

VIRTUAL PROPERTY RIGHTS: A MODIFIED USUFRUCT OF INTANGIBLES*

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I. INTRODUCTION

*"Reality is merely an illusion,
albeit a very persistent one."
– Albert Einstein*

Virtual worlds, once the mere rallying point of escapist online gamers, have launched themselves into the real world as an unexplored phenomenon to reckon with from legal, social, and economical perspectives. One might say that this boom of 'unreality' was an unintentional consequence triggered by something as silly as make-believe swords and daggers. In any case, there are now 30 million gamers worldwide heralding a genesis of virtual society with millions of dollars being spent for the production and preservation of these 'unreal' yet extremely profitable worlds.

Although the primary market of virtual worlds, meaning the subscription cost for one to participate in game-play, is in itself staggering,¹ it is the amount of real money that revolves within the games themselves that makes the industry genuinely intriguing. In 2001, a fantasy world called *Norath* was estimated to have a gross national product of \$135 million wherein each of the 430,000 subscribers theoretically had an average income of \$3.42 per hour.² And these figures, which

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¹ Julian Dibbel, *The Life of the Chinese Gold Farmer*, The New York Times Magazine, June 17, 2007, at <http://www.juliandibbell.com/texts/goldfarmers.html> (last visited April 3, 2008). World of Warcraft is one of the most profitable computer games in history, earning close to \$1 billion a year in monthly subscriptions and other revenue.

² Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, 2 THE GRUTER INST. WORKING PAPERS ON LAW, ECON. & EVOLUTIONARY BIOLOGY 1

translate to a higher per capita than that of Bulgaria (thus easily eclipsing both India and China) reflect *just one* virtual world in 2001. Updated and more broadly applied the aggregate gross domestic product for today's virtual economies range anywhere from \$7 billion to \$12 billion³ with over 16 million⁴ virtual world users world-wide. And included in this multi-billion dollar industry is the subject of this paper's study, the controversial secondary market of virtual property.

Who owns virtual property within these virtual worlds? Does it belong to its creators or its users? At the onset, the question admittedly seems naïve, perhaps inconsequential, considering that the subject has been and is being discussed in the context of a gaming environment. Yet one can posit that where large amounts of money flow, even if borne from the entertainment sector, the law will eventually follow. In this case, the subsequent establishment of a market in virtual goods, one that is neither legal nor illegal by normative standards, and the resulting backlash in virtual crime has made the raw inquiry even more pressing than the recreational quality attached to it.

The question is hardly novel. Since the influx of virtual worlds in the early nineties, propositions have been consistently espoused by property theorists and their dissenters regarding the status of virtual property. Those advocating emerging rights in virtual property justify the need on philosophical and economic considerations while their detractors debunk such reasons based on policy and contract. Regardless of their views, the lack of actual decisions⁵ and legislation on the matter continues to leave the question unanswered. As a prelude therefore to offering another solution, one stemming from a civil law legal system as compared to that proffered by virtual property authors based in common law jurisdictions, this paper introduces the study in its entirety by discussing existing theories, criticisms to the same, and the interest of both parties in securing a claim to ownership in this admitted gray area of property law.

(2001), available at http://www.bepress.com/giwp/default/vol2/iss1/art1/current_article.html - Norrath is the fantasy world of EverQuest, the most popular MMORPG in 2002.

³ *World of Warcraft*, The Economist (Dec. 6, 2007), available at http://www.economist.com/business/displaystory.cfm?story_id=10251308 (last visited April 3, 2008). World of Warcraft had about 9.3 million subscribers in 2007. See also Julian Dibbel, *supra* note 1.

⁴ Ryan Vacca, *Viewing Virtual Property Ownership Through the Lens of Innovation*, TENNESSEE LAW REVIEW, Vol. 76, No. 1 (2008), n. 39, at 11, available at http://works.bepress.com/ryan_vacca/1, citing Bruce Sterling Woodcock, *An Analysis of MMOG Subscription Growth - Total MMOG Active Subscriptions*, at <http://www.mmogchart.com/Chart4.html> (last visited April 3, 2008).

⁵ Though several cases have been filed in recent years in the United States, no conclusive decisions regarding the issues related to MMORPGs have been reached due to the prevalence and inevitability of out-of-court settlements.

A. THE CONCEPT OF A VIRTUAL WORLD

Virtual worlds exist as computer simulated environments that offer many features of the real world that are viewed and experienced through three-dimensional images.⁶ Massively multiplayer online role-playing games (MMORPGs) allow thousands of users around the world to participate in a fantasy atmosphere, usually medieval or space-oriented, after paying a monthly subscription fee. Although virtual worlds have numerous derivatives,⁷ this paper will focus solely on MMORPGs which are property-averse,⁸ or that where virtual property rights are strictly not recognized by the game developer's contract, and the underlying virtual property issues that exist within these environments arising from either the non-recognition of these rights or the non-enforcement of the contract itself.

But before we even begin to delve into these issues, it becomes imperative for this study to describe the connection between the fantasy world of the make-believe and the real world that allows the former to operate.

B. THE MMORPG EXPERIENCE

The connection that binds the gamer to this surreal enterprise is his avatar, or the graphical representation he chooses for himself within the virtual world. For purposes of illustrating the relationships between a gamer and his avatar, between the avatar and virtual chattel and between avatars themselves to those unfamiliar with MMORPGs, allow a narrative of modest scope to tell the story of a typical gamer embroiled in its use.

⁶ Allen Chein, Note: *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059, 1064 (2006)

⁷ Some virtual worlds no longer limit their structure to role-playing and go further with real-life simulations such as the Sims Online, There, Second Life, and HabboHotel among others.

⁸ Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 445 (2007) – "Contracts may shape user-operator disputes in worlds whose operators openly oppose virtual property rights ("property-averse worlds") differently than in worlds whose operators purport to accept and even foster users' property rights ("property-promoting worlds"), such as Second Life."

The case of *Marc Bragg v. Linden Research and Philip Rosedale* does not fall under this category because the latter dealt with virtual property rights in the *property-promoting* MMOG of Second Life. Even if it were a *property-averse* virtual world however, Linden Labs and the plaintiff subsequently agreed on a confidential settlement on October 7, 2007 thereby depriving the court from issuing a real decision that could have covered tangential intricacies of virtual property.

Earl, is a fresh graduate of a technical skills course in the Philippines who, while waiting for gainful employment, has settled in an internet café as a cashier and crewman for the shop's thirty computers. When not receiving payments from customers, he's seen hunched over his barely ventilated area in the cashier's desk with his eyes glued to the monitor in front of him. The intense gaze, rapid clicking of the mouse and frequent taps on the keyboard are no strange sight to the café's customers who also seem to be entranced in the same activity and the same program. At the risk of belittling the study's importance, let it be stated at the onset that Earl and his patrons are simply playing a game,⁹ albeit on a grander scale than anything else imaginable.

In the screen in front of Earl, a small group of fighters appears to be acting in concert against a band of club-wielding giants¹⁰ in a mountain pass leading to a well-fortified cave. Earl or Fandango, as he is known in this virtual world, is a human cleric who is part of this raiding party. After a minute or so of spell-casting, stabbing and mauling, the battle ends and the giants vanish instantaneously. Shiny gold coins fall in their place which are then collected and divided amongst the victors.

Earl's avatar, a high-leveled character decked in monk's garbs and a black veil, stands triumphant along with a roguish-looking elf and a bloodied but visibly recovering dwarf. Aside from knowing that the former is a stockbroker just recently divorced and the latter, a college dropout in San Francisco, Earl knows very little about the real life personas behind his compatriots. In this world though, they are simply his friends. Never mind that when he first started out in this fictional world, the elf was an arrogant bully who would steal the little amount of gold coins that his low-leveled cleric could collect from leveling up¹¹ or that the dwarf had once player-killed¹² him just to prove that he could do it in ten seconds. Those events had transpired several months ago and he has since become a worthy character to contend with.

⁹ See Richard Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 1 N.Y.L. SCH. L. REV. 19, 23 (2004) - Some people have taken an interesting view, however, and claim that MMORPGs merely pretend to be games and that despite having surpassed the common notions of what constitutes gaming, it still holds the 'game conceit.'

¹⁰ See *Id.*, n. 27, at 29 - The giants are NPCs or non-player characters.

¹¹ Leveling allows the avatar to acquire new skills and spells and increase vital statistics such as hit-points, magic-points, and movement-points that make him stronger and more able to survive the virtual world. Generally when an avatar kills a creature, experience points are generated (the amount depends on the relative strength of the creature) and when these points reach a designated limit, he 'levels up' and repeats the process until the another designated limit is reached. Usually, game developers specify maximum level attainable at a certain number but achieving this state by no means implies that the game is over. In most cases, it simply means the game is just beginning.

¹² MMORPGs usually give the gamer a choice as to what kind of server he'd like to be a part of. Depending on the kind of gamer he is he may choose to enter a player-killing virtual world or one that prohibits the practice.

Hearing Earl's subsequent cries of jubilation, some of his customers decide to take a break from their own monitors to watch the next part of Earl's virtual storyline. It could be surmised that the chieftain of the giants, the one wielding the Mace of the Damned, was now just minutes away from being confronted by the raiding party. Though the impending melee was bound to be an exciting spectacle by itself, the giant being one of the harder creatures in the game, the focus of the discussion of Earl's new found audience was in the weapon that the giant chief held. The Mace of the Damned was a rare find in the realm and thus quite valuable in both the virtual world where it existed and in the real world where it was treated just like any other saleable commodity. Only a few more minutes and Earl would be the proud owner of this exquisite artifact. His audience now wanted to know if he was going to sell or give his older weapon to one of them. It not being too bad an artifact by itself, Earl guessed he could get at least five thousand pesos for it.

As described above, the role-playing adventure scenario coupled with its myriad possibilities of interaction with thousands of other players is a rather compelling experience. The appeal stems from a variety of aspects that range from experiencing new-found freedoms, entertainment, achievement, and social interaction, among others.¹³ Castronova, the economist who first studied the robust market of these virtual worlds, considers them as distinct play-spaces where the normal rules of economics, law, and government do not apply. In his words:

"Their distinctiveness seems to be a large part of the appeal. In synthetic worlds, you can be a thief, and you do not have to go to jail. You can be a great mogul, and not pay taxes... Most important, you can be your own man, woman or both, as you prefer, a person with a real identity and a self-made

¹³ Jan Bromberger, *Social Construction of Virtual Assets: Step One: Relevant Social Groups and Interpretive Flexibility*, Unpublished Manuscript, p. 2 (2006), available at http://virtual-economy.org/bibliography/bromberger_jan/2006/the_soc. "Players are motivated by different roles: Achievers want to overcome obstacles in the game and measure indirectly with other players, e.g. in terms of character advancement, game-social status or money; Socializers want to communicate with other players. They like campfires and chatting; Explorers want to ascertain the game world and its miracles and tales; want to see new content; Competitors want to measure directly with other players, e.g. by fighting them. game-social status or money; Grievers want to disrupt other players' gaming experience. They steal, kill, lie, harass, defame – whatever they enjoy and other people do not; Performers want to perform on the stage. For example in the form of role-playing, but not exclusively; Leaders want to influence other players in a leading way. Those others could be, for example, achievers or competitors, but also grievers. Leaders could create a campfire socializing group or lead a performance. These groups are not disjunct, but characterize the main motivation for playing."

See also Tony Manninen & Tomi Kujanpää, *The Value of Virtual Assets – The Role of Game Characters in MMOGs*, INT. JOURNAL OF BUSINESS SCIENCE AND APPLIED MANAGEMENT, Vol. 2, No. 1 (2007) which discusses the three motivations of game-play: achievement value, social value, and immersion value.

history, and someone that is much more than a cog in some other person's machine... In these worlds, you can be whoever you want to be."¹⁴

A different analogy describing the appeal of MMORPGs and virtual worlds is presented by another author who portrays virtual worlds as the American frontier during the early days of its colonization:

"[It] serves as an effective analogy, because the conditions found in Europe that produced the mass migration are becoming more prevalent in the real world. Financial desperation and the search for personal freedom motivated many to make the long and dangerous trek across the Atlantic to settle in a hostile and undeveloped land. The population of the American colonies expanded from 4,600 in 1630 to 2,780,400 by 1780. There are similar forces now at work that drive people into the virtual world. The real world is increasingly expensive, crowded, and legislated. The only place where many people can experience personal freedom is in the virtual world, where they can manifest their fantasies and explore the wide-open expanses that were once commonly available in the real world."¹⁵

In MMORPGs of the fantasy genre, fictional realms are complete with its own set of continents, cities, and nationalities. Different races of people from popular fantasy books such as J.R.R. Tolkien's *Lord of the Rings* and J.K. Rowling's *Harry Potter*, are commonplace entities; items that would not look out of place in a medieval armory are necessary commodities for everyday living; accessories such as potions for healing, scrolls for raising the undead, and other such fictional constructs are the norm instead of the bizarre.

When a new player starts out in this world, he exists as an ordinary mortal, penniless and equipped with minimal clothing. A repetitive and time intensive process then ensues where the gamer's avatar fights off monsters, earns levels, and collects items of value either by buying them using the local currency¹⁶ or by prying them off NPCs (non-player characters) like the giants in the narrative depicted above. Eventually he will have accumulated enough gold to even buy virtual real-estate, an income-generating faculty by itself that serves as a mark of success and pride in the virtual world. As opposed to ordinary games, the 'hero's journey'¹⁷ in

¹⁴ Edward Castronova, *The Right to Play*, 49 N.Y. L. SCH. L. REV. 185, 193 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=733486.

¹⁵ Jamie J. Kayser, *The New New World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59, 62 (2006).

¹⁶ World of Warcraft employs the generic gold coin as its local currency. Lineage II, the immensely popular Korean MMORPG, uses something called the 'adena' while Final Fantasy XI uses the 'gil'.

¹⁷ See Richard Bartle, *supra* note 10, n. 29, at 30, citing JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES (Pantheon Books, 1949): "Many people play virtual worlds as a means to role-play an idealized version of themselves. Individuals journey to a world of adventure where challenges are met, foes defeated, aspects of the self confronted, and identity asserted. As a result, the individual is a more complete person than they were before they made the journey. In

MMORPGs hardly ends after one reaches the highest level, collects the best equipment, becomes the wealthiest player, or even after one accomplishes all three. In some cases, achievement of one of these aspects only marks the beginning of another. Unlike ordinary computer games, there is no final goal in MMORPGs because it cannot be won by any single standard. It simply never ends.

This is primarily due to the fact that the environment upon which virtual worlds operate is persistent and dynamic, which is to say that even when a player is not around, the worlds continue to exist and events happen in real-time regardless of his or her presence. While one sleeps in the real world, other people's avatars may be talking to each other, slaying dragons, gathering gold, or manufacturing equipment. By the time he gets back to this virtual world, he may find that others have excelled further than him or perhaps they might have been robbed or, in some cases, killed (and later resurrected).

A player shares this virtual world with thousands of others who also compete for the same things albeit in different ways. Some players like Earl prefer to be healers; others use their time-honed skills as thieves or assassins, while others engage themselves as blacksmiths, knights, or wizards. The variety of castes is important in these worlds because in some areas where the monsters are more difficult to kill, particular skill-sets are required in order to survive. The challenges are designed in such a way that players must group themselves to form raiding parties in order to acquire wealth or treasure hidden deep within these areas. Naturally, the harder the area, the greater the rewards one can seek to claim.

C. AN UNINTENDED ECONOMY OF A NON-EXISTENT WORLD

Not everybody though, whether they participate in groups or as mere individuals, can devote the time and effort necessary for the "grind" or the hour-long excursions into virtual dungeons for leveling up, collecting gold, gathering equipment, or engaging in group raids. Intervening real-life factors, most notably work and family time, remove the casual gamer from this surreal milieu and prevent him from accumulating the wealth and equipment that he would have otherwise earned had he stayed online. As a resulting consequence, some players become better off than others by virtue of acquired virtual loot. Oddly enough, it is this inequality brought about by the game's intended scarcity of goods that keeps the

virtual worlds, the undertaking of a hero's journey is, for many players, the ultimate source of the fun they derive from playing."

game interesting, competitive, and enjoyable. "And it is this scarcity that creates the market."¹⁸

Having described the effort required to acquire items or achieve power within these virtual worlds, it comes to no surprise then that those lacking time or patience for the "grind" have opted for an alternate route to success: that of employing real money. And despite there being rules that prohibit the practice, there have always been players willing to sell. "Scarcity, after all, breeds markets, and markets will seep like gas through any boundary that gives them the slightest opening – never mind a line as porous as the one between real and make-believe."¹⁹

It is in this vein that our virtual property issue begins to emerge.

D. THE REAL-MARKET TRADE CONTROVERSY

In our fictional narrative, Earl's future sale of the dagger, albeit the common practice of selling virtual goods for real money, would be illegal if the terms of his contract with the game developer were to be honored.

Though "real-market trade" (RMT) transactions have existed long before these massive mainstream environments,²⁰ the legal attention it has been receiving is a fairly recent trend attributable to the unintended economic consequences that have followed in the wake of the commodification²¹ of virtual property. Personal sales of in-game assets, as one of these consequences, are nothing compared to third-party companies – entities separate from players and game developers – who

¹⁸ Bryan Camp, *The Play's the Thing: a Theory of Taxing Virtual Worlds*, 59 HASTINGS L. J. 1, 10 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980693.

¹⁹ Julian Dibbel, *supra* note 1.

²⁰ See Tony Manninen & Tomi Kujanpää, *supra* note 13, 23 – The predecessors of MMORPGs were called MUDs or multi-user dungeons which were purely text-based. The first one was programmed on a computer mainframe at Essex University, England, in the fall of 1978 by Roy Trubshaw. His work was then continued by Richard Bartle. From 1985 onwards many of the MUDs went on to achieve commercial success as part of early online services. However, most of the evolution of these text-based virtual worlds occurred within the academic domains of universities.

²¹ Commodification (or commoditization) is the transformation of what is normally a non-commodity into a commodity, or, in other words, to assign value. See Commodification, from Wikipedia, available at <http://en.wikipedia.org/wiki/Commodification> (last checked April 3, 2008).

now facilitate the market by being either a mediator or a retail seller of virtual goods.²²

According to a recent complaint filed in a California district court, Goldman-Sachs, one of the largest global investment banks in the world, values one such third-party company to be worth almost a quarter billion dollars.²³ A popular writer on virtual worlds, describing the intricacies of this business venture, has aptly labeled the employees of these enterprises as 'Chinese gold farmers', a unique minimum-wage profession borne from the RMT phenomenon:

"It was an hour before midnight, three hours into the night shift with nine more to go. At his workstation in a small, fluorescent-lighted office space in Nanjing, China, Li Qiwen sat shirtless and chain-smoking, gazing purposefully at the online computer game in front of him. The screen showed a lightly wooded mountain terrain, studded with castle ruins and grazing deer, in which warrior monks milled about. Li, or rather his staff-wielding wizard character, had been slaying the enemy monks since 8 p.m., mouse-clicking on one corpse after another, each time gathering a few dozen virtual coins -- and maybe a magic weapon or two -- into an increasingly laden backpack... Twelve hours a night, seven nights a week, with only two or three nights off per month, this is what Li does -- for a living... At the end of each shift, Li reports the night's haul to his supervisor, and at the end of the week, he, like his nine co-workers, will be paid in full. For every 100 gold coins he gathers, Li makes 10 yuan, or about \$1.25, earning an effective wage of 30 cents an hour, more or less. The boss, in turn, receives \$3 or more when he sells those same coins to an online retailer, who will sell them to the final customer (an American or European player) for as much as \$20... There is little to distinguish these digital sweatshops from the other industries that have mushroomed across the Third World to feed the desires of the Western consumer save that instead of real goods, virtual items and avatars are being sold in what seems to be a modest \$80,000.00 annual business."²⁴

Although originally the game developer's stance over RMT was one of *laissez-faire*²⁵ over embargo,²⁶ of wry amusement rather than raw concern, it did not

²² Until recently, in fact, eBay played a large part in this secondary market. When it finally decided to side with the game developers and restrict such transactions, it was then too late. Other online auction sites specializing in virtual property sales had already been born.

²³ See *Alan Deborneville v. Brock Pierce*, *infra* note 107. This is a case in which one of the two founders of a company (IGE or Internet Gaming Entertainment) which was valued over \$220,000,000.00 is now suing the other co-founder due to, among other things, numerous breaches of fiduciary duty, breaches of contract, and fraud. This case was scheduled for trial on May 20, 2008.

²⁴ Julian Dibbel, *supra* note 1.

²⁵ Jan Bromberger, *supra* note 13, at 3. Laissez-faire operators are "not involved in real-money trade." This was common in the early stage of MMORPGs with operators being rather amused about the new development.

²⁶ *Id.* Embargo operators seek "to prevent all real-money trade. This was a reaction on increasing problems with fraud, leading to higher support times and legal costs, and shrinking customer satisfaction.

take long for them to realize that gamers were starting to profit from the virtual world experience. Due to the lucrative phenomenon, some developers have even gone so far as to adopt hybrid RMT models in their virtual worlds to compete with the market.²⁷ As an example, the MMORPG Entropia Universe not only permits the influx of real world dollars into the game world, but the virtual economy itself is founded on the principle that real world money will be injected into the game and used to purchase virtual items.²⁸ In 2006, it was estimated that \$165 million passed through the Entropia Universe.²⁹

The tacit restriction embodied in the EULAs and subsequent modes of prevention notwithstanding, property-averse game developers have failed to fully stop these allegedly illicit transactions. In Asia alone the real-cash virtual item market exceeds \$100 million annually.³⁰ More broadly applied, the online gaming market is forecasted to reach \$13 billion by 2011³¹ with China accounting for \$3 billion in 2010.³²

The economic success of this secondary industry though is not without its set of varying social harms. One such problem, as already mentioned at the onset but not fully described, is the subsistence of a dangerous and unpredictable gray market.

“An economic phenomenon by itself, the trade of goods in this market is neither illegal nor sanctioned by official governing bodies because of the uncertain nature of the rights to virtual property. The full scale of the effects

²⁷ Jason Archinaco, *Virtual Worlds, Real Damages: The Odd Case of American Hero, the Greatest Horse that May Have Lived*, 11 GAMING L. REV. 1, (2007), n. 14, at 26. See also A.H. Rajani, (Re-)Interpreting Access Controls, 21 BERKELEY TECH. L.J. 365, 392 (2006).

²⁸ Features of the Entropia Universe, at <http://www.entropiauniverse.com/en/rich/5357.html> - “The Real Cash Economy (RCE) in the Entropia Universe means that the virtual items inside the universe have a real value. In order to develop your character in the Entropia Universe it is necessary to invest in your character. You may wish to purchase tools, weapons, real estate or a range of other items. These items cost PED (the Entropia Universe currency).” (last visited April 3, 2008)

²⁹ Entropia Universe, at <http://www.entropiauniverse.com/index.var> (last visited April 3, 2008).

³⁰ Edward Castronova, *Real Products in Imaginary Worlds*, HARVARD BUSINESS REVIEW, 20 (May 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=759924.

³¹ DFC Intelligence (last modified June 6, 2006), at <http://www.dfciint.com/news/prjune62006.html> (last visited April 3, 2008).

³² Pearl Research, *Games Market in China*, at <http://kotaku.com/371005/chinese-game-market-grew-to-166-billion-in-07Business> (last visited April 3, 2008) - Business intelligence and consulting firm Pearl Research released its results of a new study showing that the games market in China grew 60 percent to \$1.66 billion in 2007 -- and is expected to exceed \$3 billion in 2010.

of this gray market is not yet known, but there are at least some indications that it can lead to unjust unacceptable outcomes.”³³

In June 2005, for instance, Qiu Chengwei killed another player in the real world after the latter sold his ‘dragon sabre’, a powerful virtual item within the game. The item was originally acquired by Qiu after going through a difficult quest. He later loaned it to a friend who, instead of returning the same, sold it for a whopping \$870.00. Although Qiu had sought the help of the authorities, both the game developer and the police, to recover the virtual item before confrontation, the latter refused to take steps to redress the injury thus prompting the eventual attack and fatality.³⁴ Unlike black markets where participants presumably know that their only recourse would be through extralegal self-help, gray markets allow participants like Qiu to hope that such disputes are still capable of being settled in court.³⁵

As a corollary to unsupported court action, a second problem surfaces in the form of virtual crime. “Gray markets create incentives to defraud as well as incentives to exploit.”³⁶ “While hackers who exploit the game developer’s database might face criminal prosecution against the latter, gamers whose items were manipulated in the course of the hack would be without legal recourse against either the hacker or the developer for the value lost from the ‘stolen’ virtual goods.” Westbrook illustrates a similar analogy that makes the problem easier to understand:

“[If] the law fails to recognize A’s right to own his briefcase and its contents, then there exists an incentive for B to assault A and steal the briefcase. In that situation, A could recover from B the damages he suffered resulting from the assault, but not any measure of damages for the value of the stolen briefcase. If the case contained something very valuable, B could stand to make a considerable windfall profit. Likewise, the failure to recognize any property interest in virtual goods could result in the unjust enrichment of hackers and imposters.”³⁷

In the alleged landmark decision of *Li Hongchen v. Beijing Artic Ice Technology*,³⁸ the petitioner was a gamer in the MMORPG Red Moon developed by the

³³ Theodore Westbrook, *Owned: Finding a place for Virtual World Property Rights*, 2006 MICH. ST. L. REV 779, 790 available at http://msulr.law.msu.edu/back_issues/2006/3/Westbrook.pdf (last visited April 3, 2008).

³⁴ BBC News, *Chinese Gamer Sentenced to Life* (June 8, 2005), available at <http://news.bbc.co.uk/2/hi/technology/4072704.stm>.

³⁵ See Allen Chein, *supra* note 6, n. 58, at 1069, citing Andrew Murray-Watson, *Real Profits from Virtual Worlds: The Landscapes May Be Imaginary but Players of Computer Games Are Starting To Trade in Real Money*, Sunday Telegraph, London (Jan. 9, 2005) – Unlike in the real world where trade of goods and services is regulated by a Securities and Exchange Commission, no such counterpart exists in the virtual world.

³⁶ Theodore Westbrook, *supra* note 33, at 802.

³⁷ *Id.*

³⁸ Jay Lyman, *Gamer Wins Lawsuit in Chinese Court Over Stolen Virtual Winnings*, TechNewsWorld (Dec. 19, 2003) available at <http://www.technewsworld.com/story/32441.html> (last visited April 3, 2008).

respondent. After a hacker broke into the game developer's database and "stole" Li's collection of 'bio-chemical weapons' which made him a powerful player in the game, Li filed an action against Artic Ice in the Beijing Chaoyang District People's Court for restitution and damages. As a defense, the developer claimed that it was immune from liability based on the EULA which Li had agreed to when he first started out in the game. The Court rejected this argument claiming that the game developer was negligent in securing its servers against attack, and that such negligence was the proximate cause for the loss of Li's property. Restitution and damages were thus ordered.

Though it might seem at first glance that virtual property rights were recognized, as one study³⁹ is won't to point out, a more logical view is that the dispute "was more of a tort case than a property case. That is, [the court recognized] a game developer's duty to the player to protect server integrity more than it recognized a property right in the items [stolen]."⁴⁰ The court merely ruled that the limitation of liability clause could not protect the game developer from its own negligence. If negligence were factored out of this equation, would the immunity clause have had merit? Would the gamer have been unjustly deprived of a valued good only for contract to stipulate that no corresponding right was violated?

This controversy has yet to be thoroughly resolved by the courts and until such resolution is reached, it is no conceit to say that the advent of virtual property has far-reaching legal consequences that the law has yet to address before gamers can be assured of protection in both transactions borne from the gray market and offenses borne from virtual crimes.

E. THE VALUE OF VIRTUAL PROPERTY

It begs the question though why someone would value virtual property inside a game to the extent of actually purchasing it with real money. There not being any quantifiable use of such in the real world, the answer becomes blatantly obvious. It is done simply to empower the user's avatar, the gamer's virtual self. Why anyone would want to do this with hard-earned legal tender in a make-believe world will be answered after considering another typical scenario in MMORPGs:

³⁹ Bobby Glushko, *Tales Of The (Virtual) City: Governing Property Disputes In Virtual Worlds*, 22 BERKELEY TECH. L.J. 507, 519 (2006), n. 69, citing Joshua Fairfield, *supra* note 47, at 1084-1087.

⁴⁰ Jeff Cole, a commenter in the Terra Nova Blog, available at http://terranova.blogs.com/terra_nova/2003/12/virtual_propert.html#c414945 (last visited April 3, 2008)

Henry is a celebrity of sorts who, during his free time, enjoys the comfort and anonymity of the virtual world. His avatar, an ogre warrior, has been around the game for almost a year now yet is considerably weaker than his contemporaries. Just last week a human cleric, one of the weakest fighters in the game, beat him in the Arena in single combat. Embarrassed by the event, he judged that his equipment was the source of the debacle. Where he wore iron plates, full plate armor, and wielded a bastard sword – items sufficient to get you around most places in the virtual realm – most ogres his level would be sporting mithril⁴¹ chainmail and wielding serrated battleaxes. Items of the latter sort were admittedly hard to come by. If he had time, he'd be like any other player and join the raiding parties that ventured towards the Northern Steppes, an area that required at least four healers and various other fighters to survive. And besides that, the raids usually took hours to complete. Though he lacked the time, he certainly wasn't lacking for money. Instead of joining the raids, he visited an auction site yesterday and purchased a complete set of mithril armor for \$700.00, a reasonable deal if he ever saw one.

Individuals who think like Henry are not uncommon in virtual worlds. "Studies show that people feel extremely connected to their avatar, not as a thing but a projection of their self."⁴² Therefore, items acquired, these pieces of virtual property, are the "very representative form of a gamers' achievement which could be used for themselves or handed over to other players."⁴³ Their value is not only calculated objectively by rarity, utility, or its demand but also by its corresponding social value in relation to the player's avatar.

"The process of developing avatar capital seems to invoke exactly the same risk and reward structures in the brain that are invoked by personal development in real life. The idea is shocking because it seems to suggest that utility and well-being are not the same thing. Utility always rises when constraints are relaxed, yet people seem to prefer a world with constraints to a world without them. Constraints create the possibility of achievement, and it is the drive to achieve something with the avatar that seems to create an obsessive interest in their well-being. Moreover, since the virtual worlds are inherently social, the achievements are relative: it is not having powerful weapons that really make a difference in prestige, but in having the most powerful weapons in the world. In a postindustrial society, it is social status, more than anything else, that drives people to work so diligently all their lives."⁴⁴

⁴¹ Mithril is a fictional metal from J. R. R. Tolkien's Middle-earth fantasy writings. It is silvery and stronger than steel but much lighter in weight. See Mithril, from Wikipedia, available at <http://en.wikipedia.org/wiki/Mithril>

⁴² Greg Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 65 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=402860

⁴³ Jun Sok Huh & Sang Woo Park, *Game Design, Trading Markets, and Playing Practices - What did Lineage do for enchanting Korean players?*, Unpublished Manuscript, p. 3, available at <http://anarinsk.com.ne.kr/data/lineage.pdf>

⁴⁴ See Edward Castronova, *supra* note 2, at 17.

People come to care about their characters and the items they possess or seek to possess because of the blurred distinction of game values and real values in virtual worlds. "For many participants, virtual lives are psychologically important, for a few they are fiscally important, and for several thousand individuals, their virtual claims are claimed to be more important than their real lives."⁴⁵ Virtual chattel, therefore, as accessories to one's online personality serve not only as tools for gaming, for eviscerating fictional giants and the like, but also as a means to mark the gamer with distinction within this particular online community. Through his earned assets, he becomes a wielder of status, a force to reckon with, somebody other than a graduate of an obscure technical skills course from the multitudes of the Third World.

F. WHAT IS VIRTUAL PROPERTY?

Yet virtual property is still by no means a well-known concept even among those who advocate property rights in its favor. In theory, it is not limited to virtual chattel within gaming environments but encompasses digital constructs in the internet such as e-mail addresses, domain names, and the like. For purposes of defining this term though we shall limit our understanding of virtual property to its technical and descriptive dimensions within MMORPGs. This section will thus recount observations previously made by various property theorists to allow for a more meaningful discussion about its legal implications later on.

1. Technical Account of Virtual Property

In MMORPGs, a piece of virtual property is an image created by a game developer and tracked through a database that can be transformed and exchanged among gamers.⁴⁶ To understand how these images are rendered in the real world (or how a computer's 1's and 0's become a *Mace of the Damned*) an explanation about how the internet is structured is in order.

"The internet is, by design, layered. The physical computers and connections that are the backbone of the net form the basis for internet communication;

⁴⁵ Greg Lastowka & Dan Hunter, *supra* note 42, at 70.

⁴⁶ See Ian MacInnes, YJ Park & Sang-Min Whang, *Virtual World Governance: Digital Item Trade and its Consequences in Korea*, presented during the Telecommunications Policy Research Conference, Arlington, VA (2004), p. 2, available at <http://web.si.umich.edu/tprc/archive-search-abstract.cfm?PaperID=382>.

layered on top of that are the transfer protocols that enable communications between computers; layered on top of that is the basic code that creates a website [or a virtual world]; layered on top of that is the intellectual property that inheres in the content of the website [or virtual world]; and layered on top of that are the creations of the environment users. [Virtual property] built on the structure of the internet is thus necessarily built on other people's work."⁴⁷

What exists as a *Mace of the Damned* in the virtual world is but a construction of computer code layered on top of more code. Where the former represents a piece of property, the latter creates the virtual world itself. The game developer can manipulate the code at its leisure while gamers can only do so by means of engaging themselves in game-play through a client program installed in their computers. When users acquire or lose an item, therefore, commands are sent from these remote clients to the game developer's servers which subsequently update database records as to its location and current possessor. It is through this highly technical process of mathematical algorithms exchanged between several computers that a piece of virtual property, which in reality is a set of numbers in a database, is transferred from one holder to another.

There is nothing inherently wrong with the exchange, this being the intended design of the game to facilitate the virtual world's local economy. The developers however did not expect the transfer to involve real money in the real world. Wanting to restrict the practice for various reasons – one of which was the unauthorized use of their servers for the gamer's profit⁴⁸ – most game developers have turned to intellectual property law and the law of contracts to prevent the intrusion of real world economics into their virtual worlds.

2. Descriptive Elements of Virtual Property

Since our study would seek to treat virtual property as if they were real tangible objects (at least on some level), the normative approach would be to consider whether or not virtual property exhibits the same characteristics as real world artifacts. Fortunately, the similarities and differences between both kinds

⁴⁷ Joshua Fairfield, *Virtual Property*, 85 BOSTON UNIVERSITY LAW REVIEW 1047, 1076 (2005), n. 146, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=807966, citing *Name Space, Inc. v. Network Solutions*, 202 F.3d 573, 577 (2d Cir. 2000) - describing the structure of the domain name system; and Daniel Benoliel, *Cyberspace Technological Standardization: An Institutional Theory Retrospective*, 18 BERKELEY TECH. L.J. 1259, 1266-1278 (2003) - describing the structure and institutions of the internet.

⁴⁸ *Id.*, at 1069.

have already been clarified in previous studies⁴⁹ allowing us to review the observations made in summarized detail.

The consensus in all is that the distinguishing aspects of the 'virtual' do not bar its resemblance to the 'real'. The argument of the former's intangibility and of its limited use in the real world is easily discredited if one considers the general trend of society to recognize property rights in constructs with a saleable interest⁵⁰ regardless of the temporal restrictions that limit its use. The fact that virtual property is intangible hardly removes it from the ambit of property classifications if analogous concepts like intellectual property, leasehold and easement interests can exist with well-defined rights despite their intangibility. On the other hand, the argument that virtual property is merely evanescent, that its usefulness is limited to the confines of the virtual world, is debunked by the existence of valid forms of property which also have temporal restrictions. Among these are "usufructs which terminate at the death of the owner, patents and copyrights which expire after a limited number of years, and trademarks which can be abandoned over time if not used in the marketplace."⁵¹

Instead the advocates posit that, like real world objects that are traded on a daily basis, virtual property also exhibits elements of "rivalry, persistence, and interconnectivity."⁵² They are rivalrous in that property is possessed by one to the exclusion of all others; persistent in that property remains unchanged even if not being used; and interconnected in the sense that all gamers can 'experience' (or have the potential to utilize) particular property under the possession of another. These elements are further supplemented by the fact that a secondary market⁵³ exists for

⁴⁹ *Id.*, at 1059; See also Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137 (2006); See also Greg Lastowka & Dan Hunter, *supra* note 42.

⁵⁰ Greg Lastowka & Dan Hunter, *supra* note 42, at 53. – "Outside of legislatively recognized intellectual property rights, legal scholars have noted how markets in intangible properties have been conjured into existence through the expedient of simply declaring a saleable interest."

⁵¹ *Id.*, at 56. – The time limitations inherent in virtual property are hardly different from those other temporally-limited interests which we see in real, personal, and intellectual property systems.

⁵² Charles Blazer, *supra* note 49, at 143, *citing* Joshua Fairfield, *supra* note 47, at 1053 – "(1) Rivalry is the inherent characteristic of traditional property that limits control of the property, at any given time, to one person. Particularly, rivalry is the principal difference between virtual property and intellectual property. Where they both share the trait of intangibility, the former is rivalrous while the latter is not. (2) Persistence is the inherent characteristic of traditional property that maintains the property, generally unchanged, even when it is not being used (as the case when a gamer decides to end his session and subsequently returns to the game weeks after to find his avatar and inventory in the same state as he had left them). Thus, like most forms of tangible property in the real world, virtual items persist in existence as opposed to the general nature of intangibles which often lack the quality of persistence. Intellectual property is the quintessential representation of the latter. (3) Interconnectivity is the inherent characteristic of traditional property to affect or to be affected by more than one person and by other property."

⁵³ *Id.*, at 146. – "Courts should be particularly alert for possible virtual property interests when users develop secondary markets to trade access to and control of remotely hosted computer code, regardless of whether a service provider sanctions such trades. As a matter of

their transfer and that, by its very use, there is value added⁵⁴ to such properties by its users, who at the onset are merely given "an empty box" from which they subsequently build upon.

Having described the social and economic setting of the problem, the subject of the inquiry, and the reasons for the modern world to clarify the legal status of virtual property rights, we now consider the reasons why either of the primary parties involved should be awarded control of such rights. These justifications, especially for the property theorists, later become important in analyzing whether they bear any consideration for recognizing rights in virtual property.

II. THE CONFLICT OF INTERESTS

*"Technology is dominated by two types of people:
those who understand what they do not manage,
and those who manage what they do not understand."
- Putt's Law⁵⁵*

A. GAME DEVELOPER'S INTERESTS: ABSOLUTE OWNERSHIP

Aside from having created the virtual world and the property within it, legitimate interests of the game developers revolve around their (1) expected revenue generated from user subscription, and their (2) interest in retaining control of their creation for purposes of improving general in-game content and for absolving themselves from liability arising from disputes over virtual chattel. For

policy, where a free market cultivates value, courts should protect that value as long as other substantive rights are not infringed. Courts should also avoid excessive "protection" which could strangle creativity and do more harm than good."

⁵⁴ *Id.*, at 147. "The fifth and final indicium is akin to co-authorship, in that multiple users may assume an ownership interest in a virtual property by customizing and improving the property to reflect their collective creativity. Users often add value to a remotely hosted computer resource simply by using the resource, over time, in the manner in which it was intended to be used. A MMOG user account is the quintessence of value-added-by-user. The MMOG service provider's business model presumes that players will add value to the account, thereby becoming personally invested in, or addicted to, the game."

⁵⁵ Archibald Putt, *Research/Development Magazine* (January 1976).

purposes of this discussion, we borrow the terms from one study⁵⁶ to label these interests accordingly.

1. Subscription Interest

If virtual property rights are ceded to gamers and RMT markets are legitimized, game developers claim that they stand to lose a significant amount of money. They base this on either of two possibilities: the first is that “if new players can improve their avatars dramatically or purchase someone else’s advanced avatar through out-of-game transactions, developers might see a loss in subscription revenue for the time that users would otherwise spend earning those attributes through normal game play”;⁵⁷ the second is the possible loss incurred through dissatisfied customers, those genuine gamers who, believing the RMT practice to be a form of cheating, decide to spend their time in other virtual worlds which better limit the behavior.

Although there have been claims⁵⁸ that RMT heralds a positive effect to the subscription interest of game developers, other studies⁵⁹ reveal a contrary result due to a different approach used. Notably, the distinct lack of empirical data has

⁵⁶ Anders Eriksson & Kalle Grill, *Who Owns My Avatar – Rights in Virtual Property*, Proceedings of DiGRA 2005 Conference: Changing Views – Worlds in Play, p. 4, available at <http://www.infra.kth.se/~kg/Who%20owns%20my%20avatar.pdf>.

⁵⁷ Theodore Westbrook, *supra* note 33, at 788.

⁵⁸ Jun-Sok Huh, *Effects Of Real-Money Trading On MMOG Demand: A Network Externality Based Explanation* (2006), p. 22, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943368 – “The economic consequence that RMT brings is Pareto-improving, which means that with RMT both of the player and the company are in the better states than those without RMT.”

See also Arseni Starodoumov, *Real Money Trade in Virtual Economies*, p. 35, available at http://search.ssrn.com/sol3/papers.cfm?abstract_id=958286 – “The model developed in this research proves that in sufficiently large virtual worlds with varied challenge structure, the creation of the real money trade of digital assets is almost inevitable. Moreover, the real money trade can actually increase the overall satisfaction level out of the game as the example of [one MMORPG which has adopted hybrid RMT policies], Project Entropia (now Entropia Universe) shows, consequently increasing loyalty of the subscribers and securing traditional profit streams.”

⁵⁹ Edward Castronova, *A Cost-Benefit Analysis of Real-Money Trade in the Products of Synthetic Economies*, INFO - THE JOURNAL OF POLICY, REGULATION AND STRATEGY FOR TELECOMMUNICATIONS, Vol. 8, No. 6 (2006), p. 33, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917124. – “Regardless of what such research may show, however, the analysis and calculations in the paper together form a solid case for some policy intervention with respect to RMT in these large games. What we have is a clearly identifiable negative externality. Analytically, we know that its costs to society exceed its benefits. Moreover, the activity that produces the externality is done in contravention to explicit rules to which all parties have agreed ex ante.”

made it hard to evaluate the veracity of either claim. One author though was quick to note that “lacking empirical data, no conclusion can be made as to whether the subscription interest is in fact violated by trade in virtual property.” And that “one way to handle the immediate issue would be to appeal to a general principle of liberty, saying that the burden of proof lies with those who champion prohibitions [against RMT] to show that there are in fact negative consequences, or that such consequences are likely to be forthcoming.”⁶⁰ Game developers, at present, have yet to make the assertion based on hard empirical evidence.

2. Control Interest

For the most part, the control interest of game developers revolves around their uninhibited ability to shape the virtual world, its contents and characters in order to balance⁶¹ and improve the game for the greater good of its denizens.⁶² Some game developers argue that a virtual world that recognizes virtual ownership of property considerably undermines these explicit authoritarian powers by converting their role as sovereign owners into mere responsible custodians of virtual chattel. Thus, if their argument is to serve as a premise, there exists an implicit yet unwarranted obligation on the part of the game developers to ensure that virtual property ‘owned’ by users retains their extrinsic monetary value despite changes introduced in the game.⁶³ This runs contrary to the god-like powers

⁶⁰ Anders Eriksson & Kalle Grill, *supra* note 56, at 6.

⁶¹ Theodore Westbrook, *supra* note 33, at 789. “For an example of the latter consideration, a developer may find an imbalance present in the virtual world when one avatar picks up a virtual weapon that is extremely and unexpectedly powerful. As a result, the avatar may easily handle game challenges and content that should be much more difficult and take much more time. In this situation, the developer would be under an undue amount of pressure to create new and more challenging content, also a very time-consuming task. As a result, developers attempt to reserve the right to resolve such an imbalance by resorting to ‘nerfing,’ or reducing the effectiveness of, for example, a particular virtual weapon or avatar class. Nerfing has led to a number of disputes between users and developers in the past, particularly when a substantial sum of real money has been exchanged for a powerful weapon, only for the purchasing user to find that the developer has removed its most desirable characteristic.”

⁶² Although this may seem like an unbelievable altruistic motive on the part of the game developers, make no mistake that the same is aimed at increasing rates of subscription and user game time. MMORPG players more often than not prefer a balanced world and will not stoop to paying monthly subscription fees for something less than pristine.

⁶³ Richard Bartle, *Pitfalls of Virtual Property*, The Themis Group (2004), p. 9, available at <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf> – “This assumption of responsibility places virtual world developers in a very awkward position. It implies that, as controllers of the software that determines the intrinsic characteristics of virtual objects in their custody, developers have a duty to ensure that these characteristics do not change in such a manner as to affect unduly the value of their associated objects. This puts severe - perhaps impossible - constraints on them.”

attributed to the game developers who must now revise, add, and destroy content in their virtual worlds taking into consideration the new-founded rights gained by its users. As a consequence of the possibility of such rights, game developers now include a clause in their contract that allows them to be absolved of any liability incurred just in case property rights are later instituted.⁶⁴

B. PHILOSOPHICAL JUSTIFICATIONS FOR VIRTUAL PROPERTY RIGHTS

Before one can proceed to the legal arguments proposed by property theorists, it is essential to see the underlying reasons that have moved them to make such arguments. Briefly then, this section summarizes the philosophical justifications that promote virtual property rights in the real world and an examination of the flaws or incompleteness of these theories in light of studies that have been conducted to debunk the same.

1. The Lockean Labor Theory

*"[E]very Man has a Property in his own Person.
This no Body has any Right to but himself.
The Labor of his Body, and the Work of his Hands,
we may say, are property his.
Whatsoever then he removes out of the State that Nature hath provided,
and left it in, he hath mixed his Labor with,
and joined to it something that is his own,
and thereby makes it his Property.
- John Locke"*⁶⁵

Simply put, "one's labor is the source of one's property; one who has expended labor in the acquisition of a good is entitled to it over one who has expended little or no labor in its acquisition."⁶⁶ Based on the theory, players and avatars have a property claim in virtual chattel since it can be argued that without the time and effort placed by the gamers, none of the assets would have

⁶⁴ See *infra* note 85.

⁶⁵ Greg Lastowka & Dan Hunter, *supra* note 42, at 61 citing John Locke, *Second Treatise of Civil Government* § 27, at 287-88 (1690).

⁶⁶ Theodore Westbrook, *supra* note 33, at 792.

materialized. As to the question of whether or not participation in an MMORPG – a game designed to provide entertainment in exchange for a subscription price – can count as labor under the Lockean analysis, Lastowka and Hunter argue that:

“[T]here is no principled distinction that one can make between these two states [work and play], especially in a world where professional sportspeople get paid fortunes to play games. And, as anyone who has slaved over a virtual forge will tell you, “playing” the games comprising these virtual worlds can involve at least as much tedium as any real world work.”⁶⁷

A study, however, claims that if this is the sole argument of property theorists then a tug of war ensues between the player who obtained the use of the virtual object through time, skill, or money (if obtained through RMT) and the game developer who created the virtual world, its structure and rules, and provided the code that makes up the virtual object.⁶⁸ Whose labor should be rewarded? To answer this question, another study exhausted the arguments of Locke’s labor theory (as applied to virtual worlds) and concluded that a gamer’s claim to virtual property, by having picked up gold or acquired equipment by defeating creatures, is defeated by an even stronger claim by the developer who actually created both the equipment and the creatures.⁶⁹ This contention is not supported by this paper for the simple reason that it fails to appreciate the very nature of virtual property – intangible assets which are being exchanged in the world market for billions of dollars without the slightest bit of control from government, regulatory boards, and game developers themselves. For game developers to claim absolute ownership of virtual assets would not only render meaningless the time and effort spent by these gamers to acquire said property, but it would eviscerate the dormant economic capital generated from the items themselves.

2. Bentham’s Utilitarian Theory

*“An action then may be said to be conformable to the principle of utility...
when the tendency it has to augment the happiness of the community
is greater than any it has to diminish it.
– Jeremy Bentham”*⁷⁰

⁶⁷ Greg Lastowka & Dan Hunter, *supra* note 42, at 62.

⁶⁸ Theodore Westbrook, *supra* note 33.

⁶⁹ Steven J. Horowitz, *supra* note 8.

⁷⁰ Greg Lastowka & Dan Hunter, *supra* note 42, at 57 citing Jeremy Bentham, *An Introduction To The Principles Of Morals And Legislation*, at I.6 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789)

This theory, which coincidentally serves as the source of institutionalizing private property in modern history, removes the labor problem out of the equation and, instead, establishes that an individual's property right can exist if it benefits society as a whole. Thus, "the granting of a property right in any object, tract of land, sea, idea, or design is justified if it tends to maximize the good of society rather than diminish it."⁷¹ Although it has been argued that virtual assets are useless to society since recognizing the same only benefits in-game individuals, Lastowka and Hunter defends this theory by stating that:

"[To] the individual owner, the creation of his or her avatar is of some significance. It is clear from the amount of (real world) time and (real world) money invested in the virtual world property that individuals are placing a very high value on the virtual objects they create... From the utilitarian perspective, society is just individuals in aggregate. And since millions of people are spending vast amounts of time and money in virtual worlds, it is easy to see that on utilitarian grounds there are strong reasons for the grant of property based on the value of the transaction to the individual user."

This theory avoids the clash between game developers and players regarding the labor question in Locke's labor theory but presents another question as to what, exactly, comprises the greater good? It becomes a complicated inquiry because if virtual property rights are granted to the players, on one hand, the gray market in virtual trade would disappear and individuals would greatly benefit from the recognized property rights, yet on the other, game developers could be seriously disadvantaged from a possible substantial loss over investments and control. The difficulty lies in ascertaining which side the balancing scales should favor? Which side would benefit society as a whole?⁷² The scholars mentioned above claim that "at the risk of appearing to duck the question, we think it too early in the development of virtual property types to ascertain what the appropriate balance in these interests might be."⁷³ This paper would suggest later that, in light of the literature written and norms that have already evolved, these interests have already been determined but have yet to be legitimized as binding.

3. Hegelian Extension of Personality

*"[On Hegel's view]... property was an extension
of personality.
Ownership expanded the natural sphere
of freedom*

⁷¹ Theodore Westbrook, *supra* note 33, at 795.

⁷² *Id.*

⁷³ Greg Lastowka & Dan Hunter, *supra* note 42, at 60.

*for the individual
beyond his body
to part of the material world.
-Thomas Grey*⁷⁴

According to Hegel, private property rights are inseparably bound to personhood and identity. Property theorists have found this theory applicable to virtual property because it makes no distinction between tangible and intangible objects. Because users often strongly identify with their avatars and, to a lesser extent, their virtual belongings, the argument runs that these things are proper objects of property rights and ought to be protected.

The criticism against this is that though the theory might support property rights with regards to items held by avatars, it is unclear whether it would support transactions involving the avatars themselves. If property rights are justified under this theory, does it not follow that a sale of avatars also includes the sale of identities? Since a user-avatar's reputation is gained by interactions in the virtual world, wouldn't the subsequent sale of these avatars be tantamount to a sale of one's reputation and status? This loophole would certainly provide a means for perverse users who have purchased identities to defraud other users both within and without the virtual world.

4. Theory of Maximizing Innovation and Creativity

From what seems to be an application of Lawrence Lessig's thesis in *Free Culture*,⁷⁵ one recent study is of the view that the granting of property rights in virtual worlds may stand to boost individual creativity and innovation.⁷⁶ It admits however that without conclusive empirical data, it would be close to impossible to determine whether or not creativity and innovation would be maximized if virtual users were allowed to own property they acquire or create.

It is interesting to note that, at the moment, culture has already expanded from the very existence of virtual society. *Machinima*, or short movies of virtual world experiences, have now become a prevalent creative outlet for MMORPG enthusiasts. "Creators use the 3D rendering capabilities of an existing game, but use

⁷⁴ *Id.*, at 64, citing Thomas Grey, *The Disaggregation of Property*, 22 NOMOS, PROPERTY 74 (J. Roland Pennock & John W. Chapman eds., 1980)

⁷⁵ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (New York: Penguin Press 2004).

⁷⁶ Ryan Vacca, *supra* note 4.

the game to stage a movie scene or video presentation, which they record as it is played out. This recording is then distributed on the Internet as a standalone short film."⁷⁷ Another example can be seen in the movement for virtual world interoperability that has recently been launched in hopes of allowing property in one virtual world to be compatible with other software in other virtual worlds. Although this objective admits of being "a technically huge task to accomplish"⁷⁸, the original conception of the idea stemming from science fiction novels⁷⁹, its potential for being considered an option, if not a goal, for future virtual worlds is not unlikely.

III. CURRENT THEORIES OF VIRTUAL PROPERTY

*"When neither their property nor their honor is touched,
the majority of men live content."*
— Niccolo Machiavelli⁸⁰

The decade-old question of who owns virtual property based on the aforementioned interests and justifications has not lacked for possible answers. Although game developers have continually relied on contract, intellectual property, and recently, a proposed legislative charter to establish dominion over their creation, property theorists have conceived various plausible solutions that now include (1) assigning virtual property rights in the level of code, (2) considering the developer in estoppel for turning a blind eye to RMT, (3) separating the remedies depending on the virtual transaction involved, and (4) criticizing the contract on the basis of unconscionable terms, as multiple tools for justifying rights to virtual property. Although this paper espouses a different view, one of connecting interests rather than dividing them, it will briefly summarize the current theories and commentaries made on the same.

⁷⁷ *Id.*, n. 92, at 21, *citing* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (Yale Univ. Press 2006). *See also* Ondrejka, *infra* note 89, at 3.

⁷⁸ Virtual World Interoperability Wiki Site, at <http://vwinterop.wikidot.com/forum/t-26824/shared-scenario-use-case> (last visited April 3, 2008).

⁷⁹ NEIL STEPHENSON, *SNOWCRASH* (Bantam Spectra 1992) and WILLIAM GIBSON, *NEUROMANCER* (Ace 1984) are cyber-punk novels that detail the existence of a metaverse or cyberspace where data is represented by three-dimensional images.

⁸⁰ NICCOLO MACHIAVELLI, *THE PRINCE* (1532), *available at* <http://www.gutenberg.org/etext/1232>.

A. GAME DEVELOPER'S PERSPECTIVE

1. Contract is Law between the Parties

Before a gamer can participate in MMORPGs, a click-wrap contract known as the End User License Agreement (EULAs) is executed between the gamer and the game developer. Through this procedurally-accepted contract of adhesion⁸¹, developers pronounce their companies absolute and unconditional ownership of intellectual property over the game's content and activities. Aside from it stipulating that the developer does not recognize any right or title of players to virtual goods⁸² (thus considering the RMT of items or avatars to be of no merit⁸³), it also allows the developer to terminate an account⁸⁴ and even the virtual

⁸¹ Since *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), American courts have considered the typical click-wrap contract to be procedurally enforceable. A click-wrap contract is a common agreement found in software packages and internet websites as part of its installation process.

⁸² This paper will use the EULA of the most popular game in the market at the time of this writing (Blizzard Entertainment's World of Warcraft) to describe the restrictive clauses similar in most property-averse virtual worlds. World of Warcraft, *Terms of Use Agreement*, Last Updated January 11, 2007, available at <http://www.worldofwarcraft.com/legal/termsofuse.html> - "All rights and title in and to the Program and the Service (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into the Program, transcripts of the chat rooms, character profile information, recordings of games played on the Program, and the Program client and server software) are owned by Blizzard or its licensors. The Program and the Service are protected by United States and international laws. The Program and the Service may contain certain licensed materials, and Blizzard's licensors may enforce their rights in the event of any violation of this Agreement."

⁸³ *Id.* "Blizzard does not recognize the transfer of Accounts. You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Program. You agree that you have no right or title in or to any such content, including the virtual goods or currency appearing or originating in the Game, or any other attributes associated with the Account or stored on the Service. Blizzard does not recognize any virtual property transfers executed outside of the Game or the purported sale, gift or trade in the "real world" of anything related to the Game. Accordingly, you may not sell items for "real" money or otherwise exchange items for value outside of the Game."

⁸⁴ *Id.* "Blizzard may suspend, terminate, modify, or delete the account at any time with any reason or no reason, with or without notice. For purposes of explanation and not limitation, most account suspensions, terminations and/or deletions are the result of violations of this Terms of Use or the EULA."

world itself at any time, modify existing terms⁸⁵ of the contract at its behest, and absolve itself from liability⁸⁶ in case of disputes.

Richard Bartle, one of the pioneers that spawned the first set of text-based MMORPGs known as MUDs in the early 90's and one of the chief proponents in discarding virtual property rights for gamers today, puts the game developer's stance in much more able words:

"As a player of virtual worlds, you don't own anything, your character owns it. What's more, you don't own your character, either - you don't even own "your" account. These are all part of the 'set' that is owned by the developer. Only if the rules of the virtual world acknowledge that real-world ownership can be transferred does the concept of ownership in the virtual world correspond with the concept of ownership in the real world."⁸⁷

The real market trade is, by explicit terms of the contract, illegal. Yet despite these clauses and the reasons justifying the developer's complete ownership⁸⁸ of virtual chattel, one study has questioned whether game developers even have a choice as to the commodification of virtual items. Since the violation of in-game virtual property sales through RMT is rarely enforced, if indeed the same can ever be considered enforceable considering the unregulated nature of the internet, is the blockage of economic intrusion into digital worlds even desirable? Ondrejka explains the proposition in this light:

⁸⁵ *Id.* "Blizzard reserves the right, at its sole and absolute discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this Agreement at any time, including without limitation access policies, the availability of any feature of the Program, hours of availability, content, data, software or equipment needed to access the Program, effective with or without prior notice; provided, however, that material changes (as determined in Blizzard's sole and absolute discretion) will be disclosed as follows: Blizzard will provide you with notification of any such changes to the Program through a patch process, or by email, postal mail, website posting, pop-up screen, or in-game notice. If any future changes to this Agreement are unacceptable to you or cause you to no longer be in compliance with this Agreement, you must terminate, and immediately stop using, the Program and the Account. Your continued use of the Program following any revision to this Agreement constitute your complete and irrevocable acceptance of any and all such changes. Blizzard may change, modify, suspend, or discontinue any aspect of the Program at any time. Blizzard may also impose limits on certain features or restrict your access to parts or all of the Program without notice or liability."

⁸⁶ *Id.* "Neither Blizzard nor its parent, subsidiaries, licensors or affiliates shall be liable in any way for damage or loss of any kind resulting from (a) the use of or inability to use the program or service including without limitation loss of goodwill, work stoppage, computer failure or malfunction; (b) the loss or damage to player characters, accounts, statistics, inventories, user profile information stored by World of Warcraft; or (c) interruptions of service including without limitation ISP disruptions, software or hardware failures or any other event which may result in a loss of data or disruption of service. In no event will blizzard be liable to you or anyone else for any direct, indirect, incidental, special, exemplary or consequential damages."

⁸⁷ Richard Bartle, *supra* note 63, at 4.

⁸⁸ See *supra*, Part II.

"Modifying the game mechanics to prevent real-world exchanges necessitates the blocking of all in-world exchanges of items between players and all exchanges of accounts between players. Blocking all in-world exchanges is required because there is no way to accurately determine if the exchange is the result of a real-world monetary transaction. Certain patterns may indicate that the exchanges are driven by real-world concerns, but detecting and proving player intent is extremely difficult and prone to false positives. So, developers are left blocking all player-to-player transactions, which completely eliminates most of the game play of MMORPGs. Proving that an account has changed hands, much like proving intent, is also difficult and inaccurate. Technical detection of intent, generally, is an arms race that is at best expensive and at worst not winnable."⁸⁹

The lack of a contract's enforcement, however, does not serve to invalidate it on that ground. At most, the lack of its enforcement by game developers, if done despite the knowledge of the breach of contract, may serve to put the latter in estoppel for having slept on its contractual rights.

2. The Intellectual Property Defense

As mentioned earlier, it is the natural argument espoused by game developers that the virtual world, by virtue of intellectual property laws, vests in them absolute ownership of everything within the said world. However, one study has already shown that such a defense is weak and unsatisfying since no copyright infringements occur when in-game assets are traded for real money.⁹⁰ Particularly:

"The [intellectual property] assertions contained in these contracts rests on a number of questionable legal assumptions. Either [game developers] assume that: copyright subsists [aside from the virtual worlds they created,] in avatars and other virtual items and that the [they] hold the copyright and that the rights granted under copyright encompass avatar sales and, lastly, that any contractual clauses to this effect are legally enforceable. Or they assume that: the [game developers] hold copyright in some other work and that these rights are extensible under [license] to control the act of avatar sales... [These] assumptions are baseless in law or tenuously arguable at best."⁹¹

⁸⁹ C. R. Ondrejka, *Living on the Edge: Digital Worlds Which Embrace the Real World* (June 5, 2004) (unpublished paper, Linden Research), p. 2, available at <http://ssrn.com/abstract=555661>

⁹⁰ Molly Stephens, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513 (2002).

⁹¹ Ren Reynolds, *Hands off MY avatar! Issues With Claims of Virtual Property and Identity*, Proceedings of Digital Games Industries, Unpublished Manuscript (2003), p. 3, available at <http://www.ren-reynolds.com/downloads/HandsOffMYavatar.htm>

3. The Charter of Interration

Castronova argues that the ambiguous state of virtual worlds merits legislative action not primarily for the game developers but to protect everyone's 'right to play'.⁹² With people seeking refuge in virtual worlds from the rigors of real life, real world laws should have no bearing in these distinct play-spaces since their intrusion would merit the destruction of the one good that virtual worlds seek to perpetuate: a hope for escape. He likens the current situation to England at the time of the Industrial Revolution where 'we imposed on ourselves the predations of the work system'.⁹³ Having this recently-invented escapist venue where workers have hope for relief, governments must recognize that property-averse virtual worlds, at the very least, should be removed from the ambit of the law. A double-standard must therefore apply where the law cannot touch 'closed worlds', or that which prohibit the practice of RMT, but can do so to 'open worlds', where virtual worlds are not play-spaces but an extension of Earth.

This schematic, which he calls a Law of Interration, would recognize that these virtual worlds provide a unique good to society, one that the law should protect, ironically, by leaving it. He thus argues that a properly worded EULA would eliminate the intrusion of the law in these virtual worlds and thus make everyone better off. "Under a utilitarian conception of legal policy, if current law does not support these EULAs, new law should be written that supports these types of agreements." As a precedent, he cites the acts of creating corporations:

"Some 400 years ago, governments began to realize that society would be better off with certain restrictions on individual behavior and rights, restrictions that invoked a tightly-defined and circumscribed game of make-believe about the notion of personhood. Incorporation invented the idea of a fictional person to promote a specific form of human interaction. On its face, the law that instantiates the fictional person and forces everyone into the game of make-believe about him is truly oppressive to living, breathing people. Smith can dwindle away the assets of Smith Incorporated, but Smith is not personally accountable for the loss. Any investment in the company is lost when the corporation goes under. Yet once the law has its effects, all people, including those who are oppressed and denied rights by the face of

⁹² Castronova's *Right to Play*, *supra* note 14, was published a month after Balkin's *Virtual Liberty*, *infra* note 104, but the former seems to support the latter's assertion of separating the virtual world from the real one. The first study was written for the purpose of protecting a distinct 'right to play'; while the second, for protecting the constitutional right to free speech and expression. This study chose to focus on Castronova's solution rather than the modes of regulation offered by Balkin because the former related its arguments to the subject of virtual property.

⁹³ Edward Castronova, *supra* note 14, n. 10, at 193.

the law, are better off... The analogous legal act of intertation would have a similar purpose: to create a fictional place.”

There would thus be benefits for those who follow the charter and sanctions to those who allow prohibitions to occur. Although his proposition is sound, the practical fact of the matter is that, regardless of intertation, of separating closed and open worlds, property exchanged within virtual worlds will always involve some form of consideration. And as already shown, it becomes close to impossible to monitor such considerations outside the gaming atmosphere. Unless technology is developed to address the latter issue, such charters and proposed laws of division, albeit having an ideal flare, would be reduced to a loud, barking law without much bite.

B. PROPOSED LEGAL SOLUTIONS OF PROPERTY THEORISTS

1. Code-Level Separation

Proposals have been made to separate virtual property from the virtual world through the level of code. Fairfield, the leading scholar promoting this view, posits that if any rights are to exist with virtual objects, these rights appear at the level of the code since it is this within this context that something can be valued and sold.⁹⁴ Therefore, if one owns a building in the virtual world, he or she owns it regardless of the intellectual property inherent in the underlying code and can sell it at his leisure.

The study grounds its thesis on economic efficiency as a form of temperance against the growing *tragedy of the anticommons* in cyberspace. “An anticommons is a state in which overlapping rights of exclusion cause property to go unused or underused.”⁹⁵ Where the more popular *tragedy of the commons* makes publicly-owned property prone to abuse due to a distinct lack of owners who would improve and manage the same, a *tragedy of the anticommons* occurs when a scarce resource such as virtual property becomes the subject of multiple owners who have the right to individually exclude others from its use. This stalemate of claims inevitably deprives both the gamer and developer of virtual property’s most economically efficient use – that of having a marketable, fiscal value – and coincidentally this impasse also increases the transaction costs related to such use.

⁹⁴ Joshua Fairfield, *supra* note 47, n. 152, at 1077.

⁹⁵ *Id.*, at 1069.

The anticommons is primarily created by contract between private parties. “And, indeed when we look at the places where virtual property interests are beginning to strongly emerge, we find contractual restrictions that explicitly attempt to knock out emergent virtual property interests.”⁹⁶ The prudent solution, according to Fairfield, would be to recognize virtual property rights in the level of code in order to address such a dilemma.

A separate study on the other hand, which seems to support Fairfield’s thesis yet makes no mention of his study, theorized that rights of gamers should be based on the integers (bits) that are stored in the database as they are used in the game (context).⁹⁷ The “bits in context” theory posits that since it is within the context of a game that the bits have value, whether objective or subjective, it is over the bits representing virtual property as used in the context of a game that the issues of legal rights will arise. The proposals undoubtedly seek to modify existing EULAs to allow for virtual rights to exist at the code-level.

2. Waiver of Rights

Despite EULAs explicitly forbidding the practice of RMT, game developers often turn a blind eye to the sale and transfer of virtual property. “The presence of so many third-party sellers of virtual property even in games where it is ostensibly banned makes it appear that developers are not aggressively enforcing their rules.”⁹⁸ A possible reason for this lack of enforcement is given by one author who claims that:

“Developers arguably benefit from the sale of virtual assets. Many players do not have sufficient time to develop their avatars to the point of advancement necessary to visit much of the virtual world. Without the equalizer of real-world markets providing players unable to otherwise develop their characters the virtual assets they need to compete, those players would cease paying their monthly subscription fees, decreasing developer revenues. This may explain why developers may often choose not to enforce their EULAs.”⁹⁹

“One could argue therefore that, regardless of the terms contained in the EULAs, the virtual-world providers implicitly recognize the legitimacy of real-world

⁹⁶ *Id.*, at 1082.

⁹⁷ Michael Meehan, *Virtual Property: Protecting Bits in Context*, 13 RIC. J.L. & TECH 7 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908924

⁹⁸ Bobby Glushko, *supra* note 39, at 529.

⁹⁹ Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 300 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113334.

value of virtual items when they fail to take steps to shut down the secondary marketplace.”¹⁰⁰ One study has suggested that:

“If they truly wanted to eliminate the practice, they could alter the code or the rules governing the virtual world within the system to prevent transfers of this sort. Since they do not do so, they arguably implicitly endorse the real-world value of the items and therefore admit the reasonableness of believing in such value.”¹⁰¹

Although this argument may lie, it overlooks the overwhelming fact that there is no manageable way for developers to distinguish between a legitimate in-game trade of goods and a real-market transaction to forestall the practice. Since transactions of the latter occur outside the game, away from the developer’s domain and line of observation, it would be close to impossible to consistently prove that trade within a virtual world involved real money. The only logical solution to prevent the phenomenon would be to ban the very concept of trade within virtual worlds, an event which will inevitably bring about more harm than good to both gamers and developers.

3. The Passive Approach: A Separation of Remedies

One study is of the view that the solution to the controversy is simple: transactions that occur within an MMORPG should be governed by contract while transactions that occur outside of the game, but that involve virtual goods or relationships, should be treated no differently than real-world transactions that involve similar goods or relationships. “One of the primary virtues of the proposed approach is that courts will only have to interpret contracts and will not have to address the near-infinite variety of imaginable scenarios they would face if virtual-world events were actionable in real-world courts.”¹⁰² The buying and selling of virtual goods, on the other hand, would be regulated by real-world laws.

This solution implicitly recognizes the duality of virtual property – how it is fiscally valued outside the game and how it is considered a mere tool for gaming within. The duality though presents a problem. Is virtual property, property in its general sense? Or is merely property sometimes? How can courts tell the difference when, primarily, problems arise because users claim they own the property involved regardless of whether it be in the real world or in the virtual setting? Although this

¹⁰⁰ David P. Sheldon, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 780 (2007)

¹⁰¹ *Id.*, at 780.

¹⁰² Jacob Rogers, *A Passive Approach to Regulation of Virtual Worlds*, 76 GEO. WASH. L. REV. 405, 423 (2008)

study agrees with the conclusion, the passiveness of this approach does not set clear-cut guidelines as to what would prompt the intercession of real-world courts into transactions between gamers and developers and between the gamers themselves.

4. The Unconscionable Contract

Another solution has been to treat the contract as being unconscionable since it does not meet the reasonable expectations of its consumers. Both gamer and game developer will agree that a virtual world is a community. The question though is what laws should apply? Can real-world laws intrude into this virtual play-space? Or is this a separate world entirely where such rules are simply dictated by contract authoritarianism? Game developers are of the view that the latter is controlling and that where disputes occur, the EULA, a social contract of sorts agreed upon by its denizens, should serve as the sole means to resolve them. As discussed earlier, the developers have legitimate interests in preserving its dominion over the virtual world. The contract merely buttresses these interests and the violation of its provisions would constitute the appropriate sanction: termination and exclusion from the virtual world should the offense call for it. These interests are further secured by a limitation of liability imposed by the contract that serves as a catch-all solution for developers in case disputes between the parties should occur. Though they are not wrong to limit their liability, and courts have yet to actually decide if such arguments can lie, one study explains that developers have not fully understood their relationship to the gamers.

"Players within virtual worlds have an ongoing relationship with the game developer, other players, and virtual property within those worlds. [They] also invest considerable time and money into the virtual world, a virtual world that continues to be under the control of the game developer. Because of this continuous and close relationship, developers of virtual worlds have a greater responsibility to their customers than most software developers."¹⁰³

Balkin, who supports an entirely different argument regarding virtual worlds but nevertheless presents an accurate description of the relationship between its interested parties, states that:

"In virtual worlds, the relationship between platform owners and players is not simply one between producers and consumers. Rather, it is often a relationship of governors to citizens. Virtual worlds form communities that grow and develop in ways that the platform owners do not foresee and cannot fully control. Virtual worlds quickly become joint projects between

¹⁰³ Bobby Glushko, *supra* note 39, at 519.

platform owners and players. The correct model is thus not the protection of the players' interests solely as consumers, but a model of joint governance."¹⁰⁴

Thus, allowing the game developer to limit its own liability *and* enforce the contract's stipulations at its own discretion, according to the first view presented, would be tantamount to a double-standard that puts the gamer at the authoritarian rule of the developer without considering the general nature of the environment – one that is a community that expects its rights to be protected. Because of this apparent unconscionability, coupled with the philosophical justifications presented by Latswoka and Hunter, one study posits that a tort action should be considered a valid remedy for the gamer to recover actual damages resulting from the deprivation of the latter's right to virtual chattel.¹⁰⁵

Although anti-property theorists can argue that these rights are being claimed in light of 'gaming' or for 'entertainment purposes', one need only see the general trend of how people associate with their avatars, the growing number of gamers, and the economic and social utility derived from these virtual worlds to see how the interpretation might favor users who expect a reasonable form of protection from the contract's harsh terms. Written solely for the benefit of the developer and not taking into account player expectations of fairness, the argument that the contract is unreasonable might be strong in light of the modern trend of millions of people 'migrating' to these virtual worlds and finding a unique, sometimes pecuniary, value within them.

Having propounded upon current views from both sides, we turn our attention to the initial inquiry and determine whether another solution can be presented. This paper would suggest one that would seek a compromise between the two views instead of a simple statement that X, may he be developer or gamer, completely owns virtual property.

¹⁰⁴ Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VIRGINIA LAW REVIEW 2043, 2082 (2004) – The study focused its attention more on the free speech aspect of the virtual world controversy as opposed to the market of virtual goods and discussed various means of regulating the same.

¹⁰⁵ Alfred Fritzsche, *Trespass to (Virtual) Chattels: Assessing Online Gamers' Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity*, Unpublished Manuscript (2007), p. 34, available at http://works.bepress.com/alfred_fritzsche/1 – "Given these property interests, MMORPG designers implement unconscionable EULA, TOS, and TOU contracts to prohibit RMT activity. Those contracts allow designers to terminate accounts for engaging in RMT activity, and reserve to designers the penultimate right to pull the plug on the virtual world. Considering MMORPG participants' property interests and the unconscionable contracts designers employ to prevent RMT activity, courts should find that designers trespass upon gamers' virtual chattels when they terminate accounts that engage in RMT activity. However, courts must employ the trespass to chattels doctrine with caution to prevent anomalous results and preserve the often desired lawlessness inherent in MMORPG environments."

IV. VIRTUAL PROPERTY RIGHTS: A MODIFIED USUFRUCT OF INTANGIBLES

"Property, n. Any material thing, having no particular value, that may be held by A against the cupidity of B. Whatever gratifies the passion for possession in one and disappoints it in all others."
– Ambrose Bierce¹⁰⁶

A. ADOPTING A NEW PARADIGM USING THE CONCEPT OF USUFRUCTS

A criticism of law is that it has been unable to consistently cope with the rapid developments of technology. When things subject to controversy are born, it takes a substantive amount of time – and coincidentally, a corresponding number of cases involving the abuse of these things – before legislation is able to put the issues involved within reach of the supposed 'long arms' of the law. In the virtual world scenario, that of make-believe swords and daggers being the object of property rights, the law has had very little to say in terms of specific attribution to virtual property. There being no definite ruling on the judicial forefront as well, cases being prone to end in settlements instead of actual decisions,¹⁰⁷ the debate continues to rage on in hopes for the panacea to resolve the dispute. This paper would submit, however, that a foundation for understanding the intricacies involved in this semi-porous world of 'unreality' already exists. And this bedrock, stemming from a civil law legal system, is the law of usufructs.

The claim of ownership of property within virtual worlds though would not be complete without examining the concept of ownership by itself. Defined to

¹⁰⁶ AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* (1911), at p. 140 (NuVision Publications, LLC, 2007).

¹⁰⁷ Julian Dibbel, *Black Snow Interactive and the World's First Virtual Sweat Shop*, WIRED magazine (January 2003) available at <http://www.juliandibbell.com/texts/blacksnow.html> - This article recounts the case of *Black Snow Interactive v. Mythic* that was subsequently settled in the summer of 2002.

The case of *Marc Bragg v. Linden Lab*, a popular case in virtual property discussions, also ended up in a confidential settlement agreement (Oct. 1, 2007). More recently in *Blizzard v. In Game Dollar* (Dec. 17, 2007), the respondent third-party company (neither developer nor gamer) was shut down after the Federal District Court, Central District of California, issued a permanent injunction on the latter as a part of a settlement package. At present, there are two ongoing cases related to virtual property that are tangentially related: *Alan Deborneville v. Brock Pierce* (founder of third-party virtual property company IGE) and *Hernandez v. IGE* (Internet Gaming Entertainment). The first is scheduled for trial on May, 20, 2008 (California) while the second, on April 4, 2008 (Florida). Aside from the cases of *Blizzard* and *Black Snow*, the other cases arose from disputes in the property-promoting virtual world of Second Life.

be a basket of rights by the early Romans, ownership includes the fundamental rights of the right to use the thing (*jus utendi*), the right to its fruits or profits (*jus fruendi*), and the right to dispose of the same (*jus disponendi*). In adopting these rights into our own jurisdiction, the framers of law and jurisprudence could hardly be said to have contemplated the idea of ownership in virtual worlds to be within the ambit of property law, how much more as a subject of real world disputes. Yet if we implement these Roman rights in analyzing the real market trade controversy, current statutes related to the rights involved might proffer a possible solution to govern the relationship existing between gamer, game developer, and virtual property.

Two of these fundamental rights, the *jus utendi* and the *jus fruendi*, when combined, form the right of usufruct.¹⁰⁸ Du Buen in *Derecho Corrun* defines an usufruct to be “a real right, of a temporary nature, which authorizes its holder to enjoy all the benefits which results from the normal enjoyment of another’s property, with the obligation to return, at the designated time, either the same thing or, in special cases, its equivalent.”¹⁰⁹ It can be gleaned from the foregoing definition then that the remaining fundamental right – the *jus disponendi* – is held by a person other than the usufructuary; this right is also the essence of what is termed “naked ownership.”¹¹⁰ Not being the complete owner of the thing therefore, the usufructuary is prohibited by law from alienating the thing held in usufruct for to do so would prejudice the naked owner.

To illustrate the concept of a typical usufruct relationship between parties consider the following scenario:

Original owner X who is about to die wills his property to his only son A, but reserves the right of usufruct to be held by his wife Y until after her death. Y, therefore, despite not inheriting the property after her husband’s death, continues to possess the same as a temporary holder. As an usufructuary, Y is prohibited from selling the property since to do so would prejudice her son A who is now deemed the naked owner. Although an usufruct is usually constituted for the usufructuary to preserve the form and substance of the thing, should the contract so stipulate, *the naked owner can prejudice the rights of the usufructuary*.

If one compares this situation with the one pervading in the virtual world setting, as depicted below, one immediately sees the point of comparison with regard to the two rights that an usufructuary is given (*jus fruendi*, *jus posidendi*) and the one right which he is prohibited from exercising (*jus disponendi*):

¹⁰⁸ *Eleizegui v. Manila Lawn Tennis Club*, 2 Phil. 309 (1903)

¹⁰⁹ II ARTURO TOLentino, CIVIL CODE OF THE PHILIPPINES 317 (2004) – describing Article 562 of the Civil Code, Tolentino states that an “usufruct gives a right to enjoy the property of another with the obligation of preserving its form and substance, unless the title constituting it or the law otherwise provides.”

¹¹⁰ II EDGARDO PARAS, CIVIL CODE OF THE PHILIPPINES ANNOTATED 526 (14th ed. 1999)

Developer D, as owner and creator of the virtual world, grants a right of use to gamer G via his avatar. This right however is severely curtailed by contract. G is expressly barred from alienating any property acquired within the virtual world and can be subsequently terminated by D if such violations become manifest. In addition, D is explicitly authorized to modify any objects in the possession of G at its discretion.

In both settings, the person granted the right to use the property is barred from alienating the same to a third-party. In both settings, the naked owner and the developer are allowed to prejudice the rights of the possessor by virtue of contract – both hold the *jus disponendi* or the right to destroy. It is at this point though that the similarity ends and the crux of the RMT controversy resurfaces.

The distinguishing aspect that separates the two situations from being considered completely analogous is the fact that the *sale of rights* is permissible for an usufructuary¹¹¹ yet explicitly made unavailable to the gamer. The former can alienate the *jus possidendi* and the *jus fructu* to another person provided that certain conditions are met¹¹² whereas the gamer is restricted by no less than two provisions in a typical End-User License Agreement of a property-averse MMORPG.

Now we've already examined the reasons and the interests that game developers have espoused with regard to the illegality of the real market trade. The first involved a subscription interest that catered to the profits of the gaming companies. The second was a control interest that would allegedly render the authoritarian functions of the developer inutile if virtual property rights were recognized. Conceding that these arguments are hypothetically granted, what if these interests could be preserved and yet still allow the gamers a modicum of protection with regard to their virtual assets? Would this setup prove to be satisfactory to either of the claimants?

And from another vantage point, if we accept the premise that virtual objects resemble things held in usufruct,¹¹³ why should contract prohibit what the law categorically allows for something which is similarly situated? Though the freedom to contract¹¹⁴ allows individuals to stipulate such prohibitions that are

¹¹¹ CIVIL CODE, art. 572. The usufructuary may personally enjoy the thing in usufruct, lease it to another, or alienate his right of usufruct, even by a gratuitous title; but all the contracts he may enter into as such usufructuary shall terminate upon the expiration of the usufruct, saving leases of rural lands, which shall be considered as subsisting during the agricultural year.

¹¹² The first is that property reverts back to the naked owner (A) upon the death of Y and the second is that Y is to be held liable for any damage incurred to the thing by the person who substitutes her. The second condition of the usufructuary-owner relationship, that of holding the original usufructuary liable for damages done by the substitute owner, should be discarded in the virtual world setting.

¹¹³ See Charles Blazer, *supra* note 49; See also Joshua Fairfield, *supra* note 47.

¹¹⁴ CIVIL CODE, art. 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy.

appropriate under the circumstances, the numerous justifications presented from philosophical, economic, and social standpoints inevitably points towards a marked appreciation, rather than disdain, of the pecuniary value of virtual property.

Thus, it is for these reasons that this paper posits that an exception should be carved out by legislation in light of the public policy issue arising from the recognition of virtual property as an intangible asset that is quite distinct from intellectual property. And this can be done if law and virtual society approaches the problem from a rights-based paradigm instead of an object-oriented sale. The real-market trade of virtual property can be legitimized and the interests of both gamer and developer can be subsequently protected if the law would allow for some basic rules of usufruct to apply. The applicability should not be copied wholesale but merely used as a derivative to create better rules that already reflect existing norms.

B. THE PROPOSED RULES OF VIRTUAL PROPERTY IN MMORPGS

It is thus the thrust of this paper that a modified set of rules on intangible usufructs should govern the relationships generated by virtual property. The primary reason, one practical rather than one-sided in nature, is to provide its users with a set of reasonable terms (instead of debunking them in the name of contract law) whilst not alienating the game developer's interests. Using the concept of usufructs, this might be achieved should the following be considered the default rules of virtual property in MMORPGs:

Rule 1. The developer of the virtual world is to be considered the true and lawful owner of virtual property but, by virtue of contract, allows users to partake of the following rights: the right to use and the right to the fruits of such use. These rights are susceptible of alienation and will be considered, when bundled together, as a virtual property right. Any stipulation to the contrary shall be considered void.

The first rule clarifies the roles played out by developer and gamer with regard to virtual property. More importantly, it legitimizes the real market trade not as a sale of property, but as a sale of rights with 'naked ownership' to be retained by the game developer. To adopt this rule would provide a two-fold function. First, it would allow the developer to absolve itself from fraudulent disputes borne from player-to-player transactions. Secondly, real-world trade disputes borne from the players themselves would be settled by using the current market rate of virtual property as a direct corollary to the right to the fruits of a thing. When a player is

thus 'unlawfully deprived'¹¹⁵ of his right to use a virtual artifact, his remedies would be subject to either the return of the same or he be fiscally indemnified from the loss of such by the wrongdoer. In a situation where a transaction is characterized by fraud, the injured party would have recourse to just compensation without the involvement of the game developer unless it can be proven, as in the exceptional case of *Li Hongben v. Beijing Artic Ice Technology*, that the latter was negligent in providing adequate and reasonable protection to its own content.

Rule 2. The developer may construct any works and make improvements or diminution of which the virtual property and/or virtual world is susceptible to provided that such acts, should they cause a diminution in the value of the usufruct or prejudice the right of the usufructuary, are not exercised arbitrarily.¹¹⁶

Although in the usufructuary scenario with X, Y, and A, the naked owner is required by law not to prejudice the rights of the usufructuary (unless otherwise agreed upon),¹¹⁷ this paper suggests that, in light of the unique relationship between game developer and gamer provided by Rule 1, a new paradigm should be allowed in virtual worlds whereby gamers may be prejudiced and the value of the thing in usufruct diminished so as long as the acts committed by the developer are not exercised arbitrarily. Were this the case, the control interest of the game developer would not be affected since it would allow reasonable leeway in modifying content for purposes of improving or balancing the virtual world without worrying about devaluing existing property. Thus when EULAs stipulate that the inherent value of items introduced into the game may be 'nerfed' or modified for purposes of balancing and improving the virtual world to the prejudice of those in possession of said items, such stipulation can be considered valid under the second Rule so as long as the change affects all gamers and not merely exercised for the purpose of isolating a particular gamer or group of gamers. Although players are won't to agree to such a stipulation, they realistically have no choice since to remove this powerful control interest of the developer and adjudge full property rights in favor of the gamer would inevitably spell a diminution of incentive for the developer to operate, create, and improve virtual worlds – a scenario that is admittedly not to the best interest of either of the parties involved.

¹¹⁵ If a thief were to steal an item within the virtual world, this would not be actionable. But should such theft occur outside the game, this would constitute an actionable wrong.

¹¹⁶ CIVIL CODE, art. 595. The owner may construct any works and make any improvements of which the immovable in usufruct is susceptible, or make new plantings thereon if it be rural, provided that such acts do not cause a diminution in the value of the usufruct or prejudice the right of the usufructuary. (Provision was taken said article and modified to suit this paper's theory.)

¹¹⁷ CIVIL CODE, art. 562. Usufruct gives a right to enjoy the property of another with the obligation of preserving its form and substance, unless the title constituting it or the law otherwise provides.

Rule 3. In the event that the developer should terminate the virtual world, the gamers are deemed to have returned virtual property, both avatars and virtual items, to the developer thereby absolving the latter from any complaint that might arise.

The concern that game developers would deprive gamers of the value of virtual property upon closing down their virtual worlds is legitimate (despite being unlikely) but one wholly answerable by the paradigm of virtual property through usufructs. As encompassed by De Buen's definition of usufruct, an 'obligation to return, at a designated time' is present. And in the virtual world setting, this obligation becomes manifest when the game developer, as the naked owner, decides to terminate the usufructuary right because of the need to destroy the virtual world. This right to terminate is inherent in the prejudicial powers of the game developer as discussed in the preceding rule. So as long as such an act is not exercised arbitrarily, the same can be considered as a legitimate exercise pursuant to the best interests of both the game developer and the gamer.

Although the MMORPG industry is distinctly on the rise, there exists the possibility that some games may not be able to generate a profit or a substantial user base that would allow a free-flowing virtual world to subsist. This would inevitably prompt the developers themselves to close shop. This rule therefore caters to the game developer's subscription interest and provides the latter immunity from liability should the company decide to discontinue operations due to fiscal concerns. Though this may seem like an extreme option, it is doubtful that this rule will be thoroughly exercised by the major game developers if one takes into consideration the amount of money these companies have been and are accumulating through subscription fees alone. Rather, it is an option reserved for the protection of start-up developers or those MMORPGs that have yet to gain widespread acclaim and use by a substantial portion of the currently existing thirty million-strong gaming population.

These proposed rules leave much for legislation to iron out. However, the gist of the suggestion is that they be recognized as binding in the use of virtual property in MMORPGs to allow for a more appropriate conception of virtual chattel by both the gamer and the game developer.

C. CONCLUSION

We have already examined the descriptive elements of virtual property and have concluded that they mimic real world artifacts to the point that their saleability as a valued object is not an issue when their attributes of 'rivalry, persistence, and interconnectedness' are considered. The justifications and proposals of property theorists and their dissenters, their interests in the matter, have been presented to

be legitimate, despite at times beings flawed or countered by other arguments. The reasons why the virtual property impasse should be resolved were established to be primarily two-fold: the first, to counter the growing rate of virtual crime and, the second, to remove transactions involved in RMT from the dangerous and unpredictable gray market of goods.

Yet despite this rich literature on virtual property,¹¹⁸ what has been contemplated in the real market trade is still a sale of services – that what is being sold is the time and effort that users have expended in accomplishing, achieving, or acquiring items within the virtual world – or a sale of objects that presumably belong to the gamer. This paper would state that virtual property is, in fact, property but that the paradigm of a sale of services “continually rendered” or of a sale of objects themselves should give way to a rights-based approach that would visualize a sale of a distinct and reasonably curtailed use-right: a modified usufruct of intangibles.

Undoubtedly the sale of these rights, should the rules apply, would be considered valid. Should the terms of the contract prohibit the practice, as the game developer’s EULA is won’t to do at present, the restrictions should be deemed inefficacious because of the existing norms that have developed with regard to the relationship between gamer, developer and property within virtual worlds. To claim that the stipulations embedded in the contract should solely govern the relationship between the parties fails to consider the unique nature of virtual property: its acquisition as a product of labor, the established pecuniary and social value of the same, and the raging economic market that will capitalize on its existence regardless of any contractual restriction that would suppress its recognition as a saleable construct. Instead of deciding that virtual property belongs to either of the interested parties *in toto* then, this paper posits that the proposed rules, adopted from the law of usufructs, should serve as the foundation for legislative reform in the recognition of virtual property rights.

It is interesting to note that one particular theory¹¹⁹ that opposes emerging rights in virtual property hopes to completely remove property-averse virtual worlds from the ambit of the law by creating a legislative divide between worlds virtual and real. This line though is admittedly permeable, one that the market has already decided to enter with or without the intervention of real life laws. Regardless of the inevitable decision on virtual property, it would be a prudent course for policy and decision makers to consider that the border that separates, has been, for a long time now, breached by forces that are not inherently evil. And instead of isolating and excluding these worlds from each other, as transaction costs regarding this venture would prove to be costly and the effect of such would prove fruitless considering

¹¹⁸ See Virtual Economy Research Network at <http://virtual-economy.org/bibliography?page=1>; See also the Virtual Law Bibliography by Greg Lastowka (from the Terra Nova Blog), at http://terranova.blogs.com/terra_nova/2008/03/virtual-law-b-1.html.

¹¹⁹ See *supra* Part III.A.3.

that the real world market is not subject to the scrutiny of the game developers, it would bode well for the authorities to consider regulating the link between these worlds instead of tersely destroying it. After all, borders not only bind as boundaries but also connect as gateways. And this connection, a *form* of usufructuary right if this paper's thesis is to hold merit, should be a saleable asset that shouldn't be devalued just because contract says so.

As the borderlines between play and work start to blur and the economic benefits, social disadvantages and lawsuits regarding virtual property grows, it appears that legislative bodies and courts will have to decide in the very near future whether, as a matter of public policy related to user expectation, notwithstanding contractual restrictions inherent within, virtual property rights should be recognized. Whether or not these authorities will subscribe to either of the views presented is yet to be decided. Judging from the increased interest in virtual worlds though, they won't have to wait very long.¹²⁰

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¹²⁰ Benjamin Duranske, *Congress Holds First Hearing on Virtual Worlds; Linden Lab CEO Philip Rosedale Testifies*, Virtually Blind Blog, available at <http://virtuallyblind.com/2008/04/01/congress-virtual-worlds/> (last visited: April 3, 2008). The first-ever Congressional hearing on virtual worlds took place in Washington on April 1, 2008. Linden Lab CEO Philip Rosedale testified, along with representatives of IBM, TechSoup, and the New Media Consortium. It was cast as an educational hearing, essentially a first look at these virtual spaces for subcommittee members. With a few notable exceptions, the subcommittee members displayed a better understanding of virtual worlds than one might have expected, and both their comments and the testimony offer a look at the future of virtual law and the interaction between real world governments—or at least the U.S. government—and virtual worlds.