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***AMICI CURIAE* LEGAL AND CULTURAL STUDIES SCHOLARS**

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARVEL ENTERPRISES, INC. AND MARVEL CHARACTERS, INC., Plaintiffs v. **NCSOFT CORPORATION, CRYPTIC STUDIOS, INC. AND NC INTERACTIVE, INC.,** Defendants	Case No. CV-04-9253 RGK (PLAx) **MEMORANDUM OF POINTS AND AUTHORITIES OF *AMICI CURIAE* LEGAL AND CULTURAL STUDIES SCHOLARS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Date: December 19, 2005 Time: 9:00 a.m. Judge: The Hon. R. Gary Klausner Courtroom: 850 (Roybal)

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I. INTRODUCTION

Amici curiae, scholars who study the legal and cultural dimensions of the emergent phenomenon of virtual environments, submit this *amicus curiae* brief to help the Court understand the cultural importance of expressive conduct in these spaces.[1] Virtual environments such as Paragon City (the environment of *City of Heroes*) are social spaces where millions of people engage in meaningful relationships and in robust community dialogues through the exercise of creative freedoms. Plaintiffs' claims in this case threaten to limit the expressive autonomy and liberty of players who are not parties to this litigation. It is the interests of this greater society that *Amici* wish to bring to the attention of the Court.[2]

The players of NCSoft's *City of Heroes* are not represented in this lawsuit. Though Marvel brands them as "direct infringers," they are men and women, boys and girls who mix Marvel's cultural icons with their own self-expresssion to create *personae* to participate in online communities. (2d Am. Compl. ¶ 43). Their expressive conduct does not threaten Marvel's copyright privileges, but Marvel's lawsuit threatens to stifle their self-expression. Any

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[1] *Amici* Edward Castronova, Ph.D.; Mia Consalvo, Ph.D.; Julian Dibbell; Joshua Fairfield; Dan Hunter, Ph. D.; Henry Jenkins, Ph.D.; Lawrence Lessig; Thomas Malaby, Ph.D.; Beth Simone Noveck, Ph. D.; Greg M. Smith, Ph.D.; Kurt Squire, Ph.D.; Constance Steinkuehler, Ph.D.; T.L. Taylor, Ph.D.; and Rebecca Tushnet are listed with affiliations, for identification purposes, on the attached Notice of Interested parties. For examples of their writings, *see*, *e.g.*, Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185 (2004); JULIAN DIBBELL, MY TINY LIFE (Basic Books 1998); JAMES GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LITERACY AND LEARNING (Palgrave MacMillan 2003); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004).

[2] *See generally* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

claims that hinge on calling individual players "infringers" should be dismissed.

II. PLAYER COSTUMES WITHIN ONLINE GAMES ARE NOT "CHARACTERS" ELIGIBLE FOR PROTECTION PURSUANT TO APPLICABLE NINTH CIRCUIT PRECEDENT

Plaintiffs' claims of contributory and vicarious liability are premised on the assertion that it "owns" certain "characters" and that players "unlawfully copy Marvel Characters." (2d Am. Compl. ¶ 43). However, it has long been recognized that fictional characters are not a separate class of copyrightable works. *Warner Bros. Pictures, Inc. v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954). NIMMER ON COPYRIGHT observes how the Register of Copyrights has espoused this position, calling it "*unnecessary* and *misleading* to specify fictional characters as a separate class of copyrightable works." 1-2 NIMMER ON COPYRIGHT § 2.12 n.2 (citing Reg. Supp. Rep., p. 6.) (emphasis added). The treatise states that the issue of protection for "characters" is "more properly framed as relating to the degree of substantial similarity required to constitute infringement." 1-2 NIMMER ON COPYRIGHT § 2.12. In other words, claims of character infringement are claims based upon "characters" as functioning elements animating larger fictive works. *Warner Bros.*, 216 F.2d at 950.

Where characters within an allegedly infringing work are found to be "especially distinctive" or to represent a "story being told," they may be held to constitute a separately protected element according to applicable precedent of the Ninth Circuit. *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175-76 (9th Cir. 2003); *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978). However, it is crucial to note how inapplicable the reasoning espoused in *Rice*, *Olson*, and *Air Pirates* is to the current case. The avatars that one can find in

Paragon City are not authorial works. Paragon City is populated by hundreds of thousands of non-fictional gamers engaged in expressive activities.[3] It is therefore erroneous to equate individual avatars in Paragon City with fictional comic book or film "characters."

Marvel's claims are not about "characters" and are certainly not about the use of "characters" in expressive works distributed in a marketplace, as in *Rice*, *Olson* and *Air Pirates*. Instead, Marvel objects to a small number of player-created costumes virtually worn by individuals playing a game. Claims about "characters" are claims about traits and personal characteristics of fictional persons embedded in creative works. *Rice*, 330 F.3d at 1175-76; *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 243 (2d Cir. 1983) (rejecting protection for characters as costumes and requiring an analysis of traits and personality characteristics as expressed in the greater work). This is not a case of one fictional work borrowing from another. Rather, a community of real individuals is at issue. The fact that this community is rendered visible through a computer screen does not alter the fact that these are real individuals and not fictional characters.

Any greater character "story" exists only in the private imagination of each discrete player, and its contours are understood only by that player. This imaginative context is not a "work." The only recognizable work is a costume worn by players. It is established law that there is no copyright in costumes when such costumes are worn by real individuals. *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005). This general rule should be true online as well as offline. Even if one were to apply copyright protection

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[3] *See* Balkin, *supra* n.2; Castronova, *supra* n.1. Regarding the complex and collaborative nature of virtual social spaces, *see generally* Constance A. Steinkuehler, MMOG Research, available at: http://website.education.wisc.edu/steinkuehler/mmogresearch.html; T.L. Taylor, Curriculum Vitae, available at: <http://www.itu.dk/people/tltaylor/cv.html>.

to costumes, superhero costumes heavily partake of stock elements which, in other contexts (such as movies or books), are treated as *scenes a faire*. *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003).

Because Marvel's claims based on "character" copyright are inapplicable to the costumes worn in the social environment that is Paragon City, Marvel has no basis on which to claim infringement of "characters," and its claims should fail.

III. EVEN IF PLAYER COSTUMES WERE TO RAISE ISSUES OF COPYRIGHT, PLAYERS CREATING SUPERHERO COSTUMES IN AN ONLINE GAME SHOULD BE PRESUMED TO BE MAKING FAIR USE UNDER 17 U.S.C. § 107.

In the social environments of virtual worlds, users rarely forgo the opportunity to create unique, personally expressive characters. The perpetual player-organized creative costume contests at Atlas Park and other virtual public fora in Paragon City demonstrate the degree to which creativity is held in high esteem by the player community. Even when players choose to evoke some aspects of the visual costume of a well-known superhero, they *must* imbue that costume with their own personality because they are real individuals engaging in social dialogue and play.

Plaintiffs' Complaint is short on detail regarding the claimed direct infringements. Indeed, discovery has shown that several of the exhibits were created by Marvel itself—with the authorization of any relevant copyright holders. With regard to other alleged infringements, a wide range of expression is potentially at stake. A woman might wish to play by evoking the superhero Storm because she identifies with that well-known female superhero. A boy might take a villain and reinvent him as hero. The creator of Pyra Phoenix may happen to be a fourteen-year-old girl who is an ardent fan

of the well-known Phoenix.[4] (2d Am. Compl. ¶ 43). In addition to her personal creativity, this young fan may hone her artistic skill by rendering comic book panels from the Phoenix series on her school notebooks, by sewing a Phoenix costume for herself and by writing "fan fiction" featuring new exploits of Phoenix.[5] Perhaps she shares these creative and imaginative efforts with a small circle of her school friends. Virtual worlds extend the creativity that we accept—and even celebrate offline—when inventive children craft their own costumes and pretend to be Spider Man or the Hulk in their backyards.

Congress, in legislating copyright protection, did not intend to limit artistic freedoms to express oneself and hone artistic skills through personal, creative, instructive and non-commercial activities. A copyright holder who sued a notebook sketch artist or backyard role-player would likely invite sanctions. *See, e.g. Mattel v. Walking Mountain Prods.*, 2004 U.S. Dist. LEXIS 12469 at *7-8 (C.D. Cal. June 21, 2004) (finding that fair use was obvious in the case of a suit against an individual artist for using the character of Barbie in a creative work and stating that "[M]attel (a large corporation) brought objectively unreasonable copyright claims against an individual artist. This is just the sort of situation in which this Court should award attorneys fees to deter this type of litigation which contravenes the intent of the Copyright Act."); *see also* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 664-678

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[4] Phoenix is a powerful but malevolent alien entity who, during a series of Marvel comic books, copies and usurps the identity of Jean Gray of the X-Men. One fan's history of Phoenix can be found online at: <http://users.aol.com/dkphnx/dkphoenx.html>.

[5] Regarding fan fiction, *see generally* Tushnet, *supra* n.2; HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE (Routledge 1992).

(1997) (performing a fair use analysis of the creative genre of individual and non-commercial fan fiction).

Now what if a young artist discovers the software tool provided by *City of Heroes*? Perhaps this year her friends are watching fewer cartoons on television and are instead creating, debating and playing games together within the virtual spaces of Paragon City. The tools offered by *City of Heroes* present another creative opportunity. These tools are similar to colored pencils, fabric and word processing programs. They create an opportunity to hone artistic skills and express a personal creative vision. The game's Creation Engine is, as Defendants have noted, a high-tech crayon box. Our artist might wish to create her own personal character called Pyra Phoenix based upon her admiration for Phoenix.[6] The Court should presume that she, and others like her, are free to do so without fear of liability for copyright infringement.

To determine fair use, a Court must look to: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578-79 (1994). Based on these facts, the creation of a Pyra Phoinex costume by *any* user should be reasonably construed as protected fair use. There is no commercial motivation here. The copying here is, even at the

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[6] Defendants' "block list" of names should not be taken by this Court as mapping to any putative rights of Marvel, as Marvel has alleged to the court. (2d Am. Compl. ¶ 20). As this Court has recognized, these avatar names do not raise issues of trademark law. (Order of May 9, 2005 at 5). Also, copyright does not subsist in words and names. Copyright Office Circular 34, available at: <http://www.copyright.gov/circs/circ34.html>.

most derivative, is simply copying of a costume. This single individual's efforts will likely enhance, not detract from, whatever value Plaintiffs are entitled to extract from Phoenix as a character. This is a fair use. *Compare* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 664-678 (1997) (performing an analogous analysis for fan fiction).

In addition, it is well-established that fair use should be construed "in light of the purposes of the Copyright Act." *Mattel v. Walking Mountain Prods*., 2004 U.S. Dist. LEXIS 12469 at *3-4 (C.D. Cal. June 21, 2004). The United States Supreme Court has evinced a special solicitude for online creative technologies such as those offered by Defendants, noting how they have created a "vast democratic forum[]" that is "open to all comers," thus creating a "new marketplace of ideas" with "content [that] is as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 868, 870, 880, 885 (1997). The *Reno* opinion demonstrates the Supreme Court's vision of the Internet as a vehicle to enable grass-roots, user-created, broadly participatory culture. Plaintiffs, however, would have this Court take the unprecedented step of stifling such creativity and demanding that when amateur artists associate in online communities, they lack the expressive freedoms that they currently enjoy offline.

Amici Curiae believe Counts II and III of the Second Amended Complaint are, in essence, an attack on the vitality and freedom of online culture.[7] The rights of individual players to express themselves creatively should not be limited or indirectly curtailed in response to Marvel's claims of "direct primary infringement by a third party"—and most certainly not without opportunity to hear from those accused "third parties." (Order of May 9, 2005

[7] Balkin, *supra* n.2; Castronova, *supra* n.1; Gee, *supra* n.1.

at 7). Indeed, it is likely that Plaintiffs' claims have already had a chilling effect upon players' liberties. The vast majority of players cannot afford private counsel to guide them through such legal mysteries as the four-part test of fair use, the doctrine of *scenes a faire* or the limits of copyright protection as applied to characters. If players erroneously credit Plaintiffs' claim that they risk liability for committing copyright infringement simply by using the Creation Engine, they may reasonably, reluctantly, choose not to be creative online.

Other game companies and online forum providers are undoubtedly paying close attention to this litigation. They will likely see Plaintiffs' attack against *City of Heroes*—if it is allowed to proceed to trial—as a warning that they dare not technologically empower individual users with creative freedoms in virtual environments. The end result will be to hamstring future Paragon Cities and future Creation Engines, forcing the innovative technologies that could enable diverse and vibrant future online communities to be chopped down to tools that will keep communities uniform, bland and faceless. This vision of the online future fails both the letter of copyright law and the greater social purpose of copyright.

IV. CONCLUSION

The hundreds of thousands of players who give life to Paragon City and the millions of members of similar virtual communities worldwide are not currently before this Court as parties. *Amici* urge the Court not to lose sight of the true focus of this litigation: their aggregated interests. The freedoms and liberties of these players and creative amateurs are being threatened and this Court should protect their interests.

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For this reason, *Amici* urge the Court to grant Defendants' Motion for Summary Judgment with regard to Counts II and III of the Second Amended Complaint.

Respectfully submitted,

Dated October 27, 2005

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