

Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion upon Seclusion in Virtual Worlds

“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone.’”
– Samuel Warren & Louis Brandeis¹

I. INTRODUCTION

At this very moment, millions of people face a computer screen, doing nothing but living in a virtual world as an “avatar.”² Virtual worlds are three dimensional interactive online communities, and as close as one gets to a parallel reality like the one found in *The Matrix*.³ There is even a device that allows users to interact in the virtual world using their brainwaves via a headset.⁴

In virtual worlds, one can find buildings, schools, parks, museums, shops, and people from all over the world. Residents of virtual worlds, or avatars, maintain jobs, own homes, run businesses, go shopping, attend school, and even go to church, all in the virtual world.

Second Life,⁵ a popular virtual provided by Linden Labs, has almost thirteen million residents.⁶ Major businesses, having noticed the popularity of Second Life, have expanded to the virtual world. For instance, CNN, Coca-Cola, Toyota, Verizon, H&R Block, IBM, Nike, and American Apparel are just some of the big name companies which have ventured there.⁷ The legal realm has caught on as well. Virtual worlds have already generated litigation,⁸ and even attracted visitors such as the Honorable Judge Richard A. Posner of the Seventh U.S. Circuit Court of Appeals.⁹

¹ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

² See discussion *infra* Section III.A (explaining that users in virtual worlds represent themselves through their “avatar”); Wikipedia, *Avatar*, <http://en.wikipedia.org/wiki/Avatar> (last visited Mar. 20, 2008) (In Hindu philosophy, “avatar,” meaning “descent,” refers to incarnation into other realms of existence.).

³ See Internet Movie Database: *The Matrix*, <http://imdb.com/title/tt0133093/> (last visited Mar. 20, 2008).

⁴ For a demonstration video see YouTube, *Strolling Virtual World Using Brainwaves*, <http://www.youtube.com/watch?v=YipEdFersgM> (last visited Mar. 20, 2008); see also BBC News, <http://news.bbc.co.uk/2/hi/technology/7254078.stm> (last visited Mar. 20, 2008) (explaining how a neuro-headset which interprets the interaction of neurons allows interaction in virtual worlds using thoughts).

⁵ See Second Life Homepage, <http://secondlife.com/whatis/> (last visited Mar. 20, 2008).

⁶ Second Life Statistics, http://secondlife.com/whatis/economy_stats.php (last visited Mar. 20, 2008).

⁷ Chuleenan Svetvilas, *Real Law in the Virtual World*, CALIFORNIA LAWYER, Jan. 2008, at 23.

⁸ See discussion *infra* Section III.C (regarding application of the law in virtual worlds).

⁹ Svetvilas, *supra* note 7, at 22. The American Bar Association formed committees on virtual worlds in both Sections of Intellectual Property, and Science and Technology Law. *Id.*

While virtual worlds exist on massive computer networks, the communities they inhabit are real. However, in some virtual worlds such as Second Life, users have unlimited freedom to program devices that allow one avatar to eavesdrop or spy on the other.

Can one protect the “right to be let alone”¹⁰ in a communal environment that thrives by bringing people together? That is, can one avatar assert invasion of privacy against a virtual resident in real court? This Comment answers that question by showing that the tort of intrusion upon seclusion¹¹ may be applicable to invasions of privacy in the virtual world.¹²

Section II of this Comment provides a historical background of common law privacy and traces the development of the intrusion tort to its attempted application to the internet. Section III introduces virtual worlds, and explores the role of real law in the virtual realm. In addition, Section III distinguishes virtual worlds from the internet, and highlights the type of virtual privacy concern that this Comment addresses.

Section IV applies the Restatement language of intrusion upon seclusion to a hypothetical invasion of privacy in the virtual world. There, this Comment analyzes how each element¹³ of the intrusion tort may be implicated and satisfied in the virtual world. Specifically, the analysis reveals that courts will need to pay special attention to the reasonable person standard that is raised by the objective elements of intrusion. Section IV concludes by explaining that inadequacy of the reasonable person standard hinders the applicability of the tort to virtual worlds.

Section V explains the reasonable person standard as a concept built on community norms, and sets forth a reasonable avatar standard as a more meaningful way of determining what ‘highly offensive’ intrusion and ‘reasonable expectation of privacy’ constitute in the virtual world. Section V ends by reconciling additional limitations that plaintiffs must overcome to assert an intrusion tort against another avatar in the virtual world. Finally, in Section VI, this Comment concludes by noting that application of the intrusion tort to virtual worlds is possible, but only in narrow circumstances.

II. BACKGROUND ON PRIVACY

A. *The Common Law, Warren and Brandeis*

While fundamental legal rights, like the right to property or contract developed centuries ago, the right to privacy was created fairly recently. Awareness of privacy protection sparked in 1890, with one law review article, *The Right to Privacy*, by lawyer Samuel D. Warren and the

¹⁰ Warren & Brandeis, *supra* note \1\, at 193.

¹¹ RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

¹² See discussion *infra* Section II.B (explaining that intrusion upon seclusion is the only privacy tort that does not require publication, and therefore, the best vehicle for invasion of privacy claims).

¹³ As discussed *infra* Section IV.A, the elements of intrusion upon seclusion are: (1) an intentional intrusion; (2) the intrusion is highly offensive to a reasonable person; and (3) there is a reasonable expectation of privacy in the matter intruded upon.

later Supreme Court Justice, Louis D. Brandeis.¹⁴ Warren and Brandeis set forth to protect privacy through the common law.¹⁵ They observed that the common law lacked a civil remedy for privacy invasions even though it “secure[d] to each individual the right of determining, to what extent his thoughts, sentiments and emotions shall be communicated to others.”¹⁶ Thus, Warren and Brandeis urged courts to create a remedy for privacy invasions.¹⁷

At first, Warren and Brandeis’ project to create a separate distinct right to privacy was rejected.¹⁸ Soon, however, in a case concerning a plaintiff’s photograph in an advertisement of the defendant’s company, the Supreme Court of Georgia recognized Warren and Brandeis’ thesis for a right to privacy, noting that:

The right of privacy has its foundation in the instincts of nature. Each individual instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.¹⁹

The Court further noted that “the day will come that the American bar will marvel that contrary view was ever entertained by judge of eminence and ability.”²⁰

Decades later, the American Law Institute created a new tort making a person liable for “unreasonably and seriously interfere[ing] with another’s interest in not having his affairs known to others[,] or his likeness exhibited to the public is liable to the other.”²¹ However, this tort proved “amorphous,” because it “ignored the salient differences between different types of privacy protections.”²² Moreover, it was not until 1960, when another law review article, this one by Professor William L. Prosser, that the tort of intrusion upon seclusion was introduced.²³

¹⁴ Warren & Brandeis, *supra* note \1\, at 193.

¹⁵ *Id.* at 195.

¹⁶ *Id.*

¹⁷ DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 58 (2004); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 *CATH. U. L. REV.* 703, 705-06 (1990) (“[B]y pulling together various isolated strands of the common law, the authors demonstrated that creating remedies for privacy invasions wouldn’t radically change the law but would merely be an expansion of what was already germinating.”).

¹⁸ *See* *Roberson v. Rochester Folding Box Co.*, 64 *N.E.* 442, 445 (1902) (rejecting plaintiff’s claim that her privacy was invaded through the use of her picture without permission on an advertisement for the sale of flour).

¹⁹ *Pavesich v. New England Life Ins. Co.*, 50 *S.E.* 68, 69 (Ga. 1905).

²⁰ *Id.* at 80-81.

²¹ *RESTATEMENT (SECOND) OF TORTS* § 867 (1938).

²² DAVID ELDER, *PRIVACY TORTS* §1:4 (2002).

²³ William L. Prosser, *Privacy*, 48 *CAL. L. REV.* 383, 389 (1960).

B. Prosser and Intrusion upon Seclusion

Several decades after Warren and Brandeis put forth the “right to be let alone,”²⁴ Prosser systematized the more than 300 invasion of privacy cases litigated since then, to introduce four different privacy torts that encompassed the right to privacy: (1) intrusion upon a plaintiff’s seclusion or solitude, (2) appropriation of the plaintiff’s name or likeness, (3) public disclosure or embarrassing of a plaintiff’s private facts, and (4) publicity placing plaintiff in false light in the public eye.²⁵ Consequently, the American Law Institute adopted these four privacy interests, and codified them in the Restatements (Second) of Torts.²⁶ These four distinct privacy torts collectively protect the “right to be let alone.”²⁷

Of the four privacy torts, intrusion best captures invasion of privacy.²⁸ The tort protects one’s mental interests,²⁹ and focuses on the manner in which private information has been obtained.³⁰ The intrusion tort was intended to “fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.”³¹ Moreover, the other three privacy torts deal with the use of information once it has been acquired.³² Only intrusion redresses invasions of privacy where the acquired information is not used.³³ The Restatement provides liability for intrusion upon seclusion if “[o]ne . . . intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] the intrusion would be highly offensive to a reasonable person.”³⁴

C. Evolution of the Intrusion Tort

The privacy torts have expanded to encompass more conduct because of the same concerns that prompted Warren and Brandeis’ article: the worry that “recent inventions and

²⁴ See Warren & Brandeis, *supra* note \1\, at 193.

²⁵ See Prosser, *supra* note \23\, at 389.

²⁶ ELDER, *supra* note \22\, at §1:5; RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (“[E]ach [of the four torts] involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others.”).

²⁷ Prosser, *supra* note \23\, at 390.

²⁸ ELDER, *supra* note \22\, at § 2:1; *see also* Shulman v. Group W. Prod., Inc., 955 P.2d 469, 489 (Cal. 1998) (intrusion “best captures the common understanding of an invasion of privacy as an affront to individual dignity”).

²⁹ Prosser, *supra* note \23\, at 392.

³⁰ Doe v. High-Tech Inst., Inc., 972 P.2d 1060, 1065 (Colo. Ct. App. 1998).

³¹ *Id.*

³² § 652C–E.

³³ Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 IND. L. REV. 155, 164 (2000) (“[T]he tort of intrusion . . . focuses on the methods used to gather information rather than on the publication of it.”).

³⁴ § 652B; *see* discussion *infra* Section IV.A.

business methods”³⁵ in technology threatened personal privacy. In its early stages, the intrusion tort involved only physical intrusions.³⁶ However, the tort was eventually applied to “any type of prying or intrusion into anything the plaintiff would consider private.”³⁷ Accordingly, modern courts have applied the intrusion tort to “harassing phone calls by a creditor to a debtor at home and work, spying on women in the bathroom of a fast-food restaurant, circulating nude photographs after a film was dropped off for developing, and performing an HIV blood test without permission.”³⁸

Currently, the internet is where application of the intrusion tort is still unclear.³⁹ Seemingly, the intrusion tort most appropriately protects against internet spyware.⁴⁰ The essential characteristic of spyware is that it seeks to remain unnoticed by the user by making itself difficult to detect and remove.⁴¹ Moreover, the essence of eavesdropping characterized by spyware — “a form of electronic surveillance . . . designed to collect information for the benefit of third-parties”⁴² — is already recognized by the Restatements and courts.⁴³ However, courts are likely to reject intrusion claims on the internet. Showing a reasonable expectation of privacy⁴⁴ on the internet is difficult because most of the information is provided voluntarily.⁴⁵

³⁵ See Warren & Brandeis, *supra* note 11, at 195-96 (“The press is overstepping in every direction the obvious bounds of propriety and of decency To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.”).

³⁶ Don Corbett, *Virtual Espionage: Spyware and the Common Law Privacy Torts*, 36 U. BALT. L. REV. 1, 19. (2006); *e.g.*, *Byfield v. Candler*, 125 S.E. 905, 906 (Ga. Ct. App. 1924) (entering a women’s bedroom on a steamship constituted an invasion of privacy).

³⁷ *Id.*; RESTATEMENT (SECOND) OF TORTS § 652A cmt. b (listing eavesdropping and wiretapping as examples of intrusion).

³⁸ Marmon, *supra* note 33, at 164.

³⁹ Daniel B. Game, Alan F. Blakley, & Matthew J. Armstrong, *The Legal Status of Spyware*, 59 FED. COMM. L.J. 157, 194 (2006) (noting that intrusion upon seclusion is ideal for privacy protections because the tort encompasses intrusions which are not physical).

⁴⁰ See Game et al., *supra* note 39, at 161 (Spyware is a general term for computer software, usually installed without the user’s consent, which records information about the user, including but not limited to the user’s internet browsing activities, the keystrokes typed, email messages, and other personal information.).

⁴¹ See *id.*

⁴² Corbett, *supra* note 36, at 27.

⁴³ § 652A cmt. b.

⁴⁴ A reasonable expectation of privacy is an element of the tort which has expounded and applied *infra* Section IV.A.2.

⁴⁵ Christopher F. Carlton, *The Right to Privacy in Internet Commerce: A Call For New Federal Guidelines and the Creation of an Independent Privacy Commission*, 16 ST. JOHN’S J.L. COMM. 393, 423 (2002) (“The tort of intrusion upon seclusion is rejected as a solution to online privacy concerns because most of the personal information obtained online is provided voluntarily by the user.”); *e.g.*, *United States v. Charbonneau*, 979 F. Supp. 1177, 1179 (S.D. Ohio 1997) (holding that the openness of a chat room diminishes a reasonable expectation of privacy in chat).

And even more difficult is for spyware victims to show “dignitary harm” caused by software that merely monitors the habits of a computer user.⁴⁶

III. WHAT ARE VIRTUAL WORLDS?

A. *Brave New Worlds: An Introduction to Virtual Worlds*

Virtual worlds are three-dimensional computer-generated versions of the real world that exist in cyberspace.⁴⁷ Just like in real life, “users will find the sun, wind, buildings[,] paved streets, grass, rivers, seas, mountains, islands, and countries, all recreated to look and ‘feel’ as if users were actually living in cyber reality.”⁴⁸

Virtual worlds started out as massive multiplayer online role-playing games, or MMORPGs.⁴⁹ Like virtual reality video games, virtual worlds allow users to create a character, a “representational proxy” known as his or her “avatar.”⁵⁰ Through their avatars, users can be flexible with their identity, and can take on multiple or new roles in society.⁵¹

But, virtual worlds are not just games anymore.⁵² As in real life, when people join virtual worlds, they can go to work, conduct business, attend virtual churches, and join virtual societies.⁵³ It is estimated that more than 20 to 30 million users spend more time in virtual worlds than they do in the real world.⁵⁴ These worlds are becoming places where users do more than the obvious real-world impossibilities, like flying or morphing into animals. “Real-life corporations, universities, government agencies, and medical centers are venturing into virtual worlds to hold classes, conduct research, and provide training.”⁵⁵ Even national security has caught on; virtual worlds are now used to train soldiers.⁵⁶

⁴⁶ Game et al., *supra* note \39\, at 198 (While “spyware may annoy consumers and even require them to spend hours trying to remove the offending applications . . . only a few individuals will have sufficient damages to lead them to pursue a remedy.”); *see* discussion *infra* Section V.C (explaining that plaintiffs must show damages).

Further discussion of the privacy concerns on the internet is not necessary here because, as discussed *infra* Section III.B, virtual worlds are significantly distinguishable from the internet.

⁴⁷ *See* JACK M. BALKIN & BETH SIMONE NOVECK, *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 3 (2006).

⁴⁸ Bettina M. Chin, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 *BROOKLYN L. REV.* 1303, 1303 (2007) (“Second Life is ostensibly a free-range graphical environment where users may explore, interact, create, and trade as they do in real life—only this happens, of course, in a second life.”).

⁴⁹ EDWARD CASTRONOVA, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* 9 (2005).

⁵⁰ F. Gregory Lastowka & Dan Hunter, *Virtual Worlds: A Primer*, in 13 *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS*, *supra* note \47\, at 15.

⁵¹ BALKIN ET AL., *supra* note \47\, at 10.

⁵² *See id.* at 3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Svetvilas, *supra* note \7\, at 22.

⁵⁶ BALKIN ET AL., *supra* note \47\, at 3.

Along with all the benefits of social cooperation, virtual worlds also present the problems of social conflict.⁵⁷ Crime that occurs in the real world can also occur in the virtual worlds.⁵⁸ For example, in Amsterdam, a teenager was arrested for stealing thousands of dollars worth of virtual furniture from a hotel in a popular virtual world that has 80 million registered users from more than 31 countries.⁵⁹ And until a recent crackdown, the FBI was investigating the presence of illegal gambling, and child pornography in virtual worlds.⁶⁰ Apart from being distinguishable from games, virtual worlds are also distinguishable from the internet in general.

B. Distinguishing Virtual Worlds from the Internet

1. Practical Reality

Virtual worlds are both real and unreal.⁶¹ In the sense that these worlds exist only on plastic and metal computer parts, virtual worlds are “artificial, fictitious, imaginary, intangible, and invented.”⁶² However, these worlds provide a practical reality.⁶³ That is, a real purpose, at least to the extent that users “can fairly easily immerse themselves in it, for hours on end, month after month, year after year, in a sort of parallel existence.”⁶⁴ Whether one joins to market products,⁶⁵ or just to associate amongst others with similar interests, there is a practical benefit to the world. Indeed, this type of practical benefit is not unique to virtual worlds, but is typical of the internet. For example, the internet is inundated by chat services, interest groups, and shopping sites — so, what is distinguishing about virtual worlds?

First, whatever users’ practical use may be, in the virtual worlds, everything is literally nested in the same geographical (cyber) space. In that sense, virtual worlds bring the benefits of the internet into a common virtual space. Moreover, in virtual worlds, the user becomes an actor through her avatar.⁶⁶ Thus, virtual worlds capitalize the “unusual thing about cyberspace . . . that we can be both here and there at the same time, and the place that is ‘there’ can be constructed, essentially, however we might like.”⁶⁷ For instance, take the case of an internet user, Jane, who is shopping online and chatting with her friend, Edna. On the internet, Jane would probably have two browser windows open, one for shopping and another to chat with Edna. However, instead

⁵⁷ *Id.* at 4.

⁵⁸ See F. Gregory Lastowka & Dan Hunter, *Virtual Crime*, in 121 THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS, *supra* note \47\, at 121 (discussing occurrence of rape in virtual worlds).

⁵⁹ Reuters News, <http://uk.reuters.com/article/oddlyEnoughNews/idUKL1453844620071114> (last visited Mar. 20, 2008).

⁶⁰ Svetvilas, *supra* note \7\, at 21.

⁶¹ BALKIN ET AL., *supra* note \47\, at 3.

⁶² *Id.*

⁶³ See CASTRONOVA, *supra* note \49\, at 4; see also Chin, *supra* note \48\, at 1327 (“[A]rguably, activity in these worlds is not virtual at all. With real value and consequences, it deserves the full attention of policy and law.”).

⁶⁴ See CASTRONOVA, *supra* note \49\, at 4.

⁶⁵ See *supra* note \4\ and accompanying text.

⁶⁶ See Lastowka et al., *supra* note \50\, at 15.

⁶⁷ See CASTRONOVA, *supra* note \49\, at 3.

of having to switch between the two windows, in the virtual world, Jane could be shopping, while Edna accompanies her, as the two talk together. In addition to a virtual practical reality, there are at least two more differences that make virtual worlds unique in relation to the internet.⁶⁸

2. Real Investments

i. Emotional Investment of Virtual Residents

Virtual worlds do more than just combine the practicalities of the internet into a three dimensional world — they make the user’s experience “psychologically natural.”⁶⁹ Notice that in describing Jane, we leave a little bit of the technical truth out: in referring to Jane, we say that Jane will be talking with Edna, and *not* that Jane’s *avatar* will be talking with Edna’s *avatar*. Because virtual worlds simulate reality, Jane can act through her avatar just as she would in the real world.⁷⁰ Unlike the internet, where a user remains external to the activity taking place, virtual worlds embody the user.⁷¹ In the virtual world, “all of our interests are the same as they ever were, but the environment in which we pursue them has become untethered from the Earth environment with which we have become so comfortable.”⁷² Therefore, accompanying the practical reality of virtual worlds is an element of social or “emotional investment.”⁷³

ii. Practical Investment of Virtual Residents

Versatility of virtual worlds does not come without a price. The initial transaction costs to take advantage of virtual worlds are significantly higher than other internet services.⁷⁴ For example, “you can become a registered online user of New York Times in less than a minute, and you’ll never have to enter your information again.”⁷⁵ However, to become a member of a virtual world, one has to go through a series of steps, including the payment of fees, agreement to terms of service, and installation of software.⁷⁶ Financial investment comes in two forms. First, users have to pay to join and actually engage in the virtual world.⁷⁷ Second, users also buy goods and services to build on their avatar and accumulate property.⁷⁸ Thus, in addition to the

⁶⁸ For a detailed discussion of these differences, see *id.* at 44-47.

⁶⁹ *Id.* at 45.

⁷⁰ *Id.* (“No one ever says, ‘My avatar’s strength is depleted,’ or ‘my avatar owns a dune buggy.’ They say ‘my strength’ and ‘my dune buggy.’”).

⁷¹ *Id.*

⁷² *See id.* at 3.

⁷³ *Id.* at 45.

⁷⁴ *Id.*

⁷⁵ *Id.* at 44.

⁷⁶ *Id.* at 45 (“To enter the fantasy realms of cyber-space . . . you’ll have to pay fees, load software, adapt to a strange user interface system, and agree to a fairly substantial sacrifice of rights.”).

⁷⁷ *E.g.*, Second Life Membership Plans, http://secondlife.com/what_is/plans.php (last visited Mar. 20, 2008).

⁷⁸ Lastowka et al., *supra* note \50\, at 17.

emotional investment, there is also an element of practical investment involved when a person becomes a member of virtual worlds.

3. Real Returns

Emotional or social gains are not the only type of benefits that users can enjoy. An increasing number of users make real money.⁷⁹ Virtual world residents can sell property including *virtual* real estate,⁸⁰ “swords, silk sashes, and even one’s own avatar.”⁸¹ While using the internet to make money is not something new,⁸² virtual worlds are unique in that they allow users to replace their real job with a virtual one.⁸³ For example, soon lawyers may be providing legal advice in the virtual world.⁸⁴

Hence, virtual world residents experience a practical reality much closer to the real world. The benefits users enjoy in return for their investments is both emotional and practical. The cumulative effect of these unique features is an embodiment⁸⁵ of personality in the virtual world.

C. Real Law in Virtual Worlds

Despite their recent resurgence, virtual worlds have already enjoyed the attention of legal scholars,⁸⁶ and even become the subject of a few court cases.⁸⁷ As residents continue to use and

⁷⁹ *See id.* at 16.

⁸⁰ *Id.* at 17; *see also The Unreal Estate Boom: The 79th Richest Nation on Earth doesn't exist*, WIRED MAGAZINE, Jan. 2003, available at <http://www.wired.com/wired/archive/11.01/gaming.html> (last visited Mar. 20, 2008).

⁸¹ Lastowka et al., *supra* note \50\, at 17.

⁸² *See, e.g.*, Ebay, www.ebay.com (last visited Mar. 20, 2008).

⁸³ Lastowka et al., *supra* note \50\, at 17.

⁸⁴ Svetvilas, *supra* note \7\, at 23.

⁸⁵ *See discussion infra* note \163\ and accompanying text.

⁸⁶ *E.g.*, Chin, *supra* note \48\, at 1316 (applying the tort of defamation to virtual worlds); Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 Akron. L. Rev. 649, 651 (2006) (discussing intellectual property rights in virtual worlds).

⁸⁷ *E.g.*, Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 594 (E.D. Pa. 2007) (finding a virtual world provider’s arbitration clause unconscionable where the plaintiff, a virtual resident, sued the provider for unfairly terminating his account and depriving him of his virtual property); Eros v. Leatherwood, No. 8:07-cv-1158-T-24TGW (M.D. Fla. Nov. 16, 2007), Ct. Order, http://virtuallyblind.com/files/eros_default.pdf (virtual resident sued another avatar who duplicated and sold unauthorized copies of the plaintiff’s adult entertainment products in the virtual world); *see also* Legal Action and Investigations Related to Virtual Worlds, <http://www.lawspotonline.com/lawspot/liti/litigation.jsp> (last visited Mar. 20, 2008) (list of virtual world litigation in the last ten years).

invest resources in their virtual world, they seek attention of the law to protection of their virtual assets — usually intellectual property.⁸⁸

Two types of lawsuits may arise in the virtual worlds: those between a virtual world provider and resident, and those between residents. In the first type of lawsuits, virtual world providers will try to shield themselves from lawsuits by incorporating arbitration clauses in the Terms of Service (TOS) or End-User License Agreement (EULA) to which residents must agree.⁸⁹ These agreements usually require residents to waive future lawsuits against the provider.⁹⁰ However, in the second type of lawsuits, those between residents, TOS and EULAs will likely have no effect on how the parties resolve disputes.⁹¹ Hence, invasion of privacy claims are more likely to be litigated when the dispute is between one resident and another.

D. Privacy Concerns in Virtual Worlds

Privacy disputes in the virtual world come in various forms. One commentator, Tal Z. Zarsky, categorizes privacy disputes in virtual worlds into two classes:

1. Privacy concerns that arise from a breach in the crucial connection between the virtual world and the physical world.
2. Privacy concerns that do not involve the flow of information between the physical and virtual worlds, but exclusively pertain to the collection, analysis, and use of personal information within the virtual realm.⁹²

⁸⁸ See *supra* notes \106\ and \107\; see also BALKIN ET AL., *supra* note \47\, at 112 (“The more people live in them, and the more time, money, and effort people invest in them, the more they will attract the law’s attention. Intellectual property rights, consumer protection, and privacy will be three important reasons for legal regulation of virtual worlds in the years to come.”).

⁸⁹ Tal. Z. Zarsky, *Information Privacy in Virtual Worlds: Identifying Unique Concerns Beyond the Online and Offline Worlds*, 49 N.Y.L. SCH. L. REV. 231, 236 (2005).

⁹⁰ *Id.*; but see Bragg, 487 F. Supp. 2d at 594 (held arbitration clause in EULA was unconscionable).

Scholars disagree on the extent to which EULAs are enforceable in court. Compare LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999) (arguing that TOS and EULA are bodies of code that is equivalent to law) with Chin, *supra* note \48\, at 1316 (“[EULAs] are insufficient to protect . . . residents when . . . serious injustice, particularly virtual property disputes, fraud, or defamation, is committed against them by other Second Life participants.”).

Any further discussion of EULAs is beyond the scope of this Comment. For a thorough explanation of EULAs and TOS agreements governing virtual worlds, see Andrew Jankowich, *EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 5 (2006).

⁹¹ See Zarsky, *supra* note \89\, at 242 (“Since EULA or TOS govern most interactions between the user and game controllers, virtual worlds will rarely involve “open-ended” privacy questions” between residents.).

⁹² *Id.* at 243.

The second class of privacy disputes best illustrates the circumstances where applying intrusion in virtual worlds is fruitful.⁹³ Disputes in the first class focus primarily on transactional informational privacy — that is, protecting ‘personally identifiable’ information such as credit card numbers residents may use in making virtual purchases.⁹⁴ This information is often insufficient as “private matter” under the intrusion tort.⁹⁵ Unlike the first class, the second class of privacy concerns is unfettered by real-world information — thus encompassing only purely virtual privacy invasions.⁹⁶

IV. PRIVACY INVASION IN THE VIRTUAL WORLD

Imagine a pair of eyes lurking through your window as you sit in the comfort of your home.⁹⁷ Of course, one would naturally close the blinds, and maybe even call the police. Common law privacy recognizes “a man’s home as his castle.”⁹⁸ But in the virtual world, where a man’s home often *is* a castle, privacy protections are trivial at best. There, neighbors can get just as nosey as in the real world, but without all the physical boundaries.⁹⁹ Moreover, virtual world residents have full freedom to write any program they choose, producing a myriad of “data collection tools” that facilitate invasions of privacy.¹⁰⁰ With such virtual spyware, avatars will inevitably assert invasion of privacy claims. Courts will have to determine how virtual worlds implicate each element of the tort. This section addresses each element of intrusion upon seclusion, and hypothesizes how an avatar might assert an intrusion claim.

⁹³ *See id.* at 243. (The second class of privacy disputes “provides the majority of interesting questions that are unique to virtual worlds.”)

⁹⁴ *Id.*

⁹⁵ *See, e.g.,* Phillips v. Grendahl, 312 F.3d 357, 373 (8th Cir. 2002) (discovery of a person's social security number does not fit the profile of intrusion upon seclusion); Andrews v. TRW Inc., 225 F.3d 1063, 1067 (9th Cir. 2000), *rev'd on other grounds*, 534 U.S. 19 (2001) (“We take judicial notice that in many ways persons are required to make their social security numbers available so that they are no longer private or confidential but open to scrutiny and copying”); Busse v. Motorola, Inc., 813 N.E.2d 1013, 1018 (Ill. App. Ct 2004) (Customers sued their the cellular service providers under invasion of privacy for retrieving data from their customer records, including names, addresses, and social security numbers, and transferring the information as a database to a private research firm for its studies on cell phone safety. The court held that the customers’ telephone numbers, addresses, and social security numbers were not private facts.).

⁹⁶ Zarsky, *supra* note \89\, at 243.

⁹⁷ *See, e.g.,* Pritchett v. Board of Com’rs of Knox County, 85 N.E. 32, 35 (1908) (invasion of privacy by looking through plaintiff’s windows).

⁹⁸ Welsh v. Pritchard, 241 P.2d 816, 819 (Mont. 1952) (quoting Warren & Brandeis, *supra* note \1\, at 220).

⁹⁹ BENJAMIN DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS (forthcoming Apr. 2008) (working draft at 243, on file with author) (“In many virtual worlds, it is not even possible to conceal the contents of one’s home from other users.”).

¹⁰⁰ *Id.*

A. Application of the Tort under the Restatement

The Restatement (Second) of Torts states that: “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”¹⁰¹ States recognizing the intrusion upon seclusion tort¹⁰² have deduced three elements stemming from the Restatement language: (1) an intentional intrusion or prying; (2) the intrusion is highly offensive to a reasonable person; and (3) the matter of the intrusion is private.¹⁰³

1. An Intentional Intrusion or Prying in the Virtual World

The intrusion tort requires an intentional interference with the plaintiff’s body or to his private affairs.¹⁰⁴ The defendant must commit some “affirmative act”¹⁰⁵ constituting an actual intrusion. In the majority of cases, this element is satisfied through an interference that is physical or trespassory.¹⁰⁶ For example, sneaking into another’s private bedroom to rummage through personal belongings would undisputedly constitute an intrusion.¹⁰⁷ However, the manner of the intrusion need not be physical, and it may be accomplished “through the use of the senses, with or without the aid of devices.”¹⁰⁸ Thus, an intrusion can also occur through technological devices that circumvent physical boundaries — such as microphone bugs, or wire tapping.¹⁰⁹

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 652B.

¹⁰² North Dakota and Wyoming are the only states that have not recognized intrusion upon seclusion. ROBERT M. O’NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 77 (2001); *E.g.*, *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 816 (N.D. 1998) (“This Court has not decided whether a tort action exists in North Dakota for invasion of privacy.”); *Jewell v. North Big Horn Hosp. Dist.*, 953 P.2d 135, 139 (Wyo. 1998) (“[Plaintiff] . . . cannot pursue claims for invasion of privacy.”).

¹⁰³ *Busse v. Motorola, Inc.*, 813 N.E.2d at 1018.

¹⁰⁴ § 652B cmt. a.

¹⁰⁵ *Kane v. Quigley*, 203 N.E.2d 338, 340 (1964).

¹⁰⁶ *E.g.*, *Gonzales v. Southwestern Bell Tel. Co.*, 555 S.W.2d 219, 221 (Tex. Civ. App. 1977) (holding intrusion claim as “analogous to trespass”); *Miller v. Brooks*, 472 S.E.2d 350, 351 (N.C. Ct. App. 1996) (defendants placed a video camera in plaintiff’s bedroom and also intercepted plaintiff’s mail).

¹⁰⁷ 652B cmt. b (“The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff’s room in a hotel or insists over the plaintiff’s objection in entering his home.”).

¹⁰⁸ *Id.*; *see also Shulman v. Group W. Prod., Inc.*, 955 P.2d 469, 473 (Cal. 1998) (acknowledging that a plaintiff must show that “defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff”).

¹⁰⁹ *E.g.*, *Gonzales*, 555 S.W.2d at 221 (intrusion “includes not only physical invasion of a person’s property, but also eavesdropping upon private conversations by wiretapping, microphones or spying into windows of a home”).

And to some extent, an intrusion may also occur psychologically,¹¹⁰ for example, through persistent and unwanted phone calls.¹¹¹

An intrusion or prying in the virtual world is just as possible as it is in the real world. In mimicking the physical world, virtual worlds implicate the same private physical boundaries that exist in the real world. In the virtual world, these boundaries are less secure because avatars can move around more freely in the virtual world.¹¹² Avatars can fly and teleport to any location of their choice. Therefore, intrusive acts of the real world translate to the virtual world.

Additionally, in virtual worlds, intrusions may not be physical or trespassory. For example, avatars in Second Life enjoy a “freely movable camera,” which gives them the ability to view and zoom in on others from different perspectives.¹¹³ Thus, an avatar could stay in one place, and still be able to spy on others without moving a virtual inch. Even worse, avatars can also have audio “tied to camera focus... [and] eavesdrop on spoken communication between other avatars at great distance with relative ease.”¹¹⁴ Additionally, avatars can create devices that are designed specifically to eavesdrop and spy on other avatars.¹¹⁵ A multitude of data collection “tools” are available for purchase to residents in Second Life.¹¹⁶ One such device is the “chat monitor,” a program which records the conversations of avatars who come near it.¹¹⁷ There is even one shaped like a house plant, called the “Chat Spy House Plant,” available for 200 Linden dollars.¹¹⁸ The malicious use of this device is unambiguously solicited in the advertisement, which states:

Worried about what is said behind your back? Got a cheating partner? Get the Dirt with this cleverly disguised Chat spy. The plant looks and acts like any ordinary home decor item. Even an experienced scripter won't know its [sic] a spy because the script is hidden inside.¹¹⁹

¹¹⁰ See *Phillips v. Smalley Maint. Serv. Inc.*, 435 So.2d 705, 711 (Ala. 1983) (“One’s emotional sanctum is certainly due the same expectation of privacy as one’s physical environment.”); see discussion *infra* Section IV.A.2.ii (regarding a reasonable expectation of privacy).

¹¹¹ *Zellinger v. Amalgamated Clothing*, 683 So. 2d 726, 733 (La. Ct. App. 1996) (harassing phone calls “constitute [an] illegal and unwarranted infringements of [plaintiff’s] right to privacy.”).

¹¹² DURANSKE, *supra* note \99\, at 243.

¹¹³ *Id.*

¹¹⁴ *Id.*; see also Second Life Blog, <http://blog.secondlife.com/2007/08/30/tip-of-the-week-how-to-move-your-camera-further-and-better/> (last visited Mar. 20, 2008).

¹¹⁵ DURANSKE, *supra* note \99\, at 244.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ SL Exchange, Chat Spy House Plant, <http://www.slexchange.com/modules.php?name=Marketplace&file=item&ItemID=461510> (last visited Mar. 20, 2008). Linden Dollars is the currency of the Second Life, and is convertible to U.S. dollars. See Second Life Economic Statistics, http://secondlife.com/whatis/economy_stats.php (last visited Mar. 20, 2008).

¹¹⁹ SL Exchange, <http://www.slexchange.com/modules.php?name=Marketplace&file=item&ItemID=461510> (last visited Mar. 20, 2008).

The Spy House Plant is only one of the many hundreds of tools that Second Life residents can access.¹²⁰

If such “tools” were available in the real world, their use would easily satisfy the intrusion element of the tort. Indeed, courts have held such devices to constitute an intrusion.¹²¹ Thus, this first element, the requirement of an actual intrusion or prying, is not impossible to satisfy in the virtual world.¹²² However, applying the second and third elements of the intrusion tort to virtual worlds is problematic.

2. The Problem of Applying the Objective “Highly Offensive” and “Reasonable Expectation of Privacy” Elements to Virtual Worlds

Alone, an intentional intrusion is not enough to sustain an intrusion upon seclusion claim. The plaintiff must also show that the intrusion is highly offensive to a reasonable person.¹²³ Additionally, the plaintiff must also prove that the matter intruded upon is private — meaning that there is a reasonable expectation of privacy in the matter.¹²⁴ Both of these requirements are objective elements, meant to strike a balance between the individual privacy interests and societal interests;¹²⁵ these elements render the tort to protect only one’s “reasonable expectation” of privacy, and only against “highly offensive” intrusions.¹²⁶ The reasonable person standard, as manifested in both of these elements, gives courts leeway in striking this balance.

In applying the second and third elements to virtual world, suppose the following scenario. Dave Avatara is a Second Life resident who runs a flower business. He creates and sells plants as home décor to other residents. One day, Dave meets Pam Avatara, a customer who wants to buy a house plant. Dave suspects that Pam may be his ex-wife. Anxious to find out,

¹²⁰ See DURANSKE, *supra* note \99\, at 244.

¹²¹ Rhodes v. Graham, 37 S.W.2d 46, 47 (Ky. 1931) (intrusion through telephone wire running into appellant's home to listen plaintiff’s conversation); Hamberger v. Eastman, 206 A.2d 239, 241 (N.H. 1965) (“The tort of intrusion upon the plaintiff’s solitude or seclusion is not limited to a physical invasion of his home or his room or his quarters . . . [it] extend[s] to eavesdropping upon private conversations.”).

¹²² One reason why Second Life has become a popular virtual world is because residents are given full rights to create and own such devices. See Second Life Terms of Service, <http://secondlife.com/commerce/ip.php> (last visited Mar. 20, 2008) (residents retain intellectual property protection for the digital content they create, including avatar characters, clothing, scripts, textures, objects and designs); see also Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatar*, 39 AKRON L. REV. 649, 651 (2006) (“This right is enforceable and applicable both in-world and offline, and for non-profit and commercial ventures.”).

¹²³ RESTATEMENT (SECOND) OF TORTS § 652B.

¹²⁴ Shulman v. Group W. Prod., Inc., 955 P.2d at 478 (Cal. 1998) (“The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source.”).

¹²⁵ Shorter v. Retail Credit Co., 251 F.Supp. at 330, 336 (D.S.C. 1966) (holding that the right of privacy is not absolute).

¹²⁶ See ELDER, *supra* note \22\, at § 2:1 (the intrusion tort is “wary of providing an action to an unusually sensitive person, or an individual ‘only subjectively offended’”).

Dave purchases the “Chat Spy House Plant,” and with Pam’s consent, installs it in Pam’s virtual bedroom. Of course, Pam is not aware of this plant’s ability to capture and record all of her conversations. Assume that Pam finds out about this plant, but only after Dave has learned about her personal sexual history with her new husband. Does Pam have a claim for intrusion upon seclusion against Dave? As discussed above, Dave’s installation of the plant in Pam’s home would satisfy the first element of the tort — an intentional intrusion or prying. Thus, the rest of this section will attempt to apply the second and third elements.

i. Highly offensive to a reasonable person

To show that Dave’s intrusion is highly offensive, Pam must prove that the intrusion is “the result of conduct to which the reasonable man would strongly object.”¹²⁷ Courts have deemed this requirement as largely a function of “social conventions and expectations.”¹²⁸ While offensiveness of the intrusion is a question of fact, most of the cases are determined on summary judgment, and therefore, the court is heavily involved.¹²⁹ To determine whether an intrusion is highly offensive, courts employ an array of factors, including: “the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives, and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”¹³⁰ Consequently, courts’ analysis of a highly offensive intrusion is usually fact specific, and not useful for suggesting any bright line rules.¹³¹

Whether a reasonable person would find any intrusion in the virtual world as highly offensive is unclear. On one hand, whatever is highly offensive to a reasonable person in the real world should be highly offensive in the virtual world. Moreover, courts have found that surveillance, such as Dave’s plant, is an intrusion highly offensive to a reasonable person.¹³² However, virtual worlds are still, for many, fictitious worlds where users voluntarily enter for fun and games. Therefore, because users enter the virtual world to engage in a fantasy world, the reasonable person might not find it highly offensive that such a tool, so widely available, is used to overhear another’s game activity.¹³³

¹²⁷ § 652B cmt. d.

¹²⁸ PETA v. Bobby Beronini, Ltd., 895 P.2d 1269, 1281 (1995).

¹²⁹ See, e.g., Carter v. Innisfree Hotel, Inc., 661 So. 2d 1174, 1178 (Ala. 1995) (“After reviewing the evidence, we conclude that a jury could reasonably find that the [plaintiff’s] privacy had been intruded upon by [the defendant].”).

¹³⁰ E.g., Shulman v. Group W. Prod. Inc., 955 P.2d at 493.

¹³¹ See ELDER, *supra* note \22\, at § 2:1 (noting general vagueness of the standard and inconsistency of precedent).

¹³² See, e.g., Miller v. Brooks, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996) (surveillance camera placed in the plaintiff’s bedroom); Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101, 1118 (Md. Ct. Spec. App. 1986) (a “detection device” placed on plaintiff’s motel door); Eastman, 206 A.2d at 242 (concealed listening device in marital bedroom).

¹³³ See Hill v. Nat’l Collegiate Ath. Ass’n, 865 P.2d 633, 648 (Cal. 1994) (“[T]he court will focus . . . [on] competing social norms that may render the defendant’s conduct inoffensive.”); see also Aisenson v. Am. Broad. Co., 269 Cal.Rptr. 379, 387 (Cal. Ct. App. 1990) (“In determining whether an intrusion is highly offensive to a reasonable person, the court will consider the extent to which the plaintiff voluntarily entered into the public sphere.”).

The problem is that courts will need to decide who the reasonable person in virtual worlds is, and whether the reasonable person takes virtual worlds seriously, or as just a game. The requirement of a reasonable expectation of privacy poses a similar problem.

ii. Reasonable expectation of privacy

Plaintiffs also need to show that the matter intruded upon is private.¹³⁴ That is, the defendant must have “intrude[d] into a private place, or otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs.”¹³⁵ To prove this, plaintiffs must show a reasonable expectation of privacy,¹³⁶ and thus, meet two prongs.¹³⁷ First, they must have “an actual, subjective expectation of seclusion or solitude in the place, conversation, or matter.”¹³⁸ Second, that subjective expectation of privacy must be “reasonably objective.”¹³⁹

A subjective expectation of privacy may be demonstrated by any outward manifestation that the plaintiff expected the matter to be private.¹⁴⁰ To satisfy this prong, Pam would need to show that she expected privacy in her virtual bedroom, and that she acted consistently with that belief.¹⁴¹ Dave may argue that Pam did not act consistently because her belief of privacy when she invited another avatar to her room to install a piece of home décor. Nevertheless, whether she acted consistently with her belief or not, at the least, the first prong is applicable to the virtual worlds.

The second prong poses the most serious problem in applying the intrusion tort to virtual worlds. To show that her subjective expectation of privacy is objectively reasonable, a plaintiff must show that her expectation of privacy is one that a reasonable person would have in her position.¹⁴² That is, the court must determine whether the plaintiff’s expectation of privacy is “one that society is prepared to recognize as reasonable.”¹⁴³

Does the reasonable person expect privacy in the virtual world? In our scenario of Pam and Dave, the strongest argument for Pam is that courts have generally recognized that the expectation of privacy in one’s home is objectively reasonable.¹⁴⁴ However, this argument

¹³⁴ Fletcher v. Price Chopper Foods of Trumann, Inc., 220 F.3d 871, 878 (8th Cir. 2000) (“A legitimate expectation of privacy is the touchstone of the tort of intrusion upon seclusion.”).

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 652B cmt. c.

¹³⁶ E.g., Med. Lab. Mgmt. Consultants v. Am. Broad. Co., 306 F.3d 806, 812 (9th Cir. 2002).

¹³⁷ Courts have borrowed this test from the Fourth Amendment constitutional context. See Katz v. U.S., 389 U.S. 347, 361 (1967).

¹³⁸ Med. Lab. Mgmt. Consultants, 306 F.3d at 812.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 810.

¹⁴¹ See Hill, 865 P.2d at 648 (The plaintiff’s behavior must be “consistent with having an actual expectation of privacy.”).

¹⁴² *Id.* at 657 (“Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant’s conduct constitutes a serious invasion of privacy are mixed questions of law and fact.”).

¹⁴³ Kemp v. Block, 607 F.Supp. 1262, 1264 (D.Nev. 1985).

¹⁴⁴ See, e.g., Katz, 389 U.S. 347, 361 (“a man’s home is, for most purposes, a place where he expects privacy”); Weeks v. United States, 232 U.S. 383, 344 (1914) (noting “the sanctity of a man’s home”).

ignores a key feature of virtual worlds. Virtual worlds are open spaces “intended for its users to inhabit and interact via avatars.”¹⁴⁵ At its core, the virtual world is a public sphere, and essentially as a community.¹⁴⁶ Courts have been unwilling to find a reasonable expectation of privacy in “matters which occur in a public place or a place otherwise open to the public.”¹⁴⁷ For example, in Second Life, avatars are always exposed, and their location can be seen through the “mini-map”¹⁴⁸ feature on the screen. However, barring an expectation of privacy in the virtual world ignores a fundamental tenet of the intrusion tort “to protect people, not places.”¹⁴⁹ Hence, it is unclear whether a reasonable expectation of privacy exists in virtual worlds.¹⁵⁰

iii. Understanding the problem: Can we blame the reasonable person?

The problem is that, had the same situation between Pam and Dave occurred in the real world, the outcome would have been different. For example, in one case, the defendant used a hidden microphone to record the plaintiff’s conversation at the plaintiff’s front door.¹⁵¹

Why is there this difference? Seemingly, the “reasonable person” understands privacy needs of the real world but not of the virtual world. First, what a reasonable person would deem as a highly offensive intrusion precludes conduct in the virtual world that is otherwise sufficient for an intrusion claim in the real world. Second, because of the open and public nature of virtual worlds, an avatar’s expectation privacy may not be reasonable.

However, this problem exists only because of a flawed application of the reasonable standard. As set forth in the next section, avatars must be understood as separate individuals — and therefore, the reasonable person standard in virtual worlds should translate to a reasonable *avatar* standard.

¹⁴⁵ Wikipedia, *Virtual World*, http://en.wikipedia.org/wiki/Virtual_world (last visited Mar. 20, 2008).

¹⁴⁶ DURANSKE, *supra* note \99\ at 240.

¹⁴⁷ Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980); *but see* Huskey v. Nat’l Broad. Co., Inc., 632 F. Supp. 1282, 1288 (N.D. Ill. 1986) (“The mere fact a person can be seen by others does not mean that person cannot legally be ‘secluded’ [V]isibility to some people does not strip him of the right to remain secluded from others.”).

¹⁴⁸ Second Life Insider, <http://www.secondlifeinsider.com/2006/09/15/newbie-tip-the-mini-map/> (last visited Mar. 20, 2008) (“Avatars are represented on the Mini-map by green icons . . . this is especially useful when trying to follow someone as they fly.”).

¹⁴⁹ Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969) (quoting Katz, 389 U.S. 347, 351 (1967)); *see also* Nader v. Gen. Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) (“A person does not automatically make public everything he does merely by being in a public place.”).

¹⁵⁰ *See* Jeffers v. City of Seattle, 597 P.2d 899, 907 (Div. 1979) (“Though . . . the cases frequently use ‘public places’ to illustrate limitations upon the tort interest in privacy, logically, a person’s interest of privacy does not depend upon whether the place is ‘public.’”).

¹⁵¹ Alpha Therapeutic Corp. v. Nippon Hoso Hyolai, 199 F.3d 1078 (9th Cir. 1999) (finding an intrusion claim actionable because the defendant’s recording denied the interviewee “an important aspect of privacy of communication—the right to control the nature and extent of firsthand dissemination of his statements”).

V. A POSSIBLE SOLUTION: THE REASONABLE AVATAR STANDARD

A. *The Reasonable Person Defined By Community Norms*

The reasonable person “is not to be identified with any real person.”¹⁵² Rather, as Professor Robert C. Post explains, the reasonable person is “a representative of the normal standard of community behavior, who embodies the general level of moral judgment of the community.”¹⁵³ Consequently, as a benchmark for what a “highly offensive” intrusion and reasonable expectation of privacy is, the reasonable person standard guides the intrusion tort in accordance to those community norms.¹⁵⁴ Indeed, as the Restatement states, “the protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens.”¹⁵⁵ Moreover, Courts emphasize that “privacy . . . is not a binary, all-or-nothing characteristic [and that] there are degrees and nuances to societal recognition of expectations of privacy.”¹⁵⁶

Thus, the reasonable person is in constant consideration of community values, and constitutes a placeholder for the normative set of social norms and practices of the community.¹⁵⁷ For example, consider an intrusion claim involving an eavesdropping device. Where a landlord installed an eavesdropping device in marital couple’s bedroom, one court articulated that “it is only where [an] intrusion has gone beyond the limits of decency that [tort] liability accrues.”¹⁵⁸ The court found the intrusion actionable because “the general level of moral judgment in the community finds it highly offensive . . . to spy.”¹⁵⁹ Hence, the reasonable person standard, as applied in virtual worlds, must depend on the virtual community norms.

Virtual worlds foster real communities.¹⁶⁰ Residents of these communities experience a practical reality, where they invest emotionally and financially.¹⁶¹ Moreover, as residents project

¹⁵² RESTATEMENT (SECOND) OF TORTS § 283 cmt. c.

¹⁵³ Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 961 (1989) (internal citations and quotation marks omitted).

¹⁵⁴ *Id.* at 1008 (explaining that community norms “enable individuals to receive and to express intimacy, and to that extent are constitutive of human autonomy”).

¹⁵⁵ § 652D, cmt. c.

¹⁵⁶ See *Taus v. Loftus*, 151 P.3d 1185, 1217 (Cal. 2007) (citing *Sanders v. Am. Broad. Co.*, 978 P.2d. 67, 71 (Cal. 1999)); see also *Hill v. Nat’l Collegiate Ath. Ass’n*, 865 P.2d at 648 (“A ‘reasonable’ expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms.”).

¹⁵⁷ Post, *supra* note \153\, at 961.

¹⁵⁸ *Id.* (quoting *Hamberger v. Eastman*, 206 A.2d at 242).

¹⁵⁹ *Id.* at 961.

¹⁶⁰ See *Svetvilas*, *supra* note \7\, at 21. (“Users have formed economies and societies within these worlds that have real-world implications for the way we live, work, and play.”).

¹⁶¹ See *id.* at 22 (Virtual worlds are “a natural extension of Web 2.0 and social-networking applications . . . [and] the first step toward a more immersive virtual-reality experience.”); see also discussion *supra* Section III.B.1-3.

their identity through an avatar that grows and changes along with them,¹⁶² they experience an “embodiment”¹⁶³ of the self in the virtual world. For many, virtual worlds become breeding grounds for a new self.¹⁶⁴ As avatars begin a new identity, hence a “second life,”¹⁶⁵ the user behind the computer and the avatar can become two distinct personalities.¹⁶⁶ Thus, the need for privacy emerges when users want to keep the two discrete in their own worlds.¹⁶⁷

B. Discerning The Reasonable Person in the Virtual Community

As avatars emulate real personas in virtual communities, the “reasonable person” in virtual worlds must consider the norms of the virtual world community. Thus, the reasonable person in the virtual world may be described as the reasonable avatar — hence, a reasonable *avatar* standard. Accordingly, under a reasonable avatar standard, the intrusion tort would require the intrusion to be highly offensive to a reasonable avatar. And likewise, an avatar’s expectation of privacy would be reasonable only if it is one that the *virtual* “society is prepared to recognize as reasonable.”¹⁶⁸

A reasonable avatar standard would ensure that courts hearing virtual intrusion claims would consider the norms of the virtual world community.¹⁶⁹ Admittedly, this standard does not change the reasonable person standard. Rather, the reasonable avatar standard only guarantees that the reasonable person standard is applied correctly. Nor does the reasonable avatar standard necessarily imply greater privacy protections for avatars. To the contrary, it may even provide for less privacy protections. For example, in the hypothetical with Pam and Dave, whether the spy house plant¹⁷⁰ is highly offensive, would depend on Second Life community norms. Suppose that such devices are widely available in Second Life, and the reasonable avatar would not be surprised, but rather merely annoyed, if an avatar planted them in the community. If such were the case, the reasonable avatar would likely not find the intrusion as highly offensive.

However, the problem with invoking a reasonable avatar standard is putting it to practice. Courts already face a difficult time in determining the reasonable person standard in the real-

¹⁶² Zarsky, *supra* note \89\, at 236 (“[W]hile players invest both time and money in their virtual persona, they grow attached to it and see it as a reflection and even an important part of their physical, offline ‘selves.’”).

¹⁶³ Svetvilas, *supra* note \7\, at 20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Tal Z. Zarsky, *Privacy and Data Collection*, in 13 THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS, *supra* note \47\, at 220.

¹⁶⁷ *Id.* (“Consider . . . [a user] who does not want his offline friends and neighbors to learn of his escapades in virtual worlds, where he portrays a particularly grotesque avatar. . . . [H]e might be greatly concerned if other players publicize in the real world the connection between him and his avatar.”).

¹⁶⁸ See *Kemp v. Block*, 607 F.Supp. at 1264 (D.Nev. 1985) (A reasonable expectation of privacy is “one that society is prepared to recognize as reasonable.”); see also *supra* note \179\ and accompanying text.

¹⁶⁹ See Post, *supra* note \153\, at 961.

¹⁷⁰ See *supra* note \118\ and accompanying text.

world context.¹⁷¹ How will juries determine what the reasonable avatar deems as highly offensive or as a reasonable expectation of privacy? Judges before motions for summary judgment need to be educated and admonished of the reality of virtual worlds — an overwhelming task considering the vast and nascent nature of virtual worlds. When virtual worlds become as ubiquitous as the internet, perhaps then, judges and juries will no longer be strangers to virtual worlds.

Moreover, there is a broader problem of determining which community norms would dictate the reasonable avatar standard.¹⁷² Virtual world residents may prefer privacy law to not pierce the “magical circle”¹⁷³ of virtual worlds. As much as virtual worlds offer a real experience, they are still nevertheless a game.¹⁷⁴ Thus, applying real law in the virtual world can impede how the game is played.¹⁷⁵ Additionally, community norms on which the reasonable avatar standard depends are ambivalent:

For every player who is content to view the virtual world as play, there is another who gleefully buys and sells the game’s wands, armor, and gold pieces for U.S. currency on eBay. For every player who does not care if the world is hacked and accounts are robbed, there is another who views the breach as a computer crime of the highest order. For every player who sleeps soundly after being banished from a [virtual community], there is another who thinks about committing suicide.¹⁷⁶

Ambivalence in the norms of virtual communities would perplex the reasonable avatar, and render the reasonable avatar standard indeterminable.

Consequently, the reasonable avatar standard is not an absolute solution. Rather, only where virtual community norms are clearly established, can the reasonable avatar standard properly apply the objective elements of the intrusion tort. Consider the community norms of

¹⁷¹ See Alan F. Blakley, *Privacy: The Delicate Entanglement of Self and Other*, 3 RUTGERS J.L. & PUB. POL’Y 172, 209 (2006) (discussing vagueness of ‘reasonable,’ and ‘privacy’).

¹⁷² See BALKIN, *supra* note \47\, at 112 (“Virtual spaces are not natural kinds: they can and will be used for many purposes in the future, including not only commerce, but also education, therapy, political organization, and artistic expression. Courts and legislatures should keep these differences in mind and avoid one-size-fits-all solutions.”).

¹⁷³ The ‘magic circle’ is a “metaphorical boundary between fantasy realms of the virtual worlds and real world, used to protect virtual worlds from outside influences.” CASTRONOVA, *supra* note \49\, at 73 (Virtual worlds seek “to allow players to engage in fantasy,” and therefore the law should “safeguard the ‘Magic Circle’ that allows them to do this.”).

¹⁷⁴ See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2062 (2004) (“When one avatar murders another or destroys the other’s property, this generally raises no legal problems, assuming that murder and mayhem are permissible within the rules of the game.”).

¹⁷⁵ See CASTRONOVA, *supra* note \49\, at 68 (“Virtual worlds allow ... deeper ... access to . . . mental states invoked by play, fantasy, myth, and saga . . . [which] have immense intrinsic value to the human person. Yet virtual worlds cannot provide these mental states ... if the boundary that distinguishes them as play spaces is eroded.”).

¹⁷⁶ Edward Castronova, *The Right to Play*, in 68 THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS, *supra* note \47\, at 72.

Second Life, and its implications for applying the reasonable avatar standard to the house spy plant in the hypothetical with Pam and Dave. Linden Labs, the provider of the Second Life virtual world, and Second Life residents, both encourage intersection of the real world into the virtual world.¹⁷⁷ Thus, the community norms of Second Life ostensibly support the permeation of the real world through the ‘magic circle.’ Hence, the reasonable avatar standard is not at loss in the Second Life context. However, there are virtual worlds where the ‘magic circle’ is unambiguously regarded highly.¹⁷⁸ As a result, there, the community norms would dictate a reasonable avatar standard that is less likely to find a reasonable expectation of privacy or highly offensive conduct.

C. Other Limitations in the Way of Plaintiffs

Even if all three elements of intrusion upon seclusion are satisfied, application of the tort to virtual worlds incites several other hurdles.¹⁷⁹ First, as with most other tort claims, plaintiffs must prove harm that is proximately caused by the defendant’s conduct. In the intrusion context, courts generally look for some form of mental anguish.¹⁸⁰ Since reputation is vital to virtual world residents,¹⁸¹ injury to one’s reputation stemming from the intrusion is likely to satisfy a showing of harm that is recognized by courts.¹⁸²

Second, plaintiffs will need to demonstrate a court’s jurisdiction over the virtual world.¹⁸³ In the few cases involving virtual world copyright litigation, plaintiffs have successfully asserted both personal and subject matter jurisdiction.¹⁸⁴ In one case, the plaintiff subpoenaed the virtual

¹⁷⁷ See *supra* note \7\ and accompanying text (discussing introduction of real-world entities into Second Life).

¹⁷⁸ See, e.g., World of Warcraft, <http://www.worldofwarcraft.com> (last visited Mar. 20, 2008).

¹⁷⁹ These concerns are not unique to intrusion upon seclusion, but rather surface regardless of what tort is applied in virtual worlds. As such, these are only addressed briefly in this section.

¹⁸⁰ E.g., *Monroe v. Darr*, 559 P.2d 322, 327 (Kan. 1977) (“An invasion of privacy action is primarily concerned with compensation for injured feelings or mental suffering of the injured party.”); *but see* *Craig v. Andrew Aaron & Assocs., Inc.*, 947 F.Supp. 208, 213-14 (D.S.C. 1996) (“[I]t is incumbent upon plaintiffs to show blatant and shocking disregard of their rights and serious mental or physical injury or humiliation.”).

¹⁸¹ See *Chin, supra* note \48\, at 1327 (“Whether for economic reasons or not, virtual world participants rely on their reputation . . . because a resident’s existence relies on her interactions with and reputation among other residents.”); see also generally DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 189 (2007).

¹⁸² See, e.g., *Narducci v. Bellwood*, 444 F.Supp.2d 924, 938 (N.D. Ill. 2006) (recognizing “loss of reputation and integrity in the community” as sufficient harm) (quoting *Schmidt v. Ameritech*, 768 N.E.2d 303, 316 (Ill. App. Ct. 2002)).

¹⁸³ See *Chin, supra* note \48\, at 1332 (“[A]scertaining a party’s identity is a necessary element of any legal action and, in the virtual context, fraught with legal and definitional land mines.”).

¹⁸⁴ See, e.g., *Eros v. Simon*, No. 1:07-cv-04447-SLT-JMA (E.D.N.Y. Oct. 26, 2007), Compl., http://www.virtuallyblind.com/files/07_10_24_eros_et_al_v_simon_complaint.pdf (last visited Mar. 20, 2008).

world provider for the defendant's internet protocol (IP) address.¹⁸⁵ Then, the plaintiff located the defendant by subpoenaing several internet service providers, who determine the billing addresses associated with the defendant's IP information.¹⁸⁶ The plaintiff, a Florida LLC, asserted that the District Court for the Middle District of Florida maintained both subject matter jurisdiction and personal jurisdiction over the defendant, a resident of Texas.¹⁸⁷ Ultimately, the court entered a default judgment for the plaintiff.¹⁸⁸ Thus, as long as plaintiffs can identify the defendant — as demonstrated, an arduous task — claiming the court's jurisdiction over the defendant is not an impossible feat to overcome.

VI. CONCLUSION

The “right to be let alone” began with recognition of the need to protect individual liberty in the community.¹⁸⁹ Virtual worlds extend and expand real-world communities. Residents, or “avatars” of virtual worlds, lead “normal” lives, and in so doing, invest a great deal of time and resources. Thus, the question is whether avatars can invoke protection through the tort of intrusion upon seclusion.

The intrusion tort developed as the primary vehicle for invasion of privacy claims. Since its inception, the tort developed in reaction to innovations like the binoculars, instant photography, and wire bugs. With each new device, the adoptability of the tort was tested. Intrusion claims have been able to withstand despite developing technology, because the tort is more concerned with protecting a plaintiff's mental interest than the manner of the invasion.

The objective elements¹⁹⁰ guide the applicability of the intrusion tort to new technology. Both, the “reasonable expectation of privacy” and “highly offensive” elements rely on the concept of the reasonable person. Built on community norms, the reasonable person standard provides the proper benchmark to ascertain which intrusion claims are actionable.

Virtual worlds yield their own set of community norms. Avatars experience a practical reality, with real investments and returns. Moreover, virtual worlds create a rich environment where users are able to form a distinct identity. Thus, to ensure the intrusion tort accounts for community norms of virtual worlds, courts should consider a reasonable avatar standard in applying the objective elements.

But even with a reasonable avatar standard, the prospect for intrusion claims in the virtual world is narrow. The reasonable avatar standard is indeterminate in virtual worlds where the community norms are not established clearly. Virtual worlds proffer a “magic circle”¹⁹¹ of fantasy life which would be pierced by the application of privacy law.

¹⁸⁵ Reuters, Second Life News Center, <http://secondlife.reuters.com/stories/2007/10/25/eros-lawyers-id-john-doe-avatar-youth-denies-hes-catteneo/> (last visited Mar. 20, 2008).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Eros v. Leatherwood*, No. 8:07-cv-1158-T-24TGW (M.D. Fla. Nov. 16, 2007), Ct. Order, http://virtuallyblind.com/files/eros_default.pdf (last visited Mar. 20, 2008).

¹⁸⁹ See discussion *supra* Section II.C.

¹⁹⁰ See discussion *supra* Section IV.A.2 (regarding the “reasonable expectation of privacy” and “highly offensive to a reasonable person” elements).

¹⁹¹ See discussion *supra* Section V.B (explaining “magic circle”).

Where community norms uphold protection of the “magic circle” of fantasy, the reasonable avatar may not find intrusions actionable. Moreover, if community norms view the virtual world as more than a fantasy game, then the reasonable avatar might find privacy intrusions as legally actionable. Community norms of the virtual world need to be clear for the reasonable avatar standard to be applicable.

Once the virtual world community norms provide an applicable reasonable avatar standard, other conditions must be met to apply the intrusion tort to virtual worlds. First, the intentional intrusion element of the tort must be satisfied. This element is not impossible to satisfy since the intrusion tort already contemplates wiretapping or eavesdropping as invasive conduct.¹⁹² Second, plaintiffs must point to a specific defendant for jurisdictional purposes, and harm to collect damages caused by that defendant.¹⁹³ While none of these conditions are impossible to satisfy, with each one, a plaintiff’s case for intrusion upon seclusion is made increasingly difficult. Therefore, protection of privacy through intrusion upon seclusion in the virtual world is feasible, yet filled with many obstacles.

At first blush, the concept of protecting the “right to be let alone” in an environment that thrives on community and social interaction seems to be an empty endeavor. However, the intrusion tort’s protection of the person should also extend to virtual personhood. Virtual worlds illustrate the tension that dominates much of tort law — the balance between personal freedom and protection. Thus, once community norms reflect how much freedom avatars should enjoy in the magic circle, the reasonable avatar standard emerges to guide the objective principles of tort law.

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¹⁹² See discussion *supra* Section IV.A.1 (applying the intentional intrusion element).

¹⁹³ See discussion *supra* Section V.C (regarding the requirement of damages).

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