FOR SALE—ONE LEVEL 5 BARBARIAN FOR 94,800 WON: THE INTERNATIONAL EFFECTS OF VIRTUAL PROPERTY AND THE LEGALITY OF ITS OWNERSHIP

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I. INTRODUCTION

In an episode of the eighteenth season of *The Simpsons*, Marge Simpson, as a virtual elf, explores the online game of "Earthland Realms," wherein online gamers develop characters by completing various missions. Throughout the game, Marge attempts to stop her son Bart's character, "Shadowknight," from committing carnage and stealing virtual objects such as gold, virtual swords, and jewelry from other players in the game. Within the game, Shadowknight rises to fame and power by winning and stealing virtual goods from in-game characters. When Marge cleans out Shadowknight’s virtual stockpile of booty and redecorates his virtual castle, Bart becomes furious and accidentally kills her elf character. Bart's reaction to the "theft" of his virtual property illustrates unresolved questions in online gaming: what is the legal status of virtual property, how have different countries around the world dealt with this question, and is a legislative or a judicial approach more appropriate for resolving this issue?

Virtual property is property that gamers acquire in an online game. Virtual property varies between games and can include magical amulets, game currency, or even virtual real property. Often these goods can be transferred between online gamers who are in the same virtual world. Virtual property is a common theme in many massively multi-player online role playing games (MMORPGs). An MMORPG centers around the adventures of a gamer’s avatar, a personally assembled virtual character, such as Bart’s Shadowknight.

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1 *The Simpsons: Marge Gamer* (FOX television broadcast Apr. 22, 2007), available at http://wtso.net/movie/100-The_Simpsons_1817_Marge_Gamer.html. Earthland Realms is a parody of both EverQuest and World of Warcraft, two popular online games.
2 Id.
3 Id.
4 Id.
6 Id.
7 See *id.* (stating that "[a]n island in a virtual world recently sold for $30,000").
8 See Dr. Richard A. Bartle, *Pitfalls of Virtual Property*, THE THEMIS GROUP, April 2004, at 1, 2–3, http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf (discussing transfer of ownership within virtual worlds). The term “virtual world” and phrase “in-game” are used in this Note to describe anything that happens within an online game.
9 See Loftus, *supra* note 5 (discussing virtual property in MMORPGs).
or Marge’s elf. In MMORPGs, gamers’ avatars interact with each other.\textsuperscript{11} Avatars can fight,\textsuperscript{12} trade,\textsuperscript{13} and in some MMORPGs, even steal\textsuperscript{14} virtual property from one another. In order to participate in most MMORPGs, gamers subscribe to an online service and pay a real-world fee.\textsuperscript{15}

Virtual property is an interesting topic for legal study because it can develop a real-world value.\textsuperscript{16} Gamers who want to convert their virtual property into real money use online auction sites to sell their items to other gamers; this type of transaction is known as a real money trade or transaction (RMT).\textsuperscript{17} An RMT is distinguishable from an in-game transfer between gamers because it involves real money in a recognized national currency.\textsuperscript{18} An example of an RMT might be when one garner sells one level five barbarian to another garner for 94,800 won\textsuperscript{19} on an auction website.\textsuperscript{20} A gamer can make a sizeable amount of real money from the sale of virtual goods and virtual property.\textsuperscript{21} Consider the case of Anshe Chung, who estimates her net worth at more than one million real dollars, which she earned by speculating on virtual real property in the game Second Life.\textsuperscript{22}

\begin{enumerate}
\item See id. (explaining that an MMPORG “is a computer game that can be played with thousands of other people in a . . . game world”).
\item Id.
\item F. Gregory Lastowka & Dan Hunter, Virtual Crimes, 49 N.Y.L. SCH. L. REV. 293, 301 (2004).
\item Kevin W. Saunders, Virtual Worlds—Real Courts, 52 VILL. L. REV. 187, 190 (2007). “Real-world” and “real world” are used in this Note to mean everything outside of the online virtual world.
\item See id. at 192 (explaining that “virtual assets . . . may be saleable in real world markets . . .”).
\item Saunders, supra note 15, at 229 (“Assets in virtual worlds are not simply traded or bought and sold using the currencies of the virtual worlds. They are bought and sold using real world currency.”).
\item Won is the national currency of South Korea.
\item See, e.g., BuyMMOAccounts.com, http://www.buymmoaccounts.com (last visited May 11, 2009) (an auction website where a gamer can buy barbarians, hordes, elves, and similar characters for various prices).
\item See Hoff, supra note 21 (discussing how Chung accumulated virtual real estate).
\end{enumerate}
However, online sales are a bone of contention in the online world because the rightful ownership of virtual property is often disputed, leaving gamers and game companies unsure about the validity of the sales.\(^\text{23}\) Game companies do not know whether they or the gamers own the rights to sell, own, and trade virtual property.\(^\text{24}\)

Both in-game exchanges between individual gamers and real-world interactions between the gamers and the game company are relatively ungoverned under the laws of most countries. When disputes arise between gamers and the company as to who owns the game, gamers claim that they have spent time and money developing their avatar, running through levels and earning virtual gold, thereby earning the right to sell whatever virtual property they have earned.\(^\text{25}\) On the other hand, game companies argue that they own the physical servers and game copyrights; therefore, they own the virtual property within the game as well.\(^\text{26}\)

Exchanges between gamers and game companies are often governed by an End User Licensing Agreement (EULA), which most gamers are required to agree to in some form.\(^\text{27}\) The EULA dictates the terms of the operation of the game and allows game companies to pre-determine favorable terms of play.\(^\text{28}\) Interchanges between gamers in-game may also be controlled by the terms of service included in an EULA or a separate set of “community standards” referred to by an EULA.\(^\text{29}\) This Note concentrates primarily on interactions


\(^\text{24}\) See id. (noting the confusion over the treatment of virtual property in the real world); see Jamie J. Kayser, The New New-World: Virtual Property and the End User License Agreement, 27 LOY. L.A. ENT. L. REV. 59, 85 (2006) (noting that “[g]ame developers are trying different approaches to modulate the effect that real-world courts will have on their virtual spaces” and that “it is certain courts will have to address them in the near future”).


\(^\text{26}\) See id. at 37 (pointing out that disputes over whether “the owner of a virtual world’s physical server [is] also the owner of virtual castles created on that server . . . have been the subject of real-world litigation . . .”).

\(^\text{27}\) Kayser, supra note 24, at 61, 63.

\(^\text{28}\) Id. at 61.

between players and the game creator, as these produce a more visible tension in the real world.\footnote{There are numerous other potential methods of dispute resolution between gamers in-game: informal ostracizing by other players, in-game court systems, and mediation. Saunders, \textit{supra} note 15, at 228. Professor Saunders provides a comparison to baseball; just as baseball players play by the rules of the game and should not be governed in a typical court, neither should real-world laws govern the disputes of the virtual world. \textit{id}. However, the line is not so easily drawn between real-world and in-game exchanges when issues in the virtual world affect issues in the real world; for example, YouTube posts of an intentional virtual attack on a gamer’s avatar were eventually taken down by administrators after the gamer complained. \textit{See} Warren Ellis, Opinion, \textit{Second Life Sketches: Two Worlds – Fame and Infamy}, \textsc{Reuters.com}, Jan. 5, 2007, http://secondlife.reuters.com/stories/2007/01/05/second-life-sketches-two-worlds-fame-and-infamy/.}

Virtual worlds are attracting a large and growing population of users, and economists have asserted that these virtual economies directly impact real world economies.\footnote{\textit{Id.} at 11–12. Just as states serve as laboratories for the federal government, the virtual world can serve as a laboratory for the real one. \textit{Cf.} Gonzalez v. Raich, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (stating that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country” (quoting \textit{New State Ice Co. v. Liebmann}, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).} Further, these virtual worlds can function as laboratories for investigations into new forms of law, social interaction, and other experiments.\footnote{There have been recent events in European countries that have drawn attention to virtual theft, but those developments will not be analyzed here. \textit{See} Lester Haines, \textit{Dutch Teen Swipes Furniture from Virtual Hotel}, \textsc{Register.co.uk}, Nov. 14, 2007, http://www.theregister.co.uk/2007/11/14/.habbo_hotel_heist/ (reporting on an arrest for “virtual burglary”).} This Note focuses on the issue of virtual property within virtual worlds. Part II of this Note consists of an assessment of the history of virtual property and the world of online gaming. Part III assesses additional methods for regulating the virtual property disputes in the virtual world—namely private contracts between parties in the form of an EULA. Part IV appraises both existing and proposed legislation that targets virtual property in China, South Korea, Hong Kong, Australia, and the United States.\footnote{\textit{See infra} Part III.} It also evaluates whether these countries, through their laws, have designated an “owner” of virtual property. Part V proposes various solutions, particularly the use of adverse possession to allow gamers in different countries to claim ownership over virtual property. In light of the ineffective nature of EULAs and the unique characteristics of virtual property,\footnote{\textit{See infra} Part III.} countries should rely on judicial
II. Why All The Fuss About Virtual Property—What Is It and How Did It Develop?

Some academics argue that the virtual world has existed for centuries in the myths and legends that eventually were memorialized into written fairy tales or other fictional literature. However, the more traditional notion of what today's society considers a virtual world developed as early as 1976 when Will Crowther created a simplistic computer game for his children called ADVENT. Multi-User Dungeon 1 (MUD1) was the first game that allowed social interaction between game characters on computers. MUD1 was developed in 1979 by Roy Trubshaw and Richard Bartle at Essex University in England. Since then, the popularity and the complexity of these virtual worlds have changed and now include highly complex transactions and sales of online virtual property. Today, many virtual worlds exist as a product of MMORPGs, discussed below.

A. Types of MMORPGs

There are two types of MMORPGs: goal-based and player interaction-based. Goal-based MMORPGs, such as EverQuest, World of Warcraft, or EVE Online, center around the gamer overcoming certain levels, fighting with...
other characters, forming alliances, and gaining a certain amount of points. The games allow the gamer to create an avatar that could be anything from a dwarf, an ogre, or an elf to a spaceship captain. The gamer then looks for adventure through the game's levels, and concentrates on building up strength and agility points by slaying monsters or collecting items. The games also feature virtual economies with virtual gold. These games seem to have the same basic premise: the combination of adventure with role playing in a virtual world.

Player-interaction-based MMORPGs revolve around gamers' interactions in a virtual world similar to the real world, such as in games like Second Life, Weblo, or The Sims Online. Second Life was created by Philip Rosedale in 2001. After a slow start, users eventually flocked to the game, and its

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42 See Couper, supra note 41 (explaining that gamers may play this game as different types of elves or an ogre); Deci, Synopsis: World of Warcraft, supra note 41 (stating that game includes "player-controlled . . . [d]warves"); Deci, Synopsis: EVE Online, supra note 41 (explaining that gamers may play as starship or spaceship captains).


44 See David Barboza, Ogre to Slay? Outsource it to the Chinese, N.Y. TIMES, Dec. 9, 2005, at A1 (discussing "gold coins and other virtual goods . . . that . . . can be transformed into real cash"). Problems develop when entrepreneurial gamers sell virtual gold in the real world. See id. (noting that these gold farmers operate like textile mills and toy factories that exploit the cheap labor available in China, may violate the terms of service, and distort the games). Gold farming is the large-scale business where an entrepreneur obtains virtual property in an MMORPG and then sells it online for real-world money. See id. (describing the "harvesting [of] artificial gold coins . . . that . . . can be transformed into real cash").


46 See infra notes 57–58 and accompanying text for a discussion of the game.

47 See infra notes 59–61 and accompanying text for a discussion of the game.

48 Jessica Bennett & Malcolm Beith, Millions Flock to Virtual Free World, N.Z. HERALD,
current membership is approximately eight million users; two million signed-on between June and July of 2007 alone. Second Life is a unique virtual world that is structured similarly to the real world, with an in-game economy and in-game laws that apply to a gamer’s avatar. Any disputes between the gamer and Linden Lab are governed by California state law. If the gamer is located outside of the United States, he retains intellectual property rights to the extent that he has such rights under the laws in his jurisdiction, while if the gamer is located inside the United States, U.S. laws apply. Second Life’s burgeoning economy is based on the virtual “Linden dollar,” which between November 30 and December 30, 2008 had an exchange rate ranging between 250 to 272 Linden dollars to 1 U.S. dollar. After exchanging their money, players are able to buy objects—like virtual shirts, fireworks, and homes—in the virtual world for their virtual characters. The gamers can create items and patent, copyright, or trademark them in Second Life under U.S. intellectual property law, and take the issue to a U.S. court if need be.

Weblo, a Canadian game with more than 40,000 members, follows a social-network model, where subscribers can join at different levels, build user profiles, and buy virtual properties. If gamers attract enough interest for their


49 See id.
51 Linden Lab is the controller and operator of Second Life. Id. para. “General Provisions.”
52 Id. para. 7.1.
53 Id. paras. 3.2, 7.1, “General Provisions.”
57 Virtual Real Estate, THE GRAND RAPIDS PRESS, Aug. 10, 2007, at A1; Tessa Wong,
property through their Weblo websites, blogs, and message boards, they can make money through advertising or selling their property.\textsuperscript{58} The Sims Online is a multiplayer online version of The Sims, where players direct their avatars through a virtual world where there is no ultimate objective.\textsuperscript{59} The players can work and thereby earn virtual currency known as simoleans.\textsuperscript{60} Much like reality, the accumulation of virtual goods and simoleans allows a player to gain wealth, reputation, and social standing.\textsuperscript{61}

These player-interaction-based games also center on the obtainment of virtual property, but in these games the status of virtual property is more certain due to the games’ marketing schemes and EULAs. Weblo actually advertises that gamers can make real money through participation in the game.\textsuperscript{62} Second Life explicitly states in its EULA that Second Life users are creating an intellectual property interest in their Second Life goods.\textsuperscript{63} However, in either type of game, progress can be measured by the gamers’ accumulation of virtual “real property” and chattel, such as virtual currency.\textsuperscript{64}

\textbf{B. Virtual Property Versus Real-World Property}

When virtual property is compared with real-world property, parallels exist. For example, like real-world property, virtual property is persistent because it continues to exist on the main server after the gamer turns off his computer.\textsuperscript{65} Also, similarly to real property, a gamer has the right to exclude other gamers from her virtual goods.\textsuperscript{66}

\textsuperscript{58} Virtual Real Estate, supra note 57, at A1.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{63} Second Life, Terms of Service, supra note 50, paras. 3.2, 5.3. Second Life’s EULA also says that the game company can disconnect, delete, or otherwise alter a user’s account at any time, and that Linden dollars are only redeemable for real currency at the discretion of Linden Lab, which makes their ultimate legal status still uncertain. Id. paras. 1.4, 5.3.
\textsuperscript{64} Saunders, supra note 15, at 227.
\textsuperscript{65} Id. at 191 (noting the persistence of virtual worlds); see Glushko, supra note 40, at 511 (describing virtual property as persistent and explaining that “[v]irtual property does not disappear when the player turns off her computer”).
\textsuperscript{66} Compare RESTATEMENT (FIRST) OF PROP. § 7(a) (1936) (“A possessory interest in land
However, virtual property differs from real-world property in several ways. Virtual property might be transferable within the game from player to player, but it is not transferable or accessible outside of the game and the game's platform. Virtual property exists in a different form than physical property; it is essentially lines of computerized code, ones and zeros, which only spring into existence when that code is interpreted by a machine. This characteristic does not preclude legal protection however; the law often protects intangible property such as domain names or intellectual property rights.

There are also different types of virtual property within both types of MMORPGs. Virtual property sales can be quantified into three categories: sales of virtual currency (e.g., gold), items (e.g., weapons, clothing, and land), and gamers' accounts.

C. Traditional Property Theories as Applied to Virtual Property

Both game companies and gamers have feasible legal theories to support their interests in the ownership of virtual property, and these theories can be

exists in a person who has . . . a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general . . . ."), with David P. Sheldon, Comment, Claiming Ownership. But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods, 54 UCLA L. Rev. 751, 761 (2007) (stating that "[v]irtual-world participants do act as if virtual items are their property" by excluding others from possessing the items and enforcing their rights through the legal process).

67 See Glushko, supra note 40, at 512–13 (discussing how a player may not take a spaceship from one game’s virtual world and fly it in another game’s virtual world).

68 Id. at 512.

69 See Joshua Fairfield, Virtual Property, 85 B.U. L. Rev. 1047, 1055 (2005) (identifying a domain name as an example of virtual property); id. at 1055 n.30 (noting the protections for URLs provided by U.S. law).


71 Glushko, supra note 40, at 510; see also Michael Meehan, Virtual Property: Protecting Bits in Context, 13 RICH. J.L. & TECH. 7, paras. 7–8 (2006) (discussing types of virtual property and the "market for virtual property").

72 These theories have been covered at length by various pieces of scholarship, and so will only be covered generally here as a framework to understanding the international treatment of virtual property rights. See, e.g., Steven J. Horowitz, Note, Competing Lockean Claims to Virtual Property, 20 HARV. J.L. & TECH. 443 (2007) (comparing gamers and game creators’ labor-based claims to the products of virtual worlds); Theodore J. Westbrook, Note, Owned: Finding a Place for Virtual World Property Rights, 2006 Mich. St. L. Rev. 779 (2006) (arguing
better assessed and critiqued in courts by judges than in congressional houses by politicians. This is because judges are more likely than legislators to look to traditional property theories when presented with novel virtual property issues. Game companies argue that a discussion of property theory is only relevant when the EULA of a game does not specify ownership of in-game virtual property; gamers counter that property rights should override the EULA, or alternatively, that the EULA is unconscionable in some situations. The most prevalent theories applied to virtual property include the Lockean labor theory, utilitarian theory, and personality theory.

English philosopher John Locke postulated that the ownership of property was created by the input of a user's labor. Both gamers and developers may employ the Lockean labor theory to explain their views, raising the question of what actually qualifies as "labor" within the virtual realm. Game designers initially expend effort, money, and resources to create the framework of the game world. One critic stated, when referring to game creators, "[t]heir creations maintain the story lines, or at least the backgrounds against which story lines develop . . . ." On the other hand, the gamers earn virtual goods through trade or the defeat of a virtual foe. Gamers argue that they have spent time working to develop the attributes of their avatars, and that the utilitarian model provides the best validation for recognizing a property right in virtual goods; Saunders, supra note 15 (discussing the role of real world courts in virtual property courts).

73 See infra Part II.D. and Part III.
74 Horowitz, supra note 72, at 451, 451 n.38.
76 See Westbrook, supra note 72, at 791-95 (discussing Lockean theory as it relates to disputes between gamers and developers). Does gaming on the internet qualify as labor? Considering that internet gaming is an expenditure of physical or mental effort, especially as it is sometimes difficult, and is often a service performed by workers for wages, see, e.g., Barboza, supra note 44 (describing the activities of Chinese gold farmers who earn up to $250 each month), it could be considered labor under the traditional definition of labor. Labor is defined as "the expenditure of physical or mental effort especially when difficult or compulsory," or "the services performed by workers for wages." MERRIAM-WEBSTER 15 ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/labor (last visited May 11, 2009).
77 Horowitz, supra note 72, at 454 ("[Gamers'] Lockean claims to property within the world are limited by the pre-existing, competing claims of the operators who labored to produce the world and all of the products in it.").
79 Horowitz, supra note 72, at 454-55.
without their input and interaction, avatars would not exist at all.\textsuperscript{80} The Lockean theory leads to new and unanswered queries, such as when the game creator can destroy the gamer’s “property” without recourse.

Jeremy Bentham, the father of utilitarianism, placed importance on providing the greatest good for the greatest number of people.\textsuperscript{81} The application of the utilitarian theory of property rights to virtual property would likely support the gamers’ claims of ownership. As applied to the virtual world, the millions of individuals\textsuperscript{82} who spend time within virtual worlds benefit from the obtainment of virtual property, potentially outweighing the detrimental effect on game creators. According to the utilitarian theory, gamers would thus be vested with an interest or “own” the virtual property and be able to sell it. Therefore, in the aggregate, the declaration of personal property rights in favor of the gamers could amount to a social good in economic terms. Beyond the economic good that may come from gamers’ actions, a substantial individualized good comes from the mere recreation of the “billions of hours per year” that gamers spend in virtual worlds.\textsuperscript{83}

German philosopher Georg Wilhelm Friedrich Hegel put forth the personality theory of property, which posits that private property rights are justified to the extent that the owner has put his or her will into an object and the level to which an owner’s personality is intertwined with the object itself.\textsuperscript{84} Under the personality theory of property, gamers have a meritable claim to virtual property,\textsuperscript{85} because gamers self-identify with their avatars,\textsuperscript{86} and their avatars, in turn, develop based on virtual property acquired,\textsuperscript{87} the creator of an avatar could potentially claim rights over that virtual property.\textsuperscript{88} However, 

\begin{footnotesize}
\begin{enumerate}
\item Westbrook, \textit{supra} note 72, at 792–93.
\item Eight million people alone play Second Life. Bennett & Beith, \textit{supra} note 48.
\item Westbrook, \textit{supra} note 72, at 796.
\item See Westbrook, \textit{supra} note 72, at 799 (stating “[c]ommentators have found personality theory particularly applicable to virtual property . . .”).
\item See \textit{id.} at 797–99 (explaining that under personality theory “private property rights are essentially linked to personhood and identity” and noting that gamers “often strongly identify with their avatars”).
\item E.g., an avatar’s shield or armor.
\item See Westbrook, \textit{supra} note 72, at 797 (discussing personality theory and its applicability to virtual property). Westbrook qualifies this application, stating that this theory might oversimplify gamers’ rights and that gamers could be considered co-owners of the avatar with
\end{enumerate}
\end{footnotesize}
although the personality theory might strongly support the ownership of a gamer’s in-game avatar, the theory is weaker when used in defense of the ownership of virtual land or gold. Although gamers might be able to argue that they have personalized their virtual property by adding a house, some shrubs, or other special items, it is highly unlikely that they have been able to intertwine their personalities with fungible virtual gold. In response, game creators may argue that when the game was created, it was a product of their ideas and imagination and is therefore an extension of their personality.

In 2000, Raph Koster, a longtime game designer for both Ultima Online and the Star Wars Galaxies MMORPGs, created a satirical document called the Rights of Avatars, based on the Bill of Rights and the 1789 Declaration of the Rights of Man. He playfully stated that the avatars have come together to form a social community and are therefore governed by a social contract, and that property rights may arise when the populace tries to grant them to themselves. In one of his nineteen enumerated rights of avatars, he stated that “[s]ince property is an inviolable and sacred right, and the virtual equivalent is integrity and persistence of data, no one shall be deprived thereof except where public necessity, legally determined per the code of conduct, shall clearly demand it . . . .” Although his document was satirical, it could be used as a blueprint for players and administrators to create a more gamer-friendly EULA.

D. The Current Situation

There is a huge amount of investment potential in virtual worlds. One Gartner Research study estimated that “four [out] of every five people who use

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92 Id. art. 16.
93 See Raph Koster's Website, Declaring the Rights of Players, Advice to Virtual World Admins, para. 2, Aug. 27, 2000, http://raphkoster.com/gaming/playerrights.shtml (stating “the Declaration of the Rights of Avatars . . . is a useful tool for players and admins alike: admins who don't know what they are doing can use it as a blueprint, and players can use it to evaluate . . . administrations in search of one they like”).
the internet will participate in Second Life" or another virtual world by 2011.94

MMORPGs have gradually become more popular, with players generating over one billion dollars of business in 2006; projections suggest that by 2011 there will be over 10 million subscription accounts generating one and a half billion dollars.95 One Dutch study found that on a typical day in Second Life, people spend 1 million real dollars buying and selling virtual objects, and fifty-seven percent of Second Life users spend more than eighteen hours a week online.96 Popular companies are beginning to take advantage of the marketing opportunity in the virtual world by establishing a presence in games like Second Life.97 Virtual worlds are also a rich source of interest for academics interested in social interactions; as U.K. IBM forum speaker Cliff Dennett says, "'[It's] millions of people collaborating in virtual project teams around the world with people [they have] never met solving complex strategic and tactical problems using an IT system."

As early as 2001, online vendors eBay and Yahoo forbade the sale of virtual items, such as fishbone earrings and magic capes, from EverQuest.99

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97 Research Alert, EPM Communications, Virtual Worlds are Impacting Consumer Perceptions of Brands, Whether Marketers Like It or Not, 25 RESEARCH ALERT 1, 6, Apr. 20, 2007 (providing IBM, Reuters, Nissan, BMW, Reebok, Pontiac, American Apparel, Toyota, etc. as examples of brands who have "established a presence" in Second Life).

98 Simon Hendery, Virtual Worlds Can Bring Real Benefits for Business, N.Z. HERALD, Aug. 30, 2007, at C4; see also Saunders, supra note 15, at 192 (noting an economist’s interest in “the micro and macroeconomic aspects of [virtual] worlds”). For example, individuals who interact regularly in the virtual world may have improved their leadership skills, and can more easily help people resolve business problems. See, e.g., Hendery, supra, at C4 (highlighting a survey revealing that “IBM staffers who are also gamers” showed skills like collaboration and problem solving).

Additionally, eBay fully banned the sale of all virtual game assets by gamers in January of 2007. At that time, game items such as characters, accounts, currency and items were forbidden ostensibly because that practice would help "protect buyers from purchasing unauthorized or counterfeit merchandise [and would help] intellectual property rights owners protect their rights." But at least one observer speculates that the ban was to prevent getting mired in the complexities of what constitutes ownership in the new field of virtual reality. One method of regulating ownership rights exists through legislation but another exists in the EULA.

### III. EULA AS A METHOD OF PRIVATE REGULATION

One way of governing virtual property disputes is through use of an EULA. EULAs are contracts that provide rules governing interactions between the user and game creator for a piece of software. Before the software will run, a gamer must agree to the EULA by clicking in a box in a pop-up window, agreeing to a contract which is commonly called a "click-wrap agreement." EULAs provide an interesting twist to the virtual property
rights dispute; an EULA allows game developers to contract around any legal or common-law rights that the gamer might possess. Judges and courts are familiar with the traditional contractual principles that govern EULAs, and so they are better situated to standardize the acceptance and rejection of EULAs than are the legislators of various countries.

Many EULAs for popular games state that users do not have any rights to virtual goods within the game and that gamers’ accounts can be terminated at the game developer’s whim. Alternatively, some EULAs represent a mixed approach, prohibiting gamers’ ownership of virtual property rights while simultaneously allowing gamers to exchange and sell virtual items within a designated arena, such as the Sony Station Exchange.

There are many benefits to EULAs. The Restatement of Contracts states that “[s]tandardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.” EULAs are private agreements between parties that respect individuals’ autonomy to contract. The contracts are already in place in most games, and both the gamers and the game creators have notice of them since the beginning of the game.

Internet Transactions, 106 A.L.R. 5th 309, 309 (2003) (stating that some courts “have refused to enforce . . . clickwrap agreements”).

Horowitz, supra note 72, at 446 (discussing the World of Warcraft terms of use); see, e.g., World of Warcraft Terms of Use Agreement, paras. 2, 8, http://www.worldofwarcraft.com/legal/termsofuse.html (last visited May 11, 2009); Final Fantasy XI User Agreement, art. 3.1(a), https://secure.playonline.com/supportus/rule_ff1user.html (last visited May 11, 2009).


RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. a (1981).

See supra notes 104–05 and accompanying text.

See supra notes 104–05 and accompanying text.
However, there are also downsides to EULAs, especially ones that completely prohibit sales outside or barters within the game. For example, the EULA only covers interactions between the gamer and the game developer, not interactions between the gamers themselves, or between the gamers, game developers, and third parties that may buy gamers’ virtual property.\(^\text{111}\) When picking a game, gamers experience a lack of choice regarding the types of EULAs available, as most games now have EULAs which restrict virtual property rights.\(^\text{112}\) Most EULAs and other click-wrap agreements allow only a “take it or leave it” proposition and users have no opportunity to bargain against unreasonable terms.\(^\text{113}\) These contracts of adhesion do not represent the summation of an open agreement between parties, but rather are an imposition of an agreement between parties who do not have equal bargaining power. The developers are then left to their discretion to enforce or ignore their EULAs; even when EULAs entirely ban RMTs, RMTs of in-game goods are nevertheless present as the game creator typically chooses to look away while gamers engage in RMTs.\(^\text{114}\) EULAs are usually written by the game developer solely for their benefit.\(^\text{115}\) Because of these reasons, courts in the future may find some EULAs unconscionable and therefore unenforceable.\(^\text{116}\) In American courts, however, EULAs have been upheld.\(^\text{117}\) It remains to be seen how South Korea, China, Singapore, and Taiwan’s courts will choose to treat EULAs. Ideally, in a world where all individuals are on equal footing, individuals can contract as they wish and may choose to contract away some rights in exchange for other opportunities.\(^\text{118}\) However, certain American cases

\(^{111}\) PODCAST: REGULATING VIRTUAL WORLDS (State of Play V 2007), http://www.nyls.edu/pages/5098.asp (follow link to “Regulating Virtual Worlds”) (Joshua Fairfield explaining that these agreements do not take third parties into account).

\(^{112}\) See supra notes 104–06 and accompanying text.

\(^{113}\) Horowitz, supra note 72, at 446.

\(^{114}\) Westbrook, supra note 72, at 804.

\(^{115}\) Glushko, supra note 40, at 527.

\(^{116}\) See id. at 527–30 (discussing the inadequacy of EULAs and the uncertainty of their enforcement). The author here points out that allowing a game developer to delete a million dollars in assets would be unconscionable, e.g., if Second Life seized the assets of Second Life millionaire Anshe Chung. Id. at 530; see, e.g., Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007) (holding an arbitration provision in the EULA unconscionable).


\(^{118}\) See Lochner v. New York, 198 U.S. 45 (1905) (overturning a restriction on working hours of bakers and upholding bakers’ freedom to contract); see also id. 59–62 (discussing the “liberty of person and freedom to contract”).
suggest that individuals may not be allowed to contract away certain rights, and so courts in the future may decide not to adhere to EULAs.

Many MMORPGs have EULAs that are similar to those in American games. Red Moon Online, from South Korea, states that all data stored on the servers is the "properity [sic] of The Company . . . includ[ing] . . . Characters, Items, Gold, Equipment, Experience points . . . etc.," and that the gamer has "no legal . . . rights to it of any kind." Red Moon Classic, License Agreement, sec. 12, http://www.redmoonclassic.com/page.php?id=3 (last visited May 11, 2009). Canadian game Weblo’s terms and conditions state that the gamer is granted a revocable license to use Weblo’s software and site, and that except for personal information submitted by gamers, all other content within the site including “the virtual domain names, properties and celebrity fan sites’ is owned by Weblo or its licensors.”

Therefore, these EULAs function in the same way as many American games’ EULAs; they attempt to extinguish ownership rights in the gamer.

IV. HOW COUNTRIES HAVE REACTED TO VIRTUAL PROPERTY ISSUES

Most countries have not statutorily identified virtual property as property under law. Instead, virtual property law has been shaped by court cases, tax laws, and states’ regulations. As steps taken under a judicial approach can be gradual and targeted to specific factual situations that arise in virtual property disputes, courts are better poised to address these issues than are politicians who may pass overly broad laws. Virtual property issues that have arisen include virtual taxation, gold farming, virtual currency speculation, and virtual

119 See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (finding a minimum wage law valid despite the argument that adult employees should be allowed to contract); see also Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating employment contracts where workers were prohibited from joining a labor organization). One notable distinction between these cases and the gaming context is that gaming is far from an essential service; this difference suggests the freedom to contract may win out and the EULAs will stand.


122 See id. (granting the right to use software but retaining myriad intellectual property rights in Weblo). Both Weblo and Redmoon Classic provide an auction board where users can buy and sell in-game items. See, e.g., Redmoon Classic, RMC eXchange, http://www.redmoonclassic.com/forums.php?m=topics&s=5 (last visited May 11, 2009) (presenting numerous Redmoon game items that are for sale); Weblo, Online Auction Site, http://www.weblo.com/auction/ (last visited May 11, 2009) (highlighting several Weblo items for sale). These types of sanctioned auction sites may alleviate the temptation for gamers to resort to unauthorized RMT.
crime. Many countries have grappled with these issues and situations. What follows is a comparison of the reactions of several governments to virtual property issues and an assessment of whether these reactions designate an official "owner" of virtual property.

A. Virtual Property and Taxation

With large amounts of money exchanging hands, countries are presented with the quandary of whether and how to tax virtual income. Also, if it is taxed, countries must also address who is obliged to pay the tax. One commentator suggests that virtual income can be divided into two categories: in-game income and real-world income derived from the game. Although it is clear that earnings from the sale of virtual property in the real world can be taxed, the real question is whether the government can or should tax the in-game interchanges and barters between the gamers that do not involve a transfer of real money in the real world. Otherwise, the virtual world could be used as an illegal tax haven, and individuals could potentially avoid capital gains taxes. Another issue is whether the holders of virtual property should be taxed merely for holding the property, just like people pay local taxes on their homes. The taxation of in-game virtual income or virtual property could

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124 See supra notes 95–96 (noting that MMORPGs generate more than one billion dollars annually).

125 PODCAST: REGULATING VIRTUAL WORLDS, supra note 111 (Joshua Fairfield discussing the distinction between these types of income).


127 See PODCAST: REGULATING VIRTUAL WORLDS, supra note 111 (Joshua Fairfield discussing how a virtual world could be a haven for avoiding taxes). For example, investors could buy a piece of in-game real estate for ten dollars and redeem it later for twenty dollars without being required to pay any tax on the appreciation since there is no current system dealing with in-game transactions.
probably not be accomplished unless a state is willing to pinpoint a definitive property owner; otherwise it would be unclear as to who must be taxed. If a state is willing to pinpoint a definitive property owner, it would be unclear as to who must be taxed.

States have taken a variety of approaches to the taxation of virtual income and property. Australia, for example, taxes and assesses barter exchanges in the same way it taxes other transactions. The Australian Taxation Office (ATO) has stated “[gamers’] income will not be treated any differently than if . . . earned . . . working nine to five in an office.” If a transaction in a virtual world can be attributed a real-world value, then these transactions may become part of a gamer’s taxable income. If a gamer earns more than 50,000 Australian dollars by exchanging virtual jewelry for virtual gold, then he must get an Australian Business Number (ABN) and register for the goods and services tax (GST). This taxation method attempts to capture those who might otherwise avoid taxation when using alternative currencies or barter transactions. The ATO website explains the situation thus: if Harvey bought a computer from Carol using some form of bartering credit, then Carol is required to issue Harvey a tax invoice showing the GST and the exchange rate of the bartering credits to Australian dollars, while Harvey is required to give Carol his ABN. Therefore, although it is clear that RMTs are subject to taxation,

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128 Game companies likely prefer less outside regulation in the games because it creates massive red-tape issues and taxing reporting requirements. See David J. Mack, Comment, Itax: An Analysis of the Laws and Policies Behind the Taxation of Property Transactions in a Virtual World, 60 ADMIN. L. REV. 749, 762–63 (2008) (stating that a capital gains tax and its accompanying reporting requirements would require a great amount of work for both the IRS and for game providers).


131 Id.

132 Id. See Australian Taxation Office, supra note 129 (providing that ABN stands for Australian Business Number and GST stands for goods and services tax).

133 See Miller, supra note 130 (stating “[traders] in virtual worlds should consider very carefully whether they are conducting a business or a hobby, the Tax Office advises”). As a practical matter, it is unlikely that the government could ever set up an effective system to monitor barter exchange, whether in-game or not.

134 Linden dollars or simoleans may be specific examples of bartering credits. See supra note 60.

135 See Australian Taxation Office, supra note 129 (discussing this example with reference to “Better Bartering credits”).
gamers who also make money by trading in-game are not exempt from taxation.\textsuperscript{136} Although the ATO does not provide any guidelines for how such a tax would be assessed or collected, or whether or not gamers officially own the property they are selling, its treatment of online bartered items as bartered property shows that the ATO places the burden of paying taxes on the people who are earning money through the sale of virtual items—the gamers.\textsuperscript{137} This behavior shows that the ATO treats virtual property as legal property of some sort.

The United States Congress’ Joint Economic Committee (JEC) has also addressed taxation of virtual world exchanges.\textsuperscript{138} The JEC decided that more study was needed before virtual economies could be taxed by the United States.\textsuperscript{139} In a 2006 press release, Congressman Jim Saxton, Chairman of the JEC, stated that “some uncertainty exists regarding taxes and intellectual property rights” and that any attempt to tax transactions within virtual economies would thus be “a mistake.”\textsuperscript{140} Congressman Saxton also noted that clarification was needed regarding the distinction between in-game transactions of virtual goods that generate real money, and therefore could potentially be taxed, and in-game transactions that do not generate real money, and would thus not be taxed.\textsuperscript{141}

Further, Dan Miller, a senior economist for the JEC, said that virtual worlds could be used for money-laundering operations, and suggested it is more likely that virtual crime, rather than taxation of virtual economies, will be the first target of regulation by the United States government.\textsuperscript{142} Miller also pointed out that it would be “difficult to determine whether the income [is] taxable in the location of the player, the servers, or the company. The tax consequences could also hinge on whether virtual assets [are] considered property, services,
or game winnings." The Internal Revenue Service currently taxes barter transactions, and states that the "[i]nternet provides a new medium for the bartering exchange industry," prompting the following reminder: barters are taxable.

In sum, although countries have recognized this new issue as an area worthy of note, those that have considered enforcing the taxation of in-game barters have realized potential problems that will arise with any barter transaction.

The MMORPGs themselves often have tax-like systems in place to tax the goods and interchanges that are made in-game. Second Life taxes the land that exists in its game. If a gamer lives in the European Union, value added tax (VAT) is added to anything that a gamer buys from Linden Lab, whether it is premium account registration, purchases from the land store, land use fees, private region fees, or land auctions. In Weblo, gamers can be a governor or mayor of a virtual state or city; the gamers themselves can then obtain up to 0.5% of every transaction done on their site. Sony Station Exchange charges a service fee of ten percent of the purchase price of any virtual good sold on its exchange site. These methods of taxing real-world revenue might be helpful for providing a model of how in-game transfers, which do not involve real world money, should be taxed. Second Life, Weblo, and the Sony Station Exchange system allow in-game transfers of items. This practice might demonstrate the game creators’ belief that the item functionally belongs

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145 See Second Life, Land Pricing & Use Fees, http://secondlife.com/whatis/landpricing.php (last visited May 11, 2009) (outlining land use fees billed in addition to membership fees). Second Life says it charges a gamer’s account a “user fee” according to how much property they own; the user fee functions in the same fashion as a tax. Id.


147 Wong, *supra* note 57.


149 See id.

150 See *supra* notes 55, 107, 122, 147–48 and accompanying text.
B. Gold Farming

In addition to taxation concerns, some states have entered the virtual property debate because of concerns over gold farming. Gold farming is the large-scale business where an entrepreneur obtains virtual property in an MMORPG and then sells it online. A gold farmer will often employ any number of workers who are paid a flat rate to accumulate gold in a real-world, computer-filled factory. The gold farmer then can sell or trade the gold or other items online. Gold farmers and others also sometimes create "bots," computer programs which run avatars automatically and allow them to collect virtual property without actually being present. Authorities have uncovered gold farming operations in China, South Korea, and Mexico; one 2005 estimate stated there were over 100,000 Chinese young people engaged in these operations.

Big gaming companies, irritated at these perceived abuses of the system, have been fighting back worldwide through lawsuits and lobbying of local governments. Theoretically, gold farmers have a lesser claim to virtual

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151 See Barboza, supra note 44 (describing the "harvesting [of] artificial gold coins").
152 See id. (discussing "online gaining factories . . . in China"). The workers make money in any number of ways, such as, by mining for points or repeatedly killing easy-to-slay foes. Id.
153 Id.
155 Barboza, supra note 44.
156 See Kim Tae-jong, Gaming Bill Has Holes—A Lot of Them, KOREA TIMES, Dec. 25, 2006 (discussing the proposed bill's inclusion of "a prohibition on the trading of cyber money").
158 Barboza, supra note 44.
159 See Mark Hefflinger, Blizzard Sues Virtual Gold Sellers for Spamming "World of Warcraft" Players, DMWDAILY, June 1, 2007, http://www.dmwdaily.com/news/2007/06/01/blizzard-sues-virtual-gold-sellers-for-spamming-world-of-warcraft-players (reporting on a lawsuit filed by the company operating World of Warcraft against "a company it [Blizzard] says has spammed players with ads for its service that sells virtual gold used in the game"); see also CDC Games Achieves Major Success in Shutdown of Illegal Pirate Server Operator, CDC GAMES, Nov. 12, 2007, http://www.cdcgames.net/cdcgames/news071112.html (discussing efforts by the Online Games Alliance Against Piracy, which include lobbying relevant
property than an individual gamer does. Instead of playing the game for its intended use, recreation, with successful players having the added benefit of making money, gold farmers treat gaming solely as a commercial business. Therefore, states are likely to give gold farmers even less protection than the ordinary gamer. The legislation discussed below gives a general overview as to how countries choose to treat these large-scale virtual property traders and developers.

The South Korean Ministry of Culture and Tourism (MCT) recently proposed a bill that would make gold farming illegal. The bill, which was sent to the Korean National Assembly in December 2006, officially prohibits the business of buying, selling, or exchanging virtual money; however, the small-scale trade of virtual items is still allowed. There are some flaws in the bill, as virtual currency was not defined. The bill was ostensibly directed at the prevention of illegal gambling, but in practice, the new law would benefit Korean online game companies like NCSoft while punishing profit-driven trading of online items. The MCT also stated it “will prohibit the trading of [virtual] items by ‘unfair’ and ‘illegal’ ways . . . to ‘promote’ the healthy growth of the game industry.” In 2007, South Korea passed The Bill for Promoting the Game Industry into law with the help of MCT’s Game Industry Division. The final version of the bill provides that any gamer engaging in bulk-item trade or using hacking software can be fined up to the equivalent of $50,000 U.S. and jailed for up to five years. Korean gold farmers have created the Digital Asset Distribution Promotion Association (DADPA) to lobby for their interests.

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160 See Tae-jong, supra note 156 (discussing the proposed bill’s inclusion of “a prohibition on the trading of cyber money”).
161 Id.
162 Id.
163 See id. (referring to hazardous gambling).
164 Cho Jin-seo, Ban on Cyber Asset Trading Clouds Game Industry, KOREA TIMES, May 10, 2007; see Tae-jong, supra note 156 (discussing the potential impact on NCSoft as compared to the impact on item trading companies). The trading occurs on sites like Itembay, About Itembay, http://www.itembay.ca/about.php (last visited May 11, 2009).
165 Jin-seo, supra note 164.
167 Id.
China also has a strong gold farming economy. For a day’s work, a Chinese gold farmer can earn about the equivalent of $4 American dollars. Critics complain that the actions of Chinese gold farmers are causing inflation within the game; as more virtual gold floods the virtual gold market, the real world value of virtual gold owned by other players goes down. The only response that the Chinese government has instituted is a limit on the number of hours that Chinese teens can spend per day on the computer—after five hours, online games will rescind all points gained by an underage gamer. President Hu Jintao spurred the creation of the regulation when he ordered regulators promote a “healthy online culture”; the time limit is part of an effort to curb online gaming addictions.

Gold farming is not limited to the countries of China and Korea. Gold farming in the United States came to gamers’ attention in 2002 when gold farming company Blacksnow Interactive filed a lawsuit against Mythic Entertainment, Inc. Mythic, operator of the MMORPG Dark Age of Camelot, was made aware of Blacksnow’s online business selling the game’s gold on eBay. Blacksnow had a gold farming factory in Tijuana, Mexico

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China’s ‘Gold Farmers’ Play a Grim Game (National Public Radio broadcast May 14, 2007).

See id. (discussing inflation caused by “extra gold by gold farmers”). China’s fastest rising currency is not the yuan, but is the virtual, in-game QQ coin, created in 2002 by Tencent Holdings Ltd. to allow users to buy items in Tencent’s virtual world. Fowler & Qin, supra note 100. After other online sites began accepting QQ coins in 2006, the ensuing large amount of online trading and buying of QQ coins caused speculation by Yiping Huang, the chief Asia economist of Citibank, that if too many QQ coins were “manufactured,” it could possibly create inflation in the Chinese economy. Id.


China Clamps Down on Teenage Internet Gaming, supra note 171.

See DIBBELL, supra note 157, at 11 (describing Blacksnow’s business as selling “things that [did not,] strictly speaking, exist,” such as weapons, armor, and money in online games).

See id. at 14 (discussing that the lawsuit was filed after Mythic caused eBay to shutdown auctions of products Blacksnow was selling because Mythic viewed Blacksnow’s actions as violating Mythic’s rights to its “exclusive property”); David Becker, Game Exchange Dispute Goes to Court, CNET NEWS, Feb. 7, 2002, http://www.news.com/Game-exchange-dispute-goes-to-court/2100-1040_3-832347.html.

See DIBBELL, supra note 157, at 10–11, 14 (discussing Blacksnow’s sales on eBay and referencing “metal ore” and “money” among other items sold).
with several Mexican employees. Mythic contacted eBay and stated that Blacksnow was violating Mythics' intellectual property rights; eBay removed Black Snow's listings. Blacksnow retaliated by filing a lawsuit in federal district court in California claiming "unfair business practices" and "interference with prospective economic advantage." Blacksnow's lawyer stated the suit was the first of its time, and could prompt "a judicial declaration as far as the rights of online gamers to trade outside the game." The case was eventually withdrawn, and the U.S. court missed a rare opportunity to present an American perspective on the true owners of virtual property. The court's decision as to who owns virtual property would have been elucidating—especially because a gold farmer probably holds fewer rights to in-game virtual property than does the typical gamer.

Another United States case is Hernandez v. IGE. A gamer instituted a class action lawsuit against an overseas gold farming company which doubled as an online auction site. The gamer accused IGE of "knowingly interfering with and substantially impairing the intended use and enjoyment associated with consumer agreements between Blizzard Entertainment and subscribers to . . . World of Warcraft." Hernandez also stated that IGE used cheap labor in undeveloped countries to acquire and then sell virtual property, leaving less virtual property for "real" gamers to acquire, devaluing virtual currency.

176 Id. at 18–20.
177 See id. at 15 (stating that eBay shut down Blacksnow's auctions). The game's EULA said "playing the Game for commercial, business, or income-seeking purposes is strictly prohibited." Id.
178 Id. at 15–16.
179 Becker, supra note 174.
180 DIBBELL, supra note 157, at 28. The case disintegrated after the Federal Trade Commission fined Black Snow partner Richard Phim $10,000 for selling computers online and then "forgetting" to deliver them; their lawyer withdrew the suit after several of Black Snow's partners dropped out of contact. Id.
182 See Class Action Complaint at 1-2, Hernandez v. IGE, No. 07-CIV-21403 (S.D. Fla. May 30, 2007), available at https://netfiles.uiuc.edu/dcwill/www/IGEComplaint.pdf (providing facts about the defendant's "process of generating virtual assets and then selling them through eBay or other industry websites").
183 Id. at 1.
184 Id. at 1–2, 9–10.
The suit has aroused interest, as the court’s decision may well establish American precedent on the legal status of virtual property. Jeffrey Steefel, executive producer of Turbine Inc., which makes the MMORPG Lord of the Rings Online stated, “‘The “secondary market” is a huge topic of conversation across the industry, and [we are] watching it really closely.’” He also stated although his game does not tolerate secondary markets like IGE.com, the existence of secondary markets are a reality; further, he expects business models to change in the next two to five years to accommodate RMTs online.

C. Criminal Law and Virtual Property

No country has specifically addressed virtual property ownership through statutes. However, some countries have responded to virtual crimes through statutes, regulations, and case law. Albeit not dispositive on the issue of ownership, the legal treatment of virtual crimes may help clarify some of the confusion noted above.

The first case in the world which directly identified a property right in virtual property was the Red Moon case, decided in a Beijing court. Twenty-four-year-old Li Hongchen sued the makers of the MMORPG Red Moon when hackers broke into his game account and stole some of his virtual property. He asked the company to return the assets, but the makers of Red Moon refused to tell Li which user was currently in possession of his stolen assets. Li then approached the local police, who were unable to resolve the situation. At the time that Li had started playing Red Moon, players were not required to sign a EULA; he had since invested more than two years and the equivalent of $1,200 in the game. For the first time in the world, a judge seemed to respect an individual’s right to virtual property when he rejected the

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186 Id.
190 Id.
191 Li Hongchen, supra note 188.
192 Online Game Player Wins 1st Virtual Properties Dispute, supra note 189.
company’s argument that virtual property was just “piles of data” with no real value. The judge also stated that because the company had an obligation to protect Li’s in-game assets, the game’s loopholes and lack of security obligated Red Moon to return to Li the stolen virtual property. The judge used Chinese consumer regulation and contract law to decide the case, as China had no law protecting virtual property. Additionally, several other court cases show that Chinese criminal and copyright law is applicable to virtual crime. Three men were charged in Shanghai’s first case of a criminal copyright violation. In March 2007, a Chinese judge sentenced a Shanda Interactive Entertainment programmer and two others to five years in prison for virtual embezzlement; the three men, one of whom was in charge of creating virtual assets for the Legend of Mir II, created extra virtual weapons without permission and sold them to players for over a quarter of a million dollars. The three men argued that Chinese criminal law did not address the embezzlement of virtual property, but the court said that “virtual properties [are] worthy [of protection under Chinese law] when players contributed time and money to earn them.” Also, in 2006, the Guangzhou Intermediate People’s Court affirmed the conviction of a gaming company employee for stealing players’ accounts and passwords, resulting in a fine equal to $617. Five major online gaming companies, including Tencent, recently called for legislative as well as regulatory action against a ring of highly organized virtual property thieves. The five companies have organized a lobbying group called Industrial Alliance to Fight

193 Lyman, supra note 187.
194 Li Hongchen, supra note 188; Online Game Player Wins 1st Virtual Properties Dispute, supra note 189.
195 Li Hongchen, supra note 188.
197 Fowler & Qin, supra note 100.
200 Tencent is an internet company in China and creator of the QQ coin. Fowler & Qin, supra note 100. For more information about the QQ coin, see supra note 170.
Internet Theft.\textsuperscript{202} They state that internet theft has impacted both the game industry and gamers and that China’s government should do more in order to fight this new type of crime.\textsuperscript{203}

Moreover, Taiwan, Hong Kong, and South Korea have instituted criminal sanctions against hackers who steal gamers’ virtual property.\textsuperscript{204} In 2003, the Taiwanese government changed internet crime laws to include the theft of virtual property under a section that prohibits the “damaging of electromagnetic records.”\textsuperscript{205} With this amendment, the Taiwanese criminal code now prohibits “forced entry into computers without cause [and] the acquisition, deletion, or alteration of electromagnetic records,” and is intended to have a significant effect on cyber-crime.\textsuperscript{206}

The Hong Kong police have a Technology Crimes Division, and its website directly addresses online game theft and theft of virtual property: “As a result of advances in technology, stealing of information stored in computer[s] has become an increasingly popular method for criminals to make money, [from items] such as cash in your e-banking account, on-line game tokens or points which you have attained when playing online games….”\textsuperscript{207} The Hong Kong police advises internet users to keep their passwords safe and to refrain from downloading any auto-play plug-ins.\textsuperscript{208} The situation is similar in South Korea, where police report that there were 22,000 cybercrimes related to online gaming issues in the first half of 2003.\textsuperscript{209} Because of the rampant cyber-
crime present in these countries, they have each developed procedures to address the theft of virtual property; however, they have not directly addressed the question of who initially owned the stolen virtual property.

One of the United States’ only tools against virtual property hackers is the Computer Fraud and Abuse Act. The Computer Fraud and Abuse Act criminally punishes a person who “knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value.” The value of the item taken must exceed $5,000. This $5,000 requirement limits the effectiveness of the Act, and decreases the number of potential cases which could be brought under the Act.

D. The United States’ Missed Opportunity

In 2006, the United States saw its second virtual property case. Marc Bragg jointly sued Linden Lab and Phillip Rosedale, operators of Second Life, for wrongly confiscating his Second Life property. Bragg, a real-life lawyer, joined Second Life in 2005 and created an avatar called Marc Woebegone. Bragg claimed that he was induced to participate in Second Life because Linden Lab and Rosedale made statements promising that gainers would retain a property interest in the intellectual property they created in the game. Prior to the suit, Second Life had issued several press releases over the period of a year. Rosedale summarized the thrust of these statements:

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210 Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2002), amended by Pub. L. No. 110-326 (2008); see Sean F. Kane, Virtual Worlds, Digital Economies and Synthetic Crimes, 94 PRAC. LAW. 35, 46 (stating the “Computer Fraud and Abuse Act... could be used to grant some element of justice for a virtual crime or injury”).
212 Id.
215 Id. at 596–97. See also Kathleen Craig, Second Life Land Deal Goes Sour, WIRED, May 18, 2006, http://www.wired.com/gaming/virtualworlds/news/2006/05/70909 (stating that Bragg is known in Second Life as “Marc Woebegone”).
216 Bragg, 487 F. Supp. 2d at 595–96. The creators of Second Life seemed to have considered players’ freedom to contract—that is, they can accept an EULA or choose to not play the game—and marketed Second Life as a place where gamers would have the right to own property.
217 Id. at 596 & n.6 (noting that Linden Lab and Rosedale repeated this idea in numerous
We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.\footnote{218}

Bragg began to invest in virtual land and sell virtual fireworks.\footnote{219} Bragg then used “hacker-like method[s]” to obtain a piece of land in a virtual auction in Second Life.\footnote{220} By exploiting a loophole within Second Life’s auction software,\footnote{221} Bragg was able to win virtual land that normally costs a minimum $1,000 at the cost of $300.\footnote{222} In response, Linden Lab froze Bragg’s account, which included virtual real estate property and virtual nightclubs.\footnote{223} Bragg brought suit in Pennsylvania under ten different causes of action; among other claims, he asserted violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, fraud, conversion, intentional interference with contractual relations, breach of contract, unjust enrichment, and tortious breach of the covenant of good faith and fair dealing.\footnote{224}

The case was decided after the judge denied the defendant’s motion to compel arbitration.\footnote{225} On May 30, 2007, the judge held that the arbitration clause located in the terms of service, which Bragg had agreed to in a click-

\footnotesize{pieces of media, newspaper articles, and press releases).}


\footnote{219 Bragg, 487 F. Supp. 2d at 596.}

\footnote{220 See Craig, supra note 215 (discussing Linden Lab’s “online auction pages that allowed [Bragg] to buy land . . . . [and] . . . the hacker-like method he used to exploit the auction system”).}

\footnote{221 See \textit{id.} (referring to possible “problems with the [auction] system” as well as Bragg’s “hacker-like method”).}

\footnote{222 \textit{id.}}

\footnote{223 \textit{id.}}

\footnote{224 Bragg, 487 F. Supp. 2d at 597 n.8.}

\footnote{225 \textit{id.} at 595.}
wrap agreement, was unconscionable and unenforceable. The court considered it unfair that Linden Lab could seize and freeze a participant’s account without first going through an arbitration procedure: “[T]he TOS expressly allow[s] [Linden Lab], at its ‘sole discretion’ and based on mere ‘suspicion,’ to unilaterally freeze a participant’s account, refuse access to the virtual and real currency contained within that account, and then confiscate the participant’s virtual property and real estate.”

This case had the potential to establish an American view on virtual property rights and perhaps shed light on the question of gamers’ rights to virtual property. This case would have allowed the courts to make a strong statement for the existence of virtual property as legally protected property. Unfortunately, instead of proceeding with the lawsuit, Marc Bragg and the defendants settled. Bragg’s account and avatar were reinstated and the details of the settlement were kept confidential. Raph Koster commented, that the settlement “means that the industry has once again managed to dodge legal questions regarding ownership of ‘virtual property.’”

V. POTENTIAL SOLUTIONS TO THE PROBLEMS WITH VIRTUAL PROPERTY

A. Adverse Possession as a Tool to Establish a Claim to Virtual Property

In America and other common law systems, the application of adverse possession to virtual property might provide a basis for gamers’ ownership claims. In most American states, adverse possession requires the fulfillment of several elements: continuous possession that is open, exclusive, and hostile.
for the duration of a certain statute of limitations. Assuming that game creators would claim they are the "owner" of a piece of virtual property, gamers could probably claim that they have adversely possessed the item. The elements for adverse possession of personal property or chattel are the same as for real property, although the elements may be fulfilled differently than with real property. For personal property, a gamer's possession and use of an account, avatar, or land openly in a game is probably open enough to qualify. The gamer's possession and use of a virtual item is as actual as can happen for a virtual item, as "virtual" items will never "physically" be in possession of anyone. A gamer's uninterrupted and continuous possession of a virtual item during the duration of the term required by an adverse possession statute could be proven by an account statement or account summary.

The final criteria necessary to satisfy adverse possession is the fulfillment of the element of hostility. Hostility presents a complication for a gamer who has agreed to a game's EULA. When an EULA exists which specifically extinguishes virtual property ownership rights in a gamer, the game creators could claim the EULA acts as a contract that the gamer has agreed to that merely grants her rights to use virtual property within the game. Game creators would likely utilize the adverse possession defense of permissive possession, the defense that gamers' possession of the account, land, or avatar is adverse not by their mere possession of the items, as the game is designed around gamers' possession and usage of items in the virtual world. However, should the gamer use the item in opposition to the understood usage (as when the gamer sells it), her possession at that point may become adverse.

233 3 AM. JUR. 2D § 10 (1986); see, e.g., O.C.G.A. § 44-5-161 (1991) (listing the elements of adverse possession for real property in Georgia).


235 Some American states use the discovery rule or the demand and refusal rule instead of adverse possession for chattels. See, e.g., O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (adopting a discovery rule); Yeager v. Wallace, 57 Pa. 365 (1868) (requiring demand and refusal before a claim of trover can be made). The demand and refusal rule states that the applicable statute of limitations will not begin to run until the true owner makes a demand for the property's return and the person in possession of the chattel refuses to return it. See O'Keeffe, 416 A.2d at 868 (explaining New York's application of this rule). The discovery rule states that the statute of limitations runs when the true owner "first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor..."

See id. at 870 (adopting this version of the discovery rule in the context of a painting replevin claim).

236 See supra note 233 and accompanying text.
Would adverse possession begin once the gamer’s intent was to possess the item and exhibited acts of control, or would it begin only when the gamer acted contrary to the rules of the game creator and the game creator did not respond? Under traditional American law, possession of land which was initially permissive can become hostile. The claimant must clearly and unequivocally declare his hostility either by “actual notice of the hostile claim, or acts or declarations of hostility so manifest and notorious that actual notice will be presumed in order to change a permissive possession into one which is hostile.”

In a virtual property scenario, any action that is contrary to the EULA, such as when a gamer sells, buys, or even merely lists her account, virtual weapons, land, or gold online in anticipation of a sale could constitute an act of hostility. Irony is inherent in the idea of the gamer’s possession of an item becoming adverse only once she has sold the item because once the item is sold, the gamer probably has no more rights to it. However, a property owner may be able to tack his period of possession to that of the preceding owner, as long as there is privity between the two; this could enable an adverse possession claimant to satisfy the required possession period.

Additionally, the failure of EULAs to address the status of third parties provides an opening for third parties who are not within the game to use adverse possession. The EULA is a contract between the gamer and the game creator, and thus does not bind third parties, such as online sites that resell virtual property or gold farmers. Arguably, the items have no “use” until they are loaded in the appropriate game and its platform, which requires that the person loading the item agree to an EULA. But if the intent of the buyer is to act as a buyer and reseller of the items, then they will never have to enter the game or agree to the EULA. Therefore, these third parties may be able

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237 68 AM. JUR. PROOF OF FACTS 3D Permissive Possession or Use of Land, § 7 (1988).
238 Id.; see, e.g., Wallace v. Snider, 204 S.W.3d 299, 304 (Mo. Ct. App. 2006) (stating that if use is permissive at inception it is made adverse only by “a distinct and positive assertion of a right hostile to the owner”).
239 See, e.g., EVE Online, Terms of Service, para. 10, http://www.eve-online.com/pnp/terms.asp (stating that users “may not market, sell, advertise, promote, solicit or otherwise arrange for the exchange or transfer of items in the game or other game services unless it is for in-game sales of in-game services or items”).
240 See Howard v. Kunto, 477 P.2d 210, 214 (Wash. Ct. App. 1970) (holding that “a purchaser may tack the adverse use of its predecessor in interest” if they are in privity).
241 See DIBBELL, supra note 157, at 44, 46 (describing an individual who speculates in virtual property, buying it online to resell it later).
242 Some gamers or online transfer websites may even want to raise a bona fide purchaser
to own and resell items without recourse if a court would accept an adverse possession argument.

In countries other than the United States, especially those under civil law, adverse possession may not be codified into law. The usage of adverse possession to claim virtual property will then depend on whether the country recognizes the theory. Hong Kong follows a common law system developed from English common law and uses the theory of adverse possession. South Korea, a civil law system, also recognizes the adverse possession of land. Some civil law countries draw distinctions between good and bad faith possessors of land, increasing the statute of limitations necessary to acquire the land for the latter. With minor deviations, it is possible that adverse possession could be used in other countries to lay a foundation for the ownership of virtual property.

One American case which potentially hinders a gamer's usage of adverse possession to gain legal recognition of their ownership of virtual property is MDY Industries v. Blizzard Entertainment. Blizzard Entertainment, the maker of World of Warcraft (WoW), claimed that MDY was guilty of (BFP) defense, stating that although a seller generally cannot convey a better title than he has, if the seller has voidable title, he can transfer good title to a BFP. Kotis v. Nowlin Jewelry, Inc., 844 S.W.2d 920, 923 (Tex. Ct. App. 1992) (explaining that a transferor with voidable title can transfer good title to a good faith purchaser and that "[t]he test for good faith is the actual belief of the party and not the reasonableness of that belief"); see U.C.C. § 2-403 (2003) (explaining a good faith purchase and transfer of good title). However, a BFP defense would likely be difficult to prove, as most people who engage in online gaming will arguably have a suspicion that virtual property sellers may not have full ownership.

Albert H.Y. Chen, Constitutional Adjudication in Post-1997 Hong Kong, 15 PAC. RIM L. & POL'Y J. 627, 627 (2006); see Charles Harpum, Adverse Possession and Statements Against Interest, 28 HONG KONG L.J. 329, 332 (1998) (discussing Hong Kong's "following a line of modern English cases which placed the law of adverse position on sound doctrinal footing").

Jeong-Yoo Kim, Good-Faith Error and Intentional Trespassing in Adverse Possession, 24 INT'L REV. L. & ECON. 1, 3 (2004).


See generally MDY Indus. v. Blizzard Entm't, No. CV-06-2555-PHX-DGC, 2008 WL 2757357, at *3 (D.AZ. July 14, 2008) (order granting partial summary judgment) (holding on motions in a dispute between a software owner and a game operator that "users of [the game] are licensees who are permitted to copy the copyrighted [material] only in conformance with the EULA" which sets limits).
copyright infringement, violations of the Digital Millennium Copyright Act, trademark infringement, and unjust enrichment, among other claims.\textsuperscript{248} MDY had operated a software program called WowGlider, which was a "robot" or "bot" program that once installed on a gamer's computer, played WoW automatically for its owner while its owner was away from his computer, allowing the gamer to acquire more virtual assets and advance more quickly through the game than he might have otherwise been able to.\textsuperscript{249} The U.S. District Court of Arizona held MDY had violated copyright law:\textsuperscript{250} when the gamer started the game, the game client software was copied from the hard drive of the player's personal computer to the computer's random access memory (RAM), which constituted sufficient "copying" to violate the Copyright Act.\textsuperscript{251} The court decided that if the gamer was not authorized by the copyright holder or by a license (as granted in the EULA) to copy, they were infringing on the copyright holder's rights, as the terms of use and the EULA of WoW specifically prohibited the use of bots.\textsuperscript{252}

The \textit{MDY Industries} court held that when a license is limited in scope, and the licensee acts outside that scope, the licensor can bring a claim for copyright infringement.\textsuperscript{253} Although no party raised the issue of adverse possession in \textit{MDY Industries}, one could argue that the case forecloses the possibility of a valid adverse possession claim by holding that actions outside the scope of a gamer's license—the adverse use, sale, or possession of the property—would be considered a violation of the EULA and terms of use rather than hostile possession, a necessary element of adverse possession.

However, \textit{MDY Industries} does not bar a gamer's claim to virtual property by adverse possession. \textit{MDY Industries} examined a goal-based game rather than a game based around player interaction, in which a gamer could have an even greater claim to virtual property, as the EULAs of those games more clearly delineate some rights for the gamer.\textsuperscript{254} Also, \textit{MDY Industries} alleviates the injustice imposed upon gamers by game designers. For the duration of any particular game, many game designers, in the EULA, have formally prohibited gamers' engagement in RMTs but, in practice, permitted RMTs. Due in part to this practice of allowing gamers to earn real-life money, the game designers

\textsuperscript{248} \textit{Id.} at *1–2.
\textsuperscript{249} \textit{Id.}
\textsuperscript{250} \textit{Id.} at *10.
\textsuperscript{251} \textit{Id.} at *6.
\textsuperscript{252} \textit{Id.} at *6–7.
\textsuperscript{253} \textit{Id.} at *10.
\textsuperscript{254} See supra notes 62–63 and accompanying text.
have enjoyed increased popularity and increased subscriptions. In many cases, the game designers may delay commencing—if it ever does commence—a suit on whatever claims it has; in such a circumstance, gamers could argue that the game designer inequitably and implicitly condones gamers into prohibited activities, such as RMTs. In addition, the strength of a gamer’s claims to virtual property under any of the basic property theories, such as the utilitarian, labor, and personality theories is not diminished by the MDY Indus. case.

B. Civil Law Countries v. Common Law Countries

What is the best method for dealing with property in virtual worlds? Is it better for states to create and enforce legislation? In common law countries, should the common law as modified through judicial decisions prevail, using the idea of adverse possession where appropriate? Is it best to let each game company provide their own terms through EULAs? Several countries recognize a gamer’s right to not have virtual property stolen, but no country except China has recognized a right to restitution of a gamer’s virtual property. Which country practices the best method of dealing with virtual property issues?

Problems are pervasive whether a judicial solution or a legislative solution is used. Lawmaking bodies in each country may not have the expertise to understand the issue and have the potential to be swayed by lobbyists. Poor drafting may result in laws that could become outdated in a matter of weeks. Standardization from game to game and from country to country is important but impracticable, as both game designers and countries have little incentive to make interpretation easier for gamers. In addition, some critics claim that the reason virtual worlds do so well is that they have very little internal regulation; they are virtual free markets, as the “barriers to entry and to commerce are so low, it is hard to imagine a more ideal business environment.

255 Depending on the particular factual situation, a gamer who sold virtual property in RMTs could possibly assert a statute of limitations defense or the defense of laches. Laches is an equitable defense, operating as estoppel against the assertion of a right when any delay becomes inequitable. WILLISTON ON CONTRACTS § 79:11 (4th ed. 2008). There are two elements of laches, namely “(1) an unreasonable delay by one party in asserting its right or remedy; and (2) prejudice to the other party as a result of the delay.” Id.

256 See supra notes 72–87 and accompanying text.

257 This problem is inherent in the creation of any technical law. Here, larger gaming companies may have the advantage, as they are more likely able to organize and lobby because they have more resources and more at stake than do individual gamers.
for entrepreneurs. Therefore, in general, regulation through national standardization may not be the most desirable solution for virtual property issues.

Moreover, differences between civil and common law systems add another layer to the complexities of virtual property. The principle difference between civil and common law systems is that in the latter, judge-made law and stare decisis are given more importance. Common law countries like Singapore, Hong Kong, Australia and the United States therefore allow their courts to consider the specifics of each new case in conjunction with case precedent. A common law system might provide a better framework as it is more malleable to each new situation (some might even say judges are too partial to outside influences). Common law systems pay more attention to jurisprudence, and judges mold and shape the law rather than simply interpret it. The common law systems allow for both “gradual development and timely response to the changing requirements of society.”

Virtual property is a new topic and legislatures may be unwilling to legislate on it until they more fully understand it. Therefore, common law countries that apply legal reasoning from past decisions to this new area might be able to act more quickly than would a system that does not allow judges to shape the law. Civil law countries like China, Taiwan, South Korea, and Japan might therefore have a more difficult time addressing virtual property issues through statutes, primarily because it is such a new and untested area.

Waiting to see which tactics will work best is also advised. Each state has had a unique approach to other aspects of virtual worlds—such as gold farming, virtual crime, virtual taxation—and will likely find a different method to address virtual property as well. Singapore’s Principal Senior State Council Charles Lim Aeng Cheng states that Singapore is creating an Advisory Council on the Impact of New Media on Society to study virtual world’s effect on

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258 Bennett & Beith, supra note 48 (referring to Second Life). In addition, a skeptic could argue that many of the problems identified above, such as gold mining, are the direct result of the lack of regulation in MMORPGs. The authors’ comment would have less applicability to a goal-based MMORPG, as presumably a gamer’s desire for enjoyment is his primary motivation.

259 See Margaret Fordham, Comparative Legal Traditions – Introducing the Common Law to Civil Lawyers in Asia, 1 ASIAN J. COMP. L 1, 1 (2006) (stating “common law systems are based on judge-made law, which is developed on a case by case basis”).


261 Fordham, supra note 259, at 3.

262 Id.
Singapore because the country does not want to rush into unneeded lawmaking. He says there is no definite regulatory policy in Singapore and the state should avoid regulating what they do not understand, as there is no point creating laws which cannot be enforced.

Other countries should follow the lead of Singapore, which acknowledges that the application of law in virtual worlds will be different than in the real world. As the legal status of virtual property is an emerging question, there may not be support for an international agreement on the topic. As shown, very few states have decided to legislate on the issue, and there have been no international disputes rising to a level that involved state actors. Although the numbers of persons affected by MMORPGs and virtual property struggles are growing, it may well take some time to generate state interest in the issue, much less gather and maintain support for an international declaration.

The best way to address the issue of virtual property for now will be judicially. Until more is understood about the possible implications of statutorily declaring an owner of virtual property, taxing it, or outlawing gold farming, courts can adequately address issues on a case-by-case basis. Therefore, common law systems provide a better framework to approach the issue. The Red Moon case demonstrates this suggestion: although China had not yet legislated on the issue of virtual property, the court applied previously existing principles to decide the case appropriately, thereby creating a sort of precedent. However, because China is a civil law country, other Chinese courts do not need to give this precedent any weight in future decisions, thereby leaving the issue unresolved in China. For the reasons discussed above, it will likely be easier for common law countries, rather than civil law countries, to address virtual property issues through judicial interpretation, rather than legislation.

VI. CONCLUSION

Whether virtual property is actually owned by gamers or by game creators is an issue that will need to be decided by each individual country. The best approach for the issue will most likely be a gradual creation of case law and jurisprudence, rather than the drafting of laws which could possibly be overbroad or under-inclusive. Therefore, a common law system will probably

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263 PODCAST: REGULATING VIRTUAL WORLDS, supra note 111 (Charles Lim Aeng Cheng discussing legal issues related to virtual worlds at a conference).

264 Id.
provide a better avenue to address virtual property issues than a civil system of law. The history and phenomenon of virtual property shows that common law systems can adapt traditional property theories like adverse possession to new situations. Civil law countries will need to engage in careful analysis and study before legislating.

In most countries it is only a matter of time until politicians and judges extend legislation that addresses gold farming, virtual taxation, and virtual crime into the virtual property arena; although a judicial solution would be more desirable, legislators’ and judges’ approaches to these issues will gradually force them to designate a true owner of virtual property. An onslaught of legislation and cases in countries such as China, South Korea, Taiwan, Hong Kong, Singapore, and the United States is not yet apparent but is almost certain to come. The approach that these countries take will affect fifteen million players and one billion dollars in transactions. Let us hope that each country's decision to award property rights is well-thought out and deliberate when made.

265 Michael Connelly, Business is Good for Online Video Games and Virtual Worlds, STREETDIRECTORY, http://www.streetdirectory.com/travel_guide/103724/gaming/business_is_good_for_online_video_games_and_virtual_worlds.html (last visited May 11, 2009) (stating that "over 15 million people worldwide are now playing [MMORPGs]" and that "[i]n 2006 this particular genre of video games grossed over 1 billion dollars").