

## Virtual Spaces & Virtual Layers – Governing the Ungovernable?

Online multi-user platforms like World of Warcraft and Twitter have one common regulatory mechanism; the End User License Agreement. This document forms the cornerstone of the regulatory system within each of these spaces. Yet it is regularly contravened by users and providers alike. These agreements are very often the only forms of control or regulation that are present in online environments and therefore control more than user behaviour. Yet these platforms also share another feature: virtual disputes, but these are no longer confined online. Threats of violence and other criminal offences arise too, with examples including the abuse issued to Criado-Perez, and more recently, Flipovic. Criado-Perez suffered Twitter abuse and Flipovic was victimised on online message boards.

Cyberspace was once deemed to be free from governmental control but the increasing disputes suggest there is now a need to consider how users of spaces such as online games, virtual worlds and social media are protected. Is it fair and practical to leave regulation to EULAs? How do users achieve redress for wrongs – through online and in-site governance mechanisms or wider controls? This work will consider some of these issues, and will suggest that there is now a need for additional layers of regulation to fill the ‘responsibility gap’ left between EULAs and the offline legal mechanisms.

### Introduction

Virtual worlds, online social media sites, virtual communities and even MMORPGs<sup>1</sup> have had a chequered past, experiencing exponential growth in user numbers and subscriber bases. Facebook has truly global reach, with an estimated 1.23 billion worldwide users engaging with, or using the site regularly.<sup>2</sup> This alone, in the opinion of Kiss is one way in which the Internet (and our uses of it) have been rapidly transformed – we are longer merely using the Internet, we are part of it, and our interactions contribute to it.<sup>3</sup> Facebook is however, only one example of one platform – there are a multitude of others, offering slightly different versions of a similar experience or similar service. Twitter for example, it is estimated, has over 400 million users, and sees over 500 million tweets per day.<sup>4</sup> This is not the only example of an online platform with mass user numbers – World of Warcraft, the most popular

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<sup>1</sup> Massively Multiplayer Online Role Playing Games; hereafter MMORPGs.

<sup>2</sup> J Kiss, ‘Facebook’s 10<sup>th</sup> Birthday: from college dorm to 1.23 billion users.’ *The Guardian* (4 February 2014) <<http://www.theguardian.com/technology/2014/feb/04/facebook-10-years-mark-zuckerberg>> accessed 4 September 2015.

<sup>3</sup> E Reuveni, ‘On Virtual Worlds: Copyright and Contract Law At the Dawn of the Virtual Age’ [2007] 82 *Indiana L.J* 261, 264; Garlick M, ‘Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers’ (2004-2005) *Yale Jou of Law & Tech* 424.

<sup>4</sup> R Holt, ‘Twitter in Numbers.’ *The Telegraph* (21 March 2013) <<http://www.telegraph.co.uk/technology/twitter/9945505/Twitter-in-numbers.html>> accessed 4 September 2015.

online game in history peaked at 12 million subscribers.<sup>5</sup> Whilst this is just a very small sample of some of the leading online platforms, these figures indicate that there is a very high level of interactivity across a number of platforms.

Whilst the Internet and cyberspace was once deemed to be free from governmental control and claims of governmental sovereignty,<sup>6</sup> is there now a need to consider how users of spaces such as online games, virtual worlds and social media are protected? Is it fair and practical to leave regulation to EULAs? How do users achieve justice – through in-world and in-site governance mechanisms or wider controls? This paper will consider the current regulatory mechanisms operating across online platforms including social media sites and online gaming platforms, and question, in light of some prescient examples, whether the current forms of control are suited to allowing users to enjoy their online interactions whilst also ensuring that there are adequate provisions to allow disputes to be resolved in the interests of all of the parties concerned.

Whilst this development of ‘new’ forms of interaction has blossomed to the extent that Ofcom reports 50% of our time is now spent online,<sup>7</sup> these changes in our social behaviours also present a number of challenges, not only in terms of our changing social realities, but also in terms of new forms of potentially deviant and undesirable behaviour arising through interactions with these online platforms. Of course, within any discussion of online platforms, especially ones dealing with control and governance, there are questions of the division between the online or virtual, and the offline or real.<sup>8</sup> Similarly, issues of conflict of laws and jurisdictional competence arise, particularly when discussing online spaces. Again this work acknowledges that such discussions do arise, but does not engage with those aspects here.

### *Virtual Spaces*

In a wide variety of online spaces, there are a wide variety of potential behaviours and activities which users can engage in. This is, in part, dependent upon the particular space – for example, in certain games, it is acceptable to seek to rape and pillage,<sup>9</sup> whereas on Facebook or other social media sites, remarks or content connected to

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<sup>5</sup> Blizzard Entertainment, ‘World of Warcraft subscriber base reaches 12 million worldwide.’ Blizzard Entertainment Press Release (7 October 2010) <<http://us.blizzard.com/en-us/company/press/pressreleases.html?101007>> accessed 4 September 2015.

<sup>6</sup> J P Barlow ‘Declaration of the Independence of Cyberspace’ EFF (8 February 1996) <<https://projects.eff.org/~barlow/Declaration-Final.html>> accessed 4 September 2015.

<sup>7</sup> Ofcom ‘Consumers spend almost half of their waking hours using media and communications.’ (2010) <<http://media.ofcom.org.uk/2010/08/19/consumers-spend-almost-half-of-their-waking-hours-using-media-and-communications/>> accessed 4 September 2015.

<sup>8</sup> For example, virtual communities, as identified by B Anderson, *Imagined Communities: Reflections on the Origin and spread of Nationalism* (Verso 1983), T Edensor, *National Identities and Popular Culture* (OUP 2001). But see further: D Bell, *An Introduction to Cybercultures* (Routledge, 2001); and F Weinreich, ‘Establishing a point of view towards virtual communities.’ (1997) 3(2) *Computer-Mediated Communication* <<http://www.december.com/cmc/mag/1997/feb/wein.html>> accessed 4 September 2015.

<sup>9</sup> For example ‘Sociolotron’ is an adult sex game; M Whitty and G Young, ‘Rape, pillage, murder and all manner of ills: Are there some possibilities for action that should not be permissible even within gamespace?’ in K Poels & S Malliet (eds) *Moral Issues in Digital Game Play*, ACCO Academic (2012) 2.

such behaviours would be incredibly controversial and problematic, as Twitter Trolls have recently discovered.<sup>10</sup> It should also be noted that the situation is not always straightforward in terms of what is and is not acceptable – particularly in a gaming context.<sup>11</sup> It is also the situation that creating and sharing content through online platforms can be problematic – especially given the troubled private copying exception,<sup>12</sup> introduced in October 2014, only to be overturned by the High Court in June 2015.<sup>13</sup> Similarly, the Amazon Reviews sections are an online space, and potentially also an online community controlled by a specific set of rules.<sup>14</sup> These are not the only examples however – Mumsnet, fan fic sites,<sup>15</sup> Comment Is Free on the Guardian website are all also examples of online spaces in which users contribute, connect and interact. In a sense each of these spaces are controlled by guidelines written or unwritten, and create cyber communities, highlighted by Bowrey who suggests that there are, ‘different kinds of communities and associated cultures that intersect with the layers of self-regulation, voluntary schemes, co-regulation, legislation, and international agreements.’<sup>16</sup> In a sense therefore, online spaces, and their associated interactions provide not only challenges to the traditional paradigms of governance and control, but also highlight the changing nature of interactions. Similarly, ‘property’ disputes – be it intellectual property or digital property – are increasingly more prevalent and predictable, yet the legal responses to them are far from predictable in the light of the private copying exception fiasco. Decisions such as that in the Google Books litigation,<sup>17</sup> or the Second Life Linden Labs class action<sup>18</sup> have been handed down and indicate the significance of digital properties and their host spaces. This has seemingly been recognised by the judiciary but the legal system itself has yet to adapt to such developments.

Regulation is currently non-platform-specific, and relies in an online context almost exclusively on contractual agreements. This current approach means that there are gaps in the system of control – be it in the contractual agreements or in terms of the regulation of behaviours within these platforms. It is possible that there are also gaps in responsibility, which exacerbates the lack of governance and control in these online platforms. Who for example, is responsible in the current paradigm where the EULA does not deal with the dispute raised? What recourse would a wronged user have in such a situation? The next layer following the EULA under the current paradigm is usually to resort to the offline legal provisions, however, the user is then constrained by applicable law clauses in the EULAs, meaning that the chance of resolving a

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<sup>10</sup> *R v Nimmo; R v Sorley* (2014) (unreported) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-nimmo-and-sorley.pdf>> accessed 4 September 2015.

<sup>11</sup> See for example: M Luck, ‘The Gamer’s Dilemma: An Analysis of the arguments for the moral distinction between virtual murder and virtual paedophilia’ *Ethics and Information Technology* 11 (1):31-36 (2009).

<sup>12</sup> The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014.

<sup>13</sup> *British Academy of Songwriters, Composers And Authors & Ors, R (On the Application Of) v Secretary of State for Business, Innovation And Skills* [2015] EWHC 1723 (Admin) (19 June 2015).

<sup>14</sup> Amazon.co.uk, ‘Review Creation Guidelines’ <<http://www.amazon.co.uk/gp/community-help/customer-reviews-guidelines>> accessed 4 September 2015.

<sup>15</sup> For example: [www.fanfiction.net/](http://www.fanfiction.net/).

<sup>16</sup> K Bowrey, *Law and Internet Cultures* (CUP 2005) 14.

<sup>17</sup> *The Authors Guild et al. v Google Inc.* 770 F. Supp. 2d. 666 (S.D. New York) 2011.

<sup>18</sup> *Evans et al. v Linden Research Inc. et al.* No. C 11-01078 (DM. United States District Court, N.D. California) 2012.

dispute is reduced still further as most online platforms stipulate their choice of governing law.<sup>19</sup>

Whilst there are a number of online spaces, and online disputes, each with distinct characteristics, and user bodies, there are some key elements, which are shared amongst all of these online communities. Online spaces are essentially communities of various types. These spaces have a number of shared features: a high number of users; users who interact with one another – engaging in game play, creating and producing content all through virtual environments; and these interactions produce disputes which require resolution. These spaces all share a further commonality; the End User License Agreement as the dominant mechanism of regulation and dispute resolution.<sup>20</sup> In these ways, online spaces resemble offline communities, users associate with other users, sharing bonds and establishing connections. As highlighted by Wang & Wellman: ‘Friendship is alive and well – and living offline, online and sometimes in-between.’<sup>21</sup> It is therefore possible to view an online community as similar to a football club for example because influences of norms and laws play a role in shaping such communities.<sup>22</sup> Indeed, as Inglis has stipulated, ‘Communities can be as broad or as narrow as we want them to be.’<sup>23</sup>

However, this in part goes against the practicalities of controlling the online platforms. With worldwide user bases, and the scale of user numbers – control and regulation of these spaces is far from straightforward, and may not even be practical. Twitter is but one example of an online or virtual community, with its own rules and norms, and forms of interactions between its netizens.<sup>24</sup> It is also one that has been the subject of controversial headlines over trolling, and online abuse, particularly in respect of well-known personalities such as Laurie Penny.<sup>25</sup> Similarly, whilst each of these online spaces have norms and specific elements, disputes and disagreements also occur – just as in the offline world. The distinction however, is in relation to what a user *can do* when something does go wrong online given the differences between the online and the offline methods of redress, although Easterbrook would suggest no such difference exists.<sup>26</sup>

Given the challenges posed by seeking to regulate these platforms, rather than focussing on the kind of regulation that each platform adopts (and there are some

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<sup>19</sup> This for example, in online gaming is often the law of the state of California, which makes taking legal action prohibitively expensive for most users.

<sup>20</sup> Although such agreements commonly include other variants such as: Terms and Conditions, Terms of Service, Rules of Play and Play Nice Policies.

<sup>21</sup> H Wang and B Wellman, ‘Social connectivity in America: Changes in Adult Friendship Network Size from 2002 to 2007’ *American Behavioural Scientist* (April 2010) Vol. 53 (8) 1148.

<sup>22</sup> S B Sarason *The Psychological Sense of Community: Prospects for a Community Psychology*. Joey-Bass (1974).

<sup>23</sup> S Inglis, ‘In a Web 2.0 world, are the words virtual or online redundant when defining community?’ <<http://networkconference.netstudies.org/2013/wp-content/uploads/2013/04/Virtually-the-Same-.pdf>> accessed 17 September 2015.

<sup>24</sup> J Hauben, ‘Further thoughts about netizens’ (1 June 2010)

<[http://http://www.columbia.edu/~hauben/CMC/netizen\\_thoughts.html](http://http://www.columbia.edu/~hauben/CMC/netizen_thoughts.html)> accessed 04 September 2015.

<sup>25</sup> I Johnston, ‘Laurie Penny: Feminist author subjected to ‘vile sexist and anti-Semitic abuse’ over her book.’ *The Independent*, 21 July 2014 <<http://www.independent.co.uk/news/people/unspeakable-things-feminist-author-laurie-penny-subjected-to-vile-sexist-and-antisemitic-abuse-over-her-book-9617744.html>> accessed 17 September 2015.

<sup>26</sup> F H Easterbrook, ‘Cyberspace and the Law of the Horse.’ *U Chi Legal F* 207 (1996).

differences between each, irrespective of how subtle), it is perhaps time to ‘zoom out’ and consider the so-called ‘bigger picture’ of online spaces and online control rather than particular problems in particular spaces. Whilst examining each platform and the norms surrounding each interactive space can undoubtedly provide insights into the governance of such spaces, the reality today is that the plethora of interactive platforms makes such an approach unworkable. Rather, identifying common issues and approaches could provide a fresh approach to tackling the issues with virtual social interactions, and ought to provide an approach to governance that places the users of such spaces in positions from which they can seek redress for wrongs suffered. This discussion will therefore focus on such an idea in light of fairness and justice from the perspective of the users of such online spaces.

### *The ‘Issues?’*

The leading issue for consideration here is one connected fundamentally to users, in the event that there is a dispute, or an issue that arises requiring some form of resolution. In the gaming context, this usually concerns some aspect of proprietary interests – be it the ‘theft’ or other acquisition of gaming items, or the disputes that arise after the attempted sale of game items.<sup>27</sup> In non-gaming platforms however, such as virtual worlds, or even social media sites, the issues that have become increasingly problematic in recent years encompass various forms of targeted abuse or bullying – from the Ask.fm suicides,<sup>28</sup> to Twitter Trolling – targeted abuse and threatening messages directed at named Twitter users<sup>29</sup> – to hacking of Wikipedia pages to allow a ‘virtual beating up.’<sup>30</sup> There are also other examples – the Habbo Hotel child grooming revelations from July 2012,<sup>31</sup> and the virtual rapes in Second Life in 2007,<sup>32</sup> are also examples of the potential for undesirable online activities to occur. These issues, are perhaps, distinct from property disputes when considered from legal perspectives. Twitter abuse, and hacking are potentially criminal activities – within the purview of the offline criminal law for example – whereas the property disputes which may arise in online games are perhaps not as significant from a criminal perspective – but may be as problematic for users who have expended significant

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<sup>27</sup> K Barker, ‘MMORPGing - The Legalities of Game Play’. *European Journal for Law and Technology*, Vol. 3, No.1 2012 <<http://ejlt.org/article/viewFile/119/195>>.

<sup>28</sup> D Lepido, ‘Another Teen-Suicide Linked to Ask.fm Leaves Questions’ *Bloomberg* (5 March 2014) <<http://www.bloomberg.com/news/2014-03-05/another-teen-suicide-linked-to-ask-fm-leaves-questions.html>> accessed 4 September 2015.

<sup>29</sup> *R v Nimmo; R v Sorley* (2014) (unreported) where two trolls were handed custodial sentences for targeted abusive and threatening messages aimed at Caroline Criado-Perez and Laurie Penny.

<sup>30</sup> K Fernandez-Blance, ‘Misogyny, Violence highlighted in online video game, social media threats.’ *London Community News* (11 July 2012) <<http://www.londoncommunitynews.com/2012/07/misogyny-violence-highlighted-in-online-video-game-social-media-threats/>>; H Lewis, ‘This is What Online Harassment Looks Like.’ *New Statesman* (6 July 2012) <<http://www.newstatesman.com/blogs/internet/2012/07/what-online-harassment-looks>> accessed 4 September 2015.

<sup>31</sup> R Seifert, ‘Striptease and cyber sex: My stay at Habbo Hotel,’ *Channel 4 News* (12 June, 2012) <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> accessed 4 September 2015.

<sup>32</sup> R Davis, ‘Welcome to the new gold mines.’ *The Guardian* (5 March 2009.) <<http://www.guardian.co.uk/technology/2009/mar/05/virtual-world-china>> accessed 4 September 2015.

amounts of time and effort in developing their online accounts, which as Kennedy predicts, could lead to a very different approach to virtual items.<sup>33</sup> Nevertheless, irrespective of the type of dispute, or indeed the platform where the issue or activity has occurred, there is something that has happened to require some form of dispute resolution.

These issues – and all of these issues arising in online platforms – are supposedly regulated and dealt with at online platform level under the End User License Agreement (EULA). Such agreements require the consent of user of each online platform – irrespective of gaming or otherwise – before full access to the platform is granted. EULAs are imposed without negotiation or flexibility, and are widely recognised as being contracts of adhesion,<sup>34</sup> compounding the situation in respect of gaps in the regulatory paradigm. In addition to the EULA, there may also be an additional layer of regulation at a different level i.e. offline laws may also be applicable to activities online, but such laws may not be well suited to the online sphere, something acutely highlighted by Baroness Howe in 2013<sup>35</sup> when introducing the Online Safety Bill.<sup>36</sup> Further examples include those mentioned above; namely the Twitter Trolls,<sup>37</sup> who in the UK are now likely to face criminal prosecutions for malicious communications on the basis of their activities online.<sup>38</sup> The Twitter example seems perhaps to be one area where laws appear suitable yet these same laws do not appear to extend or apply to other online platforms. Offline laws such as those dealing with harassment or assault are not as suited to online gaming platforms. This is most significantly because to allow such laws to apply would undermine the idea of role play in a virtual community for example, and indeed as Adrian highlights, to apply offline criminal law to these spaces would be to apply the law in a way that players would not expect nor want.<sup>39</sup> As such, if such laws are applied they would deal only with the consequences, rather than the actual on screen activity and characters, and would therefore not actually address the issue. For example, it is acceptable to kill and harm another character in game battles, and indeed to take the goods of the fallen character, whilst it is not acceptable to seek to scam a player or obtain virtual items through hacking for example. It is a very narrow division between expected game activities and unexpected activities such as theft of items in virtual worlds. The theft of game items in games may be acceptable, but the theft of items from a gamers account outside of the game may not. Offline law seems to have no way of distinguishing between these two types of theft.

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<sup>33</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95.

<sup>34</sup> *Schroeder Music Publishing Co Ltd v Macaulay* (1975) 1 All ER 237, per Diplock LJ.

<sup>35</sup> --'Protected offline, but exposed online, says Baroness Howe.' CARE (14 May 2013.) <<http://www.care.org.uk/news/latest-news/protected-offline-exposed-online-says-baroness-howe>> accessed 4 September 2015.

<sup>36</sup> Online Safety Bill [HL] 2012-13.

<sup>37</sup> *R v Nimmo; R v Sorley* (2014) (unreported).

<sup>38</sup> CPS, 'Guidelines on prosecuting cases involving communications sent via social media.' (November 2013)

<[http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/index.html](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html)> accessed 4 September 2015.

<sup>39</sup> A Adrian, 'Beyond Griefing: Virtual Crime' Computer Law & Security Review, Vol 26(6) (2010) 640.

A EULA is a binding, standard-term contractual agreement, which forms the relationship between a user and the developer, rather than between one user and all other users. This is in itself potentially problematic because in order to resolve a dispute between user A and user B, the developer will be required to be involved given the lack of a direct contractual relationship between the users. In this way, it is perfectly possible to view these agreements as something more than merely a license agreement, and actually something more akin to a set of rules dealing with the rights and entitlements and obligations a user is under during their membership of the online platform in question. In the online game, World of Warcraft,<sup>40</sup> for example, the EULA also makes reference to additional agreements such as Terms of Use Agreement. Other examples include agreements such as Rules of Play and Play Nice Policies in another online game – EverQuest II.<sup>41</sup> These agreements therefore cover much more than merely the actual licensing of content to the user, and encompass clauses as varied as Dispute Resolution, Indemnities, Limitations of Liability and Intellectual Property Policies.

This is especially the situation given that increasing ranges of issues are arising in these online platforms, encompassing a range of activities. Whilst there are also instances where the offline law and regulatory model has ‘stepped in’ this is far from the usual situation, and therefore, contractual redress under the EULAs is a leading method for users to seek to gain some recompense. However, there is a significant gap between the application of the provisions of such contracts and the law. It is therefore possible that this gap in levels of redress leads to a situation, which is detrimental to the interests of the users. An approach of two layers – for example, firstly the EULA layer, and, secondly, the criminal law layer – alone is insufficient, and there are therefore gaps in governance, which potentially allow issues (such as those highlighted above) to seep into online interactions. A game player suffering the theft of his game items – for example a virtual sword – can resort to the EULA, and to the criminal law. However, if the sword was taken within game play, there is little the criminal law can do. If the sword was stolen from the gamers game account outside of game play, there is a clearer link to the criminal law here because that activity is something which the offline law recognises as a problem.

### ***Governing the ungovernable?***

In light of the kinds of spaces under consideration, and the type of disputes that can – and do – arise in online platforms, questions of EULA competency arise, alongside broader questions of Internet control and governance. In the context of online platforms however, the focus rests on a ‘broad brush’ approach to such concerns, rather than considering very specific areas of control and governance. Similarly, the discussion is not one of internet governance as a whole, but instead, a focussed approach which incorporates layers of governance ought to be considered. As such, only 2 layers seem to operate to form any kind of regulatory paradigm, and there is a void between the in-game mechanism of the EULA, and the offline mechanism of the criminal law. There is nothing in between operating as a different level of control.

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<sup>40</sup> World of Warcraft EULA, Clause 8 (9 December 2010) <[http://eu.blizzard.com/en-gb/company/legal/wow\\_eula.html](http://eu.blizzard.com/en-gb/company/legal/wow_eula.html)> accessed 4 September 2015.

<sup>41</sup> Sony’s EverQuest II Code of Conduct; ‘Play Nice Policies – Activity within EverQuest II.’ <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> accessed 4 September 2015.

Solum and Chung have suggested the need for layers in their ‘vertical hierarchy’<sup>42</sup> but this adopts a different focus of layering, and highlights the layers involved in the Internet architecture from a public law perspective, rather than a layered regulatory paradigm. They suggest for example, that the layers of the internet consist of: physical foundations, a logical layer, an information layer and, finally, users. Accordingly, whilst these elements combine to form a hierarchy and each operates at a different level, this is different to the layers suggested here. It is possible that a more structured and focussed system of appropriate and graduated layers of control ought to provide mechanisms which would ensure that the gaps in governance found in relation to online platforms and communities are closed.

This system of ‘layered governance’<sup>43</sup> would necessarily include some additional levels of control. For example, instead of only the EULA and the offline law, it is possible to perceive a system of platform specific dispute resolution relating to disputes arising within a platform – something similar to the eBay model.<sup>44</sup> Thus, such a layer could operate between the EULA and the offline law to provide a graduated set of options for a wronged user to pursue. Such a system would therefore present a hybrid system of governance for online platforms – combining the offline and online mechanisms, but also combining in-game and out-of-game mechanisms. A hybrid approach is not too different from the situation that currently exists, although it would shift the focus of control to one within these communities and spaces rather than the application of offline laws, because, unlike the current system, there would be specific online controls designed specifically for the online spaces rather than adapted from offline legal mechanisms. This approach would however operate as a stop-gap measure until a pure online system could be incorporated.

The layered approach would also potentially allow for a system that would incorporate different levels of dispute resolution – from platform specific (or ‘in-house’) approaches such as mediation, or community resolutions – similar to the eBay Dispute Procedures<sup>45</sup> – to an oversight body, similar to that like the Football Association (FA) that oversees domestic football in England.<sup>46</sup> A system of governance incorporating different layers would also potentially allow for users who have not reached a satisfactory resolution to escalate their claim to the next ‘level’ in the model of governance, and could therefore empower users to resolve their difficulties, rather than allowing them to be treated in an unfair manner, and left to follow the provisions within EULAs. Such an approach would also allow for the most serious online issues to be dealt with by the courts or by enforcement bodies if necessary – as is now the scenario for criminal online communications.

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<sup>42</sup> L B Solum and M Chung, ‘The Layers Principle: Internet Architecture and the Law’ U. San Diego Public Law Research Paper No. 55. (2003). <<http://ssrn.com/abstract=416263>> accessed 4 September 2015.

<sup>43</sup> K Barker, ‘Online Games and IP – Battle of the forms to Social Norms: Reconceptualising and Re-layering?’ (2013) 10:3 *SCRIPTed* 320 <<http://script-ed.org/?p=1153>>.

<sup>44</sup> eBay, ‘How to use the Resolution Centre.’ <<http://pages.ebay.co.uk/ebay-money-back-guarantee/how-to-help.html>> accessed 4 September 2015.

<sup>45</sup> *Ibid.*

<sup>46</sup> The FA, ‘Rules & Governance.’ <<http://www.thefa.com/football-rules-governance>> accessed 4 September 2015.



In advocating for a system of such layered mechanisms of control, more regulation is not the dominant concern; better regulation is being advocated. Suitable and more specific regulation, which is suited to the spaces and disputes concerned would be an improved approach to online governance of online spaces. This could in theory also potentially address issues of control, which have arisen through the Snowden revelations,<sup>47</sup> Wikileaks<sup>48</sup> and the Pirate Bay.<sup>49</sup> Layers would also potentially allow for decentralised control, something Berners-Lee highlights as a necessary ingredient for the development of the web.<sup>50</sup>

### **The Future of Virtual Platform Regulation?**

The gaps in responsibility extend beyond user-user interactions to platform providers / developers, who have understandably implemented a dominant system of contractual control reflecting heavily their own self-interest, rather than also balancing the interests of the users. Online communities are not purely online – they reflect a blend of online and offline. It is therefore baffling although understandable that current regulatory mechanisms seek to apply offline controls to online spaces. Neither space can exist without the other – they are co-dependent and co-existent. A key feature of such platforms is the global user base, and the ability to transcend boundaries.

Time spent ‘online’ is increasing and therefore, as the Internet and our uses of it develop further, the regulatory models applicable to it must also develop. Layered controls – filling the gaps in responsibility – are one method that would allow regulators to retain jurisdictional control whilst simultaneously allowing a more focussed, and potentially fairer system of control to operate in online platforms. Such a change would provide the potential for greater user involvement in the creation of regulatory paradigms, and could allow for a fairer system of regulation from the perspective of users. The interchange between Web 2.0 and Web 3.0 is one that offers a unique opportunity to deal with the threats to the online paradigm whilst redressing the balance between providers and users to reflect the enhanced levels of creativity and interaction. Now is the time to simultaneously develop new regulatory paradigms addressing the responsibility gap – introducing more layers of control between EULAs and offline legal provisions – reflecting the changing uses of our connectedness.

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<sup>47</sup> The Guardian, ‘The NSA Files.’ <<http://www.theguardian.com/us-news/the-nsa-files>> accessed 4 September 2015.

<sup>48</sup> The Guardian, ‘Wikileaks.’ <<http://www.theguardian.com/media/wikileaks>> accessed 4 September 2015.

<sup>49</sup> *Neij and Sunde Kolmisoppi v Sweden* (App no 40397/12) ECHR 13 March 2013.

<sup>50</sup> L Clark, ‘Tim Berners-Lee: we need to decentralise the web.’ *WIRED* (6 February 2014.) <<http://www.wired.co.uk/news/archive/2014-02/06/tim-berners-lee-reclaim-the-web>> accessed 4 September 2015.