

2005

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### Recommended Citation

Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L. Q. 1733 (2005).

Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol83/iss6/2](http://openscholarship.wustl.edu/law_lawreview/vol83/iss6/2)

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# TRADEMARK LAW AND THE SOCIAL CONSTRUCTION OF TRUST: CREATING THE LEGAL FRAMEWORK FOR ONLINE IDENTITY

BETH SIMONE NOVECK\*

## ABSTRACT

*Trust is the foundation of society for without trust, we cannot cooperate. Trust, in turn, depends upon secure, reliable, and persistent identity. Cyberspace is thought to challenge our ability to build trust because the medium undermines the connection between online pseudonym and offline identity. We have no assurances of who stands behind an online avatar; it may be one person, it may be more, it may be a computer. The legal debate to date has focused exclusively on the question of how to maintain real world identity in cyberspace. But new “social software” technology that enables communities from eBay to Amazon collectively to rate their members is giving rise to meaningful reputation in an online context. To determine what rules should govern online reputation and the use of such reputational data, we should look not only to constitutional, copyright, or tort law, but to trademark, the area of doctrine most closely analogous. Trademarks are a collaborative creation made by the source of the mark and the buying public, which associates the mark with that source. The public’s interest in the mark circumscribes the property rights of the individual holder. By reasoning from trademark theory to create a new set of rules for online reputation we create incentives for the social construction of trust in cyberspace. One key consequence of this approach is the conclusion that in order to produce reliable and persistent online identity, past reputational data should be preserved, transparent, and widely shared.*

The aim of virtual communities is the common good of its [sic] citizenry, from which arise the rights of avatars. Foremost among these rights is the right to be treated as people and not as

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disembodied, meaningless, soulless puppets. Inherent in this right are therefore the natural and inalienable rights of man. These rights are liberty, property, security, and resistance to oppression.

—Raph Koster, *Declaration of the Rights of Avatars*<sup>1</sup>

If there is no permanent individuality, who gives you monks your robes and food, lodging and medicines? And who makes use of them? Who lives a life of righteousness, meditation and reaches *Nirvana*? Who destroys living beings, steals, fornicates, tells lies, or drinks spirits?...If your fellow monks call you Nagasena, what then is Nagasena? Would you say that your hair is Nagasena? Or your nails, teeth, skin, or other parts of your body, or the outward form, or sensation, or perception, or the psychic constructions, or consciousness? Are any of these Nagasena? Are all these taken together Nagasena? Or anything other than they?

—*The Milindapanha* (Questions of King Nenner)<sup>2</sup>

Colin Hepburn of Beaumont, Texas plays online videogames in his spare time. He enjoys Anarchy Online, City of Heroes, Shadowbane, and other popular titles.<sup>3</sup> Once he tires of a game and something more exciting hits the shelves at Christmas, Colin leaves one game community to join another. After all, it is not only time consuming but costly to pay subscription fees to more than one online service.

When he wanted to leave Sony's Everquest 2 for World of Warcraft, the hugely popular new interactive game from Blizzard Entertainment, Colin did as he had done before: he listed his "avatar," or online character, for sale on eBay, the way one would sell an old stuffed animal in a garage sale. Around the same time as Colin put his "Level 25 Kerra Bruiser" on eBay for sale under the heading, "EQ2 Game with Extras," Sony Online Entertainment, the publishers of Everquest 2, launched "Station Exchange," a commercial website for the sale and trade in virtual goods

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1. Raph Koster, A Declaration of the Rights of Avatars (Aug. 27, 2000), <http://raphkoster.com/gaming/playerrights.shtml>.

2. PANKAJ MISHRA, AN END TO SUFFERING: THE BUDDHA IN THE WORLD 25 (2004) (adapting THE QUESTIONS OF KING MILINDA 43-44 (T.W. Rhys Davids trans., Motilal Banarasidass 1965) (1890)).

3. Anarchy Online, <http://www.anarchy-online.com/> (last visited July 6, 2005); City of Heroes, <http://www.cityofheroes.com> (last visited July 6, 2005); Shadowbane, <http://www.shadowbane.com/us/index.php> (last visited July 6, 2005).

from Sony's videogames, including swords, armor, clothing, and avatars. Sony's terms of service prohibit sales in other markets.<sup>4</sup>

Sony demanded that eBay suspend Colin's auction. It claimed that Colin was selling intellectual property that belonged to Sony. The Kerra Bruiser avatar, though designed and brought to life by Colin and the identity he assumed over several months of play in Everquest, was, according to the terms of the Everquest user agreement, the property of Sony Online Entertainment Inc. eBay, consistent with its Verified Rights Owners Program (VeRO)<sup>5</sup> and the terms of its own subscriber contract, acceded to Sony's request and took down Colin's auction. After Colin tried to re-list his auction, eBay terminated Colin's eBay account and, with it, eight years of stellar reputation ratings,<sup>6</sup> the feedback evaluations given by buyers to a good seller in the eBay marketplace.<sup>7</sup> Future buyers rely heavily on reputation when deciding whether to transact across long distances with an unknown seller.<sup>8</sup> Reputation points are gold on eBay and without them, Colin's ability to sell, not simply virtual goods, but the contents of his basement, is severely impeded. He was distraught.<sup>9</sup>

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4. Terms of Service, <http://sonyonline.com/tos/tos.jsp>.

5. Verified Rights Owners Program, [http://pages.ebay.com/help/community/vero\\_aboutme.html](http://pages.ebay.com/help/community/vero_aboutme.html).

6. For a description of eBay's rating system, see Evaluating a Member's Reputation, <http://pages.ebay.com/help/feedback/evaluating-feedback.html> (last visited July 28, 2005).

7. Galit Sarfaty summarizes how the eBay system works:

The case of the eBay auction site provides an example of how reputation is established through an online rating system. One can think of eBay as a series of repeated transactions. eBay's auction site uses what it calls a feedback mechanism between buyers and sellers where participants can rate each other and provide written comments. The highest bidder of an item sends the seller money and trusts that the seller will ship the item and that the item is of the quality promised by the seller. On eBay, a seller builds her reputation by honestly carrying out her transactions. If a seller cheats a buyer, she may likely receive a negative rating (-1 and negative comments), which would presumably hurt the seller's chances of selling anything in the future. The incentive to act honestly and strive for a good reputation comes from the very fact that the seller is likely using the eBay site repeatedly and engaging in many transactions.

Galit Sarfaty, On-Line Rating System for Rulemaking (2005) (unpublished paper, on file with author).

8. See Peter Kollock, *The Production of Trust in Online Markets*, in 16 ADVANCES IN GROUP PROCESSES 99 (E.J. Lawler, M. Macy, S. Thyne & H.A. Walker eds., 1999).

Separating the two sides of the transaction by time or space (such as purchasing something by mail or on credit) introduces greater risks: the party who moves second must be considered trustworthy or have some other form of guarantee. The formal infrastructure that exists to manage these risks is vast and includes such elements as credit card companies, credit rating services, public accounting firms, and—if the exchange goes bad—such service as collection agencies or the court system.

*Id.*

9. In an extreme example of the type of distress caused by online loss, a Legend of Mir 3 player killed a man who sold the player's magic sword while on loan. See *Chinese Online Gamer Gets Life for Murder*, MSNBC, June 8, 2005, <http://www.msnbc.msn.com/id/8143073/>; Mike Slocombe, *Legend*

Colin's story raises two legal questions: (1) should he be able to sell his Everquest avatar; and (2) should eBay be allowed to terminate his identity and associated reputation? These highlight a fundamental dilemma of the digital age—one that will be increasingly urgent to address as we move from the two-dimensional, text-based “web world” to more interactive, immersive and life-like social cyberspaces where a greater range of social interaction becomes possible<sup>10</sup>—the legal treatment of online identity. How should the law promote and protect the development of robust, persistent online identity? In any medium, social cooperation depends on trust.<sup>11</sup> We need signals of commitment to support cooperative behavior.<sup>12</sup> Traditionally, we rely on face-to-face mechanisms for creating trust and producing useful signals of social commitment. When new communications technologies change the nature of social interaction, our institutions adjust to account for the loss of these signals.<sup>13</sup> For example, in the nineteenth century the law of defamation evolved from a protection for personal honor and dignity into a property right in business reputation. This more explicit legal protection was intended to shore up the absence of face-to-face measures<sup>14</sup> of identity and reputation necessary for commercial transactions. Cyberspace, by facilitating interaction independent of geography or physical space or place, changes how we engage in social relations.<sup>15</sup> Initially, we assumed that cyberspace only creates a problem for identity formation insofar as it undermines our

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*of Mir 3 Gamer Killed After Selling Virtual Sword*, DIGITAL-LIFESTYLES.INFO, Mar. 31, 2005, [http://digital-lifestyles.info/display\\_page.asp?section=business&id=2061](http://digital-lifestyles.info/display_page.asp?section=business&id=2061).

10. See Beth Simone Noveck, *Democracy: The Videogame*, in *THE STATE OF PLAY: LAW AND VIRTUAL WORLDS* (Jack Balkin & Beth Simone Noveck eds., forthcoming 2006) (in this essay I distinguish between the second generation “web world” and the forthcoming third generation “virtual world” with its immersive and three dimensional interfaces and socio-technical characteristics that are more conducive to collective action and socialization).

11. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (In his classic work, Axelrod writes “[T]he very possibility of achieving stable mutual cooperation depends upon there being a good chance of a continuing interaction” because it is through repeat play that trust is developed.).

12. See Oliver R. Goodenough, *Law and the Biology of Commitment*, in *EVOLUTION AND THE CAPACITY FOR COMMITMENT* 262 (Randolph M. Nesse ed., 2001).

13. For example, in contemporary society we rely on regulated ratings agencies to substitute for personal measures of trust in the marketplace. See, e.g., ratings agencies such as Experian, <http://www.experian.com/> (last visited July 11, 2005); Transunion, <http://www.transunion.com> (last visited July 11, 2005); Equifax, <http://www.equifax.com> (last visited July 11, 2005).

14. See Paul A. David, *From Keeping “Nature’s Secrets” to the Institutionalization of “Open Science”*, in *CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY* 85, 92 (Rishab Aiyer Ghosh ed., 2005) (David describes the “institutionalization of reputation-building proceedings” in post-Renaissance Europe “which turned upon the revelation of scientific knowledge and expertise among extended reference groups that included peer-experts.”).

15. See Noveck, *supra* note 10, at 257–82.

ability to link online identity to offline identity. If we now want to promote the development of a robust, persistent on-line society, we need to consider the role the law should play in fostering the creation of reliable and distinct identity in online spaces.<sup>16</sup>

Our conversation in cyberlaw to date has focused on how offline-identity translates in the new medium. We have discussed how to apply constitutional, copyright, defamation, and other doctrines to connect online to offline identity. We pass legislation aimed at piercing the veil of cyberspace to get at the “real” person behind the online one.<sup>17</sup> We are pursuing technical strategies to do the same.<sup>18</sup> Yet we collaborate online without meeting face-to-face and as we spend more time online, we ought to be concerned with building up online identity itself.<sup>19</sup> We are familiar with legal personhood for corporations, but absent from our scholarly legal conversation to date has been any attention paid to the legal treatment of online reputation as distinct from offline.

While we may or may not be able to tie offline and online identity together, we *can* more effectively create real identity—and reputation—online. It does not always matter who I am in real life. I can be someone equally real on America Online (AOL) or eBay or Everquest. We can use the graphical, networked screen to create vivid, visual representations of personal identity—an avatar—independent of our offline attributes. At the same time we can create context-specific reputations in online communities independent of social identity in real space. New software tools make it possible for the communities of which we are a part to create that reputation collectively through rating, ranking, and public feedback mechanisms. It is the eBay community that created Colin’s reputation. Rating systems<sup>20</sup>—or what we term “social software”—allow us to form

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16. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 145–46 (1984) (Axelrod posits that the evolution of cooperation depends upon social structures including reputation and labels.).

17. The most recent of these prohibitions against cyberspatial anonymity is the so-called E-Annoy Law, which amends 47 U.S.C. § 223 to impose criminal penalties upon anyone who sends an anonymous communication with an “intent to annoy,” including via e-mail. 47 U.S.C. § 223(a) (2000).

18. See, e.g., Doug Beizer, *Defense Unit, IT Federation Collaborate on Identity System*, GCN, Feb. 9, 2006 (on defense department agreement with IT companies to establish employee authentication system).

19. Yuki Noguchi, *Self 2.0: Internet Users Put a Best Face Forward*, WASH. POST, Nov. 22, 2005, at A1 (citing Nielsen-NetRatings that the average American spends 80 hours per month online at work and 30 at home).

20. See Paul Resnick et al., *Reputation Systems*, COMMUNICATIONS OF THE ACM, Dec. 2000, at 45, 46 (“Reputation systems seek to establish the shadow of the future to each transaction by creating an expectation that other people will look back on it. The connections among such people may be significantly weaker than in transactions on a town’s Main Street, but their numbers are vast in comparison. At eBay, for example, a stream of buyers interacts with the same seller. They may never

relationships across physical distance, as Colin has done in Everquest and on eBay, while, at the same time, having the benefit of persistent and reliable identity in a given group.

As a result of our focus on the legal rules to connect offline identity to online identity and little concomitant attention to the question of how to treat online identity per se, we lack clear answers to the questions posed above. We have not addressed whether and how to ensure that online identity will remain persistent over time. We lack mechanisms to ensure the integrity of reputation within a given online community. We lack the mechanisms to protect the rights of the communities in the reputations that they collectively create.

The default rule is that the owner of the software platform on which the identity is created is the “owner” of that identity. But in a social software environment of collaborative creativity and interaction,<sup>21</sup> where representation is malleable and reputation created by the community, we need a view of identity that moves away from this property-centric approach. We need to think about online reputation in such a way as to recognize the interests of the collective as well as of the individual in the way identity is constructed in online environments. If eBay is allowed to own, alter, and delete my reputation despite the fact that the community created it, there is little assurance that we will be able to develop robust and persistent identities in cyberspace. Moreover, if eBay is allowed to use intellectual property protections to limit the portability of reputation, this will create a disincentive to investing in goodwill within any given community. The eBay reputation score or the collaborative filtering preferences of a group of Amazon users about buying decisions are a signaling mechanism for successful collective action. Merely because that reputation depends on software tools for its articulation should not give rise to an exclusive property right for the platform owner without regard for the needs of the group.

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buy an item from the seller again, but by sharing their opinions about the seller via the Feedback Forum, they construct a meaningful history of the seller.”); see also Peter Kollock, *The Production of Trust in Online Markets*, in 16 *ADVANCES IN GROUP PROCESSES* at 99 (E.J. Lawler, M. Macy, S. Thyne & H.A. Walker eds., 1999); Paul Resnick, *Impersonal Sociotechnical Capital, ICT's, and Collective Action Among Strangers*, in *TRANSFORMING ENTERPRISE: THE ECONOMIC AND SOCIAL IMPLICATIONS OF INFORMATION TECHNOLOGY* 399 (William H. Dutton et al. eds., 2005).

21. We are witnessing the rise of more collective forms of cultural creation as a result of the network technology that facilitates collaborative creation as well as the use and re-use of older cultural products to make new ones. See, e.g., Signal or Noise Conference, <http://cyber.law.harvard.edu/sn/> (last visited July 6, 2005); Sasha Frere-Jones, *1+1+1=1: The New Math of Mashups*, *THE NEW YORKER*, Jan. 10 2005, at 85.

This Article proposes to re-center the debate by arguing that the law recognize the rights of the community in online identity and craft appropriate rules to safeguard the group interest in online reputation.

My goal is not to weaken the liberal, inward-driven conceptions of identity with which philosophy is concerned.<sup>22</sup> Rather, my aim is to focus on the social ascriptions of identity that support group belonging and collective action online. The project is driven by the practical need to create a legal framework to solve a problem of collective action online. We need to address the issue of on-line reputation if we are to enable communities to create trust in cyberspace. This Article asks how we can create an incentive for the “moi commun,” as Rousseau termed it, the social conception of identity on which the law, as social regulator, must focus. In other words, this Article is not a re-telling of how technology changes our philosophy of identity. Rather, given the role that identity plays in fostering trust and social cohesion, what are the right legal rules for identity to create social order in online spaces? “If I have established a relevant reputation,” points out Russell Hardin, “it enables me to start new relationships with seemingly less risk to my new partner than he or she would face in a new relationship with someone with no or a bad reputation.”<sup>23</sup> Identity is a means to the end of fostering the trust at the center of social interaction. In this case, cyberspace is fundamentally changing the underlying social behavior and allowing representation and reputation to be created in entirely new ways. The doctrine needs to account for how we actually build trust and create identity online and the normative vision for how we want to do so in the future.

The vexing problem of online identity, I argue, has its solution, not in constitutional law, which regards identity as fixed rather than malleable; nor in the tort right of publicity, which defines identity with reference to visual manifestation; nor in the law of defamation, which concerns negative statements but not the positive construction of reputation<sup>24</sup>; nor in copyright law, which covers only the fixed expressions that represent our identity. Previous proposals relating to identity in the early years of cyberspace sought to apply these doctrines to the new environment.<sup>25</sup> All of them have something to offer to the debate, but none are complete.

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22. See generally C. FRED ALFORD, *THE SELF IN SOCIAL THEORY: A PSYCHOANALYTIC ACCOUNT OF ITS CONSTRUCTION IN PLATO, HOBBS, LOCKE, RAWLS, AND ROUSSEAU* (1991).

23. RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* 139 (2002).

24. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692 (1986) (“Reputation . . . is a mysterious thing.”).

25. Robert Post indicates reputation is to be located either in the concepts of property, honor or dignity. *Id.* at 693.



Each protects an individual right in identity as an incentive to individuals to share information to facilitate trade. In a social software environment, however, identity is socially constructed. The community produces it by means of the available tools. We assume social roles within the various networks of which we are a part and those roles are subject to the reputation ascribed to them by the community. Identity is a form of collective action.<sup>26</sup> The area of doctrine most closely analogous to how identity is constructed in cyberspace is, in fact, trademark, which also concerns the collective creation of brand identity. Not only does trademark concern the identity of fictional persons, like corporations, but trademarks are the product of a collective, namely the source of the mark and the buying public which associates the mark with that source. Trademark recognizes the interests of the collective in the authorship and use of identity in specific social contexts. We need to *borrow*<sup>27</sup> from (not adopt) trademark law to account for the collective way reputation is created. It is a good place to locate a new doctrine of online reputation.<sup>28</sup>

To elucidate this contention, Part I first tells Colin's story in detail. The parties' claims illustrate the commonly accepted legal approaches to online identity. In short, the common view is that rights in identity belong either to the real life person or to the company that provides the tools to make that identity manifest to others. Part I also explains how digital life is transforming identity and its construction. Part II shows the uses and deficiencies in three possible approaches to the problem: constitutional law approaches, including locating the rights of avatars in the fundamental rights tradition of the 14th and 5th Amendments; copyright law which protects characters; and tort law causes of action, like defamation and defamation of credit. Drawing on the deficiencies in these alternative

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26. Hassan Masum & Yi-Cheng Zhang, *Manifesto for the Reputation Society*, 9 FIRST MONDAY (2004), [http://www.firstmonday.org/issues/issue9\\_7/masum/](http://www.firstmonday.org/issues/issue9_7/masum/) ("To promote an interconnected ecology of socially beneficial reputation systems, conscious design, analytical modeling, and learning from past successes and failures is indispensable.").

27. For more on the conception of doctrinal borrowing, see Garrett Epps, *Constitutional Borrowing*, talk given at Law & Society 2005 conference in Las Vegas (June 4, 2005) (transcript on file with author) (Epps suggests that the Supreme Court borrows from one doctrinal area to apply to another. Because the rhetoric is familiar, we often fail to perceive the consequences of applying one legal concept in a wholly different arena.).

28. The challenge that technology poses to our legal understanding of identity is akin to the problems we are facing with regard to authorship and ownership of intellectual property. New technologies are enabling not only new, more collective models of creation, but also of distribution, marketing and consumption. See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004); see also Marilyn Strathern, *Imagined Collectivities and Multiple Authorship*, in CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY, *supra* note 14, at 13.

approaches, Part III argues that trademark law, because it recognizes the rights of the collective in the mark, provides better guidance of how to think about online reputation. I propose that the public has interests in online reputation that go beyond that of either the tool-providing company or the creator and those interests will not be represented by market incentives alone. Part IV then reasons from trademark law to fashion a practical legal approach to online reputation, arguing that courts recognize the community right in reputation and suggesting some of the rules we might adopt to safeguard strong online identity.

### I. COLIN'S STORY

E-Bay's terms of service (Section 5.4) provide that "eBay's Verified Rights Owner (VeRO) program works to ensure that listed items do not infringe upon the copyright, trademark or other rights of third parties. VeRO program participants and other rights owners can report listings offering infringing items, and request that such items be removed."<sup>29</sup> The VeRO program is eBay's response to the Digital Millennium Copyright Act (DMCA). The DMCA provides that internet service providers, to be entitled to the exemption from liability for contributory copyright infringement provided for under the DMCA statute, must provide a contact name and number and must act to take down allegedly infringing copyrighted material.<sup>30</sup> The DMCA compels on-line service providers who want to take advantage of this safe harbor from prosecution under the statute to institute administrative procedures to serve as private copyright policemen.

Hence the VeRO program "lets intellectual property rights owners report listings that infringe their rights. It is in eBay's interest to ensure that infringing items are removed from the site, as they erode buyer and good seller trust."<sup>31</sup> It also helps eBay avoid liability under the DMCA by offering clear, privately-administrable take-down procedures.

Not wanting to undertake the costly measure of adjudicating copyright disputes before the courts, eBay will take down any auction accused of trafficking in infringing and violative material.<sup>32</sup> At the same time, and

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29. For an example of a VeRo action, see *Dudnikov v. MGA Entertainment*, 410 F. Supp. 2d 1010 (D. Colo. 2005) (17 U.S.C. 512(f) action for knowing misrepresentation against defendant who sought take down under VeRO program).

30. 17 U.S.C. § 512(c)(1)(a)(iii) (2000) ("[U]pon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to, the material. . .").

31. VeRO Program, <http://pages.ebay.com/help/tp/programs-vero-ov.html>.

32. See KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 21 (2005) ("To say that collective

consistent with the DMCA, the VeRo program provides a limited right of redress for the seller of the allegedly infringing material. If a seller feels that her listing has been taken down in error, she can petition the intellectual property owner or ask eBay to do so on her behalf. There is no guaranteed right of “put back,” but eBay has detailed dispute resolution procedures in place to assist with such disputes. After all, SquareTrade, eBay’s dispute resolution provider, has adjudicated upwards of one million disputes for eBay,<sup>33</sup> approximately half the number of cases currently pending in the entire U.S. Federal court system.<sup>34</sup>

It is against the backdrop of this policy, which applies to artwork and music (not only avatars) that Colin’s auction was initially taken down. Sony Online Entertainment had notified eBay that Colin’s sale of his Everquest avatar constituted a violation of Sony’s terms of service. As a condition of receiving an account to play Everquest, Sony had required Colin to agree to the following:

The Station [Sony’s defined term for any of its games or websites], including, without limitation, all SOE [Sony On-Line Entertainment] Communication Features, contains copyrighted material, trademarks and other proprietary information including, without limitation, text, software, photographs, video, graphics, music and sound, and the entire contents of The Station and each area contained therein are copyrighted as a collective work under the United States copyright laws. SOE owns a copyright in the selection, coordination, arrangement and enhancement of such content. You may not modify, publish, transmit, participate in the transfer or sale, create derivative works, or in any way exploit, any of the content contained on The Station (including, without limitation, content that The Station enables you to download) without the express written permission of SOE and the copyright owner. In the event of any permitted copying, redistribution or publication of copyrighted material, no changes in or deletion of author attribution, trademark, legend or copyright notice shall be

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identities—that is, the collective dimensions of our individual identities—are responses to something outside ourselves is to say that they are products of histories, and our engagement with them invokes capacities that are not under our control. Yet they are social, not just because they involve others, but because they are constituted in part by socially transmitted conceptions of how a person of that identity properly behaves.”).

33. SquareTrade has handled over 1 million disputes in over 120 countries in 5 languages. About SquareTrade, <http://www.squaretrade.com/cnt/jsp/abt/aboutus.jsp> (last visited June 29, 2005).

34. For judicial caseload indicators, see <http://www.uscourts.gov/caseload2004/front/judbus03.pdf> (last visited Aug. 9, 2005).

made. The downloading of copyrighted material from The Station is allowed by you only for your own use. You acknowledge that SOE and/or third-party content providers remain the owners of all materials posted on The Station, and that you do not acquire any of those ownership rights by downloading copyrighted materials.<sup>35</sup>

The company's argument runs something like this. Under these terms, Sony believes it owns every expressive aspect of Everquest, including the avatars designed by players to represent themselves and serve as their online identity in that world. Regardless of time spent by players crafting, clothing, and imbuing those characters with lifelike characteristics and personalities, these assets belong to Sony Online Entertainment, according to the company. The characters are simply emanations of software code that generates a graphical image. The code is protected as a literary work and the image as a graphical or pictorial work under copyright law. The code is Sony's property. The graphical representation, even if customized by the player, derives from intellectual property created by Sony. But it is not itself a derivative work. It is too intertwined with intellectual property developed by the Sony, including backdrops, graphics, and music. Players can only create characters using copyrighted software provided by the company. Furthermore, in a virtual world, much of the creation is collaborative.<sup>36</sup> To permit anyone else to own intellectual property other than the game company would be to open a Pandora's Box of disputes surrounding who owns what in this space where people routinely create together. But Sony did not have to argue its case to eBay. The VeRO program provided an automatic mechanism for Sony to police, and eBay to avoid problems with, third party intellectual property.

While Sony was politely threatening eBay to take down Colin's auction or risk liability, at the same time, the company launched Station Exchange, a new online marketplace of its own for the sale and trade in virtual goods. "Station Exchange is the official Sony Online Entertainment auction service that provides players a secure method of buying and selling the right to use in-game coin, items and characters in accordance with SOE's license agreement, rules and guidelines."<sup>37</sup> Sony uses its terms of service

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35. <http://sonyonline.com/tos/tos.jsp>.

36. Cory Ondrejka, *Escaping the Gilded Cage User Created Content and Building the Metaverse*, in *THE STATE OF PLAY: LAW AND VIRTUAL WORLDS* (Jack Balkin & Beth Simone Noveck eds., forthcoming 2006) (arguing that the uniqueness of virtual world technology lies in its facilitation of collaborative creation rather than individual crafting).

37. Station Exchange: The Official Secure Marketplace for Everquest II Players, <http://stationexchange.station.sony.com/> (last visited July 6, 2005).

agreement to force players to trade virtual goods in its own marketplace where it can control and profit from the flow of commerce. Precisely the behavior that Sony sought to forbid on eBay, it is promoting through its own service, Station Exchange.

Despite the take down notices from eBay, Colin re-listed his auction. The plan was, as he had done before, to sell his avatar by charging a price for his username and password which would give the buyer control over the avatar and then enable the buyer to change the name and address on the account. As Colin commented,

I had listed an account and inadvertently left out the disclaimer. This was later pointed out to me by eBay with a standard canned response that my auction had been ended because of VeRO claim by Sony. Ok, no prob I'll just put the disclaimer back in and re-list the item. Again the item was canceled and I received the canned response about VeRO infraction. I listed the item a 3rd time but with the disclaimer at the head of the listing thinking that it was just to [sic] small at the bottom of the page but once again it was canceled. I gave up on eBay and sold the item through another online auction site (<http://www.playerauctions.com>).<sup>38</sup>

Around the same time, Colin also sold a Level 30 Dark Elf Fury avatar who was also, according to Colin, "a Level 50 Tailor, one of the best known tailors on the server. I even had a website set up for the tailoring community ([www.eq2tailor.com](http://www.eq2tailor.com)) and that I incidentally sold with the account."<sup>39</sup>

But three strikes and you're out!

One week later, Colin received notification that his eBay account was suspended indefinitely and, with it, eight years of reputation points. The act of selling his Everquest identity triggered the demise of his eBay identity. Colin was, needless to say, aggrieved. He feared that without those reputation points, his ability to sell other goods online would be adversely affected, an assumption borne out by social scientific study.<sup>40</sup>

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38. E-mail from Colin Hepburn to author (Apr. 10, 2005, 11:36:32 EST) (on file with author).

39. E-mail from Colin Hepburn to author (June 19, 2005, 09:05:37 EST) (on file with author).

40. See Daniel Houser & John Wooders, *Reputation in Auctions: Theory, and Evidence from eBay* 17 (University of Arizona, Working Paper No. 00-01, 2001), available at <http://eller.arizona.edu/~jwooders/revision.pdf>, ("Our main finding was that seller reputation (but not bidder reputation) is a statistically and economically significant determinant of auction prices."); see also Paul Resnick & Richard Zeckhauser, *Trust Among Strangers in Internet Transactions: Empirical Analysis of eBay's Reputation System*, in 11 ADVANCES IN APPLIED MICROECONOMICS, THE ECONOMICS OF INTERNET AND E-COMMERCE (Michael R. Baye ed., 2002); Gary E. Bolton et al., *How Effective Are Online Price*

He was upset enough to contact an unknown virtual worlds lawyer (yours truly) via the Internet to plead his case and request assistance with finding legal counsel. From Colin's perspective, his reputation points and his avatar are his property. They belong to him because of the time and energy spent creating them.<sup>41</sup> But in addition to this Lockean conviction that hard work results in private property, Colin also felt a dignitary right in his virtual identities. He was a member of these communities.<sup>42</sup> Either way, he has rights in them that no one should be able to take away. Colin wanted redress. His indignation went beyond that of someone who lost money or a potential business opportunity. Colin had lost something deeply personal and special to him. It was not a thing of which he was deprived. Rather, losing his eBay account was like losing a piece of himself, a social calling card into the marketplace and community of eBay users. He used his reputation points to increase the value of his sales of all manner of goods. His reputation on eBay was a valuable asset he had been awarded by the community that had given him this feedback.

Colin believed that his reputation points "belonged" to him as an extension of his identity and as property that he owned and earned, but he also felt entirely comfortable selling his Everquest avatar. He had inhabited the skin of that Kerra Bruiser and in Everquest, people knew Colin as that avatar. He had no other identity. The avatar was he and he it. Because he viewed himself as having an individual property right in his avatar—and the account that controlled it—he believed he had the right to alienate his own identity as an asset.

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*Mechanisms? An Experimental Investigation* MANAGEMENT SCIENCE (forthcoming) (sellers are more likely to sell and to realize price premiums).

41. For more on the Lockean notion that spending time and money creating an avatar entitles you to property rights in it, see Cory Ondrejka, *Changing Realities: User Creation, Communication, and Innovation in Digital Worlds* (2005), <http://www.themis-group.com/uploads/Changing%20Realities.pdf>; Julian Dibbell's Play Money Webpage, <http://www.juliandibbell.com/playmoney/> (last visited June 28, 2005); Andres Eriksson & Kalle Grill, *Who Owns My Avatar?-Rights in Virtual Property*, <http://www.infra.kth.se/~kg/Who%20owns%20my%20avatar.pdf> (last visited June 28, 2005).

42. See Sal Humphreys, *Commodifying Culture—It's Not Just About the Virtual Sword* (2004), <http://www.itu.dk/op/papers/humphreys.pdf>. (last visited July 18, 2005); Ren Reynolds, *Hands Off MY Avatar! Issues With Claims of Virtual Property and Identity*, in DIGITAL GAMES INDUSTRIES: WORK, KNOWLEDGE AND CONSUMPTION (J. Rutter ed., forthcoming 2006), available at <http://www.ren-reynolds.com/downloads/HandsOffMYavatar.htm>; T.L. Taylor, "Whose Game Is This Anyway?": *Negotiating Corporate Ownership in a Virtual World*, in PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE (forthcoming 2006).

### A. *The Meaning of Identity OnLine*

So what is new about Colin's story that we should care about it?

With changes in technology we construct reputation in new ways. Identity online functions differently than identity off-line but it also functions differently in the cyberspace we currently inhabit and will inhabit than it did ten or even five years ago.

First, these new forms of on-line identity, on the one hand, share much in common with off-line identity. While we are used to thinking about identity in cyberspace the way we think about a bank statement or social security number, online identity is becoming more socially contextualized. Previously in the web world,<sup>43</sup> our online identity may have comprised this "crabbed description"<sup>44</sup> of ourselves as a collection of statistics or our statements in a chat room<sup>45</sup>—this has little to do with the highly nuanced and richly instantiated selves we experience in more social and interactive online environments. Like off-line identities, our new online selves are emergent, dynamic, and evolving through interaction with others. We have physical representation and can express ourselves with voice, gesture as well as text.

Second, online identity also looks quite different from real space. It is more malleable and potentially much more controllable in mediated environments.<sup>46</sup> In the physical world, our identity takes myriad forms, including those we consciously take on (name, profession), those we subconsciously or even involuntarily project (race, class), and those that others ascribe to us (personality, status). In cyberspace, we have more variations on identity.<sup>47</sup> But, more significantly, we have qualitatively different ways of manipulating identity. We have the ability to erase or minimize the involuntary projection of identity and to create more and

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43. See Noveck, *supra* note 10.

44. Susan P. Crawford, *Who's in Charge of Who I Am?: Identity and Law Online*, 49 N.Y.L. SCH. L. REV. 211, 214 (2004).

45. See Hal Abelson & Lawrence Lessig, *Digital Identity in Cyberspace*, White Paper Submitted for 6.805/Law of Cyberspace: Social Protocols (Dec 10, 1998), <http://www.swiss.ai.mit.edu/6095/student-papers/fall98-papers/identity/white-paper.html> ("Identity is a unique piece of information associated with an entity. Identity itself is simply a collection of characteristics which are either inherent or are assigned by another. The color of a person's hair and whether or not another thinks he is attractive is part of a person's identity.").

46. Cf. Stephanie Rosenbloom, *Loosing Google's Lock on the Past*, N.Y. TIMES, June 2, 2005, at G1 ("Marissa Mayer, director of consumer Web products for Google, said that people call and e-mail the company regularly to request that links to their names be removed, though she would not estimate how many.").

47. A new company, GamePal, allows you to "rent" an avatar in fourteen different virtual world games. GamePal Home Page, <http://gamepal.com/rentals> (last visited June 28, 2005).

different voluntary forms of identity.<sup>48</sup> We can voluntarily embed ourselves in new social groups and contexts where we exercise greater free choice over identity.<sup>49</sup> Whereas in real space my skin color and gender are (relatively) immutable traits, they are not in cyberspace.<sup>50</sup> We not only have the ability to erase identity (as we do on the phone or in a letter, to an extent) but we also have the tools to shape and control the identity others ascribe to us.<sup>51</sup>

Third, multiple personalities are the “feature not the bug.” One person can consciously co-exist with different identities because of the ease with which we can publish or conceal information about ourselves. We can embed ourselves in different groups and assume different roles in each one. This socio-technical fact often gives rise to concern about the lack of accountability, integrity and authenticity that results from the ease of interacting anonymously in cyberspace.<sup>52</sup> The difficulty of ascertaining any physical “truth” about a person obscured by the screen reinforces the ability to construct multiple existences.<sup>53</sup> Not only can I be a professor,

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48. The distinctiveness of on-line identity is exemplified by the infamous story of Mr. Bungle, the character in the text-based virtual world LambdaMOO who “presented to the virtual world—he was at the time a fat, oleaginous, Bisquick-faced clown dressed in cum-stained harlequin garb and girdled with a mistletoe-and-hemlock belt whose buckle bore the quaint inscription ‘KISS ME UNDER THIS, BITCH!’”, Julian Dibbell, *A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society*, THE VILLAGE VOICE, Dec. 23, 1993, at 26, available at [http://juliandibbell.com/texts/bungle\\_vv.html](http://juliandibbell.com/texts/bungle_vv.html).

49. See Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet*, 57 VAND. L. REV. 965, 984 (2004) (“[T]he incorporation of group values into one’s life-story through participation in Internet groups applies pressure on the liberal aspects of that life-narrative. The need to incorporate group values, in particular, affects aspects of the life narrative that are governed by the uniqueness and separateness tenets of the liberal meta-narrative.

At the same time . . . that adoption of a new community through the Internet can exert pressure on the communitarian meta-narrative. The communitarian identity meta-narrative does not endorse free choice in the selection of group values. . . . Hence, exercising a choice to belong to a new group in fact enhances the individual’s autonomy and self-fulfillment, thereby strengthening in this respect the liberal aspects of that individual’s life-narrative.

50. See Jerry Kang, *Cyber-race*, 113 HARV. L. REV. 1130 (2000); Nick Yee, *Through the Looking Glass, The Daedalus Project* (Feb. 21, 2004), <http://www.nickyee.com/daedalus/archives/000755.php?page=1>.

51. As Foucault noted with regard to Sartre’s thinking about identity: “The idea that the self is not given to us, I think there is only one practical consequence. We have to create ourselves as a work of art.” Appiah, *supra* note 32, at 18 (quoting MICHEL FOUCAULT, *THE ESSENTIAL WORKS: ETHICS—SUBJECTIVITY AND TRUTH*, at 262 (2005)).

52. See Jonathan D. Wallace, *Nameless in Cyberspace: Anonymity on the Internet*, 54 CATO INSTITUTE BRIEFING PAPERS (1999), available at <http://www.cato.org/pubs/briefs/bp54.pdf>; M. E. Kabay, *Anonymity and Pseudonymity in Cyberspace: Deindividualization, Incivility and Lawlessness Versus Freedom and Privacy*, Paper presented at Annual Conference of the European Institute for Computer Anti-Virus Research (EICAR) (1998), available at <http://www2.norwich.edu/mkabay/overviews/anonpseudo.htm>.

53. See Ken Jordan et al., *The Augmented Social Network: Building Identity and Trust into the*



daughter, friend, and music lover, as I would be off-line, but I can more cheaply and easily create entirely fictional identities (sans makeup and wigs) that persist over time. We have been able, for a long time, to create different representations of ourselves in different social contexts. In cyberspace, it becomes easier and cheaper while concomitantly making it more difficult to discern the physical persona that may attach to the online identity. Yet as we spend more time in cyberspace and do more in the virtual world, we must maintain a certain persistence to our identity in different contexts.

Fourth, identity in cyberspace is divorced from identity in real space. Not only we can be a different person online than we are off-line, but online identity is alienable.<sup>54</sup> It can be assumed by different offline entities. Multiple sellers in a family, for example, may share an eBay account and develop a reputation collectively. Unbeknownst to members of the online community, the role of “treasurer” in that group may be played by more than one real life person. As Susan Crawford writes: “Cyberspace users may be getting used to the idea of identity online that is different from identity offline—identity that is ‘unbundled’ and exists only in an online space may be a concept whose time has now come.”<sup>55</sup>

Moreover, one online identity can represent the interests, wishes and actions of a group, a “group avatar.” The legal fiction of the corporation is an off-line example of the group avatar. Communities often “own” or control assets collectively, such as the native community in Mato Grosso, Brazil that Anthony Seeger describes as managing their native songs by a variety of group decision mechanisms.<sup>56</sup> In the online environment, where we have much greater flexibility in the choice of representations of identity, a group can easily be embodied—incorporated if you will—in the avatar. In other words, online identity can mask one person, more than one person or different groupings of people who stand behind that role and its representation in cyberspace.

Finally, and most important, not only is technology making it easier to create new representations of ourselves—on the Internet, no one knows you are a dog—it is also making the creation of collective forms of reputation possible. While in cyberspace, online identity can be separated

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*Next Generation Internet*, 8 FIRST MONDAY (2003), [http://firstmonday.org/issues/issue8\\_8/jordan/](http://firstmonday.org/issues/issue8_8/jordan/).

54. A point that Larry Lessig makes clear in telling the story of Jake Baker, a mild-mannered, even nerdy college student in the off-line world who becomes an aggressive purveyor of snuff porn. LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 21–22 (2000).

55. Crawford, *supra* note 44, at 215.

56. Anthony Seeger, *Who Got Left Out of the Property Grab Again: Oral Traditions, Indigenous Rights, and Valuable Old Knowledge*, in *CODE*, *supra* note 14, at 75, 80.

from off,<sup>57</sup> online identity can also be re-associated with reputation. Colin—seller in the eBay marketplace—has a unique identity in that context based on the feedback points ascribed to him by those with whom he has done business. That reputation offers useful information that will have a material impact on whether another person will interact with him in that context, independent of whether Colin is an axe-murderer or a law professor in real life.

In the communities of which we are a part, we adopt roles with the aim of accomplishing work together. I am the CEO or treasurer or voter or member of a particular subcommittee or player or buyer and I am expected to assume that identity as defined and agreed to by the group. In cyberspace, this is especially important as we depend on these role structures to ensure collaboration.<sup>58</sup> This is what Erving Goffman referred to as “masks,” or social ascriptions of identity that we “perform” in order to fulfill a role within a team.<sup>59</sup> They are “life scripts.”<sup>60</sup> Of course, I can have myriad identities that allow me to embed myself in more social groups. But within each one my reputation needs to be persistent and verifiable, not vis-à-vis any “real world” identity but with regard to my commitments in that social circle. Hence, despite the flexibility of identity, as we increasingly become habitués of cyberspace, these identities become more, not less, important to our ability to work together. Representation is “thin” and malleable, the simulacrum of self, but reputation breathes life into flat characters and imbues them with an identity independent of the physical world and capable of trust.

In cyberspace, we create representations of the social roles we play in each context. Those social roles can be filled by one or more than one “real world” person. The group, using software, then ascribes a reputation<sup>61</sup> to that role that travels with the online identity. Colin has one identity on eBay and another in Everquest. His reputation in that role is

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57. See Abelson & Lessig, *supra* note 45.

58. The practice of divvying up work to accomplish something together is the hallmark of open source software development, which relies on Internet communications and procedural structures to coordinate the activities of disparate programmers. See generally STEVEN WEBER, *THE SUCCESS OF OPEN SOURCE* (2004) (discussing the organizational principles of open source software development and coordinating piecemeal work into finished software product).

59. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 16 (1959) (“When an individual or performer plays the same part to the same audience on different occasions, a social relationship is likely to arise.”).

60. APPIAH, *supra* note 32, at 22.

61. See Resnick et al., *supra* note 20, at 46 (“A reputation system collects, distributes, and aggregates feedback about participants’ past behavior. Though few producers or consumers of the ratings know one another, these systems help people decide whom to trust, encourage trustworthy behavior, and deter participation by those who are unskilled or dishonest.”).

created, not by Colin alone, but by the groups of which he finds himself a part.<sup>62</sup> To a far greater degree than in the offline world, the individual chooses these roles and the community creates the reputation associated with them using tools provided by a private party. The graphical interface makes it easier for the group to create reputation and to perceive reputation as it evolves and changes.<sup>63</sup> The eBay community uses the feedback system to police its own membership; the Slashdot community avails itself of unique software to moderate its own postings; Amazon shoppers recommend books based on each other's preferences; the group that I create online can develop and encode its own forms of expertise.

It is important to make clear how the collective construction of reputation in social software actually works in practice.

### *B. The Technology of Identity*

In order to develop more doctrinal coherence we need a clear understanding of how technology is changing the functions of identity.<sup>64</sup> "Our conception of identity is," after all, "dependent on the technology that mediates between social interaction."<sup>65</sup> Technology defines the scope of social relationships and our online social interaction has different characteristics. In order to know the law's role, not only in shielding real world identity from abuse<sup>66</sup> or piercing the veil between online and off-line identity, but in fostering the development of the robust online identity that is essential to successful commerce and society online, we need to understand the technology.

While we are all familiar with identity-as-visual-representation in cyberspace, because of the newness of the technology we have less experience with how online reputation is collectively created. Since the advent of the commercial Internet, we have used screen names or handles or logons to represent ourselves. We have an AOL handle. We appear under a different name on Yahoo. We use an altogether different

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62. See Tracy Spaight, *Who Killed Miss Norway*, SALON, Apr. 14, 2003, [http://www.salon.com/tech/feature/2003/04/14/who\\_killed\\_miss\\_norway/index\\_np.html](http://www.salon.com/tech/feature/2003/04/14/who_killed_miss_norway/index_np.html).

63. See Beth S. Noveck & David R. Johnson, *Society's Software*, 74 *FORDHAM L. REV.* 469 (2005).

64. See Bernstein, *supra* note 49.

65. RISHAB AIYER GHOSH, *Mechanisms for Collaboration*, in *CODE*, *supra* note 14, at 110.

66. For some of the legal literature on identity theft and abuse, see Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 *HASTINGS L.J.* 1227 (2003); Anthony E. White, Comment, *The Recognition of a Negligence Cause of Action for Victims of Identity Theft: Someone Stole My Identity, Now Who is Going to Pay for It?*, 88 *MARQ. L. REV.* 847 (2005).

“identity” in an on-line chat room or community like the Well or MUD.<sup>67</sup> Until recently, identity has really referred to the convention of using alternative names for ourselves in cyberspace as a shield to hide our “true” selves in order to associate anonymously or be able to define ourselves anew in these online spaces. With the advent of graphical technologies, we have added visual and even three-dimensional representations of self to go with those names. Now in a videogame or virtual world or even on instant messenger I have an icon or two or three-dimensional avatar as my “face” in cyberspace.

Now we are moving from representation to reputation<sup>68</sup> as the key to identity in the new cyberspaces and this is one reason why identity is becoming so much more important and meaningful in the second-generation web. Social reputation software<sup>69</sup> goes beyond mere naming conventions. It allows us to create positive and robust characters in online environments. Social reputation software makes manifest descriptions of our behavior and actions over time in these environments. Through numerical ratings or a graphic or map or even through the functionality of my avatar, the software gives the community a picture of my identity. These metrics embedded in the software say more about who I am in this space than my name and representation do alone. Unlike in real space where, when you meet me, my reputation may precede me or you may not know me from Adam, social software makes it possible to have reputation permanently and unavoidably attached to a person or to a piece of information.<sup>70</sup> It would be as if, instead of giving you a business card when we met, with one click you could visualize my resume, my transcripts, my credit rating, and what my friends and enemies think of me. Imagine if, instead of knowing only what I want to tell you about me, you could summon that information the community wants you to know. In the same way that we force sex offenders to brand their homes<sup>71</sup> or repeat drunk drivers to use special license plates<sup>72</sup> or give companies special

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67. See Dibbell, *supra* note 48; LESSIG, *supra* note 54.

68. For non-legal sources on reputation in cyberspace and the development of trust and identity, see <http://databases.si.umich.edu/reputations/bib/bib.html> (last visited July 5, 2005).

69. Social software is beginning to be discussed in the legal and social science literature. See, e.g., Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105 (2005); David R. Johnson, Susan P. Crawford & John G. Palfrey, Jr., *The Accountable Internet: Peer Production of Internet Governance*, 9 VA. J.L. & TECH. 9 (2004); Hunter & Lastowka, *supra* note 28; Clay Shirky, *Situated Software* (Mar. 30, 2004), [http://www.shirky.com/writings/situated\\_software.html](http://www.shirky.com/writings/situated_software.html).

70. See Outfoxed, <http://www.getoutfoxed.com> (last visited June 29, 2005).

71. See, e.g., Megan’s Law, N.J. STAT. ANN. § 2C:7-1 (2005).

72. See, e.g., Evan S. Ben, *License Plates Could Reveal DUIs*, MIAMI HERALD, Feb. 23, 2006, at B8.

credit ratings,<sup>73</sup> social software makes it possible to construct more persistent forms of identity in spaces where we lack face-to-face social cues and clues. But unlike the license plates, social software also makes it possible for the group or the community to decide on its own “rating” criteria and implement those by means of the code.<sup>74</sup>

What does this mean in current practice? Social reputation software ensures an effective measure of identity in a given context. It automates the calculation of social feedback and makes that feedback—the preferences and judgments of people connected via a network—visible on the screen. There are numerous social software websites that focus on social or dating relationships and offer rating systems whereby people are “rated” based on who they know and who their friends are. In other words, the wildly popular Friendster and Orkut provide a graphical map of my friendships. Cyworld, another social networking service, boasts a quarter of the population of Korea as its user base.<sup>75</sup> Linked In provides such a map for my business relationships. Epinions bills itself as a “web of trust” system.<sup>76</sup> It allows me to create a network of trusted reviewers. Slashdot moderates its site based on similar principles. The community decides which contributors and content is best, and that information rises to the top. Virtual worlds, like Second Life, have a social reputation system based on interactions between players. Time spent with another player indicates friendship.<sup>77</sup> Opinity is a repository for reputation information from other sites. New publishing models also rely heavily on social

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73. For an explanation of the credit rating system, see Andrew Berman, “*Once a Mortgage, Always a Mortgage*”—*The Use (And Misuse) of Mezzanine Loans and Preferred Equity Instruments* (forthcoming) (manuscript at 22–23, on file with author).

74. Examples of software systems using social reputation schemes include Kuro5hin, which uses mojo to allow users to moderate the site. Mojo is a time-weighted average of comment ratings, used to set the “initial” rating for each new comment, <http://www.kuro5hin.org/> (last visited Aug. 10, 2005). See also Slashdot, a “News for Nerds” site which uses a moderation system for both articles and authors that allows for a largely self-governed news outlet that obviates most hierarchical editorial functions. Slashdot, <http://slashdot.org> (last visited Aug. 10, 2005). See generally AAANDS, <http://aaands.com/>, auction addict, <http://www.auctionaddict.net/>, buysellbid.com, <http://buysellbid.com/>, virtual feedback, <http://virtualfeedback.com/>, ExpertCentral.com, <http://www.expertcentral.com/> (last visited Aug. 10, 2005).

75. For a relevant article on Cyworld, see Jonny Evans, *Koreans Find Secret Cybersauce*, WIRED, Aug. 8, 2005, [http://www.wired.com/news/culture/0,1284,68361,00.html?tw=wn\\_tophead\\_7](http://www.wired.com/news/culture/0,1284,68361,00.html?tw=wn_tophead_7).

76. Epinions-FAQ: The Web of Trust, [http://www.epinions.com/help/faq/?show=faq\\_wot](http://www.epinions.com/help/faq/?show=faq_wot) (last visited June 29, 2005).

77. <http://secondlife.com/features/communication.php> (last visited July 7, 2005). A rating score can be given by one avatar to another in selected categories (appearance, behavior, building skills). Rating an avatar costs L\$ (Second Life currency called Linden Dollars). The weekly stipend allocated to an avatar by the game gods is based upon one’s rating score.

reputation software to filter content.<sup>78</sup> Outfoxed is a service that “uses your network of trusted friends and experts to help you find the good stuff and avoid the bad” by using social reputation as a criterion in web surfing.<sup>79</sup> There are already a wide variety of social reputation tools even though we are just at the beginning of their evolution<sup>80</sup> and are sure to see the development of a wide new array of technological structures designed to measure social reputation.<sup>81</sup>

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78. Several websites use rating schemes to filter and edit content collaboratively. *See, e.g.*, Discordia, <http://www.discordia.us/scoop/> (last visited Aug. 10, 2005) (based on a customized version of the Scoop weblog software that provides a multi-layered discussion interface, similar to the Slashdot and Indymedia websites). *See also* infoAnarchy, <http://www.infoanarchy.org/> (last visited Aug. 10, 2005). This site is community-edited—users decide what gets posted. Once a user creates an account and logs on, s/he can see submitted but as-yet unposted articles and recommend them for posting or for dumping. The Tennessee Independent Media Center, <http://tnimc.org/> (last visited Aug. 10, 2005). Unlike many of the other IMCs, this Indymedia site encourages users to rate content, influencing how prominently an article is displayed. *See also* Corante Many2Many: A group weblog on social software, <http://many.corante.com/> (last visited Apr. 3, 2005).

79. <http://getoutfoxed.com/> (last visited June 29, 2005). Outfoxed describes its methodology as follows:

The essential idea of Outfoxed is that people make decisions based primarily on a few people whom they trust. The average person has a set of experts whom they consult in designated areas: the computer expert, the car expert, the fashion expert, the financial expert. If the opinions of these experts can be collected, they are incredibly useful: it is this metadata (data about other data) that gives the most intelligent filtering and sorting on the internet.

For example, Outfoxed lets my Mom know that I think its okay for her to install the Flash plugin, but that she should not install anything from Claria. That’s pretty good, but it gets better. The real power comes from chaining trust: Outfoxed also lets my mom know that PC Pitstop, a company that I trust, has reported that Orbitz advertises via spyware. So if she ends up on an Orbitz page, or if Orbitz is returned in a search result, she will know to think twice about doing business there.

<http://getoutfoxed.com/about>.

80. Galit Sarfaty points out that current systems “differ according to a number of factors: (i) anonymity of users; (ii) what is rated; (iii) type of rating; (iii) who is moderating; and (v) ordering of ratings and filtering.” Sarfaty, *supra* note 7.

81. *See* Masum & Zhang, *supra* note 26 (“Emerging information tools are making it possible for people to rate each other on a variety of traits, generating what is really a whole set of reputations for each person. (Information technology is also indirectly increasing the need for such reputations, as we have to sift through more and more possibilities.) You may mentally assign a friend a bad reputation for being on time or returning borrowed items promptly, while still thinking them reliable for helping out in case of real need. No person can be reduced to a single measure of “quality.” So people will have different reputations for different contexts. But even for the same context, people will often have different reputations as assessed by different judges. None of us is omniscient—we all bring our various weaknesses, tastes, bias, and lack of insight to bear when rating each other. And people and organizations often have hidden agendas, leading to consciously distorted opinions.

Reputations are rarely formed in isolation—we influence each others’ opinions. Studying the structure of social connectivity promises to reveal insights about how we interact, and thinking about simple quantities like the average number of sources consulted before an opinion is formed will help us to better filter these opinions.) (internal citation omitted).

In the emerging world of social software<sup>82</sup> and highly immersive online spaces, identity is becoming enriched with more persistent forms of reputation. There have been on-line communities since the beginning of the Internet, but social software and other tools that facilitate the creation of collaborative reputation and the inculcation of structures for trust-building and collective action are fundamentally changing the nature of those communities. The growth of on-line social environments fundamentally depends upon the development of robust and contextualized persona. The ability to create “real” online persona counteracts the trend toward less iterative, less strong social ties that we regularly see in cyberspace. The software offers an opportunity to create what Hardin terms “intermediaries in trust” that help us to create informational feedback and produce stronger ties at the social level.<sup>83</sup>

Much more so than in offline space, online identity is explicitly socially constructed. Instead of looking to these old ways of safeguarding property<sup>84</sup> in reputation, I will argue in Part III that we should look to borrow from trademark law for guidance in crafting a new standard that recognizes the role of the collective in creating social reputation.

## II. LEGAL APPROACHES TO ON-LINE IDENTITY

Since online identity looks different from offline and is arguably more crucial for forming social relationships in cyberspace, where we lack other mechanisms for trust-formation, it is crucial to explore what doctrinal approaches might create the right incentive for communities to invest in the creation of reputation. Let us examine how we have approached identity legally until now in order to assess how well these areas of law apply.<sup>85</sup> We want to identify whether these doctrines will protect the group interest, not merely the individual property right, in reputation and in what

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82. See Corante Many2Many weblog, *supra* note 78; Clay Shirky, *Social Software and the Politics of Groups* (Mar. 9, 2003), [http://shirky.com/writings/group\\_politics.html](http://shirky.com/writings/group_politics.html).

83. HARDIN, *supra* note 23, at 140.

84. Post, *supra* note 24, at 695 (“[D]efamation law safeguards ‘that repute which is slowly built up by integrity, honorable conduct, and right living. One’s good name is . . . as truly the product of one’s effort’s as any physical possession.’”) (quoting Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904)).

85. The right of publicity, too, is an identity-related legal protection but, like copyright, it concerns representation rather than reputation, and like defamation, it protects a property right in personhood. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

ways they might ensure persistence, transparency, and integrity of reputation over time.

Constitutional, copyright, and tort law are the three doctrinal approaches that might logically be thought<sup>86</sup> to be adaptable from offline identity to protect online identity.<sup>87</sup> For the most part, these current doctrinal approaches focus on remedying the wrong of misappropriation of individual property. While they each offer valuable remedies for the problems and challenges of managing physical identity, their individual and property-centric approach is not based on the technological reality of online reputation as it is currently coming to be constructed. As we shall discuss by looking at these three ideal-types<sup>88</sup> of identity law, each one gives us some helpful guidance without being, by itself, the right solution for promoting collectively created reputation.

#### A. Constitutional Law

Constitutional law is centrally concerned with identity. While the Fourth Amendment loosely relates to identity by protecting personal privacy from the incursions of search and seizure<sup>89</sup> and the First Amendment protects one from compelled speech and safeguards the right to personal expression which fosters the development of personal identity and reputation,<sup>90</sup> the sanctity of personal honor, dignity, and reputation are central to the protections imparted by the Fourteenth and Fifth Amendments. The immutability of identity, namely race and gender, lies

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86. See Adam White Scoville, *Text Is Self: The Merger of Property and Identity*, 1999 B.C. INTELL. PROP. & TECH. F. 060507. Scoville explores the right of privacy, right of publicity, trademark, unfair competition, and copyright as approaches to on-line identity; although trademark is only touched upon and then rejected as inapposite for all but the protection of visual characters. Scoville's concern is with protecting the property in identity.

87. There are, of course, other areas of law, including the "law of names" and the naming of fictional persons, such as corporations and organizations. See CAL. BUS & PROF. CODE § 17910 (West 1997); *Bechtel v. Robinson*, 886 F.2d 644 (3d Cir. 1989). For regulations dealing with the integrity of identifying documents and technologies such as passports, see 18 U.S.C. § 1546 (2000); 22 U.S.C. §§ 211a–214 (2000). For examples justifying grant or denial of petition to change adult name, see 8 U.S.C. § 1447(e) (2000) (name change in U.S. citizenship naturalization); *In re Anonymous*, 587 N.Y.S.2d 548 (N.Y. Civ. Ct. 1992) (name change in relation to physical sex change operation); Jane M. Draper, Annotation, *Circumstances Justifying Grant or Denial of Petition to Change Adult's Name*, 79 A.L.R.3d 562 (1977).

88. See generally MAX WEBER, *ECONOMY AND SOCIETY* 20–21, 57 (Guenther Roth & Claus Wittich eds., 1968). In an effort to make the social sciences more empirical and objective, Weber sought to reduce the complexity and disorder of social phenomena and render them capable of analysis by focusing on "ideal types" or basic models of socio-economic life.

89. See U.S. CONST. amend. IV.

90. See Abelson & Lessig, *supra* note 45.



at the foundation of the constitutional protections against discrimination.<sup>91</sup> Precisely because we cannot alter certain aspects of our identity and because they are not voluntary, the law intercedes to prevent social subjugation and status differentiation on the basis of traits over which we exercise no control.

As a result, we might consider constitutional protections as ideally suited to safeguarding the rights of avatars and online identity. Several scholars have made the argument that, despite the fact that cyberspace is not a public but a private realm, constitutional protections should be extended to the on-line life.<sup>92</sup> Avatar, or on-line identity, one might argue, could benefit from the application of constitutional principles. Such safeguards would permit the flourishing of on-line identity. Imagine if on-line persona enjoyed free speech rights? Raph Koster has floated just such a proposal,<sup>93</sup> suggesting that inhabitants of immersive, virtual spaces should be entitled to the protection of their expression against, not only the government, but also the de facto government of these spaces, namely the “game gods,” or private owners of the servers that control virtual worlds and massively multiplayer videogames.<sup>94</sup> If our on-line persona enjoyed the liberties of free speech and the right to be free from compelled speech, this would help to develop more robust, endowed, and autonomous on-line identities. We would have to balance the free speech rights of avatars against the dangers of online libel and defamation, but, it could be argued, we overcame this challenge in real space.<sup>95</sup> Furthermore, we might

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91. For writings about social subjugation and race, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); see also Paul Brest, *Foreword: In Defense of the AntiDiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Jack Balkin, *The Constitution of Status* 106 YALE L.J. 2313 (1997).

92. See Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1302–06 (2000) (arguing for application of constitutional norms in regulation of cyberspace); Peter S. Jenkins, *The Virtual World as Company Town: Freedom of Speech in Massively Multiple OnLine Role Playing Games*, 8 J. OF INTERNET L. 1, 17 (2004) (arguing that virtual worlds should be treated like company towns where such virtual worlds are open membership).

93. See Koster, *supra* note 1.

94. See Richard Bartle, *Virtual Wordliness*, in *THE STATE OF PLAY: LAW AND VIRTUAL WORLDS*, *supra* note 10 (“Early virtual worlds didn’t have the problem of people claiming real-life ownership of virtual objects. The reason for this was because these worlds would periodically *reset*—everything was returned to its starting position, leaving only the character records of the players untouched. This was for design reasons, but one consequence was that players took it for granted that everything in the virtual world was transitory: the lord giveth and the lord taketh away.”)

95. See generally Robert B. Charles & Jacob H. Zamansky, *Liability for Online Libel After Stratton Oakmont, Inc. v. Prodigy Services Co.*, 28 CONN. L. REV. 1173 (1996); Danielle M. Conway-Jones, *Defamation in the Digital Age: Liability in Chat Rooms, on Electronic Bulletin Boards, and in the Blogosphere*, A.L.I.-A.B.A. BUS. L. COURSE MATERIALS J., Oct. 2005, at 63; Orit Goldring and Antonia L. Hamblin, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20

consider constitutionalizing equal protection or substantive due process rights of avatars. It is conceivable to explore what it would mean to require that one's online identity be entitled to equal treatment as one's off-line identity. We have such a rule now with regard to electronic signatures, for example, which by statute (unrelated to any constitutional justification) must be accorded the same legal value as paper signatures.<sup>96</sup> But what if we raised this protection to constitutional status? What if we accorded constitutional rights to avatars? Or created a doctrine of equal protection between avatars?

Constitutionalizing rights of on-line identity is conceivable, but fundamentally the Constitution is the wrong tool to solve this narrower problem of reputation. The constitutional protections of free speech and association and safeguards against social status subjugation do not squarely address reputation. While the anti-discrimination principle recognizes the role others play in ascribing identities to us, it has no reason to provide for rights to the group, rather than the individual. Constitutional law protects against discrimination on the basis of involuntarily, but not voluntarily, created reputation.<sup>97</sup> Equal protection is intended to protect us

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HOFSTRA LAB. & EMP. L.J. 383 (2003); John L. Hines, Michael H. Cramer & Peter T. Berk, *Anonymity, Immunity, & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97 (2003); Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000); Robert M. O'Neil, *The Drudge Case: A Look At Issues In Cyberspace Defamation*, 73 WASH. L. REV. 623 (1998); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147 (1997); Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377 (1996); Stephanie Blumstein, Note, *The New Immunity In Cyberspace: The Expanded Reach Of The Communications Decency Act To The Libelous "Re-Poster"*, 9 B.U. J. SCI. & TECH. L. 407 (2003); Scot Wilson, Comment, *Corporate Criticism on the Internet: The Fine Line Between Anonymous Speech and Cybersmear*, 29 PEPP. L. REV. 533 (2002).

96. See Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. §§ 7001–7006, 7021, 7031 (2000); UNIF. COMPUTER INFO. TRANSACTIONS ACT (UCITA) (2002) (adopted in two states), available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>; UNIF. ELEC. TRANSACTIONS ACT (UETA) (1999) (adopted in forty-eight states), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>. See generally Daniel J. Greenwood & Ray A. Campbell, *Electronic Commerce Legislation: From Written on Paper and Signed in Ink to Electronic Records and Online Authentication*, 53 BUS. LAW. 307 (1997); Raymond T. Nimmer, *Electronic Contracting: Legal Issues*, 14 J. MARSHALL J. COMPUTER & INFO. L. 211 (1996).

97. Of course, constitutional law can give way to tort law so that defamation can be enforced despite the First Amendment. "The common law of slander and libel is designed to effectuate society's 'pervasive and strong interest in preventing and redressing attacks upon reputation.'" Post, *supra* note 24, at 691 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). "The trick is then to 'balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression.'" Post, *supra* note 24, at 691–92 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944–45 (1985) (opinion of Powell, J.))."

from irrational and unreasonable differences in treatment on the basis of immutable traits.<sup>98</sup> It does not speak at all to voluntarily assumed differences. The due process jurisprudence is no less inapposite. It is not at all clear how or why to apply the concept of fundamental rights to ephemeral, mutable, and non-physical forms of identity. To the extent that we would seek to protect equal treatment of on- and off-line persona by according rights and liberties to our avatars, the mutability of identity is a stumbling block. One can imagine the notion that there is a fundamental right to create online identity and to enjoy anonymity of that persona against compelled speech. The creation of an avatar could be regarded as a fundamental right of self-expression.<sup>99</sup> But that protection—while both desirable and arguably already included in the penumbra of First Amendment rights as a form of free expression—may still not provide adequate protection to safeguard the community. Also, on-line reputation, the cornerstone of identity in the on-line space, is not by itself the complete measure of the person. A single eBay score, while indicative of who that person is in one community, does not say anything about identity in another community. Such totalizing protections as those the Constitution provides seem a bit broad in this context.

These are protections from governmental incursions on liberty, but the challenge in most instances is not the government, it is private companies who assert a property right in personal reputation. Colin's conflict arose out of his desire to claim ownership over his avatar (representation) and his eBay points (reputation) as against Sony and eBay. There are those who would suggest that these private on-line spaces, such as eBay or newly emerging virtual world environments, be treated as spaces of public

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98. Immutable traits give rise to discrimination and often signal political powerlessness. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 472 n.24 (1985) (“The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group’s interests and needs.”); *Hernandez v. Tex.*, 347 U.S. 475 (1954); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994). *Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST* 150 (1980) (“Surely one has to feel sorry for a person disabled by something he or she can’t do anything about, but I’m not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there’s not much left of the immutability theory, is there?”) (internal citation omitted).

99. For a further discussion of avatar rights, see Dan Hunter, *Avatar Rights*, Terra Nova (Oct. 12, 2003), [http://terranova.blogs.com/terra\\_nova/2003/10/avatar\\_rights.html](http://terranova.blogs.com/terra_nova/2003/10/avatar_rights.html).

accommodation<sup>100</sup> or as the new public forums<sup>101</sup> where avatars would be able to assert constitutional protections<sup>102</sup> against the owners of those spaces, the so-called “game gods.”<sup>103</sup> But the Constitution does not give us the instruments with which to differentiate between spaces. Is eBay a public forum? Is Everquest? What protections do inhabitants of these spaces receive? Not all online spaces are the same, and the constitutional jurisprudence has not evolved to distinguish among them, nor does it provide the analytical tools to do so in the future.<sup>104</sup> It is a hammer, designed for immutable, not mutable traits, when what we need is a much more refined instrument that takes account of the way identity is formed online. Constitutional law is designed to protect us from the government—a negative liberty—rather than to accord us positive rights in the identities that we create or to create the social incentives to developing on-line identity.

If what we are seeking is a legal incentive for the social creation of reputation, constitutional protections, while perhaps useful to protect the individual against the state or the private “god” of that cyberspace, are not a good match. There is no suspect class at issue nor is there any public space on which to peg such protections. However, while constitutional rights might not apply, constitutional values suggest that reputation is about more than just property. It is rooted in conceptions of dignity and honor. Hence, while constitutional law might not be adapted successfully in this context, we can take away a lesson from constitutional values for our doctrine of online reputation: a heightened regard for the value of personal identity and reputation that goes beyond mere property.

### B. Copyright Law

If constitutional law has its shortcomings, we might instead turn to copyright law to protect on-line identity. Copyright law (along with

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100. Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH 149 (1998).

101. See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 488–94 (2003) (discussing application of public forum doctrine to cyberspace); Beth Simone Noveck, *Designing Deliberative Democracy In Cyberspace: The Role Of The Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1 (2003); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1153 n.167 (2005) (noting the holding of *Mainstream Loudoun v. Bd. of Tr. of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), holding “that the government’s provision of Internet access in a public library constitutes a designated public forum”).

102. See Koster, *supra* note 1.

103. See Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63 (2004); Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185 (2004).

104. See generally Balkin, *supra* note 103.

trademark and trade dress) is centrally concerned with the protection of fictional “characters” in copyrighted works independent of those works. If we protect literary or comic book characters with copyright, we might think about protecting on-line identity in the same way. One commentator has noted, “[f]ully realized characters in literature are little different than fully defined personalities in daily life. . . . A literary character can be said to have a distinctive personality, and thus to be protectable, when it has been delineated to the point at which its behavior is relatively predictable so that when placed in a new plot situation, it will react in ways that are at once distinctive and unsurprising.”<sup>105</sup> Yet we can imagine that where a videogame, for example, provides the tools to create a richly instantiated and unique representation of self, copyright law may be brought to bear. If we assume that software can help to create more persistent forms of identity, should copyright law apply and does this help create the necessary incentives to developing identity online?

It is well-settled copyright doctrine that specifically delineated and well-articulated fictional characters are entitled to copyright protections.<sup>106</sup> They need not be graphically represented. A fictional character, if sufficiently well expressed, is protected by copyright. As Learned Hand famously wrote, “It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for making them too indistinct.”<sup>107</sup> There are two rationales for protecting character: either a character is sufficiently delineated, as Hand suggested, to be the fruit of creative expression rather than a stock character;<sup>108</sup> or the character “constitutes the story being told” rather than being subordinated to the story, such as a Superman or a James Bond.<sup>109</sup>

The copyrightability of character is the centerpiece of recent and ongoing secondary copyright liability litigation by a comic book company against a videogame producer. The former alleges that the tools provided by the videogame enable players of that game to infringe the rights of the comic book company in its valuable character-properties.<sup>110</sup> The comic

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105. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.7.2, 128 (1989).

106. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12 (1985–2005) (chapter on characters).

107. *Nichols*, 45 F.2d at 121.

108. See *Warner Bros. Inc. v. Am. Broad. Cos.* 720 F.2d 231 (2d Cir. 1983) (finding “Superman” to be a protectable character).

109. See, e.g., *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., Inc.*, 216 F.2d 945, 950 (9th Cir. 1954) (the “Sam Spade” case) (“It is conceivable that the character really constitutes the story being told, but if the character is only the chessman in the game of telling the story he is not within the area of the protection afforded by the copyright.”).

110. See *Marvel Enter., Inc. v. NCSOFT Corp.*, No. CV 04-9253-RGK (PLAx), 2005 U.S. Dist.

book company argues that its characters are being infringed. The videogame company regards these characters as “stock” characters that belong to the general culture and the public domain rather than the sufficiently expressive identities belonging to any one creator. Moreover, and relevant to our exploration of identity, the videogame company is not itself copying the characters, it is providing the tools to its users to create their own characters, which may turn out to strongly resemble those of the comic book company. The Marvel Comics case, however it is resolved, is likely to push the boundaries of our understanding of what constitutes fictional “identity” and highlight the role software plays in creating it.

The copyrightability of character is what gives rise to the dispute between Sony and Colin over ownership of Colin’s avatar. Because, in Sony’s view, it is intellectual property, ownership of that property must be resolved. Sony asserts that the character belongs to Sony because it provides the tools and the raw materials to construct the character. If there is any doubt, Sony asserts that, by contract at the very least, Colin has ceded any rights in his avatar to Sony. This may make sense so long as we think about on-line identity as something fictional, such as in the context of a game. While there is precedent for applying copyright protections to character even without visual representation, such as literary characters, there is no precedent for applying such treatment to non-fictional characters. The hallmark of copyright is expression that demonstrates a modicum of originality. To the extent that on-line identity is not to be considered a fictional character but, rather, a “real” projection of oneself, copyrightability may be irrelevant.

Even if we read the doctrine as applying or adaptable to the protection of non-fictional online representations of self, it is not clear that we should. In our non-moral rights tradition, to treat identity as copyright makes it subject to all the usual vagaries of contract law and enables a company to demand assignment of identity as a condition of service. Furthermore, it would protect against the reproduction of identity and afford the owner the various rights of copyright holders under 17 U.S.C. § 106, but not safeguard the integrity or persistence of reputation.

Copyright protects the visual representation of identity, such as a painting or cartoon or sculptural rendering of my likeness.<sup>111</sup> It also

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LEXIS 8448 (C.D. Cal. Mar. 9, 2005); *see also* Allen Rausch, *NCsoft Scores Partial Victory Over Marvel*, GAMESPY PC, Mar. 11, 2005, <http://pc.gamespy.com/pc/city-of-heroes/595372p1.html>.

111. 17 U.S.C. § 102(a)(5) (2000) (stating that among the subject matter copyright protects are “pictorial, graphic, and sculptural works.”).

conveys ownership in the software code<sup>112</sup> that creates visual representations of the self on the screen, in addition to ownership of the graphical representations of the avatar as an image.<sup>113</sup> In other words, if I write a computer program to generate pictures,<sup>114</sup> I have separate copyrights both in the code to the program and in the graphical works created by the program. Copyright provides myriad avenues to protect representation. But while copyright may protect representation, it does little to protect reputation, which may not have a visual representation and is not necessarily fixed in a tangible medium of expression.<sup>115</sup>

It is unclear how copyright might prevent the abuse of reputation created by the group. Copyright does provide for joint ownership. It allows for multiple authors. In moral rights jurisdictions, the cultural community—or the so-called public heritage—may retain an inalienable interest in work created by an artist.<sup>116</sup> But those rights are narrowly circumscribed. If what we care about is creating incentives for the persistence of reputation to enable social interaction, protecting the originality and creativity of representation may not be enough to safeguard reputation.<sup>117</sup> The protections copyright offers may, on the one hand, be too limited to create a framework for the promotion of on-line identity.<sup>118</sup> On the other hand, the protections it provides may also be too far reaching—even while copyright might be more adaptable than

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112. See 17 U.S.C. §§ 102, 117 (2000) (copyright's protections for literary work also cover software code); see also *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.* 797 F.2d 1222 (3d Cir. 1986); *Apple Computer, Inc. v. Franklin Computer, Corp.*, 714 F.2d 1240 (3d Cir. 1983); *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982); see also NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS (CONTU), FINAL REPORT (1978). Cf. Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection For Computer Programs In Machine-Readable Form*, 1984 DUKE L.J. 663 (1984) (criticizing the CONTU Final Report and further arguing that copyright law is inappropriate for protection of computer programs).

113. See Reynolds, *supra* note 42 (addressing the copyrightability of an avatar from a non-lawyer's perspective).

114. See Kurzweil CyberArt Technologies, Inc., <http://www.kurzweilcyberart.com> (last visited July 8, 2005).

115. 17 U.S.C. § 102 (2000) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . .").

116. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989); Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177 (2001); John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989); Sarah La Voi, Comment, *Cultural Heritage Tug of War: Balancing Preservation Interests and Commercial Rights*, 53 DEPAUL L. REV. 875 (2003).

117. Cf. *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (Scalia, J.) (noting that trademark, unlike other areas of intellectual property law, is not designed to protect originality and creativity).

118. See Molly Stephens, Note, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513 (2002).

constitutional law for an on-line environment, what it fundamentally provides for is ownership. It creates, not a right of personhood,<sup>119</sup> but a right of property in identity. This may make some sense when the goal is to protect the fictional and artistic creations of authors.

Because copyright recognizes the expressive value of character, it gives us some guidance for on-line identity. It suggests that we take the construction of social roles in online spaces seriously and as something with its own, inherent creative value apart from off-line identity. Copyright also provides for rights in compilations, the creative arrangement, selection, or ordering of collective works.<sup>120</sup> Reputation could be understood to be a creative arrangement of facts about a person. We can take away from copyright the notion that we ought to recognize the value inherent in the collective creation of the characters we “play” in our communities. Yet even though personhood, artistic integrity and authorial dignity may comprise part of the theoretical basis for intellectual property protection,<sup>121</sup> the means to those ends under U.S. law is the creation of a property right in intangible creations. As we shall discuss when we address tort law approaches, this propertization of identity cannot be the basis for rights in collectively created reputation.

### C. Tort Law: Defamation

The law of online reputation, perhaps most obviously, could be located in the doctrine of defamation and those torts that directly and expressly concern the preservation of personal identity against harm. Defamation law provides a way of preserving the integrity of reputation and may suggest a way forward with our problem. These communications torts have evolved from their earliest origins in Biblical times, when it was forbidden to “give false report.” Throughout the Middle Ages the Anglo-Saxon *Lex Talionis* provided for removal of the tongue as a punishment for slander.<sup>122</sup> Initially, the law of defamation protected people in high

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119. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Radin expands upon the Hegelian notion that ownership of property is inextricably bound up with our conception of self. She views the property right as itself a right of personhood. *Id.*

120. 17 U.S.C. § 201(c) (2000).

121. See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 73 CHI-KENT L. REV. 1203, 1212–15 (1998) (“Political theorists and legal scholars have developed four main ways of shaping and justifying property rights in general, and intellectual property rights in particular.”); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL L. REV. 1, 43 (2004) (“There are as many normative accounts of property as there are property theorists. . . .”).

122. PETER F. CARTER-RUCK & RICHARD WALKER, CARTER-RUCK ON LIBEL AND SLANDER 18 (3d ed. 1985).



positions and guarded against calumny of the state and those in power, rather than providing for a private right of action or a right in personal identity. It was only with the attempt to outlaw dueling by the Star Chamber in sixteenth century England that civil actions for defamation of ordinary persons became an increasingly popular alternative to shore up the culture of honor,<sup>123</sup> so much so that the courts were overwhelmed by “action upon the case for words.”<sup>124</sup>

While the history of the law of defamation<sup>125</sup> is marked first by this radical shift from protection of public to private figures and to private rights in identity, it is also marked by a second transformation from a protection of the rights of personal dignity and honor to a protection of a property right in reputation coterminous with the rise of mercantilism. In other words, while the early common law protected reputation because “men’s reputations are tender things, and ought to be like Christ’s coat, without seam,”<sup>126</sup> the need to do business with a wider circle of often unknown acquaintances gave added significance to reputation. Reputation became, not simply an aspect of honor or dignity, but important as property, because without it, one could not make a living in a world of faceless interchange. Losing one’s reputation resulted in a pecuniary loss. The law evolved the doctrine necessary to protect this property right in reputation by means of a legal fiction.<sup>127</sup> Reputation became a currency, trade in which enabled commerce. This property conception of identity squarely undergirds our modern conception of the tort of defamation.<sup>128</sup>

The narrative of a commercial society dependent upon preservation of identity in the service of commerce has carried over from real space into cyberspace. There is a sizeable emerging literature on communications torts such as libel, slander, and defamation in cyberspace.<sup>129</sup> It focuses primarily on the making of negative statements by anonymous and

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123. *Id.* at 20.

124. *Id.* at 20–21.

125. See generally *id.* at 16–29; JOHN TOWNSHEND, TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL 37–49 (4th ed. 1890); Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743 (1986); Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL’Y 433 (2004).

126. TOWNSHEND, *supra* note 125, at 47 (quoting Lord Bacon, Leg. Gul. Conq. 14 in the ANCIENT LAWS AND INSTITUTES, published by the English Record commissioners).

127. *Id.* at 47 (“[W]here the law does protect reputation, it does so indirectly, by means of a fiction—an assumption of pecuniary loss.”).

128. Post, *supra* note 24, at 696 (“No person has the right to a reputation other than that created by the evaluative processes of the market, and, conversely, every person enjoys an equal right to enter the market to attempt to achieve what reputation he can.”).

129. See, e.g., Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

unidentifiable actors to the detriment of a business interest. The “problem” is that if identity is property, the ease with which we can engage in anonymous speech online is a threat to that property. Identity is not a positive ascription, but a challenge to be overcome.<sup>130</sup> The individual property rights conception directs our attention to the boundary between the real life person and the online identity. The new, robust, highly-contextualized and richly-instantiated forms of online identity—from the graphical, three-dimensional renderings of lifelike avatars to the community-creation of social reputation by means of social software—receive the same treatment as an item of information. They are treated like property, rather than personhood, and restrictive ownership is asserted over them. We most commonly talk about identity in terms of “identity theft,” propagating a notion that identity can be stolen like a piece of tangible property.

Even worse, on-line identity, as the general rule, is treated under American law as other people’s property, not even our own. As Susan Crawford writes:

[J]ust as we are getting comfortable with the idea of these contextual, group-shaped, customized online avatar identities, it is disturbing to learn that online intermediaries (the companies who create online spaces—currently, games, but in the future, walled worlds that will be our internets) now have ‘ownership’ of online identities, together with hooks allowing them to remove identities they don’t like. In other words, the “gods” of the virtual worlds are making all the rules (or laws) about identity.<sup>131</sup>

On-line identity is property to be owned, generally by the company that provides the facilities for social interaction. Companies, eager to avoid any potential liability and increasingly concerned about the imposition of indirect and secondary forms of liability, no longer content themselves with ignoring on-line activity. Rather, they assert their complete ownership, control, and rights of take down. There is no legislation to provide to the contrary, nor is there any judge-made law as yet that would hold otherwise.

The central problem with treating identity as information and as property in the metaverse is that the identity-as-property theory assumes

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130. See Scoville, *supra* note 86.

131. See Crawford, *supra* note 44, at 212 (internal citation omitted).

that the law needs to step in to protect an *individual* right to reputation in order to safeguard commerce in the marketplace.

Nowhere is the disjuncture between the identity-as-property vision and what is actually taking place in cyberspace more apparent than when we try to apply defamation rules to on-line reputation. This is not to suggest that defamation law is not relevant or applicable in cyberspace. It is still well-suited to protecting real world people from harmful and injurious statements made in cyberspace or offline. The rules are not less applicable because of the medium. But as a cause of action to protect the social interests in on-line reputation, defamation works less well, not least of all because the need here is to maintain transparency and consistency of reputation, not only to protect against injurious words.

“Defamation of credit,” the specific type of defamation that applies when one’s financial reputation is impugned, might otherwise appear to be the most applicable legal protection of online identity. Financial reputation is, of course, explicitly created by third parties. Commercial vendors and community creditors collaborate to create the credit rating. Everyone who has lent me money disclosed my reliability as a borrower in order to assure that future decisions by members of the lending community comport with my trustworthiness. The Fair Credit Reporting Act<sup>132</sup> and the Federal Consumer Credit Protection Act<sup>133</sup> both create a cause of action for misreporting of credit status by credit agencies,<sup>134</sup> as defined in the statutes.<sup>135</sup> Like the deletion of Colin’s online reputation, if Equifax deletes or misstates my consumer credit reputation, it can be held liable.<sup>136</sup>

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132. See 15 U.S.C. § 1681o(a) (2000 & Supp. 2003) (“Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . actual damages; . . . and reasonable attorney’s fees. . . .”); see generally 15 U.S.C. §§ 1681–1681x (2000 & Supp. 2003); see also Stephen R. Pitcher, *Commercial Defamation Caused by Erroneous Credit Report Issued by Credit Reporting Agency*, 9 AM. JUR. 2D, *Proof of Facts* § 1 (2005).

133. 15 U.S.C. § 1611 (2000) (“Whoever willfully and knowingly (1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder . . . shall be fined not more than \$5,000 or imprisoned not more than one year, or both.”).

134. The major credit agencies are Equifax, Transunion, and Experian, while the major company and debt rating agencies are Moody’s Investor Services, Standard and Poor’s, and Fitch. See Michael Pereira, *Risk Management for the Age of Information*, *FORDHAM J. CORP. & FIN. L.* 715 n.175 (2004) (reviewing ROBERT J. SCHILLER, *THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY* (2003)).

135. See 15 U.S.C. § 1681a(f) (2000) (“The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”).

136. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (holding

The cause of action also can be found in state common law<sup>137</sup> as well as in these federal statutes. Defamation of credit “originally stemmed from the merchant’s right to protection of an erroneous sully of his credit reputation.”<sup>138</sup> It has its origins in so-called “trade libel” that arose out of need for accurate credit information about unknown merchants. Whereas in earlier times, reputation was ascertained either through social ties and affiliations or visual inspection of the goods, once those face-to-face mechanisms broke down, the law of trade libel emerged to protect a merchant’s reputation in the marketplace and facilitate trade.<sup>139</sup> We have further adapted this common law idea into statutory protections suited to a complex, highly information-driven, and often automated financial markets where one’s credit score is one’s calling card. A falsely-poor credit rating can effectively exclude one from the market economy. Hence, statutes also exist imposing criminal and civil penalties<sup>140</sup> for making various kinds of false statements for the purpose of obtaining credit information.

Defamation of credit and trade libel would seem to be closely akin to the loss of reputation rating on eBay (or the deletion of one’s AOL screen name or Amazon seller’s points). It is equivalent to the loss of a financially valuable calling card facilitating commerce. If TRW deletes my credit rating or Standard and Poor’s deletes the rating for my company, I am hampered from doing business in the marketplace. Like a credit report, an eBay rating makes it possible to do business in that marketplace by providing potential buyers and sellers with additional information. So why not just apply this doctrine to online identity? Why not, as a matter of public policy, protect online identity the way we protect credit reporting

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that action for defamation for the false statements in credit report did not require showing of actual malice for recovery of presumed and punitive damage).

137. See *Myshrall v. Key Bank Nat. Ass’n*, 802 A.2d 419 (Me. 2002) (holding that Maine’s Fair Credit Reporting Act, ME. REV. STAT. ANN. tit. 10, § 1311 (West 2004), did not preempt common law cause of action for defamation of credit); see also *Stafford v. Cross Country Bank*, 262 F. Supp. 2d 776 (W.D. Ky. 2003).

138. *Fairfax Leary, Jr. & Richard Seth Hudson, Unfair Credit Reporting and Wrongful Dishonor—Two Wrongs Made from the Same Right*, 10 DEL. J. CORP. L. 1, 6 (1985) (arguing that short shrift given to wrongful dishonor of credit information by the Uniform Commercial Code is resulting in a weakening of the tort, and calling for adoption of reasonableness standard).

139. See *Marzetti v. Williams*, (1830) 109 Eng. Rep. 842 (K.B.) (contract damages for wrongful dishonour of a cheque).

140. 15 U.S.C. § 1681q (2000) (“Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.”); 15 U.S.C. § 1681n(b) (2000 & Supp. 2003) (“Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or \$1,000, whichever is greater.”).

given its central role in the information economy, especially for enormous marketplaces like eBay that allow ordinary people with no start up capital to create niche markets for the sale of goods?

Quite simply, the answer is we should. But eBay is not Equifax, and therefore defamation of credit, by itself, is inapposite. First, reputation is created through peer production, not hierarchy. While eBay, like a credit rating agency, is also a central collector of reputational data, that data comes, not only comes from the community, but is also based on a much wider array of factors personal to each member of the community. Second, while it may have a de facto monopoly over niche markets for auctions,<sup>141</sup> eBay is only one of many large on-line communities. There are innumerable social reputation schemes proliferating on the Internet on different websites. Social reputation is measured in a variety of ways for different purposes. Third, Equifax is the least cost avoider with regard to correcting mistakes in a credit report. The report is centrally controlled and maintained and based on criteria set by Equifax. While eBay may be in the best position to correct Colin's feedback score, it cannot police his feedback in AOL or Slashdot. Fourth, and most important, while defamation of credit gives me a right to go against Equifax, in the on-line reputation context we need a right for a member of the community to go against eBay to safeguard reputation, not only the person whose reputation is in question, and not only in the event that reputation is being impugned.

The law protects the individual investment in goodwill that we make when engaging in commerce—social or economic—in order to develop personal standing and the other social signaling that is required to engage in relationships with strangers. We invent a property right as an incentive to publish more information about ourselves in the marketplace. As a matter of public policy, we want people to cultivate a good reputation, not only to promote good faith and fair dealing, but also in order to encourage the dissemination of greater information about people with whom, in an atomistic and geographically dispersed society we would not otherwise have social dealings. Whereas in the Renaissance one developed so-called social capital<sup>142</sup> through involvement in civic affairs and in community

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141. See *eBay, Inc. v. Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (granting preliminary injunction against auction aggregation site); Oscar Cisneros, *EBay Accused of Monopolization*, WIRED, July 31, 2000, <http://www.wired.com/news/business/0,1367,37871,00.html>; Ina Steiner, *eBay/PayPal Acquisition Decision Expected Today*, AUCTIONBYTES.COM, Aug. 19, 2002, <http://www.auctionbytes.com/cab/abn/y02/m08/i19/s01>.

142. See ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000). While not the inventor of the term, Robert Putnam is often associated with the expression "social capital." As he writes:

life, with the rise of cities and the decline of the mediating institutions of social life,<sup>143</sup> reputation has been a cornerstone of identity.

We have therefore become accustomed to “owning” identity.<sup>144</sup> Viewed from this perspective, Colin suffers a harm—measurable property damage—when he is deprived of his reputation points or the ability to control the disposition of his avatar. But this narrative about how identity is constructed does not comport with the reality of identity being, not something that we only invest in as individuals, but something that is directly socially constructed by the group to a much greater and more direct extent in cyberspace than in real space. Colin does not create or control his reputation. EBay does not either. Rather the community, by means of the new social technologies of reputation systems, is the author of Colin’s reputation. An eBay reputation, though measured and displayed using facilities provided by eBay, is the product of the eBay marketplace, not in some amorphous or indirect sense (i.e. price measures the will of the marketplace), but based on the direct aggregation of participant preferences and based on criteria selected by the users themselves, not by the centralized authority.

Constitutional values suggest the importance of identity to the individual and to society. Copyright law teaches that identity has legally cognizable value and reflects original expression and creativity. It also gives us the idea of the collective work comprising various underlying elements as well as the principles of moral rights that recognize the right of the collective in a creative work. Tort law has long recognized the importance of identity as a marker of trustworthiness in the marketplace and has granted a property right in reputation as an incentive to individual investment in identity. Defamation of credit, in particular, recognizes a right to safeguard and correct financial reputation information. As we have

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Whereas physical capital refers to physical objects and human capital refers to the properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them. In that sense social capital is closely related to what some have called “civic virtue.” The difference is that “social capital” calls attention to the fact that civic virtue is most powerful when embedded in a dense network of reciprocal social relations. A society of many virtuous but isolated individuals is not necessarily rich in social capital.

*Id.*

143. On the decline of civil society in cities, see generally, RICHARD SENNETT, *THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES* (1990); LOUIS WIRTH, *ON CITIES AND SOCIAL LIFE* (Albert J. Reiss, Jr. ed., 1964).

144. Post, *supra* note 24, at 694 (“To injure such a reputation without justification is to unjustly destroy the results of an individual’s labor. The resulting loss is ‘capable of pecuniary admeasurement’ because the value of reputation is determined by the marketplace in exactly the same manner that the marketplace determines the cash value of any property loss.”).

seen, all of these approaches offer something to solve the dilemma of online reputation. None, by itself, fits well with cyberspatial environments where identity is malleable rather than immutable, and where identity is “real” rather than fictional, and where the group, rather than the individual, creates reputation.

### III. THE TRADEMARK APPROACH

If we eschew a view of identity that creates the incentive for *individual* investment in reputation, we must look elsewhere in the doctrine for an approach to online identity that recognizes the role of the group. The goal is not simply to create an incentive for individual investment in the production of goodwill but to create an incentive for the *collective* production of such goodwill and disincentives for actions that destroy such goodwill. We want to generate more information about identity and greater integrity of that information.

In this Section, I propose that trademark law—coupled with constitutional, copyright and tort—affords us even better guidance for how to maintain integrity and reliability for online reputation. While personal names can function as trademarks,<sup>145</sup> I do not propose that trademark law can be used as is.<sup>146</sup> After all, trademark is intended to make “actionable the deceptive and misleading use of marks” and to “protect persons

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145. *Parks v. LaFace Records*, 329 F.3d 437, 447 (6th Cir. 2003) (“[Rosa Parks’] prior commercial activities and international recognition as a symbol of the civil rights movement endow her with a trademark interest in her name the same as if she were a famous actor or musician.”); *Cf. ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 922–23 (6th Cir. 2003) (dismissing claims by golfer Tiger Woods against a visual artist, holding that “as a general rule, a person’s image or likeness cannot function as a trademark,” but a particular photo or image if used frequently and consistently in the sale of particular goods or services may function as a mark); *Pirone v. MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990) (“[A]n individual’s likeness is not a consistently represented fixed image—different photographs of the same person may be markedly dissimilar. Thus a photograph of a human being, unlike a portrait of a fanciful cartoon character, is not inherently ‘distinctive’ in the trademark sense of tending to indicate origin.”) (citation omitted).

146. See ROLAND BARTHES, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142 (Stephen Heath ed., trans., 1977); Michel Foucault, *What is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141 (Josue V. Harari ed., trans., 1979); Jane C. Ginsburg, *Essay—The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of « Paternity »?* (2005) (Oxford Intellectual Property Research Centre Working Paper Series, Paper No. 4, 2005) [hereinafter Ginsburg, *The Author’s Name*] (arguing that right of attribution is dead) (this essay is based on a translation of Jane C. Ginsburg, *Le Nom de L’auteur en Tant que Signe Distinctif: Une Perspective Perverse sur le Droit la Paternité des Oeuvres de L’esprit?*, in 16 LES CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 117 (2004)), available at <http://www.oiprc.ox.ac.uk/EJWP0405.pdf>; Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063 (2003).

engaged in commerce” against unfair competition.<sup>147</sup> This does not comport with our purposes, which go beyond commerce and the commercial marketplace to include reputation and identity created in a wide array of social contexts. Furthermore, trademark law while concerned with marks of source, does not, by itself, create a right of attribution<sup>148</sup> (e.g., a requirement to name the author of an expressive representational work) or deal centrally with the issue of personal identity. Rather, this Article suggests that we need to think about reputation the way we think about brands where the public and the mark’s holder both have important interests. Let me be clear at the outset that looking to trademark law for guidance with the identity issue does not suggest any desire to follow the prevalent trend<sup>149</sup> toward greater commodification of intellectual property.<sup>150</sup> We have been arguing against this property-centric notion. But the rights and interests of the group uniquely circumscribe the property right in trademark unlike other areas of intellectual property. This Article is not advocating, for example, an anti-dilution right in on-line identity (e.g., that one may not tarnish reputation through its use by a competitor).<sup>151</sup> Rather we are looking to the way trademark mediates successfully between the interests of the holder and the interests of the public in the use and disposition of the mark. On-line reputation functions like a trademark, and it is trademark doctrine that may provide the most useful, practical indication of how to recognize and respect both Colin’s interests and those of the Everquest community in which he built his avatar’s identity and the eBay community who created his eBay reputation.

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147. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) (quoting 15 U.S.C. 1127 (1988)).

148. See Gregory F. Lastowka, *The Trademark Function of Authorship*, 3 (working paper, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=656138](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=656138) (“Thus, shorn from trademark law by *Dastar*, and ignored by copyright, markings of authorship are generally not protected by the two primarily federal laws of intellectual property that would conceivably regulate such marks.”); see also *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35–36 (2003) (“We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.”).

149. According to Christopher Kelty, we live in an “[E]conomy absolutely saturated with proprietary forms of ownership.” Christopher Kelty, *Trust Among the Algorithms: Ownership, Identity, and the Collaborative Stewardship of Information*, in *CODE*, *supra* note 14, at 127.

150. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984) (finding that trade secrets are property subject to Fifth Amendment protection); *Kewanee Oil Co. v. Bicron*, 416 U.S. 470, 481–85 (1974) (discussing intersection of state trade secret law and federal patent law); see also Stephen L. Carter, *Owning What Doesn’t Exist*, 13 HARV. J.L. & PUB. POL’Y 99 (1990) (arguing that the non-tangible quality of trademarks creates difficulties in applying to classic utilitarian analysis); Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993).

151. Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c) (2000).



A trademark, like on-line identity, is a source identifier. We might think of both Colin's avatar and his eBay rating as trademarks pointing to him as a source. Trademark is not concerned with precisely who in the "real world" stands behind a mark. The mark may not tell us exactly who the person is behind that identifier, but it points to a defined source.

Trademark law is fine with pseudonyms. A trademark need not be the legal name of the entity, simply an identifier as to source of the goods. While a trademark is designed to sell goods or services rather than indicate authorship in the traditional sense, it both represents the entity standing behind the mark and has an independent legal standing as a mark. But the mark is not merely a representation of the source; it also ties to reputation. The mark signals the goodwill invested in the mark. It is an avatar, essentially, that represents the life of a product in the marketplace. It operates in a similar vein to signal information and reputation, not simply about the product, but about the source of those goods.

Moreover, a trademark, like on-line identity (and unlike the way we typically think about copyright) is created by the public as well as the author. The actual mark (representation) may be the invention of the trademark's owner; but the value in a trademark (reputation) is created by the public which associates that mark with the source of the goods and a quality standard over time. Trademark is the collaborative creation of the source, the public and the marketplace.<sup>152</sup> A certification mark, even more so, is a collaborative creation. Trademarks are developed gradually over time through iterative interaction and transactions. While Colin may have created the appearance and dreamed up the name for his avatar, or taken the steps to set up his account with eBay, the identity he has in both spaces—his reputation or feedback rating—is the product of the collective. Members of the community who bought or sold from him on eBay took the time to give feedback. In many cases, the software automatically tabulates reputation based on action or interaction, making judgments about reputation on the basis of friendly or unfriendly interactions between players.<sup>153</sup> Reputation in the blogosphere<sup>154</sup> or on Google<sup>155</sup> is measured

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152. See generally Steven Wilf, *Who Authors Trademarks?*, 17 *CARDOZO ARTS & ENT. L.J.* 1 (1999).

153. See Second Life social reputation system, *supra* note 77. Other social networking tools calculate reputation based on number of links or number of friends; see also Trust and Reputation in Web Based Social Networks, <http://trust.mindswap.org/trustProject.shtml> (last visited Aug. 26, 2005); Web Based Social Network Listing, <http://trust.mindswap.org/cgi-bin/relationshipTable.cgi> (last visited Aug. 26, 2005).

154. For information on how Technorati tracks weblogs, see About Technorati, <http://www/technorati.com/about> (last visited Aug. 27, 2005) ("A few years ago, Web search was revolutionized

automatically by the number of links or references, for example. While in these systems, “reputation” is essentially equivalent to popularity; and reputation can be measured in other ways. Avatars in games, for example, have their reputation measured by their rank, title and special powers that indicate skill, talent, and expertise. But reputation in games is also measured by gaze (e.g., how long I looked at you) as an indicator of likeability and popularity.

This is very similar to the way trademarks operate. It is the public whose view is measured in determining whether a mark is distinctive.<sup>156</sup> For descriptive brands that are less obviously distinctive as trademarks, the law requires, for example, an explicit showing of secondary meaning (an association of the mark with a unique source) among the consuming public.<sup>157</sup> In other words, the validity of the mark derives, not from the actions of the mark’s holder, but also from the minds of the public. Either direct evidence in the form of consumer surveys or circumstantial evidence of actions on the part of the holder, such as extensive advertising, can indicate the state of the mind of the public.<sup>158</sup> But the law is not fundamentally interested only in the action of the mark’s holder. The

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by a simple but profound idea—that the relevance of a site can be determined by the number of other sites that link to it, and thus consider it ‘important.’ In the world of blogs, hyperlinks are even more significant, since bloggers frequently link to and comment on other blogs, which creates the sense of timeliness and connectedness one would have in a conversation. So Technorati tracks the number of links, and the perceived relevance of blogs, as well as the real-time nature of blogging. Because Technorati automatically receives notification from weblogs as soon as they are updated, it can track the thousands of updates per hour that occur in the blogosphere, and monitor the communities (who’s linking to whom) underlying these conversations.”)

155. Our Search: Google Technology, Google Page Rank Explained, <http://www.google.com/technology/index.html> (last visited Aug. 26, 2005).

156. *See, e.g.,* Publications Int’l v. Landoll, Inc., 164 F.3d 337, 338–39 (7th Cir. 1998) (Posner, J.) (“The courts have struggled to articulate a standard for when a trade dress is sufficiently distinctive to be entitled to the prima facie protection of the Lanham Act.”) (citations omitted); *see also* Insty\*Bit, Inc. v. Poly-Tech Industries, Inc., 95 F.3d 663, 672 (8th Cir. 1996); Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1008–09 (2d Cir. 1995); Duraco Prods., Inc. v. Joy Plastic Enters., Ltd., 40 F.3d 1431, 1448–51 (3d Cir. 1994); Dunn v. Gull, 990 F.2d 348, 351 (7th Cir. 1993); Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1344 (C.C.P.A. 1977). This struggle is mirrored in the district judge’s opinion and in the briefs of the parties. But efforts to define intuitive concepts such as “distinctiveness” are often both futile and unnecessary. We use with perfect clarity many words that we cannot define, such as “time,” “number,” “beauty,” and “law.” Everyone can recognize when a product has a “distinctive” appearance, without having been tutored in the meaning of “distinctiveness.”

157. Lanham Act, 15 U.S.C. § 1125 (2000).

158. Among the factors a court will consider in finding secondary meaning are: “(1) the length and manner of its use, (2) the nature and extent of advertising and promotion of the mark and (3) the efforts made in the direction of promoting a conscious connection, in the public’s mind, between the name or mark and a particular product or venture.” *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1218 (10th Cir. 2004) (citation omitted).

public is the sole touchstone of distinctiveness and therefore of validity. Marks do not achieve trademark status without further association in the mind of the buying public with the source.<sup>159</sup>

The same is true for trademark genericide.<sup>160</sup> A mark can be rendered invalid by the public because of the public's inability to distinguish between the source of the goods and the goods themselves (as provided from multiple sources).<sup>161</sup> The Lanham Act provides that the test for determining whether a registered mark has become generic is what the "relevant public"<sup>162</sup> thinks, and whether the public, not the trademark holder, considers the primary significance of the mark to name the goods or services rather than their source.<sup>163</sup> Again, as with reputation, the touchstone of the mark is its usefulness to the public and that interest outweighs that of any individual mark's "owner."

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159. See *In re MBNA America Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003); *In re Nett Designs, Inc.*, 236 F.3d 1339, 1341 (Fed. Cir. 2001) ("The perception of the relevant purchasing public sets the standard for determining descriptiveness.") (citation omitted). Thus, a mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service. On the other hand, "if a mark requires imagination, thought, and perception to arrive at the qualities or characteristics of the goods [or services], then the mark is suggestive."). *Id.* (citation omitted).

160. Genericide is, "[t]he loss or cancellation of a trademark that no longer distinguishes the owner's product from others' products. Genericide occurs when a trademark becomes such a household name that the consuming public begins to think of the mark not as a brand name but as a synonym for the product itself. Examples of trademarks that have been 'killed' by genericide include *aspirin* and *escalator*." BLACK'S LAW DICTIONARY 707 (8th ed. 2004). See also *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938) (shredded wheat); *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95 (2d Cir. 1989) (Murphy Bed).

161. 15 U.S.C. § 1064(3); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("[A] registered mark may be canceled at any time on the grounds that it has become generic.") (citation omitted).

162. See *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 406 (6th Cir. 2002) (relevant public are "participants in the semiconductor industry including manufacturers, customers, suppliers, vendors and the trade and technical press"); *Loglan Inst., Inc. v. Logical Language Group, Inc.*, 962 F.2d 1038, 1041 (Fed. Cir. 1992) (finding that where the product is a logical language, the relevant public is "the small group of persons who have written about the language or have been involved in the invented language research effort as well as those to whom the Loglan language has been or is being marketed"); *Microsoft Corp. v. Lindows.com Inc.*, 64 U.S.P.Q.2d (BNA) 1397, 1404 (W.D. Wash. 2002) ([T]he relevant public consists of all "owners and users of Intel-compatible personal computers."); *Capital Project Mgmt., Inc. v. IMDISI, Inc.*, 70 U.S.P.Q.2d (BNA) 1172 (T.T.A.B. 2003) (relevant public for construction scheduling analysis services includes engineers, architects, lawyers, construction owners, contractors, and other professionals in the construction management field who purchase schedule analysis services, courts, boards of contract appeals, arbitrators, and others in the field who read or are concerned with schedule analysis reports).

163. See, e.g., *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001) ("[I]s the term sought to be registered . . . understood by the relevant public primarily to refer to that genus of goods or services?") (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 990 (Fed. Cir. 1986)); *In re American Academy of Facial Plastic and Reconstructive Surgery*, 64 U.S.P.Q.2d 1748 (T.T.A.B. 2002).

Similarly, scandalous marks are prohibited as against public policy because the public deems them to be so, and because in the social and political climate of the time, the marks are judged inappropriate and undeserving of the law's protection. Multiple dictionaries are used to determine what the public would consider to be scandalous or immoral.<sup>164</sup> While not the only example, trademark law is an abstraction and embodiment of this relationship between the creator and the public, a relationship to which the law gives voice. Again, trademark law represents the public interest in the mark by means of rules prohibiting scandalous marks and circumscribing the holder's individual property rights.

The trademark holder cannot freely alienate a trademark. Assignments in gross are prohibited by statute.<sup>165</sup> As McCarthy writes: "Good will and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both. A trademark has no independent significance apart from the good will it symbolizes."<sup>166</sup> So even though a trademark may be considered property, it is not the right of the holder or "owner" unilaterally to dispose of that mark as he wishes. That limitation includes preventing so-called naked licenses, the severing of the mark from its goodwill. Coca-Cola cannot give its hugely valuable brand to Joe's Cola without transferring assets or exercising some kind of quality control. Because trademarks play a signaling function to the public, the public interest limits the property right and gives rise to the rule against naked licenses.

As intellectual property scholar Steven Wilf points out, the fundamental truth about trademark—not just a collective mark—is that marks are collectively authored. They are the product of the community. This notion of collective authorship of the trademark, says Wilf, while a central feature of trademark law and how trademarks operate in reality, is often obscured by the liberal approach we adopt to describe the incentive

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164. 15 U.S.C. § 1052(a) (refusing registration to "immoral, deceptive, or scandalous matter"); *In re Boulevard Entertainment Inc.*, 334 F.3d 1336, 1341 (Fed. Cir. 2003) ("In a case such as this one, in which multiple dictionaries, including at least one standard dictionary, uniformly indicate that a word is vulgar, and the applicant's use of the word is clearly limited to the vulgar meaning of the word, . . . the PTO can sustain its burden of showing that the mark comprises or consists of scandalous matter by reference to dictionary definitions alone. In such instances, although other evidence, such as consumer surveys, would no doubt be instructive, the PTO's finding is not legally insufficient because of the absence of such evidence.") (internal citation omitted).

165. 15 U.S.C. § 1060(a) (2000); *see also* *Int'l Soc'y for Krishna Consciousness, Inc. v. Stadium Auth. of Pittsburgh*, 479 F. Supp. 792 (W.D. Pa. 1979) ("there are no rights in a trademark alone, and 'no rights can be transferred apart from the business with which the mark is associated.'") (citation omitted).

166. J. THOMAS MCCARTHY, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:2 (4th ed. 1996).

theory of trademarks. “Thus, a major concern is that both the personality theory and Lockean paradigms begin with the premise that through sole creation of the trademark, its holder has established ownership. In the original position, according to these models, all property rights belong to the trademark holder.”<sup>167</sup> As Wilf makes clear in his essay, the “public authorship model” is more accurate of what is actually taking place.<sup>168</sup> “It is the collective personality of culture that participates in the authorship of trademarks and that act of collective labor establishes a stake to trademark symbolism contemporaneous with any private claims.”<sup>169</sup>

Most importantly, the law recognizes public rights in and to the trademark. Building on Wilf’s contentions about trademark, I want to reinforce the claim that on-line reputation, even more than trademark, is not the property of an individual. We need to start thinking about on-line reputation as a “brand” or a type of trademark that enables social transactions in specific online marketplaces or communities. While one creator can have multiple marks or identities, each one must remain consistent and authentic. That is not to say that they have to be authentic vis-à-vis the real world person. Rather they have to be consistent within that social network or community. Having a pseudonymous identity, different from one’s “real world” identity is perfectly consistent with the way trademarks function, too.<sup>170</sup> In trademark doctrine, the public does not need to know the name of the source of a product, merely that the product comes from a specific source. Similarly, we need to shift attention from the “problem” of piercing the veil between the on-line person and the “real” person. Instead, thinking about identity as a mark focuses on creating robust reputation online independent of off-line data.

In sum, the trademark paradigm, more so than copyright, constitutional or tort law makes sense in terms of the comparable way trademark and reputation function and in terms of the way trademark law and policy

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167. Wilf, *supra* note 152, at 4.

168. See Wilf, *supra* note 152, at 1 (“By associating a symbol with an object, the public contributes to the authorship of trademarks. This associative power grants a word or icon meaning as the representation of a particular object.”); see also Peter Jaszi, *Who Cares Who Wrote ‘Shakespeare’?*, 37 AM. U. L. REV. 617 (1988).

169. Wilf, *supra* note 152, at 4–5.

170. See Ginsburg, *The Author’s Name*, *supra* note 146, at 9 (“The « author » who enjoys her public’s loyalty is merely a construct designed to hide the true identity of the creator. A sometimes necessary falsehood, for example in the 19th century, to deceive publishers regarding the author’s sex. Nonetheless, the pseudonym is perfectly consistent with trademark law, because it is indeed the brand name under which the creator offers her works. From the point of view of trademark law, the relevant information is the name under which the product is sold, whether or not an actual person bears this name.”).

safeguard the interests of the public and the mark's source. While many different areas of law touch and concern the legal treatment of identity, the fact that new social software transforms the construction of identity and reputation from an individual into an explicitly group process points the way towards trademark as the most apropos legal protection. It is trademark law that we turn to for an appropriate legal analogy, reasoning from trademark law to think through how we ought to deal legally with on-line reputation.

#### IV. THE TRADEMARK THEORY OF IDENTITY: APPLYING TRADEMARK LAW TO ON-LINE REPUTATION

As we have seen, identity in cyberspace is fashioned differently than in real space yet it plays an equally important role in cementing trust and supporting social relationships. Three distinct entities shape that identity: the person described, the creator of the software that measures the identity and the community which does the work of rating and ranking and making use of the information. When we speak of identity, we refer to two distinct phenomena. Identity comprises both representation and reputation. Representation, often now in graphical form, can be highly malleable, and we want to be able to take advantage of the flexibility cyberspace affords to change our appearance and be free of the burdens that physical embodiment imposes in real life. Reputation, however, needs to be persistent. This does not mean we need to tie online identity to the same physical, real world person. Nor do we have to have the same reputation across all our communities online. In cyberspace we can play different roles in myriad social groups. We can spend a few minutes programming for an open source software project, chatting on a political message board, participating in a collaborative wiki drafting project and helping to build a visual map and oral history of a community. The challenge is to create persistence and transparency with regard to our identity within each of these groups in order to strengthen the bonds of trust and promote accountability.

Before we proceed to discuss the application of law to on-line reputation, we must first discuss why profit-seeking firms do not deliver the group interests in reputation. Why do we need law at all? Is not the platform owner like eBay in the best position to safeguard reputation for the community? Does it not possess the requisite incentives? What after all are likely to be the practical problems impeding the successful flourishing of on-line reputation?

The private marketplace offers the software to create feedback and reputation-building mechanisms. In order to foster the trust that promotes commercial transactions, eBay wants to offer a buyer-seller rating system as well as dispute resolution services. In order to promote more book purchases, Amazon wants to use collaborative filtering to create trustworthy recommendations. In order to encourage people to spend time on their platforms, any one of a number of online service providers, such as a videogame producer, will increasingly provide the tools to help groups manage roles through reputation. An incentive exists for the service provider to offer these reputation-building tools.

Missing are the protections necessary to create an incentive for users of these platforms to avail themselves of the tools provided. First, reputation systems, while used by the community, are designed according to the reputational criteria set by the service provider. There needs to be alternative, open and interoperable means for creating reputation according to the criteria of the group. This may require the ability to gain access to data about interactions within user communities in order to enable these sorts of third-party reputation systems. The community needs the data stream about itself in order to measure reputation in the ways that it finds most useful. Perhaps our group does not want to measure reputation based on gaze. Instead, we want to do the work of measuring reputation based on more affirmative criteria that we, not the platform owner, determine. Or we may simply want to use third-party tools to create visualizations or maps based on reputation. This will require having access to data streams that the company has no incentive to provide. Second, we may want to allow our reputation to be portable from one platform to another. I want to allow people into my group on AOL who have a certain eBay or Slashdot rating. We need to ensure that those reputational ratings are not propertized to prevent their portability. Third, we may need to require a right of correction for personal reputation in the online spaces to which we belong. If we accept that there will be automatic and inescapable reputation-tracking from which we cannot opt out, then we must have a right to correct mistakes. This can be a costly and complicated endeavor, which there is no incentive to provide. Finally, we need ways to ensure, for the group, transparency of reputational information.<sup>171</sup> If I am to be accorded a reputational score, I ought to know what the criteria are so I can choose my online spaces based on the way

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171. Randall Stross, *Trying to Get a Read on Amazon's Books*, N.Y. TIMES, Feb. 12, 2006, at B3 (describing shareholder dissatisfaction with Amazon.com's secretive business practices).

reputation is tabulated in that space. One on-line virtual world space, for example, has been reported to have turned over those who behave badly to the FBI.<sup>172</sup> The mechanisms for calculating reputation should be transparent.

These rights in reputation will not be protected by the private sector alone. Companies have every incentive to provide reputation systems but to assert total ownership in them by means of the terms of service contract. Our current legal approach to identity would allow companies to use the end user license agreement to enforce rights in reputation regardless of the interests of the group or the individual being rated.

Trademark theory—combined with the lessons of constitutional, copyright and tort law—gives us an alternative way to make sense of the landscape of online identity. It teaches that we need to be concerned with protecting the rights and interests of the collective in the mark and serving the interests of the group, not only the individual “owner.”

Thinking through the legal incentives for the social construction of identity is a hard and complex task in a dynamic and ever-changing technological environment. But trademark theory gives us a set of principles for managing screen names, handles, avatars, reputation scores, feedback points, and the evolving social software technologies we have yet to develop. Under this approach, we are able to construct two boxes into which to sort these socio-technical artifacts. One box is filled with those things that facilitate only individual selection of identity, including virtual representation. The other box, which this approach illuminates, is filled with those aspects of online life, including social reputation that should be subject to trademark-like strictures that protect the interests of the group.

Let us look back at Colin’s problem and see how the trademark theory of identity would help us in thinking about the two questions posed earlier. If Colin had taken his case to court (with someone else as his lawyer), what should the court have done? How should a judge, if cognizant of trademark principles, have ruled on his two questions: as between Colin and Sony over the sale of his avatar on eBay and as between Colin and eBay over the deletion of his account and reputation points. Another way to ask this is: what rights should any of us have in our avatars and our eBay reputation points?<sup>173</sup>

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172. Second Life is reported to be submitting the names of malicious users to the FBI. *See, e.g.*, Daniel Terdiman, ‘*Second Life*’ Turns Attacker in to FBI, CNET NEWS, Dec. 15, 2005, [http://news.com.com/2061-10797\\_3-5997330.html](http://news.com.com/2061-10797_3-5997330.html).

173. Or how about your Michelin stars? Who controls those—Michelin or the restaurant?



The judge, applying a new common law doctrine of on-line reputation, would have found that Colin, Sony and eBay had each been in the wrong in its prescription for the desired outcome.

Colin was wrong to think that he alone should control the destiny of his avatar. The graphical representation of his character is Colin's creation. Yet it drew from templates offered by the creator of the game. The community played no role in the choice of representation nor did the game limit Colin's ability to change his representation. The appearance of the avatar was mutable and should be. Trust in online environments is not based on physical appearance, which is the sole creation of the individual, not the group and therefore there is no reason to invalidate the terms of service. Colin created the avatar in the context of game play and subject to a contract with Sony Online Entertainment. Sony has a right to impose conditions on its players by contract. That contract prohibited sale—perhaps in part for the purpose of preserving stable identity. Users desiring to join communities that allow avatar sales should find and join them. Colin believed that his avatar belonged only to him with no rights accruing to any other party.<sup>174</sup> But the graphical representation of his character was personal intellectual property subject to ownership by Colin and assignment to Sony.

Under a trademark theory, representation should be easy to change; reputation should not. The individual controls representation while the community controls reputation. Hence, we should stop thinking in terms of “rights of avatars” and focus on rights in reputation. Consider an on-line group whose aim is to stage a protest or organize a movement or sell a product. Within that group, one “person” may be the leader, another the treasurer, a third the manifesto-writer. These are social roles that may be inhabited by the same physical person over time, but different people may also take them on. A speechwriter comes and goes. Someone leaves the group and is replaced by someone else. Four people may share the job of treasurer. What we want to keep consistent is the measure of the reputation

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Apparently, a dispute is brewing in France between restaurateurs and the venerated guidebook. “But while some chefs say that stars no longer matter to them, Michelin says that it alone controls its stars.” Elaine Sciolino, *Whose Stars Are They Anyway?*, N.Y. TIMES, June 15, 2005, at F6.

174. This is reminiscent of the incident on the on-line community, The Well, where a member committed suicide and before doing so wrote a script to delete all evidence of his existence, including every posting or thread ever made. The debate raged after his death whether he had a right to “delete himself” from the community or whether the community had the right to preserve its own history. Katie Hafner, *The Epic Saga of the Well*, WIRED MAGAZINE, May 1997, available at [http://www.wired.com/wired/archive/5.05/ff\\_well\\_pr.html](http://www.wired.com/wired/archive/5.05/ff_well_pr.html); see also the Introduction in HOWARD RHEINGOLD, *VIRTUAL COMMUNITY: HOMESTEADING THE VIRTUAL FRONTIER* (1994), available at <http://www.rheingold.com/vc/book/intro.html>.

of “The Treasurer” over time. We want to track reputation by role. We may also care—such as in the case of online dating—about the identity of the real life person underneath. But in other contexts this is irrelevant.<sup>175</sup> Colin as an eBay seller may, in the real world be “Colin Hepburn,” but it may also be Colin’s mother using his account. That means, Colin should have the right to change or kill the graphical representation of his avatar (subject to conditions imposed on him as a term of service or a rule of the game) but not to extinguish its reputation.

At the same time, Sony was wrong insofar as it disregarded any interest the Everquest community may have had in the reputation that accompanied Colin’s avatar just as eBay could not disregard the interests of its community, as we will discuss. Sony was also misguided to think that its intellectual property rights gave it the right to dictate to another marketplace what its terms and conditions should be. This was incorrect. Sony had the right to create a game where characters could not be transferred. But it did not have the right to dictate rules to the eBay community so as to interfere with the integrity of reputation. The trademark theory of identity suggests that to enable netizens to participate in a variety of groups, we focus on maintaining integrity and persistence within marketplaces and communities, not necessarily across them. While the DMCA gave Sony the legal tool by which to force eBay’s hand, upon review, this practice should be deemed contrary to public policy and detrimental to the right of reputation.

eBay was also wrong insofar as it might have believed that it had the right to terminate Colin’s reputation and feedback points or to vindicate Everquest’s rules (as opposed to violation of its own eBay rules). Taking down the auction was a response to the DMCA but canceling Colin’s account was not. Either way, as a condition of service, it had the right to control Colin’s account but not to delete his reputation. Those feedback points were created by and belonged to the eBay community. It was the creation of that group and served like a trademark as a signal to the eBay community about Colin-as-eBay-member. Since the goal is to create incentives to information sharing about the role someone adopts in a social context, regardless of whether one or one thousand or a computer stands behind that role, eBay cannot terminate reputation created by the group as a result of violating a rule in another community.

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175. See, e.g., Rob Walker, *Double Fantasy*, N.Y. TIMES MAGAZINE, Feb. 5, 2006, at 29 (cyber-athletes receive medals for competitive performance in on-line games though they may be utterly unskilled in real world sport).

Thinking about reputation as trademark also means that eBay must help to ensure persistence of identity. This means that eBay should not only have the right but the obligation to adjust and fix problems with the reputation systems that it sets up. If it controls the technology that controls reputation, it needs to be able to correct and fix mistakes and undo abuses and corruption of the system, where possible. It needs to enforce the rules of its own system. Companies providing the facilities for the creation of social reputation rankings and scores must provide a right of informational redress to remedy errors and correct inaccuracies. Let me propose that we can take a page from the defamation of credit doctrine, which requires the rating agencies to correct problems with credit scores and misreported financial information. We need rules, I would suggest, to administer the preservation, correction and deletion of online identity to prevent abuse. This does not require a central registry. Rather, it means having transparent and clearly defined criteria that produce greater information about the meaning and measure of given forms of identity within defined groups.

If we reason from the perspective of trademark law, neither Everquest nor eBay has an absolute right to extinguish accurate, past informational data that is created by and valuable to the community as a whole without good cause. This is not because on-line identity is like property or like personhood, but because, like trademark, on-line identity serves a social signaling function to reduce confusion and increase the trust that is essential for social interaction. Online identity, while important to us as individuals—we care about our avatars—serves a central *social* function. “Information about the individual helps to define the situation, enabling others to know in advance what he will expect of them and what they may expect of him. Informed in these ways, the others will know how best to act in order to call forth a desired response from him.”<sup>176</sup> The public plays a role in constructing reputational identity. Members of the social groups to which we belong have an overriding interest in seeing it maintained, not to the detriment of our ability to adopt new social roles and voluntarily take on new representations of identity, but to ensure transparency, openness, and consistency.

Even if eBay decides to terminate the real-world-Colin’s contract of service, it needs to preserve online-Colin’s reputation and make that information available. But why, we may ask, does Colin need a reputation score on eBay, if he is no longer a participant in that marketplace? After

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176. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 1 (1959).

all, trademark permits abandonment of a mark. But trademark does not expunge the record or the registry when a mark is abandoned. Other informational systems may rely on online reputation to create a cross-community reputational record. If, as in many communities, accounts can be transferred or sold or given away then we need to maintain information about the reputation associated with that role. That information needs to be interoperable and portable.

While trademark concerns reputation in the marketplace, on-line identity concerns reputation in a potentially unlimited number of social groups in which we are embedded. We may have a different reputation on eBay as a seller than we do in Match.com as a dater. Within each community, there needs to be transparency of rating criteria so that all parties understand the meaning of reputation. I ought to be able to know what it means to have a “5467” on eBay versus 4-stars from Amazon. We need to evolve norms of making the rating criteria of social reputation software transparent.

These rating criteria need to be open and non-proprietary to enable third parties to compare identities across social reputation systems and to develop tools to help make reputation manifest via the screen. No intellectual property rights should be asserted in social reputation software, taxonomies, or metrics in such a way as to prevent a third party from creating a graph of eBay sellers based on reputation. Those providing the facilities and tools for the calculation of social reputation should not be able to assert intellectual property rights in social reputation practices, processes, or methods. Social reputation is a fundamental building block of social interaction and it must be kept free, open and transparent if we are to build a new society online. This will help to encourage the development of more and enhanced visualizations of reputation that help us to understand reputation better via the screen and the growth of third-party reputation trustees.

Finally, the practice of branding and visual representation of corporation identity suggests that we ought to evolve better ways of using the screen to make reputation manifest. This is not the same as a set of rules dictating transparency. Rather, we need a set of design principles—informal norms—that push towards showing reputation on the screen and helping the public to make sense of reputation within communities. At the same time, reputational data streams about interaction and behavior need to be available to members of communities to manipulate in order to make reputation more available, transparent and visible to the group.

Trademark can guide us in thinking about Colin’s problems; problems that are increasingly common as we evolve more social cyberspaces. How

we apply these values in the online reputation context is complicated and will require a far greater degree of attention and understanding of how reputation is formed online. But we now have a set of legal principles by which to understand social interaction in these socio-technical environments. The trademark theory of reputation enables us to make social trust a normative goal once again by giving us the right interpretive approaches for strengthening identity in online communities.

#### V. CONCLUSION: WHY ON-LINE IDENTITY MATTERS

There is a lot at stake in getting the rules of on-line identity right. Social interaction depends on the development of ongoing relationships of trust.<sup>177</sup> Trust is formed through iterative interaction that gives rise to shared values and norms.<sup>178</sup> Identity—specifically reputation<sup>179</sup>—is a marker of this trust. We do not need to know people in the sense of having their street address or a legal name, but we do need to have settled expectations about those with whom we are dealing and what role they play in the social network of which we are a part in order for us to engage in productive interaction. Solving the challenge of identity in cyberspace is part of the larger question of addressing how we create trust without face-to-face interactions.<sup>180</sup> While identity is also central to the disciplinary inquiries of philosophy, psychology and literature, the legal dimension of identity is focused on ensuring that the rules of identity help to promote the trust that is at the root of stable and peaceful social interaction.

Strengthening online identity is central, not simply to the stories we tell about ourselves, but to the stories we tell about each other. This does not imply a normative shift to a communitarian view of how identity is constructed for us by others or an abandonment of liberal notions of free will in choosing our identities. To the contrary, cyberspace permits greater

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177. See Socialphysics.org, <http://socialphysics.org>.

178. See Noveck, *supra* note 10.

179. See Post, *supra* note 24, at 692–93 (“The common law, as a rule, has ‘not attempted to define reputation.’ The dictionary describes it as the ‘common or general estimate of a person with respect to character or other qualities.’ Reputation thus inheres in the social apprehension that we have of each other. In one sense, of course, virtually all of our social relationships consist of such apprehension, and it is not clear what it would mean for them all to be ‘protected’ by defamation law. But by looking carefully at the nature of the ‘injuries affecting a man’s reputation or good name’ defamation law is actually designed to redress, one can uncover a more focused image of the exact kinds of social apprehension that defamation law considers ‘normal,’ or ‘desirable,’ or deserving of the law’s protection. In this sense defamation law presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, so will the nature of the reputation that the law of defamation seeks to protect.”) (citation omitted).

180. See Keltz, *supra* note 149, at 128.

freedom in the voluntary assumption of identity at the same time as it involves the relevant public in “thickening” our identity with reputation and making it useful and meaningful for social interaction. It is the group or the community—not unlike a rating agency offline—that creates reputation.<sup>181</sup> Hence my concern is not with the human psychology and philosophy of identity as it impacts us as individuals. Rather, my approach to identity recognizes the way technology is changing how we engage in social interactions and the role the law must play as a mediating institution in fostering the trust necessary for robust social interchange and collective action. Naturally, this has salutary individual effects on personal autonomy and freedom. But, and I cannot stress this enough, strengthening reputation helps us to be more effective<sup>182</sup> in groups and to create and maintain the kind of purposive groups that cyberspace might allow.

The legal doctrine of on-line reputation should focus, not on individual property rights in identity, but on creating the necessary incentives for healthy and useful reputation systems that promote social trust. We need to recognize the work of the group and the interest of the group in these collective measures of reputation that force more information out into the open. In much the same way as we rely on professional groups to certify the reputations of their professionals—experts in a given social context—we rely increasingly on ranking, rating and reputation offered by communities in myriad online communities. We want to promote the kind of self-regulatory yet transparent mechanisms that these groups use to determine reputation based on merit, rather than for example, race or social standing that are irrelevant to determinations of identity within that social context.

This is where trademark doctrine comes into play. Unlike other doctrinal approaches that focus on who “owns” identity, trademark offers to help us determine who has the right to do what with collectively created ascriptions of reputation in online communities. Again, this is not to focus

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181. See Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 1009 (1989) (“Rule found that attempts to limit the access of such organizations to personal information in the name of privacy were invariably transformed into requirements that such organizations ensure the accuracy and instrumentally appropriate use of such information. This transformation ultimately rested on the unimpeachable assumption that organizations could reach better, more precise decisions with greater information, and on the more questionable assumption that ‘both organizations and individuals shared an interest in [this] enhanced efficiency.’”) (citing JAMES B. RULE ET AL., *THE POLITICS OF PRIVACY* (1980)).

182. See Masum & Zhang, *supra* note 26. Better reputation systems will help with assessing and filtering content, finding others who share a passion, generating local and global reputation to provide feedback that encourages increasing competence levels and in motivating the development of our leisure tastes to move beyond passive consumption to actively broadening our horizons. *Id.*

on the trademark as property but on the way, as Steven Wilf has argued, that trademark mediates between the interests of the creator of the mark and the public which depends upon its signaling properties. This requires establishing a legal framework for greater transparency of on-line identity and social reputation metrics, preventing the monopolization of these metrics through intellectual property law and limiting the rights of any one party to extinguish reputational records while ensuring the flexibility and malleability of representation in online spaces. While we have genuine legal concerns in certain contexts about piercing the veil between on-line and off-line identity, these concerns cannot constitute the right legal framework to make on-line identity meaningful and robust. If I want a loosely-knit group to be able to accomplish a project, achieve a goal, or open a bank account<sup>183</sup> by collaborating, I have to be able to divvy up roles within the group. In order to define expectations for social interaction online, identity must not be subject to the whim of private entities and a contractual rule that says past reputational data can be erased at any point. Hence, we need to protect reputation of online identity differently than we have thus far treated representation.

As more of our lives move on-line<sup>184</sup> and we develop significant emotional attachments in these social spaces,<sup>185</sup> it is inevitable that we need to reconsider who we are and who we want to be in these new metaverses. Arguably, we want to increase human autonomy by making it easier to assume identity independent of our offline identity. We also want to accord ourselves greater flexibility in assuming the social roles necessary to engage in cooperative work. Strengthening identity builds trust and enables collective action and sociability.

While we are in the process of developing the technical architecture and tools to support persistent identity in cyberspace,<sup>186</sup> we need, in

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183. See generally Noveck & Johnson, *supra* note 63.

184. See Susan Kuchinskas, *Earth to Virtual Earth*, INTERNETNEWS.COM, May 24, 2005, <http://www.internetnews.com/xSP/article.php/3507236> (regarding a recent MSN project about “deeply immersive” data searching tied to location, in which “[u]sers will be able to map a particular location and then search local listings for businesses nearby. Eventually, according to the demonstration, they’ll be able to click on a listing and get more information about the business.”).

185. See Balkin, *supra* note 103, at 74 (“Although leaving the virtual community for a new one or creating a new identity are technically available options, they may not be a sufficient remedy if people invest a great deal of time and energy in creating their in-world personas, and highly value their participation in the virtual community. In general, the more important that virtual worlds become to people, and the more time and effort they invest in them, the more likely the law will take seriously injuries to their in world reputation as well as their in world possessions.”).

186. See John Clippinger’s project on social physics at the The Berkman Center for Internet & Society at Harvard Law School, The Social Physics Project, <http://socialphysics.org/> (last visited July 11, 2005).

parallel, to create the right legal framework. If we do not solve the problem of how to treat on-line identity from a legal standpoint, we cannot take advantage of the software's potential to create digital institutions.<sup>187</sup> While in real space, we turn to legal institutions, such as courts, mediators, corporate structures, and other vehicles to create the necessary infrastructure to manage social relations, the hope is that in cyberspace we can make it simpler, cheaper, and more efficient for people to engage in collective action across a distance. This requires us to support newly emerging social software<sup>188</sup> with the appropriate legal rules that establish clear rights in on-line identity. Without a law of identity appropriate to the new material and technological environment in which we live, we impede our ability to use the screen to create social groups and foster the means for collective action.

If I am not for myself, who will be for me? Yet, identity especially online, is not purely an individual construct. It is inherently the work of the group. If I am only for myself, what am I? Instead, we can collectively and collaboratively assume roles within different social contexts. I can be a buyer here and a seller there. I am a CEO in one group and a worker in another group. Here I contribute information. There I critique others. We have the technology, now we just need the legal framework to realize opportunities for creating rich forms of identity and transforming cyberspace from a place for me into a place for us. If not now, when?<sup>189</sup>

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187. See Chrysanthos Dellarocas, *Analyzing the Economic Efficiency of eBay-Like Online Reputation Reporting Mechanisms* (MIT Sloan Sch. of Mgmt., Working Paper No. 4181-01, 2001), available at <http://ssrn.com/abstract=289968>, ("The production of trust is an important requirement for forming and growing open online trading communities.").

188. See SUSAN P. CRAWFORD & DAVID R. JOHNSON, *ESSAYS ON NETIZENSHIP* (work in progress, on file with author); Noveck & Johnson, *supra* note 63.

189. "If I am not for myself, who will be for me; if I am only for myself, what am I; if not now when?" This famous aphorism is generally attributed to Hillel, the Jewish sage and contemporary of Jesus.