

# Virtual Identity and Virtual Privacy: towards a Concept of Regulation by Analogy

Bart Van der Sloot

The right to privacy protects the unimpeded creation of one's personal identity without external infringements. This protection is essential for the development of independent citizens, which properly functioning democratic states cannot do without. As a growing number of people shape their identity on the Internet, there is an increasing demand for privacy rights that protect the unimpeded creation of the virtual identity. The right to virtual privacy ensures the independent development of one's virtual personality, and also offers an opportunity for regulating cyberspace in an innovative way.



**Bart Van der Sloot**  
Researcher at the Institute for Information  
Law at the University of Amsterdam  
b.vandersloot@uva.nl

## 1. Introduction

Privacy can be described as 'the freedom from unreasonable constraints on the construction of one's own identity'.<sup>1</sup> It is not for nothing that a common definition of 'privacy' is the control a person has over his personal information.<sup>2</sup> The unimpeded creation of one's identity protected by the right to privacy is crucial for the formation of critical and independent citizens, which is essential in a properly functioning democratic state. If citizens are extremely influenced in the development of their identity by fellow citizens, the community or the state, they are not actually free to independently formulate an opinion and to participate in the democratic process.

Since the advent of the Internet and in particular the so-called Massively Multiplayer Online Role Playing Games (MMORPG), such as Second Life and World of Warcraft, the Internet has become increasingly important for the development of one's identity. Increasingly the virtual identity has been seen as an independent interest. Platforms like Second Life offer a virtual community where people move and act through their virtual identity: the avatar. This is perceived by the players as an independent identity, existing separately from their physical body. Since they identify with it and express a part of their personality with it that they could not fruitfully display in real life, there is an increasing demand for adequate protection of this interest by granting a virtual right to privacy. Besides the fact that this would better protect the independent and unimpeded development of the virtual identity in cyberspace, the recognition of virtual identities as independent assets and the allocation of virtual privacy rights offer an opportunity for the regulation of cyberspace, and especially MMORPG, in an innovative way.

## 2. The virtual body and the virtual identity

A virtual identity is born when someone logs on to a digital platform. Each platform has its own kind of digital body, each with its own physical characteristics. Often, one can also choose between different characters per platform, such as elves, humans or orcs. One can choose to be

male, female or sometimes neuter. Finally, one has a large influence on the physical characteristics of the avatar, such as facial features, body type and hair color. These extensive options ensure that everyone is able to shape his or her dream identity. Importantly, the virtual identity is not fixed. Developing and maintaining the virtual identity is a key mission of every player of a MMORPG. Through certain acts an avatar may gain more features and capacities. For example, an avatar that has entered many battles will grow stronger. Moreover, instruments and objects may be obtained which give the avatar certain extra capacities. Finally, in the virtual world, the avatar can join certain groups in which avatars are united that share the same hobby, race or virtual profession. Reputation and identity in these groups are of great importance to the internal relationships and the position of the avatar in the group.<sup>3</sup>

The formation of identity in the virtual world has great advantages over the formation of identity in the real world. In the virtual world one has a large freedom and influence in respect to bodily features, the development of one's identity and the environment in which this development is located. This contributes to the process of identification. In communication studies, this process is grasped by the concept of 'telepresence'. This is '...the extent to which one feels present in the mediated environment, rather than in the immediate physical environment.'<sup>4</sup> 'Telepresence' depends both on the degree of interactivity in the virtual environment and on how 'real' such an environment is perceived to be by the player. This process enables the person to develop a part of his identity he or she cannot fruitfully express in the real world.<sup>5</sup>

Edvard Catronova calls the avatar '...the physical representation of the self in virtual reality. ... The avatar mediates our self in the virtual world, we inhabit it, and we drive it, we receive all of our sensory information about the world from its stand point.'<sup>6</sup> He therefore proposes that people can actually have two bodies: their real avatar (the body) and their virtual avatar. A distinction is psychologically irrelevant. 'Coming to own the avatar, psychologically, is so natural among those who

spend time in synthetic worlds that it is barely noticed. No one ever says, “My character’s strength is depleted,” or, “My avatar owns a dune buggy.” They say “my strength” and “my dune buggy.”<sup>17</sup> The avatar in the virtual world is the vehicle of the brain to engage in certain activities and to develop a part of its identity, just as the physical body is the vehicle of the brain in the real world. The fact that many people spend more time developing their virtual identity than their real life identity leads Castranova to think that they attach more value to the identity represented by their virtual avatar than the one represented by their real avatar.<sup>8</sup>

### **3. Virtual right to privacy**

The importance of privacy in cyberspace is undisputed but this right is granted to real persons, whose privacy is then also protected in the virtual environment. However, increasingly people feel that the avatar’s right to privacy should be protected as an independent value. The basic principle that the right to privacy is a prerequisite for the development of one’s personality also applies to avatars. ‘The concept of privacy does not need to be transformed to account for cyberspace; rather, it must simply be applied in its traditional conceptual understanding within cyberspace, the realm of virtual persons.’<sup>9</sup> For the development of a virtual identity, a virtual right to privacy is indispensable.

There are a number of parties that may contribute to the violation of privacy in the virtual world. First of all, real governments and real people may gather information about people in the virtual world and use or misuse it in the real world with regard to real persons. In addition, the administrator of the platform and other avatars may violate the privacy of an avatar.<sup>10</sup> Administrators have access to all information generated and diffused on the virtual platform. Other avatars have a number of instruments at their disposal, depending on the platform, to breach the privacy of others, such as flying cameras, virtual eavesdropping devices and tools informing of the presence of other avatars in a certain range. Although avatars may also purchase privacy enhancing tools in the virtual world, again differing per platform, such as a house on an isolated island or in the sky, or a magic ring allowing the avatar to be invisible, these are widely regarded as too limited for the adequate protection of the privacy of avatars.<sup>11</sup>

The privacy violations restrain the avatar from developing his or her identity freely and independently. Without the right to privacy, there are no guarantees of personal autonomy for avatars in the virtual

world. The autonomy and the protection of the virtual personality are important assets for several reasons. First of all, there is an emotional bonding between a person and his or her avatar. The right to privacy protects this bond and shields the identity that the person sees reflected in his or her avatar by granting safeguards against unwanted infringements. Secondly, the distinction between real and virtual bodies is irrelevant for many players. They see no reason why their real identity and body deserves protection and their virtual identity and body does not.<sup>12</sup>

It is important to note that the privacy of avatars cannot be adequately protected by applying and enforcing real world privacy rights in the virtual world. First of all, it is not clear which rules apply in a given situation where the right to privacy of an avatar from someone in the Netherlands is breached by a player from Egypt in a game that is hosted in India and is regulated by someone from the United States. Moreover, it will be difficult to enforce the rights and obligations of one country on a player from another. Secondly, the application of the laws of a foreign nation on a player entails both a democratic deficit and a ‘foreseeability’ problem. In such a situation, people have barely any influence on the rules that apply to them and cannot be expected to know all the prohibitions of the different legal systems that might be applied to them. Moreover, in different situations, ethical standards shift. Applying the real right to privacy in the virtual world without alteration is also undesirable in that respect.

Just as in the real world, different privacy rights could be applied in the virtual world, such as bodily or physical privacy, locational privacy and informational privacy. The right to control the virtual body means the exclusive right to dispose of the virtual body and to determine who will have access to it. In order to protect the identity of the avatar it is also important to ascribe a form of locational privacy, for example by encrypting public spaces with a public password and private spaces with a private password. Finally, informational privacy rights protect the right to control information about the avatar, to determine who receives it and potentially to demand virtual money or virtual goods in return.<sup>13</sup>

### **4. Virtual legal paradigm**

The problems regarding the current regulation of MMORPG are twofold. Firstly, the administrator of the virtual platform is considered a despot by many. He creates rules and enforces them without any suffrage. Secondly, as explained above, there are problems with applying the real legal

system in the virtual world. This leaves the avatar unprotected. These ills can be overcome by creating a virtual legal paradigm as a separate system regulating the virtual world. This is called regulation by analogy, a form of regulation in which every core concept of the real world legal paradigm is transposed to a virtual legal paradigm.<sup>14</sup> By recognizing the virtual community and virtual body as independent values and assigning a virtual privacy right there is room for a mature concept of citizenship in the virtual world.<sup>15</sup> To that end, not only the right to privacy should be granted to avatars, but also the right to a fair trial,<sup>16</sup> freedom of expression<sup>17</sup> and virtual property.<sup>18</sup> Virtual property can be traded either through barter or fee. Most virtual platforms have a virtual currency with which it is possible to sell and buy goods. The virtual currency and economy enable the administrator of a platform to impose virtual tax obligations on avatars and to impose fines in respect of breaches of virtual rights. Surely, as avatars can claim rights, they have a duty not to breach the rights of other avatars.<sup>19</sup> Besides enforcement of these rights by fining criminal avatars, virtual freedom may be limited and a virtual death penalty may be imposed, the latter by disconnecting an avatar from the platform. These virtual rights and obligations demand a virtual state, which consists of a legislative, an executive and a judiciary branch. The problem currently experienced by players of the MMORPG is that these three powers are all in the hands of the administrator of the platform.

That the executive power lies in his or her hands is not very controversial. He or she has both the position and the instruments to properly implement the rules. With respect to the legislature, there is more critique. It would be preferable if the players of a virtual platform could voice their opinion on the norms in their virtual environment and have a voting right to determine the rules that are applicable to them.<sup>20</sup> This would mean the introduction of a virtual democracy, either in the form of a direct democracy or an indirect democracy, in which certain avatars specialize as professional politicians. A similar position can be taken in respect of the judiciary, which may be formed by trained and specialized avatars or by lay avatars in a jury system.

### **5. Conclusion**

The independent and unimpeded development of one’s identity is of great importance in a properly functioning democratic state, since it requires independent and critical citizenship. This is protected by the

right to privacy. Identity in the modern age is increasingly dependent on the Internet, not only in relation to the information, the fora and the social networking sites it offers, but also because of the opportunities the MMORPG present. There, people develop virtual identities that are separate from their real life identity. A growing number of people regard their virtual identity as valuable and worthy of protection. The privacy of the avatar might be breached both by other avatars, by such instruments as flying cameras and eavesdropping devices, and the administrator of the platform, who has access to all information generated and diffused on the platform. Privacy of the virtual identity can neither be adequately protected by real world privacy rights nor by privacy enhancing technologies in the virtual platform. Therefore a virtual right to privacy should be granted to avatars in respect of their bodily, locational and informational privacy. By seeing the virtual community in analogy with the real community, the virtual body in analogy with the real body and the virtual right to privacy, freedom of speech, a fair trial and property likewise, a virtual legal paradigm is constructed on the basis of regulation by analogy. A virtual economy has its own virtual currency and virtual states may impose virtual taxes and impose virtual fines, or restrict the freedom of a criminal avatar or even impose the death penalty on it by removing it from the platform. Finally, avatars should be granted the right to vote and there should be a separate judicial branch in the virtual world. The executive power is left in the hands of the administrator of the platform. Thus, regulation by analogy allows for an adequate and equitable regulation of cyberspace and in particular the MMORPG.

- 11 J. Lo, 'Second Life: Privacy in Virtual Worlds'. <[http://www.priv.gc.ca/information/pub/sl\\_080411\\_e.cfm#ftn104#ftn104](http://www.priv.gc.ca/information/pub/sl_080411_e.cfm#ftn104#ftn104)>.
- 12 J.W. Penney, p. 234. T. Palyan, 'Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion upon Seclusion in Virtual Worlds', *Southwestern Law Review*, 2008-38.
- 13 P. Toscano, 'Toward an Architecture of Privacy for the Virtual World', *John Marshall Journal of Computer and Information Law*, 2000-19.
- 14 J. Dibbell, 'Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society', *The Village Voice*, 1993.
- 15 P. Toscano, 'Toward an Architecture of Privacy for the Virtual World', *John Marshall Journal of Computer and Information Law*, 2000-19, p. 117.
- 16 R. Koster, 'Declaring the Rights of Players', p. 55-67. In: J. M. Balkin & B. S. Noveck: *The State of Play: Law, Games, and Virtual Worlds*. New York University Press, 2006.
- 17 S. Stepney, 'Freedom of speech in the virtual world', *Albany Law Journal of Science and Technology*, 2009-231. E. Mangiona, 'An avatar's parody: Considering a first amendment right to parody real world trademarks in a three dimensional virtual world', *Albany Law Journal of Science and Technology*, 2009-183. J. M. Balkin, 'Virtual liberty: Freedom to design and freedom to play in virtual worlds', *Virginia Law Review*, 2004-93.
- 18 R. Kennedy, 'Virtual rights? Property in online game objects and characters', *Information & Communications Technology Law*, 2008-17. P. Brown & R. Raysman, 'Property rights in cyberspace games and other novel legal issues in virtual property', *The Indian Journal of Law and Technology*, 2006-2.
- 19 B. Chin, 'Regulating your second life, defamation in virtual worlds', *Brooklyn Law Review*, 2007-4. F. G. Lastowka & D. Hunter, 'Virtual Crime', p. 121-137. In: Balkin & Noveck. T. Grivna, 'Virtual Crimes', *Masaryk University Journal of Law & Technology*, 2008-97.
- 20 A. E. Jankowich, 'Property and Democracy in Virtual Worlds', *The Journal of Science & Technology Law*, 2005-11-2. R. Koster, 'Declaring the Rights of Players', p. 55-67. In: Balkin & Noveck.

1 E. Agre & M. Rotenberg, 'Technology and Privacy: the New Landscape', p. 7. MIT Press, 1998.

2 A. F. Westin, 'Privacy and Freedom'. Atheneum, 1970.

3 M. White, 'The body and the screen: Theories of internet spectatorship'. The MIT Press, 2006. D. Bray, 'Survey: Virtual Worlds and Augmented Reality, 1991 - Present'. SSRN 962728. E. Castronova, 'Virtual worlds: A first-hand account of market and society on the cyberian frontier'. SSRN 294828. D. A. Bray & B. R. Konsynski, 'Virtual Worlds, Virtual Economies, Virtual Institutions'. SSRN 962501. T. C. Anderson, 'The body and communities in cyberspace: A Marcellian analysis', *Ethics and Information Technology*, 2000-2.

4 A. F. Wood & M. J. Smith, 'Online communication: linking technology, identity, and culture', p. 54. Lawrence Erlbaum, 2005.

5 Wood & Smith, p. 59.

6 E. Castronova, 'Theory of the Avatar', p. 3/5. SSRN 385103.

7 E. Castronova, 'Synthetic Worlds: The Business and Culture of Online Games', p. 45. The University of Chicago, 2008.

8 E. Castronova, 'Theory of the Avatar', p. 7.

9 J. W. Penney, 'Privacy and the new virtualism', *Yale Journal for Law & Technology*, 2008-194, p. 231.

10 T. Zarsky, 'Information privacy in virtual worlds: identifying unique concerns beyond the online and offline worlds', *New York Law School Law Review*, 2004-49.