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O YES! O YES! O YES! THE SECOND LIFE SUPERIOR COURT IS NOW OPEN: THE CREATION OF A CIVIL LAW JURY TRIAL SYSTEM IN SECOND LIFE TO ADDRESS CIVIL WRONGS

The paper addresses issues in American Law related to the 1st Amendment and privacy in online environments.

Introduction

One of the majesties of the law is its ability to adapt to new situations and novel contexts. One of the current challenges facing the law is its response to the increasingly pervasive existence of alternative or mediated reality computer-generated sites like Second Life. In this paper, I point out the weaknesses in the traditional legal approaches used to protect an individual's reputation, dignity, or privacy while engaged with online communities, and conclude by suggesting an alternative model for the protection of Second Life user's reputations and privacy interests – the creation of a Second Life courtroom with online users as jurors.

I. Computer Reality

For those of us of an age not raised in a household with a computer and the Internet, let me begin with a description of what I mean by "mediated reality." In this paper, I specifically focus on the computer-generated program of "Second Life." According to its own website, Second Life is "a 3-D virtual world created by its Residents. Since opening to the public in 2003, it has grown explosively and today is inhabited by millions of Residents from around the globe" [1]. It is a virtual reality with buildings, markets, currency and intellectual rights, and is used by people for fun, for business and for teaching [2]. People "inhabit" Second Life by creating virtual replicas of themselves called "avatars" that can walk, talk, shop and even fly.

II. Traditional Legal Approaches

The traditional legal approaches to protect one's reputation, dignity, or privacy are defamation, privacy torts, and intentional infliction of severe emotional distress.

A. Defamation

The first tort I discuss in this context is the tort of defamation [3]. I define defamation whether written or spoken – as a statement of fact (as opposed to opinion) that is false and defamatory, and is of and concerning the plaintiff that is published and not absolutely or conditionally privileged, and, as a result of fault by the defendant, causes injury and special (monetary) harm in addition to generalized reputational injury. The Restatement of Torts defines defamation as "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication" [4].

This traditional tort is a viable option for virtual reality slights that falsely malign a person's reputation online. If a plaintiff is able to prove the elements of a defamation suit – a publication of a false fact published through the fault of a defendant which results in injury to the reputation of her character – then she should be able to prevail in a claim for libel even though it happened only in the virtual world.

1. Identification

While a suit of this kind presents the normal hurdles for a plaintiff, a libel suit based upon the publication of defamatory material in the mediated reality of Second Life is even more problematic. Probably the most difficult hurdle in this area concerns identification. The first problem is identifying the defendant – the mediated defendant's anonymity makes this burden difficult indeed. This issue is making its way through the courts in a number of contexts. For example, in *Doe v. Ciolli* [5], two Yale Law School students brought suit against pseudonymous posters on an Internet discussion board for users posting comments on colleges and law schools, "AutoAdmit," after the anonymous posters posted crude and derogatory posts about them, including photographs of the two female law students copied from other social networking sites. This case is still pending. In *Mobilisa, Inc. v. Doe* [6], an Arizona Court of Appeals has put forward a three-part test for revealing the identity of an anonymous speaker. In *Mobilisa,* the plaintiff served a subpoena on Doe's ISP seeking Doe's identity in a suit alleging that an unknown defendant had wrongfully accessed plaintiff's computer and used that computer to forward an embarrassing electronic mail to third parties. Doe's motion to quash was analyzed pursuant to three factors which require a plaintiff to show that (1) the anonymous party was notified of the request for identification, (2) the party seeking the identity put forward sufficient facts to survive a motion for summary judgment, and (3) then a balancing of the relative interests of the parties is assessed (the plaintiff's right to have a potential tort addressed versus the defendant's First Amendment rights of free speech). The competing interests in this area are the potential harm suffered by a plaintiff as a result of potentially libelous material on the one hand versus the First Amendment and privacy rights on the other of players to interact and play in this mediated reality anonymously.

A second issue with regard to identification is identifying the plaintiff for purposes of assessing the harm inflicted and the resulting level of appropriate damages. In a libel suit, the libelous material must be "of and concerning he, she or it." What if the corpus of the libelous material is about an avatar and not a real world person? Most people in Second Life do not appear in this mediated reality as themselves. Instead, avatars use pseudonyms. And, because the gravamen of a libel action is harm to a person's reputation, it is by its very nature a social tort, that is, the harm suffered is measured against a person's previously existing reputation within a given community. Unlike, the harm suffered by a person tortiously battered, for example, the plaintiff in a libel suit does not suffer harm to her physical person, but harm to her socially constructed persona. Exactly what is the harm suffered when an *avatar's* reputation is maligned?

B. Privacy Torts

William Prosser, the preeminent authority on torts, wrote a highly influential law review article dissecting Warren and Brandeis's right of privacy into four distinct categories – intrusion, disclosure, false light and appropriation [7]. These privacy torts are another area of traditional tort law that can be used to redress unwanted intrusions upon privacy interests in the world of mediated reality.

1. Intrusion Upon Seclusion

In an intrusion upon seclusion action, a plaintiff must show that a defendant (1) intentionally intruded, physically or otherwise, (2) on the solitude or seclusion of another or on his private affairs or concerns, (3) in a manner highly offensive to a reasonable person [8]. The tort of intrusion upon seclusion addresses harmful information-gathering, even if it is not subsequently disclosed. However, the crux of this type of action is that a plaintiff has to have a reasonable expectation of privacy in the information tortiously collected. Courts have found a reasonable expectation of privacy in such places as a home [9], a hotel room [10], a tanning booth [11], and a shopping bag [12]. While a plaintiff's solitude can be intruded upon via technological means, such as "unwarranted sensory intrusions like eavesdropping, wiretapping, and visual or photographic spying" [13], such intrusions still require plaintiffs show they had a reasonable expectation of privacy. So, a plaintiff "reluctantly photographed and 'YouTubed' . . . in front of a classroom full of students" does not have a reasonable expectation of privacy sufficient to support the tort of intrusion upon solitude [14]. The key issue in these cases likely will be whether or not plaintiffs took measures to guard their online information sufficient to warrant a finding that they had a reasonable expectation of privacy in their information.

2. Public Disclosure of Private Facts

The tort of public disclosure of private facts also requires a plaintiff to show she had a reasonable expectation of privacy in the facts disclosed. With this tort, a plaintiff can seek redress for the unwarranted publication of truthful but private and non-newsworthy, offensive facts. Specifically, a plaintiff in this action must show that a defendant (1) gave publicity (2) to a private fact (3) that is not of legitimate concern to the public, where such disclosure (4) is highly offensive to a reasonable person [15]. As with the previously discussed torts, this tort requires that the information be treated in such a way that there is a reasonable expectation of privacy.

For example, a photograph of a person standing in line outside of an unemployment office was not held to be the publication of a private fact because the plaintiff (there to take pictures himself) was in a public setting with no reasonable expectation of privacy [16]. In fact, with this type of claim, courts often treat the zone of privacy like a bubble – once the information has been disclosed, once the bubble is burst, then it is no longer legally protectable as private. As Professor Abril notes, "[s]ome courts have disqualified the privacy of information that had been disclosed to one other person or to individuals within the aggrieved's intimate circle" [17].

3. False Light Privacy

The third traditional privacy tort is false light privacy, a "twin child of a different mother" of defamation. The tort of false light privacy protects a person's interest "in not being made to appear before the public in an objectionable false light or false position, or in other words,

other than he is" [18]. With this tort, a plaintiff is required to show that the injurious material was published and that the material was false or misleading and highly offensive in nature. As with the other privacy torts, an action for false light privacy only protects matters that are inherently private. So, any matters that have been shared with others or is visible from a public place is not actionable.

4. Appropriation

The last of the four traditional privacy torts is appropriation. This tort does not concern false statements or unwarranted disclosures, but focuses on the use of a person's identity for commercial gain. The Restatement (Second) of Torts defines appropriation as follows: "Appropriation of Name or Likeness. One who appropriates to his own benefit the name or likeness of another is subject to liability to the other for invasion of privacy"[19]. The right to publicity includes the protection of a person's name, likeness and identity. For example, in *Hoffman v. Capital Cities/ABC Inc.*, a Los Angeles magazine used a picture of Dustin Hoffman (a picture of his head when he was dressed up as a women for his movie, "Tootsie," superimposed over a picture of a model's body dressed in some of the latest spring fashions) with the caption, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels." Hoffman was awarded three million in damages for commercial appropriation [20].

As with the others, this tort can be based upon a technological appropriation. For example, Facebook recently launched a platform called "Social Ads" that allows advertisers to use pictures of members in advertisements without their prior consent. It is likely that this is an actionable case of appropriation.

C. Intentional Infliction of Severe Emotional Distress

The final traditional legal approach used to protect an individual's reputation, dignity, or privacy is the tort of intentional infliction of emotional distress. According to the Restatement (Second) of Torts, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress" will be liable for its emotional or physical results [21]. Actionable conduct for this tort must exceed all reasonable and socially-tolerable bounds of decency. The commentary in the Restatement (Second) of Torts describes it in this manner: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" [22]. This threshold of "outrageous" behavior is difficult to reach in a traditional tort setting, that is, the hurly-burly existence of the real world, but it is probably even more difficult to reach in an online world populated with young people. One commentator noted this difficulty in the following manner: "In an online environment where individuals voluntarily release sex tapes to promote their careers or 'fart their way into the spotlight' for a chance at fleeting cyber-stardom, one may be hard pressed to find 'outrageous!' conduct, much less define 'community member'" [23].

II. Weaknesses in Traditional Approach

The computer age has added or exacerbated the harm of defamation or privacy in two ways. First, the length of time that a potential harm exists is now apparently endless. A defamatory remark or revelation of an embarrassing fact on the television, radio or

newspaper has a limited life. The potentially harmful material is presented to a finite audience – those people reading an edition of a newspaper, listening to a radio program, or viewing a television show, and for a finite amount of time – the length of time the newspaper story, radio program or television show takes to be read, heard or watched. On the other hand, web-based material apparently has an unlimited shelf life. Information on the web now has the potential to be available for as long as the web exists. This indefinite availability also heightens the impact of the second way the computer age exacerbates the potential harm of defamatory material or the revelation of an embarrassing fact – the potential exposure to any number of unintended audiences surfing the web. This information is no longer limited to a specific audience (readers of a given newspaper or viewers of a specific television show, for example), but is available to any web surfer who happens upon it while trolling for information. Moreover, this larger audience typically is populated by people with no connection to the person defamed. Consequently, the person defamed is unable to counter the potentially false information by responding or by relying on her good reputation within the community. I am thinking here of the phrase, "Oh, I did hear that about her, but I know her and I refuse to believe she would do something like that!"

A. Identification

The first problem with this new medium is identifying the potential defendant. The answer is to require ISP's to gather accurate personal information from potential customers at the time they sign up for service, including, importantly, credit card information or a social security number (the credit card would be the option for users understandably hesitant to post their social security information). However, this requirement does not have to be a requirement for operation. Instead, it could be used as a potential shield for liability on the part of an ISP. That is, if the ISP can provide the information, or cannot through no negligence on its part, then the ISP should be immune from liability. On the other hand, if an ISP fails to obtain such identifying information, or does so in a negligent manner, then the ISP should be held vicariously liable for the tortuous conduct of its user.

B. Assessment of Harm

One important issue regarding the identity of a given plaintiff is really a matter of the assessment of harm. That is, if the reputation of an avatar is defamed, what exactly are the damages? Second Life players do not use their real names while using the site. So, if an avatar itself is defamed, the good "name" of the avatar is affected, but what is the harm? If, on the other hand, an avatar defames a real world person, then the issue of harm and appropriate damages is no different than in any other defamation action.

C. Jurisdictional Issues

Another potential issue would be jurisdiction concerns. For example, can an aggrieved party in Oregon ask an Oregon court to exercise personal jurisdiction over a potential defendant from Florida? An important part of the legal analysis regarding the exercise of jurisdiction is the notion of fairness. In order for the exercise of jurisdiction over a nonresident of a given state to be deemed fair (the question becomes, "When is it fair to allow Oregon, for example, to exercise its jurisdictional power over a resident of Flori-

da?"), the United States Supreme Court has said that a person must have "minimum contacts" with that state so that an exercise of the state's judicial authority is fair and warranted. In *International Shoe Co. v. Washington*, the Court, in an opinion by Chief Justice Stone, adopted Judge Learned Hand's view that an analysis based upon a corporation's symbolic "presence" or "consent" was not sufficient contact with a jurisdiction to satisfy due process. Instead, a corporation has to have had certain minimum contacts with the forum such that a lawsuit does not offend "traditional notions of fair play and effective justice" [24]. This requirement of minimum contacts, however, does not require the physical presence of a defendant. In *Hustler*, the corporation's distribution of its magazine in New Hampshire was sufficient contact with the state to warrant New Hampshire's exercise of authority over defendant Hustler Magazine in a defamation suit brought against it by a former employee [25].

D. International Access

And, to complicate the analysis further, where do people from across the world go to settle their disputes or to bring actions for damages for harm they have suffered online? Second Life's dispute resolution clause allows individuals to choose arbitration for claims under $10,000, but requires actions above that amount to be brought to court in California [26]. This is both prohibitively expensive for Second Life users that live in other countries as well as unfair to require these users to submit to a foreign legal system.

E. Constitutional Rights in Second Life?

Second Life is incorporated in the United States of America and subject to the laws therein. However, any *voluntary* alternative dispute resolution process does not need to comport with constitutional requirements. The question becomes, then, does Second Life want to include pertinent constitutional rights in this area of the law into their system of jurisprudence?

Specifically, the one constitutional right in this area is the First Amendment's freedom of expression as related to libel and intentional infliction of severe emotional injury torts [27]. In the seminal case of *New York Times v. Sullivan*, the United States Supreme Court framed the issue before them in the very first line of their opinion: "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct" [28]. In this case, the *New York Times* carried a full-page editorial-advertisement, placed there by an ad hoc coalition of civil-rights leaders called, "Committee to Defend Martin Luther King and the Struggle for Freedom in the South". The text charged public officials in the South of using violence and illegal tactics to try to quell the peaceful civil rights struggle [29]. Several public officials in Alabama, including Montgomery, Alabama Police Commissioner L.B. Sullivan, brought suit against the *Times*. Sullivan, never actually named in the ad, argued that negative comments about the police reflected on him. The trial court ruled for Sullivan and awarded him a $500,000 damages award. The verdict and amount of

the verdict were upheld by the Supreme Court of Alabama [30]. Upon appeal to the United States Supreme Court, in a unanimous decision authored by Justice Brennan, the lower court's decision was overruled. Relying on the "general proposition that freedom of expression upon public questions is secured by the First Amendment," and "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" [31], the Court said that a public official may not recover damages "for a defamatory falsehood relating to his official conduct" absent proof that the statement was made with "actual malice" – "knowledge that it was false or with reckless disregard of whether it was false or not" [32]. In other words, the Court held that the First Amendment is implicated in those cases where a plaintiff in a libel action is a public official and that the much higher burden of "actual malice" must be proven by a government official-plaintiff in order to prevail in a libel action.

The issue in the Second Life context becomes, then, are there times when a right of free expression, whether based upon the First Amendment of the United States Constitution or some other analogous right from another jurisdiction, should be invoked to temper or to vitiate a plaintiff's claim for a defamatory remark issued in the Second Life site. The *New York Times v. Sullivan* Court focused on the status of a given plaintiff in a defamation action, protecting our right as citizens to question and critique the operation of government by allowing us to engage in uninhibited and spirited conversations about how politicians and other public officials are performing. But, there are not any analogous avatars in Second Life – it is an open market of loosely connected players without any apparent hierarchy of authority present. Consequently, at least at this stage in the development of the Second Life world, I argue that the First Amendment protections presented by the *New York Times v. Sullivan* Court should not be applied to defamation claims brought to court in Second Life. That is, the potential harm suffered by a person on Second Life by a defamatory remark is not outweighed by any larger societal concerns regarding the interplay between free expression and governance.

III. A New Approach

I suggest Second Life create a virtual civil legal system where avatars can sue one another without requiring the need for attorneys. Courtrooms can be provided and avatars required to serve on juries. Damages can be assessed and paid in Second Life currency.

Conclusion

In this paper I pointed out the weaknesses in the traditional legal approaches used to protect an individual's reputation, dignity, or privacy while engaged with online communities. Specifically, I begin by noting the difficulties with identification in a libel suit, both in identifying a defendant in a world where defendant's are often anonymous, and identifying the plaintiff for purposes of assessing the harm inflicted and the resulting

level of appropriate damages – the plaintiffs often are the avatars themselves, not the real world persona behind the avatar. I then pointed out that the requirement that there be a reasonable expectation of privacy in privacy actions is made all the more difficult in the computer-mediated world. Our worldview of what is private is changing everyday as new generations grow up with online diaries instead of the hard-cover books children used to hide under their mattresses. I also pointed out how high the threshold of "outrageous" behavior has become in intentional infliction of emotional distress cases – spend an hour watching video clips on YouTube if this statement is not patently clear. Finally, I identified some difficulties with law suits concerning behavior on the World Wide Web with regard to jurisdiction. My suggestions for a new approach included the following. I suggest requiring ISP's to gather accurate personal information from potential customers at the time they sign up for service, including, importantly, credit card information or a social security number (the credit card would be the option for users understandably hesitant to put their social security information). If an ISP fails to obtain such identifying information, or does so in a negligent manner, then the ISP should be held vicariously liable for the tortuous conduct of its user. On the other hand, if the ISP can provide the information, or cannot through no negligence on its part, then the ISP should be immune from liability.

Finally, I suggested that only an avatar's "reputation" is harmed, that Second Life create a virtual civil legal system where avatars can sue one another without requiring the need for attorneys. Courtrooms could be provided and avatars required to serve on juries. Damages can be assessed and paid in Second Life currency.

1. "Second Life, What is Second Life?" Accessed November 19, 2008, at http://secondlife.com/whatis/.

2. Id.

3. I use the term "defamation" as the penumbral term for both libel and slander.

4. Restatement (Second) of Torts § 558.

5. No. 307-CV-00909 (D.Conn. Complaint filed June 11, 2007).

6. P.3d, 2007 WL 4167007 (Ariz. App. Nov. 27, 2007).

7. Prosser, William, "Privacy," 48 Cal. L. Rev. 383 (1960).

8. Restatement (Second) of Torts § 652B (1977).

9. Abril, Patricia, "Perspective: A (My)Space of One's Own: On Privacy and Online Social Networks, 6 Nw. J. Tech. & Intell. Prop. 73, 79 (Fall, 2007), citing Dietmann v. Time, Inc. 284 F. Supp. 925 (C.D. Cal. 1968); Welsh v. Pritchard, 241 P.2d. 816 (Mont. 1952).

10. Id. at 79, citing Newcomb Hotel Co. v. Corbett, 27 Ga. App. 365 (1921).

11. Id. at 79, citing Sabrina W. v. Willman, 540 N.W.2d 364 (Neb. Ct. App., 1995).

12. Id. at 80, citing Sutherland v. Kroger Co., 110 S.E.2d 716 (1959).

13. Restatement (Second) of Torts, § 652B com. B, illust. 1-5 (1977).

14. See note 6, at 80, citing Requa v. Kent School Dist., 2007 U.S. Dist. LEXIS 40920 (D. Wash. 2007).

15. Restatement (Second) of Torts, § 652D (1977).

16. Cefalu v. Globe Newspaper Co., 391 N.E.2d 935 (Mass. App. Ct. 1979).

17. Abri 80, supra note 7, citing Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665 (1984)(plaintiff's confiding to a group of people his sexual orientation vitiated privacy expectation).

18. Restatement (Second) of Torts.

19. Restatement (Second) of Torts § 652C.

20. Supp.2d 867 (1999).

21. Restatement (Second) of Torts § 46.

22. Id.

23. Id. at note 7 (citations omitted).

24.326 S. 310, 319-20 (1945).

25. Keeton v. Hustler, 465 U.S. 770 (1984). In fact, the sale of the magazine was the only contact with State of New Hampshire. The plaintiff in this case was a resident of New York and Hustler Magazine is an Ohio corporation with its principal place of business in California. New Hampshire was chosen by the plaintiff in this case because of its unusually long statute of limitations period – six years (the plaintiff had failed to bring her suit within the time allowed in every other state.) (That statute of limitations is now three years.)

26. Amy J. Schmitz, "'Drive-Thru' Arbitration in the Digital Age: Empowering Consumers Through Binding ODR," 62 Baylor L. Rev. 178, 195 (Winter, 2010).

27. Because I am referencing civil actions in the area of defamation and privacy torts, other constitutional protections are not implicated in this setting. For example, the right to face one's accuser is a constitutional right in criminal actions, not civil. In a civil action, if the "accuser," that is, the plaintiff, fails to appear, then the case is simply dismissed.

28. S. 254, 256 (1964).

29. Id. at 257-59.

30. Id. at 262-64.

31. Id. at 270, citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949) and Jonge v. Oregon, 299 U.S. 353, 365 (1937).

32. Id. at 279-80.