

A New Virtual Commons? :

Property in Online Game Objects and Characters

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1 Introduction

Fictions abound in the law. Every legal system develops ideas and notions which assist in reconciling a system of rules, physical realities, and people's expectations. Intellectual property is a particularly good example of this phenomenon: a very convenient and useful notion that there can be 'property', ownable and transferable, in creative works, inventions, and marketplace reputation. Real property also abounds with such ideas, often created to deal with new social and economic relations, such as the 'flying freeholds' of apartment blocks.

Fictions also abound in the imagination. Humans enjoy games and stories. Many enjoy nothing more than to play within a story which they help to create and tell. They are willing to pay for this pleasure. As a result, computer games have become a major market in recent years.¹ With the widespread availability of Internet connections, many games are now being played online, allowing people to share the experience of story-telling and play on an unprecedented scale.

People are also trading real money for game property, creating value in a virtual world. This paper considers whether this new marketplace is creating some new form of property. It presents a very brief history of the development of online

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¹ See e.g. DFC Intelligence, *DFC Intelligence Forecasts Strong Growth For Video Game Industry*, at <http://www.dfcint.com/news/prapril172003.html> (April 17, 2003), which forecasts that the industry "should grow from \$20.7 billion in 2002 to as much as \$30 billion by 2007"; Beth Winegarner, *Game sales hit record highs*, GAMESPOT NEWS, at http://www.gamespot.com/news/2005/01/28/news_6117438.html (Jan. 28, 2005), which reports that sales of software alone reached \$7.3 billion in 2004; and Game Daily Biz, *Video Game Industry Sales Up 21%*, at http://biz.gamedaily.com/features.asp?article_id=10190 (July 28, 2005) which reports that sales for the first half of 2005 have reached record highs.

computer games. It gives an overview of trading in these games, and considers what might go wrong and how the courts might be involved. It considers the legal and theoretical framework within which a claim to property over virtual game objects might be argued. It concludes that if we are seeing the development of some new form of property, it does not fit well into the existing categories of intellectual property but might be best seen as belonging to the community of game developers and players, to counter the increasing tendency towards corporate ownership of culture.

2 Virtual Worlds: A Very Brief History²

These games take many forms. The earliest were text-only, without illustrations, depending on written descriptions to spark the imagination of the player. The places and objects in the game were defined in advance by the creator, and the plot was generally the solving of a series of puzzles, often connected. Due to the limited power of early computers, players played on their own. There was no interaction with other people within the game world itself.

Greater computing power provided the ability to have more than one player in the game. As they moved from solo to shared experiences, inventive programmers added facilities for individuals to add their own creations: new places and things could be brought into being by players. Due to the early technology, these were textual descriptions. As more powerful computers became more affordable, graphics were added to the available tools, and players could see, rather than read about, the “places” they were visiting.

With computer networks came linked play, first on local area networks and then via the Internet. Players can now interact with others in distant locations, often complete strangers, in a wide and increasing variety of games. These offer a different environment to most online interactions, with an emphasis on competition rather than communication.

For the purposes of this paper, it is important to distinguish between various types of games, as the settings, rules and the social norms can be quite different. Some (particularly the older, text-based games), are generally free to play, more co-operative, and play does not involve success or failure. Players often have

² For a full history of the development of computer games, see F. Gregory Lastowka and Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 14-29 (2004); Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435, 439-43; Edward Castranova, *On Virtual Economies*, 6-11 CESifo Working Paper No. 752 (2002), available at http://ssrn.com/abstract_id=338500; for a personal viewpoint, see Richard Bartle, *Virtual Worldliness*, 49 N.Y.L. SCH. L. R. 19, 20-22 (2004).

control over the rules of the game and play for the enjoyment of adopting an alternative identity.

Many of the more recently-developed online games, which usually involve sophisticated computer graphics, require subscriptions, are competitive, and have measures of success or failure (gathering property, advancing in rank or level and status, or quests with defined objectives). The rules of the game are defined by the developers and players cannot change them. The players participate because they like to assume a new identity but also because of the attraction of competition. There are exceptions to these generalizations: some of these environments are not games, requiring struggle and contest, but are “an online place where you can hang out, chat with friends and family, and go dune-bugging.”³ One wide definition of these new ‘places’ is “computer-moderated, persistent environments through and with which multiple individuals may interact simultaneously.”⁴ (This paper does not deal with single-player games, or games that are not persistent, in the sense of continuity of characters and circumstances from session to session.)

2.1 Scarcity in Virtual Worlds: A Feature, Not a Bug

From the perspective of lawyers, economists, and social scientists, these virtual worlds (VWs)⁵ present a laboratory in which to observe humanity operating under different conditions:⁶ “[v]irtual worlds ... may accidentally provide an environment that lends itself well to the testing of legal rules.”⁷ A small minority of these games are set in a Hobbesian war of all against all, but many players and settings emphasize socializing more than violence.⁸

³ Dan Hunter and F. Gregory Lastowka, *To Kill An Avatar*, LEGAL AFFAIRS, Jul.-Aug. 2003, at http://www.legalaffairs.org/issues/July-August-2003/feature_hunter_julaug03.msp.

⁴ Richard A. Bartle, *Pitfalls of Virtual Property*, at <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf>, 2. ‘Persistent’ here means that events continue to happen in the game even when you are not playing.

⁵ Another common abbreviation is MMORPG, for ‘massively multi-player online role-playing game.’

⁶ Daniel Terdiman, *Laying Down the Virtual Law*, WIRED NEWS, at <http://www.wired.com/news/games/0,2101,61188,00.html> (Nov. 13, 2003).

⁷ Caroline Bradley and A. Michael Froomkin, *Virtual Worlds, Real Rules*, 49 N.Y.L. SCH. L. R. 103 (2004).

⁸ *Id.* at 128-130.

One particularly interesting finding is that people tend to prefer playing in a game where there is scarcity: it has “turned out to be a feature, not a bug.”⁹ Designers therefore deliberately make currency and objects such as weapons and food scarce, even creating mechanisms (known as “gold sinks”) to degrade and destroy objects.¹⁰ This may seem odd at first – why should people prefer to deny themselves more opportunity? Within a digital environment, there is no need for scarcity. It must be deliberately imposed by the rules defined by the creators and developers of the world. It seems, however, that there must be some sort of competition over resources in order to create a challenge for players.¹¹

To paraphrase Demsetz, scarcity leads to property: “property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.”¹² In a game world, as in the real world, externalities occur when a player takes something scarce, denying its use to others. We would therefore expect that when objects within a game world are scarce and these objects are desirable or necessary, players will develop mechanisms of ownership and participate in markets to transfer ownership to the person who values the object most. Amongst the motivations which players might have for buying and selling virtual goods are investment, group-play (to stay on par with their online friends), for inflated status, or because the object is otherwise unavailable.¹³

It is important to bear in mind the distinction noted above between different styles of games. Where players have more control over the rules, objects are not likely to be scarce – the rules will allow for infinite duplication. Where rules are controlled by the developers, scarcity is generally imposed in order to provide an

⁹ Julian Dibbell, *The Unreal Estate Boom*, WIRED 11.01, at http://www.wired.com/wired/archive/11.01/gaming_pr.html (Jan. 2003). It seems that scarcity, rather than utility, can be the prime determinant of price: “an innocuous-looking piece of horse crap ... sells for as much as \$400” in *Ultima Online*. *Id.* (In programmer jargon, a ‘bug’ is “[a]n unwanted and unintended property of a program or a piece of hardware”, whereas a feature is its antonym, a “good property or behavior”. *The Jargon File*, at <http://www.catb.org/~esr/jargon/html/B/bug.html> and <http://www.catb.org/~esr/jargon/html/F/feature.html>.)

¹⁰ Dibbell, *supra* note 9.

¹¹ Edward Castranova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, CESIFO WORKING PAPER NO. 618, at <http://papers.ssrn.com/abstract=294828>, at 16.

¹² Harold Demsetz, *Toward a Theory of Property Rights*, 57 THE AMERICAN ECONOMIC REVIEW 347, at 350 (1967).

¹³ Bartle, *supra* note 2, at 39-40.

element of competition and challenge. Games that are played in a co-operative style are generally free to play and do not involve scarcity. Competitive games generally charge a subscription to play and scarcity is part of the appeal. There are exceptions: *Second Life* is an example of a co-operative game which requires a subscription and involves scarcity (imposed in order to create a marketplace).

It is interesting to note that many of the early communitarian/libertarian MOO-style games, where there was no scarcity, nonetheless had concepts of property and ownership.¹⁴ It seems the ideas are hard to completely leave behind, but there does not seem to have been any trading of game objects for money outside of these games. The remainder of this analysis, therefore, does not consider these games.¹⁵

In modern VWs, game property is traded in the real world, for real money. The amounts are significant: one estimate is that the overall aggregate gross domestic product of the major VWs is between \$7 billion and \$12 billion.¹⁶ The amount of money changing hands for a single item can be substantial.¹⁷ There are even reports of digital sweatshops, “where Third World laborers play online games 24/7 in order to create virtual goods that can be sold for cash”.¹⁸

Trading money for game objects, at least on this scale, is a new phenomenon. Game objects are traded in the real world also, from marbles to collectable cards (some of which can be quite valuable), but there is always a physical object to act as a starting point in resolving questions of ownership and property. In the online world, the physical element is not immediately obvious and the virtual object raises complex issues of intellectual property (IP) law.

¹⁴ Lastowka and Hunter, *supra* note 2, at 34.

¹⁵ For a discussion of legal disputes in these contexts, see Jennifer L. Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO*, 2 J. OF COMPUTER-MEDIATED COMM., available at <http://www.ascusc.org/jcmc/vol2/issue1/lambda.html> (1996).

¹⁶ Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES, June 17, 2007. This estimate is based on Castranova, *supra* note 11, at 32-33, which estimates the GNP of one VW at \$135 million. The method is to find the price of an avatar’s level and how many levels are created in an hour of game time, thus giving a figure for hourly wealth creation.

¹⁷ “An island in one virtual world recently sold for \$30,000!” Tom Loftus, *Virtual Worlds Wind Up in Real World’s Courts*, MSNBC.COM, at <http://www.msnbc.msn.com/id/6870901/> (Feb. 7, 2005).

¹⁸ *Id.* See also Bartle, *supra* note 4, at 2.

3 Trading Virtual ‘Property’

Before considering those issues, a brief explanation of the mechanics of game play is useful. To play a commercial VW game, a player must first purchase a copy of the game software itself.¹⁹ She then installs the software and connects to the Internet. Before playing, she designs an ‘avatar’ or ‘character’, a virtual persona to represent oneself in the virtual world, choosing both physical characteristics and skills and attributes. The player chooses how she wants her avatar to look and dress, and what abilities the avatar has. Often this is done by spending ‘points’ from an overall budget. A player cannot excel at everything but must choose between, for example, being strong or smart.

The avatar is then placed in the VW and the player controls its movements and actions. The avatar can interact with other players and with *biots*, game creatures controlled by the game software.²⁰ The avatar generally starts with little or no money or significant abilities and must invest time (and thus subscription fees) in order to be able to engage in any activities of note.²¹

3.1 Trading Within Virtual Worlds

Within the game, an avatar can have property in virtual objects, “with all of the familiar real world features of exclusive ownership, persistence of rights, transfer under conditions of agreement and duress, and a currency system to support trade”.²² Some games, such as *Second Life*, use devices that closely resemble physical property in the real world, like rents on virtual land.²³

The avatar can sell property to biots, some of whom are ‘merchants’ who are programmed to buy and sell. The avatar can also haggle with other avatars. This can be much more difficult, but more profitable, as the biot merchants are programmed to buy low and sell high, leaving space for arbitrage. This trading takes place in defined and well-known areas of the VW.²⁴

¹⁹ Castranova, *supra* note 11, at 9.

²⁰ *Id.* at 11-13.

²¹ Lastowka and Hunter, *supra* note 2, at 38.

²² *Id.* at 30.

²³ Amy Kolz, *Virtual IP Rights Rock Online Gaming World*, LAW.COM, at <http://www.law.com/jsp/article.jsp?id=1101738506769> (Jun. 12, 2004).

²⁴ Lastowka and Hunter, *supra* note 2, at 26-28.

3.2 Trading Outside Virtual Worlds

Trading outside of the VW, for real money, takes three forms. For the first two types of transaction, players strike bargains in third-party websites (such as eBay), most of which use an auction mechanism to decide prices. Money is transferred through credit cards and the electronic payment system PayPal.²⁵

When the sale involves game objects, the players arrange for their game avatars to meet in a marketplace area in the game. The goods are ‘handed over’ – passed from avatar to avatar – there.²⁶ Entire accounts are also sold, with avatars being transferred from one player to another. Here the transaction takes place in the real world, with a username and password changing hands.²⁷ Finally, some game creators have recognized that there is a market here which they should tap into and will directly sell game property for real money.²⁸

Some developers actively try to shut down the real world markets for property in their games.²⁹ The end-user license agreement (EULA) for the VW often prohibits the sale of game property.³⁰ This has not always been straightforward, particularly when the party selling the property does not play the game (and so is not bound by the end-user license agreement).³¹

4 Disputes over Bits

Why should lawyers care about all of this? Is it not just a game? Once real money is involved, there are bound to be transactions that go awry and individuals seeking assistance from the law to resolve disputes. Where there is scarcity, it seems there is also likely to be theft, even in a game, at least where the developers allow it.³² Even where they do not, hackers may circumvent the game to steal property.³³ Fraud is also a very real possibility in any online transaction.³⁴

²⁵ Kolz, *supra* note 23.

²⁶ *Id.*

²⁷ Dibbell, *supra* note 9.

²⁸ MindArk’s *Project Entropia* is an example. *Id.*

²⁹ Dibbell, *supra* note 9; Curt Feldman, *Spot On: Virtual worlds...trouble ahead*, GAMESPOT NEWS, at http://www.gamespot.com/news/2004/06/30/news_6101604.html (Jun. 30, 2004); Miller, *supra* note 2, at 465.

³⁰ Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. R. 63, 78 (2004).

³¹ Bartle, *supra* note 4, at 21.

³² *Id.* at 76.

³³ Dibbell, *supra* note 9.

Disputes over game property may even lead to real world violence – one player in Shanghai stabbed another to death for selling a “dragon sabre” which had been loaned to him,³⁵ and in Brazil, a top gamer was kidnapped and threatened with a gun in order to extort his password and thus steal his account.³⁶

Some countries have begun to engage with these issues in a meaningful way. China, Taiwan and Korea have begun to develop legal regimes for dealing with virtual property, granting players real world rights in virtual goods.³⁷ A Chinese court has “ordered the restitution of one player’s stolen virtual weapons.”³⁸ In the only known American case on the issue, the plaintiffs, who were selling game property, made a Lockean argument that they were selling the time and effort involved in obtaining it. This argument was rejected by the court but no final judgment was given, as the plaintiffs ran out of money.³⁹ Another American case is still ongoing – this involves a player in the game Second Life whose entire “land” holdings were confiscated because of alleged abuse of in-game procedures.⁴⁰

Although we have not yet had definitive rulings on the issue from common law courts, we may be seeing the development of a new form of property. It is clear that *something* is being traded in the real world as part of people’s participation in

³⁴ Cindy Yans, *Virtual Property Brokers promise “We deliver instantly 24 hours a day”*, COMPUTER GAMES MAGAZINE at <http://www.cgonline.com/content/view/21/40/> (October 2004).

³⁵ *Cyber-sabre provokes real death*, AUSTRALIAN IT at <http://australianit.news.com.au/articles/0,7204,12711503%5E15404%5E%5Enbv%5E15306-15322,00.html> (Mar. 31, 2005).

³⁶ Jesus Diaz, *Gang Kidnaps Gamer to Get Password Using Fake Orkut Date*, GIZMODO, July 20, 2007, available at <http://gizmodo.com/gadgets/sex,-crime-and-videogames/gang-kidnaps-gamer-to-get-password-using-fake-orkut-date-280966.php>.

³⁷ Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1084-88 (2005).

³⁸ Kolz, *supra* note 23. According to Gamespot, *supra* note 29, “a player sued because someone hacked the server of a MMOG [massively multi-player online game] and stole his character’s gear. The court ruled that the company was negligent in securing the server and found for the player.” The case is further described in Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2067 (2004), citing *Lawsuit Fires Up in Case of Vanishing Virtual Weapons*, CHINA DAILY, Nov. 20, 2003, at 1, available at http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283094.htm.

³⁹ Bartle, *supra* note 4, at 7.

⁴⁰ Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED, June 18, 2006, available at <http://www.wired.com/print/gaming/virtualworlds/news/2006/05/70909>. More information on the case is available at <http://secondlife.typepad.com/>.

online games. Individuals are prepared to spend large amounts of money on virtual goods. Some can make their living trading in these new spaces and it has formed the basis of the business models of enterprises. There are numerous instances of “virtual” theft and robbery in China, Taiwan and South Korea, where these are taken seriously as real crimes by the police.⁴¹

The fact that people attach sufficient value to these virtual objects to pay money for them implies that they believe that they are obtaining some form of property.⁴² Although many of the vendors dress their sales up as ‘service’, claiming that buyers are exchanging their money for the time of the seller,⁴³ purchasers nonetheless feel that they ‘own’ the item which they pay for.

But what exactly are they obtaining? In physical form, these items are no more than an arrangement of digital information in the memory of a server. These electrical patterns have no value without an infrastructure of technology to give expression to the story which the game tells – the creators of the game, the programmers who make it function and the interconnection of computer networks that enable the player to participate in the shared story. Nor are they secure. The operators of the game can shut the game down and extinguish this property without explanation or justification.⁴⁴

5 Legal Claims to Virtual Property Rights

Of course, the fact that these are simply arrangements of data does not mean that they cannot be the subject of property claims. There are many other examples of “virtual” property in practice: URLs, email accounts and bank accounts are familiar examples.⁴⁵

What distinguishes this market from others is that it generally operates without clear legal rules. Although there are exceptions, such as *Second Life*,⁴⁶ the *Entropia Universe*⁴⁷ and *Sony’s Station Exchange*,⁴⁸ where the game developers

⁴¹ Fairfield, *supra* note 37.

⁴² Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 1, 5 (2007), available at <http://ssrn.com/abstract=981755>.

⁴³ Charles Blazer, *The Five Indicia of Virtual Property* 5 *Pierce L. Rev.* 137, 157-58 (2006).

⁴⁴ Horowitz, *supra* note 42, at 6.

⁴⁵ Fairfield, *supra* note 37, at 1055-8.

⁴⁶ <http://www.secondlife.com>

⁴⁷ <http://www.entropiauniverse.com/>

⁴⁸ <http://stationexchange.station.sony.com/>

allow the exchange of real world currency for in-game currency or the purchase of game items for real money, it is generally a grey market without proper recourse in cases of fraud, misrepresentation, theft or other difficulties. The EULA will normally preclude the acquisition of rights. Even a game such as *Second Life*, which has based its success and media profile on granting players what seem to be intellectual property rights in what they create, reserves the right to delete any and all items from its servers.⁴⁹ This lack of clear rights does not seem, however, to be limiting the development of the market in any significant way, although it has led to calls for clear legal intervention.⁵⁰

The other particular aspect of this market is that what is traded does not fit neatly into established notions of copyright and it is not clear who has proper legal title to it. It may not be the developers of the games. The rights of creators to control the creation and disposal of derivative works based on their original copyrighted creations may not extend far enough to prevent the sale of game items in the real world.⁵¹ Stephens argues that existing statute law does not go far enough to protect game creators from the appropriation or monetization of their intellectual property, which may act as a disincentive to the creation of new games and leads to the use of contract law as a tool for protecting property rights.⁵²

It may not be players. Although their rights have received little legal consideration, video game players have been held not to provide sufficient creative input to found a claim for authorship rights.⁵³ Although this ruling was based on a previous generation of games, and modern online games involve considerable contributions from players, even this may not be enough to give players legal rights in their contributions to games.⁵⁴ However, it may be that a

⁴⁹ Horowitz, *supra* note 42, at 6.

⁵⁰ Blazer, *supra* note 43, at 139.

⁵¹ Mia Garlick, *Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers* 2004-2005 YALE J. L. & TECH. 1, 28-9 (2004-2005).

⁵² Molly Stephens, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators* 80 TEX. L. REV. 1513, 1534 (2002).

⁵³ See Chief Judge Cummings in *Midway Manufacturing Co. v. Artic International, Inc.* 704 F.2d 1009 (7th Cir. 1983), at 1012: "Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture."

⁵⁴ Garlick, *supra* note 51, at 17-8.

broader reading of case law which deals with an earlier generation of games is more appropriate, one which sees the player as “a co-creator of his world.”⁵⁵

6 Theoretical Foundations for Virtual Property

If there is no proper legal basis for determining who has property rights in this new market, we must see what theoretical arguments can be made. There are three principal justifications offered for online property rights: Locke’s labor-desert theory, Hegel’s personality theory, and utilitarianism.

6.1 Locke’s Labour-Desert Theory

Locke argued that “[t]he Labour of [a person’s] Body and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*.”⁵⁶ In other words, a person acquires property through applying their labor to common, ownerless goods. This is the theory most often cited by players as a justification for property in virtual objects,⁵⁷ and was invoked in an attempt to launch a class action against Sony for canceling online auctions for property in EverQuest.⁵⁸

It could be argued that what occurs in the game world is play, not work,⁵⁹ but it is difficult to distinguish clearly between these. Indeed, ‘play’ in a VW can often involve a great deal of ‘work’ in that a great deal of effort is required,⁶⁰ and the value in an advanced character derives from the game time that must be invested in order to build up skills and abilities.⁶¹

Nozick might further object that the players cannot claim property in the entire game simply by playing it, but this does not preclude a claim over a small part of

⁵⁵ Miller, *supra* note 2, at 455.

⁵⁶ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305-306 (Peter Laslett ed., Cambridge University Press 1967).

⁵⁷ Ren Reynolds, *Intellectual Property Rights in Community Based Video Games*, at <http://www.ren-reynolds.com/downloads/RReynolds-MMORPG-IPR.htm> (last visited May 07, 2007).

⁵⁸ Special Correspondent, *Everquest Class Action Threat Over Auction Spat*, THE REGISTER, Jan. 25, 2001, available at http://www.theregister.co.uk/2001/01/25/everquest_class_action_threat_over/.

⁵⁹ Bartle, *supra* note 4, at 6.

⁶⁰ Lastowka and Hunter, *supra* note 2, at 46-47.

⁶¹ T.L. Taylor, “Whose Game is This Anyway?”: *Negotiating Corporate Ownership in a Virtual World*, in F. MÁRYÄ (ED.), *COMPUTER GAMES AND DIGITAL CULTURES CONFERENCE PROCEEDINGS* (2002), at at 232.

the world, such as the player's avatar or the objects which she has created. However, another objection is that property can only be claimed when there is "enough and as good" left for others. A player claiming property over a specific, scarce object denies it to others, both fellow players. She also denies it to the developers, by constraining their freedom to change the game.⁶² Such a claim may be justifiable in the context of a dispute between two players over a particular object, but becomes more difficult where the dispute is between a player and a creator.⁶³

It can be argued that developers have abandoned objects into the game environment, leaving them available for appropriation by players,⁶⁴ but given the level of control which developers retain over these objects, both in a legal sense (under the EULA, as noted above) and in a practical sense (as they can re-configure the game or shut it down at will), this argument does not withstand close scrutiny.

If Lockean theory grants property rights to game objects to anyone, it is to the developers who have invested their labour in creating the game in the first instance. This claim may, of course, be weaker (even to the point of non-existence) in game environments where the players create objects either entirely or by combining previously available items in new, imaginative combinations. In these environments also, players may argue that they are the ones who have created value from an uncultivated common, but the fact of uncultivation does not imply lack of ownership and this type of "labour theory of value" is ultimately unsatisfactory. Therefore, the general rule should be that the labour of game creators should outweigh that of game players in a Lockean calculus.⁶⁵ Although Lockean theory has some application, it is not a basis for property rights in virtual game objects.⁶⁶

6.2 Hegel's Personality Theory

According to Hegel, a person requires property in order to express themselves fully as a human being:

⁶² Erez Ruevini, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age* 82 IND. L.J. 261, 286 (2007).

⁶³ Theodore J. Westbrook, *Owned: Finding a Place for Virtual World Property Rights* 3 MICH. ST. L. REV. 779, 793 (2006).

⁶⁴ *Id.* at 794.

⁶⁵ Horowitz, *supra* note 42, at 9-14 (2007).

⁶⁶ See Lastowka and Hunter, *supra* note 2, at 46-48.

A person must translate his freedom into an external sphere in order to exist as Idea. Personality is the first, still wholly abstract, determination of the absolute and infinite will, and therefore this sphere distinct from the person, the sphere capable of embodying his freedom, is likewise determined as what is immediately different and separable from him.

...

Since my will, as the will of a person, and so as a single will, becomes objective to me in property, property acquires the character of private property; and common property of such a nature that it may be owned by separate person acquires the character of an inherently dissoluble partnership in which the retention of my share is explicitly a matter of my arbitrary preference.⁶⁷

Play, as an “arbitrary preference”, is a fundamental means of self-expression, whether it occurs in the real world or in a virtual world. The level of connection which players feel with their avatar presents a strong argument for recognizing property rights in a VW.⁶⁸ Despite this, players do not tend to rely on Hegelian notions of property.⁶⁹

If they did put forward such arguments, a counter-argument is that the game developers invest a great deal of their own personality in creating the game in the first place, giving them rights in it. If these competing rights need to be balanced against each other, it would seem that the rights of developers would outweigh those of players. The developers are responsible for creating the entire game-world, an act that involves much more investment of personality than creating a character, similar to the difference between the author of a book and the author of a short story.

It can be argued that developers reduce their attachment by letting others play the game, but this, after all, is the point: to share it with others. An author is no less owner of her writings for sharing them with the world. Readers do not own the works they read, nor do players own the games they play.

⁶⁷ G. HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford University Press 1952), 40-42.

⁶⁸ Lastowka and Hunter, *supra* note 2, at 48.

⁶⁹ Bartle, *supra* note 4, at note 14.

There may also be something unhealthy or fetishistic about the attachment which players feel towards their in-game property (consider, for example, the 'dragon sabre' incident mentioned above).⁷⁰ This also points against granting players property rights. Overall, therefore, the Hegelian arguments are not convincing.

6.3 Utilitarianism

In utilitarian theory, property rights should be granted when they increase overall utility or social welfare.⁷¹ This doctrine, and the economic analysis it brings with it, is commonly applied to legal problems, particularly in intellectual property.⁷² The underlying assumption is that granting property rights in an object stimulates more production of that object.⁷³

Given the amounts of money that people are willing to spend on it, it seems that tradable property does improve the game experience for players, which is a strong argument for granting them property rights.⁷⁴ Without these protections, some argue that players will not invest as much time and effort into their game characters and play,⁷⁵ although this ignores the rich creativity which players have shown throughout the development of online games. Utilitarian principles can provide a justification for property rights, as the benefit to the large numbers of players may outweigh the disadvantage to creators, the calculation involved is daunting,⁷⁶ and there are strong counter arguments.

The first is that intellectual property is generally limited in some way (time, subject matter, or scope), and that it is too early to decide where to draw those boundaries.⁷⁷

The second is that we need to consider the interests of game creators, who may lose welfare as a result.⁷⁸ Many game developers would prefer to avoid the complications that might result if litigation should arise over the transfer of

⁷⁰ Westbrook, *supra* note 63, at 799.

⁷¹ Lastowka and Hunter, *supra* note 2, at 43.

⁷² *Id.* at 58-59.

⁷³ *Id.* at 59.

⁷⁴ *Id.* at 59.

⁷⁵ Reuveni, *supra* note 62, at 277.

⁷⁶ Westbrook, *supra* note 63, at 797.

⁷⁷ Lastowka and Hunter, *supra* note 2, at 60.

⁷⁸ *Id.* at 60.

property in a VW.⁷⁹ They would not, generally, like to see courts acknowledge that players have valuable property in the objects in a VW:⁸⁰ “[i]f these assets are lost due to technical problems or a security breach, the developer could be sued if it does not compensate the user.”⁸¹

They also claim that allowing sales may affect their profitability because new players spend money elsewhere buying powerful characters rather than on subscriptions to build their own through play (known as “levelling”⁸²), existing players who object to sale of game objects and characters leave, and developers lose the opportunity to sell property themselves.⁸³ Players’ property rights constrain the freedom of developers to alter the game world.⁸⁴

The physical limitations of an object do not apply in a computer-mediated experience.⁸⁵ The designers of a game have freedom to change the laws of physics within the game.⁸⁶ This freedom may be limited by players having property, creating a form of anti-commons. This occurs, according to Heller, when “multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use.”⁸⁷ In the context of an online game, players with property rights over game objects would be able to exclude changes to the game. Computer software is noted for its rapid obsolescence. Can developers shut down an out-of-date or unprofitable game in which people have made valuable investments?⁸⁸ The constraints this might create are a strong argument against granting property to players.

⁷⁹ Kolz, *supra* note 23.

⁸⁰ Ian McInnes, *The Implications of Property Rights in Virtual Worlds*, PROCEEDINGS OF THE TENTH AMERICAS CONFERENCE ON INFORMATION SYSTEMS 2727, 2727-28 (2004).

⁸¹ *Id.* at 2729.

⁸² Taylor, *supra* note 61, at 231.

⁸³ Stephens, *supra* note 52, at 1519.

⁸⁴ McInnes, *supra* note 80.

⁸⁵ David R. Johnson and David G. Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1401-02 (1996).

⁸⁶ Bartle, *supra* note 4, at 10.

⁸⁷ See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998); see also Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003).

⁸⁸ See Loftus, *supra* note 17.

If the courts choose not to recognize the property which players claim in game objects, this favours the *status quo* and the rights of developers. Given, however, that participation in these game worlds is optional and consensual, it is difficult to argue that this would be unfair or that the basic rights of players would be in some way harmed.

The other aspect of the *status quo* that is protected is the rights of other players. Given that they have contracted to enter the game on the basis of the EULA, it does not seem good law or good policy to allow another party to acquire rights over and above this initial document. If the EULA says that players do not have property in game objects, the courts should not change this agreement without good reason. Conversely, if the EULA does allow players to claim property (as the *Second Life* license does, for example), the courts should enforce this.

7 A New Form of Property?

It is clear that many players and developers believe that in-game ownership is a form of real-world property. It is also clear that some governments are beginning to take this notion seriously, whether law enforcement in Asia or the US Congress, which is considering whether and how to tax income from online games.⁸⁹ We seem to be witnessing the development of a new form of property, but one whose contours are not clear.

In many of these games, the objects that players claim property rights over are not their independent creation and thus cannot be their intellectual property. Even in those instances where the players do participate in the creation of new objects, such as *Second Life*, the applicable contracts intervene to deny most or all out-of-game rights. Nor does this new form of property belong to the developers. Copyright law does not extend far enough for the creators of these games to own or manage the items which are bought and sold.

If there is a new form of property developing, who, then, owns it? Perhaps the answer lies in considering where the value of these goods comes from. It emerges from the participation of all involved – creators and players – in the game. Without this community, there would be no trading in virtual property. Game objects are useless without the game, which is the creation of the developers and players together. In online computer games, the final creative

⁸⁹ See Adam Reuters, *US Congress Launches Probe into Virtual Economies*, at <http://secondlife.reuters.com/stories/2006/10/15/us-congress-launchs-probe-into-virtual-economies/>, cited in Leandra Lederman, *Stranger Than Fiction*: Taxing Virtual Worlds 82 N.Y.U. L. REV. (2007) (forthcoming), available at <http://ssrn.com/abstract=969984>.

work depends as much on the contribution of the individual players as on the ideas of the creators and programmers.

The traditional understanding which copyright law has of the creative process is that of the solitary author, labouring alone and driven by a unique spark of inspiration. The new levels of interaction which the networked computer facilitates illustrates how limited that understanding is. Gamers are simultaneously consumers and producers – sometimes labeled ‘conductors’.⁹⁰

This is a notion that does not fit easily with the idea of the original, Romantic author.⁹¹ Copyright depends on a divide between creator and consumer; online games blur this distinction.⁹² Many game developers actively encourage the filming of ‘machinima’ (animations created within games) and the creation of ‘mods’ (modifications) for their games by players; these may even form the basis of a marketing strategy.⁹³

In this way, VWs may point towards a commonisation of intellectual property that may help to re-balance the increasing trend toward corporate enclosure of shared culture.⁹⁴ However, thus far, we see only the dim outlines of the final shape which that new commons might take. The commercial context within which the debate is held may limit its parameters too much to provide the space in which a movement away from the commoditization of culture.⁹⁵

If there is a new form of property developing here, and neither law nor theory clearly allocates its ownership to any individual, perhaps it belongs to the community, in a commons or commons-like arrangement. Of course, such a statement has little or no practical effect or meaning in the context of modern copyright law, which divides property into content in copyright, with specified, discrete owners, and an ownerless public domain. There is no “community copyright”, although projects such as GNU and Creative Commons attempt to

⁹⁰ Garlick, *supra* note 51, at 4.

⁹¹ *Id.* at 41.

⁹² Reuveni, *supra* note 62, at 272.

⁹³ Christopher Moore, *Commonising the Enclosure: Online Games and Reforming Intellectual Property Regimes* 3 Australian Journal of Emerging Technologies and Society 100, 102-06 (2005).

⁹⁴ *Id.* at 107-111.

⁹⁵ Sara M. Grimes, *Online Multiplayer Games: A Virtual Space for Intellectual Property Debates?* 8 NEW MEDIA SOCIETY 969, 987-88. (2006).

foster at least a facsimile of this notion.⁹⁶ It may be that the online game world can show how this notion can be built from the ground up, by individual actors in a marketplace, rather than as a policy-driven initiative, directed by ideology.

8 Conclusion

With the development of computer game software and networks, a thriving and lucrative market for virtual game objects has emerged. This gives rise to concerns about theft, fraud, and the proper balance of intellectual property rights between developers and players. Much of the debate has focused on whether players should have legal rights to in-game objects.

These rights do not fit neatly into existing definitions of copyright. Nor is there any proper theoretical justification for recognising them. Locke's labour-desert theory fails because of the conditions of scarcity that give rise to the trading and the larger investment of time on the part of game developers. A Hegelian argument that property is an expression of the player's personality cannot succeed when weighed against the interests of game creators. There is a stronger utilitarian argument, but even if the welfare calculation required could be made, when the welfare of game developers is considered, it is also likely to fail.

The volume of trading in game objects indicates that players already consider these objects to be a form of property and that the lack of clearly legal rules is not seriously impeding the market. If some new form of property is emerging, it is perhaps best (at least for the observers in the legal and economic academy) to locate its ownership, for the moment, with the community, as an experiment in understanding how an alternative conception of copyright can develop from market forces rather than from ideology.

⁹⁶ See Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licences and Limited Abandonment of Copyright*, 14 GEO. MASON. L. REV. 271 (2007).