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RECOGNIZING VIRTUAL PROPERTY RIGHTS, IT'S ABOUT TIME

John S. Chao

I. Introduction

Today's technological advances have brought about a new social phenomenon, a new way for people to interact and communicate with one another, virtual worlds.¹ These virtual worlds are made up of people from across the globe that connect and interact with each other inside the virtual world where the participants are represented by visual depictions of user customizable avatars.² Virtual worlds have evolved and developed from simple chat rooms and text based Multi-User Dimensions ("MUDs") on bulletin board servers ("BBS") where the number of users that can simultaneously log in was limited to a handful of users to today's massive multiplayer online role playing games ("MMORPGs") which can host millions of users simultaneously.³ In these virtual worlds, players can make new friends or adventure with old friends, explore exotic locales, purchase islands, design and market new fashion lines, slay dragons, and

¹ Where the Internet brought about worldwide communication through emails, message boards, and websites, virtual worlds allow users to interact with each other not merely through text but visually within a three dimensional environment created specifically to allow for more intimate social interactions and game play. Currently, the most popular virtual world is World of Warcraft, which boasts millions of players worldwide.

² All Virtual worlds allow for some customization of the avatar by its user/ player, this can be granted in a limited capacity where the user can select the gender and the choose from a set number of pre-made models, or a fully customizable avatar where the user/player can adjust everything from hairstyle to clothing to the size, shape, and color of the avatar's eyes.

³ See generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 Cal. L. Rev. 1 (2004) (a detailed chronology and history of how virtual worlds and communities developed, starting from imaginary literary worlds and the influence of J.R.R. Tolkien to tabletop role-playing games to text based computer role-playing games and finally to today's fully immersive, visually stunning virtual worlds.)

sometimes even marry each other.⁴ These virtual worlds are a microcosm of the real world, with each virtual world developing in its own way, guided by the framework and game mechanics of the virtual world.⁵ Real world concepts such as capitalism and economics are clearly developed in each of these unique virtual worlds.⁶ As the technology developed to allow for the creation of these massive virtual worlds and its plethora of sub-cultures and communities, real world social and economic complexities brought about by mingling millions of players together in a virtual world created a host of new legal issues and problems for the creators and developers of virtual worlds as well as the users of these virtual worlds.

The law has yet to catch up to technology in this emerging field and in the United States; we are currently without a body of law⁷ to address the issues arising from conflicts within these virtual worlds. The game creators have turned to contract law and intellectual property law to protect themselves and their virtual worlds with agreements such as the Terms of Service (“TOS”) and the End User License Agreement (“EULA”). The TOS and the EULA are contracts the game creators require every user to agree to before accessing their virtual world. These agreements explicitly reserve all claims of

⁴ Marriages between avatars have occurred in the virtual world where the avatars are considered “married” in the game and share last names in the virtual world. Some of these romances in the virtual world have also led to real life marriages between the users.

⁵ Virtual worlds develop differently depending on the goals of each individual virtual world, whether it is like Second Life where the users are given the tools and encouraged to create and change the game content that ultimately helps shape and define the virtual world, or like World of Warcraft, where there is a history of an imagined land already in place and the content of the virtual world is pre-determined and created by the game developers for the users to experience.

⁶ An in game economy is one of the first things to develop within a virtual world, the reality of buying and selling exists in every virtual world and the game creators always put a game mechanic in place to allow avatars to trade with one another. Even in an imagined, virtual world, commerce and trade is a necessity that is always present.

⁷ Many commentators have suggested that a “law of virtual worlds” is necessary to address the myriad of unique legal issues inherent in a virtual world. *See e.g.* Lastowka, *supra* note 3, at 8-13 (suggesting that the advancing technology and increasing activity in virtual worlds will require the creation of a body of law specifically aimed at resolving the disputes that may arise in virtual worlds).

intellectual property rights to the creator and disclaim any player property rights to any content in the virtual world.⁸ The game creators are intensely protective of their intellectual property rights and the maintenance of the “game integrity” in the virtual worlds, beyond protecting their intellectual property rights, game creators generally believe that if too many “real life” aspects are present within the virtual world, it would ruin the gaming experience.⁹ Game creators typically forbid the recognition, sale or transfer of any virtual property or accounts in their virtual world to other players for real world currency or consideration to protect their intellectual property rights and to shield their virtual worlds from being too “real.” Game creators use harsh self-help provisions to punish violators of their TOS and/or EULA by terminating the accounts of any users who have purchased or sold virtual property or their accounts from or to another person with real life currency.¹⁰

For players of MMORPGs such as World of Warcraft and Second Life, there is nothing more frustrating than the simple fact that under the game creator’s EULA and TOS, you do not own your avatar, or anything in your avatar’s inventory.¹¹ The countless hours these players spend on “playing” the game, whether it was acquiring a sword from a dragon, or designing/purchasing a new t-shirt for your avatar could be for nothing since the game creator does not recognize virtual property rights for the players in any aspect of the game and employs overly harsh self-help measures that allow game

⁸ World of Warcraft: Terms of Use Agreement § 4, 7, 11 (July, 29, 2008) [hereinafter “WoW TOS”], www.worldofwarcraft.com/legal/termsofuse.html, World of Warcraft: End User License Agreement § 4 (July 29, 2008) [hereinafter “WoW EULA”], www.worldofwarcraft.com/legal/eula.html, Second Life: Terms of Service Agreement § 3.3 (February 16, 2010) [hereinafter “Second Life TOS”] <http://secondlife.com/corporate/tos.php>.

⁹ See Joshua Fairfield, *The Magic Circle*, 11 Vand. J. Ent. & Tech. L. 823, 837-38 (2009) (for a detailed analysis of the psychology behind the resentment of players using real world money to get an advantage in the gaming world).

¹⁰ WoW TOS, *supra* note 8, § 8.

¹¹ WoW TOS, *supra* note 8, § 4.

creators to terminate a player's account for any or no reason.¹² This frustration is compounded by the fact that some game creators hypocritically sell virtual items directly to the players, yet still refuse to recognize a player's virtual property rights, even in the virtual items purchased directly from the game creator.¹³ An example of this type of hypocritical activity can be found in Activision Blizzard's ("Blizzard") virtual world, World of Warcraft. Blizzard sells a myriad of virtual items in their online store,¹⁴ yet Blizzard's TOS forbids the sale of virtual items or accounts by players for real world currency.¹⁵ Also, since Blizzard does not recognize ownership rights in their virtual world, the sale of virtual items in Blizzard's online store frustrates a purchaser's expectation that they would at least "own" what they have purchased from Blizzard, even if it is "virtual."¹⁶ Second Life is currently the only MMORPG in the market to grant players any property rights in their world, however, the rights granted are still subject to Linden Labs' EULA and TOS, and not enforceable against Linden Labs.¹⁷

¹² Currently, game creators require all users to agree to two click wrap agreements which govern the relationship between the creator and the user, and to some extent the relationship between users. These agreements are called the Terms of Service and/or the End User License Agreement. These two click wrap agreements explicitly state that users have no ownership rights to their avatars. The TOS and the EULA are carefully crafted to ensure the elimination of any user claims of "virtual property" rights by stating plainly that ownership of everything in a MMORPG is the intellectual property of the creator and users are granted a limited license to use.

¹³ This is especially true of MMORPGs based from Asia, they adopted a business model similar to Second Life's where the subscription itself is provided free of charge, and the users can purchase virtual items that enhance and give their avatars a competitive edge over other players. Examples include: Perfect World www.perfectworld.com, and Maple Story www.maplestory.com.

¹⁴ Examples of virtual items for sale include special pets with a purely aesthetic purpose or new mounts that give an edge to players who have purchased them over most other players. The new mount in the store allows increased travel speed superior to most other mounts in the game. World of Warcraft Pet Store: <http://us.blizzard.com/store/>.

¹⁵ WoW TOS, *supra* note 8, § 4.

¹⁶ WoW TOS, *supra* note 8, § 4. (Under the TOS, Blizzard does not recognize player virtual property rights, even the pet or mount that a player directly purchases from Blizzard can be taken away at the whim of Blizzard.)

¹⁷ While Second Life has advertised that they are willing to recognize the intellectual property rights of players in the products they create. The Second Life TOS clearly states that such rights are only enforceable against other players, and not enforceable against Linden Labs. *See* Second Life TOS, *supra* note 8, § 3.

Legal commentators have written extensively on the topic of avatar rights and virtual property rights, but the courts in the United States have yet the opportunity to squarely address whether virtual property rights could exist in spite of the game creator's TOS and EULA.¹⁸ This paper will argue for the recognition of virtual property rights in the United States based upon the utilitarian theory of property rights of Bentham, the Lockean theory of property, and the personality theory of Hegel.¹⁹ Before we delve into the individual theories that give support to the application of property rights to virtual property in the United States, we must first examine the current state of the law regarding virtual property rights and how virtual property is treated in the United States as well as how foreign jurisdictions have addressed the issue of virtual property rights.

II. Current State of the Law--Virtual Property Rights Cases

Many jurisdictions worldwide have considered the issue of virtual property rights and some jurisdictions have affirmatively embraced the concept of virtual property rights for the users of virtual worlds either through court opinions, or through legislative actions.²⁰ Although there is currently no definitive case law in the United States on whether property rights should be attached to virtual property in virtual worlds, there appears to be a trend moving away from allowing a game creator to enforce an overly draconian

¹⁸ *Bragg v. Linden Research Inc.*, 487 F.Supp.2d 593 E.D.Pa. 2007. (The *Bragg* case was, to date, the closest a court in the United States has come in analyzing virtual property rights as applied in a game creator vs. game user context. Although the case eventually settled, the court's opinion in denying a motion to compel arbitration repeatedly referenced virtual property and found the EULA and TOS to be procedurally as well as substantively unconscionable, at least in regards to the dispute resolution aspect of the contract).

¹⁹ See generally Lastowka, *supra* note 3 at 29-51.

²⁰ See Will Knight, *Gamer Wins Back Virtual Loot in Court Battle*, Newscientist.com, Dec. 23, 2003, <http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-loot-in-court-battle.html> (Analysis of *Li Hongchen v. Beijing Arctic*), See Jacqueline Carver, *Dutch Court Rules Virtual Theft is Real*, Radio Netherlands Worldwide, Oct. 22, 2008, <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/region/netherlands/081022-virtual-theft-is-real-redirected> (teenagers beat and threaten classmate until the classmate agreed to transfer virtual items to the attackers), See Korean "Act of the Promotion of Game Business," Chapter 2, 32-(1)-7 (prohibits commercial trading of virtual goods, but recognizes non-commercial exchange of virtual items).

TOS/EULA that disclaims all user property rights, forces one-sided dispute resolution on the players, and allows the game creator to pursue unrestricted self-help provisions without compensation to a “fairer” TOS/EULA that still protects the game creator’s interest in their intellectual property while limiting self-help measures for the game creator and providing some compensation for the users of the virtual world if the self-help measures are employed.²¹

a. Virtual Property Cases within the U.S.

In the United States, the issue of virtual property rights has eluded the courts for a number of years, whether it was because the case was dropped, settled, or involved more cyber security than virtual property issues, the United States have yet to definitively address the existence or absence of virtual property rights in virtual worlds.²² The first case in the U.S. to examine the concept of virtual property was when a company called Black Snow Interactive (“Black Snow”) sued a game developer, Mythic Entertainment²³ (“Mythic”), alleging unfair business practices and raising anti-trust claims when Mythic terminated Black Snow’s active accounts within Mythic’s virtual world, Dark Age of Camelot for violating Mythic’s TOS.²⁴ Black Snow was a company working out of Tijuana, Mexico, employing unskilled laborers to “work” by playing in Mythic’s virtual world and acquiring virtual items and currency. Black Snow then sold the accumulated

²¹ After the judge in *Bragg* found the arbitration provision unenforceable because it was both substantively and procedurally unconscionable, Linden has since changed their TOS to ameliorate the TOS as to avoid being found unconscionable again.

²² *Blizzard Entertainment Inc. v. In Game Dollar*, <http://www.patentarcade.com/2009/06/case-analysis-blizzard-entertainment-v.html>, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 2008 WL 2757357 (D. Ariz. 2008).

²³ Mythic Entertainment is a software developer and game creator of the virtual world, Dark Age of Camelot.

²⁴ See Julian Dibbell, *Serfing the Web, Black Snow Interactive and the World’s First Virtual Sweatshop v. Mythic Entertainment*, Julian Dibbell dot com, <http://www.juliandibbell.com/texts/blacksnow.html> (Description and analysis of Black Snow’s case against Mythic).

virtual items and developed avatars on auction sites like eBay for real world currency.²⁵ Mythic discovered Black Snow's business model of employing low wage workers to "play" in their virtual world and accumulate virtual property in Dark Age of Camelot and then selling the virtual property on eBay. Mythic terminated Black Snow's accounts for violation of Mythic's EULA/TOS and instructed eBay and other auction sites to shut down Black Snow's auctions of virtual items and avatars for infringement of intellectual property.²⁶ Prior to the proceedings, Black Snow's theory of the case was Black Snow's sale of "virtual property" was actually a sale of the individual player's time spent in the virtual world acquiring the virtual items, and not the virtual items.²⁷ Black Snow's lawyer described the issue at hand as:

What it comes down to is, does a...player have rights to his time, or does Mythic own that player's time? It is unfair of Mythic to stop those who wish to sell their items, currency or even their own accounts, which were created with their own time.²⁸

Unfortunately, Black Snow had to drop the case against Mythic when their other legal troubles began to surface, robbing the courts of the opportunity to determine whether property rights exist for virtual items in virtual worlds.²⁹ A few years later, a case involving Linden Research, Inc.'s ("Linden") virtual world, Second Life, was the closest a United States court has come in a case involving virtual property rights. *Bragg v. Linden Research* produced an opinion by District Court Judge Robreno denying Linden Lab's motion to compel arbitration even though Linden's TOS required all disputes to be settled through arbitration. In the opinion denying the motion, Judge Robreno made

²⁵ This business model is like a "virtual" sweatshop.

²⁶ See Dibbell, *supra*, note 24.

²⁷ See Jessica Mulligan, *I Own Y0o, d00d*, Biting the Hand #19., February 19, 2002. http://www.skotos.net/articles/BTH_19.shtml

²⁸ See Dibbell, *supra*, note 24.

²⁹ *Id.*

numerous references to “virtual property.”³⁰ In *Bragg*, the plaintiff purchased virtual land through an unpublished auction,³¹ and acquired virtual land at a price five to six times cheaper than normal.³² When Linden discovered Bragg’s purchase of virtual land from an unpublished auction, they employed the self-help measures in their TOS and EULA and terminated Bragg’s account without refund or compensation.³³ After Bragg’s account was terminated, he initiated an action against Linden alleging breach of contract, fraud, and violations of Pennsylvania’s consumer protection statutes.³⁴ While this case was settled by the parties shortly after the court’s denial of Linden’s motion to compel arbitration, the result of Judge Robreno’s finding that Linden’s TOS was a contract of adhesion and the arbitration provision was both procedurally and substantively unconscionable and thus, unenforceable may signal the court’s willingness to recognize that users of virtual worlds do have some rights and a game creator’s draconian use of their TOS and EULA to strip away a user’s rights may not be enforceable. This development has lead to Linden Labs changing their TOS to remedy the agreement so that it is not so one-sided as to be considered unconscionable.³⁵ Even with the decision from *Bragg v. Linden Research*, United States law has been slow to address the issue of virtual property interests and whether they should exist when compared to developments in foreign jurisdictions of the law of virtual property and the issue of property rights in virtual worlds.

b. Foreign Jurisdictions

³⁰ See *Bragg*, *supra* note 18.

³¹ Unpublished auctions are considered to be exploits to the game mechanic and a violation of Second Life’s EULA and TOS. See *Bragg*, *supra* note 18.

³² See *Bragg*, *supra* note 18.

³³ *Id.*

³⁴ *Id.*

³⁵ Changes Made to Second Life’s EULA.

Foreign Jurisdictions have a much more developed body of law when dealing with virtual property rights and property interests in virtual worlds. The first case to ever recognize virtual property rights and grant a player property rights to his virtual items despite the existence of a EULA between the player and the game creator, ironically, is a case out of communist China in 2003.³⁶ In *Li Hongchen v. Beijing Arctic Ice Development Co. Ltd.*, a Beijing court found in favor of Mr. Li against Beijing Arctic Ice Development Co. Ltd., (“Beijing Arctic”) when another player stole Mr. Li’s virtual items³⁷ through a programming loophole negligently created by the game developer.³⁸ Mr. Li’s theory of the case was that he spent labor, time, wisdom and money to acquire the virtual property, thus, why shouldn’t it be considered his belongings.³⁹ The Beijing court agreed with Mr. Li that his labor had created certain property rights in the acquired virtual property, and thus, he had certain property rights to the virtual items in Red Moon⁴⁰ enforceable against Beijing Arctic.⁴¹ The Beijing court’s ruling in this case established China as the first country in the world to recognize and protect property rights for users of virtual worlds in a court case.⁴²

In the Netherlands, a Dutch court found property rights applied to virtual items when they found two teenagers guilty of theft of virtual property from another teen.⁴³

The boys reportedly assaulted, battered and used a knife to threaten a classmate before

³⁶ See Knight, *supra* note 20.

³⁷ Mr. Li claims to have spent more than two years and \$1,210 dollars (USD) acquiring the virtual items that were stolen from him. <http://www.cnn.com/2003/TECH/fun.games/12/19/china.gamer.reut/index.html>

³⁸ *Id.*

³⁹ *Id.* (Mr. Li appears to have argued a Lockean Labor claim to property interests in virtual property when he suggested that the time and money he spent in acquiring virtual goods gives him property rights to the virtual goods).

⁴⁰ *Id.* (Red Moon is the virtual world created by Beijing Arctic and where Mr. Li accumulated his virtual property).

⁴¹ *Id.*

⁴² See Jeff L. LeBlanc, *The Pursuit of Virtual Life, Liberty, and Happiness and its Economic and Legal Recognition in the Real World*, 9 Fla. Coastal L. Rev. 255, 283 (2008).

⁴³ See Carver, *supra* note 20.

the victim finally transferred virtual property in the virtual world, Runescape, to the attackers.⁴⁴ The prosecutor in the case argued that these virtual items should be considered real and tangible since the virtual items have real and tangible value to the owner, and thus, the appropriate charge was theft instead of assault and battery.⁴⁵ The court, after rejecting defense counsel's contention that no theft occurred because the virtual items were not "real" and did not actually exist, noted that a theft did occur in this instance despite the fact that the stolen articles were "virtual property."⁴⁶ Thus, it seems the law in the Netherlands does recognize game items in virtual worlds as property,⁴⁷ and have attached property interests/rights to items in a virtual world, at least under their criminal law system.

Taiwan is another jurisdiction that recognizes virtual property rights in virtual items for users within virtual worlds. In 2001, the Taiwan Ministry of Justice Regulation expressly recognized virtual property rights under Taiwanese law by releasing the following statement:

The account and valuables of online games are stored as electromagnetic records in the game server. The owner of the [] account is entitled to control the account and valuables' electromagnetic record, to freely sell or transfer it. Although the above accounts and valuables are virtual, they are valuable property in the real world. The players can auction or transfer them online. The accounts and valuables are the same as the property in the real world. Therefore, there is no reason not to take the accounts and valuables of online games to be the subject to be protected by the larceny or fraud in criminal law.⁴⁸

⁴⁴ *Id.* (the transferred virtual property included an amulet and a mask worn by avatars in the game.)

⁴⁵ *Id.* (Prosecutor noted that the virtual items in question were valuable and could be sold for real money, thus should be considered "property" and the based on attacker's actions and intentions, the appropriate crime was theft.)

⁴⁶ *Id.*

⁴⁷ At the very least, the court recognizes virtual property rights in the criminal context, that the commission of a theft out of game for in game items is considered theft.

⁴⁸ See Joshua A.T. Fairfield, *Virtual Property*, 85 B.U.L. Rev. 1047, 1086 (2005) (citing Taiwan Ministry of Justice Official Notation No. 039030 (90) and Articles 358 and 359, Taiwan Criminal Code (2001)).

Taiwan created a body of virtual property law through legislative enactments that recognize virtual property as property with property interests and rights.⁴⁹ Their courts have consistently upheld the prosecution of fraud or larceny claims relating to virtual property.⁵⁰

The South Korean approach to the issue of virtual property applies a unique solution to balance the interests of both the game creators and the users of virtual worlds. South Korean law recognizes virtual property rights for users of virtual worlds, but prohibits the commercial exploitation of virtual property.⁵¹ Thus, in South Korea, non-merchant users of virtual worlds have property interests and can freely exchange virtual property for in-game or real world currency, while commercial exchanges of virtual property by merchants are forbidden. South Korea's unique stance on virtual property rights is an attempt to maximize user enjoyment of virtual worlds through unrestricted trading between "true players"⁵² and address the game creator's concerns of commercial exploitation⁵³ of the virtual world by curbing merchant trading.

Even with the plethora of foreign cases that firmly establish virtual property rights for the users of virtual worlds, the United States have yet to develop such a body of law and we should determine whether under United States law, virtual property should qualify as property and be given the same property rights that is applied to tangible property.

III. Is "Virtual Property" Property?

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Fairfield, *supra* note 9, at 839 (citing Korea's "Act of the Promotion of Game Business").

⁵² Real players of the virtual world as opposed to users who use the game mechanics in hopes of obtaining a profit in the real world.

⁵³ An overly commercialized virtual world can overinflate the virtual world's economy, bringing in too many real world complications to the game and ultimately resulting in reduced enjoyment by "true players." See generally Mulligan, *supra* note 27.

Some commentators have suggested that “property” in virtual worlds, or “virtual property,” cannot be property because it is too intangible to be considered property, after all, virtual property in a virtual world is only the visual depiction of a sword or a pair of jeans is computer code housed on a server managed by the game creator.⁵⁴ However, recognition of virtual property as property would not be the first time property rights were granted to the intangible. The development of an entire body of law, intellectual property law, is aimed at addressing and assigning certain property rights to intangible property.⁵⁵ Thus, the mere fact that virtual property is intangible and only exists in the form of computer code is no reason to deny that it in fact can be, and often times, is “property.”

Currently, intellectual property law governs all computer codes without distinction. It is thought that all computer code is the same in that it is only one step removed from a pure idea.⁵⁶ However, not all code is that same and not all codes serve the same purpose. Although the purpose of some computer code is an expression of that pure idea, protected by intellectual property law, there exists another form of computer code not used to express an idea, but to store information. It is the purpose and characteristics of the latter computer code that is analogous to tangible chattel and real property and thus should be treated differently than the code that is the expression of a pure idea, recognition of “virtual property” can create the distinction.⁵⁷ This type of code is rivalrous and persistent, characteristics typically associated with tangible, physical property.⁵⁸

⁵⁴ See Lastowka, *supra* note 3 at 40-41.

⁵⁵ *Id.* (Protection of Copyrights, Patents, Trade Secretes protects not the physical property interest, but the intangible property interest.)

⁵⁶ See generally Fairfield, *supra* note 48.

⁵⁷ *Id.*

⁵⁸ *Id.*

Rivalrous means that only one person may “possess” this type of code at the exclusion of others, much like tangible property.⁵⁹ Persistent means that something, tangible or intangible, does not disappear when someone stops interacting with it, these are the characteristics that this type of code shares with tangible property. Applying property law to computer code may seem strange at first, but delving deeper into the inquiry, it becomes evident that certain types of computer code is designed to mimic tangible property than to represent the ideas protected by intellectual property. For example, a chat room on the internet is the virtual equivalent of a conference room, an e-mail address is the virtual equivalent of a mailbox/P.O. box, and a Uniform Resource Locator (“URL”) is the internet’s version of real property.⁶⁰ All of the above examples share the same characteristics of being persistent and rivalrous, that is, only one person may have a particular e-mail address or mail box/P.O. box and the e-mail address/P.O. box continues to exist even if the user/owner stops interacting with it.⁶¹ And in any virtual world, this second type of computer code is used to represent the player’s avatar, the items in the avatar’s inventory. Many aspects of a virtual world, especially the avatar and the avatar’s inventory, are this second type of code representing chattel rather than the first type of code. The programming that visually displays the environment that an avatar sees, such as trees or buildings is this second type of code because the code is meant to be representative of a building, or a tree, and the code is storing that information. The distinction however, is that the tree and building is not a part of the avatar or the avatar’s

⁵⁹ *Id.* (An example of rivalrous in the tangible world is simple, if a person owns a cup, no other person can own that specific cup unless the original owner gives the rights to the cup away. In a virtual environment, an example could be an e-mail address, if a person has a particular e-mail address, no other person can have access to the same e-mail address unless the original owner permits others to use his/her email address, this is rivalrous in the virtual sense.)

⁶⁰ *Id.*

⁶¹ *Id.*

inventory. Just like in the tangible world, a person observing a tree or building has no property interest in the tree or building, an avatar would have no property interest in a virtual tree or building that the game creator has placed in the virtual world for aesthetic purposes. However, if the game creator made the tree interactive in the sense that an avatar could “chop” the tree for wood; the player would have a claim to the virtual wood due to the labor expended in converting the virtual tree into virtual wood depicted in the avatar’s inventory, but the avatar still could not claim the virtual tree.⁶² Viewed all together, this makes the second type of computer code which is intended to represent chattel, “virtual” property, and thus could be considered “property.” Identifying virtual property as a form of property is only the first step, once we accept that virtual property can be property, we must analyze the legal implications of classifying virtual property as a form of property, and examine how virtual property interests should be allocated, specifically, how it should be allocated between the a game creator and a player.

IV. Virtual Property Interests

It would seem the easiest way to reconcile virtual property interests is to look to the creator’s TOS and EULA to determine what has been licensed, and what is permitted under the license, but this would not be the best or the most accurate way to approach the issue of assigning virtual property interests. A comparison we can make to highlight the current draconian set-up of the virtual community EULAs is if all developers of word processors⁶³ decided that all property interest in any content developed with their word processor belonged exclusively to the developer of the word processor or if all e-mail

⁶² This type of interactive “tree” is common in most MMORPGs where resource gathering is a part of the virtual world. The avatars chop wood, mine minerals, or gather plants, typically, these “professions” can allow the avatar to create items in the game through a combination of various resources.

⁶³ Microsoft Word, WordPerfect etc.

providers⁶⁴ unilaterally decided that all their users had no property interest in the content of any e-mails generated.⁶⁵ Instead of embracing the EULA and the TOS as the sole governing documents to resolve legal disputes in a virtual community, we should examine not only the EULA and the TOS but also community norms, consent, and property law to determine how virtual property interests should be assigned.⁶⁶ We now examine virtual property interests under three separate theories of property law: Bentham's utilitarian property rights, Lockean theory of property, and the personality theories of Hegel.

a. Bentham's Utilitarian theory of property

Utilitarian principle seeks to find the greatest good for the greatest number of people, and is one of the core justifications for the recognition of private property⁶⁷ and has provided the basis for property law to recognize private property.⁶⁸ From a utilitarian standpoint, we ought to grant private property interests in virtual property if the recognition of private property interests in virtual property will increase overall utility to the community.⁶⁹ The argument for the application of tangible property rights to virtual property rights under a utilitarian perspective must first answer whether societal good can be derived from the recognition of virtual property interests in virtual items housed

⁶⁴ Including Internet Service Provider e-mails such as Comcast or purely internet e-mails such as Yahoo! Or Google.

⁶⁵ This is a fair comparison because a word processor developer such as Microsoft grants the user of its product a license to use, governed by the same agreements that govern virtual communities, the EULA and the TOS. The difference is that Microsoft does not claim property interest in all of the content developed by its users, and virtual communities exclusively disclaim the property interest of its users.

⁶⁶ See Fairfield, *supra* note 9, at 831-832.

⁶⁷ See Lastowka, *supra* note 3 at 44.

⁶⁸ *Id.*

⁶⁹ See Richard A. Posner, *Frontiers of Legal Theory* 95-141 (2001).

within these virtual worlds.⁷⁰ Using the Utilitarian view, a societal good is defined as the aggregate of individual goods, thus if the recognition of virtual property interest can be considered an individual good, then the aggregate of virtual property can be considered a societal good.⁷¹ It is clear virtual property has personal value to a player, and it also has tangible value in the real world that can be measured exactly in correlation with real world dollars and cents.⁷² Currently, popular virtual communities such as Second Life and World of Warcraft have well established conversion rates of virtual currency⁷³ to real life dollars and vice versa.⁷⁴ In some auction websites⁷⁵, one can also find avatars and specific items⁷⁶ for sale in real world dollars. The ability of these auction sites to exist and thrive plainly displays the real world value people have placed on virtual property in these virtual worlds, and thus, virtual property can be a “good.” Since there are millions of users spread across multiple virtual worlds, it is clear that there is enough individual “goods” to aggregate into a societal good, satisfying the justification for utilitarian recognition of virtual property rights.

b. Lockean Theories of Virtual Property

⁷⁰ The threshold question that must be answered under this perspective then is: What value does the recognition of virtual property rights, namely the same virtual world wood harvested from a virtual tree have on the outside world? And could the virtual wood be considered a societal good?

⁷¹ See Lastowka, *supra* note 3 at 44.

⁷² World of Warcraft currently boasts millions of subscribers who pay a monthly subscription fee to Blizzard to access the virtual world. Second Life lists users in the hundreds of thousands, and sell virtual land and currency for use in their virtual world. See Blizzard Press Release, December 23, 2008 <http://us.blizzard.com/en-us/company/press/pressreleases.html?081121>.

⁷³ In Second Life the virtual currency is Linden Dollars, and in World of Warcraft the virtual currency is gold.

⁷⁴ The difference is that Second Life encourages transactions between the virtual world and the real world, through LindeX, Second Life provides a easy way to convert real dollars to Linden Dollars and vice versa. World of Warcraft forbids the transfer to virtual items to real life currency, but that has not stopped players from purchasing and selling World of Warcraft virtual items and gold for real dollars.

⁷⁵ There are some websites, such as playerauction.com, which allow players to sell in game virtual property in violation of most virtual communities’ TOS and EULA. However, just because the sale of these virtual property is against the EULA and TOS does not mean these virtual items cannot have real tangible value, these auction sites can be described as a “black market” for virtual items.

⁷⁶ Items such as the aforementioned “virtual wood.”

An individual owns their own labor, and when an individual uses that labor to create something from the commons, the property right extends to what the individual created.

–John Locke⁷⁷

The users of virtual communities spend hundreds, if not, thousands of hours of playing time in acquiring or creating virtual items and improving their avatars, and based upon the mechanics of the virtual world, they are able to create, use, transfer and exclude other users from accessing their virtual items, if this time spent creating and improving virtual content can be seen as “labor” then virtual property rights could seemingly exist if it can also satisfy the tenants of ownership known as the *bundle of rights*⁷⁸ that exist in tangible property ownership, thus, providing justification for the recognition of virtual property rights.⁷⁹ Before we examine the tenants of ownership, we must first establish that the acquisition of virtual property can be considered achieved through “labor” and what should define the “commons” in a virtual community.

i. Lockean Labor-Desert Theory

The justification for recognizing property rights of virtual property under a Lockean Labor-Desert theory is that “the person who expended labor to render the ‘thing in nature’ into valuable form deserves to reap its value.”⁸⁰ Under this theory, the person who applied work and effort to something in nature that changes the thing into a valuable, usable form deserves to claim ownership rights and have property interests or the thing created. The basic argument from the users of MMORPGs is that since they have spent

⁷⁷ John Locke, *Two Treatises of Government bk. II*, para 27 (Legal Classics Library 1994) (1648).

⁷⁸ The *bundle of rights* are: Right to Use, Right to Exclude, and Right to Transfer.

⁷⁹ See Leonard T. Naura, Daniel A. Feurstein, Kristin M. Bohl & Claude W. Roxborough III, *No Man is an Island, Not Even in a Virtual World*, 943 PLI/Pat 523, 536 (2008).

⁸⁰ See Lastowka, *supra* note 3, at 46-47 (citing Stephen R. Munzer, *A Theory of Property* (1990) and Margaret Jane Radin, *Reinterpreting Property* 105-06 (1993)).

the time and labor⁸¹ in creating, developing, improving their avatars and acquiring items in the game, the players/users deserve some property interest because they have expended labor⁸² to give value⁸³ to their avatars and the virtual items in their possession.⁸⁴ Game creators contend that this theory in creating virtual property interests for users is flawed because even if the legal community accepts the notion that under this property theory, virtual property exists, under the same Lockean labor-desert theory, the game creators have a greater competing labor claim to the virtual world it created and everything within the virtual world.⁸⁵ Since the game creator has labored to create the virtual world in the first place, a creator's property interest is greater than any property interest claim that a user/player has in any aspect of the game, also, since the EULA and TOS only grants a limited license to use; there can be no virtual property in the game if the game creators does not grant the right to the players.⁸⁶ While the game-creator argument for greater Lockean labor claim to the virtual world seemingly eradicates any Lockean labor claim of the user/player, however, this remains true only when the virtual world is considered

⁸¹ The amount of time and effort spent varies according to the game and the player, but most MMORPGs are designed to require players to consume hundreds, if not thousands of hours in game to fully develop an avatar or to acquire a desirable item.

⁸² There are contentions that playing a game cannot be considered labor, and the acts of creating and acquiring virtual property in MMORPG platforms is "play." The claimed "work" in creating or acquiring virtual property is in reality play, and does not qualify as "labor." However, anyone who has "played" a MMORPG, can attest to the monotony and repetitive nature of some aspects in a MMORPG where it almost feels like work instead of play. This fact coupled with the intent of the game creators to implement such a "treadmill" style of "play" requiring hundreds, and maybe thousands of hours of "play" in order to advance an avatar cuts in favor of this type of gameplay qualifying as "labor." Also, users of Second Life can have virtual jobs where they are rewarded with Linden dollars in exchange for performing certain tasks in the virtual world, just like in real life this is "labor."

⁸³ A basic avatar on Second Life that is not developed or has not created anything is worth nothing since a Second Life account is free, and an undeveloped avatar in World of Warcraft is worth only the amount spent to initially purchase the game. However, a highly developed Second Life avatar could be worth millions of Linden dollars and a max leveled character with good equipment in World of Warcraft is worth significantly more than an undeveloped level one character.

⁸⁴ See *supra*, note 37. (This is the reasoning put forth by Mr. Li in the first case recognizing virtual property rights).

⁸⁵ See Steven Horowitz, *Competing Lockean Claims to Virtual Property*, 20 Harv. J.L. & Tech. 443, 450-54 (2007).

⁸⁶ *Id.*

as a whole. When we examine what the players are actually claiming,⁸⁷ their avatars and the respective inventory, it is the players/users labor which actually gives value to the smaller components of the game, such as the previously discussed “virtual wood,” a new t-shirt design, a sword or armor acquired by the player from a dungeon. Without the players/users labor in the game, the t-shirt, the sword or armor would not actually exist in the game.⁸⁸ Thus, the player/user’s claim of virtual property⁸⁹ is at its strongest when their “labor” is how the virtual property becomes accessible to the player’s avatar and thus able to interact with other avatars and the virtual world. Therefore, while the game-creator has the greatest Lockean labor theory claim to the virtual world in its entirety, when we boil down to smaller components of the virtual world such as to each individual avatar and their inventory, the players have a legitimate Lockean labor claim to the avatar and the avatar’s inventory where their labor makes up the greatest part of the value of the claimed avatar and its respective inventory.⁹⁰

ii. Right to Use: Lockean Theory of Property

The TOS and the EULA in any MMORPG sets out the rights of the users and grants each user the right to “use” their avatar and with the avatar, interact with the virtual world

⁸⁷ No serious claim can or should be made by a player to claim ownership in a virtual world against a game-creator, however, the virtual property addressed here are the smaller components of the game such as the aforementioned harvested “virtual wood” and each player’s individual avatars’ and their respective inventory.

⁸⁸ While the sword/armor exists in the virtual world, it is not accessible by any player until a player has actually expended labor to acquire the virtual item. The virtual property does not exist as to the virtual community or to any avatar until a player has expended the requisite amount of labor to retrieve the virtual item from the game because it is still “held” by a part of the game and not usable by any player/user until it is eventually “discovered” within the game mechanic by a player, usually as a reward for defeating a monster or passing a certain part of the game.

⁸⁹ Property Interest in the avatar and everything in the avatar’s possession, or also known as the avatar’s inventory.

⁹⁰ See Lastowka, *supra* note 3 at 47.

developed by the game creator and other users' avatars.⁹¹ Most game creator's TOS contain creator "self-help" provisions which give the game creators power to terminate a player's right to use with or without cause or notice to the player.⁹² Since the decision in *Bragg v. Linden*, Linden has revamped their TOS to limit their own discretion in terminating accounts and given up some of the rights that game creators have always asserted. Now, Linden has elected to relinquish some control and implemented a "for-cause" termination provision before they apply "self-help" and terminate a user's right to use, the new provision also states that Linden will allow the user to "cash out."⁹³ Even though the TOS and the EULA lays out many rules and regulations that control conduct within their virtual environment, it is often loosely policed and only the most serious offenders⁹⁴ receive punishment, regardless, the game creator is granting the players/users a right to use their avatar and the virtual world, thus establishing this first tenant of ownership.⁹⁵

iii. Right to Exclude: Lockean Theory of Property

MMORPG accounts are user created, individualized, password protected accounts set by when they first subscribe to a virtual world. In order to access a virtual world, the user must set up an individualized account, much like an e-mail account, to enter the game

⁹¹ This right is typically expressed as a "nonexclusive, limited, revocable license" to access and interact with the content provided. See *WoW TOS*, *supra* note 8.

⁹² See *WoW TOS*, *Second Life TOS*, *supra* note 8. (Since *Bragg*, these type of harsh, one-sided provisions may end up hurting the game creators as they can be used to find the TOS or EULA unconscionable and unenforceable.)

⁹³ See *Second Life TOS*, *supra* note 8 at § 11.3 (This was changed in response to *Bragg*, where the court found Linden's TOS to be both procedurally and substantively unconscionable and threw out the arbitration clause in the TOS. The court found the self-help measures Linden could take and the limited remedies the player has to be substantively unconscionable. The change to termination only with cause and cashing out of Linden dollars is an effort to set forth an agreement that is not substantively unconscionable and enforceable in court.)

⁹⁴ The offenses that are punished, usually by suspension or termination of an account depending on the seriousness, are ones that involve hacking or cheating in the game.

⁹⁵ See *Nuara*, *supra* note 79 at 537-38.

and create an avatar.⁹⁶ The creation of individualized accounts comes with password protections that the user must establish and warnings that the user should never reveal their password to anyone. These familiar first steps⁹⁷ gives the user an impression of individuality and an expectation of privacy that no one will be allowed to access their account or their avatar, or what is being defined as “virtual property,” without the player’s permission. This mirrors the expectation that most of us have regarding our e-mail accounts, that they’re private, they’re “ours,” and no one else has permission to access them unless we allow others to access the accounts. Essentially, the game creator is giving us the right to exclude all others from using our account without our permission. Within the virtual community itself, individual avatars usually have a “backpack” or some sort of storage system that allows the avatar to “carry” virtual items. Any virtual item within one avatar’s possession is inaccessible by other avatars unless the possessing avatar gives the item to another avatar or allows the other avatar to use the item.⁹⁸ The game creators have established a “trading” system within the virtual world between avatars, which grants an avatar a right to exclude other avatars from their “virtual property” in the game.⁹⁹ Therefore, the right to exclude in virtual worlds exist both in the virtual world within the game mechanic itself as well as generally in the set up of private accounts. Thus, this tenant of ownership, the right to exclude, exists.

iv. Right to Transfer: Lockean Theory of Property

⁹⁶Like an e-mail account system, each time the user connects to the game creator’s virtual world, the user must log-in using their own unique account name and password.

⁹⁷ The creation of most online accounts whether it be a bank account or an e-mail account or any other individualized, personal experience follows the same steps in requiring a user name and password so that the intended user is the only one that has access barring hackers and sharing of account information.

⁹⁸ Most MMORPGs have designed a trading system between avatars that mimics real life interactions between two people, albeit with some limitations.

⁹⁹ Since avatars are personifications of the user within a virtual world, any right granted to an avatar is actually a right granted to the user of the avatars.

Currently, most game creators in the United States draft their TOS and EULA to specifically state that there is no user ownership of anything in the virtual world and any transfer of accounts or virtual items in game for “real world” consideration is prohibited and is a violation of both the TOS and EULA.¹⁰⁰ The exception to the normal game creator created TOS and EULA is the virtual world created by Linden Labs, Second Life. Second Life is a unique virtual world in that it allows its users to retain copyright and intellectual property rights to the content they create within Second Life.¹⁰¹ While Second Life’s transfer policy in the TOS has many similarities with other game creators’ TOS and EULA, namely, they restrict a user’s right to transfer individual accounts,¹⁰² it does allow for the transfer of currency and virtual property in Second Life for real world consideration.¹⁰³ Second Life facilitates this transfer process in the game by providing in the game mechanics with a currency system known as Linden Dollars (“LD”), which has real life value and a conversion rate with the United States Dollar (“USD”).¹⁰⁴ Avatars can freely exchange LD in game for virtual goods, and players can freely transfer LD to USD or vice versa, through Second Life’s currency exchange system, known as LindeX.¹⁰⁵ Thus, Second Life’s facilitation and support of transfer rights to virtual items and currency help establish a user’s right to transfer, creating this tenant of ownership in the bundle of rights, the right to transfer.¹⁰⁶

¹⁰⁰ See WoW TOS, *supra* note 8 at § 11.

¹⁰¹ Second Life has in game mechanics that allow its users to design clothing, hairstyles, and other peripheral items specifically for avatars’ use in the game.

¹⁰² See Second Life TOS, *supra* note 8 at § 2.4.

¹⁰³ *Id* at § 1.5.

¹⁰⁴ See <http://secondlife.com/statistics/economy-market.php> (For the current exchange rate between USD and Linden Dollars).

¹⁰⁵ See Second Life TOS, *supra* note 8 at § 1.5.

¹⁰⁶ See Nuara, *supra* note 79 at 538-41.

While not all MMORPGs grant a player all three tenants of ownership, for the MMORPGs that grant transfer rights, such as Second Life, the game creator's recognition of transfer rights for a player completes the bundle of rights for a player to claim ownership to their avatar and virtual property in the avatar's possession in the virtual world.¹⁰⁷

c. Hegel's Personality Theory of Property

Hegel's personality theory of property lends the greatest support in the recognition of property rights in user's virtual property rights. Hegel views property as an extension of one's personality and property rights as deeply connected to one's sense of liberty, identity, and privacy.¹⁰⁸ Examples of how deep our connection to some of our possessions/property are plentiful; we develop sentimental attachments to our possessions that are particularly meaningful to our individuality, our lives. The easiest examples are things such as a house, or a wedding ring.¹⁰⁹ It is easy to see the sentimentality and the attachments we can develop to such meaningful possessions, the home we grew up in, one's wedding ring, these are more than just property to us, and have deeper connections to our sense of identity. Hegel's property theory suggests that even without any normative justifications for property rights in these objects,¹¹⁰ Hegel's theory of personality property rights would recognize property rights for the realization of self or having our other human needs secured.¹¹¹ Applying Hegel's personality theory to virtual communities has no discernible difference than applying it to the real world. Since the theory is based upon the effect of property interest on human needs such as identity and

¹⁰⁷ *Id.*

¹⁰⁸ See Jeremy Waldron, *The Right to Private Property*, 49-50, 343, 370-89. (1988).

¹⁰⁹ *Id.* at 295-310.

¹¹⁰ Objects that we have deep connections to, such as the house or the wedding ring.

¹¹¹ See Waldron, *supra* note 108 at 295-310.

liberty, these concerns are not any different when applied to intangible property or virtual items in virtual worlds. It is easy to see how virtual world avatars are analogous to a wedding ring in this respect. The avatar is a visual depiction of ourselves where in most MMORPGs, we get to express our individuality to the smallest detail,¹¹² and the more time we spend in a virtual world, the more time we spend developing our avatars, the more we identify with our avatars and feel connected to our avatars in the virtual world. In fact, many players of MMORPGs spend so much of their time in the virtual world and feel so deeply connected to their avatars in the virtual world that MMORPG addiction is a recognized problem in many countries.¹¹³ Recently, the South Korean legislature have enacted new laws to curb MMORPG addiction in underage players by restricting the amount of time an underage player may spend in a virtual world.¹¹⁴ Thus, the personality theory of property may provide a stronger justification to virtual items and avatars in virtual worlds than to property interests in tangible property. This theory of property perhaps gives the strongest justification for recognition of virtual property rights.

Bentham's utilitarian Theory of Property, Locke's Labor-Desert theory, and Hegel's personality theory of property all provide strong arguments and justification for to support the notion for recognition of property rights in virtual assets in the United

¹¹² MMORPGs typically allow us to alter the visual 'physical' features of our avatars, for example, in Second Life, we are able to modify the size and shape of our avatar and even facial features of our avatars to our liking.

¹¹³ See Dr. Kimberly Young, *Addiction of MMORPGs: Symptoms and Treatment*, Netaddiction http://www.netaddiction.com/articles/addiction_to_mmorpgs.pdf.

¹¹⁴ See Alicia Ashby, *Korea Bans Overnight Play For Teens in Top Freemium MMOs*, Virtual World News April 13, 2010 <http://www.virtualworldsnews.com/2010/04/korea-bans-overnight-play-for-teens-in-top-freemium-mmorpgs.html> (Commentators have described MMORPG addiction as similar to a gambling addiction. While MMORPG addiction is a phenomena not limited to South Korea, it is especially prevalent in the gaming intensive culture of South Korea.)

States, whether it is virtual items, virtual “real” property,¹¹⁵ or the avatars in virtual worlds.

V. Conclusion

Virtual worlds have developed to hold a firm place on our society today and can no longer be brushed aside as a just a game, affecting only the small number of “gamers.” Virtual worlds are part of the today’s mainstream media, and a legitimate source of entertainment/escape for the millions of users who choose to partake in MMORPGs. Today’s virtual worlds have become so integrated within today’s culture that popular television programs such as South Park¹¹⁶ and The Office¹¹⁷ have created entire episodes satirizing the complex social and economical effect these virtual worlds have on our lives today. The current state of intellectual property law is inadequate to squarely address the new legal issues brought forth by the creation of virtual worlds. Virtual worlds have and must be recognized for what it has become, the next step in how we communicate and interact with each other.

The development of a new body of law termed by commentators as “virtual world law¹¹⁸” is vital to the further development of virtual worlds in the United States. The United States needs to develop this body of law to settle some of these legal issues so the continued development of these persistent virtual communities can continue the way it was for foreign jurisdictions that have developed laws addressing the property rights of virtual property. The United States is already behind the rest of the world in addressing virtual property rights, and the longer we wait before we recognize property rights the

¹¹⁵ In *Second Life*, avatars can purchase virtual land and erect buildings on the land they purchase.

¹¹⁶ See *South Park, Make Love, Not Warcraft*, Episode 1008 (Originally Aired Oct, 4, 2006).

¹¹⁷ See *The Office, Local Ad*, Episode 409 (Originally Aired October 25, 2007).

¹¹⁸ See generally Lastowka, *supra* note 3.

more risk we take in stunting the development and growth of this new industry in the United States.