

Magic Circle or not?

Much ink has been spilled over many years regarding the question that lies at the very heart of video-game/interactive entertainment law. The query is itself simple enough to ask, though very challenging to answer. It is, 'To what extent ought real world laws intercede in virtual worlds?' The challenges in answering have much to do with a recurring fantasy that seems deeply aligned with our human psyche – that there must be a place so special and so different that the rules of man, no matter how logical, fair, or virtuous, ought not to apply.

We have seen this utopian dream articulated regarding many virtual spaces, including the abiding conviction at the dawning of the World Wide Web¹ that a sovereign, independent, and self-governing internet beyond the weaknesses and vulnerabilities of commerce, nation-states, and mortal laws could exist. Deeply related was the view that 'Copyright is Dead',² not through mercifully administered euthanasia, but because it had lost all meaning dashed against the rocks of fully unleashed human creativity and potential. It all turned out to be the cruelest and most unforgiving of jokes. The internet was not a separate county after all. Copyright not only lived, but became angry and vengeful fueled by business chaos stemming from the all too real audience shifts that the internet did bring. The freedoms proved mostly illusory, and the fantasies of avoidable accountabilities proved mostly temporary.

However, when it came to video games, the argument that real world laws ought not to apply seemed for a time not only plausible, but even coherent and grounded. It found an identity and associated theory in the 'the Magic Circle'. Adapted to video games³ from Johan Huizinga's pre-digital concept⁴ of a place where normal rules are suspended and replaced by other implicitly more magical rules better aligned with mysteries of artificial realities, it was, and remains for some, a remarkably addictive vision of living beyond the rule of law.

Just as we now know that the internet was not a special world beyond national laws, and neither was copyright law a corpse, so it turned out that the early vision for the Magic Circle in video games was overblown. Cracks in the idea that virtual spaces required either an alternate

regime or no laws at all came early. *The Village Voice* article 'A Rape in Cyberspace' by Julian Dibbell⁵ demonstrated that though events may appear virtual, their impact on our all too vulnerable psyches inevitably exist on the real world side of the screen. These cracks in 'the Magic Circle' turned seismic as soon as real world financial transactions entered game spaces. Say what you might about the inspirational nature of virtual currencies in game worlds, the human need to create personal profits in the real world inevitably superseded them. Aspirations for virtual economies that do good were held up to the mirror of human greed. Then finally into this progressive death knell came Professor Mia Consalvo's scholarly work 'There Is No Magic Circle',⁶ reminding us as it did that we occupy a space in this reality, no matter how much we may wish to lose ourselves in a fantasy world with no clear rules.

Then things seemed to get really ugly. The dark underside of some gamers and gaming communities came into full view during the misogynistic time associated with #GamerGate. During that period it was sometimes suggested that those who were threatening to women who criticized video games were simply playing a kind of game themselves, and that accordingly the Magic Circle could be invoked as a form of shield from any real world laws that might apply. The fallacy in any such suggestion was easily identifiable. It turns out that there is a rather huge and self-evident difference between, for example, gun violence in multi-player video-game context and a sexual assault in the same seemingly virtual context. Being killed in a game results in no real world physical harm, and little or no psychological harm, because we are quick to realize that even if our avatar is down, we are not. On the other hand, sexual assault on-line understandably seems to have significant real-world psychological effects. Sex-crimes have a lot of creepy intent in them, and even if nothing physical transpires in the real world, that same creepy violent intent does not evaporate and is not at all limited to any virtual world boundaries – it remains a very real and imminent danger to the real world.

As we go to press, the current battleground involving virtual worlds and real law concerns loot boxes and

1 As an example see John Perry Barlow, 'A Declaration of the Independence of Cyberspace', *Electronic Frontier Foundation* (February 8, 1996) <https://projects.eff.org/~barlow/Declaration-Final.html>.

2 As an example, see Lance Rose, 'Is Copyright Dead On The Net?', *WIRED* (May 1, 1993) <https://www.wired.com/1993/05/1-5-copyright-on-net/>.

3 Katie Salen and Eric Zimmerman, *Rules of Play: Game Design Fundamentals* (Cambridge, MA: MIT Press, 2003) p. 95.

4 Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (Boston, MA: The Beacon Press, 1955) p. 10.

5 Julian Dibbell, 'A Rape in Cyberspace' *The Village Voice* (December 21, 1993).

6 M. Consalvo, 'There Is No Magic Circle' (2009) 4(4) *Games and Culture*, 408–417.

related questions of video-game addiction. Real world jurisdictions are becoming increasingly certain that their gambling laws prohibiting games of chance apply to the 'virtual worlds' in games. The conflict is that to many developers loot boxes appear to be within the Magic Circle, a game design choice that happily for them is directly connected with increased profitability. What could the problem possibly be? Everyone's having fun – even when they are not – and even if everyone includes vulnerable children.

In the end, as significant as the more celebrated Magic Circle issues may be, the less than healthy duality of the concept is equally laid bare in more subtle manifestations of legal conflict. Consider the irony inherent in the lead article which explores the copyrightability of virtual universes themselves. 'Et tu, Brute' indeed to any concept that virtual spaces lie beyond the rule of law, or even that those imaginary universes are truly virtual at all. A top ten list of leading judicial interventions in the virtual world of games, legal reflections on IP protection for

gestures in virtual reality, the evergreen issue of personality rights associated with in-game versions of professional athletes, and an article on the legalities of preserving games in the real world, all eloquently make the same point in their own way. There is no Magic Circle indeed.

Leaving us with one question. If the Magic Circle does not exist, where do our feelings that it does or should exist come from? Could it be that the Magic Circle is simply a projected narrative of the less than conscious place within each of us that is inviolable, free, and knowable only to us?⁷ It is not a place of shared laws, but where our most basic and instinctual forms of individual freedom reside....As such it's wholly personal, and could never be shared except in a utopian fantasy.

Thanks to all who have contributed so much in the real world to this issue of the I.E.L.R.

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7 There is an odd but fitting legal inspiration behind this idea. *Preston v. 20th Century Fox Canada Ltd.* [1990] F.C.J. No. 1011 was a Canadian Federal Court Trial Division decision (available at <https://h2o.law.harvard.edu/collages/41425>) involving the author of a script telling a story about groups of small, furry creatures inhabiting a forest. The script included the word 'Ewok' as the name of one of the groups. The scriptwriter, Dean Preston, alleged that in 1978 his script titled 'Space Pets' was sent to George Lucas at 20th Century Fox. In 1983 Lucas released the third Star Wars film 'Return of the Jedi' which included small furry creatures that resided in forests who were known as 'Ewoks'. The Court found that

Lucas did not have access to the script sent by Preston. That said, the Court also found that even if the script was known, the infringements claimed were of public domain material that were not copyrightable having been 'drawn from a common pool of folklore'. Aside from whatever mixed feelings may arise from the suggestion that Ewoks effectively dwell within all of us in (with apologies to Carl Jung) a version of the collective unconscious, the decision does provide a form of precedent for the analogous suggestion here that the Magic Circle actually lies within and is a collective projection of our inner selves.