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IP and Internet Social Networking**

*Patricia S. Abril, Jonathan Darrow, Peter Ludlow,
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and J. Michael Monahan****

¶1 MR. SCRUGGS: All right. Welcome back from break, everybody. Again, happy to see everybody that has been here for a while and, actually, happy to see some new faces, as well. So on behalf of the Northwestern Journal of Technology and Intellectual Property, welcome. We are happy to have you as our guest.

¶2 A quick housekeeping item. For any attorneys here that are here for CLE credit, make sure you get these forms, which we have extras out on the registration table in the atrium. If you can't find those or they are missing or something, just let me know and we will get you hooked up with these. Make sure you fill out these forms and try to get them to me by the end of the day. I will be around. If you have payment today, that's great, if you are going to pay with a check or credit card number. If you don't, let me know, and I can give you my business card and I can have you mail that stuff in to me, and we will do it that way.

¶3 With that housekeeping item taken care of, I would like to get started on our next panel, which looks to be a fun one.

¶4 So Andy Warhol once said, "In the future, everyone is going to be famous for 15 minutes." So we have entitled our next panel, Famous For 15 Minutes, IP and Social Networking, which covers a broad range. You will see all different perspectives. Hopefully, we will get into some MySpace, Second Life, maybe some video game issues, definitely get into probably DMCA.

¶5 Anyway, without too much further ado, I'm going to go ahead and introduce our panelists and I am going to let them take over.

¶6 So coming from my left and your far right and going towards the other direction, I'm going to start with Mike Monahan. Mike is an attorney over at Pattishall McAuliffe, which is a wonderful law firm here in the Chicago area. It does a lot of trademark copyright type of work. Mike actually does a fair amount of work with video games, representing video game makers.

¶7 Next we have Mr. Jon Darrow, who is a professor over at Plymouth State University, which is in New Hampshire. He wrote a wonderful article for us that is on a related issue, talking about the application of the DMCA, Digital Millennium Copyright

* Patricia S. Abril is an assistant professor of business law at the University of Miami School of Business Administration.

** Jonathan Darrow is a professor at Plymouth State University.

*** Peter Ludlow is a professor at the University of Toronto and the founding editor of the Second Life Herald.

**** J. Michael Monahan is an attorney at Pattishall McAuliffe in Chicago.

Act, to online social networking. And hopefully he will be able to talk a little bit more about that today.

¶8 Then next we have Professor Patricia Sanchez Abril. She is an Assistant Professor of Business Law at the University of Miami, School of Business Administration. She received her J.D. from Harvard Law School in 2000, and previously she earned her B.A. from Duke in 1996 as an Angier B. Duke Scholar.

¶9 She has published primarily in the areas of securities fraud and privacy. Her publications include *The Locus of Corporate Scierter*, a prescription for finding scierter within a corporate entity, which was published in the *Columbia Business Law Review*, and *The Ubiquity of Greed: A Contextual Model for Analysis of Scierter*, a proposal for a rubric for the analysis of greed as an indicator of scierter in securities fraud cases, which was published in the *Florida Law Review*.

¶10 Her most recent research explores the intersection between extant law and policy and the online social networking phenomenon. *Recasting Privacy Torts in a Spaceless World*, a look into the applicability of the public disclosure tort in the online social networking context, was published in the *Harvard Journal of Law and Technology* in the fall of 2007. She has also authored an article entitled, *MySpace of One's Own: On Privacy and Online Social Networks*, which appeared in our journal, the *Northwestern Journal of Technology and Intellectual Property*. She is currently undertaking an empirical research project that aims to assess expectations of privacy on online social networking sites, cross-culturally and inter-generationally.

¶11 Prior to joining the faculty at the University of Miami in 2006, she served as business manager of legal affairs for Univision Network, the largest Spanish language television network in the U.S. At Univision she was responsible for the negotiation and administration of all network contracts, which ranged from talent and production contracts to intellectual property matters.

¶12 And, finally, on the far end we have Professor Peter Ludlow, who is currently a professor at the University of Toronto and he is kind of our resident Second Life expert. In his second life, he is the founding editor of *The Second Life Herald*.

¶13 So without further ado, I'm going to leave it over to the panel, and we are going to start. Thank you.

¶14 (Applause.)

¶15 PROFESSOR SANCHEZ ABRIL: Okay. So apologies for my long and convoluted resume. Didn't know that there was a word limit.

¶16 I was just telling Brandon that, if anything, talk about swinging the pendulum, which was the topic of our last panel. Now we are just swinging the whole thing onto like a totally different topic, which is privacy and copyright and the future of that with these emerging technologies.

¶17 So where I'm going to start is talking about this quote, "A trillion or so nanoseconds of fame." Now, although I would love to take total credit for this, this was actually Judge Alex Kozinski's term, talking about exactly what we are going to be talking about now, which is online social networking.

¶18 Now, what is online social networking? Because this is in a way so new that it has many broad definitions. You know, some would say, even something like Craigslist is an online social network. When you think of online social networking, you think of MySpace, Facebook, the Friendster, et cetera. Basically, online social networking, in

what I'm going to discuss, is any website that -- whose main purpose is to act as a connector between users.

¶19 So that -- I mean, if you really read that, you can even think of the whole internet as a connector between users. This is for purposes of socialization, for purposes of interaction, for purposes of identity formation. And, obviously, I do not need to give a lot of introduction to websites like MySpace, the industry leader. When I wrote this, it was 100 million accounts. It is probably like 1 billion by now, who knows.

¶20 So let's talk about privacy harms on online social networks because this is one of those issues that when it is oversimplified, people just roll their eyes and say, Uhh. But, really, when we think about it, there is a very, very broad spectrum of privacy harms on online social networks, some of which are -- let's say, the poster can be accountable for or the legal system has a reaction to and others that are totally just, I guess, immature.

¶21 Let's talk about one end. On the one end we have what I call self-destruction through self-disclosure. This is when you hear about online all of the time and when you hear about it in the press, this is when I put up a picture of myself at Mardi Gras doing who knows what and then I got offended because my professor or my mother or my future employer saw it and did not give me a job. Well, I'm so sorry, that is just the name of the game. Yes, the internet has multiple invisible audiences. This is something that we are not really going to be covering here because I think we all agree that there is an aspect of foolishness to disclosing that on the internet as it is today.

¶22 Okay. Some examples, these two respectable gentlemen are from my part of the world. They are from Miami, and they are gang members in Miami. About a month ago, they put up this video on YouTube saying, "Miami Police Department, come at me, here we are, we are ready for you, there is the fight." And then there were people, public outcries, saying, "Well, you know, that is free speech." More on that later.

¶23 Then there is the ubiquitous students or, let's say, some have called them digital natives claim to have a -- somewhat of a -- let's call it a contextual expectation of privacy. I put this up on the net because I think my friends, my 3,000 Facebook, quote-unquote, friends are going to think that I'm cool because of this and not even thinking that maybe those 3,000 Facebook friends each have another 3,000 Facebook friends, among which might be someone that you would not want to see you doing a keg stand.

¶24 At the other extreme, the other extreme that the media loves is the cyber stalker, the identity theft, the suicide over cyber bullying. That is not something that I'm going to deal with either because those are totally separate legal issues. Obviously, because you do something online and it's illegal in the real world does not make it any more legal just because you chose a new forum to do it in. If you beat someone up and put it online, that is not really a particularly sophisticated legal question.

¶25 So this, for those of you that have been watching the news, is Megan Meier, a young girl who committed suicide after someone was cyber bullying her through her MySpace page. It turned out the person who was cyber bullying her -- or, actually, romancing her and then cyber bullying her was her teenage friend's mother.

¶26 And this is famous fights sites, sites with teenagers beating each other up and then putting themselves up online. Again, that is the two extremes.

¶27 So what are we talking about? We are going to extract those two extremes from our discussion and we are going to talk about the middle ground. And the middle ground is very, very broad. This is defamation. This is public disclosure of private facts. This is

our knee jerk reaction, our sentiment of certain things should just be private. I should have a right to have a situational personality.

¶28 What is a situational personality? Well, I'm wearing a suit because I'm at a symposium right now. But if I go to the beach or go skiing tomorrow with my friends from college or with my friends from work or with my pastor, I'm not going to be acting exactly the same. And the way that I act in one context is not necessarily, we all understand as human beings, the way that I'm going to act in others.

¶29 So what fits in this middle ground category that I'm talking about? What are the privacy harms that I'm talking about? Who is familiar with this website? If you aren't, you are now, and this kind of -- this is the newest frontier challenging the Communications Decency Act and sorority girls around the nation. This is called JuicyCampus.com. It was started last year by a graduate of Duke University, and the website slogan is, "Always anonymous, always juicy." The website promises its users complete anonymity. And how does it do that? Why can it do that? Well, it can do that because it doesn't require a login, and they instruct their users on how to enable and how to download IP cloaking software. So they claim to not have any accountability on that, too.

¶30 The stuff on here is -- you can all imagine, I am sure. Some of you are already on there and all kinds of stuff. The defamatory stuff, every aspect challenging the Communications Decency Act, First Amendment. Everything possible is on here.

¶31 Dontdatehimgirl.com. Another site that provides a forum for this kind of criticism, vitriol, robust exchange of a marketplace of ideas. Maybe, maybe not.

¶32 So what does that lead us to? What is the difference, gossip, networking, privacy. Where are we? My contention is that we -- this is not a matter of, oh, they are silly, oh, these digital natives, they don't understand what it is, they don't understand reputation, they don't understand the power of the internet. Well, most of these people on most of these websites have grown up with the internet, so that is not a real compelling argument to me.

¶33 Then there is the argument that they are so young and immature, they don't know that this might come up to bite them later. Maybe, maybe not. I think in order to frame this issue and to really understand how the law needs to address it, we need to understand more about the sociocultural movement. We need to understand more about the technology, and we need to understand more about five revolutions, as I'm going to call them, that are challenging our territory laws.

¶34 The first one is anonymity. You have all seen this cartoon. Now, we can sing the praises of anonymity forever. We can be reminded that the Supreme Court has repeatedly held that we have the right to speak anonymously and that anonymity allows for the free flow of ideas, the free flow of criticism without the chance of repercussion. However, in these cases, for example, JuicyCampus.com, in some cases Facebook or MySpace, anonymity can really be a license, a license to defame and a license to do other potentially illegal things.

¶35 The second one is fame. We all want to be famous all of a sudden, and why is this? Because the technology has allowed us to. All of a sudden these technologies have allowed for the democratization of fame. Anyone can be famous. And so what does that mean? There is such a low cost to fame, you don't have to do anything special really, just

put yourself out there. The more outrageous, the better. So it has led to people doing these outrageous things.

¶36 And on the flip side of that, I think it was Thomas Friedman last year that had an article in the New York Times that said, "With a camera phone, we are all photographers." With a blog, we are all publishers, and with a MySpace or Facebook account, we are all public figures. So this is going to have, I think, in the future, interesting repercussions on First Amendment and on what kinds of speech is actionable in this arena.

¶37 This couple here, if any of you have been watching the news in this area, he is the president or the owner of the Shubert Theatre in New York, and they are going through a bitter divorce. Just I think maybe two days ago, she put up a seven-minute YouTube video claiming all kinds of horrible things about him that if untrue are certainly defamatory. At the very least, if true, it is definitely a public disclosure of pretty private facts. An interesting issue of, Here is this man, some people know him, but does that constitute a public figure?

¶38 The next one is accountability and the question mark is there because there is none. There is none because, as I said -- and I will talk about a little bit more the law, the existing law is completely not addressing these issues at all because the technology has really moved on much further than the law.

¶39 As to the websites themselves, yes, some of them have an opportunity for rebuttal. Some of them have an opportunity to flag things that are inappropriate or to question things for neutrality, but the law does not do anything really in order to mandate that. And as we saw in the JuicyCampus example, there are many websites whose main purpose, whose business model is to kind of fit within that gray area.

¶40 The fourth one is context. We still don't know how to interpret context on the internet. We know how -- we know the difference between the National Enquirer and the New York Times, but when something is said on the blog, even if it is a Crazy.com blog, first of all, that is infinitely replicable. Even if it came from the CrazyBlog.com, it can go to the New York Times, and we really don't know the idea of source, the idea of context, of putting it in context. It's very, very hard on the internet.

¶41 Moreover, actually, as I said before, going back to my previous point on situational personalities, when you are, you know, having a conversation with your college roommate, you may not want your mother to hear it. Well, the same issue on the internet. That conversation can be taken from its initial context and published in a way that strips from its original context.

¶42 Next is permanence, and along with permanence comes omnipresence. Okay. Because of the digital forum, not only is it infinitely replicable, it can become viral. It is permanent, and it is everywhere you go. No longer can you, you know, move away from the small town and have your past erased or do anything like that that basically relies on the fragility of the human memory. None of that anymore. Everything is permanent now and part of a digital dossier.

¶43 So why doesn't our legal system address these issues? Basically, there are several very important constraints that our legal system -- and what I mean by our legal system is really our tort system, defamation law, privacy law, privacy torts don't go to the other end of it.

¶44 Practical, procedural, and substantive issues are obstacles at recovery. Practical. By practical, the cost and the timeliness of a lawsuit makes it impossible to actually do. Moreover, the purpose of a defamation lawsuit or the purpose of a privacy tort lawsuit is basically to silence the person and to be vindicated, to vindicate reputation. Why would you put this issue in the public record? It seems very counterproductive to what you would want to do.

¶45 So in addition to the timeliness and the cost issue is an absolute, you know, disconnect. It's just counterproductive to do.

¶46 And, finally, judgment proof defendant if you could find the defendant, if the ISP will release the identity, and if you can get a subpoena, then what is to say that the defendant is not gone.

¶47 Next are procedural. Obviously, the jurisdiction has quite significant issues. Two years ago a lawyer in Pittsburgh sued Dontdatehimgirl.com after he was defamed on the site. They said that not only did he cheat on his girlfriend but he had sexually transmitted diseases and he intentionally was spreading those around. He sued. He got so much press, it was everywhere. And what happened? It was dismissed on jurisdictional grounds.

¶48 And, finally, substantive, public disclosure of private facts. Now, go back in your tort book and you would think that you have some kind of a right to privacy. However, it is well held that there is no right to privacy in public spaces.

¶49 Meaning that you are crossing the street to get a cab and you -- they take a picture of you and you are on the cover of Newsweek and it says, "The Dumbing Down of America." You would think that you would not want to be in those shoes. However, there is case law that says that anything that you do in the public space is absolutely fair game. So apply that to the internet, and it is not too much of a stretch to see that it just does not apply.

¶50 The other thing is that once something -- you have disclosed to one person, some courts have held that it is no longer secret and it is no longer a private fact. So if you are on an online social networking site and you say something that you might not want a third party to know, you have effectively waived that right to privacy.

¶51 Finally, defamation. You first you have to prove it is untrue and that might be difficult and sometimes a little bit awkward. And I mean it's basically impossible -- if you are a public figure or an internet figure or even if you are not, it's almost impossible to prove a defamation case.

¶52 Moving forward. A lot of things can happen moving forward basically because nothing has happened to date. So this is a great area to start thinking about because we basically have no framework, we have no rubric. What we do have is a great existing framework of things that we can take off the shelf to apply in this area.

¶53 One, the Digital Millennium Copyright Act has a whole framework of takedown notices. Obviously, these do not apply to privacy infractions or breaches of privacy, but it is conceivable that such a framework could be beneficial in this area, as well.

¶54 A uniform privacy code. As you know, privacy law is state by state. However, we are now moving into an era that the internet has basically obliterated those state borders, so a uniform privacy code might not be a bad idea for that case.

¶55 Uniform privacy policies for websites. Who reads privacy policies? You go on the website, you do what you have to do, and you leave. They are the ultimate contracts of

adhesion in a certain way, especially when it comes to a MySpace or a Facebook because you don't really have a choice. You don't have a meaningful choice because you are wed to the website. Your pictures are on it. Your identity is on it. If you are kicked off the website or if you decide that you want to protest it, the only person you are hurting is really yourself because you can't get in touch with your friends anymore and yourself, your internet alter ego is all of a sudden extinguished.

¶56 We can learn from intellectual property law in the area of online dispute resolution. WIPO has excellent online dispute resolution framework and model for domain names. It's worked in that arena, and I propose that it would be something that would be beneficial to look into in this arena as well because it has been proven that defamation and privacy plaintiffs -- you know what they want, they don't want money. They can't prove damages. What they want is an apology. What they want is vindication, and what they want is a sense that they can tell their side of the story and put it into their digital dossier, into the public record. This would be a very easy solution taking into account the ease and the low cost with which you could do online dispute resolution.

¶57 So those are some of my thoughts. Thank you very much.

¶58 (Applause.)

¶59 PROFESSOR DARROW: Okay. I wanted to switch a little bit from all of the patent law discussion that we heard earlier today and go into the copyright liability aspect of social networking sites.

¶60 To do this, I'm really glad that Professor Abril introduced YouTube in her remarks because I'm going to talk a little bit about YouTube. The reason that I would like to use YouTube is twofold. First, there is a ton of copyrighted content on YouTube. Over 65,000 videos per day are uploaded onto the YouTube site.

¶61 Second, a copyright infringement lawsuit was filed against YouTube last year by Viacom, Viacom the owner of MTV, Black Entertainment Television, and others, for \$1 billion for copyright infringement. So this is a suit that is out there right now.

¶62 Some people might find it curious that I'm using YouTube as an example of a social networking site, and if you are skeptical and feel YouTube maybe fits into a different category better than the category of social networking websites, I'm going to try to convince you otherwise.

¶63 First, YouTube has been referred to in the popular press as a social networking website. The New York Times just this year commented that YouTube is a place where users can connect for social activity. A British newspaper last month referred to YouTube as the most popular social networking website in the U.K.

¶64 If you look at what YouTube is, it has a number of characteristics that you would expect to find on a social networking website. It's a place where users can connect with others. They can share things with others, they can post videos, video responses, they can post comments, and you can invite friends and share videos exclusively with those friends, which has created some problems that Viacom is trying to use to their advantage in the lawsuit.

¶65 And, most importantly, YouTube has actually described itself as a place where you can connect with others who share similar interests, so it has branded itself as having the characteristics of a social networking website.

¶66 So where does the problem come up with copyright and YouTube? The problem comes up with users uploading thousands of videos a day, many of which are homemade

but many of which are not, many of which the copyright to which is owned by a third party and the uploading is taking place without that third party's permission.

¶167 It just so happens that there is a piece of federal legislation called the Digital Millennium Copyright Act or DMCA, passed in 1998 that addresses exactly this problem.

¶168 Under Section 512 of the Act, Subsection C, there is an immunity provision for online service providers that allows those service providers to avoid liability for content that is uploaded to the site by a third party so long as that service provider has met certain conditions, and those conditions are laid out in the Safe Harbor.

¶169 The first is that the service provider, as soon as it becomes aware of infringing content on the site, has to expeditiously remove it. The question is, are social networking websites, and YouTube in particular, are they doing this. And the answer is yes. A lot of the early cases that went against the Aimsters and Groksters of the world, some of them ran afoul of this portion of the Safe Harbor Act. YouTube is doing it. It has a policy. It is written on the website. They are enforcing this policy. They are expeditiously removing copyrighted material from their websites. They have done this with tens of thousands, if not more, clips on the website.

¶170 The problem with this, of course, is in an environment like YouTube, once it's taken down, you could just upload it again. It doesn't cost anything. It is very easy to do, and you have 6.5 billion potential people that might upload that same content that was just taken down again.

¶171 So the second requirement under the Digital Millennium Copyright Act is that the service provider must have and implement a policy by which those who repeatedly infringe copyrights have their accounts terminated. YouTube has such a policy. They have enforced this policy.

¶172 The third requirement and the last one that I'm going to talk about is that this service provider must not receive a financial benefit that is directly attributable to the infringing content or infringing activity. This is probably YouTube's point of greatest vulnerability because YouTube does receive a financial benefit from all of the traffic that is drawn to the website by this illegal content, and estimates of the illegal content range from 30 to 70 percent and no one knows for sure exactly how much it is on there. But it is widely believed that the amount of illegal content on there is gray, and I don't think that it is -- I think it is a difficult position for YouTube to argue that that has not drawn a large number of people to the site.

¶173 Of course, people coming from the site, those people don't need to pay to view videos or to post videos or to engage in activity on the site, so they are not generating revenue in that sense. They are generating revenue from the sale of advertising space. They can try to make an argument to say, "Well, this generation of revenue from advertising space is not directly related to the video because whether the video infringes or not, we get advertising dollars," but I still think that is going to be their greatest point of vulnerability.

¶174 The interesting thing is that the Safe Harbor of the Digital Millennium Copyright Act is a second line of defense for those accused of secondary copyright infringement. Even if YouTube and other social networking websites don't fall with the DMCA's Safe Harbor, it does not mean that they are automatically liable for copyright infringement. All it means is that they can't take advantage of the 512 Safe Harbor. They get thrown into the category of all other accused secondary infringers or accused infringers of

copyright, which is to say that they can put forth all of the defenses that you would be able to put forth irrespective of the DMCA. You can allege, “Well, our users are engaged in fair use,” or from a contributory perspective, we might start talking about Sony and the fact that YouTube is capable of many, many non-infringing uses. So, clearly, it is capable of some substantial non-infringing uses.

¶75 You would also talk about Grokster, and I think it is very easy for YouTube to differentiate what it has done from what Grokster did in the past. And Grokster was a site that descended from Napster, which was held secondarily liable for enabling music exchange, but the critical difference between what Grokster did and what YouTube is doing is that in the Grokster case, there was a smoking gun document that was found, amongst other things.

¶76 But the smoking gun document was a newsletter. It was a newsletter created by Grokster that specifically instructed users on how they could obtain specific copyrighted songs that they do not have permission to provide.

¶77 YouTube has gone exactly the opposite way. Rather than taking a name like Grokster, which the court found to be an apparent derivative of Napster and they found that Grokster was intending to take those former Napster customers and make them Grokster customers. So there was all of this evidence of inducement of intentionally trying to get people to infringe copyrights.

¶78 YouTube has gone the other way. YouTube has an instructional video that specifically tells users, you cannot upload things that you don't have the right to upload. They give examples of what you can and can't upload.

¶79 So let me just conclude by saying that I think, on balance, YouTube has the better argument in this billion dollar infringement suit and that social networking sites in general are going to be able to continue to be successful without dramatic radical change of the copyright system. The reason why we have seen so much in terms of copyright violations and piracy has less to do with the fault of the law, the copyright law not keeping up in the times and the technology, and a lot more to do with the failure of business and the inability of businesses to adapt their models to what consumers want.

¶80 We see that, I think, primarily or most dramatically in the context of music, where here we are a number of years after Napster and there is still no legal place that people can go to that has as wide a variety and without digital rights management, all of the other things that the consumers want, they can go and pay a price, to get what they want. I think we are done for now.

¶81 (Applause.)

¶82 PROFESSOR LUDLOW: Folks, are any of you familiar with Second Life or somewhat familiar?

¶83 (Show of hands.)

¶84 The people that are not familiar with Second Life?

¶85 (Show of hands.)

¶86 Okay. I'll say a little bit about it. Well, here is the way to think about Second Life. The aesthetic of it is kind of like a video game, so you go in and you have an avatar, which is a cartoonish kind of representation of yourself. And you can design that avatar to be basically anything you want to, so you could be some giant, musclebound, studly individual or you could be a dragon or you could be a furry animal or whatever the case might be.

¶87 Second Life also gives you tools to build whatever you want to build. So you can res certain primitive objects and modify them and you can script them with a basic kind of java-like scripting language and, in effect, you are writing little programs and creating objects that have a certain kind of utility in this world.

¶88 Now, one of the fallouts of this is that people can go in there and build things, and they have financial value to people. And Linden Lab, which runs Second Life, has a form of extending property rights to individuals that make and sell things inside of Second Life. There are limits to that. They reserve the right to revoke some of your rights if they want to, but for the most part, your property rights are protected inside of Second Life.

¶89 Well, as a consequence, you get people inside Second Life that are building lots of interesting things, and they are making a fairly decent living of doing that. So what I'm going to do in this talk is discuss some of those people, some of those people that are making a living inside of Second Life and some of the IP issues that arise inside Second Life. We will talk a little bit about what is being done with that.

¶90 Well, some of you may remember this issue of Business Week. This is an avatar inside Second Life named Anshe Chung. Anshe in real life is a woman living in Wuhan, China. Her name is Ailin Graef, and with her husband she runs a company that is principally a virtual real estate company inside of Second Life. She buys virtual land, she terraforms it, she develops it following certain themes, like a Chinese-themed region or a French-themed region, and then she resells it and manages property.

¶91 It is like real world property management except she is doing it inside of a virtual world. Her business is extended to other things, creating certain kinds of contents, and it is also extended to other kinds of virtual platforms. As of a year and a half ago, she had acquired the equivalent of \$1 million U.S. in virtual property inside of Second Life.

¶92 Now, it is a little bit tricky, thinking about exactly how you evaluate that property and whether really, really truly it is \$1 million worth of assets. Obviously, if she sold it all at once, the virtual real estate market would tank, but I actually did some consulting work for her for a month about a year ago. It is pretty clear that her claims for her net worth inside this virtual world are easily \$1 million worth of assets. Her company was evaluated at something like \$2 million. This was back in December of 2006.

¶93 Now, that is pretty impressive, and what is really impressive about it is that she just started out with basically nothing inside the world. She started out as a virtual exotic dancer, bought a little bit of property, and then started building it up. And then over a period of a year or two became a millionaire, and now has a little operation in Wuhan, China, in which she is employing at least 50 people, the last I heard. Lots of interest.

¶94 If you follow Anshe around in Second Life and keep track of her virtual life, it is like constant drama. There is always something crazy going on, and one of the things -- and one of our very early stories had to do with attempts by people to do a form of land extortion on her. So there were certain people that were building this sort of crazy -- all of these were like giant pictures and posters that were put up sort of on her property, as an attempt to devalue her property, and people were demanding money in exchange for that. So you get a kind of virtual extortion game.

¶95 As a kind of consequence of all of this, she has basically moved her entire operation away from all of the other property in Second Life. It is like she has her own continent, sort of offshore in Second Life right now.

¶96 Here is another case. This guy is Stroker Serpentine who has been in the news lately. This is -- yeah, I don't know. Maybe that picture is not appropriate, but what can I say? Here he is in real life. That is him on the left. Here we have -- these are the Second Life Herald paparazzi that are taking these pictures from my virtual newspaper that covers the seedier side of Second Life.

¶97 Here he is with a guy from the Electric Sheep Company, which is a virtual world development company. It has at least 100 employees. Well, what Stroker does is, he makes around \$100,000 a year making virtual sex toys that he sells inside of Second Life. So one of the very first intellectual property disputes that sort of made it into courts came when someone was copying this object of Stroker's.

¶98 So what this is, you have this bed in this sort of lovely '70s porn plaid. You have a pull-down menu, which allows you to animate your avatars into like 100 different sexual positions. Imagine a pull-down menu of the Kama Sutra. You press the button and your avatars sort of engage in this virtual sexual activity.

¶99 Someone copied this, right, and started selling it. Now there is a kind of cloak of anonymity inside Second Life. So what Stroker had to do was go to court and initially you file a suit against John Doe. The guy who was infringing was Volkov Catteneo. He filed a suit against John Doe, turned out to be a kid living in his mom's basement named Robert Leatherwood. This was down in Florida.

¶100 A default judgment was issued, and then just like a month or so ago, they came to terms, they came up with some sort of agreement. He has agreed not to infringe anymore. The lawyer says, "Yes, Stroker has proven his point and is moving on." I don't know what the details of the settlement are. Probably not too much money is involved.

¶101 But all kind of infringement -- there are infringement cases like this all over Second Life. A lot of people in the kind of fashion business inside of Second Life making things like dresses, jewelry, et cetera, and even hair, right. So you make hairpieces out of like little primitive objects, and you sell those.

¶102 Well, here is a case that came up in the Second Life Herald. The one on the right is the original, and the one on the left is the alleged infringing hair piece. And I think you could make a pretty good case that they more or less copied it. Now, the question is -- I don't know if this -- what would a real world court do with this? Probably nothing. Although, there is a significant amount of money involved in this. I mean, even the fashionistas can make close to \$100,000 a year inside Second Life.

¶103 What would a sort of in-world dispute resolution mechanism look like? It's not really clear. Second Life is also full of all kinds of virtual knockoffs. I caught this picture. The guy was wearing these Gucci shoes. In real life, he is the editor of Architectural Digest Italia, but those are pretty clearly knockoffs, as are these. We caught these. On the left is some jewelry that was being sold in Second Life, and one of our reporters who is obviously a dedicated fashionista found precisely the same design in a Cartier catalog. So on the right is lifted from the Cartier catalog and on the left you see it is just an exact copy, an exact copy of that necklace.

¶104 Now, the question is, does Cartier care or would they care? You can imagine cases in which they would. There are all sorts of interesting questions that come up. Here is one of them.

¶105 I was sort of traveling around in Second Life, and I found this outfit that sold body doubles. So if you wanted to have the body of Scarlett Johansson, for like a few dollars

you could actually buy that. Now, there is a question here, right? In the State of California, the sort of right of publicity is sort of well developed. Would Scarlett Johansson have a case here, that this is a sort of violation of any right to publicity?

¶106 Well, there are sort of -- on the other side of that there is an issue about artistic expression. Maybe this could be passed off as an act of artistic expression, which would counterbalance that.

¶107 Well, I mentioned earlier it would be really great to have some sort of dispute resolution mechanism. One thing that has happened is this guy Flipper Peregrine here has set up a Second Life Patent and Trademark Office, which allows you to register your creation with images, a description, you timestamp it, et cetera. They provide the relevant facts from our database as a neutral third party, if a dispute arises, right. They facilitate you in writing DMCA takedown letters, and they provide a way of sort of tracking limited edition stuff and so forth. That seems reasonable.

¶108 Second Life has -- the owner of Second Life, Linden Lab, has come late to the game in trying to do something about this now. They have a new policy that was issued recently about how people should protect their property, and it is basically, Well, follow DMCA thing and we will remove the offending property.

¶109 So, for example, if Cartier came in and said, "You can't have this," they would remove the offending property. Or if you -- you remember that hairpiece thing. If you could go to the database and show timestamped evidence that you had that hair first, then Linden Lab would remove the offending property, but it is not really enough.

¶110 There was a discussion of this in a really great blog that I recommend to all of you. It is called Legally Blind, and it is by a guy named Benjamin Duranske, and he covers all of these kind of legal issues inside Second Life. He was reported from a guy who was like complaining about this, and now he is using it to go after Linden Lab right. You need to do your part on DMCA's and follow the law as well by removing all instances of a stolen item. This includes stuff in the database.

¶111 What this user is complaining about is, I might file a DMCA thing inside Second Life, but they remove it from the world. It is still inside the database, and I have a copy like that, I have a copy like that, so what good is it? So this is the issue, right? What are you going to do to the people if you catch them? Are you just going to slap them on their wrist? How fast are you going to move on this?

¶112 I have to throw this in. Second Life has a new trademark policy. For years -- this is now parenthetical. It really does not have anything to do with my topic except I need help on this.

¶113 For years, they were letting everyone call their business like Second Life X, Second Life Y, Second Life Herald being a case in point. After four years of that and after calling me and thanking me for changing the name of my newspaper to The Second Life Herald and like granting interviews to The Second Life Herald and providing information on their website to put up their little logos and so forth, they have decided that it can no longer be called The Second Life Herald.

¶114 So if any of you are interested in doing some pro bono work for a virtual newspaper, see me afterwards.

¶115 Okay. Now, here is the sort of final thing, and this is like kind of a theoretical point, and it's that one of the problems in Second Life -- and it is a problem that we are going to see more and more and more as we move into these virtual worlds. I mean,

there are a lot of Second Lives on the way, and the amount of money involved is going to keep increasing, but the problem is that it is fundamentally easy to copy any sort of object inside of Second Life.

¶116 And, in fact, some people that were reverse engineering some of the code came up what they call the CopyBot. And what the CopyBot was, in effect, a kind of utility that, I could just -- it would just allow you to touch an object and create a copy like that. I could touch you and create a copy of you just like that. So here is an illustration of the CopyBot in action, and I think I will just sort of close the fact.

¶117 So what is happening? You see this person in the white suit? What the CopyBot is doing is generating more and more copies of this thing because -- I mean, you think about it. What Second Life has got to do is provide enough information to users to create the object on the client side. That is, I have to have enough information there to create the object on my computer, and it has to be three dimensional and everything else. If that information is being provided -- you get the idea.

¶118 If that information is being provided, then it becomes -- then like the information is there for anyone to make a copy any time they want to. Now, it's a little trickier with things that involve computer programs that are sort of built into these objects, but to create some sort of facsimile-type copy, that is a real problem.

¶119 Now, what that suggests is that you can't engineer away the problem of making copies. It is not the sort of thing like -- there's an engineering solution to this problem. It has to be a solution that involves some sort of either dispute resolution with teeth behind it or real world laws or something like that, but the technology won't solve the problem. There is enough money in there to make it matter, so someone is going to have to start resolving these problems somehow through either legal or quasi-legal. That is all I have got on this. Thanks.

¶120 (Applause.)

¶121 MR. MONAHAN: So I come at all this from the game side of the equation, and what I was thinking about on my way over here is, I don't know, yesterday on National Public Radio on Marketplace, they had a story about social networking sites and how they are hitting a bit of an impasse with their business models. When I heard the promo or the teaser, I immediately thought of the underpants gnomes and the police that quoted the underpants gnomes.

¶122 Those that are unfamiliar with South Park. There is a phenomenon in one episode of the underpants gnomes. They are little gnomes that you never see, but they come into your home and they collect underpants. Because their master plan is Step 1, collect underpants, Step 3, profit. Where is Step 2 you might ask? Step 1, collect underpants. Because there is no Step 2.

¶123 In the story on the National Public Radio, they commented on how a lot of the social networking businesses are kind of running into an analogous problem, and that they build a lot of audience. I think that you were talking about a number of users from MySpace. The news story yesterday said there was 200 million subscriptions or accounts. And they have a lot of content, but they have run into snags on how to monetize that.

¶124 They tried advertising. They tried sort of track-backs with purchases to sort of do more of an enhanced advertising with Amazon. That raises a lot of privacy issues

because I don't want all my friends knowing when I buy, you know, something that I would not tell you people that I buy.

¶125 So that failed. They have run into -- there has been a hot issue on the business side of gaming, micro-transactions where, in the social networking context, they have tried selling icons or maybe skins or other little bits and pieces that you can sell for very small amounts of the value as a way to utilize the traffic that is inside MySpace or Facebook or any of those social networkings.

¶126 The good news from the game side is we know how to make money on this side. What we struggle with is how to embrace the more wider, open, creative side of social networking into the gaming space. Now, gaming, in particular massive multiplayer online games -- of course the archetypical version of that is World of Warcraft. World of Warcraft has plenty of social interaction, 10 million subscribers on a number of servers around the world, and their Step 2 is every subscriber pays \$15 a month, 10 million subscribers. Do the math. It's quite a successful project.

¶127 So how does the World of Warcraft or any other closed game system sidestep or somehow avoid some of these other issues that are all very legitimate and very important and very much on the minds of game publishers?

¶128 Well, one, the allowance of creativity is something that they keep a fairly tight stranglehold on. Massive multiplayer online games, every one of them will have some level of creativity. You get to name a character. You know, there is plenty of -- there is a chat log and a lot of out-of-game kind of fan fiction, et cetera, but things like avatars and skins and those sorts of items are provided from the publisher down. You don't get a scripting set like you do with Second Life, where you can create your own.

¶129 Now, gaming providers are interested in the creative aspects of it because of the draw it has, the appeal to kind of the creative side of their players and the fact that they could draw more audience. But the recognition of the fact is that once you allow your users to create things, you take sort of a first step on the path of perhaps monitoring what they are creating or being responsible to take down what they create.

¶130 In a World of Warcraft model, if there is infringing content, the bad news is it is probably yours because you created it and you put it out there. The good news is you will find the creator and be able to police it. In other words, it is someone that worked for you or someone that was a contractor to you, so some of the struggles of anonymity and user base are not necessarily in play.

¶131 It is interesting that you close with, there may not be an engineering solution to the CopyBot. Sure there is. Don't let people create stuff and don't provide the scripting language. That is always widely tongue and cheek.

¶132 Second Life has been an exciting and sort of a wide open experiment on both creativity, which we talked about a little bit, and that you not only are allowed to create things, but you can -- the world is wide open to you but now blended into a lot of different scenarios either between users themselves or third party content owners that want to take issue with what a user has created in-game and in some difficult situations. Some question of whether or not they will take advantage of the DMCA.

¶133 At the bottom, whether they are an online service provider, as the statute contemplates, it is not clear. It is not contested. They may be, they may not be. They are certainly sort of walking and quacking like one and by putting up a policy and respond to takedown notices because I think at the end of the day, if -- it's not even going to matter if

they technically qualify as an online service provider because they have not gone through the other steps that an online service provider must do to take advantage of the Safe Harbor.

¶134 But the other sort of -- that is one decision point from the game side or many real closed systems. If I look at my crystal ball, I think the games, sort of closed virtual world side of the equation is looking for ways, albeit cautiously, to fold in more creativity, but at the same time, coming from a background where they are used to having to respond to the issues of their own content because they are the presenter of that content, they are also a lot more strict, a lot more controlling of in-game content.

¶135 To kind of riff off of the privacy concerns, do those sort of things happen in sort of the more true games? Sure. They are often a source of account maintenance because folks that would spout off either real identity information, other sorts of offensive conduct, the kinds of things that we saw on the JuicyCampus.com, when those sorts of things turn up in games, that calls for and results in closing that account because it is a very different overall environment.

¶136 It is a sandbox essentially, which your users are allowed to come in and participate with using and taking advantage of, albeit not exploiting, content that you provide, but there are rules of engagement and there are rules of conduct in play.

¶137 The other side, which is another issue within Second Life, which is a huge component for the future of either one of these is in-game -- user-generated content but, more importantly, the value of your stuff in the game. We heard about MySpace, the idea it is an adhesion contract because it is a yes or no proposition. That is what every website and every kind of online composition is necessarily going to be based on, a yes or no proposition.

¶138 But, on the other hand, once you said yes on the MySpace, you do put up content and you put a lot of work and labor into these pages, so it is not as easy as: well, the environment has changed and I want to walk away. Certainly your users have something invested there.

¶139 On the game side, there is quite an industry of folks saying that, similarly, game play and time spent and game assets generated through that play is worth something, and they prove it by selling it on EBay or selling it for third-party systems, even if the game itself says that is forbidden.

¶140 Game providers now, both wrestling with just the technical issues of policing and prohibiting real money trade, or RMT, at the same time are also exploring different business models, much like the social networking side.

¶141 The buzz word on the game side is called micro-transaction similar to what I was talking about before about social networking. Micro-transaction games were very popular in the Asian market. Shift the model from -- as opposed to, I pay \$15 a month to play in the little sandbox. My expectation is that at any given time, I have 30 days, because I paid \$15. Now, I may do that for the course of a year and I may develop a big pot of gold or lots of items or weapons or what have you, but my business relationship is, I have paid \$15 and I get 30 more days.

¶142 So if things go pear-shaped, if I decide to become a foul mouth or do some other things that run afoul of the World of Warcraft rules of engagement, perhaps I try to sell items into the real money trade. If I get banned, what have I lost? 15 bucks or some proration of 15 bucks.

¶143 Micro-transactions, if that becomes the business model, you are not selling time. You are selling things, so micro-transactions are the sort of punch list -- or the flippant way to describe it is: play for free, buy the bling. So instead of paying \$15, you get a free account, which would give you usually some limited game play. If you want to enhance that game play, well then you can go buy items that are useful in the game or access to certain areas of the game or the ability to get past that level cap. There is a bunch of different flavors for what do you get for your micro-transaction payment.

¶144 But one of the struggles with it is, once you have gone to that sort of a model, how do you keep a handle on the player expectation? I understand it is \$15 and it is a month and I'm out \$15. But if I go in and spend \$1,500 because I'm going to go whole hog and I want to trick out my game avatar with all the things available on the micro-transaction marketplace, well, what if I then go and spout off racist stuff in the global chat channel, often a source of banning? People with anonymity decide they can be as foul mouthed as they'd like.

¶145 Now I have \$1,500 in play, so the ability to police that is perhaps more difficult or, at least, raises the likelihood of someone objecting to getting their account banned or objecting to getting removed from the game.

¶146 So at the end of all of this, this sort of forecast that I would set forth is, I think that games and the online game side of this, provide a lot of -- one, they share a lot of aspects with social networking sites and the Second Life kind of virtual world content.

¶147 And, two, I'm frankly just eager to see how well the games -- whether it is -- how well the gaming space embraces and/or folds in some of these aspects, such as greater creativity for players, various business models, including some micro-transactions and other ways to engage different levels of play.

¶148 And, three, managing -- managing the creative content, whether you are importing it from other systems, sort of interoperability, or whether you are including it in your own game yourself.

¶149 (Applause.)

¶150 MR. SCRUGGS: Okay. Well, we are about to open up for Q&A, but before we do that, I just want to get a good round of applause for our fantastic panelists.

¶151 (Applause.)

¶152 MR. SCRUGGS: And with that, it's open for Q&A.

¶153 PROFESSOR LUDLOW: Can I just add a footnote to Michael's thing here. Are you familiar with this new Raph Koster project, Areae? So it's sort of just what you are talking about. At some point what happens when the game world and the sort of virtual world thing and creative content come together?

¶154 So Raph Koster is this guy -- he was chief creative officer for Sony Online Entertainment. Before that, he was involved in the development of Everquest, and now he has a new company called Areae, A-r-e-a-e, or something like that.

¶155 And the basic idea is to sort of bring together the kind of game world and the virtual content world, sort of as you suggested that might come around.

¶156 MR. MONAHAN: Yeah. There are a couple other projects out there that are sort of feeling their way through it. Some of them, I think, are questionable viability. I don't know that one, so I don't mean to sort of speak of that.

¶157 Entropia is one where theirs is more of a game but has -- it's sort of the true micro-transaction, that you buy actual game items that are useful in the game. It's free to play,

and it turns out people spend quite a bit of money on it. Now, one of the hard issues there where you are recognizing that your account or your time as money, other than just the prospective 30 days or what have you, when you kick out the guy with the \$1,500 worth of stuff, what does he get? Does he have the ability to come back and say, Wait, you closed my account, it was worth X dollars? If Anche Chung gets kicked out of Second Life for some reason, does she get \$1 million out of it?

¶158 And then there is sort of a categorical imperative problem: can Second Life go out of business? It might not, but what if it did.

¶159 PROFESSOR LUDLOW: I mean, you know the answer to that first thing, which is the Mark Bragg case. The guy who got kicked out of Second Life --

¶160 MR. MONAHAN: Right. Well, that case really settled before they could explore the value side of it.

¶161 PROFESSOR LUDLOW: That is true. That is very unfortunate.

¶162 MR. MONAHAN: The fact that that settled after the -- Mark Bragg was a lawyer who had a Second Life account and he had determined a way to kind of game, no pun intended, the land auction system such that he obtained some properties through an auction -- the way I understand it, it was an auction of one bidder. Linden got wind of this exploit.

¶163 It was not a hack. He did not go into Linden's code and rewire it. He did not actually hack their system, but they found the exploit and found that he had taken advantage of it. And their reaction was, You are done, your virtual assets are frozen because basically you can't get into the virtual system anyway, and they kicked him out.

¶164 Bragg sued in state court saying that it was -- a litany of various tort theories of conversion, et cetera, and the case was removed to federal court. And then in federal court, Linden moved in and asserted, one, its terms of service and user license agreement, which said that a dispute with us is subject to binding arbitration, and that binding arbitration has to happen in San Francisco, where Linden Labs is.

¶165 Bragg fought that, and the Eastern District of Pennsylvania said, "Well, that is a contract of adhesion." Why? It is procedurally unconscionable or it is a procedural -- the procedural aspect being it was a take it or leave it contract, the bargaining power was all one-sided, and so, therefore, it goes -- that makes it through Stage 1 of whether or not it is done with force.

¶166 That is where they'd say, "Well, they are all like that." All of your terms of service are like that. All of your end user license agreements are like that, and they necessarily have to be. So then the court goes to: well, what is the substance of that? And, in particular, remember they are zeroing in on the arbitration provision. And there they said, "Well, the arbitration provision was buried in a general provision or a miscellaneous section, so it was not -- it did not stand out, and so it was kind of an ambush."

¶167 The other big thing, and this is kind of where the gaming side of me cringes. Had Linden had the ability to change the terms of service whenever they wanted to, they could do it unilaterally, and if they did so, it was just up to them, you were subject to whatever they changed.

¶168 A lot of these agreements, a lot of websites terms of service and even end user license agreements have that ability or retain some amendment power. Not always for just the bad reasons of, I just want to be able to do whatever I want to do. A lot of times it is, again, because of this kind of code of conduct.

- ¶169 Remember, on the gaming side you have an audience, including perhaps lots of teenagers, lots of kids, and you have rules of behavior, rules of conduct that are tied into it so that when someone violates them, they can be subject to an immediate ban and not arbitration to determine whether or not spouting off, Nazi, this or that, was sufficient grounds to ban.
- ¶170 So on the gaming side of things, there really is a need to police and to police, frankly, in the dictator sense, but that side -- so that side of it is for -- one reason that actually came out in the Bragg litigation was interesting on the game side. The harder part is, at the beginning of this opinion it says, "This is a case about virtual property." There is a whole section in the end user license agreement that Linden has, and I believe it remains the same, that says, "You don't have any property. You have a limited license to use the images and content," but there is not an actual property value there, which the court in zeroing in on arbitration -- literally in the very first and one sentence punched right past it.
- ¶171 And in determining the arbitration provision was unfair, one of the things that they noted was this lawyer, Bragg, he had a lot of value in his Second Life account that Linden arbitrarily took away. On the gaming side, you don't have any value. You have 30 days.
- ¶172 PROFESSOR LUDLOW: The other side of that was all of the marketing information -- they had all of these talks and speeches by the president of the company.
- ¶173 MR. MONAHAN: Oh, absolutely. You own your things.
- ¶174 PROFESSOR LUDLOW: You can become rich. Look at what Anshe Chung did.
- ¶175 MR. MONAHAN: I certainly don't mean to suggest that notwithstanding all of this stuff, kind of pay no attention to the man behind the curtain side of it where -- I know you saw on CNN, that you get to own all of your stuff. But over here it says that you really have a limited property -- limited non-property license right.
- ¶176 The title to this section of the EULA that I'm thinking of is almost as long as like a paragraph of what you don't have. And had the court gotten to that instead of arbitration, I would not put a lot of faith in that provision either, but the court just punched right past it and, again, went to the arbitration.
- ¶177 Once Linden loses on the arbitration and it had to stay in Pennsylvania, it settled, I think, within months after that.
- ¶178 MR. SCRUGGS: Do this one first and then we will get Jake.
- ¶179 AUDIENCE MEMBER: I have a question about the real brands that are being used on knockoff products that you talked about, like the Gucci shoes you used for example. Is use of Gucci on shoes on Second Life considered a use of commerce in the Lanham Act? Has that been discussed or decided by any court and --
- ¶180 PROFESSOR LUDLOW: Certainly not in court.
- ¶181 MR. MONAHAN: Not for Second Life. There is one decision on the gaming side.
- ¶182 PROFESSOR LUDLOW: City of Heroes.
- ¶183 MR. MONAHAN: City of Heroes, which also had a flurry of motion practice, settled before they could get to some harder things.
- ¶184 One of the things that they did address, City of Heroes was an MMO, again, on the gaming side where the theme to it is comic book superhero. So you make an avatar. Your avatar can fly and punch people and shoot laser beams and a whole litany of things. You advance along, you fight crime, et cetera, et cetera.

¶185 So in City of Heroes, certain folks were making Marvel knockoffs, and the City of Heroes had several things rigged into it to try -- if you named your character, they had a long list of -- sort of a hit list of names that would not be accepted just outright. If you made a character and tried to name him Batman, you were not going to bounce character to character. But people could take steps and put periods between them and do other things to try and circumvent.

¶186 City of Heroes is kind of a good example of somewhere between the very zero creativity or minimal creativity in most games and a full-blown creativity on the Second Life side. It is a design system where you -- when you put together your account or your new character, you went through this menu process, what is your character going to look like. It was very much like most games where there is designing of the avatar. Most games, not necessarily Second Life.

¶187 It is sort of a paper doll system. What sort of pants do you want, and you have a list of 25 different kinds. Maybe within that you can fiddle with some colors and things. City of Heroes had that, but they had several different things, so instead of pants, shirt, shoes; it is boots, legs, belt, top, arms, wings, capes and lots of subsets to it such that the - - you know, if you totalled all of the permutations, there were a google, small g, of possibilities. That is a lot of creativity.

¶188 And, guess what, in that creativity, you could make someone with short pants, green skin, very big muscles, bang, you have the Hulk. Marvel sued NC Soft, publisher, and Cryptic, the developer, on kind of a Napster, Grokster sort of theory in that they said, You have this game. In it the players can make infringing content. Indeed, here are players that have. It turns out later it was a paralegal from Marvel's law firm that had it, which that was kind of a problem.

¶189 Here you can make characters that have claws and look like Wolverine, you can make the Hulk, et cetera, and so, therefore, you are secondly liable both for copyright infringement and for trademark infringement because they had trademarks for the various characters in the Marvel universe.

¶190 Well, the court did not get to some of the harder issues. This was Napster-esque because early in the motion practice, they won this kind of paralegal thing and Marvel got stung for that.

¶191 But, two, they determined that at least in this context, players had they named their character the Hulk, they are just playing a superhero game. There is no real money value, there is nothing like Anshe Chung. It is more of a pure game model, and that is not commercial. That is one of the few decisions that did come out of that, was that at least in that context, use in --

¶192 PROFESSOR LUDLOW: It is commercial for NC Soft though, right?

¶193 MR. MONAHAN: But the argument was that was not a primary infringement on the trademark side because if Joe Shmoe makes a character that looks like the Hulk, there is no trademark infringement there without that primary one. NC Soft can't be secondly liable for it because NC Soft, of course, was not advertising, "Hey, come on in, make the Hulk or things along that line?"

¶194 AUDIENCE MEMBER: Isn't that a little different than Second Life, when you are talking about real dollars being paid for a Gucci purse?

¶195 PROFESSOR LUDLOW: I think it is. I am actually surprised. I think that people can't be bothered with it.

- ¶196 AUDIENCE MEMBER: So brand owners think it is such small potatoes that they are not going after this in Second Life?
- ¶197 PROFESSOR LUDLOW: Who would you go after? You could go after -- the only person you could go after is Linden Lab probably and then for what?
- ¶198 AUDIENCE MEMBER: On the outset, conduct.
- ¶199 MR. MONAHAN: You can follow a takedown. It's hard to police. Well, you can do some searches and start finding things. Certainly a lot of things in Second Life are searchable, but short of kind of literally policing it with your own avatar or just kind of finding out a bit from folks, it's hard to find.
- ¶200 PROFESSOR LUDLOW: It's weird because they have all of these brands in the world, but they have to be where there are knockoffs everywhere. So these corporations set up -- like American Apparel had a store in there for a while. Coca-Cola was in there with some sort of marketing campaign. There were Coke machines and cans of Coke all over the place before Coca-Cola got in. Is that something that they are going to worry about, or are they just going to let it slide?
- ¶201 I mean, presumably they let it slide, unless it gets mixed up with nasty content somehow.
- ¶202 MR. MONAHAN: It's sort of a practicality issue.
- ¶203 AUDIENCE MEMBER: Don't the brand owners lose their control over their quality of their products in there?
- ¶204 PROFESSOR LUDLOW: Yeah. I mean, eventually someone is going to get pissed off and they are going to go in and --
- ¶205 AUDIENCE MEMBER: Sue somebody.
- ¶206 PROFESSOR LUDLOW: Yep.
- ¶207 AUDIENCE MEMBER: Does Second Life have a policy for trademark complaints at this point?
- ¶208 PROFESSOR LUDLOW: Not that I'm aware of.
- ¶209 MR. SCRUGGS: Another question, Jake?
- ¶210 AUDIENCE MEMBER: You guys alluded to ownership rights of content that you created in Second Life. I was wondering about copyright and trademark issues.
- ¶211 Do you have an ownership right or possible ownership right against a company like Facebook or MySpace for content that you can create on their site?
- ¶212 PROFESSOR SANCHEZ ABRIL: No. The answer to that is no.
- ¶213 So if you get kicked off for, let's say, doing anything against their terms of use, you pretty much lost everything. And sometimes they can even do it without any kind of notice or any kind of -- and I don't want to use this in the legal sense -- but due process and that has been quite criticized.
- ¶214 AUDIENCE MEMBER: Do you think that the Second Life type of ownership that has been seen in court will carry over to a social networking site?
- ¶215 PROFESSOR SANCHEZ ABRIL: I don't know that you can value, you know, my family's pictures from Key Largo last summer. At least they don't have the same kind of commercial value, but they do have emotional value that I think needs to be recognized.
- ¶216 I think if anything would make sense going forward, it is not so much that kind of a monetary damages structure, as it would be more of a portability. Like our cell phone portability that we got a couple years ago, I don't like what MySpace is doing, so I'm

going to take my identity on MySpace and now I'm on Facebook. But it is my same page but on a different provider.

¶217 That model would work much better, given these concerns.

¶218 PROFESSOR DARROW: Let me just propose an analogy that is even one step more removed from Second Life than MySpace is, which is e-mail. You create lots and lots of e-mails, and who has control of that? Just like MySpace has control of the content in your account, your e-mail service provider has control of the content in your e-mail account.

¶219 Well, what happens if you pass away and your family wants to get access to that account? Can they force the service providers to hand that over? Up until recently the answer was, "We don't know." In some jurisdictions that is still the answer, but in at least one jurisdiction, Connecticut, they actually passed a law that says you must hand that over to the estate of the deceased.

¶220 PROFESSOR LUDLOW: The Second Life policy was like a really new thing when it came out, this sort of idea that you own it to some extent. And they actually got Lawrence Lessig to draft that for them, I believe, so you might want to take a look at that. It is presumably going to be a model for stuff going forward.

¶221 MR. SCRUGGS: All right. Any more questions?

¶222 AUDIENCE MEMBER: I have one question with respect to privacy, with Professor Patricia.

¶223 How do you arrive between the public and private space on the -- especially on the social networking site, for example, uploading some private content, this means automatically public disclosure of private contents, or do you have a line between the private or public?

¶224 PROFESSOR SANCHEZ ABRIL: Yeah, that's the problem. The line between the public and the private is just basically nonexistent.

¶225 I think you would take a lot of things into account. For example, first and foremost is the structure, the architecture of the website itself. If it allows you to create a public versus a private profile, that would be the first thing you would look at.

¶226 However, if you have a private profile but you have 3,000 friends, that's a little bit different. So basically applying the precedent that we have right now in our privacy law, any disclosure would pretty much be putting it out there. Anything. Any picture you upload, even if it is in a very, very private profile with maybe three friends, which nobody has.

¶227 MR. MONAHAN: One of the other privacy things that is developing on the Second Life side is right now Second Life encourages folks to come and meet in Second Life, to do business. A lot of the business side are unwilling to do that because even though within the system of Second Life now you can create a space where people can't just wander in, but the developers can always see what is going on.

¶228 Businesses that want to have sort of serious business meetings, they may not want to worry about whether a random developer is reading their chat logs. Linden, I think, is working to develop sort of an interoperability, is kind of the heading for it, a setup so that you can have sort of separate, quote, Second Life spaces and IBM or some other businesses would have a space that is much like Second Life.

¶229 And it is on their own servers and that they control, so that avatars and IBM employees could operate there and wander back into Second Life, so it would be using

the same kind of avatar. I imagine it would be the same sort of type of technology but not the same technology to kind of move in and out of private Second Life areas or private areas that are Second Life-esque.

¶230 PROFESSOR LUDLOW: That is why Second Life is doomed in a way because you don't need Second Life. The direction this is going, it is going to be like web development where everyone has tools to develop their own website and they host their own.

¶231 These virtual worlds -- I mean, basically there are going to be ubiquitous tools that is going to make is easy to create these kinds of virtual worlds. IBM is going to make their own, you know, I'm going to make my own, and there is going to be some sort of -- something like internet protocol for this so our avatars can move back and forth and maybe bring some of our stuff, maybe not all of it.

¶232 At that time, Second Life becomes irrelevant in a way. It was a proof of concept, and then the direction it goes is kind of the worldwide web. There is a very interesting project called Ogoglio that is being developed right now or acknowledged where this guy is trying to come -- basically, he wants to put together a basket of tools that like any sort of reasonably good web developer could use to sort of build his little corner of the metaverse, and that is the direction that it goes.

¶233 MR. SCRUGGS: Any other questions?

¶234 AUDIENCE MEMBER: I'm sorry. I just have to ask.

¶235 The person that set up the U.S. Patent and Trademark Office on Second Life, can anybody register -- like could I register Gucci on Second Life in that trademark office? Is there any infringement going on --

¶236 PROFESSOR LUDLOW: That is a very good question.

¶237 AUDIENCE MEMBER: -- among the users? You're infringing my trademark, like if I named it Tammy's Dresses and someone else --

¶238 PROFESSOR LUDLOW: My guess is that you would not be able to register a Gucci or that Cartier necklace. If someone pointed out that, "Look, this was a Cartier design," it would get delisted for that reason.

¶239 MR. MONAHAN: That would make yourself probably a lot easier to find.

¶240 AUDIENCE MEMBER: But nobody is enforcing the trademarks in there anyway?

¶241 PROFESSOR SANCHEZ ABRIL: No, not today.

¶242 MR. MONAHAN: That is more a practicality matter, if it is practical for them to do it. If I was a brand looking in, that would be the first place to go look. See who has run up the flag pole thing. Look at me, I'm infringing.

¶243 PROFESSOR LUDLOW: There was some copyright -- someone did step in with copyright issues there, because there is this cult sort of based on these science fiction novels by John Norman called Gore, The Slaves of Gore, or something that involve the kind of sexual S&M, sort of futuristic place where, you know, there is all of this BDSM stuff going on.

¶244 So these people have all of these islands that are dedicated to the practice of gore. Then they had actually put virtual copies of his books in their, like, scriptorium or library, and he actually stepped in and insisted that they remove them because there was copyrighted material.

¶245 There is at least one case that I know of in the case of copyright where someone stepped in and took action about that.

- ¶246 AUDIENCE MEMBER: But there is not a flurry of cease and desist letters going on in Second Life?
- ¶247 PROFESSOR LUDLOW: I don't think so.
- ¶248 AUDIENCE MEMBER: If I come up with a mark on a product on Second Life and I'm selling it under my own mark and then someone else is free to do the thing and copy me and there is nothing I can do about it?
- ¶249 MR. MONAHAN: This is the Eros case.
- ¶250 PROFESSOR LUDLOW: Exactly. That is what the guy tried to do with the hundred position sex bed, and it never really got fully litigated because the guy just did not show.
- ¶251 AUDIENCE MEMBER: Was he making the bed outside Second Life or inside?
- ¶252 PROFESSOR LUDLOW: Inside Second Life. He was making a copy inside Second Life, so that is just copying a product that is already inside Second Life. And there it matters because the guy was making his living in Second Life. Right?
- ¶253 Now, what does Cartier lose if someone is making a virtual necklace? For all we know, it is helping them.
- ¶254 AUDIENCE MEMBER: Again, the control. What if the person selling Cartier's necklaces is going around making discriminatory statements and won't sell to a certain kind of avatar. You know, it is making a bad impression of the brand among the Second Life users, so it is a very legitimate concern for a brand owner.
- ¶255 PROFESSOR LUDLOW: It could easily happen.
- ¶256 MR. MONAHAN: I think figures in Second Life, where you don't have the -- it's an isolated game experience, it's more of a commercial venue, then yeah, the claims are there. It is strictly a matter of belief and practicality of finding and stopping them.
- ¶257 MR. SCRUGGS: All right. Any last minute ones?
- ¶258 Well, I want to thank everybody for attending. I want to thank our panelists. I want to give them one last round of applause.
- ¶259 A few things to discuss really quick. Number one, we have a cocktail reception, so everyone here is invited to join us for a beer, a glass of wine, whatever you want. We are going to have a bartender in a second, so we can actually get served.
- ¶260 Number two, for any attorneys that are here that are looking for CLEs, make sure you fill out the forms, make sure you have the forms, make sure you fill them out. It's best if you get them to me by the end of the day, but if you can't, for some reason, if you have to send in payment later, let me know, get my business card and I will have you mail them.
- ¶261 And, number three, I want to thank our sponsors. Our premier sponsor, MBHB, McDonnell Boehnen, Hulbert & Berghoff; our associate sponsor, Foley & Lardner; and our student group sponsor, the IP Law Society. Without them, we could not have done any of this.
- ¶262 Thank you again to our panelists, and thank you to all of you.
- ¶263 MR. MONAHAN: Number four, we have to give it up for Brandon, too.
- ¶264 (Applause.)
- ¶265 MR. SCRUGGS: You are very kind, very kind.