

If I am the Author of my Online Persona, How can I protect it?

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Abstract

Virtual worlds were once thought to be the future of e-commerce. Avatars in virtual worlds embodied your identity and were your trademark. Facebook has created a program called DeepFace which can pick a face out of crowd with close to human accuracy. Your face is your identity, can it be trademarked? Trademarks, more than other species of intellectual property, are one step further from tangible property. Every kind of intellectual property requires participants to acquire value. What makes trademarks different is that they require participants to acquire meaning. This article deals with the complex problem of creating intangible property interests in symbolic systems and online persona and whether a better means of protection would be image rights.

1. Introduction

Virtual worlds were once thought to be the future of e-commerce (Adrian, 2007). The game designers who created these thriving virtual worlds developed an attractive way to use the Internet: through an avatar (Morningstar and Farmer, 1991). These avatars, unlike previous video game alter-egos, were richly customized and are designed primarily for social interaction (Lastowka and Hunter, 2004). The typical user devoted hundreds of hours (and hundreds of dollars, in some cases) to develop the avatar. This avatar was your identity, your trademark. Facebook has created a program called DeepFace which can pick a face out of crowd with close to human accuracy. Your real life face can now be your online avatar. Your meatspace identity could become online trademark. An image rights registration could protect you, your avatar and your identity.

The question of trademark authorship has often gone unnoticed. Trademarks are bound to a commercial context, functional (identifying a product) rather than primarily creative, and practical rather than an expressive elaboration of ideas and sensibilities. Just as one imagines an author writing in a picturesque Edinburgh cafe rather than in the Mall of America, Nebraska, such authorship seems an unusual question for commercial language such as trademarks. Yet a trademark is a creature of symbolic language. Like any other symbol or text, trademarks do not simply appear out of thin air. They are authored. But what does that mean for a mark rather than a book? What does it mean for the representation of yourself online? (Adrian, 2007)

This article deals with the complex problem of creating intangible property interests in what transpires online. Image Rights are the suggested solution.

2. Authorship and Symbolic Systems

“The limits of my language mean the limits of my world.” (Wittgenstein, 1922). Copyright law delineates our linguistic and artistic palettes by subjecting creative expression to

monopolization and by restricting the reproduction and manipulation of cultural content (Tehrani, 2011). Joseph Liu (2003) contends that copyright law has a well-developed theory of the author but lacks a coherent theory of the consumer. For the most part, copyright law has typically deemed the user/consumer either a passive receiver of copyrighted content or an active creator of new content from old (Id.) Authorship is not a simple concept for either trademarks or the literary realm of copyright. Take the debates currently raging in copyright scholarship. Authorship, it is argued, is a cultural construction. What makes an author? Do not some “authors” (even Shakespeare) stitch together texts from pre-existing plots? Or even borrow characters and scenes whole cloth from other narratives? Why should certain kinds of expression, like literary production, be privileged above other types? (Jaszi, 1988).

These questions strike at the heart of assigning special legal privileges that restrict the use and distribution of written texts (Adrian, 2007). Traditional copyright theory underappreciates the role that intellectual property possession, use, and consumption play in mediating personal development and advancing identity interests. The underlying concept is simple: there is a link between the author's life, or physical existence, and the property right that the author possesses in her creative output (Tehrani, 2011). The study of symbolic systems uses computer systems, robots, and people as examples of symbolic systems. They are “agents that use meaningful symbols to represent the world around them so as to communicate and generally act in the world. The notions of symbol, meaning, representation, information, and action are at the heart of the study of symbolic systems. This common core of notions arises in a variety of fields including artificial intelligence, computer science, cognitive psychology, linguistics, philosophy, intellectual property law and symbolic logic.” (Stanford Symbolic Systems Program, 2014).

However, one should compare the role of authorship in symbolic logic, linguistics, image rights, trademark and copyright. Peter Jaszi (1988), in his critique of the pervasive copyright doctrine that the author is central role to copyright, traced the rise of this privileged concept to the 18th-century origins of copyright doctrine. The Romantic Movement was noted for emphasizing the understanding that individual works are the expression of an individual self. It created the myth of the author as transformative genius (Woodmansee, 1992). Jaszi (1991) has argued that such a notion of the author is a stalking horse for economic interests that dominate intellectual production at the expense of the public.

Both the meaning and value of intellectual property occurs at the interface of production and consumption. If authorship is elusive in copyright, however, it is even more so in trademark. While copyright has its classic image of the literary author and patent law its notion of an inventor, trademark is established simply through commercial use (Adrian, 2007). Avatars and online personas are authored by a network. Information is no longer isolated but instantly connected to everything else. We have moved from an information age to a networked age. A new intellectual property right is needed. The new Guernsey Image Right is established simply by existing and registering that particular existence.

3. Online Expressions of the Self: Identity and Reputation

Computers and the Internet have opened up the study of mind, information, and intelligence into a new era in a similar manner that Galileo's use of the telescope provided to astronomy. By providing the means to build powerful simulations of various kinds of intelligent action, a new methodology for the rigorous probing of questions about the nature of mind, meaning, and intelligence has been enabled. Now, think about the interaction between property rights and personhood, and the manner in which intellectual property rules regulate and often restrain such relationships, frequently with underappreciated socio-structural consequences. In a modern capitalist society, consumption represents an instrumental component in the process of identity development. The institution in which has the closest resemblance to universal democratic participation is the marketplace, now the e-marketplace. Personhood has moved into the virtual realm; and avatars, like their human counter-parts, express themselves through appearance and body language (Adrian, 2007).ⁱ

As Hegel (1821) opined: "A person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'." By exercising this individual will over material objects in the external world or over representative objects online that personhood or identity (once a nebulous, inchoate, and malleable concept) actualizes. To Hegel, individual definition comes into being from simultaneously differentiating oneself from one's physical environment, while maintaining relationships with parts of that environment (Id). Hegel (1821) further states: "A person must translate his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will, and therefore this sphere distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him. . . . As the concept in its immediacy, and so as in essence a unit, a person has a natural existence partly within himself and partly of such a kind that he is related to it as to an external world."

In online worlds, once an avatar is created, she needs a name. So the user must choose one. If they cannot think of one which matches the game's universe, an automatic name generator can be used. This name will become your identifier; your identity, in fact (Adrian, 2007). Your name will be on what you build your reputation. This will become your trademark (Walsh, 2004). An avatar is the representation of the self in a given physical environment. This environment creates an idealized situation in which a player may freely shape her own "self". She has full control over her own image. It is significant to note that people talking about their activities while in the game world use the pronoun "I", each identifying his or her "self" with their avatar they have created (Filiciak, 2003).

Today, people are creating various representations of their real world selves online. The environment is not idealized, but there is still much freedom to shape one's self. People have more control over their own image, identity and reputation. In a universe that offers hundreds of virtual worlds, the virtual body becomes a vessel of choice, and the thinking

part of humanity – the Self – will find it convenient to slip into and out of avatars as economic, social, and political circumstances dictate (Huhtamo, 1995).

Thus, self-actualization happens through acts of consumption and personhood interests manifest themselves through consumption in at least two ways: in the formation of personhood and in the expression of personhood (Tehrani, 2011). Formation of personhood takes place internally as an individual's identity is shaped through interaction with objects in the external world. Meanwhile, the expression of personhood occurs when the individual communicates some aspect of her (already formed) identity to others as a way of contextualizing herself, through her relationship with objects, within the broader community (Id).

At first glance, this may seem to pose a distinct challenge for legal theory. Law is built on the idea that the self is a unitary, rational actor. Rational choice theories of social effects emphasize the importance of information for the maintenance of social norms. Norms can only be enforced if it is possible to impose some kind of punishment on the violators. In a virtual community, the real self behind the avatar is generally hidden. As a result, any punishments the community may dictate can only be imposed on the avatar, not the self, and the self is free to simply exit the avatar and escape unscathed (Mnookin, 1996; Lessig, 1999). Nonetheless, avatars tend to mimic their players as they develop personality, individuality, and an ability to act within the virtual world – as any person on their way to maturity (Rehak, 2003).

Systems or networks that encourage reputations require that it not be easy to develop capital rapidly in another avatar. If it were easy to do so, anyone could ruin their reputation with one avatar, destroy it, and then simply reappear with another avatar of similar powers. The credibility of social norm enforcement depends on the degree to which an agent has a vested interest in the fate of the avatar. If agents are deeply invested in their avatars, and are hesitant to start new ones, it will take more time for the levelling process of population shifting to occur. There is a trade-off between equal opportunity and social order; agents will choose worlds based on their relative tastes for both (Johnson and Post, 1996; Castronova, 2003). Each avatar develops a social role.

Likewise, non-virtual systems operated online also create social norms. Intellectual property laws directly reconcile the justification of formative and expressive identity interests. Modern copyright and trademark systems do not allow individuals to manipulate and utilize intellectual property in the same way that they can customize and contextualize their experience with physical property (Tehrani, 2011). This is due to the fact that by doing so the underlying intellectual property is considered to be a potential violation of a copyright owner's exclusive rights under copyright laws or trademark laws. Society as a whole benefits from the intellectual property holder's vested interest in maintaining quality across numerous transactions. For example, the trademark holder both invents and sustains the worth of the mark, it is his claim to private ownership that must be protected (Schechter,

1927; Beebe, 2004). This is true for any online interactions. Identities and reputations must be protected.

4. Our Intellectual Property - Ourselves

Individual consumption of property serves as a powerful tool for both identity formation and expression (Tehrani, 2011). This relationship between the formation and development of identity interests was demonstrated by Erving Goffman (1961) who studied the critical role that the mere private possession of objects plays as a mechanism for asylum patients to maintain a sense of self. This theory argues that property interests can possibly improve the survival of individual identity. With respect to the expression of identity interests, consider the ways in which individuals customize tangible goods to suit their particular “needs” and then consume/use these goods publicly. Likewise, people customize their online personas on various websites to suit their particular “goals”. For example, one may have a very professional persona on LinkedIn, but a much more fun and flirty persona on Match.com. Our relationship with intellectual property is an essential part of defining ourselves. And in an increasingly digital and virtual world, the semiotic value of intellectual property is just as significant as physical property, if not more so (Tehrani, 2011).

Intellectual property’s role in extending the personhood of consumers is not limited to the internal formation of identity. By dictating the conditions under which individuals may publicly exhibit their use of cultural content, the intellectual property regime also influences the manner in which individuals can express personhood interests to the external world. As Kurt Vonnegut (1961) famously observed: “We are what we pretend to be . . . so we must be careful about what we pretend to be.” “Thus, the expressive use of cultural content before the public does not merely represent one interpretation of our identity, as framed for the outside world; rather, it arguably represents the reflection of our identity’s very essence.” (Tehrani, 2011)

Visible use of intellectual property provides a further purpose of publicizing one’s complex web of entanglements with social, cultural, political, and economic networks and by facilitating one’s interaction with the broader community. Without the ability to exhibit to the public one’s uses of certain works, one cannot effectively communicate such contextualized relationships. Moreover, as Jean Baudrillard (1970) suggests, the primary function of products no longer lies in their use, but rather in their communicative status. “The use of authorial marks in relation to the sale of creative works, like the use of business trademarks in relation to the sale of goods and services, creates social benefits that deserve legal protection. Authorial attribution acts as an incentive to authorial production, provides valuable information to consumers, and provides additional social benefits that go beyond issues of market efficiency. However, the use of authorial marks, like the use of trademarks, can also create social harm.” (Lastowka, 2005)

Intellectual property has become less a matter of invention or design than the association of the design with a particular object. Association occurs in two stages. The first stage involves a producer connecting a sign with an object. It may be placed upon the object as a label or

incorporated into its over-all design. The second stage occurs when that association is recognized and invested with meaning by the public as an interpretive community. Following association of the object with the sign there is a third stage where the object-sign association is contextualized within a broader cultural context (Adrian, 2007). The word “sign” is used to indicate a fundamental element of communication. A sign has various expressions in trademark law. It may be either linguistic (words as found on a label) or non-linguistic (pictorial representation or trade dress). According to the widely accepted semiotician Ferdinand de Saussure (1915), the sign has two intertwined characteristics: (1) signifier (the tangible expression of communication) and (2) signified (its conceptual meaning). I am suggesting an application of these two ideas to trademark doctrine. The first stage is the creation of a signifier (the making of the tangible mark itself). The second stage is that of the signified (the investing of the mark with meaning).

Who makes a mark is not an idle question. Intellectual property rights are often founded upon a right to the product of one's own labour that begins with an act of creation. The Lockean notion that creators should be rewarded with just desserts has been enshrined in natural rights arguments for the protection of intellectual property rights against free riders. In the words of Justice Brandeis, a person or corporation should not “reap where it has not sown.” (International News Service v. Associated Press, 248 U.S. 215, 239 (1918) (Brandeis, J., dissenting)) Ownership of intellectual property generally relies upon claims to creation or the transfer of those claims. Regardless of whether the writings remain locked away in a study drawer, like those of Kafka, or lack any economic utility whatsoever, intellectual property rights are linked to authorship (Becker, 1977; Waldron, 1988; Port, 1993; Landes and Posner, 1987)

The association between person and name as used in the designation for a product requires taking it away from its sole connection to individual identity and attaching it to a physical object. Such a re-association is legitimate because the naming of the self is really one communicative channel and the association with a commercial product is another (Adrian, 2007). In the case of celebrities, however, the name has become commercialized (Harrington, 2005). Self and the commons have intermingled. It therefore would be prohibited to name a perfume after Elizabeth Taylor while there would be no problem using a name already in currency for an ordinary individual. For ordinary persons, the name is arbitrary or fanciful (this individual is a “Laker”) but for products it becomes a descriptive term (Laker's may be translated as the restaurant owned by Laker). Consequently, secondary meaning is required to re-establish this new association.

These limitations express the problem of associating a symbol/name with meaning if meaning already exists: the example of surnames as arbitrary designations for an individual. This person is called Laker rather than Fitch. In a sense, then, Laker is a trademark for persons, shared within an exclusive semi-public domain by everyone named Laker. The number of people with that name may increase (Lakers pass down the mark to their children or share with a spouse or Fitches may change their name to Laker) but it is applied solely to this limited set of individuals. Different Lakers are distinguished in a variety of ways. There is

Alexander Laker, Bertram Laker, the Laker from New York, the Laker from Glasgow, Laker the professor, and Laker the insurance salesman. Because human beings are singular and found within local settings there is little confusion (though occasionally one has to resort to middle names for someone with the common appellation of Smith) (Wilf, 1999).

A public role is also required because the extension of the Laker name to a restaurant encroaches upon the entitlement of every other Laker. Another member of the Laker family would be barred from opening a restaurant with the same name in the city. For example, Joseph Gallo (brother of the Gallos who own Gallo Winery) was prohibited from using his surname on packaged cheeses) (See, E. & J. Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280 (9th Cir. 1992)). Unlike surnames, there is no secondary meaning requirement for historical names. While Michelangelo will be unaffected by a paint store named in his honour, the entitlement of everyone bearing the Laker name diminishes if it is called Laker. A secondary meaning requirement means that public use of language (its perception and associational power) trumps limited group entitlements to names. Association means authorship, and context points to meaning.

5. Image Rights protect the Authorship of Self

Image rights involve the commercial appropriation or exploitation of a person's identity and associated images linked to that person. They are related to the distinctive expressions, characteristics or attributes of, or associated with, a personality made available to public perception (Adrian, 2013). Image rights are an integral part of artistic expression and a product of not only celebrities, but ordinary people. The value of image rights is such that they are already being actively managed and traded, despite the lack of clear legal recognition and the lack of clarity as to the extent of the rights. Image rights are commercially valuable and build upon the international standards for intellectual property discussed earlier.

According to s 2(1) of the Guernsey Image Rights Ordinance (GIRO), "A registered personality is a property right obtained by the registration of a personality in the Register in accordance with the provisions of this Ordinance". "Personality" refers to the personality of the following types of person or subject, which is described in the Image Rights Ordinance as the "personnage". Section 1(1) IRO describes a "personnage" as follows:

- "(a) a natural person,
- (b) a legal person,
- (c) two or more natural persons or legal persons who are or who are publicly perceived to be intrinsically linked and who together have a joint personality ('joint personality'),
- (d) two or more natural persons or legal persons who are or who are publicly perceived to be linked in common purpose and who together form a collective group or team ('group'), or (e) a fictional character of a human or non-human ('fictional character'), whose personality—
 - (i) is registered under this Ordinance (and is accordingly a 'registered personality' for the purposes of this Ordinance), or

(ii) is the subject of an application to be so registered."

"Personality" is defined in s 1(2) IRO as "the personality of the person, two or more persons or character referred to in subsections (1)(a) to (e)". Section 1(5) IRO defines a "natural person" as a human being who "(a) is alive, or (b) has died within the period of 100 years preceding the date of filing the application for the registration of the personality". So, Robert Downey Jr or the author, Angela Adrian, would be considered natural persons, likewise so would the deceased Charlie Chaplin or the author's deceased father, Col Max Adrian.

"Image rights" are defined in s.5(1) IRO as "exclusive rights in the images associated with or registered against the registered personality". Section 3(1) IRO defines "image" as:

"(a) the name of a personage or any other name by which a personage is known,
(b) the voice, signature, likeness, appearance, silhouette, feature, face, expressions (verbal or facial), gestures, mannerisms, and any other distinctive characteristic or personal attribute of a personage, or
(c) any photograph, illustration, image, picture, moving image or electronic or other representation ('picture') of a personage and of no other person, except to the extent that the other person is not identified or singled out in or in connection with the use of the picture."

Note that there is no requirement to register specific images associated with the registered personality beyond the personality's name itself. However, for there to be a benefit in registering and for easier enforcement, specific images are useful. A registered image is presumed to be distinctive and of value, which are requirements for infringement, whereas these qualities must be specifically proven in order to enforce rights in an unregistered image (Adrian, 2013).

5 Conclusion

Symbolic systems are basically how we think and speak, how we communicate with each other, how we reason. In fact, they are who we are. Private intellectual property rights in your digital persona and digital goods are a simple result of these changes in both communication and economic values that stem from the development of new technology and the opening of new markets. In providing for ownership of personas, it should be remembered why this is being done. Due to Deep Face. your real life face - your meatspace identity - can now be your online avatar and online trademark. Your network is your identity. It is not just online, on Facebook, or Twitter, but everywhere. It is the sum of those communications, conversations, and interactions. So although avatars can be (and have been) registered as trademarks, it is neither easy nor particularly relevant. The concept of identifying the source of origin of goods or services by means of a static symbol is ill-suited to the function that avatars enjoy; what matters far more is protecting the reputational value the digital persona represents - in any form - coupled with a recognition of authorship. "Your identity is now constituted by the network. You are your friends, you are your tribe, you are your interactions, with your colleagues, your customers, and even your competitors. All those things come to form what your reputation is." (Reid Hoffman, LinkedIn) The IRO meets these requirements.

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Icondia comprises a team of experts that focus exclusively on the registration and management of image rights for an international customer base.

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ⁱ "Ultima Online gives you the option to choose your character from a set of templates of traditional professions. You're certainly not required to build your character from a template, but we highly recommend it for the first-time player. You may create multiple characters on each shard (except the Siege shards), so don't worry about creating a character you may not like. Using a template for your first character is an excellent way to get a feel for Ultima Online. To create a character from a template, choose the 'Samurai', 'Ninja', 'Paladin', 'Necromancer', 'Warrior', 'Mage', or 'Blacksmith' option. The 'Advanced' option is for those comfortable enough with the UO skill system to build a character from scratch. Once you have chosen a starting profession, you'll need to customize the 'look' of your character. The image you create will be visible to other players in the game whenever they double-click on you. This image is also known as your 'paper doll.' You can specify gender, skin color, hair style and color, shirt color, pants/skirt color and, if you've chosen to play a male character, facial hair style and color. Your first character will show up with defaults for all of these options, to change them, simply click on the corresponding part on your character. If you click on an item of clothing, you will then be able to select a color by clicking anywhere in the palette box to the right of your character. If the selected item is a hair style, you will see a drop-down menu appear to the left of your

character listing all of the style options. Clicking on one will apply it to your character. When you are satisfied with your appearance, click the small green arrow to continue." http://www.uo.com/newplayer/newplay_0.html.