ONLINE SOCIAL SOFTWARES: 
POLICY AND REGULATION IN A 
CONVERGED MEDIUM

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Abstract

Online social softwares present many challenges to policy makers and regulators. As convergent media they cross previously well defined territories and policy silos. This paper considers seven different ways of approaching online social softwares such as Massively Multiplayer Online Games and Social Networking Sites (like MySpace or YouTube) and sketches some of the policy implications of each discourse. Developing coherent policy from these competing discourses presents a huge challenge which requires regulators and policy makers to broaden their outlook beyond traditional silos. The paper suggests consumption and production are no longer distinct areas; cultural policy and industry policy need to take account of each other if the full implications of convergence are to be embraced; and users of online social media need to be drawn into the regulatory schemes of the future.

Introduction

Online social media represent a convergence of media that creates an emergent form requiring a fresh approach to policy and regulation. There are two major changes that have an impact across a range of policy areas. The first is that online interactive media enable and often require user-created content as part of their make-up. This has implications not just for classification but also for many other areas, from ownership of intellectual property to sustaining innovative business models. The second change is that online interactive media enable social, often ephemeral interaction between users, users and publishers, and users and business more generally. This raises new issues pertaining to governance, risk, consumer protection, and privacy. These two areas – the content creation of users and the social interaction and networking between users are not separate and cannot be dealt with separately. They occur in the one environment and represent the convergence of the social and material in both cultural and economic spheres. As such they present a challenge to develop coherent policy that crosses formerly well defined boundaries between consumption and production and between social and cultural, and economic policy.

In an attempt to extract some clarity from the morass of moral-panic-inflected public discussion on online social softwares, and the discipline bound writings of academe, I have
identified seven different discourses which construct different ways of understanding online social environments and which implicate a variety of policy and regulation areas. In identifying these seven areas I don’t wish to suggest each can produce its own solution, but rather each needs to pay attention to the other areas that are surfacing and attempt to integrate them into a more coherent outlook. I have used Massively Multiplayer Online Games (MMOGs) as a case to study these discursive constructions through, but six of the seven discourses can in most ways be applied to other social networking softwares (SNSs) such as MySpace, FaceBook, YouTube and Flickr. In the limited space of this conference paper, it is difficult to do more than touch on the policy implications in each area. My hope is that the paper will provide a framework through which more complex understandings of the policy terrain can be usefully developed.

The framework I use is based on work done by Lastowka (2007) who identifies three broad approaches to MMOGs that have emerged in academic writing over the past five years. I will start with his initial three areas and add a further four which are also relevant. The first discourse frames the MMOG as a text. In this it adheres to a fairly traditional view of media, and implies policy and regulation areas of intellectual property, classification and free speech. The second discourse, and the one least applicable to the broader area of social networking softwares (SNSs) is to frame the MMOG as a game. The policy implications are found in the idea of separate jurisdiction here, and as Lastowka points out sports law is a salient comparator. The idea of separate jurisdiction does give rise to some issues around private policing and private law that have wider implications in an era of endless contracts which define rights and obligations. The third discourse frames MMOGs and SNSs as communities. Although Lastowka points out there has yet to be a foundational or ‘establishment claim’ such as one finds in other areas where communities may derive special bodies of law (such as corporations, associations, families, or even nations), there are other implications that arise from understanding an online environment as a community. These include ideas of social and cultural inclusion, access and participation, and may eventually see interventions made either through policy or judicial means to deal with matters such as contractual fairness for consumers in the matter of access, or new forms of local content creation subsidies for cultural ends.

The fourth discourse frames the MMOG and SNS as data and raises issues pertaining to privacy and data protection, surveillance and the aggregation of data. The fifth discourse understands MMOGs and SNSs as Creative Industries – sites of digital content creation, innovative business models, implementing innovative social network markets, and a source of both economic and social value to the broader economy. There are policy implications here for supporting locally-based industry. The sixth discourse, related in some ways to the fifth, considers the networked production model employed by such media, which involves the users as co-creators and sets up an altered form of ‘industrial relations’ which is still very much in an emergent, unstable and ill-defined state. Policy implications may be more distant here until the form takes on a better defined shape. The final discourse considers the MMOGs and SNSs as global media, operating in transnational environments which present many cross-jurisdictional challenges for regulators and policy makers in many different areas.

Regulatory responses to the issues raised in these areas will happen in a context of ‘soft’ regulation, where we increasingly see industry self- or co-regulation as the norm (Scott, 2004). Whether users get a seat at the table will become more important as their productive role expands, and as their social and cultural lives become more entwined with the financial well-being of media publishers in this area. Currently neither government nor users have a
seat at the table in many of the identified areas, and whether such non-regulation continues to be acceptable is an issue for debate.

**A brief description of MMOGs and SNSs**

Massively Multiplayer Online Games are persistent, usually three dimension virtual worlds in which users can engage with game content and other players in a shared social environment. They are increasingly popular, with the most successful to date being *World of Warcraft* which claims somewhere between 8 and 9 million active subscribers worldwide (Blizzard, 2007). Players spend many hours inside the virtual game environments and many establish strong social ties with other players and experience much of their sense of community and social life within the game. MMOGs are very successful media applications in their ability to engage and retain users and to be commercially viable. Social Networking Sites such as *MySpace* and *FaceBook* are not games but are also intensely social spaces and the users generate almost all of the content on the platform. Sites like *YouTube* and *Flickr* are sites for users to upload content and some use these sites merely as repositories. But others use them to develop communities of interest and spend time commenting on others’ work and tagging and rating content made by other users. The revenue model for these various applications varies – MMOGs in the west tend to be subscription based. MMOGs in Asian countries run on a variety of models. SNS sites tend to rely on advertising.

Some of the key characteristics which differentiate MMOGs and SNSs from other media reside in their interactive and social capabilities. Users are active participants in the media consumption process in new ways. They not only consume but they produce content through their interaction (as Bruns terms it, they are ‘produsers’ (Bruns, 2007)). Whether that content is ephemeral and social, or more material and persistent, it means that the developers and publishers can no longer be considered the sole creators of content. Thus a player in an MMOG creates some of the gameplay that other players encounter – players interact with not only developer made content, but with other players as well. Strong ‘modding’ communities often create additional game content and players create gameplay and social engagement for each other (Modding is the fan-based practice of creating new artwork, code and architecture to add on to games). This raises issues for control of content and user behaviour not previously encountered by regulators of media. The conditions under which users engage with these media are laid out in End User Licence Agreements (EULAs) and Terms of Service contracts that often contain many onerous clauses which diminish their access to justice and their rights as citizens.

The degree to which these kinds of applications have become significant sites for symbolic and cultural exchange cannot be ignored and has implications not only for social policy pertaining to regulation and classification but for cultural policy pertaining to local content issues, and for our broader understanding of the public sphere, which seems to be shifting in large part to proprietary venues, to ‘mass private spaces’. While this paper retains a focus on MMOGs, many of the insights gained from looking at these particular applications should be read as more broadly applicable to the SNSs discussed above. MMOGs are more highly structured environments, but both MMOGs and SNSs can be considered proprietary platforms with large amounts of user created content of both a material and social nature, and where conditions of use are governed by standard form EULAs and Terms of Service which deal with IP rights, governance issues and exclusion. Such sites are often a source of innovation and development, and operate transnationally.
MМОGs as texts

Viewing an online game as a piece of text is a problematic, if convenient, approach. Whilst there are indeed many aspects of an online game that are textual, it far exceeds the boundaries of other textual media forms, such as books and films or television programs. Thus while it is possible to point to the code in the platform, and to the story world or fantasy construction of the game, and to the rules and constraints/affordances of the game, there are many aspects of the game that exceed this description. While not wishing to minimise the enormous amount of work that goes into the construction of an MMOG platform, it must be understood as only part of the assemblage that makes up the MMOG. Many of the ‘outcomes’ of player engagements are emergent, unpredictable and generative, rather than closed and finished (Juul, 2002, Humphreys, 2005a). It is thus a text only partially finished on publication and it becomes an ongoing networked piece of creative endeavour post-publication as the users populate and play within it. As a textual form it is structured very differently from the standard narrative-form texts which most media policy deals with. Authorial control is dissipated, and textual form varies from persistent to ephemeral. While the audiences of the more conventional ‘non-interactive’ texts have always been active interpreters and make their own meanings from such texts, MMOGs and SNSs actually require input from users that can change the text itself, and in unexpected ways. One user’s experience and input may significantly alter another user’s experience. Even though Australia’s laws pertaining to free speech are only implied and both the legal and cultural/political contexts are different from the US in this area, in these globalised applications, US law often matters. Facebook, World of Warcraft, and MySpace all operate out of US environments and their developers and owners deploy the discourse of free speech within the political context of a nation dedicated to keeping government regulation of free speech to a minimum.

However as Lastowka points out, in the US at least, understanding an MMOG as a text puts it within the bounds of laws pertaining to copyright and free speech. As copyrighted material it both allows the designers/publishers to control the reproduction and distribution of it, and, as speech, to take haven in the first amendment laws which “prohibit the state (and notably not private actors) from imposing restraints on speech activities.” (Lastowka, 2007:10) (original emphasis). Thus, stakeholders who wish to keep the state out of regulating MMOGs as much as possible will often argue that it is text. Designers and publishers in particular have a vested interest in treating the MMOG as text in an effort to retain control of the environment. This elides the role of users and modders in content creation and the mutable character of the text.

For regulators, treating the MMOG as a text also has several other implications. Firstly and most banal, classification regimes exist to regulate texts. These tend to operate on the assumption that the text is a finished and known quantity that can be assessed before release into circulation. Obviously the social nature of online games and the always unfinished nature of the ‘text’ means that such classification will always be inadequate to the job of classifying the content a user may encounter. The initial platform content can be classified, but little else. Different countries are taking different attitudes toward social or ‘ephemeral’ content. While Australian legislators have recently introduced a Bill (Communications Legislation Amendment [content services] Bill 2007) which would see an increased responsibility placed on content service providers to regulate ephemeral and live content, in the UK a recent Ofcom report states:

"Users can not only stop watching the content; they can go to other parts of the world, they can stop the software programme and exit that world. There are many points at
which 'virtual worlders' can cease viewing adult or offensive content. Media literacy is a vital element in this. (Marsden et al., 2006:121)

This is an alternative way of approaching ephemeral content: as generated in a quasi-public sphere best left reasonably unregulated, with users managing their own risks with regard to content, and the state working to ensure through education a literate population able to handle confronting material on their own. The current Australian Bill in contrast, risks creating confusion by being unclear in its proposed separations between content and carriage service providers, in its 22 exemptions to its definition of content service, and in making regulation and classification less platform neutral than before, and by introducing further age-based restrictions down to MA15+ for internet based materials, without suggesting a workable age verification system.

Working against the UK policy direction is the tendency of politicians to buy into the moral panic discourses mounted in the more traditional media (who have a vested interest in discrediting new media which are creating direct competition for audience attention and the advertising revenue). Video games as a source of youth violence and the internet as a source of danger, fraud, paedophiles and the general decay of civilisation as we know it, are common portrayals found in broadcast and print media. The moral panic paradigm arises with the arrival of every new media and should be understood as such, rather than given credence by policy makers. Of course politicians in search of the vote often ignore advice from people within government departments who have a stronger understanding of the territory. Such short-term policy creation is a disservice to the nation in the long run if it chills the innovations derived from user content creation business models.

Secondly, understanding the MMOG as a text, rather than, for instance, a social environment, puts it into a category of ‘product’, which then falls within the regulatory ambit of intellectual property and market exchange. While some aspects of MMOGs are suited to this, those aspects that constitute MMOGs as a service, and as social and an area for the conduct of community relations, make the categorisation of it as ‘product’ problematic (Herman et al., 2006). (The ownership of IP in persistent content created by users is already an area of contestation.) If one uses an even broader framework of regulation, it reflects the shift in trade agreements that has seen ‘culture’ reconstituted as product, mostly in the form of Intellectual Property, and subjected to terms of trade agreements in the global economic network. Thus TRIPS and various WTO agreements of the past decade have seen a reframing of culture that discursively constructs something like an MMOG as an object of exchange in the (global) marketplace (Frow, 2000), rather than as an environment of cultural and social engagements. Whether the AUSFTA bilateral trade agreement conditions on local content quotas will prevent the subsidising of local industry to create games and local social software sites should it become necessary for the maintenance of local cultural values in the public sphere remains to be seen. While local content arrangements for more traditional media industries may be somewhat quarantined, the markets of new media are subject to different conditions. In Jock Given’s assessment of the implications of the AUSFTA agreement he notes that chapter 16 on electronic commerce “is designed to ensure that local content obligations and customs duties cannot be imposed on physical (e.g. CDs, DVDs, games) or electronically delivered (e.g. broadcast, mobile, online) digital products.” (Given, 2004:16).

Online SNSs are implicated in most of the above issues, with massive reliance on user-created content on sites like YouTube and Flickr proving to be beyond the capacities and resources of classifying bodies, raising IP issues, and implicating local content production as part of cultural participation in new ways.
MMOGs as Games

To approach MMOGs as games implies a mobilisation of different policy directions. Games, according to conventional game theory, are not so much narratives as experiential environments with sets of rules and goals. The function of the rules is to delineate a separate game world where some everyday rules and regulations or codes are suspended and a different set are implemented within the game boundaries. Whether it be to ‘level the playing field’, or to create a fantasy environment where magical happenings become possible, the everyday rules don’t apply. Huizinga (Huizinga, 1950 [1938]) referred to this as the ‘magic circle’ of the game. It becomes a collective fiction – “let’s pretend that …” – which holds as long as participants accede to it and agree to suspend their disbelief. The approach that argues for a ‘magic circle’ within which games are played out, in some ways implies a separate jurisdiction. Thus, what happens within a game world should not be subject to the laws that govern the world outside of the game world.

In Lastowka’s discussion of this approach he makes an analogy with sport and the ways in which the law deals with sports jurisdiction. Thus some laws apply within sports regardless of their separate rule structure, and some are less applicable. Players consent to a different set of rules in taking to the field and this is taken into account when real world law adjudicates in conflicts from the sporting arena. However the rules they consent to do not absolve the participants or the administrators of the game/sport from a duty of care.

Much as some would like to institute the magic circle principal, in fact there is often a crossover between the ‘real’ world and the game world and it is difficult to draw a hard and fast boundary between them (Farley, 2000). The ‘real’ constantly bleeds into the fantasy world and vice versa, particularly if one starts to take account of the social relations that criss-cross the boundary in an MMOG, where many players use the MMOG as part of a communication and relationship ecology that extends well beyond the game world. Regulatory intervention from state-based bodies is not unheard of in sport, and it would be difficult to make a strong case for non-intervention in MMOGs based on the ‘game as separate jurisdiction’ argument. Altered rules and the consent of players to the altered rules would be the issue likely raised. In the world of sports law, what consent is literal and what is implied through game-play norms is a grey area of some contention. The magic circle is a fiction that is convenient for the purpose of implementing a game, but should be understood as only a partial description of the reality of gaming practice. Consent is given by players for some rules, but only implied consent exists for some practices carried out by publishers.

Of key interest here too, is the relationship of real-world money to game money. Virtual worlds such as Second Life have in-game currency with a direct exchange rate for US dollars. As such, in-world monetary gains that are then converted to real world cash are subject to taxation law, as are other internet monetary transactions. What to do about ‘illegal’ secondary economies associated with games like World of Warcraft, where the trading of game items and game money is banned by the publishers but where there is nonetheless a thriving market, is a complex area for regulators. Whose responsibility is it, exactly, to monitor, regulate, and possibly tax this secondary market worth millions of dollars? Salyer estimated in 2004 that the secondary market trading in in-game items and money was worth US$880 million per annum (Salyer, 2004) and the figure can only have grown. Although Blizzard, the publishers of World of Warcraft publicly decry the ‘gold farmers’ who operate in their game and regularly ban gold farmer accounts, the net result for Blizzard of shutting down such accounts is that the farmers go and buy new accounts, thus increasing the profits for Blizzard. In one month in 2006, Blizzard shut down 150 000 accounts. If most of those were gold farmers then
presumably most of the farm managers went out and bought new accounts in order to continue farming. Alternative solutions are available to Blizzard, but not implemented (Suzor, pers. comm. 2007).

What also makes the MMOG-as-game approach interesting from a policy and regulation point of view is that it introduces a rationale for the implementation of private law and private policing. This is taking industry self-regulation to its logical end. Games and sports, in instituting separate rules also institute private referees. MMOG publishers regulate the communities inside the games and sometimes attempt to regulate those communities in their outside-the-game environments such as guild websites, fan fiction sites and machinima sites, to name a few (Taylor, 2002). The publisher’s private referees are not subject to the strictures of accountability that keep public ‘referees’ (such as law enforcement officials and public service workers) from the excesses of power (Joh, 2004, Kozlovski, 2005). Contractual law is the key legal mechanism within this scenario, as players are subject to the End User Licence Agreements (EULAs) that organise their rights and obligations within the game world and in relation to the publisher. EULAs establish a usually diminished set of rights for game citizens (Jankowich, 2006), in which the publisher gains almost total control over the game space and there are very few avenues of redress for players who feel they have been poorly or unjustly treated. There are also many implications for privacy that will be discussed in the section on data below.

The publisher may argue for a separation of the game world from real world law on the basis of its ‘magic circle’ game status and in order to make better or more innovative games (Bartle, 2004). Players too, will sometimes argue for autonomy from the state, in order to be able to escape from the real and into the world of fantasy, or, more prosaically, in order to escape real world taxation on income generating activities in the secondary markets. However, the relationship between the players and publishers is governed at some level through a contractual mechanism of state-backed regulation. Where conflict arises between player and publisher, it is to the state-backed legal system that each turns for adjudication and enforcement of rights or contracts.

Given the need for games to establish alternative environments that operate under altered rules, some autonomy for publishers and designers is necessary, as is the ability for players to behave in ways not accepted in non-game environments. It is at the limit cases that intervention becomes necessary, just as in sports.

**MMOGs as Communities**

The intensely social character of MMOGs means that they must be considered, at least in part, as platforms that service a multiplicity of communities. While there are shaping constraints and affordances authored into the game world by developers and designers via rules and graphics and goals and so on, the communities within games are neither peripheral to its functioning, nor always ephemeral. Many players belong to guilds which they join and socialise within for years on end. The relationships they create and maintain within the game are significant – both to them and to the publisher, economically. The same can be said of social networking sites and social softwares more generally.

Lastowka points out that rules which govern communities (in a legal sense) are usually determined through the identification and foundational claim of the community. Thus geographical communities such as nations, or associational communities such as corporations, churches, unions and families all generate particular bodies of law, based on a foundational
claim made as a community. No such claim exists for a virtual game community, and he suggests that relying on a claim of community in order to establish autonomy from various legal strictures is unlikely to succeed.

There are other aspects to regarding MMOGs as communities that may come to matter more broadly, the more connected populations become (to online environments), and the more participation in online social environments escalates. Participation in online social networking and online entertainment environments such as MMOGs and SNSs must be understood as, increasingly, the place where people derive and build social and cultural capital. Much as television or film have served a function of providing common cultural ground for populations, and have become part of how we develop identities (associating ourselves with particular tv shows over others, demonstrating particular taste affinities, developing shared understandings, and so on), so too online environments will become part of a mechanism of social and cultural inclusion. Building social and cultural capital through participation in particular MMOGs or social networking sites such as MySpace or FaceBook implies a number of access issues.

In terms of cultural capital, as mentioned above, a response relating to domestic quotas or subsidies is likely to run into the AUSFTA terms which may prevent the development of specifically local content through quotas and subsidies. Governments have, in the past, been willing to intervene in media content production, legislating for local content quotas, using anti-siphoning policies to ensure particular culturally important events are widely accessible, and so on. Engineering a particular form of public sphere, where material is accessible to widespread populations through mass media has been a policy option in the past. What is the policy to be in an era of mass private spaces?

In terms of social capital, once the infrastructure is in place universally, which in Australia seems likely with the implementation of policies for broadband access for regional and remote Australia in the near future, there is little problem with access to existing commercial sites. However, participation in many online environments is subject to the rules as laid out by EULAs and Terms of Service contracts. Various ‘walled garden’ approaches to online connectivity are becoming more common. What we see with MMOGs and other online social softwares is a shift whereby people are conducting their social lives within proprietary spaces – indeed where social participation and cultural capital may be built to a large extent, within proprietary spaces. While this need not be overwhelmingly problematic, the terms of access to those spaces should be considered by policy-makers in light of unfair contract law. Is the cost of participation that people must accede to terms and conditions they find objectionable? Is there a role for the state here to intervene to curb the worst excesses of contractual agreements (as it does for other consumer goods and services) on behalf of their citizens?

There exist at both national and state levels, laws against unfair contracts. Whilst there is a tendency for courts to look mainly at procedural unfairness, rather than at the substantive aspects of contracts, this is less so when standard form contracts, in which the user has no option to negotiate terms, and in which there is an uneven level of bargaining power, and in which the user is disadvantaged by the contract, are used (Clapperton and Corones, 2007). Victoria in particular has stronger law (Fair Trading Act) than federal law on this, and NSW is developing similar law.

MMOG EULAs and SNS Terms of Service regularly include terms which allow the publisher to exclude players for “any or no reason”, to change the terms of service without notice or
notification, and various other terms which set the balance firmly in favour of the publisher in what can only be considered a one-sided and unfair arrangement (Humphreys, 2005b). Although it should always be borne in mind the imperative for a game world to establish a set of altered rules to operate under, the terms of EULAs often exceed what is necessary for the smooth functioning of the game world.

**MMOGs as Data**

Data mining is performed by the publishers of MMOGs and SNSs as a key source of their economic survival. Viewing the MMOG and SNSs as data implies a regulatory response from a privacy perspective. Profiling of players is in some ways a necessary part of understanding and governing the population within a game world or SNS. All governance strategies are to some extent dependant on knowing the population that is to be governed (Rose, 1999, Foucault, 1994 [1978], Dean, 1999). Thus as community managers, publishers need to gather information to understand the communities inside their platforms. But the uses of profiling are much broader than in-game governance or community management; demographic and other personal information is also a key tool in marketing strategies. Marketing can be read as another mechanism of governmentality – a mechanism which seeks to shape the desire of consumers, to suggest ideal forms of ‘citizenship’, to model behaviours that align with the interests of the publishers and so on (Kline et al, 2003, Humphreys forthcoming). It works at the cultural, symbolic and economic levels. At issue here is the practice of taking private information and using it in an attempt to shape behaviour in the interests of capital – interests which may or may not align with the interests of the users. While demographic profiling and marketing are not new practices, the access to unprecedented levels of information about the behaviour of individuals, the ability to target them, and the ability to aggregate data across platforms is new and warrants attention and a consideration of the ethics involved.

Most EULAs specify that the player gives the publisher the right to share their personal information with whomever they please for whatever reason they wish. This includes government agencies as well as other commercial enterprises. In effect this can set up a circumvention of accountability measures intended to ensure ethical behaviour by public agencies. Joh (2004) and Kozlovski (2004) explore the ways in which private agencies can hand public agencies and authorities information ‘on a silver platter’ that they would otherwise not have had access to. Mechanisms set in place to ensure accountability simply do not apply to private arrangements, and many of the checks and balances put in place by government to ensure transparency and accountability are diminished through the shift in policing and information gathering to private commercial companies.

Data about users is collected for use by marketing firms. Google recently patented an as-yet undeveloped system which will monitor player choices and interactions within games in order to develop psychological profiles of them to be sold to advertisers for more targeted marketing (Adam and Johnson, 2007). Whether such a system would work or not, the accumulation of information about players and the lack of any restriction on how such information may be used or shared raises questions for regulators concerned with protecting privacy. Some people think highly targeted marketing is better than random spam, and are willing for personal information to be aggregated across applications. Others regard the loss of control over access to their personal data as a diminishment of their right to privacy and a threat to their safety. The US government has already shown itself to be interested in information gathered by commercial enterprises and the aforementioned operation of the ‘silver platter’ outlined by Joh may be of concern.
Some of the MMOG publishers use spyware in their games. Players accede to having the spyware installed on their computers when they accede to the EULA. World of Warcraft is the most notable game that comes with an attendant spyware program (known as Warden). Spywares are used to monitor CPU activity and can access data on a player’s web browser usage. Thus publishers have access to information not only from within the game world that they own and run, but also about all the other programs a user is running, and the websites that the user visits. These applications fall well outside any ‘magic circle’, any boundary that might be drawn around the game environment. The collection of data on players represents a level of surveillance unprecedented in other media. The rationale for spyware is that the publisher wishes to know whether players are trading at ‘illegal’ sites that sell game items on a black market for real money in a secondary economy that has grown up around MMOGs. They also wish to know whether players are using third party softwares that give them unfair advantages in the game.

While formerly concerns (particularly in the US) were with placing constraints and limits on the powers of the state to intervene in the lives of individuals and that legal fiction, the ‘corporation as individual’, it may be time to consider whether the shift of so many functions of control and governmentality to the private sphere warrants a closer look at the transparency of processes and the accountability of those wielding power in the private sphere.

**MMOGs as Creative Industries**

Understanding MMOGs and SNSs as part of the creative industries that are currently driving much of the innovation and growth in global economies (Cunningham, 2006) draws attention to their role in creating more widespread advantage to economies through multiplier effects. One of the reasons it is interesting to look at computer games as an industry is that they are so successful and have driven many aspects of innovation in the digital economy. In a trickle down effect, these innovations are passed on to other, more prosaic and yet essential areas of the economy (Kline et al., 2003:173). This applies both to the technological advances but also to the innovations in social networking markets wrought by games. Games were the first truly successful interactive application of new media – instantly popular and engaging. Online games combined this success with the success of social interaction achieved in online chatrooms, and MMOGs can be seen as exemplary in these terms.

Regulatory environments developed around games need to be cognisant of this value to the broader economy. Concern about content should be tempered with the understanding that games have innovative value. Cutler points out that ‘the scale of investment in innovation in and through digital content appears significantly underweight relative to the funding of other industries. Given the growing economic importance of the creative industries, increased investment in innovation through digital content initiatives is key to capturing future national benefits’ (Cutler, 2003: 59). He also notes that “the leading edge activities within digital content industries function as the research and development for the content industries at large. The interface of creative industries with the cultural and not-for-profit sectors appears to be an important factor in creating economic multipliers” and that “digital content production appears to thrive where there are strong informal people networks” (Cutler, 2002:69). The 2005 DCITA report (*Unlocking the Potential*) into the digital content industry in Australia notes in part that government policy needs to:

Ensure that digital content is not excluded from available industry support mechanisms.
In order to grow, the digital content industry needs regulatory and investment frameworks that operate under technologically neutral principles and encourage interoperability, innovation, investment and competition. (DCITA, 2005:10)

Thus far government implementation of these kinds of policy initiatives has been decidedly lacking, and the development of strong local games industry support has been mostly State-based and unable to provide some of the investment tax breaks needed to develop more. Recent changes to the film industry funding scheme have provided a break to post-production digital effects companies, but fall short of providing similar rebates for the games industry (ArtBeat, 2007). Brand’s research for the Interactive Entertainment Association of Australia indicates that gamers don’t replace outdoor activities with game playing – they replace other media activities such as reading, movies, and radio. He notes a generational difference – with older consumers less likely to be gamers (Brand, 2007:22). Failing to encourage what is becoming a major source of entertainment and culture for many Australians in order to protect or focus on existent industries will result in Australia missing the out on developing a vibrant and strong industry whose innovations will have many flow-on effects for the broader economy as well as cultural dividends.

Games are being incorporated into many working environments as education and training tools (Prensky, 2001). Games can also be seen as training grounds for future workers - although many would regard this quite cynically.

Like detectives at the scene of a crime, players are regularly called upon to process screen images and scan displays in order to visually monitor the playing field for signs of enemy movement. Regardless of narrative content, game screens always function as fields of data waiting to be mined. Thus, like the modern workplace, video games present users with an extensive series of information processing tasks. … when we strip away the particulars of content, gaming is essentially an aestheticized mode of information processing, and therefore the digital economy’s ideal form of leisure. (Garite, 2003: 9-10)

Whether this is regarded as a cynical and ideological capture of leisure time by capitalism or not, the literacies derived from engagement in online games are advantageous in the employment market. There is also a well recognised pathway from game ‘modder’ into the games industry, with game developers actively recruiting from modding communities. In fact, the role of the players as innovators and risk takers is no small part of the structure of the industry and should not be overlooked. As the game publishing industry consolidates and the cost of development rises, R&D and testing is increasingly outsourced to the modding communities that spring up around games (Postigo, forthcoming). The increased importance of the players in the production cycle is discussed below in the section on production networks.

Can the interests of industry be aligned with the interests of public policy in such a way as to maximise the benefits to industry and the economy in general from having a robust games industry, without compromising the cultural and social benefits of access for consumers to environments that do not diminish their rights? A stronger consumer protection regime which encourages and facilitates participation will in fact prove beneficial to an industry working on a model where consumers are active producers, part of the production cycle in the networked environments, sources of R&D, innovation and risk-taking.
MMOGs as production networks

MMOGs and SNSs should also be regarded for the interesting ways in which they reconfigure the production process. Although the immediate regulatory implications do not seem great, it is possible that the new production processes will give rise to the most contentious issues for regulators in the future, particularly as ownership of co-created content becomes more important, and the boundary between game and non-game worlds becomes even more permeable. Player created content is also, in part, not textual, but social. This social content should be understood as a key area from which financial gains are made by the publisher. As such, they should not be ignored when considering where value is generated in a converged and online environment. Long-term engagement is the goal of publishers, who rely on the strength of social relations to keep users on their platform. Thus the social relations are intimately caught up in the economic relations.

What MMOGs and SNSs represent here is part of a much broader phenomenon found in the ‘new economy’. Immaterial labour (Hardt and Negri, 2000), intellectual, creative and affective ‘work’ are now entwined with global economics in new and intensified ways. Thus, in a space like an MMOG or SNS, where what is produced is derived from both financial and social economies, a new set of ‘labour’ relations is emerging. Labour relations in an industrial model of production are subject to a reasonably settled regulatory environment, in terms of rights and obligations, and what some basic minimum standards might be. On the other hand, production economies based in social exchange, behave very differently, with different expectations embodied in different productive behaviours and rules. Thus, in a social production economy (where what is of value is the social relations and networks produced by participants) mechanisms of gift exchange, social status, and social obligation come into play, along with intangible concepts such as the intrinsic rewards of creativity or the pleasures of contributing to community. All of these things are “difficult to standardize, specify, price and then organise as an input cost. Firms and monetised markets, however, rely on such contractual specification” (Banks and Humphreys, under review). In the mixed social and financial economies of online social softwares, the social network carries significant economic value and has become integral to the business model. How do we describe the processes and articulations between social and financial economies within a networked production environment (or ‘social network markets’ as they are sometimes being named) and what obligations exist for various stakeholders?

Some authors who approach games as production networks, cast the user contributions as exploitation by the publisher of ‘free labour’ (Kucklich, 2005, Postigo, forthcoming), but this discounts the voluntary, and often knowing engagement of the players themselves. While aware of the financial benefits to the publisher of their contributions, players forego monetary reward in favour of social reward for their productive activities.

It is possible to understand this intertwining of social and financial economies as an emergent set of industrial relations that will require new and different regulatory approaches. Some would argue that these things are best left to the market to sort out, but it is also conceivable that, as peoples’ social identity, community and ‘productive affect’ are subject to the private laws of EULAs (Crawford, 2004), some kinds of obligations might reasonably be expected from the publisher in relation to its labouring constituents, some minimum standards might be set. This might be in terms of accountability or transparency in decisions that relate to access; standards based in the social rather than financial economy. The End User Licence Agreement contract can in some ways be regarded as a new ‘labour’ contract, the mechanism through which some minimum ‘employment’ standards are set, either by state or industry self-
regulation or co-regulation. If industry wishes to make a profit from social relationships and networks, the immaterial labour within those networks should not be regarded as a free resource. Rather some duty of care towards it could be mandated. Although players probably don’t regard their participation as labour, and rightly so, the point of framing it in such a way is to bring to the surface the ways in which economic relations of production are played out in new ways in converged online social environments. New mechanisms of regulation may be needed with the shift to mass contractual, private relations. This emergent structure of production is still very fluid, and practices within it unsettled and diverse. As such it would seem regulatory intervention at this point could risk stifling innovative practices. On the other hand, it merits some attention to ensure the rights of consumer/ producers.

**MMOGs as Global Media**

MMOGs raise many issues about how to formulate policy in an environment that spans multiple jurisdictions. Various different regulatory bodies could be involved in regulating an MMOG in Australia. It should be noted that some of these operate nationally, but some also involve variations at the state level. Thus a national body like the OFLC relies on various State-based regulatory bodies for implementation of ratings restrictions, and they vary from State to State. The new amendment to the *Broadcasting Services Act*, before the parliament at the time of writing, seeks to implement a ‘platform neutral’ code of content classification but in the process makes some content currently available in some media in some states, (for instance X-rated video and Category 1 printed material in the ACT), unavailable on online and mobile platforms. Thus even with a stated aim of consistency at the level of national and State jurisdictions, inconsistencies emerge. The problems facing international cross-jurisdiction are more complex again.

Many EULAs nominate a jurisdiction in which any disputes will be heard. A surprising number of MMOGs are based in Californian jurisdictions. Although the convenience for the publisher of seeking dispute resolution in one, consistent jurisdiction is clear, does this then mean that citizens all over the world become subject to Californian law? When pursuing social goals within the virtual world of an MMOG, is a player in Australia to assume the mantle of a US citizen? Subject to US rather than Australian law? The implications for the concept of citizenship are puzzling.

However, more prosaically, there have recently been challenges to the terms of EULAs with respect to jurisdiction for dispute resolution and arbitration. A US court found that the cost to the gamer (or in this case the user of *Second Life*) to pursue an action in the Californian courts, or to submit to arbitration under Californian law, would be prohibitive and place him at a disadvantage (*Bragg v Linden*, 2007). This was regarded as a procedural unfairness in the contract, and the court was thus prepared to rule against the term of the contract.

Aside from different nations’ differing legal cultures with regard to unfair contracts, there are many differing cultural standards that are also at issue in cross-jurisdictional social softwares. Some cultures are prepared to tolerate high levels of violence in their media, but are very intolerant of sexual references. Others are more liberal with respect to sex, but hold more restrictive standards around violence. How to resolve these different standards within social software environments where content is ephemeral and unclassifiable is a thorny issue. The British Board of Film Classification and Ofcom seem disposed to leave it to the user to walk away from offensive interaction – relying on a conception of the interactive environment as a quasi-public where restrictions are (in the main) undesirable. The new Australian regulations
being debated seem to differ in this, wanting to rate and regulate through content service providers, the social interactions of online environments. Thus, upon complaint, content service providers may be obliged to cease a service or monitor and regulate it. This can only apply to services hosted within Australia and thus couldn’t apply to MMOGs from outside the country. Such inconsistencies are unlikely to lead to any sort of effective regulatory regime. A more pragmatic approach might be to insist on something like ‘sharding’, for games – where different servers have different classifications. The same game can be experienced at different age levels or for different countries by ensuring players are directed to age or culture appropriate shards (servers), each of which is held to different standards. If national sharding is implemented though, it would take away one of the most stimulating aspects of online play and interaction – the capacity to interact with people all over the world.

The question regulators and policy makers also face is one that relates to the differences between policy directed at encouraging creative industry development, and hence competitiveness, and policy directed at consumer protection or cultural content. If an onerous system of regulation is introduced, in a global economy, transnational media corporations may choose to exit from the Australian market, rather than shoulder the burden of a system they are not subject to elsewhere. Industry exit power is the issue here. Offshoring services is an option taken up by content providers wishing to avoid ACMA’s current regulatory remit. While the games industry in Australia is still reasonably small, and few MMOGs have been developed or run from Australia, requiring standards that are more restrictive here than elsewhere in the world will risk stifling industry development here. As is frequently the case with policy, balancing the competing interests is the key work of legislators here, and compromises are inevitable.

Conclusion

This paper has looked at a variety of angles from which social networking softwares and online multiplayer games can be viewed. There are a number of threads that run through the different discourses that are the source of the challenges to current practices of regulation and policy making. The first and foremost of these is that users produce content. The disruption to the linear production processes removes many of the gate-keeping opportunities afforded by more conventional media. Classification in an environment of ephemeral and user-generated content becomes an impossibility. The underlying tenets of authorship that give intellectual property and copyright laws their rationale for existence are undermined, (and yet the strengthening of these laws has been a key feature of the policy and regulation terrain). How to regulate an environment of almost unlimited producers is not familiar territory. And yet many of the producers are also consumers, who find themselves in new and different relationships to publishers.

The nature of the media text has changed. The problems that the WTO had in determining “whether trade in digital products transmitted electronically is trade in goods or trade in services” (Given, 2004:17) is a problem manifested by these environments. In many ways they are hybrids - goods and services rolled into one. This necessitates looking beyond the ‘text’ and issues of IP and classification, and assessing the implications of the service provisions as well. In the policy area this raises issues of consumer protection. It puts the regulatory concerns into the domain of contracts and their terms. Are they fair? What is the impact of the exclusionary provisions? Data privacy, accountability and transparency are all areas where regulatory interventions by the state are a possibility. Decisions made in these areas take place in a context of transnational media environments where not only the industry but the consumers are spread across many countries.
Media policy has always had an added layer of concerns, beyond those of trade in ordinary goods and services. The cultural impact of media, and the desire to shape the local cultural terrain have led to interventions in mass media policy. The drift to privatised, niche media breaks down many of the opportunities afforded by mass media to shape the cultural terrain. Mass media such as film and television are still dominant cultural forms, but ignoring the rise of interactive digital media may result eventually in a loss of the cultural dividends that come from investing locally in appropriate industries. The challenge here is to understand the ways in which local content, for instance, is developed by amateurs as well as professionals, in a production network with a currently fluid and emergent form. Here again, policy which fails to understand the significance of user-inputs, by, for instance, supporting overly strong intellectual property regimes that stifle the activities of the broad amateur content creation sector, may result in both economic and cultural deficits in the long term.

We are witnessing a shift to mass private spheres, the increasing participation of populations in proprietary rather than public spaces and aspects of this cultural/social/political citizenship are thus subject to private rather than public law, as determined through contracts. The area of contracts tends to fall in the domain of consumer protection, but we can also see ways in which it falls within the scope of broader media and cultural policy and the area of participation and inclusion.

Given the new role of users – one that exceeds that of a media consumer – and given the current context of ‘soft’ regulation or co-regulation with industry, it is imperative to include users in any new regulatory regimes that emerge. Leaving regulation in the zone of industry self-regulation will ultimately lead to both state and user interests being ignored or minimised. The market may be able to handle some aspects of the issues raised in this paper, but in areas such as data privacy, intellectual property, consumer protection, and unfair contracts, the market cannot be relied upon to work in the best interests of all stakeholders.

The aim of this paper has been to point to some of the less dominant discourses through which online social softwares can be understood. The current dominance of intellectual property, copyright and ‘moral panic’ tend to mask other equally valid aspects of these converged media. The extent to which IP and classification are bound by old models of production and form needs to be given consideration, and approaches modified to cater to the newer, converged, forms that have emerged.

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