identified and removed via Linden Lab's DMCA compliance process listed at <http://secondlife.com/corporate/dmca.php>, and you agree to comply with such process in the event you are involved in any claim of copyright infringement to which the DMCA may be applicable.

4.4 Without a written license agreement, Linden Lab does not authorize you to make any use of its trademarks.

You agree to review and adhere to the guidelines on using "Second Life," "SL," "Linden," the Eye-in-Hand logo, and Linden Lab's other trademarks, service marks, trade names, logos, domain names, taglines, and trade dress (collectively, the "Linden Lab Marks") at <http://secondlife.com/corporate/brand> and its subpages, which may be updated from time to time. Except for the licenses expressly granted there or in a separate written agreement signed by you and Linden Lab, Linden Lab reserves all right, title, and interest in the Linden Lab Marks and does not authorize you to display or use any Linden Lab Mark in any manner whatsoever. If you have a written license agreement with Linden Lab to use a Linden Lab Mark, your use shall comply strictly with that agreement's terms and conditions and use guidelines.

RELEASES, DISCLAIMERS OF WARRANTY, LIMITATION OF LIABILITY, AND INDEMNIFICATION

5.1 You release Linden Lab from your claims relating to other users of Second Life. Linden Lab has the right but not the obligation to resolve disputes between users of Second Life.

As a condition of access to the Service, you release Linden Lab (and Linden Lab's shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with any dispute you have or claim to have with one or

more users of the Service. You further understand and agree that: (a) Linden Lab will have the right but not the obligation to resolve disputes between users relating to the Service, and Linden Lab's resolution of any particular dispute does not create an obligation to resolve any other dispute; (b) to the extent Linden Lab elects to resolve such disputes, it will do so in good faith based solely on the general rules and standards of the Service and will not make judgments regarding legal issues or claims; (c) Linden Lab's resolution of such disputes will be final with respect to the virtual world of the Service but will have no bearing on any real-world legal disputes in which users of the Service may become involved; and (d) you hereby release Linden Lab (and Linden Lab's shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with Linden Lab's resolution of disputes relating to the Service.

5.2 Other service or product providers may form contractual relationships with you. Linden Lab is not a party to your relationship with such other providers.

Subject to the terms of this Agreement, you may view or use the environment simulated by the Servers through viewer software that is not the Viewer provided by Linden Lab, and you may register for use of Second Life through websites that are not Websites owned and operated by Second Life. Linden Lab is not responsible for any software used with or in connection with Second Life other than Linden Software developed by Linden Lab. Linden Lab does not control and is not responsible for any information you provide to parties other than Linden Lab. Linden Lab is not a party to your agreement with any party that provides software, products or services to you in connection with Second Life.

5.3 All data on Linden Lab's servers are subject to deletion, alteration or transfer. When using the Service, you may accumulate Content, Currency, objects, items, scripts, equipment, or other value or status indicators that reside as data on Linden Lab's servers. THESE DATA, AND ANY OTHER DATA, ACCOUNT HISTORY AND ACCOUNT NAMES RESIDING ON LINDEN LAB'S SERVERS, MAY BE DELETED, ALTERED, MOVED OR TRANSFERRED AT ANY TIME FOR ANY REASON IN LINDEN LAB'S SOLE DISCRETION.

YOU ACKNOWLEDGE THAT, NOTWITHSTANDING ANY COPYRIGHT OR OTHER RIGHTS YOU MAY HAVE WITH RESPECT TO ITEMS YOU CREATE USING THE SERVICE, AND NOTWITHSTANDING ANY VALUE ATTRIBUTED TO SUCH CONTENT OR OTHER DATA BY YOU OR ANY THIRD PARTY, LINDEN LAB DOES NOT PROVIDE OR GUARANTEE, AND EXPRESSLY DISCLAIMS (SUBJECT TO ANY UNDERLYING INTELLECTUAL PROPERTY RIGHTS IN THE CONTENT), ANY VALUE, CASH OR OTHERWISE, ATTRIBUTED TO ANY DATA RESIDING ON LINDEN LAB'S SERVERS.

YOU UNDERSTAND AND AGREE THAT LINDEN LAB HAS THE RIGHT, BUT NOT THE OBLIGATION, TO REMOVE ANY CONTENT (INCLUDING YOUR CONTENT) IN WHOLE OR IN PART AT ANY TIME FOR ANY REASON OR NO REASON, WITH OR WITHOUT NOTICE AND WITH NO LIABILITY OF ANY KIND.

5.4 Linden Lab provides the Service on an "as is" basis, without express or implied warranties.

LINDEN LAB PROVIDES THE SERVICE, THE LINDEN SOFTWARE, YOUR ACCOUNT AND ALL OTHER SERVICES STRICTLY ON AN "AS IS" BASIS, PROVIDED AT YOUR OWN RISK, AND HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES OR CONDITIONS OF ANY KIND, WRITTEN OR ORAL, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF TITLE, NONINFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Without limiting the foregoing, Linden Lab does not ensure continuous, error-free, secure or virus-free operation of the Service, the Linden Software or your Account, and you understand that you shall not be entitled to refunds for fees based on Linden Lab's failure to provide any of the foregoing other than as explicitly provided in this Agreement. Some jurisdictions do not allow the disclaimer of implied warranties, and to that extent, the foregoing disclaimer may not apply to you.

5.5 Linden Lab's liability to you is expressly limited, to the extent allowable under applicable law.

IN NO EVENT SHALL LINDEN LAB OR ANY OF ITS SHAREHOLDERS, PARTNERS, AFFILIATES, DIRECTORS, OFFICERS, SUBSIDIARIES, EMPLOYEES, AGENTS, SUPPLIERS, LICENSEES OR DISTRIBUTORS BE

LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION ANY DAMAGES FOR LOST PROFITS, ARISING (WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE) OUT OF OR IN CONNECTION WITH THE SERVICE (INCLUDING ITS MODIFICATION OR TERMINATION), THE LINDEN SOFTWARE, YOUR ACCOUNT (INCLUDING ITS TERMINATION OR SUSPENSION) OR THIS AGREEMENT, WHETHER OR NOT LINDEN LAB MAY HAVE BEEN ADVISED THAT ANY SUCH DAMAGES MIGHT OR COULD OCCUR AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. IN ADDITION, IN NO EVENT WILL LINDEN LAB'S CUMULATIVE LIABILITY TO YOU FOR DIRECT DAMAGES OF ANY KIND OR NATURE EXCEED FIFTY DOLLARS (U.S. \$50.00). Some jurisdictions do not allow the foregoing limitations of liability, so to the extent that any such limitation is impermissible, such limitation may not apply to you. You agree that Linden Lab cannot be held responsible or liable for anything that occurs or results from accessing or subscribing to the Service.

5.6 You will indemnify Linden lab from claims arising from breach of this Agreement by you, from your use of Second Life, from loss of Content due to your actions, or from alleged infringement by you.

At Linden Lab's request, you agree to defend, indemnify and hold harmless Linden Lab, its shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors, Content Providers, and other users of the Service, from all damages, liabilities, claims and expenses, including without limitation attorneys' fees and costs, arising from any breach of this Agreement by you, or from your use of the Service. You agree to defend, indemnify and hold harmless Linden Lab, its shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, and distributors, from all damages, liabilities, claims and expenses, including without limitation attorneys' fees and costs, arising from: (a) any action or inaction by you in connection with the deletion, alteration, transfer or other loss of Content, status or other data held in connection with your Account, and (b) any claims by third parties that your activity or Content in the Service infringes upon, violates or misappropriates any of their intellectual property or proprietary rights.

PRIVACY POLICY

6.1 Linden Lab uses your personal information to operate and improve Second Life, and will not give your personal information to third parties except to operate, improve and protect the Service.

The personal information you provide to us during registration is used for Linden Lab's internal purposes only. Linden Lab uses the information it collects to learn what you like and to improve the Service. Linden Lab will not give any of your personal information to any third party without your express approval except: as reasonably necessary to fulfill your service request, to third-party fulfillment houses, customer support, billing and credit verification services, and the like; to comply with tax and other applicable law; as otherwise expressly permitted by this Agreement or as otherwise authorized by you; to law enforcement or other appropriate third parties in connection with criminal investigations and other investigations of fraud; or as otherwise necessary to protect Linden Lab, its agents and other users of the Service. Linden Lab does not guarantee the security of any of your private transmissions against unauthorized or unlawful interception or access by third parties. Linden Lab can (and you authorize Linden Lab to) disclose any information about you to private entities, law enforcement agencies or government officials, as Linden Lab, in its sole discretion, believes necessary or appropriate to investigate or resolve possible problems or inquiries, or as otherwise required by law. If you request any technical support, you consent to Linden Lab's remote accessing and review of the computer onto which you load Linden Software for purposes of support and debugging. You agree that Linden Lab may communicate with you via email and any similar technology for any purpose relating to the Service, the Linden Software and any services or software which may in the future be provided by Linden Lab or on Linden Lab's behalf. You agree to read the disclosures and be bound by the terms of the additional Privacy Policy information posted on our **website**.

6.2 Linden Lab may observe and record your interaction within the Service, and may share aggregated and other general information (not including your personal information) with third parties.

You acknowledge and agree that Linden Lab, in its sole discretion, may track, record, observe or follow any and all of your interactions within the Service.

Linden Lab may share general, demographic, or aggregated information with third parties about our user base and Service usage, but that information will not include or be linked to any personal information without your consent.

DISPUTE RESOLUTION

If a dispute arises between you and Linden Lab, our goal is to provide you with a neutral and cost-effective means of resolving the dispute quickly. Accordingly, you and Linden Lab agree to resolve any claim or controversy at law or in equity that arises from or relates to this Agreement or our Service (a "Claim") in accordance with one of the subsections below.

7.1 Governing Law.

This Agreement and the relationship between you and Linden Lab shall be governed in all respects by the laws of the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods.

7.2 Forum for Disputes.

You and Linden Lab agree to submit to the exclusive jurisdiction and venue of the courts located in the City and County of San Francisco, California, except as provided in Subsection 7.3 below regarding optional arbitration. Notwithstanding this, you agree that Linden Lab shall still be allowed to apply for injunctive or other equitable relief in any court of competent jurisdiction.

7.3 Optional Arbitration.

For any Claim, excluding Claims for injunctive or other equitable relief, where the total amount of the award sought is less than ten thousand U.S. Dollars (\$10,000.00 USD), the party requesting relief may elect to resolve the Claim in a cost-effective manner through binding non-appearance-based arbitration. A party electing arbitration shall initiate it through an established alternative dispute resolution ("ADR") provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: (a) the arbitration shall be conducted, at the option of the party seeking relief, by telephone, online, or based solely on written submissions; (b) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (c) any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

7.4 Improperly Filed Claims.

All Claims you bring against Linden Lab must be resolved in accordance with this Dispute Resolution Section. All Claims filed or brought contrary to this Dispute Resolution Section shall be considered improperly filed. Should you file a Claim contrary to this Dispute Resolution Section, Linden Lab may recover attorneys' fees and costs up to one thousand U.S. Dollars (\$1,000.00 USD), provided that Linden Lab has notified you in writing of the improperly filed Claim, and you have failed to promptly withdraw the Claim.

GENERAL PROVISIONS

The Service is controlled and operated by Linden Lab from its offices within the State of California, United States of America. Linden Lab makes no representation that any aspect of the Service is appropriate or available for use in jurisdictions outside of the United States. Those who choose to access the Service from other locations are responsible for compliance with applicable local laws. The Linden Software is subject to all applicable export restrictions. You must comply with all export and import laws and restrictions and regulations of any United States or foreign agency or authority relating to the Linden Software and its use.

Linden Lab's failure to act with respect to a breach by you or others does not waive Linden Lab's right to act with respect to that breach or subsequent or similar breaches. No consent or waiver by Linden Lab under this Agreement shall be deemed effective unless delivered in a writing signed by a duly appointed officer of Linden Lab. All or any of Linden Lab's rights and obligations under this Agreement may be assigned to a subsequent owner or operator of the Service in a merger, acquisition or sale of all or substantially all of Linden Lab's assets. You may not assign or transfer this Agreement or any or all of your rights hereunder without the prior written consent of Linden Lab, and any attempt to do so is void. Notwithstanding anything else in this Agreement, no default, delay or failure to perform on the part of Linden Lab shall be considered a breach of this Agreement if such default, delay or failure to perform is shown to be due to causes beyond the reasonable control of Linden Lab.

This Agreement sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof. The section headings used herein, including descriptive summary sentences at the start of each section, are for convenience only and shall not affect the interpretation of this

Agreement. If any provision of this Agreement shall be held by a court of competent jurisdiction to be unlawful, void, or for any reason unenforceable, then in such jurisdiction that provision shall be deemed severable from these terms and shall not affect the validity and enforceability of the remaining provisions.

Linden Lab may give notice to you by means of a general notice on our **website**, through the Second Life Viewer at or after log-in to your Account, by electronic mail to your e-mail address in our records for your Account, or by written communication sent by first class mail, postage prepaid, or overnight courier to your address on record for your Account. All notices given by you or required under this Agreement shall be faxed to Linden Lab Legal Department, Attn: Dispute Resolution, at: (415) 243-9045; or mailed to us at: Linden Lab Legal Department, Attn: Dispute Resolution, 945 Battery Street, San Francisco, CA 94111.

APPENDIX VI – Correspondence with Blizzard

-----Original Message-----

To: wowaccountadmin@blizzard.com

Sent: 17/8/2007 3:10:30 PM

Subject: Account almost lost

Hi there.

I used my 10 days trial account and then I bought the game in order to upgrade my account.

To my horror the game wouldn't accept the authentication key: my copy is for the EU edition while the WoW.com website had me on US servers (though I had provided my Scottish home address). If not being able to continue on the same server I was, could at least be possible to transfer my characters (for which I spent hours and hours of playing) to the EU setting?

Thank you in advance.

Nicholas

From: donotreply@blizzard.com

Subject: World of Warcraft – Account Administration

Date: Fri, 17 Aug 2007 15:18:43 -0700

Thank you for contacting the Account Administration team regarding this issue. This is an automated email to let you know that we have received your inquiry. Please do not reply to this email; a response to your message will be sent to you as soon as possible.

While we will attempt to address all concerns as promptly as possible, it may be several days before we are able to respond depending on the total inquiries we receive. We must ask that no additional emails be submitted regarding this issue, as additional emails will ultimately result in undue delays in response time.

In the meantime, we offer other forms of support that are immediately available to you while we process your email.

From: wowaccountadmin@blizzard.com
Sent: 25/8/2007 6:53:03 PM
Subject: Account almost lost

Greetings,

Thank you for contacting us about an account issue for the World of Warcraft account you are using. However, the Account Administration Department is unable to assist with this matter. Please visit the World of Warcraft Billing Support site at <http://www.blizzard.com/support/wowbilling/?id=abl01117p> for suggestions on how to resolve this issue.

Your account issue has been forwarded to the Billing Department and you should hear from our Billing personnel regarding your request shortly. For future account information changes, please feel free to contact our Billing Department directly at billing@blizzard.com or by calling 1-800-***-**** during the hours of 8 am to 8 pm Pacific Standard Time. Customers in Australia should call 1-800-***-***.

Thank you in advance for your time and understanding. We appreciate your interest in World of Warcraft and your continued support. Please let us know if you have any additional questions or concerns.

Sincerely,

Account Administration
Blizzard Entertainment
<http://www.blizzard.com/support/wowaa/>

Customer satisfaction is a top priority here at Blizzard Entertainment, and we would like your feedback on the level of service you have received. Please feel free to provide such feedback at the following web address:

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