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Evaluating Consent and Legitimacy amongst Shifting Community Norms: an EVE Online Case Study

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Abstract

The legitimate resolution of disputes in online environments requires a complex understanding of the social norms of the community. The conventional legal approach to resolving disputes through literal interpretation of the contractual terms of service is highly problematic because it does not take into account potential conflict with community expectations. In this paper we examine the importance of consent to community governance and argue that a purely formal evaluation of consent is insufficient to legitimately resolve disputes. As online communities continue to grow in importance to the lives of their participants, the importance of resolving disputes legitimately, with reference to the consent of the community, will also continue to grow. Real consent, however, is difficult to identify. We present a case study of botting and real money trading in *EVE Online* that highlights the dynamic interaction of community norms and private governance processes. Through this case study, we argue that the major challenge facing regulators of online environments is that community norms are complex, contested, and continuously evolving. Developing legitimate regulatory frameworks then depends on the ability of regulators to create efficient and acceptable modes of dispute resolution that can take into account (and acceptably resolve) the tension between formal contractual rules and complex and conflicting community understandings of acceptable behaviour.

1. The Importance of Consent in the Governance of Online Social Spaces

Virtual worlds and other online social spaces develop internal rules that govern how participants interact within the community. These rules are given their legitimacy by the consent of the participants. In legal terms, consent creates or modifies obligations between participants and other participants, and between participants and providers (Fairfield, 2008a). By allowing individuals to self-select into communities by whose rules they agree to be bound, these spaces promise a liberal ideal of consensual governance and individual autonomy (Johnson & Post, 1995; Netanel, 2004; Lastowka & Hunter, 2004). In practice, however, governance in these spaces falls well short of this ideal. The difficulty of exiting communities, the strong network effects which concentrate power in a handful of comparable spaces, and the lack of competition in substantive and procedural governance norms mean that the real, ongoing consent of the governed is largely illusory. Instead, conventional legal analysis presumes consent in a predominantly formal manner from the contractual terms of service that participants accept as a precondition of entry. This formal view holds that consensual contracts provide the legal basis for the relationship between a participant and a provider, and the rules of participation are grafted onto this contractual framework. In virtual worlds and other contexts where the terms of service are rarely read or understood, this formal view of consent is a convenient legal fiction that systematically favors providers over participants.

Governance in online social spaces lies in the borderlands of public and private social relations. Current legal regulatory approaches treat these spaces as predominantly private, resolving disputes about the contractual terms of service primarily through the lens of consumer protection. The values at stake, however – freedom of expression, privacy, security in possessions, for example – are *governance* values of a more public character. These public values are potentially threatened by viewing governance in online social spaces as a purely private relationship (Berman, 2000; Fitzgerald, 2000).

Elsewhere, Suzor (2010) has argued that for governance in online social spaces to be legitimate, the consent of participants must be real and the arbitrary power of providers must be limited to protect the fundamental procedural and substantive interests of participants. A large part of the appeal of online spaces – and particularly virtual worlds – is that they can be autonomous environments with rule sets that do not necessarily mirror offline, territorial norms. Fantasy environments, in particular, depend on the ability to set artificial rules (Bartle, 2006). The traditional method of governance of such environments has been developer fiat, although other systems of governance have been attempted. Given the importance of enabling a substantial degree of autonomy in the development of fantasy rules and governance structures, substantive limits on acceptable governance are harder to enumerate, although certain values, like freedom from discrimination, can cut across the liberty of individuals to develop consensual rule sets. Procedural limits on the ways that rules are created and enforced, however, remain critically important to ensuring that private governance is legitimate. Of these procedural limits, consent is the key – consent delineates the exercise of private power that is arbitrary or oppressive from that which is permissible from the perspective of a communal understanding of acceptable governance. Put simply, in games and virtual worlds, the arbitrary exercise of power may be part of the game (Balkin 2004), but like all legitimate rules, it must be understood and accepted by the people it affects.

Since consent is so fundamental to legitimacy, conflict between the formal contractual terms of service and richer, more substantive understandings of consent creates serious problems for legal regulation of community governance. Based in part on the liberal ideology of freedom of contract, legal

regulation of disputes in online social spaces depends on the enforcement of clear written agreements over more subjective – and much more complex – inquiries into consent. Because the terms of service of most online social spaces are not drafted to be easily understood and are rarely enforced as written, however, they do not necessarily align with community understandings of the rules of participation (de Zwart & Humphreys, 2012). In practical terms, the rules of virtual worlds are not external laws or contractual obligations, but "are norms that are enforced, informally, by communities of virtual world users" (Lastowka, 2010, p. 96). These norms are contested and emergent, continuously shifting and evolving within different parts of communities, over time, and between environments. Disconnect between formal rules and community norms can give rise to a lack of legitimacy in community governance (Suzor, 2010). When the formal rules are enforced in a way that conflicts with the expectations of community members, it is not clear to which rules participants can be said to have consented.

2. Understanding Consent in the Legal Regulation of Private Governance

Resolving conflict between formal rules and community norms in a legitimate way ultimately requires an evaluation of consent and the reasonable expectations of community participants (Suzor, 2012, pp. 544–8). It is consent that justifies the imposition and enforcement of rules of behaviour in online social spaces – whether that consent is implied from continual participation in a community, or thickly contested through an ongoing process of negotiation and refinement. Consensual norms can also become formal rules over time, and formal rules can drive changes in community norms. But the purely formal understanding of consent that stems from neoclassical contract theory – that checking the box marked 'I agree' is a sufficient approximation for reading, understanding, negotiating, and accepting the contractual terms – is an increasingly insufficient assumption on which to base governance rules that have an important impact on the lives of participants. Conventional legal analysis, by focusing on the formal terms of service, risks misunderstanding the nature of consent and the legitimacy of community rules. Failure to take these community norms into account in resolving disputes, and instead deferring wholly to the formal terms set by providers, is likely to lead to significant harm to the interests of participants, who have little power in drafting or negotiating the contractual terms. This harm can be particularly pronounced where important substantive interests are at stake (including expression, property, social connections), or where there are procedural concerns about the way in which a formal rule is enforced (Suzor, 2009). Linden Lab provides a notorious example, where the understanding of participants that they 'own' the land and their possessions in the environment is undermined by contractual terms that disclaim any legal rights participants may expect to have (Bragg v. Linden Research, Inc., 2007). Legitimacy in governance of virtual worlds may not require any specific set of rules, but it does require that the rules are relatively consistently enforced, clearly promulgated, and enforced in a manner consistent with the expectations of participants.

The legitimate resolution of disputes in virtual communities depends on understanding consent as it is constructed within the community. Where disputes emerge through a conflict between the formal contractual rules of a community and the informal social norms, decisions need to be made about which should prevail. When disputes escalate, participants may turn to territorial law to challenge the formal rules, or providers may seek their legal enforcement. Understanding the tension and interplay between the contractual terms of service and the social norms or rules-in-use (Ostrom, 1990) is a crucial component in determining which should prevail in case of conflict. If legitimacy depends upon consent, and consent emerges from community norms, then in order to develop legitimate regulatory frameworks

for virtual worlds, territorial jurisdictions must have a deep appreciation of the complex web of norms in a community and the ways in which they evolve and interact.

Understanding community norms and practices is also crucial in order to develop effective regulatory practices. Regulators need to be aware of the potential impact of regulatory decisions in order to avoid unnecessarily damaging the viability or autonomy of virtual worlds (Bartle, 2004). Conversely, where the goal is to shift standards of behaviour, regulators need to understand how social norms develop and adapt in order to design effective interventions. An obvious example is the US attempt to ban online gambling, which has had very limited success in regulating virtual worlds and offshore websites. While the Unlawful Internet Gambling Enforcement Act (UIGEA) was successful in convincing Linden Lab to formally ban gambling in Second Life (Linden, 2007), a cursory examination shows that the formal change did not eradicate gambling within the community. In order to drive change in behaviour, more needs to be done than just formally banning a practice. In Lessig's (2006) terms, regulation is the sum of legal, social, market, and architectural design forces. Understanding how these forces interact is the key challenge of effective regulation in the online context.

The conflict between formal contractual rules and the rules-in-use of social norms is not limited to virtual worlds. The use of contractual terms of service as governance documents is common in many online communities. Most recently, Facebook (re-)discovered the tension between community understandings of governance rules and formal terms of service when it attempted to change the contracts on its newly-acquired Instagram service. Instagram's stated goal, to enhance advertising through the social network, was apparently not particularly objectionable, but the overly broad language it used to secure the rights to do so caused serious mistrust. One of the changes would have allowed Instagram a broad right to license the use of users' photos to third parties, with little restrictions and no obligation to compensate the user (Instagram, 2012). The proposed new clauses met with a highly visible protest from a relatively small proportion of Instagram's users, eventually forcing Instagram to withdraw the changes. This is only the latest episode in a trend of disputes over contractual terms of service, where members of online communities contest the legitimacy of contractual clauses that challenge the perceived norms of governance in online services.

The Instagram dispute highlights the difficulty in using contractual terms as a governance mechanism. Users of Instagram likely share a general understanding that the photos they upload will not be sold to third parties, and this norm is reinforced by Instagram. In a blog post retracting the proposed changes, Kevin Systrom, the co-founder of Instagram, explained (Systrom, 2012):

> *Instagram users own their content and Instagram does not claim any ownership rights over your photos. Nothing about this has changed. We respect that there are creative artists and hobbyists alike that pour their heart into creating beautiful photos, and we respect that your photos are your photos. Period.*

In this case, the conflict between the social norm that photos continue to belong to users and the proposed terms of service was explained as a misunderstanding. Instagram pledged to revise the wording to more narrowly achieve its goal to enhance advertising on its network. It is not hard to imagine, however, terms of service of social networks that conflict with community understandings that are not picked up by news media and which providers are not forced to retract. A conventional legal analysis suggests that in the case of dispute, such terms ought to be enforced as written; the community norms play little role in interpreting the explicit words of the contractual documents. This is a serious problem of legitimacy on all but the most formal understanding of freedom to contract.

As long as the terms of online communities are treated as mere consumer transactions, where real consent is not required and potential harm is relatively minor, the contracts which govern them are likely to suffer from serious problems of legitimacy. The fact is that, for an increasing range of human interactions, it is the rules of the private spaces in which people communicate which govern behaviour. These rules have the constraining effect of law, if not necessarily the same force. Their legitimacy matters, because it matters to the real users who use these spaces (Grimmelmann, 2006). Resolving disputes in a legitimate manner, then, requires regulators to first understand community norms.

If legitimate and effective regulation depends on a complex understanding of social norms, regulators face a difficult problem: identifying norms and understanding their evolution is a difficult and time-consuming task. More worryingly, it is not even clear that we can speak of 'the' norms of a community; social norms are not stable, and they are rarely unambiguous or shared unanimously throughout the population. Humphreys and de Zwart suggest that online game spaces can be "heterotopic [spaces] where such norms are available for reordering" (Humphreys & de Zwart, 2012, p. 517). Evaluating the legitimacy of private governance in heterotopic spaces accordingly presents a substantial challenge for regulators. If social norms cannot be reliably identified as being held by a majority of the population, it becomes very difficult to determine whether a particular act is backed by the consent of the community. In the next section, we detail a case study of *EVE Online* that highlights the complexity of evaluating consent in governance where the social norms are contested and constantly shifting.

3. EVE Online and the Difficulty of Identifying Consent

A useful approach to studying community norms is to consider disputes which arise and the way in which they are resolved. These cases, particularly high-profile ones, shape the environment through a process of explicitly testing, enforcing, and rejecting community norms in a context where the parties' goals and intentions are laid bare. An example of this from *EVE Online* (EVE) can be found in the disputes between 2010 and 2012 surrounding botting; the use of automated aids to collect resources from the EVE environment, and the inter-related disputes around real money trading within the environment.

An understanding of the norms of an environment requires viewing the environment as a whole. The case discussed in this section forms part of the results of a three-year case study of the platform *EVE Online* and theoretical sampling of interesting governance challenges within *EVE*. This study combined background research (hundreds of hours of participant observation within the environment) with a range of other materials, including discussions about the environment found on external forums and community sites. The design of *EVE*, and particularly areas of the game which are effectively gated by character experience (Woodford, 2012), make it a difficult site in which to conduct a comprehensive study. Therefore, including the meta-game and supplementing one's own experiences with other documented accounts, academic or otherwise, is essential to understanding the breadth of the environment.

Eve Online is a science fiction themed massively multiplayer environment (or MMORPG). The environment boasts a laissez-faire regulatory approach to actions by participants; fraud and scamming against other players is as valid a play style as running missions, engaging in combat with either player or AI operated ships, or mining resources from planets. There are many examples of in-game fraud

throughout the history of EVE, most notably perhaps the 'Eve Investment Bank' (Adrian, 2010, pp. 192-194), a banking structure created by participants which was ultimately to declare itself a scam, ceasing operations whilst owing approximately 700 billion ISK (the in-game currency), valued (today) at approximately AU$126,600. Another frequently cited example is the use of game mechanics and subterfuge to enable a major in-game alliance, Goonfleet, to infiltrate another large alliance, Band of Brothers, obtaining powerful roles within the alliance and using those to disband it.

4. Transgressions and Changing Norms: Real Money Trading and Botting

The hands-off regulatory structure of EVE enables such play styles, and CCP, the operator of EVE, encourages them through publicity. CCP, however, takes a very different approach to regulating behaviour it does see as transgressions of game rules, particularly those that are seen to distort the interface between participants and the outside world. Like many other environments, CCP is continually engaged in a battle to prevent and sanction those engaged in real money trading (the unofficial trading of in-game currency for real world currency). In recent years, CCP has also been actively attempting to limit the interactions of outside tools that allow automation of behaviour within EVE, such as botting to automate the repetitive tasks of collecting resources. Both of these policies are a source of ongoing disputes between members of the community engaged in the activities, the wider community, and the operator. The lack of consensus and clarity about applicable rules causes problems for CCP; rules which are not actively publicised and enforced are not easily accepted as community norms (McAdams, 1997 & Strandburg, 2004). In both of these cases the practices of CCP generate conflict with the shifting community norms, and this conflict has weakened both the implementation of CCP policy and the rules themselves.

The use of bots within an environment can be problematic for a number of reasons. In design terms it allows participants of the environments to automate actions on which other participants would be required to expend significant time and energy, giving some players an advantage over others. In a system with a working economy, this advantage permeates to other, non-automated activities within the environment. Both the design and in-game economy are affected by a sudden increase in participant revenue; the flood of in-game currency inflates the economy and drives up prices of in-game resources such as ships, ammunition and minerals, distorting the designed economy and the accessibility of the environment for new participants.

The surplus funds generated by automation also encourages real money trading (RMT). Through botting, participants are able to build reserves of currency which can be sold through RMT channels. Whilst there has been a long-standing community norm against RMT, the introduction of a time-code system called PLEX (Pilot License Extension) has significantly weakened this norm. EVE allows for payment of subscription fees by traditional means (e.g. credit card), but also through the exchange of in-game currency for PLEX time codes. Because PLEX are purchasable for real money and tradeable for in-game currency, the PLEX system provides participants with the ability to use real world currency to further their in-game progress.

PLEX have proven controversial. A well-documented incident in 2008 saw an EVE participant 'undock' (leave) a station in Jita, the central trading hub of EVE, carrying 74 PLEX in a Kestrel, a relatively large but poorly defended ship often used for transporting resources in safe areas of the environment. Two other participants, *Slickdog* and *Viktor Vegas*, who were in the Jita system at the time,

scanned the player's Kestrel, enabling them to identify the items it was carrying. Having identified that it was carrying rare expensive items, the players destroyed the ship. When ships are destroyed in EVE, there is a percentage chance (similar to drop rates in other MMORPG's such as *World of Warcraft*) that each given item on the ship survives the destruction of the ship, in which case it can then be collected by other players in the vicinity. In this particular instance, however, all 74 PLEX carried by the destroyed ship were also destroyed. At the time, these PLEX were equivalent to 2220 days of game time, 22 billion ISK, or approximately $1,295 in US currency. Whilst there have certainly been higher cost destructions throughout the history of EVE, the incident appears to have resonated with both the mainstream press and a significant proportion of the community.

PLEX enable players to purchase game-time, and by extension in-game currency, for real world money. They cannot then be sold for real-world currency; however they can be destroyed in transport. If they are destroyed, their value is effectively transferred to CCP, meaning that participants have paid for game time for which CCP never need to provide them. By introducing PLEX as a sanctioned RMT channel, CCP has weakened the community norm against RMT. The strongest arguments against RMT, including that it enables players to progress at a higher rate if they have real world currency to invest, lose their validity in the context of the PLEX system. Coupled with the windfall profits that CCP is able to extract when PLEX are destroyed, the PLEX system appeared to weaken the anti real-money norm within the community. Players who participated in RMT have justified their behaviour with comments such as "It's simple, really. ISK is cheaper [than] PLEX, and PLEX is just a legalized way of buying ISK" (Paul, *EveNews24* Interview, 2011).

The norm against RMT was also weakened by an influx of new players from other environments. Angela (*EveNews24* Interview, 2011) explains that "There is no PLEX system in [*World of Warcraft*], so old habits kind of carried over". Because *World of Warcraft* is a dominant platform within the MMORPG field, there are new players entering EVE who have previously participated in that environment, and so players carry their expectations and norms from their previous environment to their current one. As a result, there is a clear challenge for CCP, and indeed the EVE community to educate new players as to what is, and is not, permitted within EVE. The introduction of a PLEX system, in which it is legal to purchase in-game currency in some ways but not others, increases the difficulty of educating new participants. Another participant interviewed by the community site, *Eve News 24,* Mark, noted that he "thought it was a legit way to buy characters", and whilst "it's in the fine print at the start, [but] there should be something simple […] which says 'anything bought with real money outside of Eve that isn't a time code is illegal'".

A similar pattern can be identified in the community discourse surrounding the use of bots. The community generally maintained a strict anti-botting norm; comments such as "go play something else and fuck that game up if you want to bot, at least on those games, you're not fucking up the entire economy in your efforts to automate winning" (*Bel Amar*, 2011) were somewhat representative of the reaction across multiple forum and blog comment threads. However, a lack of enforcement action from CCP, later attributed to a lack of staff as opposed to a policy decision not to enforce the terms of service, saw a rapid increase in the number of players utilising such technologies, and weakened the community norm.

5. Community and Corporate Responses

Faced with shifting community norms and a potential market for exploitation participants seized the opportunity. One, Manny, claimed that "a[n] average botter can make $2.00 USD per hour [...] [W]hat if it played for you for 12 hours a day everyday all month? 21,600 Rubles. That's about $700 a month. The average Russian family lives off an income of $600-700" (Manny, *EveNews24* Interview, 2011), whilst others such as Fred argued that it was "plain necessary to do it in order to play the game", whilst questioning whether CCP's lack of enforcement action stemmed from the revenue received from participants operating multiple accounts.

Through a wide range of discussions, across official CCP-hosted forums, unofficial forums, community blogs and the forums of bot developers, it became clear that the providers of this, supposedly illegitimate, software did a far better job of publicising the benefits and potential revenues of utilising their tools than CCP did either of enforcing their terms or publicising the consequences of operating such software within their environment. In this situation then, where the norms of a group of players who believed automation to be an acceptable action within the environment competed with those of the developer and others in the player base who felt such behaviour should be prohibited, the ability of the botting software providers to better communicate their position led to a weakening of the community norm against botting, and encouraged other participants within the environment to purchase their software and become botters.

CCP's eventual enforcement action only began after a move by the community to enforce such norms themselves. The participant operated blog *Eve News 24* launched a February 2011 investigation into botting activity in EVE, and detailed a methodology he adopted to both identify bots and limit their in-game activities, identifying "a pattern in the systems which had the same # of players 13 hours later" in combination with an analysis of the number of NPC kills over that time period, observing that "It is relatively unlikely that a human would have the patience to chain belts for 13 consecutive hours and produce a smooth, even NPC kill count with low volatility" (Riverini, 2011). He subsequently reported these suspicious accounts to CCP, who apparently took action against the accounts, with Riverini claiming that whilst offline the next day, the following day "18 of the 20 bots from Kalevala were back online. From the looks of it, they received one-day bans. They are now back to producing over 12 billion isk per day".

It was not until July, and the 2011 EVE Vegas event, that CCP began discussing publicly a response to rising community pressure on bot activity, formally noting in an August 2011 developer blog that "in the past months the EVE Security Task Force has been assigned various tasks related to security issues, but one of the main tasks this team has been given was to develop new systems and tools to identify, classify and track various kind of unfair player activity" (CCP Pollux, 2011). The 2012 EVE Vegas event saw an admission that "Botting and RMT had become socially acceptable because of the inaction on the part of CCP", and that until the introduction of PLEX "no one had paid attention or really cared" (*Sugar Kyle*, 2012). Whilst the causal link between community action and an increase in platform operator action cannot be proven, the risk of weakening and failing to enforce community norms is evident from these examples.

The extent to which CCP's rules are backed by consent of the community in these situations is uncertain. It is no longer clear which norm dominates, and it is therefore not easy to determine whether enforcement by CCP of its rules can be considered to be legitimate. In regulatory terms, this creates a

potential challenge in a hypothetical dispute: if legitimacy is important, do the rules imposed by CCP retain sufficient support amongst the community to warrant upholding them with the full force of territorial law? The standard contractual answer is that participants have manifested their assent to the formal terms of service, but a more substantive answer is much more complex. This challenge is likely common in online communities, where the contractual terms rarely reflect actual governance processes. A hypothetical dispute involving Instagram participants, if it were not to be resolved in a purely formal manner, would need to ask whether the community norms support a more limited reading of the terms of service than the literal terms of the contract suggest. Actually evaluating consent, however, is a complex challenge.

6. Evaluating Consent in the Context of Shifting and Uncertain Norms

Evaluating consent amongst a diverse population in a pragmatic manner can never be more than approximation. Liberal democracies approximate consent through elections and the democratic institutions that uphold the rule of law. Most online social spaces are certainly not democracies, nor do we suggest that they ought to be – but democratic processes could help provide more legitimacy to current governance practices. Johnson et al (2013) have made a strong argument that some form of representative democracy may prove to be a useful mechanism to give voice to participants in a system of private law-making without requiring each participant to be active in the mechanics of the democratic process. CCP has attempted a similar process, allowing community representatives to exert some influence on EVE policy development through the Council of Stellar Management, with limited success. Establishing systems of strong representative democracy – or at least representative input into benign dictatorships – is likely to be difficult, particularly in terms of developing systems that are strong enough to sufficiently constrain the power of the provider on a voluntary basis. If they are practical, however, such system might play an important role in regulating the exercise of private power in online social spaces.

Similar arguments have been made by game scholars, with Taylor (2006) arguing for players to be given "some power and responsibility to govern their own community and worlds". It is certainly possible that some form of representative democratic input into rulemaking and some form of participant oversight of provider actions could increase the legitimacy of in-world governance. To date, however, the track record of devolving power to players within gaming environments has not been strongly positive. As early as LambdaMoo, attempts were made to afford players responsibility, with Curtis' (1992) 'New Direction' devolving certain powers; or, as Mnookin (1996) described it, "the oligarchs instituted a petition system, a process through which the players in LambdaMOO could enact legislation for themselves". However, this system was to fail, with Curtis (2001) concluding that the participants of the environment still saw him as a "god". Other environments with experiments in participatory democracy, such as A Tale in the Desert, remain niche platforms in the genre, perhaps leading credence to Doctorow's (2007) observation that "World of Democracycraft" might not be much fun for participants.

Representative democracy is not, however, the most crucial component of legitimacy where exit from a community is a real possibility. In private online social spaces, we suggest that legitimacy means primarily that the rules are clearly promulgated, relatively stable, and enforced in a predictable manner (Suzor, 2010, p. 1817). These are the core values of the rule of law, which define good governance across many different societies. There is reason to believe that this core sense of the rule of law, as a

restraint on the arbitrary exercise of power, is a universal value (Tamanaha, 2004, p. 137). We should be careful here not to confuse consent to arbitrary game rules with any suggestion that game rules must themselves be predictable or evenly enforced. Many games do in fact rely on predictable rules, but participants may of course also consent to arbitrary rules in games. Our point is merely that for that consent to be legitimate, it needs to be real.

Consent, as it relates to legitimacy of governance in social spaces, is likely a continuum. The threshold at which we can say that the enforcement of a particular rule is legitimate probably depends upon what is at stake. In MMOGs, we might expect that a provider's decision to ban a player who has accumulated substantial social and virtual capital within the environment should be based on good information and carried out in good faith. Conversely, in games where participants are not heavily invested, either in terms of financial or social capital, the low value and transient nature of interactions might provide less cause for concern where participants are not fairly treated. The degree to which a norm needs to be clearly articulated and known throughout the relevant community before it is legitimately enforceable likely depends, to a large extent, on the degree of harm that participants are potentially exposed to.

Regulatory approaches that prioritise legitimacy in community governance must engage with the complex task of identifying consent. While this is a difficult problem, it is not unfamiliar. Territorial courts have, over the years, been able to identify consent in games, and have done so in a way that separates the formal rules from the actual levels of consent that can be presumed from participation. Just as the rules of assault are modified by consent in football or boxing, duties between participants in virtual worlds can be modified by shared understandings of acceptable behaviour (Fairfield, 2008b, p. 825; Lastowka, 2010, pp. 110–113; Reynolds & de Zwart, 2011a, pp. 58–82). In a hypothetical dispute, a robust fact-finding process has the ability to determine whether the contractual rules relied upon by Instagram or CCP are supported by consensual community norms on the balance of probabilities. The structure of territorial justice systems are designed to make these types of findings legitimate themselves, and it is certainly theoretically possible to fit serious disputes within the existing legal framework.

The massive scale and quick evolution of social norms in online communities, however, presents an extremely difficult practical problem for legitimate regulation. It is almost infinitely easier for a territorial court to defer to the formal terms of service in resolving disputes than it is to attempt to make factual findings on the state of social norms within a community at a particular point in time. In-depth ethnographic research is able to examine social norms through an extended period of engagement within the community. Legal proceedings do not have that luxury, and the costs of such an inquiry likely outweigh the benefits in all but the most serious disputes.

The difficulty of identifying consent in online environments presents a difficult enduring problem for the regulation of private governance practices. To the extent that legitimacy is important in these environments, legal frameworks that enable rule by developer fiat, backed by the letter of contractual agreements, will not be appropriate. Investigating the foundations of community consent, however, requires a difficult trade-off between the requirements of legitimacy and due process, on the one hand, and the necessity of developing cheap, timely, and effective dispute resolution processes. It is conceivable that alternate dispute resolution processes that incorporate community representatives could play an important role in regulation (Reynolds & de Zwart, 2011b), but these systems are likely to be most successful in cases where both parties to a dispute have sufficient funding and expertise. In cases

involving asymmetrical power relations, such as in disputes between participants and providers in virtual worlds, the ability of alternate dispute resolution systems to achieve both legitimacy and efficiency goals is yet to be determined. The need for different regulatory approaches appears clear, but reconciling these tensions, at the intersection of needs for autonomy and legitimacy, is a difficult and unsolved problem.

7. Conclusion

The legitimate resolution of disputes in online communities is dependent upon the consent of participants. The formal legal mechanism for identifying consent – acceptance of contractual terms – is not well suited to resolving disputes in communities where the contractual terms do not reflect the norms or rules-in-use of the community. It follows that current legal framework are unlikely to result in desirable or effective regulatory outcomes in disputes where the social norms of a community are unclear. In order to develop legitimate regulatory processes to resolve disputes, regulators need to be able to take into account the contested and shifting nature of community norms. Understanding community norms is extremely complex, however, and developing acceptable dispute resolution procedures that are cheap, accessible, transparent, and legitimate is the key challenge for regulating privately operated online environments today.

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