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Advertising in the Garden of Eden

MARK BARTHOLOMEW†

Sometimes towards Eden which now in his view
Lay pleasant, his grieved look he fixes sad,
Sometimes towards heav'n and the full-blazing sun,
Which now sat high in his meridian tower:
Then much revolving, thus in sighs began.¹

Global warming. Terrorist threats. Skyrocketing energy costs. Urban crime. School shootings. At times the problems of today’s civilization seem insurmountable. Luckily, there is a new option: Go somewhere else. Leave the real world behind and voyage to a virtual world where pollution is non-existent, wars are bloodless, and if people want to travel somewhere, they can teleport or fly.

Millions of people each day do just this by logging into “massively multiplayer” online games that allow them to inhabit virtual spaces, acquire virtual property, and form lasting relationships with other virtual beings. Denizens of the virtual world speak of it in glowing terms as do cultural commentators enamored by its possibilities. It has been referred to as a “state of nature”² and a new “Eden.”³ One

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virtual world describes itself as taking place "in a cluster of stars far from mankind's original habitat." With names like "Second Life," "Eve Online," and "EverQuest," the virtual worlds promise prospective users a mechanism for shedding real world restraints. Users can exchange their earthbound lives for a new persona. Virtual worlds are an opportunity to build a new life, to experiment, and to leave the restrictions and prejudices of the real world behind.

But the real world is never far away. Madison Avenue has discovered virtual worlds, rushing in to capture space in one of the few unregulated and untapped arenas for commercial exploitation left. Marketers are beginning to use virtual billboards to publicize their wares, virtual stores to sell their products, and computer programs to gather valuable market research by eavesdropping on the online chats of virtual participants. Specialized advertising agencies exist that cater exclusively to businesses advertising in virtual worlds. The stakes are high: advertising expenditures in virtual worlds are expected to hit $875 million in 2009.

The intrusion of advertisers has upset some in the virtual community. There is a feeling that advertising has led to social ills in the real world, and that virtual participants are entitled to a fresh start without commercial culture's deleterious effects. Already, there have been clashes between advertisers and virtual world inhabitants. In-world terrorist groups have been formed to take dramatic action to force the advertisers out.

Of course, virtual voices are not the only ones arguing

beginning, Philip Rosedale created a virtual heaven and a digital earth, and then he said 'let there be "Second Life."'"


that modern advertising harms society. Social science literature indicates that advertising leads to materialistic goals that are at odds with psychic well-being.\textsuperscript{8} There is widespread support for restrictions on advertising to young children who cannot recognize the persuasive intent of commercial appeals.\textsuperscript{9} Advertisers have been criticized for reinforcing gender and racial stereotypes.\textsuperscript{10} And most of all, modern advertising’s omnipresence threatens privacy and raises questions as to whether its net effect is a reduction in the quality of life.\textsuperscript{11}

According to those who predict the future, advertising’s deleterious impact will grow in the decades to come. In the movie \textit{Minority Report}, director Steven Spielberg presented a vision of the future not that far off where advertising incessantly stalks prospective consumers.\textsuperscript{12} Desperate to escape detection, Tom Cruise’s character cannot avoid being verbally and visually accosted by interactive ads for Guinness, Lexus, and American Express that use retinal scan technology to individually target their appeals. In \textit{Neuromancer}, William Gibson’s futuristic novel that popularized the term “cyberspace,” luxury brand names like Gucci and Hermes continue to dominate the popular consciousness, and multinational corporations have usurped the traditional role of the nation-state.\textsuperscript{13} In Gibson’s vision of the future, outdoor markets contain thousands of advertisements that writhe and flicker.\textsuperscript{14} The


\textsuperscript{12} \textit{MINORITY REPORT} (DreamWorks Pictures 2002). The motion picture was based on a Philip K. Dick novel of the same name.

\textsuperscript{13} William Gibson, \textit{Neuromancer} 119, 184 (2004).

\textsuperscript{14} Id.
message of these works is clear: in the future, personal privacy has been sacrificed for “progress.” Although the advertisements featured in Minority Report and Neuromancer are not objectively false or misleading, we are uncomfortable with their insistent presence.

These works capture a fatalist attitude towards advertising that has been around for years. In contrast to other recognized social ills, it is assumed that the problem of intrusive advertising cannot be solved. When billboards began to blot the natural landscape, regulatory and adjudicative bodies recognized their intrusive effect yet balked at granting injunctive relief because this new advertising was seen as “an inevitable part of modern business methods.”

Sixty years ago, Judge Learned Hand described advertising as a growing and unstoppable force with unquestionably harmful effects. “[T]he art of publicity is a black art,” he said, “but it has come to stay, every year adds to its potency and to the finality of its judgments.” Hand resigned himself to a world filled with more and more advertising: “The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country; whether we like it or not, we must learn to accept it.”

This Essay maintains that this fatalism towards the spread of advertising is misplaced in the new context of virtual life. Something will be lost if advertisers have the same freedom to set up shop in the virtual world that they did in the real world at the beginning of the twentieth century. The creativity and spontaneity that attracts many to virtual worlds does not mix well with the standardization implied by mass advertising. But advertisers and virtual world developers will not restrict advertising on their own initiative. Instead, the goal of this Essay is to give virtual world participants a reason to demand change. Part I of the Essay offers a description of the history and functioning of

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15. Section 43(a) of the Lanham Act includes a specific prohibition on “false or misleading” advertising. 15 U.S.C. § 1125(a) (2000).
18. Id. at xv.
19. Id.
virtual worlds, including their use for commercial effect. Part II lists the three functional components present in all advertising—information, persuasion, and personal expression—and assesses their social utility. The Essay then takes these components and maps them onto the virtual world. The comparison reveals that there are key differences between real life and virtual life that suggest a revised role for advertising. Part III concludes the Essay by contending that the best way to begin to recalibrate advertising in virtual worlds is to establish zones of exclusion where all advertising is prohibited.

I. DESCRIPTION OF VIRTUAL WORLDS AND VIRTUAL COMMERCE

Although a recent phenomenon, virtual worlds trace their origin to text-based multi-user games first developed nearly thirty years ago. A virtual world has three central characteristics. First, the world must be interactive. To be interactive, multiple participants must be able to occupy the same space and execution of a command by one participant can affect other participants. In the late 1970s, computer programmers developed "dungeons"—textual databases that allowed users to navigate a world of orcs, dragons, and treasure akin to the Dungeons & Dragons role-playing game. In the dungeons, multiple players could exist in the same textual space and interact—a major social and technological innovation. Today's virtual worlds like Second Life and The Sims Online have taken the interactive nature of the dungeons to another level, allowing online participants to see each other, chat with each other, and even engage in cybersex.

Second, the world must simulate a first person physical environment. In the 1990s, the dungeons evolved from text to rich graphic environments. It became possible to become lost in one's computer screen and momentarily believe that you were actually navigating a separate

21. Id. at 6.
22. Id.
physical world. Today's virtual worlds bear a striking resemblance to real life. Participants traverse the virtual world via “avatars”—a graphical image usually resembling a real human being. Avatars can be customized to the user's taste on all sorts of metrics—gender, body shape, skin color, choice of clothing, hair length and color, etc. Avatars are designed for social interaction; their physical realism breaks down the barrier between the real and virtual world that existed back in the days of the text-based dungeons. Avatars converse with other avatars through textual chat windows or audio links, and they can respond to and offer their own visual cues, just like face-to-face interaction in the real world.

Third, to be considered a virtual world, the online environment must be persistent. In other words, even after the user turns off her computer and goes to bed, the program for the world continues to run, allowing other players to manipulate the environment. Persistence offers the possibility of participating in something more than a computer game. Instead, with an environment that mirrors real existence, participants can accumulate possessions and form lasting relationships with the comfort (and responsibility) of knowing that their actions in the virtual world have lasting consequences. As technology has made interactive, realistic, and persistent online systems feasible, programmers have developed environments that closely resemble actual life. Virtual worlds have been created that serve strictly as avatar social hubs. In the 1990s, the designer of LambdaMOO created a utopian environment where participants could spend their time recreating and conversing instead of trying to kill monsters to win a game. In Second Life, participants build virtual houses, buy virtual clothes, attend virtual concerts, and sit in virtual coffeehouses just as they would in Los Angeles or Beijing. Similar activities take place in other virtual worlds such as There, Entropia Universe, Active Worlds, Dotsoul Cyberpark, and Kaneva.

Virtual world participants spend an incredible amount of time and energy on their avatars and their virtual surroundings. Over three million people have joined Second
A lucrative market exists for the buying and selling of property on Second Life and the currency of that virtual world, Linden dollars, is exchangeable for American dollars and other hard currency. Monthly membership fees and commissions on exchanges of real world and virtual currency pump over one million dollars each month into the coffers of Linden Labs, the San Francisco firm that launched Second Life. The virtual world World of Warcraft is even bigger and more lucrative with seven million subscribers. According to one estimate, the market for online electronic games will surge to $13 billion by 2011. Thousands report spending over sixty hours a week in their virtual worlds.

Not unexpectedly, corporate enterprises are alert to the economic potential of virtual worlds and are trying to establish a virtual beachhead to sell their real world products. Nike and Reebok have established sales and marketing arms in Second Life. Wells Fargo has created its own island in Second Life where avatars can drop in and learn about personal finance. Intel and McDonald's advertise their products within The Sims Online virtual world. Media companies like Reuters, CNET Networks, and the BBC have established virtual corporate headquarters to promote their real world brands. Kraft is paying to advertise its products in a virtual world supermarket. The Starwood Hotel Chain has opened a virtual hotel to promote and conduct market research for its terrestrial lodgings.

25. See id. at 43.
27. Id. at 77.
32. Reena Jana, Starwood Hotels Explore Second Life First, BUS. WK.
Meanwhile, capitalist opportunities exist in the virtual world for the selling of virtual products. Nissan and Toyota are currently giving away virtual vehicles, but could potentially charge a fee for them in the future. One avatar in Second Life has created a network of advertising billboards that can be used, for a price, to display images of virtual creations. Around 130 clothing designers sell their virtual wares in Second Life. Some virtual worlds charge a fixed monthly fee to own virtual undeveloped land, but thriving markets exist for developed land as well. Not all of these early forays into virtual world advertising have succeeded. Nevertheless, businesses continue to devote more and more resources to reaching virtual consumers.

Naturally, with all of these commercial transactions going on, there is a desire to use advertising to further stimulate demand. The question is how advertising should be regulated in Second Life and the other virtual worlds. Should there be no restrictions on advertising, limiting control only to the virtual market's invisible hand? Or should there be limits on the ability of advertisers to communicate to prospective customers? To answer these questions, it is necessary to assess what advertising's real purposes are and how those purposes track the goals and capabilities of virtual life.

II. ADVERTISING'S THREE PURPOSES

Sixty years ago, intellectual property scholar Ralph Brown suggested that every successful advertising symbol has two functional components. The first is informational. Online, Aug. 23, 2006, http://www.businessweek.com/innovate/content/aug2006/id20060823_925270.htm.


37. Id. at 1168.
A trademark indicates the source of the goods being sold while other parts of the advertisement communicate other information such as price, composition, and location. The second is persuasive. All advertising attempts to persuade consumers to purchase. In fact, via appeals to emotion, advertising often does this without offering the potential consumer much in the way of information—just think of television commercials for pharmaceuticals that often offer no information as to the actual ailments that the drug is supposed to remedy.

In addition to informing and persuading, advertising has a third function not discussed by Brown. Commercial entreaties may also be valuable for their own aesthetic qualities regardless of the information they convey or their persuasive impact. A prospective consumer may like the way an advertisement looks, yet have no intention of buying the product depicted. In addition, advertisers may value their own creations not only for their ability to reach consumers but because they serve as a mechanism for their own expression. Thus, regardless of the advertisement's ability to inform or persuade the consumer, the advertiser's work may have expressive value just as a painting has value to an artist or a song has value to a composer. In order to determine the success of the law of advertising, we must look at these three functions—informational, persuasive, and personally expressive—as implemented by today's commercial interests and make some judgments as to their social utility.

A. Advertising's Informational Function

A successful advertisement indicates the source of the goods being sold. For trademark infringement law, one species of advertising regulation, indication of source is the only legally cognizable function of advertising. When the wrapper on our hamburger reads MCDONALD'S, we realize that the McDonald's Corporation is the source of our meal.

38. Id. at 1169.

39. See Michael S. Wilkes, Robert A. Bell & Richard L. Kravitz, Direct-To-Consumer Prescription Drug Advertising: Trends, Impact, and Implications, 19 HEALTH AFF. 110, 114 (2000) (describing pharmaceutical advertisements that "provide the name of the drug and other minimal information but say nothing about the drug's use, effectiveness, or safety").
Trademark law protects the McDonald’s Corporation from competitors who might use the word McDONALD’S on their own products in an effort to lure away customers.

Bound up with the source identifying function of advertising is the reputation of that source. Advertising is designed to reinforce a bond between the consumer and the product’s source of origin. The McDONALD’S mark is meant to conjure up a lifetime of experiences between the McDonald’s Corporation and the prospective consumer. By viewing the trade name on the outside of the restaurant and on the packaging of her food, the consumer links her most recent eating experience with the McDonald’s Corporation. This experience will provide an additional sample of data that will either reinforce or undermine the consumer’s view of McDonald’s as a supplier of quality food. This collection of data will be tainted if someone else is allowed to use the McDONALD’S mark in a misleading manner so that the consumer is unaware that she is receiving a product from a different source than the McDonald’s Corporation.

Both of these aspects of trademark use—the indication of source and the mark’s facility in allowing the consumer to add a current experience with the mark to prior experiences—are encompassed within the informational purpose of advertising. Advertising imparts worthwhile information to the consumer. It may include additional messages as to price, composition, location, or availability. But these messages are really secondary as compared to the message of the product’s origin. A trademark allows the consumer to easily associate informational messages with a single branded item and avoid confusion as to other similar products.

It might be argued that consumers often could care less about a product’s source of origin. In the modern age, we frequently purchase goods bearing a particular mark without knowing the manufacturer’s identity. Loving parents seek out HUGGIES brand diapers, but are unconcerned and unaware that this brand of diaper is made by the Kimberly Clark Corporation. Mass production and corporate consolidation have lengthened the distance between consumer perception and product origin. As a result, the law has adjusted to expand the protected role of a trademark. Today’s advertising law does more than prohibit the use of another’s brand that leads to confusion
as to the specific manufacturer of the original product. It also protects against the use of another's brand that confounds the consumer's expectation that the brand will come from the same source as earlier purchases, even if that source is unknown.\textsuperscript{40} For example, the Seventh Circuit Court of Appeals concluded that an unlicensed manufacturer of a toy car that resembled the "General Lee" from the Dukes of Hazzard television show was guilty of trademark infringement.\textsuperscript{41} For the court, it did not matter that most children could not identify Warner Brothers as the creator and owner of the Dukes of Hazzard program.\textsuperscript{42} What mattered was that children associated the "General Lee" with the television series sponsored by Warner Brothers, even though they did not know the name "Warner Brothers" and Warner Brothers did not manufacture toy cars.\textsuperscript{43}

The information function of advertising is socially desirable. In a complex society where production is no longer localized, advertising is essential for free traffic in goods and services. Advertising reduces consumer search costs by providing a way to identify products and product providers in the marketplace. Without advertising, it would be difficult for consumers to find out what is offered for sale and where it can be obtained. The dissemination of commercial information leads to increased buyer competence. A more informed consuming public creates more efficient markets and better products through increased competition.\textsuperscript{44}

In virtual worlds, advertising serves the same informational purpose. Those offering goods or services inform buyer-avatars of the items they have for sale and how to obtain them. Advertising lets virtual consumers know what their options are. It incentivizes product quality and competition by giving manufacturers the reputational

\textsuperscript{40} See Graeme B. Dinwoodie & Mark D. Janis, Trademarks and Unfair Competition: Law and Policy 459 (2004) (discussing Congress's decision to amend the Lanham Act to remove reference to "source of origin" in stating the cause of action for trademark infringement).

\textsuperscript{41} Processed Plastic Co. v. Warner Commc'ns, Inc., 675 F.2d 852 (7th Cir. 1982).

\textsuperscript{42} See id. at 856.

\textsuperscript{43} Id.

benefits that come from matching the positive
coloristics of an item with its source of origin. For
example, a designer of dresses for female avatars wants to
let virtual world inhabitants know about the availability of
her designs. She thinks of a catchy brand name, COTTON
CANDY, to publicize and develop a market for her
product.45 Virtual consumers would have difficulty
spreading word of the designer’s wares to others unless
they could point to advertisements using the COTTON
CANDY name and describing how to reach the designer.
The designer would have little incentive to continue to
develop quality virtual merchandise if people could not
relate their prior positive experiences with her clothes to
her through her advertisements and brand name.

Some would argue that advertising is even more
beneficial in the virtual world than in the real world
because it offers limitless resources for information-hungry
consumers. The problem in the real world, it is argued, is
that consumers often make purchasing decisions based on
incomplete information. There is only so much information
that can be conveyed in a magazine ad or a thirty second
television commercial. In contrast, online shoppers can
often access all the information they could want on a
product. When evaluating a purchasing decision over the
Internet, consumers have the ability to link to page after
page of information on the advertised product. As in other
online contexts, in virtual worlds the physical barriers that
prevent full exposure to product information have been
removed. For example, whereas in the real world an
automobile test drive requires a time consuming journey to
a car dealership over surface streets, in virtual life a
consumer can simply “teleport” to a location selling virtual
cars. Thus, a consumer could comparison shop by test
driving hundreds of virtual cars in one day. Moreover, if the
consumer wants to view product specifications, prices, or
reviews of a car by other virtual users, the Internet allows
that information to be retrieved in an instant. As a result,
thanks to advertising, virtual shoppers will make more
informed and better purchasing decisions.

45. COTTON CANDY is the name of a brand of women’s clothing in the
virtual world There. The Candy Shoppe: Cotton Candy’s Designs for the
The problem with this argument is that cognitive barriers to processing product information continue to exist in virtual life. The availability of additional product information, even if at our fingertips, will do little to improve the quality of consumer decision-making. Instead, as decision complexity increases, we tend to use less of the information available to us and rely on mental shortcuts and emotional urges to make our decision.\textsuperscript{46} Purchases are most often made via affective decision-making—gut-level, emotional responses based on familiarity with a particular brand. A great deal of cognitive effort is required to overcome the pull of affective decision-making. Studies show an emotional response to an advertised item will be resisted only when the information necessary to make an informed decision is readily available and if the individual consumer is equipped with the cognitive ability and time to decipher the information.\textsuperscript{47} Meeting all of these conditions is unlikely in most situations.\textsuperscript{48} Consumers are harried and time pressured in their real lives. They are unlikely to have more time to devote to rigorous product analysis in the virtual world. Our avatars will be just as hapless when confronted with an array of product information as our real world selves.

Moreover, there is a greater danger of information scarcity in virtual worlds than in real life. In real life, consumers benefit from competition between advertisers. Shoppers, even if they are not always capable of making the best use of it, like to feel that they are being presented with sufficient information to make an informed decision.\textsuperscript{49} They

\textsuperscript{46} See generally Paul Henry, \textit{Is the Internet Empowering Consumers to Make Better Decisions, or Strengthening Marketers’ Potential to Persuade?}, in \textit{ONLINE CONSUMER PSYCHOLOGY} 345 (Curtis P. Hau gtvedt et al. eds., 2005).

\textsuperscript{47} Vincent-Wayne Mitchell et al., \textit{Towards a Conceptual Model of Consumer Confusion}, 32 \textit{ADVANCES IN CONSUMER RES.} 143, 147 (2005); see also J.L. Zaichkowsky, \textit{THE PSYCHOLOGY BEHIND TRADEMARK INFRINGEMENT AND COUNTERFEITING} 132 (2006) (stating that research shows “fairly conclusively” that most consumers are unable to process the information in product disclaimers, at least under normal environmental circumstances).

\textsuperscript{48} See Henry, \textit{supra} note 46 (discussing how the vast resources of the Internet will not create more informed purchasing decisions because consumers are already suffering from informational overload).

\textsuperscript{49} See Mitchell et al., \textit{supra} note 47, at 148 (“Irrespective of cognitive abilities, consumers tend to feel better prepared for purchase decisions with a greater amount of information.”).
demand the appearance of information. As a result, an advertiser that overly restricts the supply of data to consumers will be punished with reduced sales. The competitive marketplace in advertising at least promotes enough disclosure to satisfy consumer perceptions even if consumers do not always use this information to make the best decisions. Such disclosures can be used by regulatory authorities to prosecute those advertisers that provide false or misleading information to consumers.

In some virtual worlds, however, the competition between advertisers may be stunted. In virtual arenas like Second Life, advertising is largely unregulated and if left unchecked may grow to resemble the real life market for advertising. But in other virtual worlds, the advertising market is heavily controlled. The game designer can specify the amount and content of advertising in her virtual world. The game designer may conclude that only certain advertisers for certain products will be allowed entrance. One advertiser may be granted the exclusive right to a particular market.\(^5\) As a result, advertisers may feel free to restrict information, knowing that that world's avatars will not be able to purchase from another advertiser that offers more information. Thus, the information provided in virtual world advertising will be no better than that provided in the advertising we experience today and in some virtual worlds it could be worse. While the informational aspect may justify some forms of advertising in general, the information argument for advertising is no stronger in Second Life than it is in real life.

B. Advertising's Persuasive Function

Of course, if the provision of accurate information was the only function of advertising, today's commercials would

\(^5\) Although not specifically related to advertising, a good example of such strategic behavior by a game designer occurred when Sony Online Entertainment acted to shut down the trading of avatars and virtual objects for its virtual world EverQuest. Sony worked with internet auction sites like eBay to prohibit the sale of virtual items outside of the virtual world. Subsequently, Sony established a monopoly by creating its own auction site, the only one to permit EverQuest participants to use real world money to purchase virtual currency and property. For a description of Sony's actions, see Viktor Mayer-Schönberger & John Crowley, Napster's Second Life?: The Regulatory Challenges of Virtual Worlds, 100 NW. U. L. REV. 1775, 1787-89 (2006).
look a lot different. Almost all advertising does more than merely provide information as to a product's source of origin, its cost, or its composition. Advertising's primary concern is persuasion (i.e., giving the consumer an emotional, non-factual reason for buying the proffered product).

Advertising changed in the late 1800s to reflect the dominance of the persuasive function. In prior times, advertisements focused on the information function. They were small, simple, and unillustrated, relying on repetition and large type-face to attract viewers. Communication of basic information as to the location of the product and the product's composition was the primary goal. By 1900, printed advertisements were completely different. Instead of columns and uniform type, ad men used artistic flourishes and lavish detail to present their message of consumption. At the same time, advertisers introduced emotional missives into their work, eschewing customary recitations of location and price. Instead, the advertisements at the turn of the century appealed to anxieties over social advancement, mortality, and gender roles to convince would-be purchasers to buy.

If the informational component of advertising has been praised for its social utility, the persuasive component has been judged by some to lead to "economic waste" and "distortion of consumer choice." Brown attacked persuasive advertising as generating market inefficiencies. In his view, instead of leading to economies of scale and reduced prices, persuasive advertising keeps markets differentiated that do not need to be differentiated and prices artificially high. Others agreed. Brown proposed altering trademark law to protect advertising's informational value while curbing advertising's persuasive function.

52. See LORI ANNE LOEB, CONSUMING ANGELS: ADVERTISING AND VICTORIAN WOMEN 7 (1994).
54. E.g., John Kozyris, Advertising Intrusion: Assault on the Senses, Trespass on the Mind—A Remedy Through Separation, 36 OHIO ST. L.J. 299, 300 (1975) ("There is also little doubt that advertising as such constitutes a cost of distribution eventually borne by the consumer and, in the view of the critics, this cost is mostly a waste.").
Various arguments exist for legitimating advertising's persuasive function. One argument is that purchasers recognize persuasive appeals as mere "puffery," and that they do not actually lead to false impressions.\textsuperscript{55} In accordance with this view, legal doctrine carves out statements of opinion and puffery as outside the bounds of false advertising law and immune from regulation. There is little doubt that persuasive advertising works, however. It seems unlikely that companies would spend billions of dollars on a type of advertising that was ineffective. Recent findings in cognitive psychology demonstrate that irrational, subconscious forces guide our decision-making processes more than ever thought.\textsuperscript{56} Even when we do our best to rationally process a decision to purchase, we remain slaves to emotion. The suggestion that we are immune to advertising "puffery" is wishful thinking.\textsuperscript{57}

Others argue that persuasive advertising provides a valuable informational signal to consumers. Only successful businesses can afford advertising, the argument goes. Thus, by bearing witness to a persuasive advertisement, a consumer receives evidence that the product being advertised is already popular and widely used, suggesting that the product is of good quality and, therefore, worthy of

\begin{itemize}
\item \textsuperscript{56} See John A. Bargh, \textit{The Automaticity of Everyday Life}, in \textit{The Automaticity of Everyday Life} 1, 47 (Robert S. Wyer, Jr. ed., 1997) (stating that the recent research demonstrates that "behavioral and cognitive goals can be directly activated by the environment without conscious choice or awareness of the activation"); Melissa J. Ferguson & John A. Bargh, \textit{How Social Perception Can Automatically Influence Behavior}, 8 \textit{Trends in Cognitive Sci.} 33, 34 (2004) ("Until recently, it has been largely assumed that although judgments and feelings can be shaped by factors outside of people's awareness, complex social behavior is determined by people's conscious and deliberately made choices.").
\item \textsuperscript{57} Advertisers are fully aware of our subconscious reliance on persuasive appeals. \textit{E.g.}, Gerald Zaltman, \textit{How Consumers Think: Essential Insights into the Mind of the Market} 9 (2003) ("In actuality, consumers have far less access to their own mental activities than marketers give them credit for."); see also Stuart Elliot, \textit{Colts and Bears and Kevin Federline: The New Rules of Super Bowl Selling Demand a Longer Shelf Life}, N.Y. Times, Feb. 2, 2007, at C1 (reporting that one marketing research firm teamed up with the Ahmanson Lovelace Brain Mapping Center at the University of California, Los Angeles, to gather brain scan images of viewers as they watch Super Bowl commercials to measure their emotional reactions).
\end{itemize}
purchase. In other words, even persuasive advertising is really informational. 58

There are multiple problems with this theory. First, advertising is not necessarily limited only to well-established products. A manufacturer may decide to make a bet on a splashy advertising campaign to get noticed. Thus, a newcomer without any popular following or reputation for quality may be inspired to use emotional advertising to gain entry into the marketplace. Second, even if consumers used persuasive advertising as a proxy for market share, that would not be enough to justify its existence. Persuasive advertising can act in a fundamentally uncompetitive manner by locking in consumer preferences even as a manufacturer's quality declines. Once a brand name has received a positive valence in our subconscious upon initial viewing, later contrary information will usually be insufficient to alter that initial response. 59 Advertising has to correlate with product quality before it becomes socially valuable.

Others argue that persuasive appeals can lead to beneficial social engineering and cite examples of advertising being yoked to civic reform. For example, persuasive advertising techniques created the mass demand necessary to sell government bonds in World War I. 60 Public service announcements have been used to change American health habits for the better. 61 The problem is that most persuasive advertising is linked to increased market share, not the improvement of society. It takes a national effort like a war or a recognized public health hazard to channel the advertising industry's persuasive skills into a non-profit

58. See Elizabeth Mensch & Alan Freeman, Efficiency and Image: Advertising as an Antitrust Issue, 1990 DUKE L.J. 321, 352 (noting the "conservative ploy" of "treat[ing] all advertising as information, which enhances consumer satisfaction by reducing search costs").


The justifications for persuasive advertising become even more tenuous in the virtual world. There is a fundamental tension between advertising's focus on the individual and the social norms of online communities. Online realms like Second Life are created for collaboration. People flock to these worlds for the purpose of interacting with others, not for focusing inward. Second Life's promotional materials emphasize the virtual world's potential for creating social capital:

Within your first hour, you'll notice that several residents approach you and introduce themselves – Second Lifers are eager to welcome you and show you around.

Within this vibrant society of people, it's easy to find people with similar interests to you. Once you meet people you like, you find it's easy to communicate and stay in touch.

At any time there are dozens of events where you can party at nightclubs, attend fashion shows and art openings or just play games.

Residents also form groups ranging from neighborhood associations to fans of Sci Fi Movies.

Similarly, the virtual world There "is targeted primarily to those interested in hanging out and chatting with friends."

In contrast to the social interaction promised by virtual life, persuasive advertising offers a one-sided experience. Consumers receive advertisers' messages passively with little opportunity for dialogue or comment. Moreover, commercial messages typically communicate individualistic values, rather than the community-oriented ones that


65. Mensch & Freeman, supra note 58, at 358.
would be in keeping with the virtual world ethos. Since the beginning of mass advertising in the twentieth century, advertisers have favored images of personal anxiety or joyous family life to win over consumers. Persuasive advertising is typically based on individual appeals—e.g., the fear of having bad breath or the desire to create a home environment that allows for introspection and family activities via the time-saving convenience of a modern appliance. Advertising emphasizes the need to protect a separate domestic sphere that serves as a refuge from the outside world. Meanwhile, the public or collective values that are at the heart of virtual life are neglected.

Moreover, for many virtual participants, virtual life requires rejection of advertising's persuasive function. In some virtual environments, manipulation of commercial symbols, thereby destroying their effectiveness, is part of the game. As Jack Balkin has theorized, there is a "right to play" in virtual worlds that would be threatened by imposing legal strictures from the real world on online behavior. One particular example would be the enforcement of trademark rights in virtual worlds. Strong trademark rights in virtual worlds would inhibit the "right to play." Sometimes in virtual worlds, manipulation of commercial activities is part of the game. For example, members of a self-described "movement dedicated to the liberation of avatars" staged guerilla attacks on clothing stores, including Reebok, and stormed the stage at the meeting of the World Economic Forum in Second Life. One can envision further attacks on corporate brands, perhaps by generating virtual clothing or posters proclaiming "Reebok Sucks" or by going in and manipulating the code of Reebok's Second Life store to change the store marquee into a statement of protest. If this was the real world, one could argue that the avatars could be responsible on a dilution cause of action for tarnishing Reebok's famous mark.


68. Id. at 2064-65.

However, many would argue that the ability to subvert such commercialization without real world consequences is a reason why some participate in Second Life in the first place.\textsuperscript{70}

One response could be to simply let consumer preference and the free market determine the role of advertising in virtual worlds. It might be argued that if people truly seek out places like Second Life for communal experiences, then they will reject efforts to link their world to advertisements communicating individualistic messages. And if a virtual world's participants see subverting trade symbols as part of the point of their existence, then they will leave when it becomes clear that their virtual utopia will begin enforcing the Lanham Act. At this point, however, it is not clear that there is sufficient consumer sentiment for an advertising-free virtual world. Despite some attacks on virtual commercial enterprises, the onslaught of virtual advertising shows no sign of abating and virtual world membership continues to increase. Perhaps the real world fatalism towards advertising's advance has infected the virtual world as well.

Given that persuasive advertising is likely to become an increasing factor in virtual life, what are its likely effects? The evidence currently available suggests that the virtual world heightens our susceptibility to persuasive appeals. Studies show that advertisements embedded into online games are particularly effective at generating positive responses in consumers.\textsuperscript{71} The positive arousal a participant feels while playing a video game or participating in a virtual world is transferred into a positive feeling towards the brand being promoted. Market research reveals that by attaching online games to an advertiser's website, the advertiser can increase the "stickiness" of the website,


leading to an increased amount of time spent on the site by each visitor.\textsuperscript{72} The same is undoubtedly true in virtual worlds. Avatars are more likely to spend time in Toyota’s Second Life store because they can “test drive” a Toyota SCION xB in Toyota’s chunk of virtual space.\textsuperscript{73} The concept of “stickiness” is particularly important in advertising because positive feelings towards a brand are developed merely through familiarity and repetition.\textsuperscript{74} The longer a virtual business can hold a virtual participant’s attention, the more likely it is that the participant will develop a positive attitude towards that business and will eventually buy its product.

At the same time, advertising in virtual worlds profits from virtual norms limiting avatar privacy. Even though participants in Second Life and other virtual worlds can own property, including houses and apartments, there is not the same expectation as in the real world that others will be precluded from observing you and entering your personal space. Although applications exist that allow some virtual property owners to exclude outsiders, because virtual worlds are designed for social interaction, it can sometimes be considered poor form to close your doors to other avatars. For example, in The Sims Online, other avatars are free to enter your apartment, lie on your bed, use your personal items, and generally intrude on your space.\textsuperscript{75} In fact, the proprietors of The Sims Online encourage this by providing “bonuses” to the holders of the most visited properties. Life in Second Life is not as gregarious. Nevertheless, there is less privacy in Second Life than in the real world. Participants describe being bombarded with instant messages from other avatars the moment they enter Second Life. Those purchasing their

\begin{itemize}
\item \textsuperscript{72} Michelle R. Nelson, Exploring Consumer Response to “Advergaming,” in Psychology: Understanding and Influencing Consumer Behavior in the Virtual World 167, 173 (Curtis P. Haugtvedt et al. eds., 2005).
\item \textsuperscript{73} Rushe, supra note 33.
\item \textsuperscript{74} See Shane Frederick, Automated Choice Heuristics, in Heuristics and Biases: The Psychology of Intuitive Judgment, supra note 59, at 548, 553; Slovic, et al., supra note 59, at 400.
\item \textsuperscript{75} Lastowka & Hunter, supra note 64, at 4 (describing environment of The Sims Online where homeowners “generally encourage strangers to enter their property, lie in their beds, eat their food, use their bathrooms, and monopolize their possessions”).
\end{itemize}
first plot of land in Second Life face a general lack of privacy with remarkably close quarters translating into "neighbors able to scroll and zoom in on every little thing you do." To some degree, this lack of privacy does not matter. The seclusion we count on in the real world is less important in virtual life as participants can use avatars to shield their real identities and do not face real world consequences for their social interactions.

This community ethos is tailor-made for advertisers attempting to infiltrate the virtual landscape. Advertisers in the real world are restricted in their ability to garner information on consumer preferences. Willingness to participate in market research studies is severely limited. Moreover, such surveys are necessarily handicapped by survey bias. And prospective consumers have the luxury of deciding when to retreat to their homes and other personal spaces to short circuit any attempts by advertisers to spy on them.

In the virtual landscape, however, privacy and the ability to avoid observation by advertisers are greatly diminished. Consumer advocates have already decried the dangers of online advertisers who surreptitiously collect detailed personal information on website visitors. Whatever dangers exist from data mining based on website traffic, these dangers are magnified greatly in virtual worlds. Market researchers have specifically set up devices to track avatar behavior and garner personal information. Mechanisms are now in place to secretly record the textual chats of avatars and then design advertisements based on those chats. Because this virtual world market research relies on direct observation and interaction, there is no ability to mask one's identity from market researchers. While a person giving information to a corporate website can make up an anonymous profile, in virtual worlds your

77. Ward, supra note 24, at 46.
78. See, e.g., Dan Mitchell, Online Ads vs. Privacy, N.Y. TIMES, May 12, 2007, at C5.
avatar is the "real" you. And because the norm of the virtual worlds encourages interaction and experimentation, most virtual participants have their guards down and do not expect to have to hide themselves from advertisers' prying eyes.

In sum, the persuasive advertising that Brown decried will be even more effective in virtual life. A lack of privacy, combined with the ability of targeted online advertising to create deeper emotional attachments to brands, strengthen the advertiser's hand. And although there are isolated examples of persuasive advertising being tied to socially progressive goals, the vast majority of commercial content in virtual life is devoted only to selling products, just as it is in the real world. Thus, the argument against the persuasive function of advertising appears even stronger in the context of virtual worlds.

C. Advertising as Personal Expression

Finally, advertising has value to many not for the information it provides about a product or its persuasive appeal, but for its own expressive capabilities. Advertising has value to the advertiser herself. It is the medium she uses to not only convince people to buy her product but to express herself. United States copyright law specifically protects the expressive component of advertising, recognizing that commercial representations can have just as much legally cognizable originality as works of literature or musical compositions.

80. One could argue that virtual world market research is flawed because participants select avatars that do not match their true corporeal identities. Virtual world participants frequently select avatars that are thinner, younger, and even of a different gender than their real world selves. But this is far different than filling out a real world market research survey with a fake phone number. Virtual world participants often select avatars based on who they wish they could be in the real world. See Alexandra Alter, Is This Man Cheating on His Wife?, WALL ST. J., Aug. 10, 2007, at W1. Such information is invaluable to advertisers. See JOHN O'SHAUGHNESSY & NICHOLAS JACKSON O'SHAUGHNESSY, THE MARKETING POWER OF EMOTION 10 (2003) (discussing how advertisers can rely on the principle that consumers use goods to express aspects of their social identity and to distinguish themselves from others).

81. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.").
The public accepts advertising as art, embracing it as a mechanism to communicate with others. At the beginning of the advertising age, many homeowners used print advertisements as the primary means of decorating their surroundings. Today, it is hard to go to any store selling poster art without encountering a wide array of reproductions of vintage advertisements extolling the virtues of extinct brands. These reproductions are purchased for display in the purchaser’s home or workplace because the advertisement has an aesthetic that appeals to the consumer.

Advertisements are purchased not just for their inherent aesthetic but also because the purchaser wishes to use a particular advertisement or logo to say something about themselves. A T-shirt with the Pabst Blue Ribbon logo suggests an affinity with blue-collar pursuits. The Nike swoosh identifies the wearer as having an athletic and fearless personality. The wearer of a John Deere logo may want to communicate reliability and association with rural life.

To some degree, the personal expression function overlaps with the informational and persuasive functions. People choose certain marks as badges of identification because they want the informational function of advertising to tie them to a particular source of origin of products and services. T-shirts and caps bearing corporate logos are typically purchased because the persuasive argument presented by the corporation’s advertisers has been successful. Someone may choose to wear a DODGE T-shirt because she likes and accepts the advertising claim that consumers of this brand have “attitude.” Still, the personal expression function deserves separate consideration because the purchaser is buying the advertisement itself rather than the underlying product.

Some would argue that the personal expression function of advertising deserves no legal protection because such expression is not culturally desirable. People should

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82. LEARS, supra note 16, at 269.

83. See Jerre B. Swann, Sr., et al., Trademarks and Marketing, 91 TRADEMARK REP. 787, 797 (2001) (giving the example of the PORSCHE brand as communicating “success” and having “self-expressive benefits” for the consumer).
not be encouraged to develop bonds of identification with GATORADE, REEBOK, and SPAM, the argument goes, because such bonds will only distract them from the things in life that are really important.84

This approach, however, goes too far. Use of trademarks as badges of identification can help people to form meaningful attachments with one another. For example, Harley-Davidson riders have an informal sense of community and many participate in owners’ group outings based on the unifying characteristic of Harley ownership.85 Marks can also satisfy emotional needs, allowing someone to feel caring when buying a Hallmark card or energetic when drinking Pepsi.86 And, given the prevalence and popularity of artistic displays of vintage advertising, it takes an extremely arrogant critic to argue that modern advertising can have no aesthetic benefit. Since advertising is undoubtedly capable of making a personal statement, the real question is when does an advertisement primarily express a personal feeling and when is its overriding goal to convince others to buy something?

As advertising becomes less homogenized, it becomes more effective as a mechanism for personal expression. As advertisers and artists broke down the boundaries between highbrow and lowbrow culture in the early and mid-1900s, it became clear that symbols of commerce could represent an important aesthetic statement for the artist. In the 1920s and 1930s, advertising design was avant-garde enough to have value in itself regardless of its commercial success. Recognized artists like Georgia O'Keefe were commissioned to sell consumer products.87 Even today, great artists and commercialism sometimes successfully intermarry. For example, film directors Ang Lee and Guy Ritchie recently used their artistic talents to make short films showcasing BMWs.

84. See Jeffrey L. Harrison, Trademark Law and Status Signaling: Tattoos for the Privileged, 59 FLA. L. REV. 195, 226-27 (2007) (concluding that trademark law should not be used to protect efforts to signal one’s status to others).

85. Swann, supra note 83, at 802.


87. LEARS, supra note 16, at 337.
Advertising only appeals to the consumer's desire for personal expression when it takes a departure from the mainstream. The key to developing art in the midst of commerce is to give the artist a certain amount of freedom. Without the ability to choose an individualized way of communicating through an advertisement, the artistic quality of the art collapses. Historian Jackson Lears has traced trends in American advertising, revealing that as economic power becomes more concentrated sales imagery becomes more standardized. Consumers seek to use advertisements to make a statement about themselves. These statements only have relevance when they can communicate something to others. So the blander an advertisement is and the broader the market it targets, the less it can say anything interesting about the consumer.

Advertising and art have always had an uneasy relationship. Art is rooted in spontaneous and personal communication. But the more personal and introspective an advertiser's expression, the less it can speak to a broad enough market to justify its original commission. An advertisement is more likely to be used in a successful campaign when it can appeal to a broad segment of the populace. Yet, when alterations are made to make the advertisement palatable to a wider public, it may no longer express the inner thoughts and feelings of its creator. The broader the appeal of the advertisement in communicating persuasive and informational arguments for purchase, the less appealing the advertisement is as a vehicle for personal expression.

Because of the nature of the virtual environment, this uneasy balance is tilted slightly more in favor of artistry and less in favor of commercial appeal than it is in the real world. In the current climate of virtual life, artistic, individual statements by advertisers are encouraged. Standard methods of advertising do not seem to work as potential consumers expect something different to reflect the pioneering spirit of virtual life. The founder of Millions of Us, a company geared exclusively towards advertising in virtual worlds, has commented that conventional

88. Id. at 332.
advertising will not be very prevalent in Second Life because it would “be badly received culturally.”  

As a result, advertisers can be expected to challenge themselves to come up with novel approaches to virtual commercials. To sell the Reuters news service, Reuters had to create an avatar for its virtual technology reporter complete with a press badge and “grim business-like expression.”

Wells Fargo created a “virtual cash machine” to teach avatars about personal finance. Pontiac allows avatars to cruise around Second Life in virtual cars that can be customized to have an outside texture that looks like cotton candy. More innovation will be needed to sell things in virtual worlds. And when advertising does not follow a standard template, it has the potential to become more personally expressive.

In addition, virtual worlds present an environment where advertising recipients are predisposed to co-opt advertising symbols and attach their own personal meaning to those symbols. First, computer code is more manipulable than much real world advertising that the recipient has little choice but to passively consume. The short history of virtual life is replete with examples of participants who chose to reconfigure the code of particular objects so they would be transformed into an object of different significance. A program called a CopyBot can be imported into Second Life and used to make unauthorized duplicates of nearly any item in the virtual world. Thus, an outdoor virtual billboard for Microsoft can by copied and transferred to a mural inside someone’s virtual home, perhaps as part of a statement critiquing Microsoft. As the founder of Second Life remarked, “[a]s technology makes things possible, more people seem to want to be creative.”

Second, virtual worlds are first and foremost arenas for self-expression. Simply by constructing an avatar or choosing a region of the virtual world to live in, a virtual world participant is making a statement about who they

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90. Living a Second Life, supra note 26, at 79.
91. Kharif, supra note 5.
92. Living a Second Life, supra note 26, at 79.
94. Rushe, supra note 33.
are. This is a place where participants are prone to appropriating the representations of others and using them for their own purposes. For example, presidential candidate John Edwards's virtual headquarters in Second Life was attacked by a flood of advertising images of Nintendo's Mario character. When Front National leader Jean Marie Le Pen opened a virtual office in Second Life, protestors took images of Le Pen and mounted them on placards with a colored in Hitler moustache. Others have targeted virtual corporate locations to amplify their calls for social or political reform.

Thus, in contrast to the informational and persuasive functions, the case for the personally expressive component of advertising becomes stronger in the virtual world. Advertisements can communicate the personal feelings of the advertiser and be viewed as "art" by the public. They may also be appropriated by the public as a means of expressing themselves to others. Advertising's personally expressive function flourishes most when the creator of the advertisement is relatively free from creative restraint and the advertisement's target audience is narrow. The virtual world's embrace of avant-garde expression and the ability of virtual participants to manipulate advertising computer code make the virtual environment especially conducive to the personal expression function of advertising.

III. ESTABLISHING A ROLE FOR ADVERTISING IN THE VIRTUAL WORLD

Advertising has an important role to play in virtual worlds. The informational component of advertising should be protected. As people come to spend more and more of their waking moments in virtual worlds, they will need to transact business. Commercial information will enable

95. Living A Second Life, supra note 26, at 79 (stating that Second Life residents often customize things that they happen to find in the virtual world).


98. See Semuels, supra note 70, at 1.
virtual inhabitants to find wanted goods and services in an efficient manner. Advertising can also serve as a vehicle for personal expression in virtual life. While some may object to the use of commercial symbols for such expression, this expression has important personal benefits for both the creator and the consumer. Moreover, any argument for eradicating all advertising from virtual life is unrealistic. It seems unlikely that the advertisers will have a change of heart anytime soon and end their assault on the gates of the virtual worlds. Unless there is a change in the status quo, it is unreasonable to expect the creators of these worlds to sacrifice the potential revenues that can be derived from alliances with commercial entities.

But an unfettered barrage of advertising in virtual life is not in anyone's best interests. The persuasive component of advertising comes with real social costs. It can lead to unnecessary product differentiation and have anticompetitive effects as consumers stick with an advertised good despite declining product quality. It may serve a valuable purpose when it meets the normative guidelines set by policymakers, but these guidelines are rarely met by advertisers. 99

The persuasive component of advertising is even less beneficial in virtual society. Virtual worlds serve as unique platforms for social experimentation and interaction. People design personally significant avatars so they can navigate these virtual worlds and communicate with others in a meaningful way. Although having some aesthetic and artistic components, advertising cannot help but clash with the very personal expression of virtual world members. Advertising tries to persuade the viewer in a way that is individualistic and one-sided. As such, it threatens the communal and expressive aspects of virtual worlds.

The way to preserve the communal components of virtual life while facilitating the informational and personally expressive functions of advertising is by relegating advertising to special zones. In these zones, virtual community members would know what to expect and would be primed to receive commercial enticements. In

99. See Brown, supra note 36, at 1182 ("National advertising is dominated by appeals to sex, fear, emulation, and patriotism, regardless of the relevance of those drives to the transaction at hand.").
other areas of the virtual world, however, there would be a prohibition on advertising. Advertisers and virtual world developers will not create these zones on their own initiative. Instead, virtual world participants must request these reforms themselves. This Essay seeks to mobilize virtual world participants to demand change. Participants should ask themselves what steps they can take to preserve the aspects of their online realms that made them special in the first place. By pressuring developers to include specified zones of advertising exclusion in their user licensing agreements, participants can ensure that the virtual world remains a place where people want to be.

A. Ability of the Virtual World to Adopt Advertising Restrictions

One might argue that even if zones of exclusion strike an appropriate balance between the informational and expressive functions of advertising and the need to rein in the persuasive function of advertising, the realities of virtual world operation will not permit such a balance. One argument would be that virtual worlds depend on advertising revenues for their survival and any restrictions will choke off their financial lifeblood. Hence, virtual world providers are unlikely to impose any advertising restrictions.

Advertising is not essential for virtual life, however. Although it is important to be sensitive to the financial needs of virtual world providers, the financial model of the virtual worlds differs from that of online search engines or other Internet businesses dependent on advertising. Unlike other businesses providing free online services, the virtual world business model is not dependent on advertising. Virtual world providers support themselves through monthly user fees or other non-advertising based revenue. Second Life, for example, can sustain its existence strictly by selling virtual real estate to its participants.¹⁰⁰ Thus, limitations on advertising will not end the financial viability of virtual worlds.

Another concern is that virtual world developers lack the incentive to create advertising-free zones, particularly

¹⁰⁰. See Living A Second Life, supra note 26, at 78.
given high exit costs for participants. It is not all that easy
to leave a virtual world once the decision has been made to
enter. Abandoning a virtual life means forfeiting countless
hours spent on developing a satisfying avatar and other
forms of virtual property.\footnote{See Eric Goldman, Speech Showdowns at the Virtual Corral, 21 Santa Clara Computer & High Tech. L.J. 845, 850 (2005) ("Some virtual world participants spend hundreds of hours building relationships, reputations and virtual assets, much or all of which is lost if the participant exits the virtual world.").} An even greater cost occurs
when someone is forced to withdraw from personal
relationships forged over time. Real attachments are
formed between avatars. Just as it might not be practical in
the real world to move from Chicago when all of your
friends and family live there, it may not be practical to
leave Second Life even if you do not like its policy on
advertising. And unlike the hypothetical departure from
Chicago, someone leaving Second Life would have to
surrender their avatar. As Greg Lastowka and Dan Hunter
ask, "Is the option of virtual exit real if it entails giving up
family, friends, property, society, and your very form?"\footnote{Lastowka & Hunter, supra note 64, at 62.} If
the market for participation in virtual worlds is truly
inelastic, this may permit a virtual world designer to ignore
desires for a less commercialized experience.

Nevertheless, virtual world developers do have
incentives to create content and regulatory structures that
will appeal to the most possible users. There are important
network effects in virtual worlds that make providers
receptive to consumer demands. Because most join virtual
worlds for the purpose of social interaction, the more people
that sign up for a virtual world, the more attractive that
virtual world becomes to other prospective users.\footnote{Mayer-Schönberger & Crowley, supra note 50, at 1803.} If word
gets out about a virtual world's unfavorable practices,
prospective participants will stay away and the virtual
world becomes less competitive.

In addition, despite the high exit costs described above,
if someone is disenchanted enough with their avatar’s
experiences, they will move. Not all participants are so
invested in their virtual life that switching to another world
would be a dramatic sacrifice.\footnote{See Goldman, supra note 101, at 850-51.} Moreover, a key change
has been inaugurated by the virtual world Second Life as it has decided to allow participants to retain intellectual property rights to their own virtual creations. Most virtual world providers require participants to forfeit property rights in all virtual creations as part of their user licensing agreements. By permitting users to retain their intellectual property rights, Second Life has lessened the exit costs for users. Some of the pain of leaving a virtual way of life is reduced if the participant may keep their avatar, the representation of their virtual persona, and plug it into another virtual world. If other virtual providers follow Second Life's lead, this may result in increased competition and more choices for participants.105

Even if there is competition for virtual world participants, however, that competition will not necessarily lead to less advertising. As Viktor Mayer-Schönberger and John Crowley have pointed out, what changes virtual worlds adopt to appeal to consumer sentiment will depend on the perceived costs and benefits of proffered alternatives. Mayer-Schönberger and Crowley make the argument that certain subsets of participants will simply leave their virtual world for one that conforms with their desires for a more democratic governance structure rather than agitating for change within their original world.106 Others, however, will ignore their preference for a more democratic environment in return for a virtual world that is organized, efficient, and technologically advanced. Mayer-Schönberger and Crowley describe this type of world as a "virtual Singapore" where democracy is given short-shrift but "the sidewalks are clean, the economy is thriving, and the citizens are well fed."107

The same will be true for the amount of advertising permitted in a virtual world. Even though some virtual participants may desire less commercialization of their virtual experience, they will be willing to sublimate these desires in return for other desirable attributes. The brief history of virtual worlds demonstrates that reduced

105. Steve Lohr, Free the Avatars, N.Y. TIMES, Oct. 10, 2007, at C6 (reporting that IBM and Linden Labs have announced plans to develop open standards that would allow the same avatar to travel from one virtual world to another).

106. Mayer-Schönberger & Crowley, supra note 50, at 1814.

107. Id.
commercialism is not a top priority for all participants. Some virtual arenas even highlight the pursuit of advertised items. The popular Sims Online virtual world makes the attainment of name-brand goods the goal of the experience. At this stage, it is not at all clear that a movement for reduced advertising in a virtual space will be successful. The goal of this Essay is to help such a movement to succeed in the future by convincing virtual world participants that restrictions on virtual advertising should be of paramount concern.

B. Benefits Realized from Zones of Exclusion

In the Victorian era, citizens reacted to the intrusive effects of advertising by creating a zone of exclusion in the home. There was little legal recognition of the advertiser's power over consumers. Instead, it was up to citizens to protect themselves from the dangers of misleading advertising without government intervention. In response, Victorians emphasized the separate sphere of the home. In contrast to the pervasive blandishments that surrounded the world of work, the home was seen as a refuge where commercialism could not enter. Eventually, advertisers were able to co-opt the Victorian cult of domesticity for their own purposes, but in its original incarnation, the doctrine of separate spheres was meant to provide a sanctuary from capitalism's abusive practices.

Perhaps we can learn something from the Victorians. Admittedly, our lives today are too diffuse to simply contend that the separate sphere of the home can inoculate us from advertising. The home is a less central part of our lives today than it was in the 1800s. The workplace, travel, and areas designated for entertainment and social interaction now compete on a more equal basis with domestic pursuits. In addition, technology has penetrated today's home, transforming it into a forum for advertising that Victorian-era consumers would not recognize.

But the Victorian idea of creating a special social sphere where advertising is prohibited is worth an examination. Even if the home is no longer an advertising-free zone, virtual worlds present an opportunity for an environment that safeguards our right to privacy and our need for unbiased contemplation. Although this Essay has detailed several instances of advertising creeping into the virtual world, it is not too late to create designated areas in virtual worlds where the advertisers would be forbidden to enter. By creating areas that are off limits to advertisers, virtual world developers could preserve the unique characteristics of virtual life and blunt the impact of persuasive appeals. Zones of exclusion would satisfy concerns over the loss of privacy in virtual life. Someone who wanted to protect their privacy could simply navigate their avatar to one of the designated zones of exclusion.

If a virtual world was divided into advertising and non-advertising spheres, advertisements could still inform the virtual population. Just as today's consumers know to look for the classifieds section of a newspaper or the list of Sponsored Links after performing a Google search, virtual world participants would know that they should travel to the advertising-friendly zones for product information. Rather than weakening the informational function, such a regime might actually strengthen advertising's informational effect as avatars would know just what sections of the virtual world they would need to travel to in order to gain information on the availability of particular products and could engage in a more targeted screening of advertisements.

Nor would the creation of advertising zones of exclusion end the virtual world's function as an environment for free expression. One of the significant things about virtual worlds is that there are no public spaces. Parks, roads, and playgrounds do not currently exist. They do not exist because such spaces are unnecessary. Although property ownership is possible in virtual worlds, as discussed above, the prevailing paradigm has been for residents' personal spaces to be open to everyone. Moreover, there is little regulation of speech within virtual worlds, and the manipulation of code often allows for speech even in areas

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111. Lastowka & Hunter, supra note 64, at 32.
where the owner would prefer to restrict expression. Thus, most areas in the virtual landscape are available for unfettered speech. This results in an environment where expression is permitted anywhere and the confusing First Amendment public forum doctrine is not needed.

By creating zones of exclusion, the virtual world developer would be altering this landscape to restrict certain types of expression in specific locations. But this should not significantly alter the ability of advertisers and consumers to personally express themselves. Advertisers would be permitted to express themselves in designated areas. Just as artists in the real world typically exhibit their work in specified venues like galleries, museums, and government and business centers, virtual advertisers would have designated areas to show off their creations. Moreover, the coercive effects of such zoning will not be as great as if a similar program were adopted in the real world. Whereas a real world advertiser banned from one geographic location or one regional newspaper might have to travel miles to find another location willing to receive her message, in the virtual world, an advertiser can instantly teleport to a different location if she is prevented from entering another. The incentive for the creation of provocative virtual advertisements will not end if those advertisements may only be displayed in certain sections of the virtual world. Instead, the incentive for artistic creation will remain as long as those areas of the virtual world zoned for advertising continue to permit the advertisers to have an audience.

Likewise, consumers who adopt advertisements for their aesthetic appeal will not find their expressive capabilities ended by a regime of separate commercial and non-commercial spheres. In designated areas, consumers would still be free to make personal statements through advertising. If an avatar wants to decorate the outside of her home with virtual commercials, she will be free to choose a residence that is not in a zone of advertising exclusion. And by cabining advertisement to specified regions, the virtual world developer will generate more competition between advertisers to win over virtual consumers. A more competitive advertising marketplace will result in more attention-grabbing idiosyncratic advertisements, i.e., those advertisements that fall closer to the personally expressive end of the advertising spectrum.
and are more likely to be viewed as "art" by the public.

Of course, things get trickier when the participant takes the advertisement and uses it in a particularly personal way as when someone dresses her avatar in a virtual T-shirt with the word "Budweiser" on it. Although it might be possible to write code for the virtual world that censors the T-shirt when the avatar walks into a region excluded from advertising, this might tread too harshly on free expression. A better approach is to recognize that some spillage of advertising messages into restricted zones is inevitable. Even if no area of the virtual world is one hundred percent ad-free, the benefits of the zones of exclusion approach will still be realized. Participants will know that certain areas will have dramatically less commercial content and will use those areas accordingly. Although advertisers will occasionally infiltrate these areas, their efforts will be particularly unwelcome by virtual participants which will make their messages relatively ineffective.\(^1\)

C. Legal Concerns

The legal framework already exists to create such zones of exclusion. First, unlike fora that are operated by a state actor or have been traditionally used for speech, virtual worlds are strictly private. While a virtual world proprietor could potentially violate a participant's common law or statutory rights, only the government can violate an individual's constitutional rights. Although advertising does enjoy some protection under the First Amendment, this protection does not extend to strictly private regulation of that speech. Because virtual worlds are private creations, restrictions on commercial speech imposed by the owners of Second Life or There would be immune from First Amendment challenge.\(^2\)

Some scholars submit that virtual worlds are like "company towns" which, because of their similarities to the structures of local government, have been required to

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113. See Saunders, supra note 2, at 203.
comply with the First Amendment. But using the logic of the company towns cases to regulate virtual worlds seems like a stretch. Even the most dedicated virtual life participants have to stop using their avatar at some point and interact in the real world. In contrast, a human being may never leave the company town where her real world job is located. Not only working, but eating, sleeping, shopping, and playing may all take place in the same company space. Moreover, while company towns provide traditional governmental functions such as water, electricity, sidewalks, and roads, virtual world designers offer a less concrete platform for virtual existence that does not match the historic hallmarks of government services that trigger constitutional scrutiny. Instead, virtual worlds are more like the private shopping malls that the Supreme Court has immunized from First Amendment regulation because they lack the overwhelming control of the company town and do not provide a full array of typical government facilities.

Even if a court could be persuaded that a virtual world provider has usurped traditional governmental functions in virtual life, Supreme Court jurisprudence permits a number of restrictions on advertising. The Supreme Court has listed several types of advertisements that it deems unworthy of First Amendment protection. The list includes advertising that is deceptive or that furthers a criminal scheme. It also includes commercial speech deemed to invade the privacy of citizens or that is thrust upon a captive audience. The courts have also been willing to uphold federal and state regulation of commercial speech in designated arenas. For example, universities may prohibit for-profit commercial activities on their campuses. Obscenity laws prohibit certain expression in areas frequented by children. Thus, there are several ways that advertising can be regulated in virtual life without running afoul of constitutional restrictions.

To be sure, there is a danger in overzealous restriction


117. See Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).
of advertising. But what I am proposing is not the end of advertising. It is not even close. I am merely advocating that virtual citizens channel their discontent with modern advertising's intrusive effects into action. The legal system as it stands now encourages accurate informational advertising but leaves persuasive advertising unchecked. At the same time, a fatalist approach towards advertising regulation has infected jurists and lawmakers. But the history of the real world does not have to repeat itself in the virtual world. If virtual world stakeholders become fully aware of the dangers of unrestrained advertising and propose restrictions that still permit virtual world developers to obtain some advertising revenue, they may succeed preserving the characteristics that made virtual life special in the first place.

CONCLUSION

The possibilities of virtual worlds have already become a favorite for legal scholarship. Armed with decades of doctrine and the advantage of hindsight, the legal academy has offered significant guidance on the recognition of property rights in avatars and other virtual creations. Meanwhile, the "metaverse" marches on, enlisting more and more members and generating hundreds of millions of dollars. This Essay adds to the growing body of virtual worlds scholarship but in a new and limited way. It is clear that virtual worlds are here to stay and that some regulation of this newfound space will be necessary. What is unclear and what has thus far escaped academic comment is how advertising in the new world should be regulated.

A little more than a century ago, American courts had to grapple with the new phenomenon of mass advertising. This grappling occurred in the context of the rise of a professional class of advertisers armed with the testimony of social scientists and others as to the effectiveness and benefits of their craft. The result was a definition of trademark infringement that safeguarded business investment in public relations. Trademark law strove to protect consumers from misleading commercial information, but it also served to protect the persuasive component of advertising, codifying the power of advertisers and their corporate clients. Courts missed the opportunity to recognize advertising's drawbacks and failed to create significant
sanctuaries from its influence.

With the arrival of the virtual world, another seminal moment in advertising regulation is upon us.\textsuperscript{118} The virtual world offers an opportunity to restructure advertising law, a second chance to avoid the mistakes of the past. This Essay suggests that the most promising route for regulation of virtual world advertising comes from knowledgeable virtual world participants. Virtual worlds hold great promise, not only as an escape from real world troubles, but as a tool for bringing disparate people together and bridging gaps of understanding. Advertising should have a role, but it should not be allowed to dominate this new world. Despite the costs of exiting a virtual life, participants need to become aware of the dangers of omnipresent advertising and to lobby the developers for virtual reforms. "Responsibility is what awaits outside the Eden of creativity."\textsuperscript{119}

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118. When disputes over advertising in virtual worlds arise, it will not be a simple matter of applying the real world template of advertising law. Participants in the virtual worlds span the globe raising difficult jurisdictional questions and leaving some defendants de facto immune from suit. Thus far, the virtual world exercises few limits on advertisers but at the same time offers little protection for their investment.

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