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Susan H. Abramovitch

David L. Cummings

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Virtual Property, Real Law: The Regulation of Property in Video Games

By Susan H. Abramovitch[†] and David L. Cummings[‡]

Abstract

This article considers property created and used in the virtual realm of video games, which is often given real-world value. From the unauthorized copying of designer clothes sold on *Second Life* for in-game cash, to real court damages awarded against game operators' deletion of player-earned swords on *Mir 3*, a bridge has been taking shape from video gaming's virtual economies to real-world economies. However, virtual property created in virtual worlds has yet to be formally recognized by North American courts or legislatures. This article attempts to touch on some of the legal considerations paramount in determining how such property can or should be governed. Virtual property shares many of the characteristics found in tangible property, and it is possible that it could be treated, at least in a legal sense, similar to tangible real-world property. Moreover, virtual property can carry both physical and intellectual property rights. While video game developers generally retain these rights via online agreements, policy reasons may have emerged for lawmakers to consider when deciding how to treat virtual property under these agreements. Property rights in virtual property are currently being recognized by some foreign legal bodies and North American courts and legislatures have also begun to deal with this novel issue. In response, some video game developers are taking new approaches to the rights granted to players in respect of the use of virtual property.

Introduction

Laws in the Western world have traditionally recognized that people value their property and therefore protecting rights in an individual's property — be it real property, chattels, or ideas — is fundamental to societal legal regimes. In the last few years, a new form of valuable property has been emerging, and it is uncertain as to whether current laws can adapt to its novel characteristics. Though video games have existed for some time, it is only recently that gaming technology has allowed for the evolution of virtual worlds made up of virtual property. From the unauthorized copying of designer hairstyles sold on *Second Life* for in-game cash,¹ to real court damages awarded against game operators' deletion of player-earned swords on *Mir 3*,² video games are mere fun and games no longer.

Property created and used in the virtual realm of video games is often given real-world value, and as a result, a bridge has been taking shape from video gaming's virtual economies to the real-world marketplace. The reality of the virtual video gaming world is

that virtual property is being commoditized in the real world, and accordingly, real-world legal implications follow. However, virtual property created in virtual worlds has not yet been formally recognized by a North American court or legislature. This paper will attempt to touch on some of the legal considerations that are paramount in determining how such property can or should be governed. It can be shown that virtual property shares many of the characteristics found in tangible property, and it is possible that virtual property could be treated, at least in a legal sense, similar to tangible real-world property. Despite its intangible nature, virtual property can carry both physical and intellectual property rights, and the developers of virtual gaming worlds generally retain these rights via online agreements. Although these agreements have in the past been held to be enforceable, policy reasons may have emerged, and may continue to emerge, for lawmakers to consider when deciding how to treat virtual property and the demarcation of rights under these agreements. In particular, property rights in virtual property are currently being recognized in some real-world courts and laws of foreign legal bodies. North

[†]© 2007, S. Abramovitch & D. Cummings. Susan Abramovitch, B.C.L., LL.B. (McGill); member of the Law Society of Upper Canada, Barreau du Québec, and the New York Bar. Susan is a partner at Gowling Lafleur Henderson LLP in its Toronto office, practising exclusively in the area of entertainment law.

[‡]David Cummings, Hon BA, LL.B., is an associate at Gowling Lafleur Henderson LLP in its Toronto office, practising in the areas of entertainment law and business law.

The views expressed in this paper are personal to the authors and do not necessarily represent the view of Gowling Lafleur Henderson LLP or clients of the firm.

American courts and legislatures have also begun to deal with this novel issue. In response to these realities, some video gaming companies are taking new approaches to the treatment of virtual property by allowing users to trade such property in the real world, even creating marketplaces for same, and by granting intellectual property rights to users in their created content.

What is Virtual Property?

Main Characteristics

Before exploring some of the legal issues surrounding virtual property, it is important to establish an understanding of how it is created and to review some of its main characteristics. At its base, virtual property is simply computer code. In contrast to computer code that expresses mere ideas, virtual property computer code is “designed to act more like land or chattel”.³ The original virtual properties in the online world included “[d]omain names, URLs (uniform resource locators), websites, [and] e-mail accounts”.⁴ Such property “consists of computer code (and thus qualifies as ‘virtual’), . . . can be owned by one entity, which has the right to exclude others from its use, . . . does not go away when you close your web browser; rather, it remains available”,⁵ and it can be sold among entities. In that regard, domain names, URLs, Web sites, and e-mail accounts exhibit certain key general characteristics of virtual property: exclusivity, persistence, and transferability.

Understanding Virtual Property in Virtual Worlds

Defining Virtual Worlds

The virtual worlds of online video games opened the door to the creation of a new type of virtual property that looks more like a chattel or real property than intangible property. Virtual worlds are “digital [representations] of a physical space” that are often “created and maintained as an online game”.⁶ Theodore Westbrook has explained a virtual world as follows:

Essentially, it is a host location that mimics aspects of our own universe. When a personal computer (“PC”) user logs into a virtual world, he is then represented by a visual depiction that acts as his proxy within this world, obeying his keyed and clicked commands. Unlike the typical console or non-networked PC game atmosphere, a virtual world is host to many such representative proxies, known as “avatars”, ranging from a few to over one million. These avatars perform various activities; they interact through . . . communications, they move about the virtual world, and they manipulate the various aspects of the world that have been designed for such manipulation.⁷

Simply put, virtual worlds are simulated depictions of the physical real world, although at times fantastical, encompassing virtual public spaces (such as stadiums, restaurants, and malls) and virtual goods (such as T-shirts, helmets, and guitars).

Virtual Economies Within Virtual Worlds

Virtual property is vital to the functioning of most virtual worlds, as they are often based on virtual economic systems. The virtual property within these virtual worlds provides the incentive for players to participate, and to continue to participate, in virtual worlds. In-world currencies can be used to “purchase everything from experience points to spells, and virtual goods such as clothing and weapons”.⁸ As the foundation for virtual economies that imitate many real-world economies, especially Western capitalist economies, virtual property can be seen to have many similarities to real-world property.⁹ For instance, in massively multiplayer online role-playing games (“MMORPG”) “virtual chattels existing in virtual worlds clearly mimic real world goods”: a player could hypothetically use his or her avatar to create or obtain a shovel, which could then be used in turn to build another piece of virtual property.¹⁰ No other player would virtually own that shovel, and the shovel would be available to the player as long as he or she subscribes to the game. The player could also sell the shovel to another player for whatever currency system is available within the game.

Real-World Trading

In addition to swapping virtual items exclusively within the virtual worlds, players can swap virtual property amongst each other in the real world. In-game items can be exchanged for in-game money, and both in-game money and in-game objects can be exchanged for real-world money.¹¹ For example, *Second Life* currency can be swapped for U.S. dollars on a currency exchange created by Linden Labs, the creators of *Second Life*.¹² These transactions occur as follows: one avatar finds another within the game who has a desirable piece of virtual property. After a negotiation, the deal is completed through an instant message screen and an online payment service such as PayPal. Since the goods all require a certain amount of virtual money amassed, and the accumulation of virtual money requires the expenditure of time, these trades “[amount] to a basic exchange of money for time”.¹³ There is a real-world value for the virtual goods and currencies.

Real-World Value

Real-world markets boasting impressive real-world values exist for the trading of virtual property. The MMORPG market is comprised of 10 million users in the United States and 73 million users worldwide, all of which are concentrated within 19 games.¹⁴ In 2005, this market was estimated to be valued at US\$1.9 billion worldwide and is “growing continuously and exponentially”.¹⁵ Edward Castronova, an economist who studies virtual economies, studied the MMORPG market in 2002 and measured the wealth produced by real-world trades of Norrath virtual property — the virtual world of the MMORPG *Everquest* — in terms of *per capita* gross

domestic product. It was concluded that, if the *Everquest* players were viewed as a national economy, the market's wealth would have made *Everquest* the seventy-seventh richest country in the real world in terms of *per capita* gross domestic product, ahead of several countries including Bulgaria, China, and India.¹⁶

Tertiary Markets

Third-party markets exist for the trading of virtual property in the real world. Many Web sites have sprung up to accommodate the real-world trading of virtual property, as businesses have clearly recognized its profit utility.¹⁷ These Web sites allow users to buy and sell virtual property for real dollars, just like traditional property.¹⁸ They operate as open markets and effectively akin to stock exchanges.¹⁹ One such popular Web site is Internet Gaming Entertainment ("IGE"), which dubs itself as "the worldwide leader in the market for buying and selling virtual property used in multiplayer online games".²⁰ The auction Web site eBay was a large player in the real-money trading market, but in January 2007, it decided to ban the sale of virtual goods, save for goods from the virtual world of *Second Life*.²¹ Castronova comments that eBay's decision can likely be attributed in part to a wish to stay clear of possible future debates between game developers and government regulators regarding the legal treatment of virtual property.²²

Virtual Property Compared to Real-World Property

Indicia of Virtual Property in Virtual Worlds

In order to identify virtual property in virtual worlds, some legal commentators have written of certain *indicia* to detect. At its base, virtual property is essentially code designed to "[mimic] the properties of real-space objects".²³ Joshua Fairfield, a technology law professor at Indiana University, has proposed that "[v]irtual property shares three legally relevant characteristics with real world property: rivalrousness, persistence, and interconnectivity".²⁴ *Rivalrousness* is the ability to use something to the exclusion of others. A player that has a virtual shovel is able to use that shovel exclusively. *Persistence* is the quality of an object having longevity. The player's virtual shovel remains in existence in the virtual world, and it remains the property of that player, even after he or she logs out of the virtual world. *Interconnectivity* is the capability to convey or transmit virtual objects among different players. It is what allows players to trade virtual goods either in a given virtual world or in the real world.

Affixing to the Intangible

Despite these parallels, since virtual property is inherently intangible, can such real-world property traits really be affixed to virtual-world property? Real-world property interests are often granted *vis-à-vis* intangible

interests that are merely fixed in form. For example, a leasehold is an intangible property interest fixed in written format that provides evidence of the interest. In virtual property, the relevant useful unit is the computer code of the piece of virtual property. The operation of such code flows via the Internet, which is made up of the following components:

The physical computers and connections that are the backbone of the net form the basis for internet communication; 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 the virtual word; and layered on top of that are the creations of the environment users.²⁵

Simply put, there exists two kinds of code: the code in the virtual world itself and the code in virtual objects.

Professor Fairfield has thus argued that the appropriate package for determining property rights in virtual property is at the level of code.²⁶ In order to monetize virtual property, users need a unified use of the whole piece of virtual property.²⁷ Ownership of a piece of code of a virtual house is useless, but ownership of unified code that makes up the whole virtual house has value. Furthermore, this says nothing of the code that makes up the virtual chattels that could exist inside the virtual house and which could have value. The code of each of these pieces of virtual property is what is transferable and can be monetized.

Virtual-World Property Distinguished from Intellectual Property

Acquiring Copyright

Despite the real-world implications of virtual worlds and the trading of virtual property, no court or legislature in North America has yet to enforce or enact laws granting property rights in virtual property. At present, a combination of intellectual property laws and contract are used to govern virtual property. With respect to intellectual property laws, "[c]opyright protection is currently a primary source of protection for computer programs and other works in digital form".²⁸ Computer programs are protected under the Canadian *Copyright Act*²⁹ (the "Act").

In order for copyright to exist in a work under the Act, the work must fall within one of the following enumerated categories: literary, dramatic, musical, or artistic work.³⁰ The meaning of "literary work" includes "computer programs", which is defined as "a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly or indirectly in a computer in order to bring about a specific result".³¹ In the case of *Apple Computer Inc. v. Mackintosh Computers Ltd.*,³² the Canadian Federal Court of Appeal affirmed that computer assembly source

code is protected under the *Copyright Act* as it falls within the definition of a “literary work”.³³ Thus, there is protected intellectual property in the code used to create a Web site or virtual world and in the content and creations of such Web sites and virtual worlds.

Virtual Property Can Co-Exist with Intellectual Property

Recognizing property rights in virtual property at the level of code does not correspond with the simultaneous elimination of intellectual property. Rather, they can complement each other. Professor Fairfield explains this concept further:

We understand instinctually and logically that ownership of a thing is always separate from ownership of the intellectual property embedded in a thing. Ownership of a book is not ownership of the intellectual property of the novel that the author wrote. The book purchaser owns the physical book, nothing more. Ownership of a CD is not ownership of the intellectual property in the music. The music purchaser owns that copy of the music, nothing more. In precisely the same fashion, ownership of virtual property does not threaten the intellectual property interest held by the creator of the property. It protects the interests of the purchaser of the object. An owner of virtual property owns the same rights that the owner of a book does.

Thus, intellectual property need not conflict with virtual property. In fact, the two, if well-balanced, will complement each other.³⁴

If property rights in virtual property are ever recognized at the level of code in North America, intellectual property can still exist with regards to virtual property.

It is the characteristic of rivalrousness that allows virtual property: (a) to behave like real property; and (b) to be differentiated from intellectual property, which is both intangible and non-rivalrous.³⁵ For instance, if a beverage company (“ColaCo.”) creates a virtual bottle of cola in a virtual world, the code relating to the virtual bottle in and of itself will be separate from the intellectual property in that virtual bottle. The virtual bottle of cola may be conveyed by one user to another, in either the virtual world or the real world, and the intellectual property remains with ColaCo., which is the original creator. Owning the right to a particular code does not necessarily mean that the owner of a piece of virtual property has the right to copy the intellectual property of the virtual thing.

Governing Rights in Virtual Property

End-User License Agreement

Application of Game Developers To Establish Contractual Rights

Regardless of whether and what rights within virtual property are ever recognized through a North

American legislature or court, at present, such rights are determined via contract. In the case of online virtual worlds, the contract is typically the end-user license agreement (“EULA”). Players generally cannot take part in a virtual world without first agreeing to the EULA proposed by a video game developer. With respect to its MMORPG *Everquest*, for example, Sony Online Entertainment LLC requires players to agree to a “click-wrap” EULA prior to being able to enter and take part in the virtual world.³⁶

Relationship of the Parties

Video game developers use computer code to control what goes on within a virtual world (e.g., by controlling and/or changing the virtual environment) and they use a contract to govern what occurs supplementary to the workings of the virtual world.³⁷ EULAs enumerate the rules of virtual worlds, including the ramifications of contravening those rules, by encompassing “features of proper play and decorum that cannot be easily written into” computer code.³⁸ They allow a video game developer to confirm the relationship between it and the player as a relationship of licensor–licensee:

Usually, online service providers make large initial investments in computer hardware, software, and intellectual property to establish a community or web-space with long-term growth potential. Service providers then license access to these expensive resources to users. Users manipulate, interact with, and develop these resources according to certain rules set by the service provider, as would a licensee acting within the bounds of a license.³⁹

The EULA permits the player to operate the product pursuant to rules and it follows that if the player does not abide by the contract, he or she may be restricted from participating in the virtual world.⁴⁰

Demarcation of Rights in Virtual Property

While the specific terms of EULAs differ and are varied from contract to contract, in general they place rights that may arise in virtual property squarely in the hands of video game developers. Typically, the EULA explicitly states that ownership of any rights will remain with the video game developer. The following is an example from Blizzard Entertainment, Inc.’s MMORPG *World of Warcraft*:

All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard.⁴¹

According to many EULAs, the video game developer would hold rights even where a player has created a virtual property item. For instance, the EULA for the MMORPG *City of Villains* reads as follows:

Members can upload to and create content on our servers in various forms, such as in selections you make and characters and items you create for the Game(s), and in bulletin boards and similar user-to-user areas ("Member Content"). By submitting Member Content to or creating Member Content on any area of the Service, you acknowledge and agree that such Member Content is the sole property of NC Interactive.⁴²

Through the EULA, video game developers attempt to avoid conflict over claims of rights in the virtual property created by individual players.

Avoiding Potential Liability

If new property rights are ever recognized as existing within virtual property, the EULA can serve as a tool to help video game developers avoid potential liability.⁴³ Some video game developers have now begun to include clauses in EULAs "incorporating an express waiver of the right to assert a claim against the developer for loss of" virtual property.⁴⁴ Moreover, a common tactic employed by video game developers is to insert a grant of rights clause whereby the user agrees to transfer any rights in virtual property that could be recognized by law:

To the extent that NC Interactive cannot claim exclusive rights in Member Content by operation of law, you hereby grant (or you warrant that the owner of such Member Content has expressly granted) to NC Interactive and its related Game Content Providers a non-exclusive, universal, perpetual, irrevocable, royalty-free, sublicenseable right to exercise all rights of any kind or nature associated with such Member Content, and all ancillary and subsidiary rights thereto, in any languages and media now known or not currently known.⁴⁵

These types of clauses will help in instances where, for example, a developer shuts down a virtual world or a force beyond the control of the developer causes the virtual world's server to cease functioning. Although the common EULA used for virtual worlds does not explicitly recognize virtual-property rights, it protects video game developers if courts or legislatures ever legally recognize such rights by allowing video game developers to retain ownership interests in all rights possibly inherent in virtual property.⁴⁶

Protecting Developers' Investments in Virtual Worlds

In addition to avoiding potential liability, EULAs serve a useful function for video game developers by protecting the investment they make in their products. Developers invest large amounts of money "in equipment, capital, software and intellectual property" and are therefore generally "unwilling to abandon any assets of value, intangible or otherwise".⁴⁷ They have an interest in "capturing the value of virtual property" and in maintaining the subscription fees that players pay in order to partake in virtual worlds.⁴⁸ However, real-world trading of virtual property could ultimately reduce video game developer profitability. The sale of in-game property permits purchasers to skip the time and effort that is

required to obtain or build much virtual property.⁴⁹ From the video game developer's point of view, purchasers of virtual property otherwise would have had to spend money on subscription fees.

EULAs can be implemented to protect the video game developer's expectation of maintaining a subscription-based avenue to profits. They allow video game developers not to have to "assert their exclusive rights to protect the revenue streams they expect from their works".⁵⁰ By vesting and reserving all rights in virtual property with the video game developer, EULAs generally prohibit the real-world sale and/or transfer of virtual property amongst players: "if the [players] don't own what they are selling, they can't (legally) sell it".⁵¹ Moreover, some EULAs specifically prohibit the transfer of virtual property:

You may not transfer, sell or auction, or buy or accept any offer to transfer, sell or auction (or offer to do any of the foregoing), any content appearing within the Game environment, including without limitation characters, character attributes, items, currency, and objects, other than via a permitted Character Transfer as described in section 3 above. You may not encourage or induce any other person to participate in such a prohibited transaction. The buying, selling or auctioning (or any attempt at doing so) of characters, character attributes, items, currency, or objects, whether through online auctions (such as eBay), newsgroups, postings on message boards or any other means is prohibited by the EULA and a violation of CCP's proprietary rights in the Game.⁵²

EULAs thus provide a tool by which developers can try to stop the monetization of virtual property by players in the real world.

Enforceability of the EULA?

Validity of EULAs

Strictly speaking, EULAs are enforceable. In the Ontario case of *Rudder v. Microsoft Corp.*,⁵³ certain subscribers of the Microsoft Network ("MSN") service questioned the enforceability of a specific clause in the MSN online member agreement. As part of the sign-up routine, new customers were required to acknowledge their acceptance of the agreement's terms and conditions by clicking on an "I Agree" button presented on their computer screen at the same time as the agreement.⁵⁴ The plaintiffs argued that individuals read only portions of such contracts and therefore could not be bound to a provision of which they had no notice. It was held that the terms of the member agreement were unambiguous and were presented fairly. Thus, Canadian case law has upheld click-wrap agreements where the terms and conditions of the agreements were agreed to online by an end-user.⁵⁵

Will EULAs Always Be Enforced?

Although EULAs are generally enforceable, can they be overcome? EULAs may not be enforceable in all cases, especially where policy reasons point to reasons for not

enforcing them. For example, in the case of *Davidson & Associates Inc. v. Internet Gateway*,⁵⁶ a video game developer's EULA was held enforceable. Both companies were large and established players in the technology industry, fully aware of industrial norms and practices. To employ Davidson's product, users had to sign an EULA that restricted the product's use. Davidson alleged that Internet Gateway had breached this agreement. In agreeing with the allegations, the judge found that Internet Gateway had "reverse engineered Battle.net to set up an alternative but free service, and were themselves relatively sophisticated about contractual terms in the industry".⁵⁷ By focusing on the defendant's level of sophistication, the judge illustrated the importance that courts may place on ensuring contracting parties actually understand the agreement to which they are signing. One must therefore wonder "whether EULAs being enforced against ordinary users would fare as well given the significant inequality of bargaining power between the parties".⁵⁸

In determining possible future cases regarding rights to virtual property as governed by EULAs, courts (and legislatures) could eventually decide that property interests in virtual objects must be factored in and protected.⁵⁹ As the real-world commodification of virtual property increases, it is possible "that current legal rules (e.g., ... EULAs) may not be enforceable in all cases if valuable property interests are at issue".⁶⁰ EULAs presently allow video game developers to effectively run their virtual worlds unabridged. For instance, they can shut-down a server or end a virtual world service,⁶¹ but players with virtual property in a respective virtual world find themselves without remedy against the developer under the common EULA.⁶² Virtual worlds operate on economic systems that promote players to treat virtual objects akin to traditional real-world property.⁶³ As long as markets and investments in virtual property proliferate, it is not clear that courts will enforce EULAs encompassing excessive restrictions that allow platform owners to do whatever they like with valuable virtual property.⁶⁴

Other Policy Reasons To Recognize Property Rights in Virtual Property

Laws Against Criminal Activity

China

Regimes in Asia have started to recognize interests in virtual property both through case law and legislation.⁶⁵ The Chinese case of *Li Hongchen v. Beijing Arctic Ice Technology Development Co.*⁶⁶ exemplifies this recognition. In that case, a third-party rogue hacked into Li's account in the game *Red Moon* and stole his virtual property. Li consequently sued Beijing Arctic, the developer of the *Red Moon* game, for not protecting his vir-

tual goods from theft by a third party. The court of first instance held in favour of Li and ordered Beijing Arctic to "pay damages equal to the amount of money Li had spent on game subscription fees".⁶⁷ The effect of the decision, which was confirmed on appeal, was to restore Li's property.⁶⁸ The case is important because it indicates that at least "some courts may be willing to view virtual property as property that is worthy of protection under the law".⁶⁹ The Court protected the property owner's rights to exclusively own the piece of virtual property contrary to all others, even to the third party that did not perpetrate the theft.⁷⁰

The decision regarding Li Hongchen does not stand alone with respect to China and the support for virtual property rights. An appeal by Yan Yifan was dismissed by a Chinese court after the lower court had convicted and fined Yan for stealing and then selling virtual property (in this case, game identification names and online equipment) belonging to players of the game *Da Xihua Xiyou*.⁷¹ In light of the general increase in occurrences of virtual property theft in China, the country's Public Security Ministry published an advisory letter regarding virtual property theft in order to assist police with punishing such crimes.⁷² Moreover, Chinese lawyers have been calling for stronger and clearer virtual property laws.⁷³ A proposal was submitted in 2003 to the "Law Committee of National People's Congress seeking a law to protect virtual property".⁷⁴ The calls for stronger recognition of virtual property have been noted by some commentators to be in line with the Chinese government's hope to encourage the development of a competitive technology industry, particularly the video game industry.⁷⁵

Taiwan

In Taiwan, the government has enacted statutes to protect virtual property at the level of code. Under the Taiwanese *Criminal Code* (the "Taiwanese Code"), virtual objects are considered "property" if they possess characteristics similar to property, such as rivalrousness, and are alienable and transferable.⁷⁶ The Taiwanese Code recognizes "that virtual property qualifies as electromagnetic records and should be considered moveable property in cases of fraud and theft".⁷⁷ Thus, the right to control virtual property is acknowledged at the level of code and it is granted to the owner of the code, "not the owner of the server on which the code happens to reside, or the intellectual property owner of the code".⁷⁸ The maximum penalty for offences regarding virtual property in Taiwan is three years imprisonment.⁷⁹

Canada's *Criminal Code*

The Canadian *Criminal Code*⁸⁰ (the "Code") does not currently contain explicit provisions regarding virtual property. Nevertheless, it may be argued that some of its provisions are broad enough to protect virtual property from theft and vandalism. Such an argument

could be premised upon the notion that virtual property code falls under the Code's meaning of data, namely: "representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system".⁸¹

The Code provides that any person who destroys, alters, interrupts, or denies access to the legal enjoyment of data is guilty of mischief and can carry a maximum penalty of two years imprisonment.⁸² If the mischief causes actual danger to life then the maximum penalty can be raised to imprisonment for life.⁸³ Further, the Code provides protection against the fraudulent and unauthorized use of any computer service or device and such an offence can carry a maximum penalty of 10 years.⁸⁴ Although the Code does not specifically mention virtual property, the provisions protecting computer use and data may potentially cover virtual property that is legally stored in a computer system.

Activity in North American Courts

The American case of *Blacksnow Interactive v. Mythic Entertainment, Inc.*⁸⁵ illustrates that, despite the intangible nature of virtual property, courts in North America are beginning to recognize that virtual property has utility in the real world. Mythic is the developer of the MMORPG *Dark Age of Camelot*. Blacksnow was a virtual-property farming ("the activity of playing a game to get valuable items to sell offline")⁸⁶ company that "farmed" for virtual property in *Dark Age of Camelot*. When Mythic prompted eBay to stop the auctioning of *Dark Age of Camelot* items, Blacksnow sued Mythic for unfair business practices and interference with "prospective economic advantage".⁸⁷ Blacksnow sought damages and a "court order declaring that the sale of items and accounts outside the game [did] not infringe on Mythic's copyrights".⁸⁸ Although the case was settled in Mythic's favour before judgment, it is notable because the facts demonstrate that at least one party has attempted to challenge the general legal position held by developers that real-world trading of virtual objects is not sanctioned. It is possible that more lawsuits of a similar variety will arise in North America in the future.

Novel Approaches

Industry Trends

The MMORPG industry has begun to move in the direction of providing its users with rights in their virtual property. The most recent trends establish that firms have begun to grant players more rights rather than to restrict them.⁸⁹ Linden Labs, the creators of *Second Life*, is now allowing certain intellectual property rights to content created by the virtual world's residents.⁹⁰ *Second Life's* Terms of Service regarding user-created rights reads as follows:

You retain copyright and other intellectual property rights with respect to Content you create in *Second Life*, to the extent that you have such rights under applicable law. How-

ever, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and to other users of *Second Life*.⁹¹

It should be noted that players' ownership of their created content does not extend to full property rights. Players have rights to the "software patterns used in making virtual objects, but no rights to the objects themselves".⁹² Thus, a player creating virtual clothing will own their designs, but not the specific pieces of clothing.⁹³ Linden Labs retains rights to the actual virtual property. This method of granting rights in virtual property gives further credence to the ability of intellectual property and actual property rights in virtual property to co-exist.

In another indication of the possible direction of the virtual property industry, Sony Online Entertainment LLC has come up with a compromised approach to the trading of virtual property. With respect to the company's MMORPG *Everquest II*, Sony has created its own auction Web site to facilitate real-world trading of virtual objects.⁹⁴ The Web site is called "Station Exchange" and Sony's impetus to create it, in part, was to provide a secure platform (as opposed to third-party Web sites that may be insecure) for real-world trading of virtual property so as to protect the residents of *Everquest II*.⁹⁵ Some commentators have taken the position that the next logical step is for the law to make a similar acknowledgement because, "[a]s a matter of policy, where a free market cultivates value, courts should protect that value, as long as other substantive rights are not infringed, . . . and should avoid excessive" restrictions on creativity.⁹⁶ The existence of Station Exchange suggests that Sony has indicated, at least on a corporate level, a willingness of a developer to acknowledge that real-world trading is occurring despite the notion that developers may otherwise wish to limit such transactions from occurring.⁹⁷

Possible Legislative Recognition

Ultimately, virtual property is increasingly being viewed as property and virtual worlds encourage players to treat their creations as such. Virtual worlds operate on the various commodities within them, which is supported by the fact that a congressional committee in the United States has been looking at whether virtual property and assets should be taxed.⁹⁸ Tax is already applicable in the United States on the incomes of those who cash out of virtual worlds by converting their assets into real-world money. The issue that now arises is whether one can have a virtual asset and virtual capital gains without ever lifting those assets from the virtual world.⁹⁹ In one sense, virtual assets are similar to stocks traded on real-world stock markets.¹⁰⁰ Stocks are intangible property interests represented by stock certificates that increase and decrease in real-world value. Stock markets allow analysts to provide real-world valuations, based on the performance of these assets, even where the owner of a stock has not realized such value. Similarly, virtual

assets increase and decrease in value in their own marketplace and this value can eventually be realized in the real world. It is thus a logical possibility that virtual property could be recognized for the purpose of taxation.

Conclusion

Although it is difficult to compose a decisive legal definition for virtual property, it is clear that many parallels exist between virtual property and real-world property, and the intangible nature of virtual property does not necessarily rule out the possibility of treating virtual property akin to physical property for legal purposes. The size of the real-world market for virtual property, both in its value and number of participants, indicates that the trading of virtual property is obviously important to a large number of individuals. In response, lawmakers in both China and Taiwan have enacted legal regimes designed to recognize and begin dealing with the contemporary reality that is the commodification and monetization of virtual property created in virtual worlds. At least one law-making body in North America

is beginning to consider the real-world effect of such property.

That technology will evolve at a quicker pace than the law responds is inevitable, but it is crucial that the law not fall too far behind. Without legal intervention, the parties that value virtual property will be left to establish their legal rights amongst themselves and without clear law governing virtual property, it is uncertain as to how courts and other legal bodies will respond. Eventually, it is possible that there will be strong policy grounds for overriding EULAs including the view that such agreements are too one-sided given the valuable nature of the property contemplated by the contracts. If and when the law does respond to the virtual world, it is possible that the rights currently retained by developers through EULAs will be unenforceable and legal liability may ensue. It would therefore be prudent for developers of virtual worlds to attempt to begin dealing with these possibilities at the present time to ensure that their rights and interests are legally protected as the virtual economy evolves in the real world.

Notes:

¹ Benjamin Duranske, "Second Life Hairstyle Raises Copyright Question" (15 February 2007), online: Virtually Blind <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>>.

² Alan Sipress, "Where Real Money Meets Virtual Reality, The Jury is Still Out" *Washington Post* (26 December 2006), A01, online: The Washington Post Company <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/25/AR2006122500635.html?nav=rss_technology/techpolicy>.

³ Joshua Fairfield, "Virtual Property" (2005) 85 B.U.L. Rev. 1047 at 1049.

⁴ *Ibid.*

⁵ Theodore J. Westbrook "Owned: Finding A Place for Virtual World Property Rights" (2006) 2006: 3 Mich. St. L. Rev. 779 at 783.

⁶ *Ibid.*

⁷ *Ibid.* at 783-4.

⁸ Danny Bradbury, "Are Virtual-Reality Games The New Wild West, and if so, Who Will Police Them?" *Backbone Magazine* (27 October 2006), online: <<http://www.backbonemag.com/Magazine/E.Law.10270601.asp>>.

⁹ F. Gregory Lastowka & Dan Hunter, "The Laws of the Virtual Worlds" (2004) 92 Cal. L. Rev. 1 at 30.

¹⁰ *Supra* note 5 at 784.

¹¹ *Ibid.* at 786; Molly Stephens, "Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Creators" (2002) 80 Texas L.R. 1513 at 1515.

¹² *Supra* note 8.

¹³ *Ibid.*

¹⁴ *Supra* note 5 at 785.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 786.

¹⁷ Allen Chein, "A Practical Look at Virtual Property" (2006) 80 St. John's L. Rev. 1059 at 1068.

¹⁸ Charles Blazer, "The Five Indicia of Virtual Property" (2006) 5 Pierce L. Rev. 137 at 148.

¹⁹ "In Norrath, Tattoine and Rubi-Ka, Just What are Your Legal Rights?" (24 September 2003), online: Knowledge@Wharton <<http://knowledge.wharton.upenn.edu/>>.

²⁰ Michele Mandel, "Money for Nothing" *Toronto Sun* (13 March 2005), online: Canoe Network <http://www.canoe.ca/NewsStand/Columnists/Toronto/Michele_Mandel/2005/03/13/959227.html>.

²¹ Daniel Terdiman, "eBay Bans Auctions of Virtual Goods" *CNET News.com* (30 January 2007), online: CNET Networks <http://news.com.com/eBay+bans+auctions+of+virtual+goods/2100-1043_36154372.html?tag=item>.

²² *Ibid.*

²³ *Supra* note 3 at 1063.

²⁴ *Ibid.* at 1053.

²⁵ *Ibid.* at 1076.

²⁶ *Ibid.* at 1077.

²⁷ *Ibid.*

²⁸ Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, loose leaf (Scarborough: Carswell, 2007) vol. 1 at 3-2.1.

²⁹ R.S.C. 1985, c. C-42, s. 3.

³⁰ *Ibid.*, s. 2.

³¹ *Ibid.*

³² (1987), [1988] 1 F.C. 673.

³³ *Ibid.* at para. 41.

³⁴ *Supra* note 3 at 1096.

³⁵ *Supra* note 18 at 143.

³⁶ *Sony Online Entertainment LLC Terms of Service*, online: Station.com <<http://www.station.sony.com/en/termservice.vm>>.

³⁷ Richard Raysman & Peter Brown, "Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property" (Paper presented to the Ontario Bar Association, Technology in Bloom 2006: New Developments in Technology Law, Toronto, Ontario, 27 March 2006) [unpublished].

³⁸ Jack M. Balkin "Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds" (2004) 90 Va. L. Rev. 2043 at 2049.

³⁹ *Supra* note 18 at 151.

⁴⁰ *Supra* note 38 at 2049.

- ⁴¹ *World of Warcraft End User License Agreement*, online: *World of Warcraft* <<http://www.worldofwarcraft.com/legal/eula.html>> (Last updated 2 February 2007).
- ⁴² *City of Villains User Agreement*, online: PlayNC.com <http://www.plaync.com/us/help/eula_cov.html> (Last modified November 2006).
- ⁴³ *Supra* note 5 at 803; *supra* note 18 at 154.
- ⁴⁴ *Supra* note 5 at 787.
- ⁴⁵ *Supra* note 42.
- ⁴⁶ *Supra* note 5 at 803; *supra* note 18 at 152.
- ⁴⁷ *Supra* note 18 at 154.
- ⁴⁸ *Ibid.*
- ⁴⁹ Anders Eriksson & Kalle Grill “Who Owns My Avatar? – Rights in Virtual Property” (Paper presented to the Digital Games Research Association 2005 Conference: Changing Views – Worlds in Play, Vancouver, British Columbia, 16–20 June 2005) [unpublished] at 4.
- ⁵⁰ Stephens, *supra* note 11 at 1528.
- ⁵¹ Dr. Richard A. Bartle, “Pitfalls of Virtual Property” *The Themis Group* (April 2004), online: <<http://mud.co.uk/richard/povp.pdf>> at 21.
- ⁵² *Eve: The Second Genesis, End User License Agreement*, online: EVE Online <<http://www.eve-online.com/pnp/eula.asp>>.
- ⁵³ [1999] O.J. No. 3778 (S.C.J.) (Q.L) [*Rudder*].
- ⁵⁴ *Ibid.* at para. 12.
- ⁵⁵ *Supra* note 28, vol. 2 at 10–13, noting *Rudder*.
- ⁵⁶ 334 F. Supp. 2d 1164 (E.D. Mo. 2004)
- ⁵⁷ Jon Festinger, *Video Game Law* (Markham: LexisNexis Canada, 2005) at 101, n37.
- ⁵⁸ *Ibid.*
- ⁵⁹ *Supra* note 38 at 2070.
- ⁶⁰ *Supra* note 37 at 13.
- ⁶¹ See *supra* note 52. Section 6.A reads: “CCP does not guarantee that it will continue to offer access to the System or support the Game. CCP may, in its sole discretion, cease to provide any or all of the services offered in connection with EVE™ (including access to the System and any or all features or components of the Game), terminate the EULA, close all Accounts and cancel all of the rights granted to you under the EULA . . .”.
- ⁶² *Supra* note 37 at 13.
- ⁶³ *Supra* note 38 at 2073.
- ⁶⁴ *Supra* note 9 at 51; *supra* note 38 at 2072.
- ⁶⁵ *Supra* note 3 at 1084.
- ⁶⁶ *Supra* note 3 at 1084.
- ⁶⁷ *Supra* note 5 at 805.
- ⁶⁸ *Supra* note 57 at 102.
- ⁶⁹ *Supra* note 5 at 805.
- ⁷⁰ *Supra* note 3 at 1085.
- ⁷¹ “Verdict on Virtual Property Thief Upheld” *The Sydney Morning Herald* (4 April 2006), online: smh.com.au <<http://www.smh.com.au/news/breaking/verdict-on-virtual-property-thief-upheld/2006/04/04/1143916492279.html>>.
- ⁷² *Supra* note 3 at 1085.
- ⁷³ *Supra* note 71.
- ⁷⁴ *Supra* note 37 at 17.
- ⁷⁵ *Ibid.*; *supra* note 3 at 1085.
- ⁷⁶ *Supra* note 3 at 1086.
- ⁷⁷ *Supra* note 37 at 17.
- ⁷⁸ *Supra* note 3 at 1087.
- ⁷⁹ *Supra* note 37 at 17.
- ⁸⁰ R.S.C. 1985, c. C-46.
- ⁸¹ *Ibid.*, s. 342.1(2).
- ⁸² *Ibid.*, ss. 430(1.1), 430(4).
- ⁸³ *Ibid.*, s. 430(2).
- ⁸⁴ *Ibid.*, s. 342.1(1).
- ⁸⁵ See Justin, “Blacksnow Versus Mythic” (27 October 2002), online: Control and Property in Play-Based Online Worlds <http://www.gamegirladvance.com/mmog/archives/2002/10/27/blacksnow_versus_mythic.html>.
- ⁸⁶ *Ibid.*
- ⁸⁷ *Ibid.*
- ⁸⁸ David Becker, “Game Exchange Dispute Goes to Court” *CNET News.com* (7 February 2007), online: CNET Networks <<http://news.com.com/2100-1040-832347.html>>.
- ⁸⁹ *Supra* note 17 at 1088.
- ⁹⁰ *Supra* note 2.
- ⁹¹ *Second Life Terms of Service*, online: *Second Life* <<http://secondlife.com/corporate/tos.php>>.
- ⁹² *Supra* note 2.
- ⁹³ *Ibid.*
- ⁹⁴ *Supra* note 17 at 1088.
- ⁹⁵ *Supra* note 21.
- ⁹⁶ *Supra* note 18 at 146.
- ⁹⁷ *Supra* note 21.
- ⁹⁸ Daniel Terdiman, “IRS taxation of online game virtual assets inevitable” *CNET News.com* (4 December 2006), online: CNET Networks <http://news.com.com/IRS+taxation+of+online+game+virtual+assets+inevitable/2100-1043_3-6140298.html>.
- ⁹⁹ Adam Reuters, “US Congress Launches Probe Into Virtual Economies” *Second Life News Center* (15 October 2006), online: Reuters/Second Life <<http://secondlife.reuters.com/stories/2006/10/15/us-congress-launches-probe-into-virtual-economies>>.
- ¹⁰⁰ *Ibid.*