

PROPERTY RELATIONSHIPS IN VIRTUAL WORLDS - A RETURN TO THE FEUDAL SYSTEM?

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Abstract

There are a number of ways to explain how the property system in a virtual world works. Various explanations are proposed in this paper to explain this phenomenon. Some people argue that property in virtual worlds is purely based on contract and as such can be explained as merely licensing players to use the virtual worlds. Other explanations include the arguments that virtual property is based purely on intellectual property, actual (real) property or even does not exist at all. However, one alternative to accepting that virtual property is actual property, is by viewing the property relationship as a system as feudal ownership or estates. This model of explaining virtual property manages to incorporate many, if not all of the current explanations for the existence of virtual property. As such, it can be argued that even if virtual property is based solely on contract and that the developer therefore maintains his or her position as owner, the player in fact, also has a stake in the virtual property. The developer can be regarded as lord with the user's interest being regarded as seisin rather than ownership. Alternatively, the developer is regarded as having dominium directum, while the player is regarded as having dominium utile, due to the fact that in most cases the developer has little or no actual interest in the ownership of a specific object of virtual property. This paper will analyse the possibilities of this explanation.

Keywords: Virtual Property; Virtual Worlds, Property; Ownership; Feudal Ownership; Property Relationships; Dominium Directum; Dominium Utile; Seisin; Feudal Estates; Governance

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1 Introduction

In the current technologically enabled society, people are dealing and interacting with virtual property on a daily basis. Many might not realise it, but virtual property is found all around them. It is commodified³²⁰ and traded³²¹ in legally sanctioned³²² as well as unsanctioned³²³ *fora*. When people log onto a website to check their email, update their Facebook status or relax by playing an online game based in a virtual world, they constantly interact with virtual property.

Most property regimes focus largely or exclusively on tangible or corporeal property, however they normally include some mechanisms to deal with specific forms of incorporeal property (immaterial property and intellectual property). This causes one of the biggest problems associated with virtual property. This problem arises because virtual property in many cases tends to mimic traditional tangible property, leading to the current legal uncertainty regarding the status of virtual property. For example, is virtual property a development of

³²⁰ The trade in virtual property has become such a normal daily event that a number of online *fora* exist for just that purpose. These *fora* facilitate the trade of a staggering number of virtual world accounts and related items. The trading does not only take place inside the virtual world, but virtual world items can be sold for real world currency. See generally Castronova E 'Virtual World Economy: It's Namibia, Basically' (2004) at www.terranova.blogs.com/terra_nova/2004/08/virtual_world_e.html; Erlank W *Property in Virtual Worlds* 2012 Chapter 2.

³²¹ See generally Castronova E 'Virtual Worlds: A First-hand Account of Market and Society on the Cyberian Frontier' (2001) *No 618 CESifo Working Paper* at papers.ssrn.com/abstract=294828, where Castronova discusses the secondary market for avatars and treasures found in virtual worlds. Also see Castronova E 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research* at www.gamestudies.org/0302/castronova/, where he analyses virtual economies and their similarity to real world economies.

³²² The legality in this sense comes from the contractual agreement between developer and player and not from state sanctioned laws. Several virtual worlds facilitate the sale and transfer of virtual items and accounts by giving their players access to shops, market-places and in some instances, even full-fledged virtual stock exchanges.

³²³ eBay used to have a category dedicated to the trade in virtual property items but due to pressure and legal action taken against them by the developers of virtual worlds, they have since discontinued the facilitation of trading virtual property linked to virtual worlds. Players are still trading in virtual goods outside of the developer sanctioned *fora* and making use of social networking sites, personal interaction or specifically dedicated 'black-market' websites that facilitate the trades.

traditional property or just a subset of intellectual property? Should it be protected as a form of property extraneous to the contracts that regulate it, or should it just be seen as a contractual relationship between the owner of the intellectual property right and the user? Fairfield summarises the position by asking whether computer code that is designed to act in the same way as traditional property should by inference also be regulated and protected in the same way as traditional property.³²⁴

As an example of how a feudal application of property rights in a virtual world operates, Grimmelman explains the position in *Second Life* as follows:

“We can resolve this tension by describing a user’s interest as seisin rather than as ownership. A tenant seised of land had sworn homage to the lord from whom he held. In exchange, the lord symbolically delivered the tenant into possession. Thereafter, the tenant owed the lord various services and feudal incidents, and in return the lord was obligated to defend his possession against outsiders to the relationship. Every element of this system maps cleanly onto Second Life. A user swears homage by clicking “I agree” to Linden’s terms and conditions; Linden delivers her into possession by changing an appropriate database entry. She owes tier fees in place of feudal incidents; Linden defends her possession via software-based controls.”³²⁵

Because the owner of the avatar is in effect the real world embodiment of the avatar, he or she has all the same rights in the real world that the avatar has in the virtual world. In essence the user is the avatar. The source of law governing the rights that a user has to his avatar is usually based on some form of contractual right. This means that the right to an avatar’s (real) property is morphed from a real right (in the virtual world) to a contractual right as soon as the subject of the right is redefined as a real person and not a virtual one. In certain instances it can become even more complex, especially if there are third parties in the real world who also claim certain proprietary interest in the user’s virtual property. If one looks at the *Second Life* model, the developers of the game grant the owner of the avatar specific and explicit ownership rights to any intellectual property that they might create in the game, as well as real (virtual) ownership rights to the property they own in the game.

2 Ownership in virtual worlds

If it is accepted that someone can have ownership of virtual property,³²⁶ there are a number of possible consequences that need to be examined. Barfield mentions three interesting issues relating to this.³²⁷ The first interesting aspect of virtual property ownership relates to the economic impact that it has on the real world. Economists have estimated that in 2002 already, the real world trade in virtual items was responsible for creating a combined gross national product of virtual worlds that was equivalent to, or more than, that of some third world countries.

The second interesting thing to take note of is the fact that the sales market for property in virtual worlds sometimes transcends into the real world. The developers of the virtual world *Entropia Universe* has contemplated issuing players with a real world ATM card with which they could draw real world money out of their virtual world bank accounts. This would be automatically converted to real world currency by the virtual world’s treasury. This immediately raises concerns about tax law, money laundering and currency exchange regulations. However, these concerns are also valid for normal transactions related to virtual property, which take place in the real world. For this reason it is inevitable that governments will start to take an interest in the regulation of the sale of virtual property. In fact, even though there is still a large amount of academic debate about whether virtual world assets should be taxed, it has already started to become a bit of a moot point.³²⁸ Following on from this possible taxation of virtual property is the fact that the whole debate about the ownership of virtual property suddenly becomes much more interesting. If a developer would keep on arguing that the players only have a mere licence to use the game (as they do in most cases), it could mean that the developers themselves would become liable for the taxation of the transactions if they do not want to share the joys of ownership with the players. If this was to be the case, then ownership of virtual property would follow the real world where ownership carries with it not only rights, but also obligations.³²⁹

The third area mentioned by Barfield is the issues surrounding the protection, or to state it as alternative, the theft of virtual property. Many authors argue that this is one of the major reasons why players should get recognised

³²⁴ Fairfield JAT 'Virtual Property' (2005) 85 *BUL Rev* 1047-1102 1048. Fairfield uses the terminology of 'real-world property', while I prefer to use the term traditional property to indicate property as traditionally encountered outside of virtual worlds.

³²⁵ Grimmelman, J 'Virtual World Feudalism' 2009 *The Yale Law Journal Pocket Part* 127. (Footnote omitted).

³²⁶ See in general Erlank W *Property in Virtual Worlds* 2012.

³²⁷ Barfield W 'On Money, Taxes, and Property in Virtual Reality' (2008) *Springerlink online article* no 10.1007/s10055-008-0097-7 1-3 at 1.

³²⁸ The US internal revenue service is already investigating the taxation possibilities of virtual assets and Australian tax officials have stated that as soon as a virtual world transaction has any real world consequences, it will attract the attention of the Tax Office.

³²⁹ Or using Hohfeldian terminology, the owner of virtual property will have the same rights, privileges, powers and immunities together with their jural opposites of no rights; duties, disabilities and liabilities as well as the correlatives of duties; no rights, liabilities and disabilities. See Hohfeld WN Some fundamental legal conceptions as applied in judicial reasoning 1913 *Yale LJ* 36.

property rights in their virtual property. In other words, virtual property users should be able to protect their property.

Even though it might seem as if virtual property can easily be explained in terms of current theories and possibly as purely contractual relationships, it is very important to look at the rights and relationships that adhere to virtual property. Some questions that illustrate the complexity of the matter are listed as indication of this. What happens with virtual property when the owner thereof dies? How does succession work in such a case? Who becomes owner of what? Could you bequeath virtual property to a legatee? And if so, how does ownership pass? Could you lease virtual property? If so, could you register such a lease; or would it be a property right like in English common law? If an embassy leases a building or office space in a virtual world (Second Life), could you get a pledge on the movable property contained in it? Could ownership in a virtual world be equated with leasehold because it is limited in time? Else if one accepts that it is indeed a form of leasehold, could a person force a developer to keep servers running for a specified time period? Is a virtual property right a subtraction from the dominium? What is the status of sovereign territory in *Second Life* – embassies; and what is the legal status of privileged information exchanged in such a virtual world? This also applies to the consultations taking place between virtual attorneys and clients. Lastly it must be asked if virtual property rights are necessarily limited in time - or is it?

As seen above, the concept of ownership in virtual world is quite a problematic one. So-called virtual property rights can be found and applied in a number of ways. Take for example a virtual sword (virtual property object) used by an avatar in a virtual world. In the first instance, the game developers have at least intellectual property rights in the software of the game as well as a contractually reserved right to the sword, which they reserve in the EULA. In the second instance, the user has a right that in the sword (that he holds via his avatar). Thirdly, there is the right that the avatar has to the sword. And finally in this specific example, there are the rights that third party avatars in the game have towards the sword. This illustrates the complexity of the question of ownership. I.e, who then owns the sword? From a civil law perspective which has a unitary ownership character, only one person or entity can be the owner.³³⁰ This creates various problems, since it is already clear that apart from the avatar (that has virtual world ownership in the sword), the developers have all the intellectual property rights to the item but also reserve ownership of all the virtual world items for themselves in the EULA. This is not allowed in a civil law tradition. Another way of looking at the problem might proffer a better explanation. If it is accepted that there are two effective owners that have different ownership interests in the sword at the same time, then a logical explanation would be one of fragmented or split ownership that is almost feudal in nature. The developer is deemed to have *dominium directum* in the sword, while the player via her avatar has *dominium utile* in the sword. A number of normative justifications can be used for supporting this allocation of rights, but for purposes of this article I will focus on the personality theory as a justification.

3 Power, control and executive lawmaking³³¹

The developer of a virtual world usually performs the functions of governance, not only out of necessity, but also out of commercial interest.³³² The developer creates the virtual world out of nothing and has as much intellectual and creative freedom in the creation of the world as modern technological capabilities will allow for. As discussed elsewhere,³³³ the only limit to the creativity of a developer is imposed by its imagination.³³⁴ A developer has the following abilities and *ex officio* capacities.³³⁵ Firstly, it has both creative and physical control over the virtual world,³³⁶ making it omniscient and godlike.³³⁷ Secondly, it can create inherent laws in the virtual world that are totalitarian and mandatorily applicable to all participants. This power is derived from the program code.³³⁸ In addition to these two capabilities, a developer can also create and manage a virtual legal system by

³³⁰ It is possible that multiple persons can be co-owners, but due to the fact that ownership has to be shared, a co-owner can never have all of the same unfettered competencies of ownership that a sole owner has.

³³¹ I will only deal with the issues applicable to a virtual world created and maintained as a revenue-generating venture by the developers.

³³² Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 179. See also the discussion about the pitfalls of virtual property.

³³³ See Erlank, W, *Property in Virtual Worlds* 2012 Chapter 2.

³³⁴ I refer to the company that develops a virtual world in both the singular and the plural, depending on the necessities of the discussion topic. The developer in its singular form is referred to as an inanimate object, since developers are usually corporations. But the need often arises to refer to the developer in the plural when the individuals who collectively make up the corporation are mentioned. Some lone developers could fulfil this function in his or her personal capacity, although the virtual world would most probably not be a commercial enterprise in such a case.

³³⁵ For an in-depth discussion of the design procedures and implementation issues from the viewpoint of developers see Morningstar, C, and Farmer, FR, 'The Lessons of Lucasfilm's Habitat' in Benedict, M (ed) *Cyberspace: First Steps* (1991).

³³⁶ 'Physical' in this sense means that it can physically control any aspect of the virtual environment and world as it is perceived by the gamer. The developer can reshape, destroy, add to it or totally transform it into something else.

³³⁷ Kunze, JT, 'Regulating Virtual Worlds Optimally: The Model End User License Agreement' (2008) 7 *NW J Tech & Intell Prop* 101, 107.

³³⁸ Lessig, L, *Code and other Laws of Cyberspace* (1999) as well as the sequel: Lessig L *Code Version 2.0* (2006); Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 177 and Pollitzer, B, 'Serious Business: When Virtual Items Gain Real World Value'

means of the EULA and TOS.³³⁹ Most real world legal relationships that have anything to do with interaction with a virtual world are governed solely by contract.³⁴⁰

The use of contract by a developer to regulate its world is not necessarily problematic, but negative effects flow from the way in which developers implement their contracts.³⁴¹ The biggest of these problems seems to be that developers forget that they are not gods or sovereigns. Even though they have virtual sovereignty inside the boundaries of their own creations, they are still themselves subject to the control, regulation and laws of their respective real world governments.³⁴²

A different approach to this problem is that the problem does not lie with the fact that developers see themselves as virtual governments, but rather that they see themselves as customer-service providers.³⁴³ The argument made by Castronova³⁴⁴ and supported by Jankowich³⁴⁵ is that the problems stem from the nature of the developer's creations. Developers need players to populate the virtual worlds they have created, because a virtual world will be useless without players. This leads to the fact that because the players are taking an active role in the continuous development and running of the virtual world, the players are left with a high level of self-perception. This self-perception is markedly lower in console-type games that do not provide for much player-autonomy and usually do not comprise of a virtual world in the strict sense.³⁴⁶ On the other hand, in the virtual world this self-perception stems from the vast self-determination capacity that a virtual world player receives. Indeed, the developer usually actively markets this autonomy as an attractive benefit and selling feature of participating in the virtual world.³⁴⁷ While the developers try to regulate their relationship with the players by typecasting their contribution in the virtual world as the provision of a service, the player perceives the developer's role as one of providing a governing function.³⁴⁸ Therefore, "in their minds, the players are not customers, but citizens with corresponding rights".³⁴⁹ In effect, the big question is one about rights. How do the parties perceive their rights and obligations, and what is the actual situation? The EULAs and TOS's are perceived as insufficient for regulating the long-term relationships between developers and players.³⁵⁰ These agreements fail to provide for all the needs of the participants and the *ad hoc* rule-making that developers use to address issues not covered in the EULA or TOS often results in unsatisfactory and arbitrary solutions.

Although I agree in principle with the position taken by Castronova and Jankowich, I think that the problem lies more in the way that developers see players not as the recipients of services but as their subjects; which they can both govern and control from their omnipotent position. In the real world, the gamer would be seen as a consumer who could in certain instances be protected by real world law to help equalise the skewed relationship between consumer and developer.³⁵¹ However, in the virtual world the developer is equal to the enterprise, government, and god.³⁵² In effect, the developer inherently acquires the role of judge, jury and executioner of the

2007 SSRN at ssrn.com/abstract=1090048 1, 20.

³³⁹ Kunze, JT, 'Regulating Virtual Worlds Optimally: The Model End User License Agreement' (2008) 7 *NW J Tech & Intell Prop* 101, 103-104; Edelmann, P, 'Framing Virtual Law' 2005 *Proceedings of DiGRA 2005 Conference: Changing Views - Worlds in Play* at www.digra.org:8080/Plone/dl/db/06278.45351.pdf 1, 4; Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 177; Fairfield, JAT, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds' (2008) 53 *McGill LJ* 427.

³⁴⁰ Jankowich extensively discusses the governance issues of virtual worlds. He mentions the problems that developers face when confronted with conflicts between themselves and players. He questions Lessig's assumption that all legal relations in a virtual world are primarily governed by the computer code as law and, if that fails, is governed by the 'catch all restrictions of the end user licence agreement ('EULA') or terms of service ('TOS') that participants agree to when joining the virtual world.' See Jankowich AE 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 177; Lessig, L, *Code and other Laws of Cyberspace* (1999).

³⁴¹ Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173,178; Glushko, B, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' (2007) 22 *Berkeley Tech LJ* 251, 270.

³⁴² Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 179; Balkin, JM, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Va L Rev* 2043, 2046.

³⁴³ See Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 178 and also Castronova, E, 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research* at <http://www.gamestudies.org/0302/castronova/>.

³⁴⁴ Castronova, E, 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research* at www.gamestudies.org/0302/castronova/.

³⁴⁵ Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 178.

³⁴⁶ In other words, the console-game usually would not have all the *indicia* of a virtual world. See Erlank, W, *Property in Virtual Worlds* 2012 Chapter 2 for a discussion of the *indicia* or *essentialia*.

³⁴⁷ For example, the 'features' description of *Asheron's Call* contains the following description of what awaits the prospective player: 'Welcome to the online role-playing game Asheron's Call, where thousands of players inhabit a beautiful 3D fantasy world to make friends and seek out perilous adventure. Customize your alter ego with a unique appearance and balance of heroic skills, then enter a magical frontier of terrible monsters, breath-taking (*sic*) vistas, and fast alliances. With over 500 square miles that offer ever more wonders to explore, Asheron's Call gives you a world of unparalleled scope and freedom, the richest setting yet for creating your personal saga or joining your friends in an epic campaign.' See Asheron's Call, 'About Asheron's Call: Features' (2009) *Asheron's Call* at ac.turbine.com/index.php?option=com_content&view=category&layout=blog&id=34&Itemid=64&NavItemid=56.

³⁴⁸ Castronova, E, 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research* at www.gamestudies.org/0302/castronova/.

³⁴⁹ Castronova, E, 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research* at www.gamestudies.org/0302/castronova/. This idea was already present in the early days of the development of virtual worlds, see Koster, R, 'Declaring the Rights of Players' 2000 *Raph Koster's Website* at www.raphkoster.com/gaming/playerrights.shtml and Koster, R, 'The Man Behind the Curtain' 1998 *Raph Koster's Website* at www.raphkoster.com/gaming/essay5.shtml.

³⁵⁰ Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 178.

³⁵¹ See Balkin, JM, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Va L Rev* 2043, 2048-2050.

³⁵² Kunze, JT, 'Regulating Virtual Worlds Optimally: The Model End User License Agreement' (2008) 7 *NW J Tech & Intell Prop* 101, 107; Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 185; Deenihan, KE, 'Leave Those Orcs Alone:

gamer. It seems as if it is because of this feeling of powerlessness that players seek help outside of the governance structure of the virtual world when they feel that their in-game rights are being limited too much.³⁵³ Jankowich stresses this fact when he states that the “absence of a robust legal system in a complex environment like a virtual world inhabited by people with very limited rights will lead those people to search for environments where they have greater power.”³⁵⁴

There are a number of reasons why this disparity between the gamer and developer came to pass, and why it still exists. In order to understand the position it is necessary to investigate the position from the viewpoint of both the developer and the gamer.³⁵⁵

There are various reasons why developers want to have as much control over the virtual world as they can get.³⁵⁶ The developer might have differing levels of influence and governing control at five stages. The first stage is the creation of the virtual world. The second is the testing and deployment stage. The third is the stage that occurs during the normal running of the virtual world. The fourth stage is the maintenance stage. Finally, there could be a stage where the virtual world is destroyed.

The developer needs to have creative control to create the world and to make sure that it is functioning properly.³⁵⁷ While the virtual world is being developed this is only of interest to the developer and does not affect anyone else. If the developer is held back in any way during this creative phase, the virtual world would ultimately not come into existence and the legal question would remain moot. Even though the players do not really have an interest in the game at this stage, the state and community in the real world where the developer is located might have a legitimate interest in the development of the virtual world.³⁵⁸ If the topic, idea, theme or implementation of the virtual world is *contra bonos mores*, or even criminal, the state and society will have the power to censure and possibly stop the further development of the virtual world.³⁵⁹

During the testing phase of the virtual world, the developer needs to constantly make changes to and fine-tune the program code. Some unexpected error might occur and unintended things could happen in the virtual world. At this stage, the developer approaches either the public or a select group of gamers to test the game in its *beta* or testing state.³⁶⁰ The developer always makes it clear that the virtual world is a work in progress and players should expect that their gameplay experience would be interrupted. The virtual world can be reset or reverted to the initial stages at any time. At this stage, the program does not qualify as a virtual world because it is non-permanent.³⁶¹ The gamers who take part in this testing stage do so voluntarily and usually do not pay for the privilege of being the first people to experience the new virtual world. The developers make it quite clear that the gameplay might change drastically at any stage and that the levelling of avatars during the testing phase could at any time revert to the initial stages.³⁶² Developers also explicitly state that the items acquired by players during the testing stages will not be transferred to the world when it launches for the broad public.³⁶³ During the testing stages, these items might disappear at any time from the avatar's collected possessions. Neither avatars nor players therefore enjoy protected rights.

Property Rights in Virtual Worlds' 2008 SSRN at ssrn.com/abstract=1113402 1, 5. For a more comprehensive discussion of what Grimmelmann refers to as 'The God Problem', see Grimmelmann, JTL, 'Virtual Worlds as Comparative Law' (2004) 49 *NYL Sch L Rev* 147, 174.

³⁵³ Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 179.

³⁵⁴ Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173, 179.

³⁵⁵ Deenihan, KE, 'Leave Those Orcs Alone: Property Rights in Virtual Worlds' 2008 SSRN at ssrn.com/abstract=1113402 1, 9-12; Balkin, JM, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Va L Rev* 2043, 2047-2052.

³⁵⁶ Bartle, RA, *Pitfalls of Virtual Reality* (2004) 1, 9-13; See in general: Deenihan, KE, 'Leave Those Orcs Alone: Property Rights in Virtual Worlds' 2008 SSRN at ssrn.com/abstract=1113402 1.

³⁵⁷ Bartle, RA, *Pitfalls of Virtual Reality* (2004) 1, 9-13.

³⁵⁸ Balkin, JM, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Va L Rev* 2043, 2048-2050, 2053.

³⁵⁹ Although this might sound like a highly theoretical issue, there are a number of games that were developed and marketed with themes that are so abhorrent that even in a liberal society, they are viewed as not only extremely distasteful, but possibly criminal in some states. Examples that spring to mind are the games where the 'hero' of the game's sole purpose is to rape women. Another game puts the player in the shoes of a terrorist who has the liberty of killing many innocent civilians at an airport. For more detail about these and other games see: Van der Byl, T, '5 Most Offensive Games Ever' 2009 *Mygaming.co.za* at www.mygaming.co.za/news/news/4863-Most-Offensive-Games-Ever.html?print. Another area where the state might want to interfere at this stage is where the state decides that the general idea or effect of the game would be against state policy. Such an example is the way that China is hindering the launch of the new *WOW* expansion. Certain elements of the game were seen as unacceptable for the government. For example, skeleton characters were not allowed. See AFP, 'China Tightens Supervision of Online Games' 2009 *AFP* at news.google.com. For a discussion of how developers try and deal with the above issues by means of self-regulation see Gray, GC and Nikolakakos, T, 'The Self-Regulation of Virtual Reality: Issues of Voluntary Compliance and Enforcement in the Video Game Industry' (2007) 22 *CJLS* 93.

³⁶⁰ See for example Bioware, 'Star Wars: The Old Republic Game Testing FAQs' 2011 *Star Wars: The Old Republic* at www.swtor.com/tester.

³⁶¹ For more details about the characteristic of permanence/persistence see the discussion about the characteristics of a virtual world in Erlank, W, *Property in Virtual Worlds* 2012 Chapter 2 at 2.4.3.

³⁶² An explicit notice to this effect is normally incorporated into the trial version's EULA.

³⁶³ For example, the Game Testing Terms and Conditions for *Star Wars: The Old Republic* state that '(L) You acknowledge and agree that BWA reserves the right to change/add/remove items collected or updated, modify or remove any items in the Game at any time and without warning.' See Bioware, 'Game Testing Terms and Conditions for *Star Wars: The Old Republic*.' 2011 *Star Wars: The Old Republic* at <https://account.swtor.com/user/register/>.

When the virtual world is functioning properly and the public has started participating in it, the developer still needs to manage the general administrative tasks required by a virtual world. Disputes between gamers need to be arbitrated when they have concerns about issues affecting the virtual world or the interests of the developers. The developer must be able to take action against players whose actions create problems for other players or have detrimental effects for the virtual world, or that could create problems regarding real world state-regulation.³⁶⁴ Any problems that crop up on a daily basis due to the expansion of the virtual world and the unintended development of certain in-game elements that have appeared must be managed and fine-tuned.³⁶⁵

There is always some sort of daily maintenance occurring in the virtual world. However, sometimes something more substantial needs to be done by the developer for the virtual world to stay stable or to grow. In the highly competitive market of MMORPGs, a developer needs to fine-tune a virtual world continually to keep the players resident there. One of the ways to achieve this is by implementing a “patch”³⁶⁶ to the client-side program that runs on the player’s computer. Sometimes this takes the form of an automatic update from the developer’s servers when the player logs onto the game. It could also take the form of either an optional or a mandatory piece of software that players have to download from the server and update by themselves. Sometimes this is sufficient to address maintenance problems, without affecting the general game experience for the player. However, this procedure could also be used by a developer to force players to accept changes that they would not ordinarily have accepted. In many instances, such a patch includes an updated version of the EULA or TOS that players must accept before they can continue playing. In other instances, the patch makes certain substantial changes to elements of the virtual world that players would find intrusive on their rights.³⁶⁷ Such a patch forces a player to accept changes a developer wants to make to the game. These changes will need to be implemented on a player’s computer before he or she will be able to continue participating in the game. Although this is not usually a problematic issue, it could lead to abuse.

Sometimes it may be necessary or inevitable that a virtual world faces a digital Armageddon and shuts down forever. This has happened in a few instances, the shutdown of *The Sims Online*³⁶⁸ being a prominent example. Even though this is a highly undesirable situation for the players, a developer would like to know that it could shut down the game if necessary. Some developers feel so strongly about this that they include a dedicated clause in the EULA giving them the right to discontinue the virtual world at their discretion.³⁶⁹ Developers

³⁶⁴ WoW’s EULA states that one is not allowed to ‘...use cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience...’ 2.B. Additional Licence Limitations: Blizzard, ‘World of Warcraft - End User License Agreement’ 2009 *World of Warcraft* at www.worldofwarcraft.com/legal/eula.html. Another reason why a developer would want to include a clause to this effect will be to be compliant with the laws of the state where the server is hosted. See for example the disclaimer by Second Life about it being a US based service: ‘13.1 Second Life is a United States-based service. Linden Lab makes no representation that any aspect of the Service is appropriate or available for use outside of the United States. Those who access the Service from other locations are responsible for compliance with applicable local laws. The Linden Software is subject to applicable export laws and restrictions.’ See 13. General Provisions: Linden Lab ‘Terms of Service - Second Life’ 2010 *Second Life* at secondlife.com/corporate/tos.php. Some of the modifications (mods) or hacks are often used to render the avatars nude or to enable the avatars to engage in sexual practices. See in general: Williams, N, ‘World of Warcraft Nude Mods and Clothing Patches’ 2008 *Vox ex Machina* at www.voxexmachina.com/mods/world-of-warcraft-nude-mods-and-clothing-patches/; Jackson, M, ‘WoW Police Hunting down Sexual Role-Play’ 2010 *CVG* at www.computerandvideogames.com/article.php?id=258879.

³⁶⁵ This would be the case where some type of error or omission in the programming is (legally) exploited by a number of players. If it is creating problems for the virtual world it would need to be rectified. An example is the case of *Bragg v Linden Research Inc* 487 FSupp 2d 593 (ED Pa 2007) in *Second Life*, where Bragg found a way to bypass the normal virtual real estate auctioning system and exploited this to his benefit by buying virtual land at rock-bottom prices. When the developers discovered this exploit, they closed the loophole and froze all of Bragg’s assets in the game. For more detail and background on the Bragg-case see: Taggart, G, ‘A Virtual Property Dispute - ANALYSIS: Bragg v. Linden et al’ 2007 *The Seventh Sun* at theseventhsun.com/0607_braggAnalysis2.htm; Craig, K, ‘Second Life Land Deal Goes Sour’ 2006 *Wired.com* at www.wired.com/gaming/virtualworlds/news/2006/05/70909; Cheng J ‘Second Life ‘Land’ Dispute Moves Offline to Federal Courtroom’ 2007 *Ars Technica* at arstechnica.com/tech-policy/news/2007/06/second-life-land-dispute-moves-offline-to-federal-courtroom.ars. See also Kunze, JT, ‘Regulating Virtual Worlds Optimally: The Model End User License Agreement’ (2008) 7 *NW J Tech & Intell Prop* 101, 102. This could be especially troubling where there are minors who also participate in the virtual world. Developers therefore use this clause to enforce compliance with their rules and give them the right to censor or prohibit certain behaviour.

³⁶⁶ A patch in this sense refers to an additional piece of software that is released after the initial launch of the main program. This ‘patch’ is then used to fix any problems that have manifested in the meantime. It could also be used to improve or change certain minor elements of the program.

³⁶⁷ For example, WoW’s EULA states that: ‘Blizzard may deploy or provide patches, updates and modifications to the Game that must be installed for the user to continue to play the Game. Blizzard may update the Game remotely including without limitation the Game Client residing on the user’s machine, without the knowledge of the user, and you hereby grant to Blizzard your consent to deploy and apply such patches, updates and modifications’: 9. Patches and Updates: Blizzard, ‘World of Warcraft - End User License Agreement’ 2009 *World of Warcraft* at www.worldofwarcraft.com/legal/eula.html. Another aspect dealing with patches, updates and modifications to the game is that the EULA and TOS are often updated with those patches. Although it does not happen every time, a player is sometimes notified that he or she has to accept the updated EULA at the installation stage of such a new patch. In reality, according to personal experience and anecdotal evidence, almost no player or computer-user ever reads any of the EULAs and players just scroll down through all the legalese and then click on the famous ‘I Agree’ button in order to continue playing the game. See in general: Gatt, A, ‘Electronic Commerce – Click-Wrap Agreements: The Enforceability of Click-Wrap Agreements’ (2002) 18 *CLSR* 404. A developer can therefore change the EULA in its totality without the players even being aware of it; or being able to do anything about it. This is one way in which a developer could also constructively force a player to abandon his virtual property interests. If a developer announces in the new EULA being forced on the players that from now on all items held by players are to disappear, the players will be helpless in economic terms. They would only be able to protest such actions by staging a mass exodus from the virtual world that could lead to the eventual collapse of the virtual world as an economic enterprise.

³⁶⁸ See Erlank, W., *Property in Virtual Worlds* 2012 Chapter 2 for more details at 2.2.3.

³⁶⁹ For example, WoW’s EULA states that ‘(t)his License Agreement is effective until terminated. You may terminate the License Agreement at any time by (i) permanently destroying all copies of the Game in your possession or control; (ii) removing the Game Client from your hard drive; and (iii) notifying Blizzard of your intention to terminate this License Agreement. Blizzard may terminate this Agreement at any time for any reason or no reason. Upon termination for any reason, all licenses granted herein shall immediately terminate and you must immediately and permanently destroy all copies of the Game in your possession and control and remove the Game Client from your hard drive.’ See 7. Termination: Blizzard, ‘World of Warcraft - End User License Agreement’ 2009 *World of Warcraft* at www.worldofwarcraft.com/legal/eula.html. The termination clause

sometimes even like to shut down a virtual world for purely financial reasons.³⁷⁰ For example, the costs of operating a virtual world that is underperforming as a financial investment could be better spent on another project or virtual world. Shareholders in the developer might also demand that funds be re-invested in other ways. This makes financial and logical sense for the developers and if one takes into account the nature of the contractual agreement between the player and developer, this should not be an issue. However, due to the nature of the virtual world as a vehicle for social interaction and considering that it is often designed to be addictive, it can be argued that a developer has a corporate and social responsibility to continue supplying players with access to the virtual world that they have come to rely on.³⁷¹

Players would of course not like to see their virtual world destroyed in front of their eyes; they would like to participate in the decision-making process before this happens. Sometimes they might even be in a position to help rescue a virtual world if there are financial problems, or else they could keep it running themselves.³⁷² However, a developer needs to control its intellectual property and usually makes it clear that players are not allowed to use its code for non-licensed purposes. Developers are faced with a distinct challenge in this regard, since players often get their hands on the source-code of the virtual world and sometimes run their own unlicensed servers. Players can create their own copy of the virtual world environment on these unlicensed servers. Even though these unlicensed servers do not interact with the properly licensed version of the virtual world, many players are content to make use of them.³⁷³ The existence of unlicensed servers represents more of a problem for virtual worlds that cater for *ad hoc* multiplayer games than for those that are socially orientated.

One other party to a virtual world who might be instrumental in the operation of a virtual world is the real world state. It is expected that as soon as anything regarding the virtual world acquires extra-territorial effect (i.e. outside the virtual world) the government has jurisdiction to interfere with the governance of the virtual world. The real world government may in certain instances not only be able to, but in fact be obliged to step in and take control of a virtual world for the benefit of the public.³⁷⁴

4 Personality justifications

Hegel,³⁷⁵ who is regarded as the father of personality theory,³⁷⁶ had the view that property should be seen as an extension of one's personality.³⁷⁷ The essence of his theory and those based upon it, is that "property rights are related – either as necessary conditions for, or as connected to – human rights such as liberty, identity and privacy."³⁷⁸ Alternatively, personality theory is described by Radin³⁷⁹ as the idea that property rights are linked

fulfils an essential function in the governing of a virtual world. It gives certainty to the developer about the point at which the contractual relationship between it and the player has come to an end. However, this specific termination clause does not provide any certainty to the contract. The requirement that is expected of the player to publicise termination of the agreement is problematic. It is unclear whether any single action specified above, i.e. destruction, removal or notification is the essential element to publicize this fact. Due to the unclear semantics, it could be construed that any of these actions could constitute such publication. If all three requirements are met, it creates a massive onus on the player. The transfer clause discussed above did not require that the developer be notified of the transfer. It now seems strange that the termination would require such explicit notification. Even more problematic for the player is the fact that the developer gives itself not only the right to terminate the agreement at any time, but also to do so for 'any reason or no reason.' Such clauses that clearly put the player at a disadvantage could be construed to be *mala fide* and *contra bonos mores*. While a person may shrug such imperious tactics off when it only applies to issues inside a virtual world, this clause also has a cross-border element. The contract affects the player-developer relationship in the real world and not only in the virtual world. If one were to accept the value of virtual property interests and vested economic, social and sentimental value that a player has in a virtual world, such actions by developers could lead to gross misuse. Problems like 'expropriation' of virtual property interests would appear and the affected player(s) would need to be able to find redress somewhere. Nothing in the clause includes references to a form of compensation or other remedy that a player can rely upon if the developer chooses to end the agreement. At the very least one should expect that a player whose licence has been unfairly or otherwise terminated by a unilateral action from the developer should be able to get compensation for the physical game media that he or she could lose. See the discussion about remedies in Erlank, W, *Property in Virtual Worlds* 2012 Chapter 7 at 7.2, where the possibility of real world protection for virtual property interests is discussed from both a private- and a constitutional law viewpoint.

³⁷⁰ See the discussion in Erlank, W, *Property in Virtual Worlds* 2012 chapter 4 at 4.4 about the implications of these actions when viewed from a normative perspective as a consideration for the justification of allocating property rights in virtual resources or not.

³⁷¹ See the discussion about the social elements and effects of virtual worlds in Erlank, W, *Property in Virtual Worlds* 2012 Chapter 4 at 4.3. Many of these virtual worlds and games are intentionally designed to be addictive and therefore developers should be held accountable for the well-being of the players if and when they decide to end a virtual world. See also the general discussion by Reuveni of the fact that virtual worlds are more than just entertainment: Reuveni, E, 'On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age' (2007) 82 *Indiana LR* 261, 303.

³⁷² Bartle, RA, *Pitfalls of Virtual Reality* (2004) 1, 12-13. When the virtual world of *Earth and Beyond* shut down, the players attempted to buy the hardware and software from the developer to ensure the continuation of the world. However, the developer could not be convinced to sell. There is an increasing movement to preserve virtual worlds when they are either terminated or have become defunct. For example the Library of Congress is funding a project called 'Preserving Virtual Worlds' which is exploring ways and methods that can be used to preserve virtual worlds after their digital sell-by dates. See Kramer-Smyth, J, 'Preserving Virtual Worlds - TinyMUD to SecondLife' 2007 *Spellbound Blog* at www.spellboundblog.com/2007/08/17/preserving-virtual-worlds-tinymud-to-secondlife/.

³⁷³ This would only be a satisfactory solution if players decide to join such an unlicensed server without any benefit from their previous playing experience on the proper virtual world server. They would have to recreate their avatars from scratch, level up from the start and also have to start accumulating all their virtual property from the beginning.

³⁷⁴ One such case would be if the destruction of the virtual world would have a measurable direct impact on the economy of the real world state or the well-being of its inhabitants.

³⁷⁵ Hegel, GWF, *Hegel's Philosophy of Right* (1896, Knox TM trans 1967).

³⁷⁶ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 958.

³⁷⁷ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 48.

³⁷⁸ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 48.

³⁷⁹ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957.

to personhood and identity.³⁸⁰ As such, property rights are justified when objects are inseparably bound up with the personality and liberty of their owner.³⁸¹ Radin's view on personality theory will be used to justify virtual property in this section.³⁸² The application of the personality theory can be used in one of two ways. Firstly, it can be used to allocate ownership to one of two (or more) competing interested parties. Secondly it can be used to explain a fragmented or split ownership of a virtual property object.

Boone³⁸³ wrote an article on the application of the personhood theory to virtual property that focuses on the value of Radin's normative argument for the justification of property rights for virtual property. Radin's theory can be summarised as follows.³⁸⁴ Property or property relations can be either personal or fungible. The first, personal property, are things that have become bound up with the individual. Radin describes these as "objects that are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."³⁸⁵ If a person were to lose such personal property it would be a much worse loss than its correlative monetary value would indicate.³⁸⁶ The classic example of this will be recognition of the fact that due to the subjective sentimental value of something for a specific person, there should be a property interest in that thing.³⁸⁷ Examples of these are things like wedding rings, homes and body parts (now also virtual wedding rings and virtual homes).³⁸⁸ Even in the absence of any other normative justifications for the existence of property rights in such items, personality theory determines that such property rights should be recognised in order to fulfil the need for self-realisation and other human needs.³⁸⁹

Fungible property is the second type. If something is not regarded as "personal property", according to Radin it would be classified as "fungible property". Fungible property could be defined as "property that is perfectly replaceable."³⁹⁰ This is the theoretical opposite of "personal property".³⁹¹ Radin states that "[t]he opposite of holding an object that has become part of oneself is holding an object that is perfectly replaceable with other goods of equal market value."³⁹² The prime example of such fungible property would be money. Other examples are items that are held purely instrumentally, such as a wedding ring held by a jeweller (for the purposes of resale), an automobile held by a motor dealer and an apartment in the hands of a landlord, held for the sole purpose of letting.³⁹³ Even though Radin categorises property as being either one of the two types of property mentioned above, the classification should be seen as a continuum between the two rather than a dichotomy.³⁹⁴ Since a wedding ring can be either personal or fungible property, it is clear that the nature of the property is not determined by some type of characteristic, but rather by an individual's relationship with the thing.³⁹⁵ The test for determining whether it is fungible or personal will be connected to the question of "whether the thing and the rights in it have become bound up with the individual."³⁹⁶ Or, in terms of the classical subject/object

³⁸⁰ For purposes of this dissertation the terms 'personality theory' and 'personhood theory' are used interchangeably. Radin prefers to use the term 'personhood' in her seminal article 'Property and Personhood'. See Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 721 fn 24.

³⁸¹ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 957; Westbrook, TJ, 'Owned: Finding a Place for Virtual World Property Rights' (2006) 3 *Michigan State LR* 779, 798.

³⁸² Radin's theory has come under harsh attack from especially Schnably. It has led to a heated (and sometimes amusing) academic debate between the two. However, for the purposes of this application of her theory to virtual property I do not find it necessary to add to the debate and accept Radin's application of the theory. Schnably's initial critique to 'Property and Personhood' appeared in Schnably, SJ, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 *Stan L Rev* 347 and Radin's reply (in the same publication) in Radin, MJ, 'Lacking a Transformative Social Theory: A Response' (1993) 45 *Stan L Rev* 409. She summarises and addresses the debate between them in her book as follows: 'Stephen Schnably, for example, finds a 'conservative bias' in my work. His is a good example of criticism from the left, because he criticizes me both for being too consensus-orientated and for failing to elaborate a 'theory of transformative social change.' These criticisms reflect two separate strands of contemporary critical thought. The critical rhetoric calling for incessant disruption of consensus resonates with the restless methodology of deconstruction, while the critical rhetoric calling for overarching transformative theory resonates with the utopian longing for total and final revolution': Radin, MJ, *Reinterpreting Property* (1993) 27 (footnotes omitted).

³⁸³ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715. Boone analyses the connection between virtual property and personhood extensively and relies mainly on Radin's personhood theory for his arguments. He manages to cover the theory in detail and I only highlight one or two of his most important findings here. For the purposes of this dissertation it is sufficient to rely mainly on Radin's initial work. Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957. However, Boone analyses Radin's development of the theory by also integrating her later works, amongst others, her book Radin, MJ, *Reinterpreting Property* (1993) and Radin, MJ, 'Market-Inalienability' (1987) 100 *Harv L Rev* 1849. Also see in general: Radin, MJ, 'Lacking a Transformative Social Theory: A Response' (1993) 45 *Stan L Rev* 409; Radin, MJ, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood' (1995) 74 *Or L Rev* 423 and Radin, MJ, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (1996).

³⁸⁴ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 723.

³⁸⁵ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 959.

³⁸⁶ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 723.

³⁸⁷ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 959-960; see also Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 723.

³⁸⁸ See especially Radin, MJ, 'Market-Inalienability' (1987) 100 *Harv L Rev* 1849, 1855-1859 where she discusses the contested issues relating to the commodification of objects such as infants, children, human organs etc.

³⁸⁹ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 48.

³⁹⁰ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 723.

³⁹¹ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 960.

³⁹² Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 959-960.

³⁹³ Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957, 960.

³⁹⁴ Radin, MJ, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood' (1995) 74 *Or L Rev* 423, 427; Radin, MJ, *Reinterpreting Property* (1993) 3. See also Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 723.

³⁹⁵ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 725.

³⁹⁶ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 724. Radin states that '[o]ne may gauge the strength or the significance of someone's relationship with an object by the kind of pain that would be occasioned by its loss. On this view, an

relationships, “property becomes personal when it becomes more subject and less object, which is other to or outside of the self/subject.”³⁹⁷ In essence, if this happens, property is said to contribute to the self-constitution³⁹⁸ of an individual.³⁹⁹

A normative aspect is introduced into Radin’s theory that poses the question of whether a connection between a person and an object should be recognised as personal and as such be afforded greater property protection. In other words, not all connections to property that are considered to be personal by the individual (subjectively speaking) will be protected as personal.⁴⁰⁰ Radin⁴⁰¹ acknowledges the fact that there can be both good (healthy)⁴⁰² and bad (fetishistic) object-relations between a person and an object. If such a connection is bad or fetishistic, it should not be afforded protection as being “personal”. She states that:

“[i]f there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself in the wrong way or to too great an extent in external objects. Property is damnation as well as salvation, object-fetishism as well as moral groundwork.”⁴⁰³

She continues that the relationship between a shoe-fetishist and shoe will not be respected like the relationship between a spouse and a wedding ring. If someone should live just for their material objects, then they are not considered to be well-developed persons, and are regarded as “lacking some important attribute of humanity.”⁴⁰⁴ How then does this theory affect property on a practical level? The personhood theory has two effects on property rights.⁴⁰⁵ Firstly it appears that personal property is given preferential treatment to fungible property. If something is classified as “personal” property, that personal property interest should be protected to the detriment of a fungible property interest held by another person. Secondly, an object that has been classified as “personal” rather than fungible could be regarded in certain instances as being “market-inalienable” and should be maintained in a non-commodified state.⁴⁰⁶ The example given to illustrate these two effects concerns a tenant’s property right, which can be considered “personal” and is maintained in preference to the landlord’s fungible property interest in the same object.

This theory is very useful for application to the field of virtual property, especially since it draws no distinction between real world and virtual-world property. It is equally easily applied to both instances because the objective value of the property does not need to be determined. For all intents and purposes a person can feel as closely connected to their virtual property as they are to their real world property. It is also useful for explaining why property rights should be granted to players with regard to their avatars. People feel connected to their avatars as projections of their selves, and not purely as things.⁴⁰⁷

When one applies the personhood theory to virtual property, the following major issues are identified by Boone.⁴⁰⁸ Boone firstly sets out to determine whether virtual world property can be classified as personal property with reference to Radin’s theory and secondly he examines the implications that would flow from an affirmative answer to the first issue. The first issue is indeed answered in the affirmative but, as with Radin’s application thereof to real world property, there are also certain exceptions and limitations.⁴⁰⁹ Boone finds that one first needs to determine whether virtual-world property can become bound up with the self and then whether such a connection is “healthy” or, rather, supports human flourishing. Many players do indeed place a high subjective value on their virtual-world property and spend large amounts of money on its acquisition and

object is closely related to one’s personhood if its loss causes pain that cannot be relieved by the object’s replacement. If so, that particular object is bound up with the holder. For instance, if a wedding ring is stolen from a jeweller, insurance proceeds can reimburse the jeweller, but if a wedding ring is stolen from a loving wearer, the price of the replacement will not restore the status quo – perhaps no amount of money can do so’: Radin, MJ, ‘Property and Personhood’ (1982) 34 *Stan L Rev* 957, 959.

³⁹⁷ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 724.

³⁹⁸ ‘Constitutive’ or ‘self-constitution’ can be used interchangeably with ‘personal’ in terms of Radin’s theory. Radin notes in the introduction to *Reinterpreting Property*, which she wrote after her initial ‘Property and Personhood’ article, that she maybe should rather have referred to ‘personal property’ as ‘constitutive’, since ‘personal property’ already means something else: Radin, MJ, *Reinterpreting Property* (1993) 2.

³⁹⁹ Radin, MJ, ‘The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood’ (1995) 74 *Or L Rev* 423, 426.

⁴⁰⁰ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 726.

⁴⁰¹ Radin, MJ, ‘Property and Personhood’ (1982) 34 *Stan L Rev* 957, 961. See also Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 726.

⁴⁰² Although Radin initially used the criterion of ‘health’ or ‘healthy self-constitution’, she later redefined the criterion to ‘human flourishing’. See Radin, MJ, *Reinterpreting Property* (1993) 5.

⁴⁰³ Radin, MJ, ‘Property and Personhood’ (1982) 34 *Stan L Rev* 957, 961.

⁴⁰⁴ Radin, MJ, ‘Property and Personhood’ (1982) 34 *Stan L Rev* 957, 961. This distinction between ‘fetishistic’ and ‘healthy’ connections between objects and persons is of the utmost importance when applied to virtual property, especially because one finds such fetishistic connections between many players and their virtual property.

⁴⁰⁵ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 729.

⁴⁰⁶ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 730.

⁴⁰⁷ The concept of the avatar as cyborg is discussed by Lastowka and Hunter as an example of the avatar being a mechanical extension of one’s persona. See Lastowka, FG and Hunter D, ‘The Laws of the Virtual Worlds’ (2004) 92 *CLR* 1, 63. Also see the discussion in Ertank, W, *Property in Virtual Worlds* 2012 Chapter 2.

⁴⁰⁸ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 730-744.

⁴⁰⁹ Boone, MS, ‘Virtual Property and Personhood’ (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 731.

maintenance.⁴¹⁰ In addition to this, it is clear that individuals also strongly identify with certain virtual-world objects and particularly with avatars.⁴¹¹ While not all players would identify with their virtual-world property or avatars to such an extent that they would be considered to meet the required blurring of subject-object relationship required by the theory, it is likely that some players will indeed meet this requirement.⁴¹² Apart from meeting the requirement of identifying with and showing a self-constitutive connection to his or her virtual property, a player would still need to show that the connection supported human flourishing (or was healthy), before the property in question could be considered to be regarded as “personal”.⁴¹³ In other words, just like with real world property, the question whether virtual property can be regarded as personal or fungible is not clear cut and will always be subject to a factual determination of the specific circumstances. Just as a wedding ring will be regarded as personal for one person and fungible for another in the real world, the same will apply in the virtual world. When one person buys and sells virtual real estate for monetary gain, he or she will have a fungible property interest in it. However, if a player builds or rents a virtual home, he or she may regard the virtual home as “personal”, depending on whether the connection between the subject and object is healthy or promotes human flourishing or not.

Boone mentions the generally negative attitude of society towards the relationship between players and their virtual property and finds that even though there may be instances where there is a fetishistic connection between player and virtual property, it would seem that the negative attitude is fanned by the sensationalistic nature of media reporting that tends to focus on the dark side of virtual world interaction.⁴¹⁴ It should therefore not be *the* determining factor in the enquiry whether virtual property could add to human flourishing.

Once it is accepted that recognition and protection of property might be justified because it has a constitutive effect on the self, there would seem to be a normative basis for accepting that property can be claimed in such things as virtual chattels, virtual real estate and, by extension, avatars.⁴¹⁵ As with its real world counterpart, if virtual property is personal according to Radin’s theory, it can also affect property rights in the same two ways. These are firstly, that a personal property interest in a virtual property object may be given preferential treatment to a fungible property interest held by another party and, secondly, that the same personal property might be subject to restricted alienability.⁴¹⁶

5 The virtual world application

When applied to the virtual world, one would most likely encounter these effects in the following two ways. In terms of the competing property interests, these interests would in all probability manifest as disputes between players and developers in the virtual worlds. If a player’s virtual-world property is personal, it would follow that the property rights of the virtual-world developers would be fungible and therefore the player’s rights would be favoured and enjoy more protection.⁴¹⁷ This situation would also apply if two players both have a property interest in the same virtual property. As a practical example, this scenario is like the one of rent control in the real world, where both a tenant and landlord hold property interests in the same residential rental unit. In this case, rent control legislation protects the personal interests of the tenant to the detriment of the landlord’s fungible property rights.⁴¹⁸ In the virtual world, the player’s property rights in virtual-world objects are analogous to those of the tenant, while the property rights of the developer are analogous to those of the landlord.

The problem with this application of the personhood theory is that due to the interdependence of these rights, the protection of the one person’s right will lead to the detriment of the other person. In the virtual world, the player’s rights would be protected to the detriment of those of the developer.⁴¹⁹ Although this would not seem to be unreasonable or create a problem *per se*, there are those who think that this protection of players’ rights to the detriment of those of the developer could have a negative knock-on effect by stunting both the growth of virtual worlds and their concomitant economies.⁴²⁰

⁴¹⁰ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 731. See also the discussion regarding the economy of virtual worlds in Erlank W *Property in Virtual Worlds* 2012 at 4 2.

⁴¹¹ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 63-68. See also Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 731.

⁴¹² Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 731.

⁴¹³ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 732.

⁴¹⁴ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 733-734.

⁴¹⁵ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 49.

⁴¹⁶ For an in-depth discussion on the possible pitfalls and consequences of finding that virtual world property is personal, see Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 736-744. Boone makes use of one of Bartle’s pitfalls regarding virtual property. See Bartle, RA, *Pitfalls of Virtual Property* (2004) 1, 9.

⁴¹⁷ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 737.

⁴¹⁸ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 737.

⁴¹⁹ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 738.

⁴²⁰ For an in-depth discussion see Bartle, RA, *Pitfalls of Virtual Property* (2004) 1 as well as Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 738, 741.

The second effect of the application of the personhood theory to virtual worlds is that it might result in the inalienability of virtual world property. An argument could be made against this application of the personality theory, which could result in the effect that due to the close personal relationship a player has with her avatar, broad alienability would not be justified.⁴²¹ In terms of this argument, virtual property could be given away, but not sold.⁴²² However, wedding rings and even non-essential body parts are accepted as being alienable.

The result of determining that virtual property could be market-inalienable could stand in direct opposition to the reason why players would want property rights in their virtual items. Therefore, the issue of real money trade or the (il)legality selling one's virtual property would possibly fall away if these items are finally determined to be inalienable.⁴²³ If the goal of the acquisition of property rights is the commodification and market-alienability of virtual property, the "necessary prerequisites to rights of alienation that enable real money transfer are antithetical to personal property under the personhood theory."⁴²⁴ Consequently, Boone argues that the application of the personhood theory to virtual property would not provide support for those players who seek the right to sell their virtual world property.⁴²⁵ However, it would be beneficial for players who really have a personal connection to their virtual property and would act to protect their interests against the fungible interests of the developers who wish to impose on their rights.

This negative view of the application of the personhood theory to the acquisition of the right to alienate virtual property could be viewed in a more positive way. One should bear in mind that the theory is not applied strictly as a dichotomy between personal and fungible property and that not all personal property is considered inalienable simply because of its personal importance. It will always be an *ad hoc* question of fact to determine the level of personhood protection that is required and the categorisation of a virtual object. In the first case, the question will be whether the object is so closely connected to the person as to be considered entirely personal – this will not always be the case. Secondly, one must enquire whether, even though the object is regarded as personal, it is also market-inalienable. This will not always be the case either. Therefore, the personhood theory could justify in certain instances the protection of property interests for players who do wish to sell their "personal" virtual property.⁴²⁶ If one were to re-examine the second consequence of the application of the personhood theory and not accept that every object that is personal is also market-inalienable, then alienability should not pose an obstacle to the application of the theory, especially not when one considers the virtual world relationship between the avatar and player.⁴²⁷ This (modern) reluctance to consider human life as the subject of property law should not be a barrier to accept avatars as alienable, even though the level of realism inside virtual worlds is continually increasing.⁴²⁸

Boone concludes that individuals are moving more of their activities online into computer-mediated space and that more of the physical world is becoming computer-mediated.⁴²⁹ While the application of Radin's theory does not provide any concrete answers to the justification issue, it does form the basis for further argument and adaptations of the theory to be more properly moulded to the requirements of virtual worlds and the changes and developments in society.

6 Conclusion

The focus in the preceding section has been on making a decision on how to allocate ownership of virtual property rights when there are competing interests. There is however, another way in which this can be addressed and especially in the case where one prefers to explain virtual property rights in terms of contract, rather than property. This is done by simultaneously allocating different types of ownership (or property-like contractual rights) in the virtual property to the competing parties. As with the (civil law) use of *dominium directum* and *dominium utile* to explain concurrent ownership of multiple parties to the same property, the same can be applied

⁴²¹ In other words, it could be argued that in certain instances virtual property could be regarded as market-inalienable.

⁴²² Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 741.

⁴²³ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 741.

⁴²⁴ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 742.

⁴²⁵ Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 742.

⁴²⁶ Much like in the real world where people would otherwise not be able to sell their family homes.

⁴²⁷ Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 49.

⁴²⁸ Eventually, as the barrier between the real world and the virtual one diminishes, this statement might need to be reconsidered. If a player should be so closely linked to the identity of his or her avatar that there could be physical and psychological repercussions from the separation of the two (as is illustrated in a number of new sci-fi movies), then the ethics of alienability of avatars would have to be reconsidered. For a more detailed discussion about the legal and ethical repercussions of personifying avatars, see the discussion about cyborgs, wizards and cyber civil rights in Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1, 51-72.

⁴²⁹ Boone states that '[v]irtual worlds can be thought of as the ultimate embodiment of a computer-mediated world. As virtual worlds exist completely within a system of computers, every aspect within those worlds is computer-mediated. Examining the individual as an avatar in what could be fairly characterized as the most highly computer mediated environment currently existing may provide insight into how a future of increasing computer mediation will impact individuals. Increasing computer mediation of human activity provides increasing possibilities of interference with an individual's ability to act and thus with an individual's ability to self-constitute themselves': Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715, 747. He uses the term 'computer-mediated' in the same way as the term 'computer-moderated' has been used in Erlank, W., *Property in Virtual Worlds* 2012 Chapter 2.

to virtual property. Where a lord had *dominium directum* in land and a vassal had *dominium utile* the application of the personality theory will mean that the lord had only a fungible property interest, while the vassal had a personal property interest. The same can be applied to virtual property. The developer as lord will have a fungible property interest in the form of *dominium directum* in the virtual property, while the user via his or her avatar will have a personal property interest in the form of *dominium utile*. However, when the personality theory is applied in the circumstances a necessary reconceptualization of the importance of the *dominium directum* versus *utile* needs to be made. This means that the content of the *dominium utile* being assigned the stronger “personal” property interest of the personality theory will result in the *dominium utile* being the better protected right to the detriment of the *dominium directum* and therefore fungible property interest of the developer. If this is the case, the developer will not necessarily be in any worse position than before, since it still remains the nominal owner of all property inside a virtual world, but the user is put into a better position by becoming a beneficial or equitable owner of the virtual property and the associated incidences of ownership that goes with it. This approach has the added benefit that the economic value of the virtual property can be exploited in such a way as to also promote the utilitarian justification of the felicific calculus.

To conclude, a number of different explanations of property rights and ownership of virtual property has been discussed. While no single explanation is identified as the preferred description of virtual property ownership, it should be clear that in all cases there is an imperative that the user’s interest in virtual property should be afforded at the very least property-like protection, fragmented ownership or even full ownership – albeit possibly only inside a virtual world and not necessarily on the outside.

References

1. Balkin, JM, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Va L Rev* 2043
2. Barfield, W, 'On Money, Taxes, and Property in Virtual Reality' (2008) *Springerlink online article* no 10.1007/s10055-008-0097-7 1
3. Bartle, RA, *Pitfalls of Virtual Reality* (2004) 1
4. Boone, MS, 'Virtual Property and Personhood' (2008) 24 *Santa Clara Computer & High Tech LJ* 715
5. *Bragg v Linden Research Inc* 487 FSupp 2d 593 (ED Pa 2007)
6. Castronova, E, 'On Virtual Economies' (2003) 3 *The International Journal of Computer Gaming Research*
7. Castronova, E, 'Virtual Worlds: A First-hand Account of Market and Society on the Cyberian Frontier' (2001) *No 618 CESifo Working Paper*
8. Deenihan, KE, 'Leave Those Orcs Alone: Property Rights in Virtual Worlds' 2008 *SSRN* 1
9. Edelmann, P, 'Framing Virtual Law' 2005 *Proceedings of DiGRA 2005 Conference: Changing Views – Worlds in Play* 1
10. Erlank, W, *Property in Virtual Worlds* (Stellenbosch, University of Stellenbosch, 2012)
11. Fairfield, JAT, 'Virtual Property' (2005) 85 *BUL Rev* 1047
12. Fairfield, JAT, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds' (2008) 53 *McGill LJ* 427
13. Gatt, A, 'Electronic Commerce – Click-Wrap Agreements: The Enforceability of Click-Wrap Agreements' (2002) 18 *CLSR* 404
14. Glushko, B, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' (2007) 22 *Berkeley Tech LJ* 251
15. Gray, GC and Nikolakakos, T, 'The Self-Regulation of Virtual Reality: Issues of Voluntary Compliance and Enforcement in the Video Game Industry' (2007) 22 *CJLS* 93
16. Grimmelmann, JTL, 'Virtual Worlds as Comparative Law' (2004) 49 *NYL Sch L Rev* 147
17. Grimmelmann, JTL, 'Virtual World Feudalism' 2009 *The Yale Law Journal Pocket Part* 127
18. Hegel, GWF, *Hegel's Philosophy of Right* (1896, Knox TM trans Oxford, Oxford University Press, 1967)
19. Hohfeld, WN, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) *Yale LJ* 36
20. Jankowich, AE, 'Property and Democracy in Virtual Worlds' (2005) 11 *BUJ Sci & Tech L* 173
21. Kunze, JT, 'Regulating Virtual Worlds Optimally: The Model End User License Agreement' (2008) 7 *NW J Tech & Intell Prop* 101
22. Lastowka, FG and Hunter, D, 'The Laws of the Virtual Worlds' (2004) 92 *CLR* 1
23. Lessig, L, *Code and other Laws of Cyberspace* (New York, Basic Books, 1999)
24. Lessig, L, *Code Version 2.0* (New York, Basic Books, 2006)
25. Morningstar C & Farmer FR “The Lessons of Lucasfilm’s Habitat” in Benedict M (ed) *Cyberspace: First Steps* (1991)
26. Pollitzer, B, 'Serious Business: When Virtual Items Gain Real World Value' 2007 *SSRN* 1
27. Radin, MJ, 'Lacking a Transformative Social Theory: A Response' (1993) 45 *Stan L Rev* 409
28. Radin, MJ, 'Market-Inalienability' (1987) 100 *Harv L Rev* 1849
29. Radin, MJ, 'Property and Personhood' (1982) 34 *Stan L Rev* 957

30. Radin, MJ, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood' (1995) 74 *Or L Rev* 423
31. Radin, MJ, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Cambridge, Harvard University Press, 1996)
32. Radin, MJ, *Reinterpreting Property* (Chicago, University of Chicago Press, 1993)
33. Reuveni, E, 'On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age' (2007) 82 *Indiana LR* 261
34. Schnably, SJ, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45 *Stan L Rev* 347
35. Westbrook, TJ, 'Owned: Finding a Place for Virtual World Property Rights' (2006) 3 *Michigan State LR* 779