Owning the Virtual Fruit

Protecting User Interests in Virtual Goods under Dutch Law

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1. Introduction

- 1.1 Background -

Over the last few years, a big part of the world has shifted to the online, virtual version. Letters are being sent through e-mail, people are interacting with each other through social media and certain games have a massive online multiplayer aspect.

But the shift to the online virtual world is not one that goes without its dangers as well. In The Netherlands for example, a child was bullied and forced, in real life no less, to transfer a virtual amulet and mask in the game *RuneScape*, to his assailants.[1] In this case, a 13 year old child was threatened with a knife by two older boys, who also kicked and punched the victim. The two older boys were eventually convicted of robbery. Another example in Dutch law is the Habbo Hotel case, where two individuals used subterfuge to acquire access to the accounts of other people and then transfered the virtual furniture from the compromised accounts to their own.[2] These two cases sparked a discussion in Dutch legal academic literature on whether or not virtual items can be considered someone's object of property, which laws regulate these virtual objects and if they should be regulated at all.

Even worse, was a case that unfolded in China with the MMO *Legend of Mir 3*, which ended with one man dead, and the killer sentenced to death.[3] In this case, a Chinese resident lent a virtual sword to someone he knew. That person subsequently decided to sell the sword online for real money. Upon discovering this, the original owner went to the police, who were unable to take action, since China had no laws that protect virtual property. Still seeking out justice, the original owner sought out the seller, and ended up stabbing him to death. Unsurprisingly, this tragic case has sparked a debate about the legal status of virtual property.

The above three examples share one thing in common: the users were faced with the question if they had some form of protection on their virtual items against third parties.

The rightful ownership over virtual goods is not always clear between all parties and disputes can rise. Users of virtual property and the owners of the platform in which virtual property exists are often uncertain about what their rights are when it comes to virtual worlds and goods. Not all users and platform-owners are aware of their rights when it comes to the trading of virtual property. Even when property rights regarding virtual items is regulated, the rules that are used to do so do not provide an ample explanation as when the rules should apply. The seemingly random classifications and protections of virtual property rights create a lot of confusion and legal uncertainty in Dutch law. E. Tjong Tjin Tai also recently identified the issue that there is hardly any analysis from the perspective of Dutch civil law on this subject matter, which prompted him to write an article to make the first step for analysing property rights on data in

[1] HR 31 januari 2012, *LJN* BQ9251, *NJ* 2012/536, m.nt. Keijzer.
[2] Rb Amsterdam 2 april 2009, *LJN* BH9791.
[3] 'Chinese gamer sentenced to life', *BBC*, 8 June 2005. http://news.bbc.co.uk/2/hi/technology/4072704.stm (last visited: 2 December 2013).

Dutch civil law.[4]

The companies would be able to argue that since they own the physical servers and the copyrights on their data, they own the virtual property within, while users would be able to argue that they invested time and money into shaping the content into virtual property of considerable worth.[5] For example, a World of Tanks account has been sold through eBay for $400,[6] an account for the popular free to play mobile game Clash of Clans has been sold for $600,[7] and the author has sold an account for another free to play mobile game for $90 himself as well. These days, a lot of people have virtual property in one way or another, possibly even without realizing it. The above-mentioned examples are just several of many others. E. Tjong Tjin Tai states that there are developments for more 'property rights-like' protections on data.[8]

Even though virtual items might not be real and physical, they can have dire consequences for the real world, like a boy getting physically threatened for his virtual items and a Chinese citizen willing to commit murder because of virtual objects, and leaving the matter unregulated would undoubtedly spark more tragic incidents. It is time to acknowledge the existence of the virtual worlds, and to regulate them in some way. With this thesis, the author will provide a clear overview of Dutch law concerning virtual property, investigate the level of protection of virtual objects, evaluate whether the protection is adequate for users and if this is found to be not the case to make suggestions to improve the Dutch system to provide a more adequate protection and legal certainty for users of virtual items regarding their property rights in these virtual goods. With improved legal certainty users and platform-owners are more aware where their rights begin and end.

- 1.2 Central research question and sub-questions -

The objective of this work is to bring forth a detailed and understandable thesis on the status of virtual property from a perspective of the Netherlands, evaluate if this level of protection is adequate and suggest improvements when this is deemed not to be the case. The central research question of this thesis is '*Is Dutch law providing adequate protection in user interests in virtual goods and if not, how can we improve it?'* This subject will be broken down into several sub-questions.

The first sub-question is '*What are the interests users have in virtual goods'*. This sub-question will identify the interests of users, which will be necessary to determine if the legal framework Dutch law currently has is adequate to protect these interests.

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[4] Tjong Tjin Tai 2016, p. 1.

[5] Examples of these arguments can be found in Horowitz 2007, p. 35; Shen, 2010, p. 4-6; Fairfield 2007, p. 412-416; And Koster, 2000.

[6] Completed eBay listing, sold on 30 September 2016. http://www.ebay.com/itm/World-of-Tanks-Unicum-account-EU-server-/222253013557?hash=item33bf4fda35:g:0k0AAOSw8gVX3TrS (last visited: 2 October 2016).

[7] Completed eBay listing, sold on 4 September 2016. http://www.ebay.nl/itm/Clash-of-Clans-Account-CoC-RH11-TH11-LvL155-Max-Heroes-walls-641-Stars-/262609107624?hash=item3d24b8faa8:g:BAYAAOSwFe5XyZSi (last visited: 2 October 2016).

[8] Tjong Tjin Tai 2016, p. 4.

This will bring us to the second sub-question, which will be '*What level and form of protection of virtual goods provides adequate protection?'*. By answering this research question the author will be able to determine what the Dutch legal framework needs to provide to users of virtual goods. A broad picture will be sketched of what needs to be protected. The form of protection will not yet be looked at.

The third sub-question will be '*How are virtual goods protected under Dutch law now and is this protection adequate?'*. When the author has identified what the user interests in virtual property are and what level of protection needs to be present for these users and their virtual property, he can start to elaborate on the current Dutch legal framework concerning virtual objects and can properly determine if the protection provided is adequate or not. Here we will look into the two different property systems of civil law and criminal law that the Netherlands has in place and explain the differences. We will start with discussing some terms used in literature to give us an idea what is meant with 'virtual goods' to work with in this thesis. After we have established a satisfactory literature term for virtual property we will talk about property rights in Dutch criminal law, followed by Dutch civil law. The section about civil law will be split between property law and contract law. The author will also look at the relationship between property law and contract law and touch upon the use of EULA's for private regulation. A significant portion of virtual property is regulated by contracts, and pulling Dutch contract law into this thesis would shine a new light on the system. Just describing the system would not be sufficient, so the author would make a judgement on whether or not contract law could provide sufficient regulation and make suggestions on how to improve regulation of property rights in virtual goods through contracts. This sub-question will also evaluate if the provided forms of protection in Dutch law are adequate to satisfy the identified user interests.

The fourth research question will be '*If Dutch law provides inadequate protection for user interests in virtual goods, how can we improve the Dutch law to provide adequate protection?'*. After we have determined if the Dutch law provides inadequate protection for user interests in virtual goods, the author will look into what is needed to change in Dutch law so that it provides more adequate protection of user interests in virtual goods. The author will assess if small changes are sufficient to patch the framework to a satisfactory level or if a whole new framework is needed.

- 1.3 Significance -

1.3.1 Societal significance

The digital world is of great importance. The world is doing more and more online, and users of the online worlds are interacting more than ever with virtual goods. Because of the increase in users having virtual goods, concerns have been raised regarding property rights on the virtual goods,[9] since not only are the virtual worlds growing in size and amount, but also in terms of legal and economic issues. "Virtual goods" is a relatively new term, and just like the virtual world, it changes and develops constantly. Law on the other hand is old and slow, and might be unable to keep up with the progress being made in these technologies. This has caused for a

[9] Tjong Tjin Tai 2016. For example: Is ownership possible over data, is action for recovery possible, can data be exclusive or non-rivalrous?

hiatus in the law concerning this type of property. It is clear that virtual items can have a large effect on the real world, and a lot of people work hard or pay real money to possess, or at least have access to, several virtual items. E. Tjong Tjin Tai writes that in this time of big data, the internet of things and Industry 4.0, it is wise to approach the idea of data with a perspective of property law.[10]

1.3.2 Scientific significance

A lot of the writing that has been conducted regarding virtual property is already several years old. Owning virtual goods is a concept that keeps changing and developing, and papers written only a few years ago, might already be outdated due to changed perspectives on virtual goods or an increase in the importance of virtual goods in modern society.[11] While conducting research the author found a lack of easily accessible literature concerning property rights on virtual items in the Netherlands. E. Tjong Tjin Tai has stumbled upon the same issue, and asks for a more in-depth analysis concerning property rights on data.[12]

By writing this thesis the author will try and create an up to date, thorough and easy to understand paper on the legal status of virtual items, raise awareness of the problem of law acting too slowly, and propose several steps we can take for possible solutions. This way we can assure consumer protection and halt the trend where companies deny users their property rights through unchecked one sided private regulation.

- 1.4 Methodology -

For this thesis, the author will focus on a literature study and desk research. Studying the Dutch laws and case law is essential. Since the author is a legal scholar, his views on economics and ethics will not be up to the standard of those fields. Because of this, the author will study prominent literature in these branches.

This thesis will be conducted at the hands of several types of research. Primarily, this will consist of the doctrinal legal research approach of reading and analysing written reports about different aspects of the subject matter. Most of the information will come from several online databases like HeinOnline, and the Social Science Research Network, but the information will also come from offline databases like the Tilburg University Library and bookstores. Although a lot of reading material will be used for this thesis, the main authors whose view will be touched upon are E.J. Koops, J.A.T. Fairfield, C. Blazer, E. Tjong Tjin Tai and Y. Moscowicz. E.J. Koops provides a good starting point for virtual property concerning Dutch criminal law. By reading the literature the author will also come into contact with more literature that is related to the subject matter. The author would limit his thesis to the Netherlands and the European Union laws which apply to the Netherlands. The questions in this research would be looked at from a perspective of the Netherlands, consisting of Dutch and EU law. While researching the subject of this thesis the

[10] Tjong Tjin Tai 2016, p. 12. E. Tjong Tjin Tai specifies that he not only means data in the original meaning, but also classifies the concrete data files themselves as 'data' (p. 3).

[11] For example: Fairfield 2005, which is a prominent piece of literature in this subject matter is more than 10 years old. Moszkowicz 2009, is already 7 years old.

[12] Tjong Tjin Tai 2016, p. 1 and 12.

author found a lack of clear cut literature about property rights in virtual objects in the Netherlands.

The main focus will be on online games and the virtual objects encountered therein. To a lesser extend the user accounts of these games will also be discussed, with analogies to other user accounts like Facebook or an e-mail account. The virtual objects that will be discussed in this thesis will mainly restrict itself to items in virtual worlds and also to clients and platforms. This would mean primarily items you buy with (often real world) currency, to use in the game. Not only this, but also items you can earn through progression and effort, for which you thus don't have to pay for, but still have real world value and will thus fall under the scope of this thesis. We will not only discuss virtual items, but also (indefinite) licenses to software. The possibility of ownership over accounts will also be looked into.

- 1.5 Overview of chapters -

After this introductory chapter the author will first take a look at the definitions of some of the terms used in this thesis in chapter two. Here the author explains what virtual goods are, where they can be found and what interests users of virtual goods have in these goods. Chapter three shall determine how virtual goods are currently protected under Dutch law. This will be done from three perspectives: criminal law, civil property law and civil contract law. The author will start by describing what constitutes as a good in the terms of the law, followed by if a virtual good can be considered as a good in that section of the law. The author will then determine what level of protection is applied to these goods. Relevant case law will be discussed in this chapter, along with relevant sections in the law. Chapter four will follow up on the previous chapters and the author will evaluate the findings he has done concerning protecting user interests in virtual goods. The author will evaluate each system of law and give an opinion on if the level of protection is adequate or not. After the evaluation, the author will put forth some suggestions for improvements where he deems protection to be significantly lacking. Finally, the author will write a conclusion in chapter five. The author will highlight the findings and key points of the previous chapters and end the thesis with answering the central research question '*Is Dutch law providing adequate protection in user interests in virtual goods and if not, how can we improve it?'*

2. User Interests in Virtual Goods

- 2.1 Introduction -

The first steps that needs to be taken to answer the central research question, is to identify the user interests in virtual goods and to determine what level and form of protection on these virtual goods will provide adequate protection to satisfy these user interests.

In this chapter the author will first sketch a picture of what he means with the term 'virtual goods' in the context of this thesis. Here the author will explain what constitutes as a virtual good

and in which platforms virtual goods can be found. By doing so, it will be clear to the reader which goods fall under the scope of this thesis and what the author does not intent to fall under the discussion laid out in this thesis. Next up is identifying the user interests in these virtual goods, which will be done by starting with the disparity of user perspectives and lawmaker perspectives on property. From there on out, the author will identify the various interests a user has in virtual goods. Finally, this chapter will then determine what level of protection on virtual goods needs to be present for these identified interests to be protected in an adequate way.

By doing this, it will become clear what needs to be protected, and what level of protection it needs to be considered adequate. In light of the central research question, this will mean that we can then measure the protection of user interests in virtual goods under Dutch law and determine if this is adequate or not.

- 2.2 Identifying virtual goods and where to find them -

2.2.1 Exploring the virtual world

In this section, the author will explain the terms used in this thesis, and which term better to start with than the virtual world, the cyberspace in which the virtual goods reside, for without the virtual world, there would be no virtual goods.

So what exactly makes a place a virtual world in the context of this thesis? Characteristics that are generally apparent in any virtual world, is that the world is (1) shared, in the sense that it allows numerous users to access the world; (2) have some kind of graphical user interface, this interface allows the users to navigate the virtual world; (3) is immediate, meaning that all actions take place simultaneously, regardless of where the user is accessing the client from; (4) persistent, which means that the virtual world will continue to exist when the users are not in this world; and (5) allow for social interaction, letting the users interact with each other.[13]

In the context of this thesis the author excludes a world that's purely imaginative. This thesis considers virtual worlds to be worlds, which aren't tangible and are imagined, but are created or accessed through the aid of a real-world object, like a computer. This virtual world can then be perceived through technological means. The form is irrelevant; it could be text describing the world, or a fully detailed 3D model.

Since the form is irrelevant, virtual worlds can take many shapes. For MMOG (Massive Multiplayer Online Game)[14] two forms can be identified when looking at the player community and the structure of the world: game worlds and social worlds.[15] In the first form the users adopt a specific role and try to achieve certain goals, while in the social world the goal is less defined and the emphasis instead lies on the social interaction between users.[16] The virtual worlds can also be differentiated by the technology that is used to provide access for the users to the virtual worlds, like client-based, web-based or through intermediaries.

[13] Glushko, 2007, p. 509-511.
[14] Examples of these can be World of Warcraft, SecondLife, or Clash of Clans.
[15] Harbinja 2014, p. 2-3.
[16] *Id.* p. 3.

2.2.2 Virtual goods in the context of this thesis

There is no clear, agreed upon definition in legal academic literature of what constitutes as a virtual good.[17] Here the author will make clear what he will mean with the term "virtual goods" in the context of this thesis. By gaining a clearer idea of what the author means as virtual goods in this thesis, we can more accurately identify user interests in these virtual goods and find out if the definition of virtual goods in Dutch law encompasses the goods that the author is discussing in this thesis.

In order to classify items as virtual goods, attempts have been made to create certain indicia to be able to identify if certain items are virtual goods. It is important to note that these characteristics are in no way absolute attributes, were a single factor should be dispositive, but rather indicia. These indicia are to be seen as practical and must be applied flexibly, evaluating if something is a virtual good not only by which characteristics are present, but also for the level of each characteristic.[18]

In order to find an acceptable definition of virtual goods, the author shall turn towards the works of Professor Joshua Fairfield, a prominent scholar when it comes to virtual goods. Fairfield attempted to define the term virtual goods as something that mimics the real-world goods, having three characteristics: rivalry, persistence, and interconnectivity.[19]

Rivalry means that a good is limited, at any given time, to only one person. The owner of an object has the power to exclude other people from using his objects.[20] This rivalry is the main characteristic that differentiates virtual objects with property rights from objects of intellectual property rights, the latter being non-rivalrous. Moving to the second characteristic, persistence means that the goods don't change and continue to exist, even when it's not in use.[21] Virtual items might be intangible, but it certainly is persistent. Of course, this element is relative and depends on the viability of a particular business model. The data stored will remain the same and continues to exist, with or without the user, provided the platform and/or carrier in which the virtual world persists. Moving to the final traditional characteristic of virtual items, interconnectivity means that the goods can affect and be affected by multiple persons and by other items.[22] As Blazer states "*Internet services that allow users to create or experience an effect, particularly services in e-commerce, demonstrate interconnectivity and thereby suggest the presence of virtual property interests*."[23]

The three indicia laid down by Fairfield are not the only indicia created to classify virtual goods. Blazer states that the formulation above is too broad. He notes that "*whereas an interest in land or chattels may be entirely acquired and assigned, internet users acquire and access virtual property as a result of service providers' initial and continuing investment in computer hardware,*

[17] Lawrence 2008, p. 508.
[18] Blazer 2006, p. 142-149.
[19] Fairfield 2005, p. 1052-1054.
[20] Fairfield 2005, p. 1052-1054; and Blazer 2006, p. 142-149.
[21] Fairfield 2005, p. 1052-1054; and Blazer 2006, p. 142-149.
[22] Fairfield 2005, p. 1052-1054; and Blazer 2006, p. 142-149.
[23] Blazer 2006, p. 145-146.

software and intellectual property".[24] Because of this, not only do we have to find a balance in the interests of users among each other, but also a balance of interests between users and the service providers.[25] This is entirely true in the eyes of the author. If there is no balance between user interests and the interests of service providers, the service providers would be less incentivized to provide virtual goods. Because of this, Blazer adds two characteristics to virtual items that he deems crucial: secondary markets and value-added-by-users.[26]

When users create secondary markets to trade access to and control over computer code, even when not sanctioned by the service provider, this could be a clear indicator for virtual items.[27] Having a secondary market for virtual goods ensures that virtual objects are created, traded, bought and sold, a characteristic that can also be attributed to real-life objects. There are three categories of sales of virtual items: (1) the sale of the virtual currency of the virtual world, (2) the sale of virtual items, such as equipment, houses, or land, and (3) the sale of accounts.[28] These sales typically occur in-game through trading, but also occur through third party-party services and auctions like eBay and PayPal. Lastly, value-added-by-users is the fifth characteristic. This characteristic means that "multiple users may assume an ownership interest in a virtual item by customizing and improving the property to reflect their collective creativity".[29]

Now that we know what constitutes a virtual good in the context of this thesis, we can give some more examples of virtual goods, like: an e-mail account (and by extension any other type of unique user accounts), a domain name (URL), items existing in the context of a virtual world (both items in for example MMOs, but also virtual goods in iTunes or Steam accounts), bank accounts, and arguably unique identifiers like screen names assigned by the Screen Actors Guild.[30] This research will however primarily focus on virtual goods in MMOGs.[31]

- 2.3 The users of virtual goods -

2.3.1 What interests the users?

If we go by the definition of what constitutes a virtual good from the subchapter above, it will be clear that a lot of people use virtual goods regularly. But why do people want to use virtual goods or own them? Here the author will identify the interests users have in virtual goods.

In order to identify user interests in virtual goods, it might be interesting to see why people *buy* virtual goods in the first place. In a survey conducted in 2012 by the company Frank N. Magid Associates, eleven percent of the respondents declared that the presence of virtual goods in a game is of importance to them in the decision if they should play a certain game or not.[32] While this is not a huge number, it shows that virtual goods are an important factor for some users, and

[24] *Id.* p. 140.
[25] *Id.* p. 140.
[26] Blazer 2006, p. 142-149.
[27] *Id.* p. 142-149.
[28] Glushko 2007, p. 510-511.
[29] Blazer 2006, p. 142-149.
[30] Fairfield 2005, p. 1055; and Glushko 2007, p. 511.
[31] *Supra* note 14.
[32] Crawford 2012.

Robert M. Crawford speculates that this number will grow rapidly as time goes on.[33]

In the survey conducted by Frank N. Magid Associates, they asked gamers what their reasons where for buying virtual goods, with the following result:[34]

- 55% of the respondents bought virtual goods in order to be able to do more in a game.
- 49% of the respondents bought virtual goods to get a better experience playing the game.
- 35% of the respondents bought virtual goods to be able to advance a level or state in a game.
- 32% of the respondents bought virtual goods with the purpose of decorating or developing their avatar identity in a game or to better express themselves.
- 27% of the respondents bought virtual goods to improve their skills in a game.
- 17% of the respondents bought virtual goods to beat their friends.
- 16% of the respondents bought virtual goods solely because they needed to in order to continue to progress or have fun.
- 14% of the respondents bought virtual goods to achieve a goal with their game friends.
- 10% of the respondents bought virtual goods to show off things that they like in real life in a game.

From this, the author can conclude that users tend to buy virtual goods to either gain more access in the virtual platform in some way or to increase the performance of themselves or their avatar either in skill, power or aesthetics. If the main reason users buy virtual goods is to gain more access to the virtual platform, it should be important that the user has access to said content at all times, since denying the user access to the content would defeat the purpose of the purchase. Buying virtual goods for aesthetic- or power-related reasons would require the user to have control over the virtual goods, to decide when to use the items and in what way. The study seems too limited however. The author thinks much more reasons are present for users to decide to purchase virtual goods or not. Identifying these different user interests will be done in the subsequent sections.

2.3.2 The user perspective on owning virtual goods

It is also good to note what users think of their virtual goods. The average person would perceive and experience using their virtual goods differently than legal scholars would perceive those virtual goods. When we're discussing the term 'property' there might be some confusion as to what is meant by that. This is because there are effectively four perspectives on property: the layman's perspective, the normative perspective, the economic perspective, and finally the legal perspective. The latter is further divided with the criminal and civil systems in Dutch law, but more on that later. There are persistent contradictory statements about what property is and what it's trying to achieve.[35]

[33] *Id.*

[34] *Id.*

[35] Purtova 2011, p. 52-53.

As the name of a layman's perspective might suggest, this perspective is taken by the everyday people with no expert knowledge or legal training on the meaning of property.[36] This perspective on property is heard often in debates on property on unconventional objects, such as virtual property. What a layman might consider his property in the virtual world might not actually be his due to the way various laws work and/or contracts that bind the user. A layman generally has two convictions about property, firstly that the term 'property' does not refer to rights, but to objects themselves, secondly by stating that said object is his, the owner has full control over it and can destroy or sell the goods when the user so desires. Thus, the idea of property, to a layman, is that some 'thing' is 'his'.[37] This idea holds little ground in the legal definition of property, since in the legal sense property itself doesn't mean an object, whether tangible or intangible, but conveys a legal relationship among people with regard to things, making a distinction between property rights and the objects itself.[38] Lastly, the layman is often convinced of absolute control over an object, while such an absolute nature of property law is often a legal fiction,[39] especially when it comes to virtual goods.

As we have seen in sub-chapter 2.2, virtual goods aren't actually the same as the physical goods that they represent, but exist out of bits and bytes, zeroes and ones. This however means nothing to the user. The user is not interested in the technological aspect of what makes a virtual good a virtual good, but is only interested in what it represents, whether that be a piece of text, a song or even an in-game item or account.[40] Even more importantly to the user, he is interested in how to access and how to exert control over the data so the user can do with the virtual goods what he was set out to do.

When a user buys a virtual good he will often perceive this as his property.[41] When someone buys a song on iTunes an eBook from Amazon or a virtual outfit in SecondLife the user will experience those goods as a digital copy, yet as we shall see later on in this thesis, legal scholars see the situation in an entirely different light.

- 2.4 Identifying user interests in virtual goods that require protection –

2.4.1 Identifying the user interests

With the above in mind, the author will now identify the user interests in virtual goods. A good way of identifying user interests is to look at the property interests associated with traditional goods. Fairfield argues that virtual goods mimic "real world" goods and should be treated like real world goods.[42] Based on the rationales from Fairfield, Blazer uses the five indicia, as laid out earlier in this chapter, to identify "legally protectable virtual property interests on the Internet".[43]

[36] *Id.* p. 54.
[37] Cribbet e.a. 2007, p. 2.
[38] *Id.*
[39] Purtova 2011, p. 54.
[40] Van der Wees 2016.
[41] Van der Wees 2016.
[42] Fairfield 2005, p. 1052-1054.
[43] Blazer 2006, p. 139.

Section 2.3.2 mentioned the layman's perspective on virtual goods. In this perspective, the layman perceives to have *control* and *ownership* over their virtual goods. Translating these layman's perspectives into a legal perspective, so what a layman *thinks* and what actually *is* would be in the interest of the user. Thus, according to the author, the first and foremost interest users have in virtual goods is claiming ownership. The idea of owning the representation of the bits and bytes lays the basis to what a user can do with the virtual goods, since ownership implies control. Users gaining full ownership over their virtual goods would allow them to do with the virtual goods as they please.[44]

Following the idea of ownership is the ability to control the virtual goods, which brings the second user interest. Even if the user has no ownership over their virtual goods (which is often the case if it is up to the EULA, as we shall see later on), the user absolutely needs to control the virtual goods in one way or another. If the user has no control over virtual goods, he can't always *use* virtual goods. But not only is it important for the user to have ownership and control over the virtual goods, it is also imperative for the user to be able to access their virtual goods, which forms the third user interest, since as pointed out in section 2.3.1 gaining (more) access to a platform is one of the prime reasons users buy virtual goods. If the user owns or controls a virtual good, but the platform-owner is denying the user access, for example through a ban or by shutting down their services, the user is unable to enjoy their virtual goods.

The fourth user interest in virtual goods that the author identifies is that of monetization. The above three interests were pretty straightforward and self-explanatory, but this one requires a bit more explanation. As we saw in chapter 2.2, secondary markets and value-added-by-users are two indicia to determine if something is a virtual good or not. This means that virtual goods often have value. MMOGs often have a very vibrant in-game marketplace, where users can trade and sell their virtual property among each other, and although the market is primarily focused online in the game itself, it has offline influences as well. Trade in these games mirror the real world, with normal shops, auction houses, or just trading. These are all in-game however, and there are numerous possibilities to extend the in-game trading outside it. Through eBay or other market sites, people can list various items for sale for real money. The important thing to understand is that the accumulation of items is often a key aspect of the MMOG, regardless of goal, and as the survey from section 2.3.1 shows, many users buy virtual goods to acquire "better" items. In the goal-driven game types, certain items translate directly to the power of the users' Avatar, while in the interaction-based game type the items can allude to a certain social status of the player. Accumulating numerous virtual goods would empower the avatar, or give the avatar a certain status and prestige among other users, making virtual property highly sought after in these types of games.

Even though most virtual worlds exhibit the trade of virtual goods between players, this has done little to diminish the secondary market,[45] a large market exists where users can exchange virtual goods for real money. In one instance, a user sued a company which was conducting "gold

[44] Article 5:1 subsection 2 Dutch Civil Code "The owner is free to use the physical object to the exclusion of everyone else, provided that he respects the rights and entitlements of others to the physical object and observes the restrictions based on rules of written and unwritten law."
[45] Bonar-Bridges 2016, p. 81.

farming" (spending large amounts of time in the virtual world for the sole purpose of gaining virtual currency to sell for real money), under the argument that the act of gold farming resulted in harming the social aspect of the virtual world, reducing his own investment in the game due to some kind of inflation.[46]

The fifth user interest in virtual goods is that of legal certainty. Users often may not have rights in their virtual goods in the way that they think,[47] as we have laid out in sub-chapter 2.3. Often times, users of virtual goods can solely derive rights on those goods which are laid out in the virtual worlds terms of use agreement, which is likely to provide less protection then what users previously thought or desired. Also, the law might not acknowledge the status of virtual goods. Users can be left wondering if theft of virtual goods is a crime or a civil offense, if they can claim property rights in online creations and what recourse is available in case a virtual world shuts down or otherwise expropriates a user's virtual goods.

Effective legal enforceability is the sixth user interest. Having all these interests protected means nothing if you can't actually enforce such protection. Users are eager to accept the concept of legally enforceable virtual property interests.[48] When users have rights and know their rights, they also need to be able to enforce those rights.

The seventh user interest is to be treated fairly regarding their rights to virtual goods. In two cases, Bragg v. Linden Research[49] and Evans et al v. Linden Research[50] the fairness of the contract was the central issue. Out of these two cases we can identify a user interest, which is the interest of fairness. There is a large gap in power in the relationship between users and platform-owners and consumer protection mechanisms to equalize the playing field would be in the interest of the user. Of course, one needs to ask firstly if there even is a consumer, but in some cases, there is. As we saw in section 2.3.1, users do *buy* virtual goods. Consumer protection can be applied when the user is buying a license for using a software or otherwise spends money on virtual goods.

The eighth and final user interest that the author wishes to address in this thesis also has to do with fairness, but surprisingly not for the user himself, but for the platform-owner. As was mentioned in section 2.2.2, a balance of user interests and the interests of platform-owners would ultimately seem more beneficial for the user than a one-sided look at the interests of the user. This is because without looking after the interests of platform-owners, platform-owners might lose interest in providing their product. This would mean less supply and diversity in virtual goods, which, in the authors eyes, would be a disservice to users.

There are more user-interests imaginable however, but these will not be fully treated in this thesis and will be merely mentioned. One of these is the interest of human rights. It is even possible to think some virtual goods, like for example the user's avatars, should enjoy human

[46] Hernandez v. Internet Gaming Entertainment, Ltd., No. 07-civ-21403 (S.D. Fla. Filed June 1, 2007, and dismissed Aug. 26, 2008).
[47] Mesiano Crookston 2013, p. 11.
[48] Blazer 2006, p. 154.
[49] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D.Pa. 2007).
[50] Evans v. Linden Research, Inc., No. C 11–01078 DMR, 2012 WL 5877579 (N.D. Cal. Nov. 20, 2012).

rights, since they are "the manifestation of actual people in an online medium".[51] Examples of such rights are equal rights, resistance to oppression, freedom of speech, freedom of assembly, presumption of innocence, etc. This however is too broad and vague to address in this thesis. This will however become too philosophical and broad to be addressed further in this thesis.

The user interest of claiming intellectual property rights is also present. In some platforms, users are able to create their own works using the tools available to them, for example SecondLife or even Minecraft. Second life has a web shop in which users can design their own items to sell. Many of these would seem to be created with a significant portion of originality and character of the creator, with little input of the platform holder. Van Eeckhoutte even suggests something along the line that a game like Minecraft acts as a licensed canvas for the many creations within.[52] Van Eeckhoutte claims that some of the works within Minecraft deserve to be protected by copyright, but that the rights structure is so unclear that copyright is hardly used to actually protect the works.[53] While the author acknowledges the interest of users to claim IP rights on their virtual goods, this is a whole other issue that will not be further addressed in this thesis.

2.4.2 What level of protection on these user interests in virtual goods is adequate?
In order for the above mentioned user interests to be adequately protected, Dutch law needs to provide some rules that ensure that the users of virtual goods can enjoy their virtual goods. However, not all user interests need to be protected at all times, due to the balance of user-interests and the interests of platform-owners that need to be struck.

For criminal law, the idea of ownership over goods is important. For virtual goods to be taken away, they need to belong to someone else first. However, the author is of the opinion that is does not matter if this ownership lies with the platform-owner or the user. All that is relevant for the user, is that the perpetrators are caught and that the virtual goods are again able to be accessed and controlled by the user. Thus having definitions in criminal law that ensure the user access to their virtual goods and that they can use their virtual goods correctly (i.e., they are not damaged, destroyed or taken away) are required to be present if we want to speak of adequate protection in Dutch criminal law.

For civil property law, it is important that ownership is the most important user interest in virtual goods that need to be ensured. Ownership is the most encompassing right one can have towards their goods, and allows users to use, access and control their virtual goods. Thus, making sure that virtual objects can be owned by the users would go a long way in adequately protecting user interests in virtual goods. Allowing users to use, access and control their virtual objects by giving them the right to do so, and denying others to breach that right, would ensure that users would be able to enjoy their virtual goods.

For civil contract law, the overarching user interest in virtual goods is to be treated fairly. This means that platform-owners can't abuse their dominant position to strong-arm users into relinquishing rights towards the virtual goods. By ensuring that clauses in contracts that deny users any ownership over virtual goods, allows platform-owners to withhold access to virtual

[51] Koster 2000.
[52] Van Eeckhoutte 2012, p. 3.
[53] Van Eeckhoutte 2012, p. 3.

goods, or deny users to monetize their virtual goods are regarded as unbinding, the user interests in virtual goods can be protected adequately.

Naturally, the user interest of legal certainty counts for all systems in which virtual goods can enjoy protection. Effective legal enforceability is also needed in all systems of the law for user interests in virtual goods to be adequately protected. Ensuring that users or platform-owners have an authority to turn to, would increase their chances or regaining the virtual objects.

3. The Protection of Virtual Goods under Dutch Law

- 3.1 Introduction -

In the previous chapter, we have successfully identified what interests users have in virtual goods and outlined what protections need to be present for the user to enjoy these interests. The next step to answering the central research question is to see how virtual goods are protected under Dutch law.

This chapter will have three key focus points, namely Dutch criminal law, Dutch civil property law and Dutch civil contract law. When concerning legal protection of property, Dutch law has two different systems: criminal and civil law. The two well-known and discussed cases of Dutch law concerning virtual goods have both been in the dominion of criminal law. Because of these actual precedents, the author will start this chapter with Dutch criminal law. After criminal law has been discussed, the author will do the same for Dutch civil law.

Once this chapter has been completed, it will become possible to answer the first part of the central research question "*Is Dutch law providing adequate protection in user interests in virtual goods?*". The thesis will have laid out the present protection on virtual goods in Dutch law, which combined with our knowledge from chapter 2, will allow us to determine if virtual goods are adequately protected in Dutch law in chapter 4.

- 3.2 Dutch Criminal Law -

3.2.1 What are goods according to criminal law?

In sub-chapter 2.3 the author shortly mentioned the layman's perspective on property rights. While this perspective explains the behaviour and interests of the user, it cannot be counted on in a matter of court. In this section the author will analyse the protection of virtual goods under Dutch criminal law.

The basis of what constitutes a good under Dutch criminal law forms the first stepping stone in identifying the level of protection on virtual goods in Dutch criminal law. It is meaningless to understand what level of protection criminal law provides if we do not know on what goods these protections apply. For example, articles 310 (theft) and 350 (destruction or damaging) Sr apply to 'enig goed': any good. And if virtual objects are not to be considered a good under

criminal law, then these provisions do not apply to them. This is easier said than done however, since Dutch criminal law doesn't clearly state what the definition of a good is.[54] Cleiren and Nijboer state in their discussion about Dutch criminal law that in order to consider something a good, it has to concern tangible objects or non-tangible objects like energy, gas, and electronic money, as well as objects that have no economic worth, as long as it has some kind of worth for the owner.[55] When in doubt, the worth criterion is the deciding factor.

So currently, it is possible for intangible goods to be an object that someone can claim ownership over according to criminal law, but this wasn't always the case. By looking into case law that helped shape the current definition of 'a good', the rationale of the supreme court and the legislator as to what is considered to be a good and why, will become clear. This allows the author to see if and how virtual goods, like those we mentioned in chapter 2.2.2, are protected.

3.2.2 Accepting the idea of intangible goods in Dutch criminal law.

The concept of legally owning goods is about as old as the concept of the law itself. The owned objects have however traditionally been tangible goods, clear as day to everyone to observe it that the good exists.

It wasn't until last century that it became generally accepted that goods did not have to be tangible in the strict sense of the word. In Dutch law, this change came to be with the "*Elektriciteitsarrest*" (Electricity case) from 1921.[56] In this case, a dentist found a way to use electricity without having to pay for it, by sticking an iron bar in the metre. Upon discovery, the dentist was charged with theft. Translated, theft in Dutch law is "the act of taking away a good that wholly, or partially, belongs to another, with the goal of unlawfully taking possession."[57] Back then, having access to electricity wasn't as common as it is now, and the judges had to ask themselves the question if one could claim property rights over electricity. The judges ruled that the theft of electricity could be seen as stealing a good. The court let go of the criteria that a good had to be tangible, and decided that for there to be a good, the good had to have an independent existence, it has an economic worth, and that the de facto control is transferable.

The Dutch Electricity Case was the first in a line of many that expanded the definition of a good in criminal law. This line of thought was continued in 1982 in the "*Giraal Geld*" case (Giro Money).[58] A 'giro' transfer is an electronic payment from one bank account to another bank account. The money involved in this account is stored virtually, and isn't tangible. In this case, money was accidentally transferred to a woman's bank account, which the woman subsequently spent. Because of this fact, the woman was tried for embezzlement.[59] Again, the court faced the question if virtual money was considered as 'a good'. Contrary to the electricity case, it is not possible to measure or see giro money, making it considered as even more intangible than electricity. Instead of relying on a strict interpretation of the term 'a good', the court attempted to protect the value that the 'good' represents. The courts stated in this case that "because of the

[54] Moszkowicz 2009, p. 498.
[55] Cleiren e.a. 2008.
[56] HR 23 mei 1921*, NJ* 1921, 564.
[57] Article 310 Wetboek van Strafrecht
[58] HR 11 mei 1982, *NJ* 1982, 583.
[59] Article 321 Wetboek van Strafrecht.

function of 'giro money' in the generally accepted practice, it can be seen as a good that belongs to another and is consequently claimable." The court paid attention to the function of 'giro money' in this case to classify it as a good.

Important to note, is that the courts intended to expand the reach of the Electricity-case.[60] For example, in the "*Belminuten*" case, a former employee took a company sim card and used it to make calls and texts.[61] The court was faced with the decision if mobile minutes and texts are to be considered goods in the sense of article 310 Sr. The court, again, decided that, because of the function of minutes and texts on a sim card in the generally accepted practice, mobile minutes and texts are to be deemed as goods in the sense of article 310 Sr.[62] Similar to the electricity case, the court uses the economic meaning of mobile minutes and texts as the deciding factor if something is considered a good or not.[63]

The year following the ruling of the Giro Money case, the courts applied the logic from the Giro Money case in the "*Computerprogramma*" case (Computer program).[64] In this case several computer programs and files were copied illegally. The court in Arnhem stated that the computer files were able to be transferred, to be reproduced, and had economic worth, and thus could be seen as a good in the sense of the Dutch criminal law. However, this judgement was met with a lot of criticism, since the programs and files were able to be duplicated, and the de facto control wasn't transferable.[65] From this, it seems that having an economic worth that has a function within a context of society is a criteria for being deemed as a good in the sense of article 310 Sr or not.

In 1996, the Supreme Court of the Netherlands decided to put an end to all the discussion regarding computer data and broke with the earlier reasoning laid down in 1921. In this case,[66] a network administrator had copied several files without permission. The Supreme Court decided that, in contrast with the earlier case, computer data cannot be considered a good, since it doesn't have the quality that the person who has the de facto control doesn't lose this control, when somebody else gains possession over the computer data.[67] The Supreme Court followed the line of thoughts that when you are able to make an exact copy of the data, then that data could not be considered a good. Because computer data are mostly copied upon transfer, it was not seen as theft of the computer data, since the owner never lost the possession over this computer data.

While the 1996 Supreme Court case was a huge blow to the notion of property rights in virtual goods, this was far from the end. The biggest change in Dutch case law that gave users a definitive legal protection for virtual goods in Dutch criminal law was the earlier mentioned RuneScape case.[68] As said, this case concerns two suspects who used physical violence and threats to extort virtual objects from the victim. The suspects gained access to the RuneScape

[60] Rozemond 2013, p. 294-295.
[61] HR 31 januari 2012, *LJN* BQ6575, *NJ* 2012/535 (m.nt. N. Keijzer onder NJ 2012, 536).
[62] HR 31 januari 2012, *LJN* BQ6575, *NJ* 2012/535 (m.nt. N. Keijzer onder NJ 2012, 536), consideration 3.4.
[63] Rozemond 2013, p. 295.
[64] Hof Arnhem 27 oktober 1983, *NJ* 1984, 80.
[65] Commissie Computercriminaliteit 1987 "preadvies computercriminaliteit".
[66] HR 3 december 1996, *NJ* 1997, 574.
[67] HR 3 december 1996, *NJ* 1997, 574.
[68] Hof Leeuwarden 10 november 2009, *LJN*: BK 2773.

account of the victim, in which they forced the victims' avatar to fight the suspects' avatar, and purposefully lose. Upon defeating the victim, the suspects were able to take the virtual objects that the victims' avatar was holding.

The Dutch court convicted the two suspects for theft. In order to qualify the offence as theft, the Dutch court used three criteria, which were derived from article 310 Sr. Firstly, as seen in previous case law, it was no longer required for a good to actually be physical or tangible. The stolen items in the RuneScape case might not be physical, but they are perceptible. Secondly the items have been transferred. The two suspects have taken the items from the avatar of the victim, and transferred them to their own avatars, denying the victim access to his virtual property. Thirdly it is of importance that the item has value for its owner. This is a very vague term, and has been open for discussion, since the value that the owner gives to a certain object says nothing about the legal entity that can be administered to the item.[69] The courts state that through previous case law the notion of 'economic worth' became more relative and subjective (the courts however provide no sources of which case law this is based on).[70] The players of the game stated that having lots of riches and items in the game made you very powerful and brought a certain prestige along with it. It was quite clear for the court that this meant that through time and effort, these virtual objects were earned and had value for the players.[71] This latter criterion also raises a question with the author, since as stated in section 3.2.1, it is not required for real world goods to have any worth to be considered as stolen.[72]

Finally, there was another criminal case concerning virtual goods in 2008, this time in the game of Habbo Hotel.[73] In this case two suspects provided a fake website which inquired for the username and passport of users. When the victims were asked to log in, the data was copied and used by the perpetrators to gain access to the accounts. When the perpetrators had entered the account, they moved pieces of virtual furniture from the compromised accounts to their own accounts. By doing so, the legitimate account users no longer had access to their virtual items. Besides trespassing into the computers, the judges also deemed that the suspects where committing the act of theft. Sadly, this case provides us less to work with, since the judges don't question and explain if and why the virtual items are considered goods in the sense of article 310 Sr or if they have any real worth at all.

3.2.3 Classifying virtual goods as goods in criminal law after RuneScape and Habbo Hotel.

The court decisions of RuneScape and HabboHotel sparked a lot of discussion in the legal field, since it still left us with a lot of questions. N. Keijzer found the RuneScape decision questionable at first, but eventually was convinced the court made the right decision.[74] Y. Moszkowicz argued that a problem with virtual property is that the property is, as the name implies, virtual. Following his train of thought. virtual is something imaginary, something that's not in the real world. So, one can wonder how one is able to claim possession of something imaginary.[75] A

[69] For example: Koops 2013, p. 8; and Moszkowicz 2009, p. 498.
[70] HR 31 januari 2012, *LJN* BQ9151, *NJ* 2012/536, annotated by Keijzer, annotation 4.
[71] HR 31 januari 2012, *LJN* BQ9151, *NJ* 2012/536, annotated by Keijzer, Grounds section 3.5 and 3.6.1.
[72] Cleiren e.a. 2008.
[73] Rb Amsterdam 2 april 2009, *LJN* BH9791.
[74] HR 31 januari 2012, *LJN* BQ9251, *NJ* 2012/536, annotated by Keijzer, and Koops 2013, p. 1.
[75] Moszkowicz 2009, p. 499-500.

virtual good is nothing more than a line of codes that conjure a visual image on a screen. If these goods actually exist, then the control of the goods will always lie with the programmers of the game, who have access and control to the entire virtual world, creating the second problem of virtual property. The game developers have the power to do with the goods as they please at all times, hence a single user who had access to the virtual good would never have the actual de control, implying that the virtual good is in fact not a good in the sense of 310 Sr.[76] Koops marks this as the most important criterion to qualify something as a 'good' in Dutch criminal law.[77] According to the author, while singular control over an object seems quite important, it should not a decisive factor. The court pointed towards passports that are property of the State, but can be taken out of the control of the holder through theft.[78] For criminal law it is thus not relevant for criminal prosecution. Koops however points out that an important difference with passports and virtual items, is that with passports the physical control only lie with the one that physically holds the object.[79]

In the Habbo Hotel case, the judges did not provide any meaningful insight into why the virtual items were seen as a good in criminal law or why they have any worth. The author would argue that in Habbo Hotel you acquire the furniture through the purchase with "habbo credits", which in turn are bought for real money. Because habbo credits are a form of virtual currency which are bought for real money,[80] they can be seen as some form of credit representing the real money that was used. This line of thought would put the virtual items into the category of the Giro Money case from 1982.[81] As the author pointed out in section 3.2.2, the courts in the Giro Money case stated that the accepted function of giro money allows it to be classified as a good. Users of Habbo Hotel use the in-game currency of habbo credits in the same way as real money. With this reasoning, the value of the virtual items can be easily calculated and Habbo Hotel can be compared to a bank, making the reasoning to qualify this as theft under article 310 Sr more clear.[82] However, if this was actually the line of thought that the court had in mind in the Habbo Hotel case is unclear.

In the 1996 computer data case the supreme court decided that there is a strict separation between goods and data.[83] In the RuneScape case the supreme court implied that something can't be a good and data at the same time.[84] The supreme court said that there are cases in which something sits between the boundaries between data and goods and a judge has to qualify which it is by his own judgement.[85] Because the judge has to qualify it as either a good or data, it seems the supreme court thinks something can't be both. Keijzer and Koops however both think that a strict qualification as either is unnecessary,[86] and the author agrees. In other areas of criminal

[76] Moszkowicz 2009, p. 500-501.
[77] Koops 2013, p. 6.
[78] *Id.*
[79] *Id.*
[80] Important to note here is that habbo credits are mostly bought for real money from the platform-owners themselves, not on secondary markets, making the value independent of users.
[81] HR 11 mei 1982, *NJ* 1982, 583.
[82] De Jager 2010, p. 38.
[83] HR 3 december 1996, *NJ* 1997, 574.
[84] Koops 2013, p. 8.
[85] HR 31 januari 2012, *NJ* 2012, 536.
[86] HR 31 januari 2012, *LJN* BQ9251, *NJ* 2012, 536, annotated by Keijzer, § 9 & Koops 2013, p. 8.

law, a certain action can be classified as several offenses, so it seems odd that crimes relating virtual property need a strict qualification. And when you require a strict separation between data and goods, then you also need a strict fencing off of the criteria, which seems to be missing at present.[87] From the RuneScape-case it seems that the criteria to mark virtual objects as a good are: have real value, are created through time and effort and that the items are, within a virtual context, in the exclusive control by someone.[88] These could apply to a lot of the virtual objects, which creates a broad spectrum of criminal offenses concerning virtual objects.[89]

Whatever the case may be, the RuneScape and Habbo Hotel cases have made it clear that *some* virtual goods are protected by criminal law. By using the existing case law, the supreme court gave a clearer explanation for when a virtual good is considered to be protectable by criminal law. Having read these court cases, the author identifies criteria for objects to be considered a virtual good protectable by criminal law. To sum it up, a virtual good that is able to be protected under criminal law is an (in)tangible object, with: (i) a certain independent existence, (ii) can be generated and controlled by a person, (iii) has genuine (economic) value, (iii) allows for the transfer of control, (iv) economic worth has a function within a context of society, (v) and the user has a de facto control over. This gives us an idea of what virtual goods are currently eligible for protection. In the next section the author will determine what kind of protection the virtual goods can enjoy.

3.2.4 Criminal actions: rules of the game or criminal law?

In Criminal Law, we have to be careful about how we approach criminal situations. When talking about the virtual world, being a "criminal" does not always mean that you're breaking the law. In section 3.2.3 the author defined the criteria virtual goods need to adhere to, to be protected by criminal law. In this section the author will discuss the rules of the platforms which these virtual goods reside in. This is important, since here the author can question whether or not the law *should* provide legal protection for virtual goods. The context of the virtual world can be looked at in two different ways.

The first and most obvious way, is that the rules of the game make actions which would be criminal in the real world not criminal. In a large number of online games for example, it is the objective to kill the avatars of other players. It would be absurd to charge the perpetrators with murder or destruction and the same could be said of thievery of virtual goods. If the game allows or encourages users to take possession of other users' virtual goods by certain means, then doing so should not be punishable outside of the virtual world. Koops calls this the 'magic circle', in which criminal law should not have any action, but as soon as one operates outside of this magic circle the real world would be affected, and with that the law.[90] This can be explained by the example of the RuneScape case. What happened in-game was all allowed. The avatars fought each other, one lost and to the victor the spoils. But what transcribed *outside* of the virtual world, ergo the *real* world is what lead to the criminal conviction of the perpetrators. This boundary of the magic circle seems very straightforward and is a good starting point in deciding whether or not an action should be punishable by law. This way, certain actions can be filtered out of

[87] Koops 2013, p. 9.
[88] Koops 2013, p. 9.
[89] *Id.*
[90] *Id.* p. 3-4.

criminal law instantly since they are part of the experience. And while disruptive behaviour is imaginable inside of the magic circle, for example positioning multiple users in such a way that access can be denied to certain areas for other users in Habbo Hotel, such offences have no place in criminal law.

A second way to look at the context of virtual worlds, is in the context of the game. In the case of virtual property rights in games, it is important to remember that it is a *game* we are talking about. By using the system, exploiting bugs or scamming people within the game, one could say that the perpetrators are effectively cheating instead of conducting criminal behaviour. As Y. Moscowicz points out, it would be undesirable if we would face criminal sanctions every time we cheated in a game like Monopoly.[91] With this dilemma we could have a philosophical debate about the separation of the real world and the game worlds, for example "is stealing considered as cheating in "the game of life" and therefore punishable?" And while it would seem clear to most people that cheating should not be punishable in a game of Monopoly, the line between in which game worlds cheating should be punishable and in which it shouldn't be is blurry at best. Judging this on a case by case basis would certainly not stimulate legal certainty. Koops makes a valuable argumentation that in the RuneScape case there are two key differences which makes it stand out from cheating in a game of Monopoly. First off, he states that online worlds are more perpetual, lasting an immense amount of more time than the average game of Monopoly.[92] If the users in question are not playing, the world continues to run without their input. This would make the virtual objects in RuneScape worth much more then in Monopoly. A second argument Koops makes concerns the technological context. With a Monopoly game, you can easily address the problem yourself, taking back your items, while in the virtual world you would either need the cooperation of the platform-owner or the perpetrator themselves.[93]

3.2.5 Taking away your goods without theft

To end this sub-chapter, the author will look into other provisions in criminal law to protect virtual goods. The above cases have been about theft, but the criminal law is not just about this offence. In most virtual worlds, it is possible to delete items, entire accounts or even the entire platform. It's clear this isn't theft, so what are they? Article 350 Sr deals with destruction of goods and article 350a Sr of destruction of computer data. So regardless of the argument if virtual goods are actual goods or merely data, there is a provision present we can use. Article 350 sub 1 Sr makes it possible to bring action against "*he who deliberately and unlawfully destroys, damages, makes unusable or loses a good that wholly or partially belongs to another*". Article 350a sub 1 Sr reads that "*he who deliberately and unlawfully changes, deletes, makes unusable or inaccessible, or otherwise adds data to data that is saved through the use of an automated work or through a method of telecommunication*" are punishable by law.

A different way to look at cases where virtual goods are taken away without consent of the user of the virtual goods is to look at articles 138ab Sr and 350a Sr.[94] Article 138ab Sr is unlawful entry into an automated work or part thereof and 350a Sr destroying computer data on purpose. These two articles will cover some cases concerning virtual goods, like the earlier mentioned

[91] Moszkowicz 2009, p. 501.
[92] Koops, 2013, p. 5.
[93] *Id.*
[94] Article 138ab Wetboek van Strafrecht, article 350a Wetboek van Strafrecht.

Habbo hotel case. When a perpetrator gains unlawful access to an automated work by the means of penetrating a security measure or assuming a false identity he can be punished under the Criminal law.[95] While the public prosecutor put up the charge for unlawful access into an automated work in the Habbo hotel case, they did not do so in the RuneScape case, even though technically the criteria had been met. After the unlawful access both perpetrators took the virtual items from the accessed account and made sure the items were inaccessible to the original holders of those virtual items. By doing so the perpetrators also violate article 350a Sr.

By following these laws, gaining unlawful access to someone's account and taking away their virtual items is still punishable by criminal law. This would provide criminal protection for the virtual goods of users while not actually assigning any property rights, thus avoiding the debate of property rights in virtual items. It can be argued that computer data cannot be taken away, since putting the data outside of the control of someone is only a change on the server.[96]

- 3.3 Dutch Civil Property Law -

Civil law provides for several forms of protection of goods, most notably through property law and through contract laws, but also through tort. First of the author will start with the system of property law. Property law provides the basis for protecting virtual goods and contract law is able to make adjustments to this base level of protection.

3.3.1 What is the legal status of virtual "goods" under civil law?

Civil law and criminal law are both an autonomous branch of the law with their own concepts. Therefore, what is considered a good in criminal law is likely not to be the same as what is considered as a good under civil law. In order to understand what level of protection virtual goods have under Dutch law, it again is needed to first identify *which* goods are protected, before moving on to see *how* and *if* those goods are protected. By knowing which goods rights are granted to, it will become clear if virtual goods are protected by civil law, and if not why virtual goods are not protected.

The first question we thus need to ask, is what is a good under Dutch law? Goods are regulated in book three of the *Burgerlijk Wetboek*. Unlike criminal law, which knows only the term "*een goed*" as an item, according to Dutch civil law, goods can be physical objects or economic rights.[97] Article 1 states that goods are all '*zaken*' (physical objects) and all '*vermogensrechten*' (economic rights). Article 3:2 clarifies that '*zaken*' are susceptible to human control and are tangible objects. This classification leaves us in the dark when it comes to virtual items, since virtual objects are not deemed to be tangible. Strictly speaking, article 3:2 states that goods are tangible, material objects which are susceptible to human control. This line of text implies that virtual objects don't fit into this category, since they are deemed as intangible.[98]

If virtual "goods" aren't considered a good in the strict sense of 3:1 and 3:2 BW, then we need to

[95] Moszkowicz 2009, p. 502.
[96] Moszkowicz 2009, p. 502.
[97] Article 3:1 Burgerlijk Wetboek
[98] Wibier 2016, p. 3-4.

ask ourselves if the data that represents the virtual goods can be considered as a good. So, the second question we need to ask, is "what is data"? By knowing what is considered to be data, the author can see if data can be classified as a good under civil law. Tjong Tjin Tai mentions that nowadays, data is considered to be concrete data files, so the digitalised data.[99] This is distinguished from the information itself that the data holds. Of itself, data has no legal status and is considered to be intangible.[100] This means that it also has no possibility of being classified as a good in the sense of articles 3:1 and 3:2 BW. However, control of data is not a foreign concept,[101] and developments are in motion that advocate for a system of protection that equals property law.[102] This however now means that virtual items are not considered goods under property law, and thus enjoy no protection

Finally, the author also mentioned the possibility of 'economic rights' as goods.[103] According to article 3:6 BW, 'economic rights' are "rights which, either separately or together with another right, are transferrable, or which intend to give its proprietor material benefit or which are obtained in exchange for supplied or the prospect of still to supply material benefit." However, considering virtual goods as an economic right, simply because a user paid money for it, is too shortsighted.[104] Due to the way virtual goods are presented to their users, the user has a contractual agreement with the platform-provider to gain access to their virtual goods, but not on the data that represents the virtual goods themselves.[105] The most prominent problem with an economic right on virtual objects, is that there can only be a right, if one can exert that right towards someone else, which seems to be impossible in data, according to Wibier.[106] Wibier further concludes that, even though an economic right on data is currently not possible, it is not impossible to create economic rights on data from a legal-technical standpoint. He however does not put forth any suggestions to achieve such a thing, and instead decided to leave it to the experts of the field.

So, to conclude the author has to give a negative answer to the question if data or virtual goods are recognised as legal property. However, as mentioned earlier in this sub-chapter, property law is not the only way virtual goods can be protected under Dutch civil law. Contract and tort law can reach results that are similar to property law. These will be addressed next.

- 3.4 Dutch Civil Law and contracts -

3.4.1 Introduction

As chapter 3.3 has made clear, virtual goods gain no protection from property law. But that does not mean that civil law provides nothing else that is able to regulate the interests parties have in virtual goods. At the start of virtual platforms, platform-owners relied on intellectual property

[99] Tjong Tjin Tai 2016, p. 2.
[100] Tjong Tjin Tai 2016, p. 5.
[101] See for example HR 27 april 2012, ECLI:NL:HR:2012:BV1301, NJ 2012/293, in which de facto control was given to the buyer of software.
[102] Tjong Tjin Tai 2016, p. 4.
[103] Article 3:1 Burgerlijk Wetboek.
[104] Wibier 2016, p. 4.
[105] *Id.*
[106] *Id.* p. 4-5.

laws to regulate their platforms. But as the virtual worlds grew, so did the possibilities therein, including for users of those virtual worlds to claim intellectual property rights themselves. When it became clear to platform-owners that intellectual property law became insufficient or unsure to regulate property rights, the platform owners sought to find a solution in contract law.[107]

The possibility of ownership is often given, and even more often claimed in contracts between platform-owners and users. Platforms that Dutch citizens use mostly adhere to property-adverse virtual worlds, meaning that the End-User License Agreement (hereafter: EULA) denies virtual property rights which someone could use to make claims against an operator.[108] The popular MMO 'World of Warcraft' is an example of this format,[109] which makes sure that the gamers have no rights to virtual property or even the accounts they operate.[110] The use of these EULAs denies the users of these game clients any ownership claims to virtual goods, making it exceedingly difficult for users to use their virtual goods to their own content, for example trading and selling their virtual objects.

This chapter shall look closer into this form of self-regulation through contracts and agreements between platform-owners and users. The author will examine the rules of Dutch contract law and apply these to several types of contracts that are commonly being used to regulate the virtual worlds. By doing so, the author will be able to determine what level of protection is available for the user interests in virtual goods. After the level of protection has been established, the author will be able to evaluate Dutch contract law in the next chapter.

3.4.2 What contracts regulate platforms and virtual goods?

A contract is an agreement between two or more parties which can be uphold in court. In these agreements, the parties generally arrange that one party promises to provide something, like services or goods, and that the other party provides something for that in exchange. If one of the parties does not fulfil this agreement, fulfilment can be forced or the shortcoming party can be held liable for damages.[111]

[107] Sheldon 2007, p. 762. For example, platform-owners tried to battle the exchange of virtual goods for real-world currency. Intellectual property provided no definite solution beyond the possibility to shut down advertisements containing copyrighted art. In addition, the time and creativity exerted by users while traversing the virtual world could possibly even give the users intellectual property protection for their avatars and creations in the virtual world. Furthermore, boundaries of rights granted by contracts are more clear and definite and EULAs can be used by platform-owners to regulate the users beyond which implicates IP interests.

[108] Horowitz 2007, p. 445

[109] See for example Battle.net End User License Agreement, February 2014, section 2: Blizzard is the owner or licensee of all right, title, and interest in and to the Battle.net Client, the Service, the Games, Accounts, and all of the features and components thereof. The Service or the Games may contain materials licensed by third-parties to Blizzard, and these third-parties may enforce their ownership rights against you in the event that you violate this Agreement. The following, without limitation, are owned or licensed by Blizzard: A. All virtual content appearing within the Service or the Games, such as: (…) iv. Items: Virtual goods, currency, potions, wearable items, pets, mounts, etc.; (…) G. All Accounts. Note that Blizzard owns all Accounts, and that all use of an Account shall inure to Blizzard's benefit. Blizzard does not recognize the transfer of Accounts. You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift, or trade any Account, and any such attempt shall be null and void and may result in the forfeiture of the Account;

[110] Horowitz 2007, p. 446

[111] Article 6:74 Burgerlijk Wetboek.

Contracts are free of form under Dutch law and can take practically any shape. However, as the industry developed, certain forms of contracts became standard. But what is laid down in these standardised models of contracts and how they are presented can be of debate in court. Depending on the type of contract, like *'algemene voorwaarden'* (terms and conditions), certain rules can be applied to them.[112] This makes it important to identify what types of contracts are applicable to the virtual goods that users have an interest in. Here the author will lay out the type of contracts that are used to regulate virtual platforms, after which the author can look into how these contracts regulate interests in virtual goods in the next section.

The relationship between users and platform-owners is regulated through contracts. These contracts take on the form of the EULA, rules of conduct or terms and conditions. The EULA is a form of terms and conditions often used by platform-owners. It is common for large industries and commercial companies to use a standardised form of contracts. Platform-owners have generally use the same clauses on which conditions they wish to have in order to protect their interests in the platform itself. The EULA is a licensing agreement to which the user has to agree in order to make use of the platform. By doing so the user is bound by a set of rules and in turn gains access to use the platform. In Dutch law the user is required to have been notified of the terms and conditions and where to find them in order for them to gain validity.[113] When the user first starts running the software, he shall be presented with a window which presents either the terms and conditions of the license or a hyperlink to the terms and conditions and a checkbox for the user to mark that he agrees to these terms and conditions. Only after the user has agreed to the EULA will the software start running.

The EULA functions like a legal code inside the game world.[114] EULA's often have clauses that govern the platform and the interactions within them. This involves ownership over intellectual property, clauses immunizing platform-owners against lawsuits, clauses which set out billing rates with provisions stating that those rates can change, forbid users to commit theft, harassment, or sexist and homophobic speech.[115] Furthermore platform-owners are able to reserve the right to take action in resolving disputes, but does not guarantee that they actually will.[116] This gives platform-owners a flexible way of enforcing their EULA's.

3.4.3 Applying Dutch contract law to contracts

Identifying the way contracts are shaped or presented to the user can be of importance under Dutch law, since certain provisions would apply to these contracts, taking into question their validity.

First off, talking about contract law in the Netherlands is not complete without mentioning the Haviltex case. In Dutch law the Haviltex case has provided an important doctrine.[117] In this case, it was determined that the letter of the contract is not the deciding factor, but the spirit of the

[112] In particular: Articles 232, 233, 234, 236 and 237 of book 6 Burgerlijk Wetboek and articles 11 and 26 book 7 Burgerlijk Wetboek.
[113] Article 6:233 under b Burgerlijk Wetboek.
[114] Glushko 2007, p. 516.
[115] *Id.* p. 517.
[116] *Id.* p. 517.
[117] HR 13 maart 1981, *NJ* 1981, 635.

contract. This means that it matters more what the parties in the contract *intended* to be in the contract and *understood* to be in the contract. This means that it is unnecessary to endlessly negotiate contracts to iron out all the possible kinks. When we apply this doctrine to the terms and conditions, the *contra-proferentem* rule makes sure that in case of doubt what a clause is supposed to mean, the explanation of said clause is ruled to be in favour of the person on which the terms and conditions are going to be applied.[118]

It is not always the case however that both parties have an input into what the conditions of a contract are. Often companies have *Algemene voorwaarden*, also known as terms and conditions, which are single handily determined by the company to be accepted by the consumer. Even though additional rules apply to these terms and conditions, the terms and conditions are legally binding, just like any other regular contract. This means that companies have a large amount of power to be able to dictate the terms and conditions by themselves. Because of this imbalance of power, the Dutch legislator has created two lists to protect the weaker position of the consumer, in which either terms and conditions, containing a listed clause, are always seen as unreasonably aggravating or are assumed to be unreasonably aggravating.[119] The former is called the black list and the latter is called the grey list. The black list deems stipulations which: deprives the counterpart entirely and unconditionally from his right to claim the performance to which the user has engaged himself (a), which leaves the decision whether the user has failed to perform one or more of his obligations to the user(…) (d), which excludes or limits the possibilities of the counterparty to provide evidence or which changes the burden of proof as distributed by law to the disadvantage of the counterparty(…) (k) always unreasonably burdensome. The grey list for example presumes stipulations which: substantially limits the meaning of the obligations of the user in comparison to what the counterparty, also in view of the statutory provisions that govern the agreement, reasonably could have expected to obtain without this stipulation (b), which releases the user or a third person in full or in part from his statutory liability for damages (f), as a penalty for certain actions or passive behaviour of the counterparty, indicates that the counterparty will lose specific rights or means of defence, except as far as the loss of these rights or means of defence is justified by these actions or this passive behaviour (h) to be unreasonably burdensome.

Because of this, regulation through the EULA is not always legitimate. According to Dutch law, some conditions in the EULA are questionable at best. The terms of use often have a clause about applicable law. For example, World of Warcraft's terms of use allows for the use of Dutch law: "This Agreement shall be governed by and construed in accordance with the laws applicable in your country of residence. Those who choose to access World of Warcraft through the Service from other locations do so on their own initiative and are responsible for compliance with local laws, if and to the extent local laws are applicable."[120] Clauses like these allow us to shine a light on the legitimacy of the EULA according to Dutch law. Finally, article 6:233 BW makes it possible to declare a certain clause null when the clause, in light of the circumstances, is unreasonably aggravating.

[118] Article 6:238 sub 2 Burgerlijk Wetboek.
[119] Article 6:236 and 6:237 Burgerlijk Wetboek.
[120] World of Warcraft terms of use, XVIII. Miscellaneous under 1. http://eu.blizzard.com/en-gb/company/legal/wow_tou.html (Last visited: 26 July 2016).

So, which clauses are deemed to be illegitimate? The first example of an unreasonable clause in article 6:236 of the Dutch civil code is one that "takes away, entirely and unconditionally, the right for the user to claim their promised achievement". This basically comes down to denying users access to the account and the virtual goods therein, if the users have put in effort to acquire those virtual goods. Even though this is not permitted, clauses that did this were not strangers to the EULA. For example, before the rework of their EULA, Blizzards 2009 EULA made it possible for Blizzard to "terminate this Agreement at any time for any reason or no reason. Upon termination for any reason, all licenses granted herein shall immediately terminate and you must immediately and permanently destroy all copies of the Game in your possession and control and remove the Game Client from your hard drive."[121] Using this right does not mean that the user had the right to any refunds. Luckily, companies realized such clauses were unreasonable and changed their EULA to provide certain grounds for termination.

A second example of far going rights in Blizzards EULA is the consent to monitor. By agreeing to the EULA you consent that Blizzard is able to monitor your computers random access memory and communicate information back to Blizzard.[122] When doing so, Blizzard may exercise "any or all of its rights under this agreement, with or without prior notice to you."[123] The rights the EULA mentions vary from temporary bans to shutting down the account of the users.[124] The temporary bans deny users access to "their" virtual items and the shutting down of an account also destroys the virtual items in the eyes of the user; all progress is lost. What the author finds most concerning about this type of authorizations, is that Blizzard is free to decide which sanction to apply, without the user being able to fully predict which one that is. Without any guidelines, the user is left in the dark which actions will result in his account getting deleted or only banned. In fact, Blizzard does not even have to give the user a prior notification or provide the user an opportunity to clarify themselves. Objections have been raised in literature that such authority can be unreasonably aggravating,[125] to which the author agrees. Some form of rebuttal should be possible at all times. The form of rebuttal does not have to take place before the termination actions are taken by the platform-owner. For an effective and fairer system, it is not necessary to require the platform-owner to start an inquiry for every violation of the terms of service, it would suffice to notify affected users of their ability to refute the termination.[126] This would provide an after the fact checks and balances analysis. Additionally, it would be desirable to provide a clearer list of offenses which result in temporary bans or terminations of accounts. This can be done either by providing examples, rankings of severity for offences or by publishing, anonymously, the actions taken for offences in the past. This would give users a much-needed certainty when it comes to the security of their virtual assets.

3.4.5 Amending the EULA during use

The world is not a rigid place. The virtual landscape changes, expectations of users and platform-owners change and laws that govern the virtual worlds change as well. Because of this, the EULA is not always the same and gets updated periodically. But how fair is a changed EULA?

[121] EULA Blizzard Entertainment 2009.
[122] Clause 4 of the Battle.net End User License Agreement 2014.
[123] Clause 4 of the Battle.net End User License Agreement 2014.
[124] Clause VI of the World of Warcraft terms of use 2012.
[125] De Jager 2010, p. 47.
[126] *Id*.

Can a platform-owner expect their users to accept the change or leave?

As we saw before, in order for terms and conditions to be of effect, users need to be able to see them and agree to the terms and conditions. Many EULAs reserve the right to change at any time however, which makes agreeing to the EULA in the first place a moot action. This would require users to actively monitor the EULA non-stop to see if they still agree to the conditions applied therein. And even if a company provides the new EULA and requires your acceptance thereof, the only other option is to discard the EULA and lose all access to the platform. This way users are being strong-armed into accepting the agreement, even if they do not actually agree with it, since the only alternative is losing everything.

Sometimes, changes to terms and conditions can be quite drastic. For example, the platform 'Steam' sells licenses to their users to games. When users buy games, they actually buy a license from Steam to gain access to that particular game. When European law changed to allow users to sell their licenses,[127] Steam changed their terms and conditions from stating that users *buy* a license to users *renting* that license instead, effectively nullifying the rights granted to the users to sell licenses.[128] If users would not agree to this change, they would lose access to their Steam account and with that access to all the licenses they previously bought.

How does this translate to Dutch law? When the terms and conditions have a clause that the EULA can change at any time we can look at article 6:233 subsection a BW. This allows a clause to be declared null if, when looked at under certain conditions,[129] the clauses are unreasonably aggravating. When the EULA does not offer such a clause, you need to look at the interests of users and platform-owners and compare them.[130] For example, is it necessary to change the EULA to ensure that the platform performs functions as it was intended, does it significantly change the way the platform is operated, etc. In the case of Steam, it was never intended for users to sell the games they bought on Steam. Such a functionality would also be severely detrimental to Steams business model. In this case, it would be unreasonable to require Steam to allow users to resell their licenses to the games. Furthermore, Steam provided alternatives to users who do not agree with the license, allowing them to run Steam in offline mode and continue using the software they have already installed on their computer.

[127] In the July 2012 case *UsedSoft GmbH v Oracle International Corp* (C-128/11), the ECJ ruled that the exclusive right of distribution that lies on computer programs becomes exhausted after the first sale, potentially allowing the reselling of computer games.

[128] Clause 2.A of the Steam Subscriber Agreement.

[129] Article 6:233 subsection a. reads: "A stipulation from the applicable standard terms and conditions is voidable: a. if it is unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case;".

[130] Article 6:248 Dutch Civil Code: (i) An agreement not only has the legal effects which parties have agreed upon, but also those which, to the nature of the agreement, arise from law, usage (common practice) or the standards of reasonableness and fairness. (ii) A rule, to be observed by parties as a result of their agreement, is not applicable insofar this, given the circumstances, would be unacceptable to standards of reasonableness and fairness.

- 3.5 Other forms of civil protection -

There are other ways to protect user interest in virtual goods besides property law and contract law. Another form of protection lies in the form of torts. In case the rightful claimant to the virtual goods is faced with illegitimate practises or violations of his rights, he can claim damages on the grounds of tort.[131] This can be the case when either the platform owner or fellow users destroy, damage or besmirch the virtual items. Article 6:162 of the Dutch civil code has a very extensive dogma and will not be treated in detail in this thesis. In short, violation illegitimate actions can lead to liability of the perpetrators,[132] and the damages occurred by those illegitimate actions can be claimed by the rightful claimant in financial compensation.[133]

This could protect users interest in their virtual goods in several key ways. First off, when another user uses illegitimate ways to gain access to virtual goods that don't belong to them or false pretences to trick a user to (temporarily) hand over the virtual goods, they can be held liable when they affect the virtual goods in a negative way. Secondly, the user can even utilize this right against the platform-owner in several cases. One of the obvious examples is if the platform-owner decides to delete an account or virtual items of a user, without having any (legitimate) reason to do so. However, even if they have a legitimate reason, this reason needs to be weighed against the legitimate interests of the rightful claimant of the virtual goods.[134] A real-life example can be found when Wargaming decided to change a virtual item that could only be bought with real currency in their game due to gameplay issues. While previous changes to virtual items had been made before, the changes this time were so drastic that they were forced to provide a refund if users who bought the virtual item so desired.[135] One could argue that a different way platform-owner can be held liable, is if they did not provide or enforce enough security measures to protect the interests of users of virtual items.[136] This counts especially when they have made clear this belongs to their tasks, like assigning authority to enforce the EULA to themselves as we shall see later on.[137]

A second form of protection that deserves mentioning in this thesis is liability according to abuse of rights. This liability construct lies in article 3:13 sub 2 of the Dutch civil code, which states that (among others) an authority can be abused when the merit of executing a decision and the interests that get harmed are not in proportion. This form of protection mostly comes into play when there is a copyright being held by the users in their virtual goods.[138] If the platform-owner decides to terminate a work, an account or the virtual world, he needs to consider the legitimate interests of the copyright holding user. This means the platform-owner needs to make sure the copyrighted work is properly documented or provide ample opportunity for the copyright holder to do so.[139] This would even be of relevance of virtual furniture, if the users designed the furniture themselves. In such a case, the user can recreate the virtual furniture on other platforms

[131] Article 6:162 Burgerlijk Wetboek.
[132] Hijma e.a. 2008, p. 278-285.
[133] Article 6:162 sub 1 in combination with article 6:103 Burgerlijk Wetboek.
[134] Articles 6:248 and 3:12 Dutch Civil Code.
[135] http://worldoftanks.eu/en/news/46/premium-vehicles-changes-86/ (last visited: 20 july 2016).
[136] Van Eeckhoutte 2012, p. 5.
[137] Article 6:74 Burgerlijk Wetboek.
[138] Vvan Eeckhoutte 2012, p. 5.
[139] HR 8 februari 2004, LJN AN7830, JOL 2004, 65.

without violating copyright and battle against people that would recreate his design in other platforms or eve the real world. Neglecting to mention the termination of the platform for example could lead to liability, since the user with a legitimate interest would not have been able to make a backup, make a screenshot or record the work thoroughly. Another example one could argue for liability according to abuse of rights in is when a platform-owner decides to shut down their platform without providing a way for users to continue their work. Shutting down a platform is well within the rights of a platform-owner; it is their creation and they ultimately hold control over the virtual world. But sometimes user interests are so high that taking down a virtual world is seen as unjustifiable. This can be prevented by releasing the source code, if necessary through escrow agents, so users have the possibility to continue the work themselves and keep their virtual goods. For example, the author would argue that the combined worth of virtual assets in platforms like SecondLife or Entropia Universe, where single virtual assets sold for upwards to $635,000 dollars,[140] or World of Warcaft or Steam, which are so immensely popular that millions of users have invested time and money into these platform, that users should at least have the option to pick up the software themselves and keep it running as a community service.

4. Improving Dutch Law

- 4.1 Introduction -

In the previous chapters, it has become clear what constitutes a virtual good, what user interests are in virtual goods and what level of protection currently lies on user interests in these virtual goods. In this chapter the author will start to evaluate the level of protection that is provided, starting with criminal law and followed thereafter by civil property law and civil contract law. Not only will the author evaluate if the current level of protection is adequate, but the author will also make several suggestions per category for the legislator and/or platform owner to improve the level of protection to better protect user interests in virtual goods.

By doing so, the author will have determined the level of protection and have given suggestions to improve the protection, thereby effectively answering the central research-question '*Is Dutch law providing adequate protection in user interests in virtual goods and if not, how can we improve it?'*.

- 4.2 Adequate protection through criminal law -

4.2.1 Does criminal law provide enough protection to protect user interests in virtual goods?
Now that we have identified what protection criminal law provides for virtual goods in sub-chapter 3.2, the author will evaluate if this level of protection is adequate to protect the relevant user interests identified in section 2.3.3.

Firstly, the author will evaluate if the type of goods that are protected by criminal law are adequate to protect user interests in virtual goods. What constitutes a virtual good under criminal

[140] Club Neverdie in Entropia Universe sold for $635,000 in 2010 and the Crystal Palace from Entropia Universe sold for $333,000.

law, is vague. The most recent case law regarding virtual goods qualifies virtual goods as: either tangible or intangible *perceptible* goods, of which the control over these goods can be transferred, and have a certain value.[141]

It seems that the courts have abandoned the idea that goods in criminal law have to be strictly tangible. Even intangible goods can now be considered a protectable good, as long as it is perceptible. Through the user interface of the virtual world, the goods are certainly perceptible. The line of code that represents the virtual goods is also perceptible. So, the first criterion from the RuneScape case is met for virtual goods, since users can perceive their accounts and the items held within that account.

The requirement of transferring control can be trickier, since not only the user has control over the items, but also the platform-owner. However, in the RuneScape case the court remarked that it was in fact the user that had the actual control and exclusive power over the items.[142] This was because he was the only one able to legitimately log into the account and exert this control over his items. That RuneScape was owned by the platform-owner Jagex Ltd. did not exclude the user from the protection provided by criminal law.[143] So again, the author can conclude that the virtual goods identified from sub-chapter 2.2 fall under this criterion.

The final criterion is that of economic worth. Contrary to what traditionally constitutes as a good as discussed in section 3.2.1, case law also requires that virtual goods need some kind of economic worth,[144] which is in direct contrast with the findings for traditional goods in section 3.2.1 which also includes objects of no economic worth.[145] Currently the criterion of economic worth is weak and can lead to different conclusions between prosecutors. Until there is either a clearer article in the law or guidelines within the ministry of justice there is no way of telling when an item is considered to hold enough value. While the author thinks that goods in criminal law should encase all tangible and intangible items with and without any worth, making this legal reality would simply be impossible.

Now that the criterion for a virtual good have been discussed, it is time to see if the laws in criminal law provide adequate protection for the user interests in the virtual goods? First, the author will evaluate what actions are classified as criminal acts that serve to protect user interests in virtual goods. As we have seen, there are currently two effective ways to charge perpetrators in Criminal law for the theft or destruction/damaging of virtual items. The first way is through a normal classification of theft as laid down in article 310 Sr. In this way, the virtual items are considered a 'good' just like their real-world counterparts. The second way is a more technical way, by filing the actions as destruction or damaging of goods or trespassing into a computer, articles 138ab Sr and 350a Sr respectively.

While the former interpretation seems more direct and clear for the users of virtual property Y. Moscowicz rightfully states that such an interpretation, as it is now, is on very shaky grounds

[141] Hof Leeuwarden 10 november 2009, *LJN*: BK 2773; and Rb Amsterdam 2 april 2009, *LJN* BH9791.
[142] Hof Leeuwarden 10 november 2009, *LJN*: BK 2773.
[143] Lodder 2009, p. 10-11.
[144] Hof Leeuwarden 10 November 2009, *LJN*: BK 2773.
[145] Cleiren e.a. 2008.

when held against the principle of legal certainty.[146] It seems clear to the author that merely not playing by the rules and cheating in a game should not be punishable by law, but where the boundaries lie, are very unclear. And while 138ab Sr and 350a Sr would have sufficed in the known cases of Habbohotel and RuneScape, the legislator has identified problems with this approach, but failed to answer them.[147]

To conclude, through case law the term 'a good' has been given a broader interpretation which includes virtual goods. Sadly, this classification is not apparent from the letter of the law. Users are thus given effective ownership, control and access over their virtual items (that meet the criteria) in the sense of the criminal law, and have grounds to enforce their rights effectively. This means that user interests in virtual goods of ownership, control, access, are adequately protected in Dutch criminal law, at least in the two presented cases of RuneScape and Habbo Hotel. However, the user interest of legal certainty leaves much to be desired. This goes twofold; despite case law, it is not certain what constitutes as a (virtual) good due to the value requirement. Secondly, it is not entirely clear *when* an act is considered to be grave enough to fall under criminal law. So while user interests in virtual goods were adequately protected in the RuneScape and HabboHotel case, there is no indication or guarantee that the same user interests also enjoy the same level of protection in a different case. This means that there is still ample room for improvements to be made.

4.2.2 What improvements can be made in criminal law to more adequately protect user interests?
The user interest of legal certainty has been identified as the weak link in criminal law when it comes to the protection of virtual goods. However, just because we *can* improve criminal law to provide more protection for user interests, doesn't mean we *should*. As Koops and Moscowicz both point out, merely cheating in a game should not be punishable by criminal law,[148] and Lodder remarks that conflict resolution should firstly be resolved by the parties, secondly by involving third-parties and lastly by law.[149]

In order for law to penalize an act there needs to be a legitimate basis. According to Feinberg there are four grounds for liberty-limiting principles: the harm principle, the offense principle, legal paternalism and legal moralism.[150] Stealing or destroying virtual property can cause harm in the sense that something of value will be lost and user interests will be damaged. According to a study, respondents find that the theft of virtual goods that have been bought with real money (for example Habbo furniture) is just as frowned upon as stealing from a store.[151] Since the respondents find the act of stealing virtual goods offensive, the offense ground has also been met.

Now that it has been established that there are improvements to be made in criminal law, the author can put forth some suggestions. The first suggestion the author would like to make is for criminal law to incorporate an article that makes clear what constitutes as a virtual good. The authors suggestion for the legislator would be to create a new interpretation like article 310 Sr of

[146] Moszkowicz 2009, p. 503.
[147] *Kamerstukken II* 2008/09, 28 684, nr. 232, p. 4.
[148] Koops 2013, p. 9; & Moszkowicz 2009, p. 501.
[149] Lodder 2009, p. 12.
[150] Feinberg 1986.
[151] Van Leest 2010, p. 64.

the term 'goods' in a new article specifically for virtual goods. In this article the legislator can make clear at what point the cheating in the virtual worlds at the expense of others becomes criminally sanctionable. Of course, just defining what constitutes as a virtual good is useless, since criminal provisions need to actually refer to virtual goods for it to have any worth. Incorporating this term into the rest of criminal law is there for a prerequisite.

Multiple suggestions can be made to provide a satisfying definition of a virtual good under criminal law. Just copying the interpretation for goods and applying these to their virtual counterparts would not suffice, since criminal law puts the criterion of economic worth forth when considering if something is a good or data. This is a questionable decision, since as we have seen in section 3.2.1, in order to consider something as a traditional good, there is no criteria of economic worth. One of the suggestions of the author would be to make the criteria of economic worth an indicium, rather than a strict criterion, as has been argued in section 2.2.2.

The objective economic worth of the virtual goods should play a large part in this determination, with only a very minor role for subjective worth. By looking at real world trade in the virtual items (like for example on eBay), one can make an accurate guess towards the worth. However, to make this more complicated, in a lot of the virtual worlds it is prohibited to trade outside of the context of the game or even trade between users at all. Selling an account for example is prohibited on nearly all virtual platforms.[152] While they still pop up on the market, the value attached to them is on weak grounds. Furthermore, the scope of the virtual world and the consequences of the criminal actions, inside both the virtual and the real world, can help decide the severity of the offences towards virtual goods. This way, we can evaluate whether or not it is desirable to apply criminal law to the offences. This provides ampler protection against a wider variety of cases than the option of 138ab Sr and 350a Sr. Also, by creating a new ground, which indicates what types of virtual goods are protected and how, the legislator wouldn't undermine legal certainty by stretching the definition of the classical meaning of theft too much, and would make it more clear in the law on what actions are sanctionable then to just sweep the actions into the category of the existing laws in *Computercriminaliteit*.

One downside to this however, is that judges can no longer reply on their own judgement if the law should be applicable or not. It is possible that, in time, the nature of virtual goods changes or their importance in society. In such a case, it would be easier to adjust criminal law through case law. While this is certainly true, the author points to the user interests of legal certainty. Especially in criminal law, knowing what a criminal offence is, is of great importance.

- 4.3 Adequate protection through civil property law -

4.3.1 Does civil property law provide adequate protection for user interests in virtual goods?
After having discussed the legal status of virtual goods and what protections lie on them we can answer the question if property law provides adequate protection for user interests in virtual goods. The short answer to this: no. As has been shown in sub-chapter 3.3, virtual goods are not considered to be a good in the sense of Dutch civil law, nor can be considered as an economic right. So, the author can quickly establish that Dutch civil property law does not provide

[152] Take for example article 1.C.viii and 2.A.vii of Blizzards Battle.net EULA and article 2.4 of Wargamings World of Tanks EULA.

adequate protection for user interests in virtual goods.

But to leave it at this would be too simple. So, in order to make a suggestion for improvements for Dutch civil law the author shall assume that there is a change in the way Dutch law works and the virtual goods can now fall under the definition of 'a good' from article 3:1 of the Dutch civil code. What would that mean for virtual goods?

If virtual goods fall under the scope of civil law, ownership over such goods will be possible. The ownership over these goods is also transferable, according to article 3:83 BW subsection 1. By qualifying virtual goods as goods, the owner is able to deny others the right of using this good.[153] These laws surrounding the good make it possible for the user to enjoy ownership, control his virtual good and possibly transfer his virtual good to others, for personal gain if needed. This makes the law much more relevant and adequate to protect the user interests.

4.3.2 Improvements for civil property law

It seems clear that from the perspective of civil property law, that improvements can be made to more adequately protect user interests in virtual goods. As has been discussed in the section above, virtual goods are currently not seen as goods that fall under article 3:1 BW. Since virtual goods and data are both not able to be classified as a good in the sense of articles 3:1 and 3:2 BW, then they cannot be regulated by property law. For example, if a user interest in virtual goods is ownership, then classifying virtual goods as a good that falls under the scope of 3:1 BW is important. Article 5:1 BW reads that ownership is the most encompassing right a person can have on a good. Following this phrasing, this means that ownership is also limited to goods. If virtual goods aren't considered goods in the sense of Dutch civil law,[154] then ownership over them is impossible. By making it so that virtual goods have the same level of protection as traditional goods, a lot of the user interests in virtual goods will be protected.

So how do we construct the law in such a way that is also encompasses virtual goods? This can be done in several ways. Firstly, is to either open our interpretation of article 3:1 BW to also include virtual goods. The second way is to change article 3:1 BW in such a way that it also includes virtual goods. The third way is to include a new article that specifically deals with virtual goods.

The first issue that must be tackled to provide a legal basis for the protection of user interests in virtual goods, is to give a legal basis for what constitutes a virtual good. A traditional good is susceptible to human control and is a tangible object.[155] It is questionable if virtual goods are actually susceptible for human control and tangible. Kleve says in his works that the line of code that represents the virtual goods are susceptible for human control and tangible.[156] From the laws of physics, virtual objects take in a tiny amount of space and are unique and singular. Electronic data are magnetic patterns. This follows more the idea of tangibility as laid down in the Electricity case mentioned earlier in the criminal law section. Sadly, this gets us nowhere since the parliamentary history of the *Nieuw Burgerlijk Wetboek* states that the concept of good cannot

[153] Article 5:1 BW subsection 2.
[154] Article 3:1 Dutch Civil Code.
[155] Article 3:2 Dutch Civil Code.
[156] Kleve 2004.

be identified as 'matter' in natural science theory.[157] Only the criteria of the *rechtsleven*, the practical world of the law, counts. In other words, data *can* be tangible, but not solely because natural sciences say so. The author thinks this is a missed opportunity for the legislator to easily broaden the interpretation of what constitutes a good. By stepping away from the rejection of the natural science theory on matter, the legislator can ensure protection for a whole number of 'intangible' objects.

Now the possibility for protecting virtual goods has been opened up, several issues have arisen. Goods, under Dutch law, are singular in nature. They are *exclusive*, and only one person has control over them at any time. The validity of the singular nature of a virtual object is doubtful, since the platform holders can make exact copies of the virtual objects.[158] The author disagrees with such an exclusive interpretation. Even though the code looks the same and the objects are virtually identical, in the real world they are represented by a different set of electrons in the same sense that two identical mass produced items are made up of different atoms. For example: 50 Shades of Grey is a bestselling novel with over 100 million copies sold,[159] but no one will argue that each and every one of those copies meets the criterion of exclusivity, even though they are made from the same material, have the same shape and the exact same content. Yet it is highly debated that exclusivity on virtual goods is possible.[160] This is because virtual items are nearly always identical to one another, represented by a single line of code that is copied for all the different users. Another argument against the exclusivity of virtual goods, is that in an economical line of thinking, copying data is effortless, promoting a non-rivalrous nature of virtual goods, especially when compared to printing new books. The reason for the legislator to exclude virtual goods for the reason that there are other virtual goods of that kind in existence seems to be too restrictive to the author. Excluding a whole slew of virtual goods for the reason that there are many of them and the goods are easy to copy seems too short sighted.

However, instead of arguing why something *could* be seen as exclusive, we can also take an active approach and institute measures that make the virtual goods in question more exclusive then they are now. Code can be designed in such a way that it can only be possessed by one person.[161] One of such ways of a possible technical solution to the problem of exclusivity would be to introduce a blockchain[162] for virtual goods, which is currently the case for BitCoins. Tapscott describes the blockchain as "the first native digital medium for value".[163] With the blockchain, integrity is ensured between strangers,[164] making it clear that the virtual good is indeed exclusive. Van der Wees says that the blockchain will pave the way to legal ownership over digital data, and that tangible and intangible properties do no longer matter in this age of law and technology.[165] Certainly, this would be an interesting technological solution to spend further research in. However, this is a technological solution, which holds little ties with the

[157] Mijnssen e.a. 2006, p. 20.
[158] Van Eeckhoutte 2012, p. 2.
[159] https://www.statista.com/statistics/299137/fifty-shades-of-grey-number-of-copies-sold/ (last visited: 23 November 2016).
[160] For example: Wibier 2016; & Tjong Tjin Tai 2016.
[161] Fairfield 2005, p. 1054.
[162] A blockchain is a distributed database that maintains a continuously-growing list of records.
[163] Tapscott e.a 2016.
[164] *Id.*
[165] Van der Wees 2016.

legislator. According to the author, while goods with blockchains on them could be seen as exclusive, there is no way to force or ensure that all virtual goods will have a blockchain type of protection.

Luckily, even though the traditional sense of the word 'a good' is left uncertain regarding virtual items, users can achieve protection for their virtual items and enforce virtual property rights through different means like tort and copyright. While this fragmented structure is convoluted, it at least provides some protection in the meantime.

- 4.4 Adequate protection through civil contract law -

Through the use of contract law, one can achieve protection on virtual goods that mimic property law rights and it seems that this is desirable in society.[166] Here the author will evaluate whether contract law is able to protect user interests in virtual goods adequately and suggest improvements to be made where necessary.

4.4.1 Is or how should the EULA be enforced?

The first step the author will evaluate is whether or not the EULA is able to be enforced internally. This section shall look into the possibility of users to force the platform-owner to enforce the EULA. Sadly, or perhaps luckily, there is no existing case law in the Netherlands about disputes concerning the applicability of the EULA.[167] The author can however look towards case law from the United States and try to fit these rulings into the Dutch legal system. For this we can use the example of Hernandez vs. Internet Gaming Entertainment[168].

In this case users tried to force internal regulation through external means by starting a class action lawsuit. In this case, several users in the game of World of Warcraft were selling virtual items and gold, which were generated by "farmers". The users that started the lawsuit stated that IGE made a ""calculated decision to reap substantial profits by knowingly interfering with and substantially impairing the intended use and enjoyment associated with consumer agreements between Blizzard Entertainment and subscribers to its virtual world called World of Warcraft (WoW)," thereby creating substantial economic damage to legitimate users. The judge laid down a prohibition to sell gold on IGE.

In the Hernandez vs. Internet Gaming Entertainment case the users and the court proceeded to enforcement, and not Blizzard. In the authors opinion, this is not a desirable way of approaching the subject. Blizzard did not take any action against the goldfarmers, but to prohibit the goldfarmers from conducting their trade through legal means should not be the way to go. The legal system is supposed to be an *ultimum remedium*, the final option. Blizzard, and any other platform-owner, should be fully capable of handling these issues themselves. If Blizzard decides not to act, the affected users should not be able to enforce the EULA themselves and punish the perpetrators. The users sign the terms of service with the platform-owner, not with each other.

[166] Tjong Tjin Tai 2016, p. 12.
[167] De Jager 2010, p. 48.
[168] Hernandez v. Internet Gaming Entertainment, Ltd., No. 07-civ-21403 (S.D. Fla. Filed June 1, 2007, and dismissed Aug. 26, 2008).

But then what of the "substantial" economic damage that is suffered by legitimate users because of the goldfarming?

Often enough, the terms of an EULA do not *require* platform-owners to take actions and enforce their EULA. Enforcing the EULA is not always the desired action for platform-owners, since it can increase the work they have to do and taking a more active stance in their platform would increase their liability. However, since users are often unable to enforce the EULA themselves this could be a problem. Glushko remarks that "the inability of players to enforce property rights in their virtual property is a key failing of the EULA as a tool to govern virtual worlds as they continue to grow."[169] Ensuring the possibility for users to enforce an EULA, either themselves or force the platform-owner to do so, would not only strengthen their property rights in virtual items, but also give more security as to what users can expect regarding their virtual property rights.

The author holds the opinion that the affected users should be able, when Blizzard refuses to cooperate and enforce its own EULA, to file a suit against Blizzard for not providing ample security and protection towards the legitimate interests of the users in their virtual items on the grounds of article 6:74 Dutch civil code. This way, the platform-owner is forced to act upon violations, giving legitimate users more security towards their virtual items and ensuring more legal certainty about which offences result in the platform-owner taking actions.

4.4.2 Do or should contracts allow for ownership interests?

As has been seen in sub-chapter 3.4, virtual worlds generally cling to a property/ownership averse system by denying users ownership in their virtual goods. Platform-owners have their reasons to argue for property averse virtual worlds. However, claiming ownership over virtual goods is one of the identified user interests. Having ownership is the most encompassing right a person can have on a good and allows the user to use his goods.[170] When platform-owners and users interests are conflicting, we need to strike a balance between these two, as per the user interest of balanced interest protection. As the author has argued before, one of the identified user interests is that a balance is struck between user interests and the interests of platform-owners, so that developers are not deterred to provide their products and services. Because of this, it would be wise to evaluate the criticisms of platform-owners regarding virtual property rights. The first criticism that platform-owners hold, is that platform-owners must retain control over the virtual world, and that this control will be conflicting with private property interests.[171] Platform-owners argue that when users hold private property interests in virtual goods, the platform-owners aren't able to make changes to the platform in a way that they want. The second criticism of platform owners is that ensuring that virtual goods are tradable will decrease the value of these virtual goods.[172] This would mean that the virtual goods that platform-owners provide become less valuable, which in turn means less profit for the platform-owner. The final criticism is that virtual worlds are mostly meant as entertainment and virtual goods as status symbols.[173] For example, if users take real-world interests in the platform, then this goes beyond the intended artistic vision

[169] Glushko 2007, p. 523-524.
[170] Art. 5:1 subsection 2 Dutch Civil Code.
[171] Fairfield 2005, p. 1097.
[172] *Id.*
[173] Gould 2008, p. 14-15.

of the platform-owner.

However, these criticisms are not averse to allowing users to have rights towards their virtual goods. For the first argument it can be said that the need for control does not require virtual property interests to be excluded.[174] Companies fear liability when they change parameters in the virtual world so that virtual goods are damaged or devalued, but liability is not always the case.[175] As real world comparisons, Fairfield gives the examples that zoning laws can increase or decrease value of property without providing compensation to the owner and that manufacturers can artificially limit or increase supply, affecting previous buyers.[176] Thus, changing parameters in the platform should not create liability for the platform-owners for the decreased value of virtual goods.

The possibility of shutting down platforms does exist and *should* exist when it is no longer profitable or desirable for platform-owners to maintain their platform. This bereaves users of their investment in virtual goods, but this should not be treated more aggravatingly than a bankruptcy scenario.[177] Making sure certain measures are in place in a scenario of closing virtual worlds would go a long way of alleviating the damage to user interests in virtual goods, or at least make it more fair. One of these measures could be an escrow agent that holds the source code and releases it when the platform-owner stops supporting the virtual world. In this case, the users can choose to maintain the virtual world themselves. Another measure is giving users that meet certain criteria compensation for the losses in their virtual assets, when these assets are required by buying them for real money from the platform-owner. Whatever seems to be the case, the author is of the opinion that users should make all their decisions well informed, and imminent closing of the platform should be disclosed if possible, so users can prepare for devaluation of their virtual assets. The second criticism is also not to be taken at absolute value. While the argument can be made that commodifying virtual goods could decrease the value of said goods, it is important to note that virtual goods are already commodities, which is often even intended by the platform-owners.[178] The final criticism of entertainment value of virtual worlds and goods is not very strong in the opinion of the author. In many virtual worlds, such as SecondLife or World of Warcraft, users engage in virtual practices that create real world profits. The scope of virtual worlds often goes outside of "just entertainment". To conclude, it seems to the author that the user interest of claiming ownership and control is not significantly undermining the interests of platform-owners in virtual goods. This means that property averse EULAs are able to be required to change to protect the user interests in virtual goods of ownership, control and monetization.

4.4.3 Fair treatment of users

Another user interest is to be treated fairly and be on more equal footing with the platform-owner. There is a severe discrepancy between the power of a platform-owner and a user. EULAs are written by platform-owners and it is of no surprise that they solely benefit the platform-

[174] *Id.* p. 15.
[175] Fairfield 2005, p. 1081.
[176] *Id.* p. 1098.
[177] *Id.* p. 1098.
[178] *Id.* p. 1099.

owners as a result without taking into account player-expectations of fairness.[179] As has been discussed in sub-chapter 3.4, there are several clauses in contracts between users and platform-owners that can be deemed as unfair, like the consent to monitor, termination of accounts and the discretion to enforce.

As the author has mentioned in section 4.3.1, a platform-owner has a lot of influence on what happens in the virtual world. The platform-owner decides what is possible, and through technical means the platform-owner can also battle misbehavior in virtual worlds. But even if platform-owners have the possibility to regulate their virtual world, it is unrealistic to rely on the platform-owners to regulate their user-base all by themselves, especially when large amounts of money are in the picture.[180] Recognizing users as a class of protected consumers would be required to safeguard the investments that users have made towards their virtual goods.[181] So while the author holds the idea that most disputes should be resolved by the platform-owner, it is still crucial to provide legal protection to users.

Some authors are of the opinion that contracts are prima facie unfair.[182] By using consumer protection laws to challenge the unfairness or unconscionable decisions in court this unfairness can be battled.[183] These consumer protection laws "reflect legislative awareness of the fact that some parties have unequal bargaining power or access to information, which seems to be the case with online-gaming EULAs."[184] However, as mentioned earlier, contracts regarding virtual worlds have not yet been attended to in Dutch courts, so there is little to evaluate in Dutch law. Again, the author will look towards United States case law and evaluate whether the outcome of such a case is desirable for Dutch law.

The Bragg vs. Linden Research case is about property rights in virtual items which users have created themselves.[185] In this case Bragg filed suit against Linden Lab, the developer of Second Life, when his account was suspended by Second Life administrators. Linden Lab did so because they claimed Bragg was violating the terms of service by buying virtual assets for a low price through the use of illegitimate means and then reselling them against regular price to third parties. However, since Linden Lab closed Braggs account, not only the assets which were acquired through (allegedly) illegitimate means were taken away from Braggs, but also virtual items which Bragg got through legitimate means. If Bragg acted outside of the context of the game, also taking away the legitimately gained goods would be unfair.[186] While the parties settled outside of court, the judge did rule over one important fact in an interlocutory judgement. Linden Lab had a mandatory arbitration provision, which the judge declared unbinding. The clause for mandatory arbitration was "both procedurally and substantively unconscionable and is itself evidence of defendants' scheme to deprive Plaintiff (and others) of both their money and their day in court."[187]

[179] Glushko 2007, p. 528.
[180] Bonar-Bridges 2016, p. 88.
[181] *Id.* p. 91.
[182] Jankowich 2006, p. 50.
[183] Riley 2009, p. 907.
[184] *Id.* p. 883-885.
[185] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D.Pa. 2007).
[186] Kokswijk e.a. 2008, p. 22.
[187] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D.Pa. 2007).

If we apply this case towards Dutch law, the terms and conditions of Linden Labs at the time stated that they could close an account at any time and for no reason at all, which would be deemed unfair according to Dutch law.[188] Again, it would have been more fair if Bragg was able to give an explanation for his actions towards Linden Lab. With this explanation Linden Lab can weigh the legitimate interests of Bragg against the severity of the sanction. It would have been amicable if illegitimate gains were removed from Braggs account and legitimate assets were kept intact. Furthermore, it is a human right in the Netherlands to always have access to a judge.[189] While mediation can be a quick and cost effective way to resolve contract issues when it comes to disputes concerning virtual items, if a user wants to go to court he should be allowed to do so.

5. Conclusion

In this conclusion, the author will provide an answer to the main research question. The main research question is: 'i*s Dutch law providing adequate protection in user interests in virtual goods and if not, how can we improve it?'*

The author researched the legal protection of user interests in virtual goods. He did so by first examining what this thesis construes as a virtual good and what the user interests in virtual goods are. Afterwards the author looked into Dutch criminal law, civil property law and civil contract law to find out how virtual goods are regulated in the Netherlands. Afterwards the author discussed this level of protection and determined if it was enough to protect user interests. If this was deemed not to be the case, the author made several suggestions as how to improve Dutch law to more adequately protect user interests.

In this thesis, the author means by virtual goods those (intangible) goods that mimic real-world goods and have the following five characteristics: rivalry, persistence, interconnectivity, having a secondary market, and have value-added-by-users. Examples of these virtual goods are e-mail accounts, unique user accounts, domain names, items existing in the context of a virtual world, bank accounts, and arguably unique identifiers like screen names assigned by the Screen Actors Guild.

There is no definitive profile of the user of these virtual goods, since the users are quite diverse. Users have many differing reasons to acquiring virtual goods, from making it easier to themselves, acquiring status, or experiencing new content. Still, the author has been able to identify several key interests users have in their virtual goods. The first and foremost interests users have in virtual goods is having control and ownership. The third interest users have in virtual goods is actually being able to access them. Another user interest in virtual goods, is that users are able to monetise their virtual goods. The fifth user interest in virtual goods is having legal certainty, followed by effective legal enforceability. The seventh identified user interest is fair treatment and the last identified user interest is balance of protection between users and platform-owners.

[188] De Jager, *"De realiteit van de virtualiteit"*, 2010, p. 49.
[189] European Convention on Human Rights article 6.

After examining Dutch criminal law, the author found that virtual goods are protectable goods in the sense of Criminal law. For a virtual good to be protected by the criminal law regime, a good has to be an (in)tangible object, with: (i) a certain independent existence, (ii) can be generated and controlled by a person, (iii) has genuine (economic) value, (iii) allows for the transfer of control, (iv) economic worth has a function within a context of society, (v) and the user has a de facto control over. But not only the classification of the goods is important, also classifying the facts is of great importance. If users act inside the *magic circle* of the platform, then no criminal actions are technically taking place. However, when users are acting outside of this *magic circle*, then they are committing illegitimate actions, which can have repercussions from criminal law.

When it comes to legal certainty, Dutch criminal law left a lot to be desired. Virtual goods are required to have economic worth, but this criterion is weak and can lead to different conclusions between prosecutors, since there is no agreed upon level and definition of worth. The author suggests to the legislator to make a cleared article in Dutch criminal law to explain what virtual goods are, or for the ministry of justice to come out with some guidelines that provide a way of telling when a virtual good is considered to be valuable enough to be protected. Furthermore, the applying article 310 Sr (theft) for taking away virtual goods is also on shaky grounds when it comes to legal certainty. The boundaries for operating inside and outside the magic circle are very unclear. To conclude for criminal law, the Dutch criminal law does not provide adequate protection for user interests in virtual goods. It is left uncertain both which virtual goods are protected and against which acts in particular. By providing clearer legislation as to what virtual goods are protected and which actions they are protected against, the legislator would improve legal certainty immensely.

As far as civil property law was concerned, the author found out that virtual goods are not considered to be goods in the sense of civil law. Because of this, they fall under no kinds of protection. It will come as no surprise that Dutch property law thus does not provide adequate protection for user interests in virtual goods. Making it so that virtual goods or data have the same level of protection as traditional goods will alleviate a large part of the problems that users face when they wish to protect their interests in virtual goods. This can be done in three ways: opening up the interpretation of article 3:1 BW to also include virtual goods, change article 3:1 in such a way that it also includes virtual goods, or include a new article that specifically deals with virtual goods.

However, user interests in virtual goods do enjoy a sense of protection in Dutch civil contract law. The relationship between users and platform-owners is generally regulated through contracts. These contracts are called End User License Agreements (EULA), and take the form of terms and conditions. Dutch law provides protections against unfair conditions in terms and conditions contracts, which provides protection for some user interests in virtual goods. Most notably the prohibition of platform-owners to terminate accounts and access to virtual goods without proper reason or some form of rebuttal. One key point of improvement that can be made to contract law, is that users need to be given a larger possibility to enforce the EULA against other users. Platform-owners are not required to act, but forcing a change into the EULA that allows users to file suit against the platform-owner for not providing ample security and protection towards the legitimate interests of the users in their virtual goods would go a long way for the user interest of effective legal enforceability.

To conclude, user interests in virtual goods do enjoy some level of protection under Dutch law, but it is not enough. There are gaps between the areas of law that can and should be addressed to provide for a better protection of user interests in virtual goods across the board. By applying improvements set out in this thesis, the Dutch legislator would provide a system that is more adequate to protect user interests in virtual goods.

In either case, the classic phrase *Caveat emptor*, let the buyer beware, is of importance here. As users will delight in the increased legal certainty and the broader protection of their interests in virtual goods, they must keep in mind that ultimately, the goods remain virtual and the platform-owner has a certain level of control over them. Creating a system that is future proof, protects the interest of the users and provides ample legal certainty is a difficult task, but not one we can't overcome. Only then, will users be able to fully enjoy the virtual fruit of their labour.

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