Real money trading on virtual property from the perspective of the United States Copyright Law

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<td>EULA</td>
<td>End-User License agreement</td>
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<td>FTC</td>
<td>Federal Trade Commission</td>
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<td>ICT</td>
<td>Information and Communications Technology</td>
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<td>MMOG</td>
<td>Massively Multiplayer Online Game</td>
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<td>MMORPG</td>
<td>Massively Multiplayer Online Role-Playing Game</td>
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1. Introduction

The advancement and application of internet technology as part of ICT has undoubtedly had a huge influence on the development of the gaming industry. The establishment of a new genre of video games called ‘online games’ proves how video games can evolve by utilizing the internet. In contrast with conventional video games, the main requirement for playing online games is an internet connection. The interconnection of the computer system is required to grant players the possibility of social interaction with peer users while cooperating to accomplish a game’s objective regardless of their geographical locations; this is a feature that cannot be found in conventional video games. Nowadays online games have become a multi-billion-dollar industry whereby more than 500 virtual worlds have been created (including online games), making it one of the most economically promising industries\(^1\). If we look back at the history of online games, the first official online game can be traced back to the 1970s when the first open virtual environment game, called Multi-User Dungeon (hereinafter MUD), was introduced\(^2\). An online game evolved from the text-based game of MUD when Habitat implemented the more sophisticated 2-dimensional graphic game interface in 1987\(^3\). Following the success of Habitat, in 1996 the studio game 3DO company introduced Meridian 59, the first game with a 3-dimensional environment. This successful game was dubbed the first “massive multiplayer” game as it enabled hundreds of players to play at the same time\(^4\).

The terms ‘virtual world’ and ‘virtual property’ are the two most important elements of online gaming and they are also subjects that are frequently discussed by many scholars. Although there is no established definition of these terms, a virtual world in an online game can be defined as a realm of a simulated virtual environment that enables players of an online game to interact socially through the interconnected network. In this virtual environment the player is represented in an animation persona,

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3. ibid., p.1
4. ibid., p.1
which is better known as ‘avatars’. At the same time, virtual property can be loosely interpreted as any particular object that resides in the virtual world and is manifested in a two- or three-dimensional graphical representation in the form of an object (e.g., characters, clothing, a house). More into the virtual property, if we examine company policy regarding virtual property ownership, there are two different approaches that can be taken. The first approach can generally be found in Massively Multiplayer Online Games (hereinafter MMOG), whereby the developer and publisher maintain exclusive rights to all materials related to game and the user is merely granted permission to use them with strict limitations. The fact that the exclusive rights remain in the hands of the publisher means that users cannot create or modify in-game content, nor can they obtain personal monetary benefit from sales of the virtual property. The second approach is implemented in online games that focus more on social interactions, e.g., as in Second Life, where users can modify and upload, submit, and publish User-Generated Content (hereinafter UGC) and retain the copyright.

From an American legal perspective, in some cases publishers of online games still find it difficult to protect their copyright of virtual property. The reason is that US copyright law can only be applied to a limited extent to provide protection for virtual property; furthermore, US courts and legislation do not recognize the term ‘virtual property’. It is ironic that US law does not provide distinct protection for virtual property despite the fact that the market for online games has grown to become so enormous that it involves billions of dollars. The finest example of a profitable online game is the MMORPG World of Warcraft of Blizzard Entertainment, Inc.; this online game has the largest number of subscriptions and according to their 2012 financial report, it earned them an estimated $1.5 billion in revenue. The fact that huge sums of money are involved in the online gaming industry has also led to several issues involving copyright infringement, including the real world commodification of virtual property.

The act of commodification of virtual property with real-world money, which is better-known as Real-Money Trading (hereinafter RMT), is one of the most common


form of legal issue that game publishers faces. The relatively recent court case involving an act of RMT is the case of Blizzard Entertainment v. In Game Dollar, LLC. As a brief summary; in 2007, Blizzard filed a federal lawsuit against In Game Dollar, LLC. As plaintiff, Blizzard claimed that In Game Dollar had committed several acts of copyright infringement against their copyright assets, in addition to the RMT practice. The case was settled on January 28, 2008, when the District Court for the Central District of California issued a consent order. The order consisted of a permanent injunction preventing In Game Dollar from performing any act of virtual property sales related to the World of Warcraft in the future.

In many countries, including the United States, the discussion of whether virtual property is a physical object or a non-physical object is still on-going. Bearing in mind that the market in online games involves a billion-dollar industry, the threat of malicious activity that infringes the copyrights of games, i.e., RMT, harms the interests of rightful copyright owners and has become an important legal issue. The legal protection of virtual property is crucial, as game publishers need to protect their assets.

1.1 Aim of this thesis

In this thesis, I research the position that US copyright law takes on protecting virtual property from acts of infringement and, more specifically, infringements that take the form of RMT.

1.2 Research question:

The main research question examined in this thesis is: ‘Does current US copyright law provide adequate protection for virtual property in confronting real-money trading?’ Furthermore, in order to respond to the research question coherently and to be able to draw conclusions regarding the central question, several subsidiary questions will also be discussed:

- How should the main characteristics of the virtual world and virtual property be defined and identified?
- And what is a EULA and what role does it play in online gaming?
- What is RMT and how can it harm the interests of game publishers?
- How does US copyright law address virtual property and the practice of RMT?
1.3 Methodology:

In order to be able to answer the main question and the subsidiary questions of this thesis, I use the methodology of a qualitative literature study, including books, journals, articles, online blog& magazine, and publishers’ contracts (EULA). Furthermore, I focus on the United States of America’s copyright law as the main source of a regulatory framework for analyzing the main theme of this thesis which relates to the act of virtual property copyright infringement, more specifically to the practice of RMT.

1.4 Thesis Structure:

This thesis contains five chapters, each of which discusses the relevant points that are necessary to answer the main research question.

I. The first chapter consists of an introduction to this thesis, the main research question and subsidiary questions, the aim of the thesis, and the methodology of writing used to complete the thesis.

II. In the second chapter, I attempt to define and identify the main characteristics of the virtual world and virtual property, the ownership of virtual property based on the EULA, and the position and enforceability power of the EULA as a form of contract.

III. The third chapter discusses the act of virtual property commodification (RMT), which is presumably is categorized as a part of copyright infringement. Therefore I will briefly define what is RMT and its background, and how it can harm the interests of game publishers, and the point of view from game publishers in regard to this issue.

IV. In the fourth chapter I analyze the relevant chapters of copyright law that are applicable to providing virtual property with protection. It also includes a discussion of the virtual world and virtual property as copyright material, the expectation that RMT practice will be confronted and exclusive rights will be enforced, and the possibility of justification of user’s RMT practice from the perspective of US copyright law.

V. In the fifth chapter I provide a summary and conclusion as well as attempting to finally answer subsidiary questions and the main research question of this thesis,
‘Does current US copyright law provide adequate protection for the virtual property of game publishers in confronting real-money trading?’
2. Online Gaming and Preliminary Issues

In order to understand and to be able to properly research the United States Copyright Law for protecting virtual property, it is important to have a clear comprehension of online gaming concepts which differ from general video games. These include: the virtual world, virtual property and – more importantly – the End-User License Agreement (hereinafter the EULA). The first section of this chapter provides an insight into virtual worlds, definitions and differentiation categories of the virtual world in online games. Later in the second section, the definition and characteristics of virtual property are described, as well as the issue of virtual property ownership. Following the overview of the virtual world and virtual property, the last section of this chapter focuses on the EULA as the contract agreement to which every user must agree before entering into an online game, and a discussion of its enforceability vis-à-vis users.

2. 1. Virtual world

2.1.1 Definitions and characteristics

For a general understanding of the definition of the virtual world, we can start by referring to the online encyclopedia ‘Wikipedia’, as this defines the virtual world as “an online community that takes the form of a computer-based simulated environment through which users can interact with one another and use and create objects”5.

In an overview, the United States Federal Trade Commission (FTC) stated that “online virtual worlds blend three-dimensional or 3D gaming environments with elements of online social networking, allowing their users to interact in and shape their own online content. Through avatars, virtual world users socialize, network, play, and often conduct business in graphics-intensive landscapes, using text or voice chat, sounds and gestures, and video”6.

According to Bobby Glushko, the virtual world is a simulated environment that possesses five main characteristics; first, the virtual world is shared: this means that

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the virtual world can accommodate multiple users who use the same environment at the same time\textsuperscript{7}. Second, the virtual world is represented in a Graphical User Interface (GUI) that enables users to experience the virtual world through graphic presentation\textsuperscript{8}. Third, the virtual world is immediate, which means that all actions of users take place simultaneously\textsuperscript{9}. Fourth, the virtual world is persistent, meaning that the virtual world is independent and will continue to exist whether or not the user is logged in\textsuperscript{10}. Last, the virtual world is interactive or involves social interaction. This last characteristic allows multiple users to interact socially and communicate through the internet connection\textsuperscript{11}.

More specifically, the virtual world refers to online games. Theodore Westbrook describes a virtual world in the following terms: “A virtual world, often (though certainly not always) created and maintained as an online game, is a digital representation of a physical space”\textsuperscript{12}. Moreover, he describes the distinctive characteristics of the virtual world of online games as “Essentially, it is a host location that mimics aspects of our own universe. When the user of a personal computer (“PC”) logs into a virtual world, he is then represented by a visual depiction that acts as his proxy within this world, obeying his keyed and clicked commands. Unlike the typical console or non-networked PC game atmosphere, a virtual world is host to many such representative proxies, known as “avatars”, ranging from a few to over one million. These avatars perform various activities; they interact through communication, they move about the virtual world, and they manipulate the various aspects of the world that have been designed for such manipulation”\textsuperscript{13}.

Though the exact definition of the virtual world is still ambiguous, from the various definitions mentioned above the conclusion can be drawn that the virtual world is a simulated environment that enables users to interact socially in real time, while most of the time it also refers to an online game. However, bearing in mind that the main feature of the virtual world is interactivity, the application of the virtual world in the


\textsuperscript{8} ibid., p.253.

\textsuperscript{9} ibid., p.253.

\textsuperscript{10} ibid., p.253.

\textsuperscript{11} ibid., p.253.


\textsuperscript{13} ibid., p.783.
broadest sense can also contribute to such areas as education by providing a virtual environment that enables students to attend classes regardless of location, time, or disability (e.g., interactive learning in a virtual class)\textsuperscript{14}. To limit the scope of the discussion, the term for the virtual world in this thesis will be limited to the virtual world as in online games.

2.1.2. Virtual world within the context of online games

The scope of the virtual world for an online game can be divided into two main categories. First there is the online game without pre-determined goals and a specific objective; this game usually focuses more on social interaction and depicts the daily activity of users through avatars\textsuperscript{15}. This category of online game is also known as Massively Multiplayer Online Social Game (hereinafter MMOSG), the most notable example of which is the Sims Online and Second Life. One of the reasons why Second Life has become such a popular MMOSG is because the game publisher, Linden Research, Inc., provides users with more freedom to express their creativity. This is reflected in the Linden policy of encouraging independent creation by providing users with coding tools that are necessary to create an in-game item; this approach encourages more social interaction and stimulates micro-transactions among users\textsuperscript{16}. Second Life-users are allowed to upload and publish their UGC though the server and website while still retaining the intellectual property rights. Moreover, the submitted UGC is protected under applicable law\textsuperscript{17}.

The second category is that of online games with a specific theme and a scripted story. Gameplay is generally based on a scripted quest with diverse background themes, ranging from a medieval fantasy world, e.g., Word of Warcraft, to futuristic science fiction, e.g., EVE online. In this type of game users are expected to invest hundreds of hours to “power-up” their avatar. The stronger their avatar as their persona in the game, the more capable they become in socializing with other players


\textsuperscript{16} ibid., p. 266.

(with a capacity to create guilds, carry out transactions, etc.). This type of online game is known as MMORPG.

The above classification covers the most common genre of online games that can be found on today’s market. Although there is also another class of online games, such as First Person Shooter (FPS) or Massively Multiplayer Rhythm Online Game (MMORG), in most instances online gaming refers to either MMO SG or MMORPG. This section discusses the main categories of online games, i.e., MMO SG and MMORPG. It is important to be able to differentiate between these categories, as MMO SG and MMORPG have a different approach with regard to ownership of virtual property based on the EULA.

**2. 2. Virtual property**

**2.2.1. Definitions and characteristics**

Professor Fairfield describes virtual property as a computer code that, when processed in the virtual world environment, is embodied in an object with characteristics similar to real-world land or chattel\(^\text{18}\). Furthermore, Professor Fairfield also asserts that, basically, virtual property has the same characteristics as real-world property, which are: rivalrousness, persistence, and interconnectivity\(^\text{19}\). Based on the above-mentioned description of Professor Fairfield, in principle, virtual property is a computer code that manifests in the form of an intangible object that to some extent resembles the characteristics of real-world property. The nature of a computer code is that it is a non-rivalrous resource, implying that if one person holds the code, this necessarily means that another person can also use the code\(^\text{20}\). Moreover, the non-rivalrousness characteristic means the code can be freely reproduced and distributed at nearly zero costs\(^\text{21}\). On the contrary, while virtual property is, at its core, also a computer code, it does have the characteristic of rivalrousness. The characteristic of rivalrousness enables the code to impede other


\(^{19}\) ibid., p.1053.

\(^{20}\) ibid., p.1053.
persons from using the same object, thus making it available only to one designated person\(^{22}\). For example, in the case of an MP3 file, a person can download, store and listen to an MP3 file without affecting another person’s ability to do the same, while with virtual property, if one person has possession of specific virtual property (i.e., an online game character), then another person is restricted from using the same character.

The second characteristic of virtual property is persistence. Resembling the characteristic of the real world, the persistence characteristic of virtual property means that virtual property continues to exist even when the user is no longer connected to the internet\(^{23}\). Virtual property as a computer code does not disappear after being used only once and it is not restricted to one specific computer\(^{24}\). For instance, an account on World of Warcraft can be accessed on any installed computer with an internet connection; also, the data of the account will always be stored on the game server even after the player has logged out.

The third characteristic is interconnectivity. It should be borne in mind that, according to the laws of physics, items of real-world property interact with and affect one another\(^{25}\). Similarly, a code can be made interconnected in such a way that, although only one person may control it, other individuals can also experience it\(^{26}\). This characteristic means that, although only one person possesses a given item of virtual property, other persons who reside in exactly the same location of virtual environment can also experience and even benefit from the same item.

The above-mentioned three main characteristics of virtual property described by Professor Fairfield closely resemble the characteristics of real-world property. He also claims that, like real-world property, the characteristic of rivalrousness allows users to invest in virtual property without fear that another party can take it away\(^{27}\); the characteristic of persistence gives the assurance that investments made in virtual property will last for a certain period \(^{28}\); and lastly, the characteristic of interconnectivity will increase the value of virtual property due to network effects.

\(^{22}\) ibid., p.1054.
\(^{23}\) ibid., p.1054.
\(^{24}\) ibid., p.1054.
\(^{25}\) ibid., p.1054.
\(^{26}\) ibid., p.1054.
whereby other people are invited to experience the same object, thus making it more desirable\(^{29}\).

In order to identify virtual property worthy of legal protection, Charles Blazer proposed ‘the five indicia of virtual property’, by adding “secondary market” and “value added by users”\(^{30}\). According to Blazer, the first three main characteristics of virtual property as mentioned by Fairfield define the resemblances between real-world property and virtual property, while the addition of the other two characteristics is based on economic interests and potential claims to natural rights surrounding virtual property disputes\(^{31}\). With respect to the first additional characteristic of secondary markets, Blazer claims that the existence of a secondary market becomes possible as the market recognizes the significant economic value that is embedded within virtual property\(^{32}\). Thus, the enormous revenue potential of a secondary market will stimulate the development of a new business model based on virtual property trading. However, the absence of the additional characteristic of secondary markets should not form an obstacle to recognizing something as virtual property, as it is merely a supplemental characteristic\(^{33}\). With the fifth characteristic Blazer underlines the similarities with the principle of co-authorship. By adding to or enhancing a certain value that reflects their collective creativity to already existing property, multiple users may assume that they have obtained ownership\(^{34}\). Blazer also pointed out that the legal justification for protecting players’ property interests may issue from a consideration of the amount of time and money players have spent on a game (based on the Lockean labor theory)\(^{35}\). However, in essence, the desire for legal protection of players’ property interests arises from the sense of ownership, security, utility, and value that stimulates users’ confidence to spend resources in the virtual world, rather than from a raw calculation of the amount of time and money resource spent\(^{36}\).

\(^{29}\) ibid., p.1055.


\(^{31}\) ibid., p.141.

\(^{32}\) ibid., p.146.

\(^{33}\) ibid., p. 147.

\(^{34}\) ibid., p.147.


\(^{36}\) ibid., p.149.
From Fairfield’s characteristics of virtual property as mentioned above, it can be said that the definition of virtual property is broad. Virtual property is not necessarily restricted to virtual objects that mimic their real-world counterparts, but also includes every virtual resource that shares the characteristics of rivalrousness, persistence, and interconnectivity. The scope of virtual property consists of Uniform Resource Locator (URL), e-mail accounts, internet domain names, and even bank accounts can be regarded as an example of virtual property. The scope of online games is such that avatars, as bearers of exactly the same characteristics, are also considered a part of virtual property. Moreover, unlike other forms of virtual property, where there is no secondary market and enhancement is not possible, avatars do possess the fourth and fifth indicia mentioned by Blazer thus making them worthy of legal protection.

2.2.2. The ownership of virtual property

Because virtual property in online games is regarded as an asset, both game publishers and game users seek to obtain all possible rights in relation to virtual property. In this matter, game publishers argue that, considering the size of the investments they have made in developing their games, they are the most appropriate party for whom virtual property rights should be reserved. Users counter this argument by claiming specifically that they, as players, have invested significant amounts of time and money in the games, which means they have a right to their avatars and their virtual property (based on the Lockean labor theory).

The most plausible solution for solving problems relating to decisions on ownership of virtual property is generally to refer to the EULA. However, EULAs that serve as guidelines in relation to the ownership of virtual property can also be classified according to two different approaches: developer-owned property (traditional model) and user-retained ownership (new model). The first approach can be found in most MMORPG, whereby the game publisher retains all aspects of the game, even to the extent of forcing users to hand over their intellectual property rights to user-modified

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items to the game publisher\textsuperscript{39}. An example of an online game with this EULA approach written into the ownership clauses is World of Warcraft.

“All rights and title in and to the service (including without limitation any user account, titles, computer codes, themes, objects, characters, character names, stories, dialogue, catchphrases, locations, concepts, artwork, animations, sounds, musical compositions, audiovisual effects, methods of operation, moral rights, any related documentation, “applets”, transcripts of chatrooms, character profile information, recordings of the game) are owned by Blizzard or its licensors. The game and the service are protected by United States and international laws, and may contain certain licensed materials in which Blizzard’s licensors may enforce their rights in the event of any violations of this agreement”\textsuperscript{40}.

In the second approach, users are permitted to possess intellectual property rights to virtual property if they are the creator of those items\textsuperscript{41}. To date, the only online game that applies this is Second Life. The EULA of Second Life states:

“You retain any and all Intellectual Property Rights you already hold under applicable law in Content you upload, publish, and submit to or through the Servers, Websites, and other areas of the Service, subject to the rights, licenses, and other terms of this Agreement, including any underlying rights of other users or Linden Lab in Content that you may use or modify”\textsuperscript{42}.

Moreover, Linden Research, as game publisher, even encourages user-ownership in virtual property by providing users with item-editing tools that can be used to create UGC. This approach grants users the possibility of attaining a copyright for any user’s personal creation in the Second Life Environment. The user is rightfully entitled as the creator (author) of this content and gains significant control regarding it, including commercialization.

The discussion in this section is limited to ownership of virtual property seen through the lens of a EULA, which highlights a different approach to viewing ownership of


virtual property. In Chapter 4 I shall revisit the topic of virtual property the transfer of ownership from the perspective of Copyright Law of the United States.

2. 3. End-User License Agreement

One noteworthy aspect of living in the real world is the submission of citizens to rules imposed by the State, which generally establish minimum standards for coexistence in a large group. Similarly to its real-world counterpart, a EULA also governs the behavior of users. The EULA is a compilation of contract clauses that govern the relationship between the parties, that is, between the user and the game publisher (as platform owner), and the relationship between peer users.

In general, software EULAs, including those for online games, are presented in the form of graphic notification windows that appear during the installation step of a software program. The user is required to read the presented terms of the license and the installation process can only be completed after the user has ticked the box indicating that he agrees to comply with the terms. On the negative side, a EULA can be considered as an unfair contract since the implementation of a EULA is rather similar to an ‘adhesion contract’, which means it leaves game publishers with much greater power. This is unfair from the perspective of users, as they are obliged to submit to clauses without being given any other option. For example, most EULAs found in online games state that users do not have any rights to materials from within the game (e.g., items, gold, avatars); moreover, a game publisher has the right to terminate an account at will.

By means of clauses in the EULA, game publishers intend to regulate the relationship with users within the context of licensor and licensee. An important factor is that

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44. ibid., p.259
45. ibid., p.259.
46. “A standard form contract drafted by one party (usually a business with stronger bargaining power) and signed by the weaker party (usually a consumer in need of goods or services), who must adhere to the contract and therefore does not have the power to negotiate or modify the terms of the contract”. “Adhesion Contract (Contract of Adhesion).” Overview. Legal Information Institute. Cornell Law School, 19Aug. 2010. Web. Sep. 2012. <http://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion>
game publishers implement the set of rules in the EULA in order to avoid the risk of unwanted behavior on the part of users that may harm the game publishers' interests. In general, the clauses in an online game EULA are designed to regulate such aspects as user behavior and the rights and duties of both parties. Taking the EULA clauses of Second Life and World of Warcraft as examples, in general, the scope of the clauses includes general provisions, terms of the service provided, accounts, ownership, limitation of liability, player conduct, privacy, and termination of the contract. Subjectively, this broad range of limitations is understandable, since the game developer has invested significant amounts of material (hardware, software, etc) and non-material resources (time) in creating the proposed virtual environment.

2.3.1. The enforceability of EULAs

Basically, a EULA is a contract containing terms that specify the relationship between a game publisher and a user. As such contracts are agreed upon by the parties, it is appropriate to realize that these contracts can be used for finding an enforceable solution when legal disputes arise. However, courts can vary and different judges may have different opinions in determining whether the enforceability of the EULA under consideration is conscionable. A EULA is a partial contract as users are faced with the option of “take it or leave it”. This is reflected by the fact that users – if they want to access the virtual world – are subject to coercion and are left without any bargaining power against unreasonable clauses. These are, as mentioned above, contracts of adhesion and they do not represent an agreement by both parties, but rather the imposition of clauses on users by game publishers. However, in general, click-wrap contracts, including EULAs for online games, are enforceable. Moreover, the EULA itself can be considered a personal document, making it enforceable under the statute of fraud, and courts usually maintain the position that a click-wrap contract (EULA) is enforceable as long as the terms are clear and acceptance is unambiguous, regardless of whether the user

I am referring here to EULA clauses that can be found in most popular online games. I took the EULA of Second Life and World of Warcraft as examples.


ibid., p.11
actually read them. Although courts in the United States generally do uphold EULAs, exceptions do exist, such as in the case of Bragg v. Linden Research, Inc., where clauses in the EULA may be deemed unenforceable by the court. The case was eventually settled amicably between the parties; however, the results of this case have left a mark, as they substantially underline the fact that EULAs can be voided and may be deemed unenforceable if clauses are proven to be unconscionable.

Crucially, one must bear in mind that an EULA is an essential document for regulating “life” in a virtual world. Nevertheless, since this contract is written exclusively by companies, and users have no bargaining power, one might predict that State interventions will ultimately be required to ensure a minimum contractual balance between both parties, as occurred in both above-mentioned cases.


3. Real-Money Trading

There are several driving physiological factors that motivate a player to play and become substantially attached to online gaming\(^{53}\). The sense of competition against other players (mostly in MMORPG) and achievement in one’s virtual identity (avatar)\(^{54}\) are two of the main driving factors that make players willing to invest significant amounts of time and money in the virtual world. However, not everyone is able to devote hundreds of tiresome hours to the virtual world (within this context via online games). In most cases, regular players can only spend a moderate amount of time and have to divide their time over other daily routines, thus hindering their avatar from becoming competitive with other, more dedicated, players. For such players who lack sufficient time to develop their avatars, it should come as no surprise that they seek an alternative option in order to remain competitive in online games by finding other players who are willing to trade virtual items for real money, thus stimulating the commodification of virtual property and RMT practice\(^{55}\).

It is important to note that game publishers’ opinions about the practice of RMT are also divided; some approve of the practice or even facilitate it, while others have declared a prohibition on the practice of RMT\(^{56}\). In the end, a game publisher’s policy regarding the legalization of RMT practice will usually be based upon the business model according to which the company is run. Similarly, there is also a degree of fragmentation in players’ attitudes towards RMT practice. Some players claim they have a right to virtual property and they can do with it whatever they like, including selling it for real money, while the contra opinion of other players is that a game


\(^{54}\) ibid., p.773.


should remain nothing more than a game, and virtual property should not be commodified as this would take all the fun out of playing.

In this chapter I discuss one of the legal issues concerning virtual property: RMT practice. In the first chapter I briefly described the background of RMT practice and the commodification of virtual property. Afterwards, chapter two discussed effects of RMT that harm the interests of game developers in this respect, due to illegal commodification of their copyrighted virtual property. Chapter three discusses the relationship between EULAs and RMT practice.

3.1 The commodification of virtual property and RMT issues

Most online games, especially MMORPG, incorporate virtual property as an indispensable part of the game. Moreover, real-world value is inherent in this virtual property. Many dedicated users regard their virtual property as an investment rather than merely as part of a game. The rationale that stimulates users to treat virtual items as valuable objects is based on their scarcity. The scarcity of certain items means they are harder to obtain; users need to invest additional time and effort in order to acquire them, so this is what increases the demand for them. Game publishers have implemented this characteristic of scarcity of virtual items in order to make their games more interesting and more challenging. However, in effect, this scarcity characteristic itself is the reason for the development of virtual property commodification.

Essentially, the commodification of virtual property arises where there is user-supply and user-demand for virtual world items, which means they have a certain value and have become suitable for exchange. However, it is also important to differentiate

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59. "Scarcity, after all, breeds markets, and markets will seep like gas through any boundary that gives them the slightest opening – never mind a line as porous as the one between real and make-believe." ibid

between in-world (in-game) commodification and real-world commodification. In-game commodification refers to the process of buying and selling virtual property using the in-game currency provided by the game developer. In general, the practice of buying and selling virtual items has no harmful effect on the interests of game publishers and does not demand specific State regulation of the virtual world other than enforcing EULA clauses. Furthermore, such practices are allowed and encouraged by game publishers who expressly authorize such actions in their EULA. On the other hand, real-world commodification, which is synonymous for RMT, refers to the process of trading in virtual items with compensation in the form of real-world money. This practice of virtual property exchange is crossing the border of the relationship between the real world and the virtual world, thus making it possible for legal problems to arise that may require interference in the form of State regulation.

Real-world commodification means there is more than just a handful of users who may gain personal monetary benefits. A player can earn money by selling virtual items or even avatars to another player who wants to take a shortcut to progress in the game, while the game publisher does not receive any revenue from such sales. Arguably, for these players their motivation to play online games is no longer limited to achieving “social components”, but instead has turned into running a business. In some cases, the RMT market, or “gold farming”, is even run by a professional company, and players employed by such a company no longer play online games for the sake of entertainment, but rather as professionals for a monthly income. In fact,

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62 ibid., p. 77
63 ibid., p.77
64 ibid., p.77
the market in RMT has indeed become a profitable industry; in 2007 an academic analysis of the industry estimated that the volume of trade in virtual goods is approximately $2.1 billion worldwide. The market for real-world commodification is also indirectly facilitated by an open auction website such as eBay. In the past, eBay allowed the sales of virtual items in their listings; however, in 2007 eBay removed the auction of virtual items from most online games, with the exception of Second Life. eBay argued that the reason for removing these virtual items was to protect users, as buyers are vulnerable for becoming victims of scam and fraud, in a way unlike the pressure on game publishers. However, deleting virtual online game items from their listings did not solve the problem. On the contrary, the market has arguably grown even larger. Nowadays, users continue to venture into the market of real-world commodification through independent gray market portals.

The practice of RMT raises the matter of ownership: a legal issue raised by game publishers. Game publishers, intent on retaining all property and intellectual property rights, dismiss the ownership of users, while, on the contrary, users believe they have ownership of virtual items, which means it is up to them if they want to sell virtual items. The most notable court case that spotlighted the issue of ownership in RMT practice is the case of Blacksnow Interactive v. Mythic Entertainment, Inc. The facts in the case were groundbreaking, and this case makes it clear that the parties – game publisher and users – will have conflicting views of ownership of virtual property. Moreover, this ownership of virtual property is directly connected to the RMT practice.

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70. Ibid

71. Third party website such as Internet Gaming Entertainment (IGE) benefits from the blocking listing of virtual property in Ebay.

Blacksnow Interactive is a company of “gold farmers” that hires unskilled low-wage employees to play intensively and collect virtual items for the purpose of real-world commodification. Mythic Entertainment, the platform-owner of Dark Age of Camelot, the game that Blacksnow exploited, found out about their illegal activity and demanded that eBay delete their auction listing\(^73\). In response to this, Blacksnow sued Mythic for unfair business practices and the case went to court. Blacksnow argued that they were the rightful owners of virtual items, that they had a right to sell them and they had earned the virtual items through playing the game and had not accumulated property by unscrupulous means\(^74\). Blacksnow had also paid a great deal of money for the game plus numerous online accounts. Mythic’s dissenting argument was that they (Blacksnow) had no right to sell, as the game and all its contents, including virtual items, is subject to Mythic’s copyright, as stated in the EULA\(^75\). However, due to financial problems Blacksnow was unable to continue the court proceedings, and the case was settled in Mythic’s favor before a final verdict was reached.

The practice of real-world commodification also raises the issue of the game publisher’s legal copyright. In the past, Verant Interactive, game publisher of EverQuest, attempted to stop the practice of RMT via the courts by relying on copyright law\(^76\). Verant denies players’ ownership rights to in-game items on the basis of their copyrights, which means that players do not have any right to sell these objects\(^77\). In addition to the court proceedings, Verant also pursued out-of-court methods, by persuading eBay, as market auction platform, to delete virtual items relating to their online game from their listings\(^78\). This attempt on the part of Verant did not, however, stop real-world commodification; on the contrary, players directly


\(^74\) ibid., p.74


\(^76\) ibid., p. 1516

\(^77\) ibid., p. 1516

\(^78\) ibid., p. 1516
involved in the RMT market joined forces to bring a joint action, filing a law-suit against the game publisher and eBay⁷⁹. Although this lawsuit was subsequently withdrawn, its initiation was a forewarning of a complex intellectual property disputes, the significance of which will increase with the growth in the online-gaming community and the increasing availability of broadband access and internet-ready game consoles, and as game developers become more intent on protecting their rights⁸⁰.

In this section I briefly discussed the background of virtual property commodification and the legal issues that arose as a result of the case cited as an example. Finally, it can be concluded that RMT is currently becoming industrialized. The economic impact of this trend of real-world commodification is significant. However, RMT practice raises the legal issue of ownership from the perspective of game publishers and users, in addition to the possibility of copyright infringement, which is discussed later in chapter 4.

### 3.2 The interests of game publishers and RMT issues

Apart from the fact that they created the virtual world and the property within it, the legitimate interests of game developers mainly revolve around two concerns. These are (economic) “subscription interest”⁸¹: expected revenue generated from user subscription; and “control interest”⁸²: interest in retaining control of their creation for purposes of improving general in-game content. In the following section I describe both of these interests of game publishers and how the practice of RMT can impede them. The main aim of game publishers, as commercial companies, is to maintain the satisfaction of players and to appeal to the market in order to increase their revenue. This section describes how RMT practice is impeding the economic interests of game publishers.

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⁸⁰ ibid., p. 1516


⁸² ibid., p.4
publishers. In connection with this matter, the following paragraphs briefly describe the business model of online games.

The first business model is “free-to-play”\(^{83}\): through this business model players have access to game software free of charge, and moreover they are also not liable to pay a monthly subscription fee. To cover the initial investments in developing the game and the maintenance expenses, game publishers turn to an alternative source of income that is unrelated to monthly subscriptions. For example, Second Life, whose game publisher is Linden Research, allows players to access their game free of charge. However, at the same time Linden Research, Inc. seeks an alternative source of income by selling premium membership. In addition, information from past surveys shows that free-to-play online games are ahead of pay-to-play online games in terms of revenue and market share in Asia, United States and Europe.

The other business model is “pay-to-play”\(^{84}\) online games. In this category some game publishers charge for game software, while other game publishers may provide it for free. Apart from this difference, the main characteristics are the same: players must pay a fixed sum as a monthly subscription fee in order to access the game. While in the past most online games embraced this business model, nowadays it has gradually been abandoned as it has failed to produce revenue for game publishers in comparison with the “free-to-play” business model \(^{85}\). Unlike the previously mentioned business model, the subscription fee is their only main source of income as the game publisher does not sell special in-game content. In this category, World of Warcraft is the best example of an existing successful game that still applies this business model.

Based on an understanding of the business models of online games, they can be related to how RMT practice can harm the economic interests of game publishers. One of the major problems with allowing users to participate in RMT practice is that it short-circuits an aspect of the economic model that is the lifeblood of many

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commercial virtual environments, i.e., the subscription fee. In this sense, real-world commodification impedes the economic interests of game publishers who embrace the pay-to-play business model. These game publishers argue that if RMT markets are legitimized, they will suffer significant losses due to the reduction in their takings on monthly subscription fees. In relation to this matter, Theodore Westbrook commented that “if new players can improve their avatars dramatically or purchase someone else’s advanced avatar through out-of-game transactions, developers might see a loss in subscription revenue for the time that users would otherwise spend earning those attributes through normal game play.” One of the main goals in online games, in this case MMORPG, is to achieve the highest level by completing multiple tasks. The player needs to devote a significant amount of time in order to reach a certain level. However, via the process of RMT, players are able to acquire high-level avatars without much effort, bypassing the intended long process of gameplay. Although this process does not harm game publishers directly, it will result in game publishers being overshadowed by the potential loss in subscription fees. In addition to the potential loss in subscription fees, the practice of RMT, by trading sophisticated virtual items or high-level avatars without making much effort to acquire them (as would a regular player), will force game developers to make premature content updates. This will increase the burden of up-dating and significantly increase the costs of further development.

On the other hand, the practice of RMT does arguably have little or no effect on game publishers who embrace the free-to-play business model. Their approach to seeking revenue is not based on the subscription fee but rather is more focused on micro-transactions. Free-to-play online games, such as Second Life, even conduct their own real-world commodification by selling customizable land and providing legal

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89 ibid., p.18
transaction currency exchange. In addition, free-to-play online games usually do not include the RMT prohibition clause in their EULA\textsuperscript{90}.

Apart from the economic interest, there is also the control interest of game publishers. For the most part, the control interest of game publishers, as platform-owners, encompasses the desire to retain full control of their games, in as broad a sense as possible, and to improve the games for the greater goods of their denizen\textsuperscript{91}. In this respect, this motivation is based purely on creative interests and is fully separable from the economic interest\textsuperscript{92}. In essence, game publishers want their games to remain faithful to the main purpose, i.e., as a game and entertainment. However, recognition of property rights in the hands of players, which may lead to real-world commodification of virtual items, may conflict with this idea\textsuperscript{93}. In dealing with the issue, platform-owners can ensure they retain control via the established norm, i.e., the EULA, that trading in virtual items with real money should not take place\textsuperscript{94}.

3.3 EULA and the RMT issue

Game publishers design their EULA with the intention of governing their licensor–licensee relationship with users, and also of limiting the rights of users as far as possible. In general, game publishers regard the practice of real-world commodification as a threat to their copyright and economic interests. As a result, game publishers impose strict EULA clauses in order to eliminate the potential for RMT practice. Nevertheless, even though EULA clauses can generally be found in nearly all online games, some game publishers do not share the same perspective regarding the practice of RMT. Below I have taken the EULA clause in World of Warcraft to represent the general attitude of game publishers towards the RMT issue:

“Ownership/Selling of the Account or Virtual Items. Blizzard does not recognize the transfer of World of Warcraft Accounts or BNET Accounts (each an “Account”). You may not purchase, sell, gift or trade any Account, or offer to

\textsuperscript{90} This refers to a comparison between the EULAs of online games that work according to the free-to-play business model. The examples taken are Second Life and Everquest II


\textsuperscript{93} Ibid., p.4

\textsuperscript{94} Ibid., p.4
purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game. You agree that you have no right or title in or to any such content, including, without limitation, the virtual goods or currency appearing or originating in the Game, or any other attributes associated with any Account. Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for “real” money, or exchange those items or currency for value outside of the Game.”

Through the above-mentioned contractual clauses, the game publisher can defend his interest against unauthorized virtual property selling. Using the EULA, game publishers, as platform-owners, arguably have an absolute right to control their virtual world, including player avatars and virtual property that players possess. The game publisher, as the platform owner, can write a EULA stating that players should have no expectations of property rights to virtual items, that platform-owners can remove or modify virtual items at will, and that players assume all risks of monetary loss when they play in the virtual world. These risks are more or less reflected in the above-mentioned clause. Another aspect being enforced by game publishers via the EULA is the sanction. Game publishers treat the practice of RMT as a breach of contract, much like any other violations (e.g., defamation, hacking, etc.): any practice of real-world commodification leads to the suspension of users’ accounts and the deletion of all virtual items in their possession.

Although the general attitude of game publishers is to include the clause prohibiting RMT practice in their EULA, there are exceptions whereby game publishers allow the

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97. “Account suspension/deletion. “Blizzard may suspend, terminate, modify, or delete any Bnet account or World of Warcraft account at any time for any reason or for no reason, with or without notice to you”. For purpose of explanation and not limitation, most account suspension, terminations and/or deletions are result of violations of this terms of use or the EULA”. World of Warcraft Terms of Use Agreement. Blizzard Entertainment, n.d. Web. 9 Oct. 2012. <http://us.blizzard.com/en-us/company/legal/wow_tou.html>
practice of RMT, such as Everquest II and Second Life with their laissez-faire policy in cross-currency trading. These game publishers regard RMT practice as part of their economy and gameplay. In fact, these game publishers do not make an issue of real-world commodification, especially when a virtual good or currency is bought from the platform-owner. However, though in practice they allow the commodification of virtual property for real-world money, this does not necessarily mean users manage to attain ownership of virtual items or currency. On the contrary, these game publishers still insist they retain ownership and that users are merely granted a license to exchange for real money. As a reflection of the attitude of the above-mentioned game publishers, I took the example of Second Life’s EULA:

“…You therefore do not acquire ownership of any copies of the content, or transfer of any copyright or other intellectual property rights in the content. You acknowledge that with respect to the use of the words “buy” and “sell” as used in this agreement and throughout the service in the context of user content: (a) the term “sell” means to “to grant a user content license in exchange for Linden dollars or other consideration in accordance with the terms of service,” (b) the term “buy” and “purchase” means “to receive a user content license in exchange for Linden dollars or other consideration in accordance with the terms of service,” and (c) the terms “buyer,” “seller,” “sale,” and “purchaser,” and similar terms have corresponding meanings to their root terms. This includes user content that may be bought or sold on the Second Life Marketplace website”.

Concerning this practice, Jack Balkin states that game publishers cannot simultaneously stimulate users to buy and sell virtual items and also seek to eliminate the property rights acquired by users by means of EULA clauses. Moreover, these
clauses can be deemed as unfair treatment of users who have already spent large amounts of money on purchasing virtual items, thus making the clauses unconscionable. This underlines the fact that EULAs may not be enforceable in all cases, if the court suggests that a game publisher was only taking advantage of users without paying due care to their interests\textsuperscript{102}.

Essentially, it seems that real-world commodification is a bridge connecting the virtual and the real-world economies through the trading of virtual goods for real money. Most of the time, Game publishers will seek to invalidate RMT practices through the enforcement of EULA clauses. However, there are exceptions in which the game publisher allows the RMT practice, even to the point of encouraging it. Nevertheless, as soon as game publishers validate real-world commodification through their EULA, they are inviting interference via State regulation\textsuperscript{103}. This means that when game publishers start to allow, or even encourage, real-world commodification of virtual property, they should not be surprised if it results in interference in the form of State regulation. After all, users will force the courts and legislators to recognize and protect the property rights of players in the virtual world\textsuperscript{104}, and subsequently seek legal justification for their RMT practice.

\textsuperscript{103} ibid., p. 79
\textsuperscript{104} ibid., p. 79
4. United States Copyright Law and real-world Commodification of Virtual Property

4.1 Overview: United States copyright law and virtual property

In examining the relationship between United States copyright law and virtual property, this section reviews the main premise of United States copyright law. This is followed by a brief description of the main requirements an author’s work must fulfill in order to attain copyright. And lastly, I discuss the scope of copyright subject matter. In addition, it should be borne in mind that both the virtual world (online games) and virtual property qualify for copyright protection.

Article I, Section 8 of the US constitution, which forms the background for granting authors copyrights, reads: “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”\textsuperscript{105}. The main intention of copyright law is to seek a balance between society and the author. The copyright is needed to provide authors with an economic incentive that will encourage the creation of valuable works that may benefit the public as a whole. However, although the welfare of the author is important, the public interest in the valuable work remains the main priority of copyright law, and the economic incentive in the form of a reward for the author is a secondary consideration\textsuperscript{106}. In this respect, the United States copyright law entitles authors to limited exclusive rights. These exclusive rights are also limited by numerous conditions (i.e., fair use)\textsuperscript{107}, whereby the public can benefit from creative work even though the author retains his exclusive copyright.

The United States Copyright Law grants authors a series of five bundled rights, which are exclusive to the author (exclusive rights) and are comprised of the right to reproduce, the right to distribute, the right to perform, the right to display publicly, and the right to prepare derivative work based on the initial copyrighted work\textsuperscript{108}. Each of these rights stands alone, which means that the author can own and enforce each

\textsuperscript{105} US Const., art.1, sec. 8, cl. 8.


\textsuperscript{107} 17 USC Sec. 107 – Limitations on exclusive rights: Fair use (Copyright law of the United States)

\textsuperscript{108} 17 USC Sec. 106 – Exclusive rights in copyrighted works (Copyright law of the United States)
right separately from the other rights. And, irrespective of the specific nature of identified rights, each right provides protection consistent with the nature of copyright protection, which is to prevent illegal acts of copying. The series of bundled exclusive rights is expected to provide the author with significant control over his creative work. For example, the author is granted the power to prevent a third party from reproducing his creative work if that party fails to obtain permission from the holder of the right. Any performance that trespasses these rights without the author’s authorization is regarded as copyright infringement. The exclusive right to control their creative work is closely related to the economic interests of authors. If an author is granted copyright, he then awarded with a position where the author may demand for a monetary compensation or a payment for any acts related to reproduction, distribution, performances, displays, and derivative creations by third parties that are based on his copyrighted work. This is parallel in conjunction to copyright reasoning, as one of the reasons that a copyright exists is to reward authors for the valuable creative work they contribute to society. This reward acts as an economic incentive; it is provided to stimulate the author’s desire to continue contributing valuable work in the future. The copyrights essentially aim to protect the author from free-riders who use the author’s work without giving any reward. If there are many free-riders who make use of the copyright material without contributing in an economic way, in the long term this will discourage the author from contributing further creative work. Thus, in the end, both society and the author lose out.

This bundled exclusive right does not, however, grant authors complete control to profit from their creative work. Under the “fair use” provision of copyright law, third parties are permitted to make limited use of an author’s creative work without any


110 ibid., p. 32.

111 "(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . ." 17 U.S.C. § 501 – Infringement of copyright (Copyright law)

112 "The objective of a copyright system is to create a social and economic climate which will encourage the creation and dissemination of material of this nature by enabling authors to profit from their labors, and by making it possible for industry to profit from the publication, distribution and promotion of these products. An adequate copyright system ensures widespread communications of these works by providing a legal basis permitting their distribution and dissemination without loss of dominion over the inherent literary property". Schulman, John. "The Battle of the Books Revived-Copyright Law Revision in the Year 1971." *Bulletin of the Copyright Society of the USA* 18.6 (1971): 397-421.
obligation to pay compensation. This provision is only effective if the background to such use is non-commercial or for educational purposes, i.e., a news report, research or teaching. More over, to determine whether the use without the have to pay compensation is appropriate for a fair use, there are four factors that have to be take into consideration, which is; the purpose of the use, the nature of the work itself, the portion of works that are used, and the effect to the works value in the market.

The United States Copyright Law has set the standard for granting a copyright to an author’s work by emphasizing the main requirements of “original” and “fixated”. This means that in order for an author’s work to qualify for copyright, the work must be an original work and the work must be fixed in a tangible medium of expression in which it can be perceived, reproduced, and communicated either directly or with the aid of machines and devices. Though the qualification of “originality” is emphasized, United States copyright law does not specifically mention a minimum threshold for the degree of creativity that an author must put into his creative work. However, a work can be recognized as original if the author’s work reflects the author’s creativity, no matter how small that may be. In addition, ‘original work’ does not necessarily mean that the work is expected to be completely original. The author’s work can be considered as original even when it closely resembles existing work; however, the author will be required to be able to prove that any similarity is the result of a coincidence rather than the result of copying from other works.

The fundamental requirements for attaining a copyright, which emphasize originality and fixation, also apply with regard to virtual property. In order to be regarded as original virtual property, something does not have to be entirely new, as long it sparks from the author’s creativity, even in the smallest degree. The basic form that virtual properties take in online games is generally fairly similar (i.e., swords, amulets, etc.). However, if an author can make virtual property distinguishable by inserting a unique

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113. 17 USC Sec. 107 – Limitations on exclusive rights: Fair use (Copyright law of the United States)
114. ibid
115. 17 USC Sec. 102 (a) - Subject Matter of Copyrights: In general (Copyright law of the United States)
116. “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious”. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991).
117. “Originality does not signify novelty; a work may be original even though it closely resembles other works, so long as the similarity is fortuitous, not the result of copying”. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991).
depiction and description, this is arguably sufficient to reflect an author’s creativity. The second requirement of fixation in a tangible medium is met through the medium of computer. Much like computer data and software codes in general, the data of virtual property have to be stored in the memories of computers so that they can be retrieved at any time. This means that the virtual property is fixated in a tangible medium, whereby the computer acts as the machine that facilitates perception and communication of the virtual property. This reasoning leads to the assumption that virtual property does meet the requirements of originality and fixation, thereby increasing the likelihood that virtual property is well qualified to attain legal protection.

The scope of works that can be protected under copyright law is vastly diverse, encompassing works of literature, music, drama performance, pantomimes and choreography, painting and sculptures, motion pictures, and other audiovisual media, sound recordings and architectural works. In this sense, the virtual world, including online games, is protected under the category of audiovisual works. The term audiovisual works itself refer to “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.” Independently, apart from (virtual world) online games as media, virtual property itself is also subject to copyright. The copyright may be granted for graphical representations of items or avatars, or for the computer code that represents the virtual property. In core, virtual property is created by a series of computer codes that can be transformed into objects in a virtual environment, that have characteristic resembling real-world land or chattel, and, under the United States Copyright Law, computer codes and source codes are included under the category of literary work. However, it is important to take note that the Copyright

118. 17 USC Sec. 102 (a) - Subject Matter of Copyrights: In general (Copyright law of the United States)
120. 17 USC Sec. 101 – Definitions (Copyright law of the United States)
Law – with respect to the category of literary work – can only protect literal aspects of a code, the actual language used and the organization of the language, rather than functional aspects of a code\textsuperscript{123}.

Virtual property in the form of architectural buildings can also become the subject matter of a copyright, but separately from the category of literary work and graphical work. For example, virtual houses and buildings may become the subject matter of a copyright under the category of architectural works\textsuperscript{124}. United States copyright law defines an architectural work as the “design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features”\textsuperscript{125}. The emphasis is on the “overall form” and “composition of spaces and elements in the design”. One might argue that if the virtual property depicting a building and consisted of distinguishable overall composition arrangement (e.g., Personal house in Second Life), the virtual property is appropriate to be referred under the categorization of architectural work.

Substantially, the United States Copyright Law is capable of protecting the virtual world (online games) and virtual property as a medium of authors’ creative expression. Both online games and virtual property meet the main requirements of originality and fixation. The main difference is that online games as a media are categorized as audiovisual works, while the computer codes that underlie virtual property are categorized as literary work. In addition, the images of items and virtual buildings can also be categorized as “Pictorial, graphic, and sculptural works” and “architectural works” respectively. Finally, copyright is crucial to provide authors with a sense of security in respect of their creative work. Providing them with the copyright grants them legal protection and the possibility of an economic incentive that will stimulate future creation.


\textsuperscript{124} 17 USC Sec. 101 – Definitions (Copyright law of the United States)
4.2 Exclusive rights of authors and the RMT issue

An emphatic provision of the United States Copyright Law is the one concerning the “exclusive rights” of authors. These rights are given with the intention of granting authors the right to control economic aspects of their creative work. Similar to an author of traditional work, an author of virtual property are granted the same scope of exclusive rights. These must encompass the right to reproduce or copy their work, to distribute or transfer the work to the public by means of sales or rental, to create derivative work based upon their copyrighted work, to make a public performance of their work and to display their work in public. Thus it is plausible that game developers can receive copyrights for their online games, as software, and also for their work in terms of virtual property that resides within the game.

Taking into consideration the significant investments that game publishers put into development, virtual property is regarded as a valuable asset. As a result, it is only natural that game publishers will have a strong interest in protecting their investments and they will seek legal protection by invoking their exclusive rights. In practice however, when game publishers attempt to prevent the practice of RMT they tend to lean particularly on the self-enforcement of EULA clauses and opt to copyright law as an alternative approach. Nevertheless, it is still open to debate whether copyright law is the most appropriate legal instrument for full enforcement when confronting the practice of RMT. Relying on copyright law, the game publisher can claim that RMT practice is a form of copyright infringement. However, the game publisher must convince the court that the practice of RMT does indeed infringe upon their given exclusive rights.

This section discusses the relationship between game publishers’ exclusive rights and RMT practice, in particular the exclusive rights to reproduce, to prepare derivative work and to distribute by means of sale. Enforcing the following exclusive rights could serve as a legal ground for invalidating the practice of real-world commodification.

First, the exclusive right to reproduce: in this sense the game publisher is granted the authority to make or give permission to other parties to make “copies” of the online

126. 17 USC Sec. 106 – Exclusive rights in copyrighted works (Copyright law of the United States)
127. “Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or
game as software and all the elements therein, including virtual property. This exclusive right to reproduce any content within a game is generally limited and will be in the hands of the game developer/publisher, unless there is specific clause in the EULA stating that the right to reproduce is licensed to users (e.g., Second life). In relation to the issue of RMT practice, game publishers may argue that real-world commodification is an infringement of their exclusive right to reproduce if sales practices are involved whereby copies of game graphics or computer codes are generated.

However, on the contrary, the current mechanics of virtual property trading in online games do not support this assumption. To elucidate the relationship of this exclusive right and the practice of RMT, I shall briefly explain the mechanics of item possession and trading in online games. In online games, an item is, essentially, a set of computer codes that are interpreted as an object that resembles its real-world counterpart when processed. These codes are important assets for a game’s existence, and courts have held that copying computer codes is an infringement of the exclusive right to reproduce. These codes are fundamental to the virtual environment, and the game developer/publisher – as initial authors – rightfully have full control of these codes.

To be exact, an item in virtual environment is only one for each type. For example, a multiple avatar can posses “platinum sword” in their inventory, however in reality what they have is an access to the original computer item code in the game publisher server. This access code is arguably similar to URL, and the process of item virtual item possession in avatar can be equated with opening a website page address: the user logs in to the game via a remote pc and, through data connection, the user’s

otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed. 17 U.S.C. § 101 - Definitions (Copyright law)


130. ibid., p. 1522
computer accesses a specific address of the game server that contains the codes for the item. Thus the item appears in the user’s possession.

In a case of RMT, the process of selling does not involve making an exact copy of the code item or the address; it merely transfers the required access to the computer item code to another user. If one player sells an item to another player, the codes that represent the item are not being copied. The access to the address leading to the codes is passed on to the buyer without being copied. Thus, the mechanics of trading in items does not justify the prevention of RMT practices based on an infringement of the exclusive right to reproduce. In addition, the United States courts refrained from granting copyright protection in relation to the address of virtual item codes because such an address lacks the minimal level of creativity to qualify as "expression" instead of "ideas".  

Secondly, game publishers can seek to void the RMT practice by relying on the exclusive right in relation to derivative work. The United States defines “derivative work” as “A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted…”. This embedding in the copyright law structure means that the incentive of copyright is not only to protect actual expression, as it can also protect any conceivable adaptation of the underlying expression. Rightfully, a derivative work is part of the game publisher’s exclusive rights. A derivative work can only be prepared by the original author, or by another party who has the authorization of the original author. Within the context of online games, both MMOSGs and MMORPGs, game publishers grant users permission to create a derivative work. In MMOSGs (Second Life), the user is allowed to create derivative work in various forms, and what’s more, they are also granted the possibility of copyright and ownership. On the contrary, MMORPG game publishers


132 17 USC Sec. 101 – Definitions (Copyright law of the United States)

limit the permission granted to creating an avatar as a derivative work, and exclude the possibility of users attaining ownership copyright.

In practice, online game with the category of MMOSG, is known to provide freedom for users to be more focus in social interaction and expressing the user creativity. More specifically in MMOSG Second Life, Linden Research as the game publisher has allowed users to become authors of creative work by providing an editing tool to create or modify the initial work. Unlike in general MMORPG, the form of derivative work in Second Life, is almost limitless, and not only restricted to forming an avatar. In relation to prepare a derivative work, In Second Life environment, the user by utilizing the tool provided by Linden can impose their own creativity by creating or enhancing the underlying work. Hence, if the creativity is sufficient to the degree that it is recognizable as original under United States copyright law, the modification (the derivative work) can attain copyright status independently of the initial work, even though the original characteristic of the underlying work may still be apparent. By analogical reasoning, this means that the user is also granted a set of exclusive rights to control his creative work, which includes “the right to distribute or transfer the work to the public by means of sales or rental…” Thus the user/author can sell his own derivative work without raising legal issues. In addition, specifically in the case of Second Life, the game publisher does in fact grant users permission to sell their own derivative work, as long as the items they are selling are the result of their own copyrighted work.

On the other hand, in the case of MMORPGs, game publishers attempt to find justification for the fact that RMT practices are associated with the commodification of derivative work based on their initial copyright material. In MMORPGs, such as World of Warcraft, a user needs to create a representative avatar by selecting components from a set of arrangements. This act of assembling several parts of pre-existing components to create an avatar can be equated with and resembles a “collage”, as in the real world. Although not specifically mentioned in United States copyright law, a collage, in the sense of a work that is created by combining several elements of pre-existing work, can be regarded as a compilation, and under

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135 17 USC Sec. 101 – Definitions (Copyright law of the United States)

United States copyright law, a work of compilation is given the same classification as derivative work. However, although avatars in MMORPGs are created based on a set of arrangements, by selecting unique composition from diverse elements, the user can arguably claim to have met the originality requirements, making it more likely that the user can attain copyright to his avatar (derivative work) or at least the status of contributor to a joint work. United States copyright law defines joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” In this sense the platform owner provided the raw selection of arrangements, and the user completed it by using his creativity to realize the final form. If this joint-authorship assumption is applicable in practice, this could mean that both the user and the game publisher have a partial copyright to the avatar. This also implies that users cannot gain full justification for RMT practices because they are not the original (or sole) author; vice versa, neither can the game publisher fully prohibit the user from selling his avatar because the user has a partial copyright to the avatar. This leaves the RMT issue from the perspective of exclusive rights to derivative work as a gray and ambiguous area.

Lastly, the third exclusive right is the right to distribute or transfer, including through the method of sales. This right is directly related to one of the basic purposes of copyright law, which is to provide authors with economic incentives. Game publishers could argue that the practice of RMT is impairing their economic interests by infringing on this exclusive right. Based on the reasoning of the existence of unauthorized sales of copyrighted work, it can be assumed that the RMT practice is a direct infringement of the author’s exclusive rights. Thus, the enforcement of this exclusive right is the most plausible legal basis for prohibiting RMT practices. However, because the current mechanics of online game trading does not involve an

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137. 17 U.S.C. § 103 – Subject matter of copyright: Compilations and derivative works (Copyright law)
138. “On the other hand, if a game provides the user with several trillion possible combinations of characteristics, as in the City of Heroes example described above, and the user decides which specific combination of characteristics to assign to the avatar, it cannot realistically be said that the programmer is the sole “author” of the avatar; instead, the user must at least be considered a joint author, if not the sole author.” Ochoa, Tyler T. “Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds.” Vandr. J. Ent. & Tech. L. 14 (2012): 959-993. Jetlaw. Web. 17 Nov. 2012. <http://www.jetlaw.org/wp-content/journal-pdfs/Ochoa.pdf> p. 975.
139. 17 USC Sec. 101 – Definitions (Copyright law of the United States)
140. “(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a)…” 17 U.S.C. § 501 – Infringement of copyright (Copyright law)
act of re-distributing copyrighted material, in practice it could be argued that the game publisher’s argument is invalid. If what has been sold or distributed without the author’s authorization is the author’s copyrighted work, or even the copy itself, copyright law could respond to this as an act of infringement. However, the object that has actually been commodified is, in reality, the address code of virtual property, which means that as an object it does not fulfill the minimal threshold of creativity. If the object lacks creativity, then the originality aspect has not been fulfilled. This means no copyright is involved in the virtual property’s address code. Hence, the copyright law cannot be enforced under this approach.

As a side note, the practice of virtual property sales, has indeed, usually involves copying a static graphic from the virtual environment through a “screenshot”\(^ {141} \). This screenshot is often used by the user that intend to sell their virtual property to advertise their sale in the auction website such as eBay or other third party website. A screenshot may replicate the graphical environment of a virtual environment in 2D images, and this may arguably be considered a breach of the exclusive right of reproduction. However, in practice the screenshot is not the commodification object, the screenshot is merely serve as an advertisement in an auction site, i.e. eBay, the virtual item object portrayed in the screenshot is the object that intend to be sale

Based on the above, one can conclude that game publishers, for the most part, cannot rely on the enforcement of exclusive rights in preventing RMT practices. The underlying premise is that acts of virtual property sale do not involve an exactly copied version of copyrighted work (reproduction right), and even if an act of unauthorized sale is involved, that which has been sold is not necessarily directly related to the objects being commodified (distribution right). The derivative exclusive right is, however, more complex than the other two. In derivative work, specifically in the case of Second Life, the platform owner permits the creation of derivative work in diverse form, and moreover, sales are also permitted. In comparison, the creation of derivative work is generally significantly limited in other online games (MMORPGs). Nevertheless users can attain (partial) copyright by imposing their own composition creativity during the avatar creation process, making them eligible for joint-authorship. This could mean users have found legal justification for their RMT practice. However, users will have to take into consideration that, because they are

not the sole author, in order to sell the derivative work they must obtain permission from the other (co-)author. Vice versa, if the joint authorship assumption is applicable, then game publishers do not have full authority to control derivative work so they will not effectively be able to seek to prevent RMT by claiming commodification of (their) derivative work. Alternatively, game publishers may seek to rely on self-enforcement of the EULA contract, which seems a more efficient way of dealing with issues of real-world commodification.

4.3 The transfer of virtual property from a copyright perspective

The ownership of virtual property has long been a subject of debate, with a variety of opinions. As was clear from the previous chapter, both game users and game publishers will ultimately seek to attain ownership of virtual property, based on their own reasoning. In relation to RMT practices, users who secure virtual property ownership can justify their sales of virtual items; vice versa, game publishers who claim ownership can (attempt to) prohibit the practice of RMT. However, in practice, by using the EULA as an instrument, game publishers have eliminated the possibility of users’ ownership (Second Life’s EULA is the only exception that has a different policy). The EULA, which acts as an adhesive component of online games, compels the submission of users, regardless of their aspirations. And the EULA as a form of contract is – justifiably – enforceable in court, unless it contains clauses that make it unconscionable.

It should be pointed that, in practice, as shown in the previous section, RMT practice does not infringe upon the exclusive rights of game publishers. Sales of virtual property do not involve commodification of copyrighted material, as they involve nothing more than the transfer of a sense of ownership. Interestingly enough, game publishers even have arguments for contradicting users’ ownership in all areas. In the first place, game publishers claim that users are merely licensed to use a game and its contents, and no transfer of ownership takes place from the game publisher to the user. Hence, game publisher do not permit users to own anything related to the virtual environment, not even an address code. Right from the start, game publishers never intended to transfer any ownership to users. Licensing is the more preferred method for game publishers, since it is arguably less problematic than selling. If a game
publisher does decide to sell, then the ownership of virtual property may also transferred in the process.

nder United States copyright law, there is a “first sale doctrine” for limiting an author’s exclusive rights of distribution\textsuperscript{142}. The first sale doctrine allows a second party to re-distribute the work of an author, as long the party legally acquires ownership of that work\textsuperscript{143}. For example, libraries are permitted to lend out books and secondhand bookstores are allowed to sell used books to the public. The intention of this doctrine is rightfully to seek a balance between authors’ rights and the right of public access to the work\textsuperscript{144}. However, in relation to software or where a digital format is involved, this rule is not fully applicable. A user may buy software CDs, but most software EULAs contain a clause stating that the relationship between the user and the developer is strictly limited to licensee and licensor. In reality, the ‘purchase’ of a software CD merely involves a license to the software it contains: the user does not ‘buy’ the software as a product. The implication is that if the EULA clause is enforceable then the buyers, as licensees, are merely licensed, they do not attain ownership, and the competence of first sale doctrine can only be granted to the owners of copies\textsuperscript{145}. In the end, first sale doctrine can form a basis for exempting second-party re-distribution from the author’s exclusive distribution rights. However, it can only be applicable if the second party actually possesses ownership of the copies.

If the same logic is applicable to cases of virtual property, then game publishers could find legal justification for invalidating RMT practice. Game publishers could accentuate the fact that the commodification of virtual property is beyond the competence of the user as licensee. Copyright law grants game publishers the exclusive right to distribute – including by means of sale – their virtual property. For example, a free to play game publisher can sell an in-game item directly to a user, and the user has technically acquired the item via the correct procedure. However, the user still cannot expect to be granted ownership, as the sale was just an extension of previous licensing. Game publishers will always rely on the EULA clause to

\textsuperscript{142} The first sale doctrine is stipulated in 17 USC Sec. 109 Definitions (Copyright law of the United States)
\textsuperscript{144} ibid., p.557
\textsuperscript{145} ibid., p.614.
invalidate users’ ownership. Hence, as users do not have ownership, they cannot expect to make use of the first-sale doctrine in their defense of RMT practices.

This approach is a mixture that makes use of both the EULA and copyright law as instruments. The copyright law itself is arguably incapable of providing sufficient protection of virtual property against RMT practices. The EULA, with its contractual clauses, still plays a larger role in protecting the interests of publishers. In the end, the combination of EULA clauses in contracts and copyright law is the most plausible route to take in invalidating the real-world commodification practice.
5. Conclusion

In this thesis, the main research question that remains to be answered is ‘Does current US copyright law provide adequate protection for virtual property in confronting real-money trading?’

In order to properly answer the main research question, I shall first answer the subsidiary questions in order to create a clear background in support of the main conclusion. With this in mind, I shall first review and use the essential points that emerged from the previous chapters in providing answers to the subsidiary questions.

**How should the main characteristics of the virtual world and virtual property be defined and identified? And what is a EULA and what role does it play in online gaming? (Chapter 2).**

Arguably there is no standard for defining the term virtual world. In general, however, the term virtual world can loosely be interpreted as the computer-based, simulated environment that facilitates social interactions similar to those in the real world. To this end, chatrooms and virtual learning classes can also be classified as falling within the scope of the virtual world. However, for the purpose of this thesis, I use the term virtual world to refer solely to the virtual environment embodied in the form of online gaming.

Numerous scholars have their own interpretations of the virtual world. Although the definitions vary from one to another, there are several explicit characteristics that define the virtual world, as it exists in online gaming. The most basic characteristic is that this environment of online gaming is shared, meaning that it is designed to allow multiple users to inhabit the same environment at the same time. Also, unlike the virtual world, in a more modest form as in chartrooms, the simulated virtual environment of an online game is represented via a graphical interface, whether it is 2D or 3D, and all interaction conducted within this environment is executed immediately in real time by utilizing data connection. Unlike in the offline game environment where the environment disappears when a user ceases to play the game, this environment persists, which means that the virtual environment exists independently. The environment of an online game continues to exist even after a user has logged out of the game. In addition, in online games, the personification of the user is embodied in the form of avatar. Through this avatar, the user can perform social interactions with peer users, and this interaction characteristic plays the most
crucial role. The combination of these characteristics into one form can safely be said
to be the main identifying feature of the virtual world (online games).
Furthermore, the virtual world, within the context of online gaming, is also divided
into two main classifications, i.e., MMORPGs and MMOSGs. MMORPGs are online
games with a pre-determined theme and settings. Games that fall under this
classification limit the user’s experience to the background narrative story. As a
result, the gameplay experience of users of this online game category is similar to the
experience of playing an offline game. On the contrary, MMOSGs are online games
without a pre-determined background and they provide users with much more
freedom for experiencing. The main feature of MMOSGs is the focus on social
interaction between peer users. Thus, the game publisher, as platform owner, will
indefinitely allow any act on the part of the user, as long it does not cross the
boundaries of norms and the law. In the case of Second Life, the game publisher
Linden Research encourages user creativity; in addition, real-world commodification
of virtual property is also allowed.
The next important complementary element of online gaming is virtual property.
Virtual property is an exclusive feature of the virtual world; it is a non-existent object
in the real world and can only be found in the virtual environment. In essence, virtual
property is a series of computer codes. These codes can be processed in a virtual
environment, and then they take on the form of an object with the same characteristics
as real-world chattels or land. This virtual property shares the same characteristics as
its real-world counterpart; this means it has the qualities of rivalrousness, persistence,
and it is (inter-) connected. In addition, there are additional characteristics that virtual
property must have before it can be eligible for legal protection; these are that it must
have value, it must be suitable for trading on a second-hand market and the value of
the virtual property must have been enhanced by the user.
Ownership of virtual property is still a gray area. The sense of ownership the user
feels towards virtual property is in contradiction of that of the game publisher, and
each party has his own reasoning to support his argument. The user relies on the
assertion that he has invested a significant amount of time and money in the game and
the norm is that he should acquire ownership (Lockean labor theory). The game
publisher’s claim is based on a more realistic argument. It was the game publisher
who developed the game and he is the copyright owner. Therefore it is only natural
that he should have full ownership of his creation. In practice, however, based on the
contractual clause in the EULA, the game publisher claims all ownership to the online game and its contents (with the sole exception of Second Life).

The EULA is a contractual agreement between the parties – the game publisher and the user – that serves the purpose of regulating users’ behavior within their area of service (the online game). By enforcing the clauses in the EULA, which has similar characteristic to an adhesion contract, game publishers can compel users to follow their regulations without leaving them any bargaining power. Game publishers use the EULA clauses for two purposes, namely, for horizontal and for vertical regulation.

Horizontal regulation is where a game publisher uses the EULA for the purpose of the greater good of users (e.g., to prohibit discrimination, harassment, etc.). If a game publisher succeeds in prohibiting malicious behavior in his online game, it is not only the users who benefit because, indirectly, it is also favorable to his own interests.

Vertical regulation is where the EULA serves strictly to license the agreement, with the game publisher as licensor and the user as licensee. This license governs all aspects related to servicing the online game, i.e., the service provided, payments, ownership, liabilities, and termination of the service.

As a contract, the EULA agreed upon by the parties is enforceable in court. However, because it is at the same time an adhesion contract, with characteristics of a take-it-or-leave it offer, in some cases the court may find that EULAs are unenforceable if the clauses prove to be unconscionable. The representative case of Brag v. Linden Research, Inc. underlines the fact that a EULA will not always necessarily be deemed enforceable, as different aspects have to be taken into consideration before a court settles on its final judgment.

What is RMT and how can it harm the interests of game publishers? (Chapter 3).

The issue of RMT has long been one of the main concerns of game publishers. The practice of RMT has become widespread and arguably there are currently no popular online games where this issue does not play a role. Nowadays, the RMT market has grown to become a fully-fledged market. In fact it has become a multi-billion-dollar industry and comparable to the gaming entertainment market itself. Essentially, the issue of RMT or real-world commodification arises when in-game items are exchanged for real-world money. This is different from in-game commodification, where trading in virtual property takes place using in-game currency provided for the
purpose. This real-world commodification of virtual property has broken through the boundaries between the virtual world and the real world. And where legal issues arise that are directly related to sales (i.e., fraud), then interference in the form of state regulation can be expected.

RMT practices have also resulted in legal issues relating to ownership. Essentially, game publishers seek to void user-ownership in virtual property, because users who attain ownership can argue that they have a right to do whatever they like with their possessions, including sale. The case of Black Snow Interactive v. Mythic Entertainment, Inc. is a representative case that underlines the importance of claiming ownership of virtual property as a means of justification for either voiding or approving RMT practice. Though the case verdict was in favor of Mythic Entertainment, Inc., the case teaches us that ownership of virtual property is the decisive factor in determining the legal status of real-world commodification. Users will always rely on the Lockean labor theory for their justification, while game publishers rely on EULA clauses in addition to their copyright (as in Verant’s case) in order to void the RMT practice.

The opinions game publishers have of RMT are varied, with some game publishers allowing the practice while others maintain a strict regime of prohibition. This variation in opinions is directly related to the interests of game publishers, more specifically to their economic (subscription) interests. In practice, it has been proven that RMT impedes the economic interests of game publishers who embrace the pay-to-play business model. The pay-to-play business model is one in which users are required to pay a monthly fee to access a game, whereby this monthly subscription fee forms the main source of income for the game publisher. The act of real-world commodification short-circuits the progress of users’ experience, hence limiting game publishers’ expected revenue from subscription fees. In addition, in order to curtail this problem, game publishers often deliver content updates in an attempt to prolong the gameplay experience. RMT practices, however, which in fact curtail the intended length of gameplay, force game publishers to deliver updates even more rapidly. This after-effect will have a further harmful economic effect on game publishers because of the intensity of content development. Thus game publishers with a pay-to-play approach will consistently aim at prohibiting the practice of real-world commodification.
On the other hand, game publishers who work based on a free-to-play business model (which alters to directly selling in-game items to users as main source of income) do not have any issues regarding RMT practices. In general, there is no RMT prohibition clause in the EULA of these game publishers. Furthermore, in some online games, as in Second Life and Everquest II, the game publishers actually allow and even encourage the practice of RMT.

Apart from game publishers’ economic interests, another aspect is their control interest in the game. This control interest is separable from the economic interests and is more closely linked to an idealistic motivation, which is to improve the gameplay experience for the greater good of users. Moreover, the background of this interest is due to considerations of the game publisher who, as platform owner, naturally wants to retain control over his game in as broad a sense as possible. Game publishers, with the exclusion of game publishers who allow RMT, will seek to invalidate real-world commodification as it will harm their control interest. The background to this reasoning is because of RMT: it has resulted in the recognition of in-game user property rights and is impairing their control over their own assets. In addition, they assert that RMT practice will not result in any positive value for users’ gameplay; on the contrary, it spoils the fun aspects of games. And they feel that online games (including virtual property) should remain true to their original purpose, which is as a form of entertainment, and they should not become a commodification material.

How does US copyright law address virtual property and the practice of RMT? (Chapter 4).

Naturally, the main intention of the United States copyright law is to seek a balance between the interests of society and the interests of authors of creative works. In effect, the copyright is granted to authors as a means of promoting useful sciences and arts through securing their exclusive rights, so that society benefits from the valuable work they contribute. These exclusive rights take the form of a bundle of limited rights comprising the right to reproduce, distribute, perform, and display work publicly and to create a derivative work. The object of these exclusive rights is the copyrighted work of an author. Moreover, if a work is to meet the criteria for being deemed an object of copyright, it must first fulfill two fundamental requirements: originality and fixation.
Essentially, virtual property, as an author’s work, must meet the above-mentioned requirements. Virtual property can easily achieve the originality requirement: the United States copyright law does not specifically set the minimum threshold for creativity, and a previous court case established that the slightest degree of creativity invested in a work can suffice for a work to be deemed original. This ‘standardization’ of creativity is also applicable to virtual property, i.e., if virtual property sparks a modicum of the author’s creativity (distinguishable representation), it meets the originality requirement. With regard to the fixation requirement, as explained earlier, the basic characteristic of virtual property is the same as software, namely, that it is a computer code. In this sense, the same rule of fixation granted to software is also applicable to virtual property, as both of them are fixed in a medium (i.e., a hard disk) where they can be perceived and communicated with the aid of a device.

Furthermore, virtual property as a work can be classified under varied categories. First, virtual property as a literary work; at its core, virtual property is a computer code, and under United States copyright law, codes are protected under the heading of literary work. Second, virtual property as graphical work; in general, virtual property is represented as an object in 2D or 3D graphical animation, in this sense, virtual property can also be classified as a pictorial, graphical, or sculptural work. Lastly, virtual property as architectural work; although virtual property in the form of a building is also represented in graphical animation, a virtual building as a copyright subject matter can be categorized separately from other virtual property. By underlining the design and overall form of arrangements, a virtual building can be placed in the same category as its real-world building counterpart. This means it can be classified as an architectural work.

Thus it can be concluded that virtual property fulfills the fundamental requirements for copyright: the originality and fixation requirements. Moreover, as an object it can be classified as being subject to copyright. With a copyright to virtual property, game publishers will naturally have the power to enforce their exclusive rights in order to control their assets and thus create a barricade against the possibility of copyright infringement. Chapter 3 showed that in most cases RMT practice, which commodified copyrighted virtual property, impedes the interests of game publishers. Thus, game publishers will inevitably respond and seek to prohibit this practice by any means, including through enforcement of EULA clauses and by relying on copyright law.
Game publishers can call upon copyright law in cases of an infringement of their exclusive rights. However, in practice it could be argued that there was no infringement of their rights, or only a partial infringement. Two of the three exclusive rights that are assumed to be directly related to RMT, i.e., the exclusive right to reproduce and to distribute, have not been breached. The exclusive right to derivative work, which can become a legal issue if a user sells virtual property based on derivative work, is still open to debate, depending on the approach of the game publisher himself. In addition, there is the possibility that a user can also attain a portion of his avatar’s copyright (assuming that the avatar is copyrighted) on the basis of joint-authorship. Thus, game publishers cannot confidently rely on claiming that RMT is a form of copyright infringement.

Having answered the subsidiary questions above, I briefly described the background to the virtual world, virtual property and EULAs, the issue of RMT, and the perspective of United States copyright law as a legal instrument in dealing with virtual property and RMT issues. Below I provide a conclusion and an answer to the main research question, which is; ‘Does current US copyright law provide adequate protection for virtual property in confronting real-money trading?’

Virtual property is an object that can be found only in virtual environments. While this object is non-existent in the real world, virtual property does share the same characteristics as its real-world counterpart; moreover, it inherently has real-world (monetary) value. RMT practice has commodified this value in exchange for real money. Even though user supply and demand do exist in this market, in general, game publishers seek to invalidate RMT practice via their EULAs and copyright law. Game publishers can rely on self-enforcement of EULA clauses to deal with the issue, because the EULA was drawn up in their favor and designated to accommodate all their interests. On the other hand, although United States copyright law is capable of protecting virtual property, it does have some strict limitations in confronting the RMT issue.

United States copyright law can be invoked in the event of an infringement of one of the exclusive rights, and if the object of infringement is included as a subject matter of copyright. It can be argued, however, that the practice of RMT is not a form of copyright infringement. Two arguments can be pointed out in support of this statement: first, RMT practice does not commodify a protected object that is subject to United States copyright law. RMT practice by-passes this restriction by only
transferring material that is unprotected under copyright law, i.e., access to the address code of the virtual property database. Chapter 4 described how courts in the United States refrained from granting copyright to these address codes because of their lack of creativity. Secondly, although game publishers can argue that RMT infringes on three of the most relevant exclusive rights in such cases – the rights regarding reproduction, distribution and derivative work – in fact, this argument can also be nullified. This is because, in reality, as mentioned above, RMT practice does not directly involve an infringement of these exclusive rights. In this sense, game publishers cannot rely on United States copyright law for adequate protection in battling the RMT issue.

Nevertheless, game publishers can seek an alternate approach to preventing RMT practice by emphasizing the ownership aspect. They can use EULA clauses to invalidate the sense of ownership that users have towards virtual property, which is the background to real-world commodification. Someone (a user) who sells virtual property may feel a sense of justification, or even legal justification, based on the first sale doctrine of copyright law. However, first sale doctrine is only applicable if the seller has attained property ownership. Justifiably, the EULAs, as contractual clauses, still play a larger role in protecting publishers’ interests. In the end, the combination of EULA clauses in contracts and copyright law (by invalidating users’ justification based on first sale doctrine) is the most plausible approach to dealing with the RMT issue.

All in all, based on the research described in this thesis, I have found that United States copyright law is capable of confidently protecting virtual property as a part of copyrightable author’s work. However, though it can protect virtual property as an object in the form of an author’s work, United States copyright law cannot deal with the RMT issue directly. The RMT issue cannot be proven to fully infringe upon the exclusive rights of the author, and if there is no copyright infringement, the United States copyright law cannot penalize RMT as a copyright infringement. The most plausible solution, in the end, is still to rely on clauses in an agreed contract such as the EULA.
6. References

Books

Articles & Journals


<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1081&context=njtip>


**Academic Works**


**Official documents, opinions, notes, technical reports**


**Legislation and other authorities sources**

The United States Constitution

The Copyright law of the United States
Websites
<http://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion>

<http://en.wikipedia.org/wiki/Avatar_(computing)>


<http://en.wikipedia.org/wiki/Pay_to_play>

<http://en.wikipedia.org/wiki/Screenshot>

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