Property rights in virtual objects

How a qualified normative approach to virtual property rights can benefit users and developers of MMOGs

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Introduction

Imagine a world in which you can own a sun-filled, tropical island of your own for a mere 700 dollars.[1] A world where you slay mythical beast upon mythical beast for the greatest of rewards. A world where you have the power to create anything that you can imagine, where the only limitations are those set by your own imagination. Does this sound too good to be true? Perhaps in the real world. However, in the virtual worlds of Massive Multiplayer Online Games (MMOGs) anything can happen.[2]

With the internet going through a rapid phase of development these virtual worlds have seen a major influx of players. Every single one of these players – or users – trying to 'escape' their everyday life in exchange for the virtual world of their choosing. Instead of boring jobs and long days in the office they prefer to instead fly through azure skies on the back of majestic beasts. If you can think of it, chances are there is a MMOG out there that lets you do it or create it.

With userbases comprising millions of subscribers[3], MMOGs have gone from being niche markets catering to internet pioneers to becoming major players in today's (virtual) world.

To further illustrate the increased importance of MMOGs in today's society one merely has to take a look at the economic side of things. In 2001, when the internet and virtual worlds were still in their infancy, research conducted by Castranova to examine how virtual world economies faired compared to real world economies yielded interesting results.[4] Using the then most popular MMOG on the market, the MMORPG[5] *Everquest*, and applying a transfer rate of one dollarcent per platinum piece[6], Castranova compared this virtual economy to that of real world countries.[7] His findings showed that the *Everquest*-economy could be ranked at a staggering 77th overall place in the real world when looking at the GNP per capita – with players earning $2.266 per capita a year – placing the game above countries

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[1] See: http://articles.latimes.com/2010/apr/30/business/la-fi-lazarus-20100430 ("said he purchased the island for about $700.").

[2] The MMOG *Endless Realms* even advertises with the motto: 'Explore a virtual world of endless possibilities.'

[3] Recent subscriber totals for Blizzard-Activision's flagship game *World of Warcraft* are available online at: http://www.statista.com/statistics/276601/number-of-world-of-warcraft-subscribers-by-quarter/

[4] E. Castranova, *Virtual Worlds: a First-Hand Account of Market and Society on the Cyberian Frontier*, CESIfo Working Paper No. 618, Dec. 2001, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828.

[5] MMORPGs are a type of MMOG. RPG stands for Role-playing Game. An example of this would be *World of Warcraft,* where the users take on alternate personas in a virtual fantasy world and undertake quests together.

[6] The virtual currency used in *Everquest*.

[7] Castranova, *supra* note 4, p. 33.

like China and Bulgaria and making it almost as wealthy as Russia.[8] Virtual world economies

have since not shown any signs of slowing down their rapid expansion, with the MMOG

Second Life seeing $160 million worth of virtual items and currency being transferred

between users in the first quarter of 2010 alone.[9]

Any user of a MMOG is able to acquire an item, piece of land, or any other type of

property in the MMOG as long as it has been made tradeable by the underlying code. The

developers of the MMOG decide – through coding – which items can be traded amongst

users and which items are so-called 'account-bound' items, items that cannot be traded once

they are in a user's possession.[10] Acquiring an object in an MMOG could come in the form of

receiving it as a reward for completing a quest[11], through mining a node of iron ore, by

slaying a dragon, or in a variety of other ways.[12]

In the early days of the MMOG all trade-related activity took place within the virtual

worlds, using only virtual currency. Nowadays entire enterprises are built around the concept

of buying and selling virtual currency and items in exchange for real world currency.[13] With

the evolution of the virtual worlds of MMOGs came not only an increase in trade, the sense

of ownership that users felt with regard to their objects also grew.[14] If a user were to spent

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[8] Castranova, *supra* note 4.

[9] T. Hale, *Second Life Economy Hits New All-Time High in Q1 2010,* Second Life, available at:
http://community.secondlife.com/t5/Features/Second-Life-Economy-Hits-New-All-Time-High-in-Q1-2010/ba-p/657582.

[10] Often, untradable items will fall in one of two categories: special equipment, which includes legendary weapons and armor that is supposed to be scarce in the MMOG, and special items bought with real money in the developer operated shop. The first category being untradable is often a security measure to ensure that black market operatives do not create artificial scarcity by monopolizing the items, as well as giving the users who do manage to obtain such an item a sense of accomplishment and uniqueness. The second category being untradable serves as a way for the developer to ensure a steady stream of real money revenue being generated through purchases in the shop.

[11] Scripted MMOGs utilize quest-based systems as a way to railroad the player experience. They provide users with objectives that, once completed, yield a pre-set item or amount of currency as a reward.

[12] This includes trading for 'non account-bound' items with other users in exchange for virtual items or currency.

[13] Some users have accrued fast fortunes through this trade. Arguably the first MMOG-millionaire was a user named Angshe Chung, who made a fortune selling real estate online. See also:
http://singularityhub.com/2011/08/23/entrepreneur-anshe-chung-makes-millions-selling-virtual-land-banking-and-fashion/

[14] As MMOGs evolved, users gained access to an ever-increasing amount of options to customize their own playing experience. Where initially they were bound to relatively simple and plain-looking character models and virtual objects, in time these turned into character models with almost unlimited customization options (e.g. being able to adjust the thickness of the eyebrows or the positioning of the nose on the character's face) and heavily customizable objects (e.g. being able to design houses or emblems to wear on one's armor). It is in this that, according to research conducted by Jo et al., the user develops a stronger sense of ownership regarding their avatar and the acquired items than in earlier iterations of MMOGs where the level of customization was significantly lower. See: S. Jo et al., "Massively Multiplayer Online Role-Playing Games

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hours in a MMOG to obtain the rarest of magical swords, they should be able to do with this property whatever they desire. Whether this is utilizing the sword to combat monsters, putting it on display to show it to other users, or even selling that sword for virtual – or real world – currency. It would only be natural that one also held the property rights in this sword.

It is here however that things become problematic. Imagine buying your tropical island from another user, then having someone visit it one day with an eviction notice stating that you are to leave the island to never return. No refunds. This is exactly what occurs in virtual worlds with regard to virtual objects, such as virtual items and virtual currency, that are being sold without the consent of the developer. While a user might pay large sums of (real world) money to acquire rare objects, they never really own anything. Instead, in order to gain access to the MMOG, users enter into contracts that give the developer the ability to deny them access to their accrued virtual objects – or the MMOG entirely – under the current system governing MMOGs: the EULAs.[15]

MMOGs are currently governed through End User License Agreements (EULAs). EULAs are contractual agreements between the users and the developer that – amongst other aspects of the MMOG – deal with the distribution of property rights regarding the virtual objects in MMOGs. In the developers' attempts to cover any potential blind-spots to protect their intellectual property rights in the underlying code, they have constructed the EULAs in such a way that these contracts also let them retain the property rights in virtual objects inside their MMOGs. Even if these virtual objects were obtained by the users.

This gives rise to conflict when a user desires to 'cash out': wants to sell the items obtained in the virtual world for real world currency. Most EULAs explicitly contain clauses that forbid this type of transaction, with the punishment often being the developer stripping

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(MMORPGs) and Commitment Behavior: An Integrated Model", *AMCIS 2007 Proceedings* (2007), Paper 70, p. 4-5, 12.

[15] A recent example of a developer taking action against their users purchasing virtual objects, currency, or avatars – in exchange for real world currency in transactions external to the MMOG – can be found in ArenaNet (developer of the MMOG *Guild Wars 2*). See: https://forum-en.guildwars2.com/forum/support/support/RMT-Purchases-Expect-them-to-be-Removed (containing both the announcement and the reasoning behind the decision to also take action against the buyers of such objects, last visited August 2015). An earlier example of ArenaNet denying users access to their accounts can be found in 2012, when ArenaNet closed thousands of accounts from users supposedly exploiting a bug in *Guild Wars 2* that allowed them to gain a significant advantage over those who did not exploit it. See also: http://www.pcgamer.com/3000-guild-wars-2-players-permanently-banned-for-karma-exploit/ (last visited August 2015).

the user of all their belongings and denying them further access to the MMOG.[16] This practice has been virtually untouched since the days of the first MMOGs.

However, in the light of the MMOG's rapid development, the time has come to re-evaluate this system. It is time to examine the most beneficial approach to property rights in the objects native to virtual worlds and their respective rightholders. It might be time to provide users of MMOGs with protection regarding their virtual items. A form of protection that could, for example, be considered is having users of MMOGs be the rightholders to the property rights in their accrued virtual objects.

Is there an approach to property rights in virtual objects that is more beneficial to users and developers than the current way EULAs govern these rights? This paper will examine, through doctrinal analysis, if contracts in the form of EULAs are the best suited instrument for regulating the distribution of property rights in virtual objects that users acquire within the realm of the MMOG or if the right kind of legal property rights approach is a preferred alternative over this.

The goal of this paper is to explain why having users of MMOGs as the rightholders, to the property rights in virtual objects they acquire, has the potential to benefit both developers and users from an economical perspective, while at the same time providing users with more protection – against thieves and the developers abusing their position of power[17] and with regard to their invested economic interests – as well as allowing the developers to maintain the same level of protection with regard to their underlying intellectual property rights in the software code as current EULAs provide them with. This paper will also explain what form such an approach should take, emphasizing that the right type of property rights

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[16] An example of this would be the EULA of Arenanet's MMOG *Guild Wars 2*, available at: https://www.guildwars2.com/en/legal/guild-wars-2-user-agreement/. Section 3(c) states that suspension or termination in case of breach of contract happens "At the sole and absolute discretion of NCSOFT (Arenanet's mother company)."

[17] See for examples of developers abusing their powers, both inside and outside of the MMOG-environment: http://www.alteredgamer.com/eve-online/44082-scandals-that-rocked-the-world-of-eve-online/ (On how developers suddenly started taking away accrued virtual wealth for actions taken by the users four years prior, while at the same time giving beneficial virtual objects to groups that the developers play in themselves), https://forum-en.guildwars2.com/forum/game/gw2/Game-Dev-abusing-power-Any-way-to-report-it (First message, about a developer continuously disconnecting (DCing) a user from the virtual world of Guild Wars 2, disallowing him access to his virtual objects and his avatar), and https://www.reddit.com/r/MMORPG/comments/3aummi/salem_the_worst_mmo_experience_ever/ (a forum-post describing bad developer behaviour inside the MMOG, and attempts to silence users – who tried to bring attention to this – outside the MMOG. A user by the name of TsukiKnight provides an extensive list of examples in which the developers abuse their powers).

approach allows for developers to continue to regulate other aspects of their MMOGs through EULAs.[18]

Chapter 1 will provide an overview of virtual markets and the development they have gone through, both inside and outside the virtual environment of the MMOGs. This serves to showcase the important role the – largely external – trading of virtual objects plays in the present day MMOGs. What started with the crude and simple Bazaar Trading model eventually developed, via the Auction House model, into the present-day Real Money Trading model. [19] It is through analysing these models that one can only come to the conclusion that virtual world economies have developed real world markets of significant size for virtual objects. Property rights in virtual objects for users are therefore needed to ensure a level of user protection that the developers of MMOGs are currently reluctant to provide.

Chapter 2 defines what exactly a EULA is. Through outlining the advantages and disadvantages that the EULA model has for developers and users of the MMOG it will become clear that the EULA in its current form – which has become the industry norm – heavily favors the developer. An important distinction will be made here between the situation users are in under the American common law system on the one side and their situation under EU law on the other side.

American courts have ruled certain EULA terms to be unconscionable, but while opportunities to do so have been presented, no court so far has answered the question of whether users can call themselves the owners of the virtual objects they acquire. Developers, therefore, continue to retain the property rights in the virtual objects present in their MMOGs. EU Directives are already in place that provide users with more protection in several scenarios where the EULA puts them in a disadvantageous position, whether this be through unclear EULAs or through the incorporation of "unfair contract terms". However, although EU law does provide users with more safeguards than the American system, it does not solve the underlying problems that arise in the case of ownership disputes between users and developers.

After comparing both situations it will become clear that American users stand to gain the most from having property rights as this allows them to protect their economic interests

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[18] Such as the rules of conduct or the terms regarding the developers' underlying intellectual property rights in the software code. See for example: https://www.guildwars2.com/en/legal/guild-wars-2-user-agreement/ (sections 5. and 6.).

[19] J. Ackerman, 'An Online Gamer's Manifesto: Recognizing Virtual Property Rights by Replacing End User Licensing Agreements in Virtual Worlds', *Phoenix Law Review* 2012, 137-VI, p. 150.

better, in addition to now also having more protection against other users and the developers. For users in the EU, property rights will mainly serve as a way to protect their invested economic interests as additional means of protection, alongside the consumer protection that the Directives already offer them.

Lastly, this chapter examines several proposed suggestions to improve EULAs to allow for less disparity between the two contracting parties.

Chapter 3 will explain why a property rights approach to virtual objects – with users being the rightholders – is a desirable governing alternative to the current EULAs with regard to the aspect of property.[20] Based on the set of characteristics that virtual objects share with real world objects of property, it can be argued that it is a logical step to – in this time of continuously developing technology and increasing importance of the trade in virtual objects – classify virtual objects as objects of property. Furthermore, criteria proposed and applied by the American court in the *Kremen v. Cohen* case, as well as by the Dutch court in the *Runescape* case, indicate a willingness of courts to treat virtual objects similar to real world property when it comes to the application of property rights. Through examining several theories – the Lockean labor theory, personhood theory, the theory of theft protection and deterrence, utilitarianism – it will become clear on which basis it would be justifiable to have users hold the property rights in their virtual objects.

This paper will then examine which property rights – when applied to virtual objects – would benefit users of MMOGs. Other commentators in favor of property rights for users have mostly neglected this aspect, instead only presenting arguments as to why users should have such rights.[21] Given that different MMOGs operate under different legal regimes, this part of the paper will focus on what rights users would have under American common law, based on its fragmentation of ownership and the rights in chattel, as well as under several European – French, Dutch, and German – civil law regimes, which find their origins in the concept of full ownership and the formula of *usus, fructus, and abusus*.

Additionally, this chapter presents and reviews three different approaches to applying property rights in virtual objects: the positive, the carte-blanche normative, and the qualified

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[20] This paper does not argue for a property rights approach that tries to take the place of the entire EULA. Instead, it argues for a property rights approach that replaces the contractual distribution of property rights aspect that EULAs currently have amongst their provisions, as seen in, for example, the EULA for *Star Wars Knights of the Old Republic* (available online at: http://www.swtor.com/legalnotices/euala, under 'No Rights over results of use of Software or over in-Game').

[21] J. W. Nelson, 'The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea', *McGeorge Law Review* 2010- vol. 41, p. 288 (Nelson specifically criticizes Lastowka and Hunter as commentators that have "neglected to present a clear outline of how property rights should be extended to virtual resources").

normative approach, created by Nelson.[22] While Nelson came to the conclusion that the property rights-governing aspect of EULAs should not be replaced by any of his suggested approaches, this paper will argue that taking a qualified normative approach will benefit users more in terms of protecting their invested economic interests as well as in case of conflict with other users or developers. It will also explain that such an approach can co-exist alongside the EULAs, allowing developers the flexibility to sculpt the terms and rules concerning their MMOGs – other than those regarding property rights in the virtual objects – in accordance with their needs and allowing them to continue to protect their own interests in the underlying intellectual property through these EULAs as well.

Chapter 4 contains the conclusion to this paper, which advocates for users being the rightholders with regard to the property rights in virtual objects they acquire in MMOGs.

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[22] Nelson, *supra* note 21, p. 296-297.

Chapter 1: The Evolution of commercial practices in virtual worlds

§1.1 Introduction

Over time, virtual worlds have drastically changed. The continuously developing state of MMOGs sparked a continuously evolving marketplace in these worlds. Where in the past one had to travel from place to place inside the virtual world to find that one highly desired special item, it now takes mere seconds to find the item on third-party auction sites[23] or websites specialising in MMOG-specific items.[24] These websites are not official developer-operated websites, but third-party operated websites that are not affiliated with the developers of the MMOGs. Furthermore, developers do not allow these types of external user-to-user transactions in the EULA, which has become a source of conflict between developers and users.[25]

The major transition from small virtual economies to massive real money trading economies - that in size outrank several nations of the real world - did not take place overnight. Since the early 2000s the major influx of new users helped bring about a rapid evolution in the way trade was being conducted in the virtual worlds. Where trade initially took place entirely within the realm of the MMOG, using only virtual currency to buy and sell items, the growth in popularity of MMOGs eventually spawned secondary markets outside of the MMOG where users can buy and sell items in exchange for real world currency.[26] Secondary market revenue – which is revenue generated through user-to-user trading of virtual items for real world currency – saw an increase from several thousand dollars in the early 2000s to several billions of dollars in the last several years.[27] The major

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[23] Since 2007, eBay has allowed certain types of virtual items to be sold through auctions on their website. These sales are limited to items from the MMOG *Second Life*. Out of fear of legal action taken by the developers, eBay still disallows the sales of virtual items from other MMOGs. See also: http://www.ebay.com/gds/Buying-and-Selling-Virtual-Items-on-eBay-/10000000004609906/g.html.

[24] These websites list the MMOGs they are active in, which items or currency are for sale, and what the prices are. See for example: http://www.6kgold.com/ (an E-Commerce platform that sells items and currencies for several MMOGs).

[25] See for example: http://eu.blizzard.com/en-gb/company/legal/wow_tou.html (the Terms of Use for *World of Warcraft*, last visited February 2015). Section VIII. Selling of items reads: "Note that Blizzard Entertainment either owns, or has exclusively licensed, all of the content which appears in World of Warcraft. Therefore, no one has the right to "sell" Blizzard Entertainment's content, except Blizzard Entertainment. Accordingly, you may not sell or purchase virtual items for "real" money or exchange items outside of World of Warcraft."

[26] When Castranova conducted his research, he noticed that black market websites auctioning items and currency while operating without the developers' consent were a new phenomenom that was rapidly gaining in popularity. See: Castranova, *supra* note 4, p. 30.

[27] See: http://www.avatarwithin.com/mmorpg/estimation-of-mmorg-secondary-market-size/ (overview of several MMOGs and their secondary markets). See also: http://www.forbes.com/sites/insertcoin/2014/07/19/world-of-warcraft-still-a-1b-powerhouse-even-as-subscription-mmos-decline/ (top 10 of subscription-based MMOGs, based on revenue generated in 2013).

problem that accompanies all of this is that the developers – through their EULAs – forbid trade being conducted outside of the realm of the MMOG. Because users do not have any rights in the virtual objects they possess, often users who are caught conducting trade outside of the virtual realm of the MMOG are stripped of their virtual belongings by the developers; sometimes their accounts get closed permanently.

This chapter will outline the transitions economies in virtual worlds have gone through since their first conception. Ackerman has categorized these transitions. He concluded that three major trading system models developed in virtual environments over the years.[28] These three major models are[29]: the Bazaar Trading model[30], the Auction House model[31], and the Auction House with a real-money component, referred to by Ackerman as "value-added economies" or the Real Money Trading model.[32] This chapter will explain these models in detail to show how MMOGs developed into a substantial role-player in today's economy and how important it has become for users to have certain safeguards regarding the virtual objects they acquire.

§1.2 Evolution of commercial practices in MMOGs

§1.2.1 The Bazaar Trading model

In the early days of virtual worlds, trading between players took place via the Bazaar model. This is a crude and simple model that was first implemented in the MMOG *Everquest*.[33] When trying to sell procured virtual items, users were required to set up their avatar as a market booth. This avatar would be placed in a central city[34] and have several items in its possession that the user marked as available for trade. The user could also set the price for each item, using the virtual currency of the MMOG.[35] Other users could interact with these avatars to see the items available for trade and their respective pricetags. They could then decide to exchange their virtual currency for the item, after which the item would

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[28] Ackerman, *supra* note 19, p. 150.
[29] *Id.*
[30] I. MacInnes, 'The Implications of Property Rights in Virtual Worlds', *Americas Conference on Information Systems*, New York 2004, p. 2728.
[31] See: http://pwi.perfectworld.com/gameinfo/advinfo/auction_house for an explanation of what a virtual auction house is.
[32] See: http://www.planetcalypso.com/ for Calypso, the mmog that allows users to earn real world currency through playing in it.
[33] Ackerman, *supra* note 19, p. 150.
[34] Known amongst users as a Player Hub or a Central Hub due to the high density of users being in these cities at all time.
[35] Ackerman, *supra* note 19, p. 151.

be placed in their inventory. Subsequently, the paid currency would be transferred to the seller's inventory.

In early versions of this model, both seller and buyer had to be online at the same time. The seller continuously advertising wares in the hopes that a buyer for a specific item would come forward during this timeframe. This buyer needed to locate the seller during this relatively short period of time as well. After a meeting had been arranged the price would be determined through haggling, much like in a real world bazaar.[36]

While a step forward compared to the time where no user-to-user trading system was available, the Bazaar model was very time-consuming for those users who were looking to get the best bargain. They had to individually check every avatar in every big city to find the item they were looking for at the best possible price. It is this time-consuming process that paved the way for black market websites to grow out of player-driven demand to purchase virtual items or virtual currency with real money, as a way of saving time.[37] These websites all worked along a similar business model: that of the virtual sweatshop.[38] They would employ workers in – mostly – third-world countries and force them to play the game for hours on end, performing menial tasks over and over again, earning small increments of virtual currency per task performed. The virtual currency obtained through these tasks would then either be sold to other users in exchange for real money via the black market website or used to purchase hard to obtain virtual items, which would then also be sold for real money through the website.

These unsanctioned black market websites were, in the eyes of most game developers as well as of most users, harmful to the virtual world experience.[39] If a person had enough currency at their disposal they could theoretically purchase all the available rare items and thus create artificial scarcity.[40] In turn, this had the potential to make other users lose interest in the game because they could not obtain the best items anymore. Having their virtual experience ruined, these users would simply stop playing, heralding an exodus of users and threatening the continued existence of the virtual world itself.[41]

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[36] Castranova, *supra* note 4, p. 26. This crude early version of the model is where this model's name originated from.

[37] Nelson, *supra* note 21, p. 286.

[38] J. Dibbel, *Black Snow Interactive and the World's First Virtual Sweat Shop*, available at: http://www.juliandibbell.com/texts/blacksnow.html.

[39] Ackerman, *supra* note 19, p. 153.

[40] *Id.*

[41] *Id.*

In addition to this, developers considered every single item in their MMOGs their property.[42] In their eyes it was considered theft when users traded virtual items and currency for real world currency, as it was not their property to trade in the first place.[43] Despite notoriously pursuing and banning[44] users who operated on black market websites, developers eventually acknowledged that the black market websites could not be halted. They also came to understand that the process of tracking them down was one that was both (too) costly and (too) time-consuming.[45] Therefore, in an attempt to make it easier for users, and to incentivize them to trade inside the virtual environment rather than through black market websites, the developers created virtual auction houses.[46] Through this model they hoped that users could be encouraged to use the trading option native to the virtual world instead of the black market websites, thus preventing black market influences from destroying their MMOGs.[47]

§1.2.2 The Auction House Trading model

The Auction House model was arguably first implemented in the virtual world of *Final Fantasy XI*.[48] No longer were users required to scour every single avatar in every single city in the search for that one specific item. Instead they could visit avatars, designed by the developers and not operated by users, in the bigger cities and access an extensive global auction house system from there.

A user wanting to sell specific items could interact with the auction house-NPC.[49] This would bring up a menu that allowed for items from the user's inventory to be placed on the auction house. The user could then assign a price and auction duration.[50] After paying a small auction fee the item would disappear from the user's inventory and be made available

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[42] Castranova, supra note 4, p. 30.

[43] *Id.*

[44] In the context of MMOGs, a ban constitutes denying the user access to the MMOG. This can be done through deletion of their account or by locking it, so that the user is unable to log into the MMOG.

[45] Castranova, *supra* note 4, p. 30.

[46] Ackerman, *supra* note 19, p. 153.

[47] *Id.*

[48] C. Nutt, 'GDC China: Square Enix's Tanaka Details Potential Fixes for Beleaguered MMO'*, Gamasutra* 2010, available at:
http://www.gamasutra.com/view/news/122438/GDC_China_Square_Enixs_Tanaka_Details_Potential_Fixes_F or_Beleaguered_MMO.php.

[49] An NPC, or non-player character, is operated not by the user but through the underlying code of the MMOG. In the case of auction house-NPCs, these characters allow users to access the trading post via starting a conversation with them. See also: https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Non-player_character.html.

[50] Ackerman, *supra* note 19, p. 153.

for sale on the auction house.[51] Other users could visit any auction house-NPC in any city, browse through all the available items, then bid on the ones that they would like to purchase.[52] If an auction was won by a user, the item would be taken from the auction house and placed in that user's possession. Often via a mailing system.[53] At the same time the user who made the item available for sale would receive payment, also via the mailing system inside the MMOG.[54]

According to Ackerman, the implementation of the Auction House model revolutionized virtual world economies almost overnight, heralding the birth of the modern virtual world economies.[55] After it was popularized by *Final Fantasy XI*, the model was adopted by many other virtual worlds, including the arguably most popular MMORPG of all time: *World of Warcraft*.[56] Over the years, several improvements were made to make this model even more attractive to users. Arenanet's *Guild Wars 2*, for example, implemented a system that enabled users to put items up for sale on the auction house without first having to visit an auction house NPC. This granted users access to the auction house straight from their inventories; from anywhere in the virtual world.[57]

However, despite removing the time-intensive aspect of user-to-user trade, the black market continued to thrive.[58] The problem now being that, even though it had become easier for regular users to obtain rare items they would otherwise spend hours searching for, the same was true for black market operatives. They too could now simply walk up to any auction house-NPC, purchase all the available rare items and then make them available for sale on their respective websites. This would again create artificial scarcity. The selling of virtual currency in exchange for real money also continued to thrive as many users still felt reluctant to go through the time-consuming process of performing menial tasks inside the MMOG in exchange for virtual currency. Instead they decided that they valued their time higher than the prices for virtual currency charged by black market currency sellers.[59]

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[51] *Id.*
[52] *Id.*
[53] Ackerman, *supra* note 19, p. 154.
[54] *Id.*
[55] *Id.*
[56] See: *Chapter II: How to play*, available at: http://eu.battle.net/wow/en/game/guide/how-to-play (under the header 'Auction House').
[57] See: https://www.guildwars2.com/en/news/introducing-the-new-trading-post/ ("Perhaps the most useful thing about the Trading Post is the ability to sell items from your inventory on it no matter where you may be in Tyria.").
[58] Nelson, *supra* note 21, p. 287-288.
[59] *Id.*

As Castranova observed, years before this model became popular, this is classic economics at work. One user's "comparative advantage in foraging leads to exchange".[60] The black market websites continued to spend hours and hours collecting virtual items and currency and it remained a profitable business.

§1.2.3 The Real Money Trading model (RMT)

The third model, the Real Money Trading model, originated from developers trying to embrace the practice of trading real world currency for virtual objects.[61] Having grown tired of their continuous struggle to ban the users engaging in black market activities and after seeing their attempts to remove any type of black market activity fail, developers instead opted to incorporate black market practices into their virtual worlds.[62]

Real Money Trading models have become increasingly more succesful as developers find ways to have users spend real world currency inside the realm of their MMOG instead of on black market websites.[63]

This model generally can be split into two categories of transactions: developer-to-user transactions and user-to-user transactions.

The former developed gradually over time. In the early 2000s almost every MMOG operated on a subscription-based model of payment. After purchasing the game disk, users would be required to pay a monthly or bi-monthly fee to continue playing.[64] The money generated through these subscriptions was used by developers to pay for the server maintenance costs, ensuring that the MMOG would be able to remain online. However, over time the cost for maintaining servers decreased significantly, to the point where developers could not always feasibly defend the subscription-based models anymore.

Therefore, a new way to obtain additional revenue was implemented in later MMOGs: microtransactions.[65] Instead of paying a monthly fee, the user now has the option to purchase special or limited-edition items from a developer-operated store[66] inside the MMOG using

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[60] Castranova, *supra* note 4, p. 21.
[61] Ackerman, *supra* note 19, p. 154-155.
[62] Ackerman, *supra* note 19, p. 155.
[63] *Id.*
[64] See: https://us.battle.net/shop/en/product/world-of-warcraft-subscription ("The easiest way to continue playing World of Warcraft beyond your first 30 days is by setting up a subscription").
[65] K. Voecks, 'Redefining MMOs: the massive money of microtransactions', available at: http://massively.joystiq.com/2009/09/11/redefining-mmos-the-massive-money-of-microtransactions/ ("We have been shifting more and more towards the idea of microtransactions as a culture, not just as a genre.").
[66] Nicknamed 'cash shop' by users because the items in it are generally obtained in exchange for real world currency.

real world currency. These transactions mimic the black market transactions of the past, with the developer taking the place of the black market seller.

An alternative take on this system has the developer presenting the user with the option to purchase special virtual currency from the developer at a set price. This special currency differs from regular virtual currency in that it can only be used to purchase items in the shop. [67] After paying for it with real money, the currency will be transferred to the user's account from where it can be used to buy special virtual items for the avatar from the shop.[68] Often the MMOGs using this system will include a virtual stock market where users can buy and sell the special currency needed to purchase items in the shop in exchange for the virtual currency users obtain through performing tasks inside the MMOG. This allows developers to also provide users unwilling to invest real world currency with a way to obtain these items. MMOGs like *Second Life* and *Guild Wars 2*, which have both a type of special currency and an in-game stock exchange[69], are great examples of how MMOGs can offer users willing to invest real world currency a way to ensure a sense of uniqueness in their avatars while at the same time also providing this option to users that are willing to work for it inside the game.[70]

Another example of developer-to-user transactions can be found in *Eve Online*, albeit somewhat more limited. This MMOG provides users with the option to purchase subscription-extensions with virtual currency instead of real money.[71]

As markets continued to expand, developers who embraced real money trading have been able to reap lucrative rewards. In *Second Life* alone there are millions of transactions each month, most of which directly benefit the developer.[72] Developers have definitely made an effort to try and embrace the shift towards trading virtual items and currency for real world currency, as long as these transactions involve the transfer of real world currency from the

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[67] See: http://wiki.guildwars2.com/wiki/Gem_Store.
[68] C. Kiondo, 'Exploring Risks in Virtual Economies', *Sotics* 2011, p. 62. Available online at: http://www.gbv.de/dms/tib-ub-hannover/736350179.pdf
[69] See: https://marketplace.secondlife.com/ and http://wiki.guildwars2.com/wiki/Gem_Store for more information on the developer-operated stores of both MMOGs.
[70] Many MMOGs available online presently are free to download, install and play. Developers generate revenue through microtransactions and VIP-packages. These types of MMOGs are called Freemium MMOGs as they are free-to-play but can require a significant investment if one wants to obtain the best, or the most special, items. This investment can take the form of paying real world currency or spending a significant amount of time inside the MMOG to accrue enough virtual currency to exchange on the stock-exchange.
[71] See: https://secure.eveonline.com/Plex/WhatIsPlex.aspx ("You can purchase PLEX directly from CCP through Account Management or from other players using in-game ISK (virtual currency). Many players pay their subscription simply by playing the game and buying PLEX on the EVE market.").
[72] Ackerman, *supra* note 19, p. 156 ("Linden Lab, the developer behind *Second Life* has generated over $75 million each year for the last three years, solely from charging transaction fees when users sell goods to other users or when users buy currency.").

user to the developer. The same cannot be said of developers embracing user-to-user transactions.

The amount of user-to-user transactions that involve trading real world currency for virtual objects also rapidly increased during the last several years. Important to keep in mind however, is that this type of trading is often explicitly not allowed by the developers. Instead, once developers become aware of users selling their virtual objects in exchange for real world currency (outside of the virtual world environment), they will often punish these users. Taking away their possessions or closing their accounts. This is an ongoing source of conflict between the developers and their userbases.

There are two types of MMOGs in which user-to-user real money trading takes place. The first category contains MMOGs in which users have little to no freedom to create items on their own, the so-called scripted environments.[73] Traditionally, MMORPGs (Massive Multiplayer Online Role-Playing Games) fall into this category. These are the MMOGs that require the user to perform specific, pre-set tasks in order to meet pre-set criteria to progress in the game.[74] Here, the developer of the MMOG sets out a script for the user to follow, written into the game code, with parameters set for allowing users to progress to the next level once specific requirements are met.[75] Ample room is allowed for users to create their own items. The items that are commonly traded inside and outside of the MMOG-environment are items that were designed and scripted by the developer of the MMOG, the user has only invested time (and potentially other resources[76]) to obtain the item they put up for sale. It is here that most conflicts arise with regard to who the rightful owner of a virtual item is. Users desire the option to 'cash out' as well as to see their efforts protected through property rights. Developers want to protect their interests in the MMOG's code, and in doing so, also do not allow for virtual objects to be transferred between users in exchange for real money.

The second category comprises of virtual worlds in which users have the freedom to do what they desire: the unscripted environments.[77] The set achievement levels and the predetermined tasks that users can complete in scripted environments are notably absent here.

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[73] K. Barker, 'MMORPGing – The Legalities of Game Play', *European Journal of Law and Technology* 2012, vol. 3, no. 1, p. 3.
[74] *Id.*
[75] *Id.*
[76] Such as buying the basic resource materials needed to craft a legendary sword from other users in exchange for virtual currency.
[77] Barker, *supra* note 73, p. 3.

One can even argue that, instead of classifying them as games, the correct term for these worlds should be 'virtual residential areas'.[78] In these environments there is room for users to 'script' or create their own code and add their own designs and items into the game. This in addition to the original script created by the developer.[79] An example would be the user who creates his or her own design, puts it on t-shirts and then sells these shirts to other users in a virtual store in the virtual world environment of *Second Life*.[80] In this scenario the items that are traded inside of the virtual world are items that are designed by the users, who utilize the MMOG-environment provided by the developers to create and sell their own designs. This type of transaction is less prone to property right conflicts due to the developers explicitly acknowledging that what users create is their own and allowing them to sell their creations inside of their virtual world environment.[81] However, when users sell these objects to other users outside of the virtual world, in exchange for real world currency, the same property rights issues arise as in the first category. Here too, the EULA forbids these types of external transactions without the explicit consent of the developer.[82]

It is clear that economies in virtual worlds have developed beyond a simple bazaar operating exclusively within the realm of the MMOG itself. With the increase in real money trading, with or without consent of the developers, users have become increasingly aware of the fact that they wish to protect their 'investment' through proper legal protection.[83] They are aware of the fact that there are several safeguards that they could potentially benefit from when trying to protect their investments made in MMOGs. Safeguards they do not possess under the current model of EULAs governing MMOGs.

The next chapter will provide an in-depth analysis of what these EULAs that currently govern MMOGs are, why they are so appealing to developers, and why this approach puts users in a disadvantageous position.

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[78] *Id.*

[79] *Id.*

[80] For a tutorial on how to set up shop in *Second Life*, see: See: http://community.secondlife.com/t5/English-Knowledge-Base/Selling-objects/ta-p/700143

[81] See: http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_FAQ#Do_I_retain_intellectual_property_rights_in_content_I_create_in_Second_Life.3F ("Yes, you retain the intellectual property rights you already have in content you submit to Second Life.").

[82] See: http://www.lindenlab.com/tos#tos2 (the Terms of Service for Second Life, last visited April 2015). Section 2.2 reads: "To be clear, and without limiting the foregoing, you may not use, reproduce, distribute, prepare derivative works of, display or perform any Linden Inworld Content, whether modified by you or not, outside the virtual world environment of the Service except as provided in the Snapshot and Machinima Policy or as expressly agreed upon in a written agreement with Linden Lab."

[83] Ackerman, *supra* note 19, p. 159.

Chapter 2: End User License Agreements

§2.1 Introduction

The MMOGs available nowadays all have one thing in common: they are governed through provisions in EULAs and variants thereof. These variants include for example the Terms of Service (ToS) or Code of Conduct (CoC).[84] They are favored by developers as a way to ensure the protection of their software through preventing the reproduction and distribution of illegal copies – of the software – without their consent. Developers also use these EULAs to retain all property rights in the objects found inside of their MMOGs. This instrument worked to some extent when trade took place almost entirely within the virtual realm, as it served as a way to protect users from black market influences. The EULA acted as a tool that allowed the developers to close down accounts that could be linked to black market activities in an effort to prevent the black market websites from negatively influencing the playing experience of regular users.[85] At the same time it also protected the developers' interests in the underlying software.

However, with the increase in real money trading of virtual objects between regular users outside the MMOG-environment, disputes arose when developers considered these trades to also be a breach of contract. The users, at the same time, considered EULAs to be too constricting and cried out for more protection regarding their virtual objects.

This chapter will first provide a description of what EULAs are. It will outline the advantages and disadvantages of the EULAs for respectively the developers and the users. Here, a distinction will be made between the position of the users under the American common law system and their position under EU law. This to showcase the differences between the two systems, as users of MMOGs find themselves with differing levels of protection under different legal regimes. The subsequent part of the chapter outlines and evaluates popular suggestions to improve the EULA: rewriting of the EULA in terms that are easier to understand, creating bilateral EULAs, making changes to how developers handle a breach of EULA and disclaim liability, virtual arbitration, and the explicit allowing of real money trading in user-to-user transactions. The final part of the chapter contains a short summary and conclusion.

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[84] A. Jankowich, 'EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds', *Tulane Journal of Technology & Intellectual Property* 2006, vol. 8-1, p.5.

[85] For a MMOG-developer's explanation as to how black market activities negatively influence the experience of regular users, see: http://camelotunchained.com/v2/foundational-principle-5-gold-sellers-still-suck/ (A blog entry by Camelot Unchained developer Mark Jacobs explaining why he does not allow black market operatives to operate freely within his games, last visited April 2015).

§2.2 End User License Agreements

The End User License Agreement (EULA) is a type of contract that governs the rights of users and their respective avatars and virtual objects inside the MMOG.[86] While differing from game to game, the majority of the content remains near identical for each EULA. EULAs generally contain clauses regulating the relationship between a user and the developer on topics such as (intellectual) property rights, liability, dispute resolution, and reasons for termination of the contract (as well as consequences for the users in case of termination).[87]

EULAs license the use of the MMOG to the users, allowing the developers to retain the (intellectual) property rights in all the virtual objects generated in the MMOG as well as the intellectual property rights in the underlying software code. An example of this can be found in *World of Warcraft*'s Terms of Use that state that the user does not own any rights to the virtual objects they acquire:

"All title, ownership rights and intellectual property rights in and to World of Warcraft (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into World of Warcraft, transcripts of the chat rooms, character profile information, recordings of games played on World of Warcraft, and the World of Warcraft client and server software) are owned by Blizzard Entertainment or its licensors. World of Warcraft is protected by the copyright laws of the United States, international copyright treaties and conventions, and other laws. All rights are reserved. World of Warcraft may contain certain licensed materials, and Blizzard Entertainment's licensors may protect their rights in the event of any violation of this Agreement."[88]

The EULA comes in the form of a so-called 'click-wrap' agreement. This is the digital version of a shrink-wrap contract.[89] Where removing the shrink wrap constitutes an

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[86] *Id.*

[87] Barker, *supra* note 73, p. 4.

[88] See: http://eu.blizzard.com/en-gb/company/legal/wow_tou.html (Section XIII. Ownership).

[89] M. Samson, 'Click-wrap Agreement Held Enforcable', p. 1. Available online at: http://www.internetlibrary.com/publications/cwahe_art.cfm.

agreement in these latter types of contracts[90], the click-wrap version usually has the developer offering the terms of agreement to users upon the initial starting of the MMOG.[91] The user is presented with the option to either agree to be bound by the EULA – usually via a 'I accept'-button – and proceed into the MMOG or to decline – via a 'I decline'-button – and terminate the program.[92] Accepting the EULA is a requirement for users to be able to enter the MMOG.

In the case of *Hotmail Corp. v. Van$ Money Pie Inc., et al.* in 1998, the United States District Court in California decided that click-wrap agreements should be considered contractual binding agreements.[93] When clicking the 'I accept'-button, users bind themselves to the terms laid down in the EULA. This means that the provisions are enforceable in court.

Lastly, EULAs are adhesion contracts. Adhesion contracts are non-negotiable agreements that can, in a standardized form, be presented to every (potential) user of the MMOG simultaneously.[94] There is no space that allows for contractual negotiations between user and developer. Simply put, for one to be able to access the MMOG, one must assent to the terms and conditions that have been determined and set by the developer.[95] Without room for negotiation on the user's behalf, this type of contract is clearly in favor of the party that drafts it: the developer.

§2.3 EULAs: advantages and disadvantages for developers and users

§2.3.1 EULAs and developers

The primary advantage for developers to use EULAs is the relative ease with which they can protect their software from being copied, reproduced, and distributed unchecked and unallowed.[96] The ability to mold the EULA exactly to their needs and wishes has led developers to develop a preference for using EULAs to govern their virtual worlds, rather than just relying on copyright laws.[97]

EULAs allow them a way to bypass the first sale doctrine, which exhausts the developer's distribution rights with regard to the copies of the software that users purchase – disks containing the software or software made available for download by the developer –

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[90] C. Cifrino, 'Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must be the Governing Paradigm in the Law of Virtual Worlds', *Boston College Law Review* 2014, vol. 55-1, p. 244.
[91] *Id.*
[92] Jankowich, *supra* note 84, p. 7.
[93] Hotmail Corp. v. Van$ Money Pie Inc., et al., 47 U.S.P.Q.2d 1020, 1998 WL 388389 (N.D.Cal.1998).
[94] Barker, *supra* note 73, p. 4.
[95] *Id.*
[96] Ackerman, *supra* note 19, p. 160.
[97] Ackerman, *supra* note 19, p. 161.

allowing users to then resell, rent out, or give away their copy of the software under American law. This is relevant, as a significant portion of MMOG developers is based in the United States.[98] Because EULAs have the developers licensing their software out to users instead of selling it, users never become owner of the software. This allows developers to create and impose their own sales restrictions on the users by allowing them to use the software but disallowing them to sell the software to other users or to distribute or copy the software for free.[99]

Of note here is the fact that when it comes to the reselling of software licenses, stored on both tangible and intangible mediums, the situation is different in the EU. Here, the ECJ has provided an exception in the case of *UsedSoft GmbH v. Oracle International Corp*.[100] UsedSoft, a dealer in second-hand software based in Germany, sold 'used' Oracle licenses, which allowed their acquirers to access and download software from Oracle's website. Oracle stated that this was a breach of contract as Oracle's EULA did not allow for its licensees to sell their licenses. The ECJ ruled however, that once Oracle allowed their customers to download a copy of the software to store on their computer as well as concluding with them a user license agreement – giving them a non-exclusive, non-transferable user right for that program for an unlimited amount of time – it exhausted its rights to exclusive distribution.[101] This right of distribution is exhausted regardless of whether the copy of the software is provided via a tangible medium – stored on a disk – or an intangible medium – being available for download on Oracle's website.[102] This means that resellers of the software license are not bound by the prohibition in the EULA when it comes to the resale of their software licenses. As long as users do not make copies of the software, nor sell it in parts, they are allowed to resell their license to other parties provided the original user's copy is rendered useless after the resale.[103] Additionally, the ECJ ruled that any such further user can be considered a lawful acquirer and – as such – has the right to download the software from Oracle's website for use on their computers.[104] The Dutch court would later reaffirm, in HR *De Beeldbrigade/X*, that it indeed does not matter whether the software is sold using a

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[98] See: http://www.gamedevmap.com/ (for a map with game developer locations that shows a high concentration of game development corporations are based in the United States and European regions).
[99] Ackerman, *supra* note 19, p. 160-161.
[100] UsedSoft GmbH v Oracle International Corp (C-128/11). Available online at:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=124564&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2558320
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*

tangible or intangible medium.[105] Furthermore, the Dutch court ruled that the purchase of a software license for an indefinite period of time constitutes a sale and as such provides the user with additional protection under Dutch law.[106]

With regard to the individual virtual objects found within the realm of the MMOG, the EULA allows developers to retain the property rights in these objects, regardless of whether or not these objects have been obtained by users. This is possible because EULAs license the use of the MMOG to the users, allowing for clauses that state that the users do not have any rights in the objects they acquire.[107]

This allows developers to impose restrictions on what users can and cannot do with their accrued virtual objects, such as prohibiting the selling of virtual objects to other users in exchange for real world currency and prohibiting users to make duplicates of their items without the consent of the developers.

Additionally, this is advantageous for developers as it allows them to easily take action when users break the rules of the MMOG, for example when they engage in black market activities, as the developer can take away the objects users accrue via these methods as a form of punishment.[108]

Another advantage for developers to use EULAs is that they can act as standardized contracts that can be used in every transaction. Once created, a single EULA can be used to contract with every user. Instead of having to draft up a specific contract every time the software is sold or downloaded, tailoring a generic EULA to suit their specific MMOG is sufficient. For developers this has the benefits of enhancing profits while at the same time mitigating risk.[109] It can keep costs low while also mitigating the risk of software being distributed freely, because it does not transfer ownership.

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[105] HR 27 april 2012, LJN BV1301 (De Beeldbrigade/X).
[106] *Id.* See also: Book 7 of the Dutch Civil Code, which contains relevant articles regarding obligations of buyer and seller.
[107] An example of which can be found in the aforementioned Terms of Use of *World of Warcraft*. See: http://eu.blizzard.com/en-gb/company/legal/wow_tou.html (Section XIII. Ownership).
[108] *Id.* (Section VI. Consequences of Violating the Rules of Conduct).
[109] Ackerman, *supra* note 19, p. 161.

The use of EULAs also makes the software cheaper for users. With the developers not having to individually contract with users they are able to bring down the cost of production as well as lower the software prices for users.[110]

The fact that the EULA is a type of adhesion contract weighs favorably in the developers' advantage. They draft the EULA and have complete authority over what they put in it.[111] This includes which rights they give to users. This ability to control user behavior heavily advantages the developer. They determine what type of behaviour is acceptable within their virtual worlds through the EULA. The users have no choice but to abide by these rules, given the consequences for violating them are severe. Most EULAs include several punishing clauses for those who breach the EULA, going as far as allowing the developer to strip users of all their virtual belongings or to delete their accounts alltogether. Sometimes this does not even require the developer to notify the user.[112]

To add even more to the developer's already significant stranglehold on users is the fact that the EULA will often contain a clause that allows developers to amend the EULA at will.[113] This puts users into the position where they agree to a contract – albeit to what extend they willingly did so is debatable – that can later be changed according to the developers wishes.

In terms of disadvantages it could be argued that, with the developers rigorously creating terms to protect themselves, they are also losing out on potential users and potential revenue. The fact that developers often reserve the right to terminate accounts, without users being able to hold them accountable, will drive away potential users that are not willing to accept such a risk. However, due to the immense popularity of MMOGs, one could also state that this is a trade-off many developers are willing to make. Especially if they can create an

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[110] R. Gomulkiewicz & M. Williamson, 'A Brief Defense of Mass Market Software License Agreements', *Rutgers Computer &Technology Law Journal* 1996-22, p. 338-346.

[111] As long as these contractual provisions are not contradictory to legal provisions. This means that users can, for example, still benefit from legislation regarding consumer protection.

[112] See: http://us.blizzard.com/en-us/company/legal/wow_tou.html. Under 'Account Suspension Deletion' it reads: "Blizzard may suspend, terminate, modify, or delete any Bnet account or World of Warcraft account...with or without notice to you".

[113] See: http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/ for Electronic Arts' Terms of Service. In the introduction it reads: "You agree to check terms.ea.com periodically for new information and terms that govern your use of EA Services. EA may modify the Terms of Service at any time." This means that the terms can be amended without notice being given to the users. Even if users periodically check for changes, it is unlikely that they will be able to find them amongst the vast amount of provisions – containing legal terms they do not understand – already available.

MMOG-experience that is able to distinguish itself from others – be it through a special feature, highly detailed graphics, or simply by being one (of few) that caters to a niche genre – the percentage of potential users that will refrain from playing the MMOG based on the EULA terms will most likely be extremely low.[114] To a point where even this freezing effect on potential users cannot feasibly be seen as a major disadvantage for developers to using EULAs.

§2.3.2 EULAs and users of MMOGs

The issue most often associated with EULAs and users is the fact that it is impossible to verify whether or not a user has actually read and understood the terms before agreeing to be bound by them.[115] MMOGs will make the EULAs available on their websites, as well as requiring users to accept them before being allowed to enter the MMOG. However, users rarely take the time to read the terms in the EULA. Eagerly wanting to access the fantasy realm of the MMOG, they click through everything just to gain faster entry into the MMOG-world. So while developers make their EULAs available for reading – a mandatory practice in the EU[116] and often endorsed in the U.S. – it is impossible to verify whether a user has taken the time to read the terms before agreeing to be bound by them. The American court in the *Register.com v. Verio* case ruled that as long as the terms and conditions are made publicly available somewhere on the developers' website, clicking an 'i accept'-box indicates awareness of the terms by the user as well as a willingness to be bound by them.[117] Whether or not the user has actually read these terms is not taken into consideration. While it is not required to confirm that users actually read the EULA terms before accepting, one could question to what extent there is any real consent to be bound by the terms when the user foregoes reading them.

Even if one were to be able to verify that the user has read the EULA[118] it would still be impossible to ensure that the user fully understands what he is agreeing to. EULAs are composed of complex legal terminology that is difficult to understand for those who are not familiar with it. This also contributes to a user's reluctance to read through pages of text containing information he does not understand.

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[114] J. Kunze, 'Regulating Virtual Worlds Optimally: The Model End User License Agreement', *Northwestern Journal of Technology and Intellectual Property* 2008, vol. 7-1 (Fall), p. 112.
[115] Barker, *supra* note 73, p. 4.
[116] Art. 10 (2) Dir. 2000/31/EC (Directive on electronic commerce).
[117] Register.com v. Verio, 356 F.3d 393 (2d Cir. 2004).
[118] Through, for example, having the users answer simple questions about the EULA before being allowed entry into the MMOG.

Barker provides us with a perfect example of how users tend to not (fully) read through EULAs in GameStation's April Fool's prank.[119] On April Fool's, GameStation, an online seller of video games, amended their EULA by adding the following clause:

"By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non-transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal sould, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamestation.co.uk or one of its duly authorized minions."[120]

Despite this clause being written in plain and simple English, 88% of the people making a purchase that day agreed to also hand over their soul to GameStation.[121]

However, even if users take the time to read through the EULA and can comprehend its language, under American law there is still the issue that developers could go ahead and change the terms without notifying the users.[122] In the above example, Gamestation could have later added this clause to the EULA. So even if one reads and understands the EULA initially, this does not mean that it cannot become more disadvantageous without the users' knowledge.

In the EU, developers have to give users an opportunity to read and accept the EULA every time it is amended.[123] Although this takes away the developer's ability to secretly amend the EULA, and thus disadvantage the users of the MMOG, it ultimately makes no difference if the majority of users does not read or understands the terms of the (now amended) EULA in the first place.

Additionally, whether or not the user has read and understood the terms also makes no difference if there is no alternative – in terms of MMOG experience – available to them. If a

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[119] Barker, *supra* note 73, p. 4. Article reporting on the joke available online at: http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html (last visited october 6th 2014).

[120] http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html (last visited october 6th 2014).

[121] The other 12% were given a discount-voucher for taking their time and putting in the effort to read the EULA.

[122] See for example: *Second Life*'s ToS, available online at: http://www.lindenlab.com/tos. Section 11.4 reads: "Linden Lab reserves the right to modify this Agreement and any Additional Terms, at any time without prior notice ("Updated Terms")."

[123] Art. 10 (2) and (3) Dir. 2000/31/EC (Directive on electronic commerce). See also: art. 3(3) Dir. 93/13/EEC (Directive on unfair terms in consumer contracts), Section 1(l) of the Annex (see Appendix 1).

user has the choice to either accept terms they are unhappy with or forego the ability to enter the MMOG entirely, there is always the possibility that they will reluctantly accept the terms to be able to take part in the MMOG's unique experience. In this scenario a case could, again, be made for the user not expressing their real consent to be bound by the terms of the EULA.

Another disadvantage of the use of EULAs for the users is that they hold no rights in the virtual objects they acquire in the MMOG, including their avatar and virtual inventory.[124] Under the EULA, these objects still belong to the developer and anyone else attempting to sell them[125] would be subject to the punishing rules of the EULA.

Ackerman provides an example involving Microsoft Word to illustrate just how counterintuitive it is to extend the use of EULAs to not only apply to the underlying intellectual property, but also to the virtual objects inside virtual worlds. Microsoft Word's EULA prevents the selling or giving away for free of multiples of the software, but it does not prevent users from transferring the product of the program – the documents the user creates using the Microsoft Word program – to other people. Nobody would buy the software if this was the case.[126] However, this is exactly what happens in EULAs governing virtual worlds and yet users continue to buy copies of the software because it provides them with an experience they cannot have anywhere else. This creates a position of power for the developer that allows them to enforce such one-sided EULAs. The situation in which developers hide behind EULAs to ensure ownership over both the underlying virtual world code as well as all the objects inside of the world which that code created leads to a morally questionable situation.[127]

Why the lack of property rights for users is problematic becomes even more apparent in the case of theft of virtual objects the users acquired in the MMOG. The explosive expansion and rapid development of virtual markets led to an influx of theft of virtual objects. In South Korea, for example, the reported cases of theft increased from 675 in 2000 to 10,187 in 2003.[128] Most of these thefts, which victimize users, involve hacking. This is theft through gaining unauthorized access to another user's account with the intend to steal virtual objects.

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[124] Barring a rare exception here and there, like certain virtual objects in *Second Life.*
[125] Outside of the MMOG environment and/or in exchange for real world currency.
[126] Ackerman, *supra* note 19, p. 162.
[127] Barker, *supra* note 73, p. 4.
[128] W. Rumbles, 'Theft in the Digital: Can You Steal Virtual Property?', *Canterbury Law Review* 2011, vol. 17-2, p. 366.

An example of this would be the hacker that gains access to a user's account to strip it of all the equipment and virtual currency, subsequently selling the procured objects on the black market in exchange for real world currency.

Under American law, the EULA-approach does not (sufficiently) protect the victimized user. The user will be unable to succesfully bring a conversion case against the thief as this requires them to have a property interest in the stolen virtual objects.[129] As it is the developers who have the ownership rights in the stolen goods, and not the user, they are the ones with such an interest. Therefore, the developers are the only ones who can take action against the thief . However, the developers still retain control over the stolen goods. Despite being stolen and transferred, the objects still reside inside the virtual world of the MMOG.[130] Therefore there is very little incentive for the developers to pursue action against a thief in this scenario, even if the user reports their objects as being stolen.[131] While other countries – such as The Netherlands[132] and China[133] – have proven willing to take action against the thief in criminal court, these situations are scarce. Additionally, while willing to prosecute thieves for the theft of virtual objects, these countries do not (always) acknowledge users as the holders of property rights to their virtual objects. As such, users only have limited actions they, themselves, can take against a thief stealing their virtual objects.

If the user wants to take action against the developer, this too will be regulated by the EULA. Often in such a way that it will be too time-consuming and too costly for the user to pursue these options.[134] As a result they will be unable to protect themselves without

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[129] Nelson, *supra* note 21, p. 298. Nelson also refers to the case of *In Re PSI Industries, Inc.,* 306 B.R. 377 (Bankr. S.D. Florida 2003) in which a Florida court states that plaintiffs need to show that they have a right to the property that was stolen.

[130] *Id.*

[131] Users will sometimes have the option to report theft of virtual objects to the developers via customer support. However, barring a few exceptions, there is usually very little that is done with these claims. See also: 'The MMO Customer Service Problem', Editorial, available online at: http://wow.allakhazam.com/story.html?story=19316 (highlighting several issues and shortcomings regarding customer support provided by MMOG developers).

[132] See: HR 31 januari 2012, LJN BQ9251 (Runescape) and Rechtbank (District Court) Amsterdam 2 April 2009, LJN BH9789 and BH9791 (Habbo Hotel). After *Runescape* there have been no more relevant impactful Dutch cases dealing with the theft of virtual objects.

[133] See: Li Hongchen v. Beijing Arctic Ice Technology Development Co. (available online at: http://old.chinacourt.org/public/detail.php?id=143455 (Chinese)) and J. Fairfield, 'Virtual Property', *Boston University Law Review* 2005-85, p. 1085 (referring to a Chinese article available online at: http://www.chinanews.com.cn/news/2004/2004-10-13/26/493946. shtml).

[134] Second Life's EULA, for example, states that arbitration is how disputes are resolved. This arbitration has to take place in California and has the user bearing the total costs. See: http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_Arbitration_FAQ#Can_I_file_claims_in _a_court_outside_of_San_Francisco.2C_California.3F.

engaging in expensive legal battles.[135] It is here, however, that over the years progress has been made in terms of user protection. Several U.S. cases involving EULA terms have had the courts rule that terms that limit users in their legal remedies are unconscionable. For users in the EU, several Directives that aim to protect them as a consumer have been adopted. Most notably the Directive on Unfair Terms in Consumer Contracts which explicitly lists the type of term that limits the user in his legal actions as an example of an 'unfair contract term'.[136] The following sections will examine these developments more in-depth.

§2.3.2.1 Users in the United States

Courts in the U.S. have spoken out against several EULA terms that they consider to be unconscionable.[137][138] This, in theory, should serve to put users in a less disadvantageous position than they currently are. Sadly, due to cases often eventually settling out of court, there is very little in terms of jurisprudential precedents that users can bring up to support them in their battles.

Since the aforementioned case of *Hotmail Corp. V. Van$ Money Pie Inc., et al.*[139] there have been two milestone cases that provided the users with some means to fight back against unfair EULA terms. The first of which was the *ProCD, Inc. v. Zeidenberg* case, in which the United States Court of Appeals for the Seventh Circuit overturned a lower court's decision, ruling that "shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law or if they are unconscionable)."[140] Initially, courts were reluctant to apply this decision to terms imposed by EULAs. However, in the trademark case of *Bragg v. Linden Research, inc.* the United States District Court for the Eastern District of Pennsylvania did decide that there are exceptions to when EULA provisions can be enforced.[141]

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[135] Ackerman, *supra* note 19, p. 174-175.

[136] See: section 1(Q) of the Annex.

[137] See for example: Comb v. PayPal, Inc., 218 F.Supp.2d 1165 (N.D. Cal. 2002). In this case the court came to the conclusion that a EULA term, which required users to settle all conflicts with Paypal on an individual arbitration basis, was unconscionable due to the unproportionate financial strain bearing the costs of such a procedure would put on the user.

[138] See also: Gatton v. T-Mobile USA, Inc., 152 Cal.App.4th 571, 61 Cal.Rptr.3d 344, 346 (Cal.App. 2007). In this case the court also came to the conclusion that a mandatory arbitration clause denying class arbitration was unconscionable, as the contract which contained the clause was a contract of adhesion. In addition, because of the small amounts of damages involved with each seperate conflict the court considered the clause to be unconscionable as well, as it contributed to the party with the superior bargaining power – who drafted the EULA – trying to cheat their users out of pursuing action against them.

[139] Hotmail Corp. v. Van$ Money Pie Inc., et al., 47 U.S.P.Q.2d 1020, 1998 WL 388389 (N.D.Cal.1998).

[140] Samson, *supra* note 89, p. 2. See also: ProCD, Inc. v. ZEIDENBERG, 86 F.3d 1447 (7th. Cir. 1996).

[141] Cifrino, *supra* note 90, p.245.

In this case a user of *Second Life* named Marc Bragg managed to bid and win a parcel of virtual land for $300.00.[142] However, this bargain turned out too good to be true as Linden Lab, *Second Life's* developer, contacted Bragg stating he had exploited a "bug"[143] to be able to purchase the parcel.[144] Linden Lab confiscated the parcel in question and froze all of the other belongings – property and currency – that Bragg had collected in the virtual world. This was made possible because of a clause in the EULA that allowed Linden Lab to strip a user of their belongings if there was as little as "a suspicion of fraud" involved, without having to return any money to the user.[145] Bragg took to court and Linden Lab countered by stating that Bragg had allowed himself to be bound by the EULA, which also contained a clause stating that arbitration was to be the remedy in case of conflict. However, this arbitration had to take place in California and Bragg was to shoulder the costs of $10.000, which according to Bragg's court claim, was unconscionable and proof of Linden Lab's scheme to ensure users did not try to pursue reimbursement via legal proceedings.[146] The court ruled that Linden Lab's EULA was unconscionable, with regard to the arbitration clause, due to five elements being present.[147] First, there is the lack of mutuality that comes with the EULA being an adhesion contract. Secondly, forcing the user to shoulder the cost of arbitration is unreasonable.[148] Third, it was also unreasonable to have the EULA determine where the arbitration took place, excluding other options. Fourth, Linden Lab also tried to establish a superior legal posture in requiring a "gag order" to be attached to all legal proceedings, disallowing potential opponents the opportunity to find any type of precedent while Linden Lab collected data for themselves.[149] Fifth, and final, element was the fact that the court considered whether legitimate business realities justified the one-sidedness that was employed in the EULA's dispute resolution terms.[150] The court's opinion was that such

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[142] Users in Second Life can purchase virtual plots of land through auctions. They can pay with either real world currency or virtual currency and then become 'owner' of the parcel. See: https://secondlife.com/land/.
[143] A bug is a fault in the underlying code, corrupting the software. In this case such a bug allowed Bragg to bypass the minimum auction value that was coded for this piece of land, buying it for less than the minimum auction value.
[144] Ackerman, *supra* note 19, p. 171.
[145] Ackerman, *supra* note 19, p. 172.
[146] Ackerman, *supra* note 19, p. 171.
[147] Ackerman, *supra* note 19, p. 172.
[148] *Id.*
[149] *Id.*
[150] *Id.*

realities were notably absent.[151] It is therefore that the court decided that Linden Lab's EULA contained several clauses that were unconscionable.[152]

With the court in *Bragg* ruling that terms in EULAs can be unconscionable, it was a step forward in the way American courts try to reduce the gap in bargaining positions between users and developers. However, it has since become clear that this was merely a small step forward. What the court in *Bragg* did not examine, was Bragg's claim that the virtual objects he had obtained in *Second Life* were, in fact, his property.[153] The court only touched upon the topic of property rights when answering the main legal issue of the case: whether the arbitration clause in Linden Lab's EULA was unconscionable. In the later case of *Evans et al v. Linden Research, Inc. Et al.,* the question of ownership of the virtual objects in question was again left unanswered by the United States District Court in California, which opted to instead focus on other aspects of Linden Lab's EULA.[154] Harbinja argues that Linden Lab's decision to settle in the latter case might have been inspired by the fact that continuing the case could have damaged their position of power as a developer, as the court could have ruled that users are the owners of their acquired virtual objects.[155]

Therefore, despite having made some (minor) succesful claims in court, users are still very much at a disadvantage compared to developers. This will remain so for as long as EULAs continue to be the one-sided, sole instruments governing MMOGs, with courts displaying reluctance to rule on questions pertaining to the ownership of virtual objects.[156]

§2.3.2.2 Users in the EU
Under EU law, the users of MMOGs are notably better protected. First of all, the Directive on Electronic Commerce states that all EULA terms have to be available for users to read.[157] Any relevant EULA to which a new user agrees to be bound has to be available for them to read beforehand.

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[151] *Id.*
[152] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D.Penn. 2007).
[153] E. Harbinja, 'Virtual worlds players – consumers or citizens?', *Internet Policy Review*, 3(4) 2014, under 'Bragg v. Linden Research'. Available online at: http://policyreview.info/articles/analysis/virtual-worlds-players-consumers-or-citizens.
[154] Evans et al v. Linden Research, Inc. et al., No. C-11-01078 DMR (N.D. Cal. Nov. 20, 2012) and Evans et al v. Linden Research, Inc. et al., No. C-11-01078 DMR (N.D. Cal. Oct. 25, 2013).
[155] Harbinja, *supra* note 153, under 'Bragg v. Linden Research'.
[156] Users remain in a disadvantaged position because of this, as it prevents them from obtaining a property interest in the virtual objects. This, in turn, prevents them from establishing a conversion claim in case of theft. It also prohibits them from engaging in real money trading as the terms of the EULA prevent them from doing so and they do not possess a right to transfer (or alienate) that they can bring against these terms.
[157] Art. 10 (2) and (3) Dir. 2000/31/EC (Directive on electronic commerce).

While parties remain free to enter into contract with whomever they desire, which includes accepting one-sided standard contracts, there is a Directive that serves to protect consumers against the abuse of power by the seller – the developer in the case of MMOGs. It is in this Directive on Unfair Terms in Consumer Contracts that users can find an additional layer of protection.[158] The Directive repeats the notion of having all – or at minimum the important terms – of the contract drafted in 'plain and intelligible language'. If it is unclear what is meant by certain terms, art. 5 of the Directive states that these terms will be interpreted in a way that favors the user.

Furthermore, art. 3 of the Directive[159] states that:

"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

While non-exhaustive, the Annex included with the Directive[160] provides us with a list of terms that can be considered unfair.[161] Of these terms, several tend to appear in the EULAs.

Under this Directive, terms could be considered unfair – section 1(C) of the Annex – when users are, for the provision of services, which include having access to the MMOG, dependent on the will of the developer. Current terms that give developers the ability to unilaterally take away virtual objects from users, as well as the power to close entire accounts, could therefore be considered unfair.

Furthermore, terms that enable the developer to terminate the user's account without reasonable notice are unfair under section 1(G) of the Annex, unless there is a serious reason for the termination. What constitutes a serious reason should be evaluated objectively and not be left to the developer's discretion. EULAs generally allow developers to decide – at their own discretion – which accounts they close, often without giving notice to the user. [162] If

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[158] Dir. 93/13/EEC (Directive on unfair terms in consumer contracts).
[159] *Id.*
[160] See Appendix 1 for this Annex.
[161] Important to note here is that this list is non-exhaustive. Terms not listed can still potentially be considered unfair under the scope of this Directive if they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer (art. 3 of the Directive).
[162] See for example: http://community.eveonline.com/support/policies/eve-eula/ (Under Termination: Suspension of Account). "CCP may terminate the EULA, close all your Accounts, and cancel all rights granted to you under the EULA if... (iv) CCP becomes aware of game play, chat or player activity under your Account that is, in CCP's discretion, inappropriate, offensive, or in violation of the Rules of Conduct."

notice is given, it rarely clearly conveys to the user the exact reasoning for the termination of the account.

Developers are not allowed to enable themselves to alter the terms of the EULA unilaterally without valid reason. Under section 1(J) of the Annex, terms that enable this are considered to be unfair. The EULA of Electronic Arts comes to mind here, as it allows the developer to unilaterally change its terms without notifying the user.[163] Unless users periodically read through the entire EULA in search of changes, they are basically at the mercy of the developer. If the burden for notifying users of changes to the EULA rests upon the developers, and developers are not allowed to unilaterally change the EULA without valid reason, then the terms in Electronic Arts's EULA that state the users are responsible for checking the EULA for changes are unfair terms.

Additionally, users have to be given the option to become acquainted with the terms of the EULA before accepting them, if this is not the case the terms are unfair under section 1(I) of the Annex.[164] It is also because of this section in the Annex that those developers that amend their EULAs without notifying their users run the risk of these terms being invalidated as they constitute as unfair under art. 3 of the Directive.

Lastly, terms that exclude or hinder the user's right to take legal action or employ any other legal remedy are considered to be unfair as well. The terms in Linden Lab's EULA in the *Bragg* case offer a good example of terms that can be considered unfair under this section 1(Q) of the Annex. The terms of the EULA required Bragg to take his dispute to arbitration in California, shouldering all the costs himself. At the same time it restricted the evidence available to him, through the 'gag order', thus putting a major (financial) strain on him and any other users seeking to employ any legal remedy other than Californian arbitration. It is this exclusion of legal remedies as well as the enforcement of a single legal remedy – arbitration – that constitutes the unfairness of the term under art. 3 of the Directive.

Art. 9 of the Directive on Consumer Rights grants consumers the right to withdrawal within 14 days of the purchase.[165] However, users of MMOGs have been excluded from the right to withdrawal as laid down in art. 9 of the Directive from the moment they open the box

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[163] See: http://tos.ea.com/legalapp/WEBTERMS/US/en/PC/ ("EA may modify the Terms of Service at any time.").

[164] Section 1(I) of the Annex. This provision is similar to Art. 10 (2) and (3) Dir. 2000/31/EC (Directive on electronic commerce).

[165] Dir. 2011/83/EU (Directive on consumer rights).

or start the download.[166] Art. 16(i) of the Directive excludes the right of withdrawal in the case of sealed computer software which is unsealed after delivery. MMOGs that are solely available in a digital form, through downloading, are another exception due to the nature of these digital goods not lending themselves for a return.[167]

Furthermore, even if users had the right to withdraw, it is questionable how useful this would be to them as exercising this right would mean that they now find themselves without the software required to gain access to the MMOG. By extension this would also exclude them from partaking in the unique gaming experience of the MMOG, which was the initial – and most important – reason for purchasing the software.

Consumers have the option under EU law to have a national court examine any contract term that they consider to be unfair within the scope of art. 3 of the Directive.[168] Users of MMOGs therefore have the option to let EULA terms that they deem unfair be examined. If a court comes to the conclusion that the term is indeed unfair, a court order can be issued that invalidates the term. However, the court may not rewrite the unfair term.[169]According to art. 6(1) of the Directive on Unfair Terms in Consumer Contracts, as long as the rest of the contract can be upheld without the unfair term, the contract will continue to bind both parties.

Ultimately however, while EU law provides users with several additional safeguards, placing them in an arguably better position than the American users, the main goal of the Directives remains consumer protection. The distribution of property rights in virtual objects does not fall within the scope of the discussed EU law. These rights remain in the hands of the developers. The fact that users enter into contracts that grant them a license to the world – and the objects inside – of the MMOG does in itself not constitute unfairness. Therefore it is likely that, in a dispute centered around virtual objects, courts will continue to rule in favor of the developers.

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[166] Dir. 2011/83/EU (Directive on consumer rights).
[167] Once downloaded, the exception in art. 16(m) applies as the supplier has begun their performance (providing digital content to the customer in the form of enabling them to access the MMOG) as the user expressed prior consent to this performance by initiating the download.
[168] Case C-237/02 *Freiburger Kommunalbauten* EU:C:2004:209.
[169] Case C-618/10 *Banco Español de Crédito SA v Camino* EU:C:2012:349.

§2.5 Changing the EULA: popular suggestions

Legal scholars have suggested several changes to help solve the problems that EULAs currently present users with. This section will discuss these suggestions as well as evaluate how beneficial each change is if applied to the current EULA system.

§2.5.1 Rewriting the EULA in plain language

The first and perhaps simplest suggestion is to rewrite EULAs in a language that is easier to understand for users.[170] Instead of using difficult legal jargon, rewrite EULAs so that a layperson can understand the terms. This should help users gain a better understanding of their rights and obligations under the EULA. This also allows users to "evaluate and compare various EULAs offered by developers, and incorporate this information into their purchasing decision"[171], ensuring in a way that developers who do not offer EULAs in plain language might feel the economic consequences in the form of reduced sales, as users instead opt for MMOGs with EULAs that they are able to understand. The EU Directive on Unfair Terms in Consumer Contracts already incorporates this suggestion in art. 5 of the Directive, which states that all terms presented in writing have to be in plain, intelligible language.

There are two major flaws to this simple suggestion. It is, first of all, a suggestion that changes nothing about the fact that users do not read the EULAs to begin with. It makes very little difference to have them written in a way that the typical user can understand if said user is not making the effort to read through the terms in the first place.

Secondly, this approach only changes the type of language used in drafting the EULA. It does not affect the content at all. This means that the developers will still retain their position of significant power over the users, with the exception that users are now able to understand the poor position they are in. Even though it will be easier for users to compare EULAs and incorporate this into purchasing decisions[172], this does not mean that MMOGs are necessarily negatively affected by having a EULA that heavily favors the developer. As long as developers manage to create a relatively unique playing experience, they will continue to attract users. Regardless of what their EULA contains.[173]

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[170] Ackerman, *supra* note 19, p. 175.

[171] Kunze, *supra* note 114, p. 114.

[172] *Id.*

[173] A *World of Warcraft* user will less likely exchange this monster hunting, battle-oriented fantasy-world for *Hello Kitty Online*, a MMOG built around the *Hello Kitty* franchise and which target audience is primarily below the age of 12, because of certain EULA clauses not suppealing to them.

§2.5.2 Bilateral EULAs

The next suggestion is to not only write the EULA in a way that the users can understand the terms, but to also give them a voice in the drafting process. Instead of having the developers hold great power over the users through adhesion contracts, you will have bilateral contracts with developers and users negotiating with eachother on significantly more balanced terms.

Kunze argues that giving the users a say in the negotiating process can potentially ensure that their interests are being protected (better).[174] The developers will have the advantage that they can now avoid unconscionability cases like *Bragg*, because the disparity between parties will not be as great. The users actually having a say in the EULA will hopefully make them aware of what they are allowed to do and what rights they have in the MMOG.[175]

Incorporating the users in the negotiating process might also reduce the chilling effect that EULAs currently have on user behaviour. To illustrate this, Kunze brings up the example of *Second Life*'s Linden Dollar – the virtual currency used in *Second Life* that can be purchased with real world currency – and its virtual exchange market: the LindeX.[176] *Second Life*'s EULA contains a clause that allows Linden Lab, the developer, to eliminate this stock exchange at any time without being liable for any resulting loss.[177] The uncertainty that this creates for (potential) users can lead to them staying away from the LindeX – or even *Second Life* – completely, causing Linden Lab to miss out on potential paying users. Kunze argues that a more balanced approach, regarding the interests of both parties, which puts the risk of market fluctuations on the users but the responsibility for providing the actual market on the developer, would be more beneficial for both parties.[178]

This suggestion potentially helps bridge the gap between developers and users, if it was not for several flaws. For one, it will be significantly more costly for developers to create a EULA through cooporating with the users. Instead of drafting up a contract on their terms and then imposing those terms on the potential users, they now have to enter into negotiations with those same potential users. This will be a more time-consuming, more costly process. It

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[174] Kunze, *supra* note 114, p. 113.
[175] *Id.*
[176] *Id.*
[177] See: http://www.lindenlab.com/tos#tos2. Section 4.3 reads: "Linden Lab reserves the right to terminate Usage Subscriptions and/or Virtual Goods and Services for cause immediately at its sole discretion without advance notice or liability. In such event you will not be entitled to a pro-rata refund or credit."
[178] Kunze, *supra* note 114, p.114.

is very likely that these costs will negatively impact the retail prices of the MMOG software, making virtual worlds more expensive and less accessible for users. That is, if developers are interested in taking such a cost-intensive approach in the first place.

Another possible problem arises when trying to decide exactly how users are given input in the negotiating process. You cannot enter into negotiations with every single user – present and future – nor can you ensure that the interests of each type of user are being taken to heart and protected. Contracting with each user on an individual level is impossible to do, but having consumer associations negotiate on behalf of (groups of) users still remains a more time-consuming and costly process as well as not necessarily guaranteeing users a better position. If consumer associations negotiate on behalf of the users this bears the risk of excluding the interests of specific groups of users. For example, it is difficult to protect the interests of users who like their playing experience untainted by parties seeking to make a profit through playing the MMOG, while at the same time protecting the interests of users who like to play the market in search of fortune.

§2.5.3 Changing the way developers handle breach of EULA and disclaim liability

One of the biggest complaints from users is that the EULAs allow developers to take away users' virtual objects seemingly at will. Amending provisions in the EULAs that allow developers to freely take virtual objects from users should provide a new level of protection to the users.

A user-favorable approach would be to remove from EULAs the developer's ability to unilaterally remove virtual items or currency from users.[179] Instead, requiring developers to at the very least show good cause when removing items or even avatars from their MMOGs would provide protection for users. Needing a good reason to remove virtual objects would assure that developers do not abuse their ability without there being an actual reason to take virtual objects away.[180] It would also serve to ensure that developers only invoke EULA terms when doing so can actually be considered justified. One could argue that, under EU law, this is already covered by art. 3 of the Directive on Unfair Terms in Consumer Contracts.

Additionally, there is the fact that developers often disclaim any form of liability through EULAs. Kunze explains that it is understandable to not hold developers liable for unforeseeable – or unpreventable – events that might have an effect on their virtual worlds,

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[179] Ackerman, *supra* note 19, p. 175.
[180] Ackerman, *supra* note 19, p.175-176.

such as server crashes or DoS attacks.[181] However, when such events occur due to negligence or malfeasance of the developer, Kunze sees no reason as to why developers could avoid liability simply by disclaiming it in their EULAs.[182] While the Directive on Unfair Terms in Consumer Contracts only mentions that EULA terms dealing with liability are definitely unfair when they "exclude or limit liability in case of death or injury of the user due to an act or omission from the developer"[183], the general consensus appears to be that this could be extended. In a proposal for the Common European Sales Law (CESL), a so-called 'black-list', containing terms which are always unfair, was created by the European Commission.[184] Art. 84 of the proposal reads that terms that "exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence" should be considered unfair.[185]

§2.5.4 Virtual arbitration

A fourth suggestion is to change the way EULAs require disputes to be settled. It is common for EULAs to force users down the path of costly and ineffective traditional legal processes if they have a dispute with the developer.[186] Therefore, it would be an option to look into alternative dispute resolution services, like virtual arbitration, as a more effective way to solve these disputes. While the Directive on Unfair Terms in Consumer Contracts already offers users protection from this under EU law – through inclusion of terms that limit the user´s access to legal remedies in the list of terms that constitute as unfair – it is still interesting to take a look at virtual arbitration as an additional remedy because it has the potential to be a fast, cost-effective way for both parties – developers and users – to resolve their disputes. This suggestion differs from the arbitration clause implemented in Linden Lab's EULA – the *Bragg* case – in that it takes place through an online medium and is optional. This makes it more accessible for users while at the same time decreasing the cost of the procedure.[187] After all, the users already have access to an internet connection or they would not be able to play the MMOG in the first place.

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[181] A DoS attack generally consists of efforts to temporarily or indefinitely interrupt or suspend services of a host connected to the Internet. The goal of such an attack is to make the virtual world inaccessible to its users, creating a similar effect as a server crash.
[182] Kunze, *supra* note 114, p. 116.
[183] See: section 1(A) of the Annex.
[184] Available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF#page=68 (see art. 84).
[185] *Id.*
[186] Kunze, *supra* note 114, p. 114-115.
[187] S. Kumar, 'Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation', *The John Marshall Journal of Information Technology & Privacy* Law 2009, vol. 27-1 (Fall), p. 85.

Users who want to avoid taking to court would be able to access a forum designed for alternative dispute resolution and voice their concerns to a neutral and licensed moderator.[188] This neutral party then offers a quick, and hopefully effective, final solution to their dispute.[189] The user would burden the costs related to this service, but they would be significantly lower than those of non-digital arbitration. This would give users a tool to assist them, while the developers see costs transferred to the player and do not need to fear incremental arbitration costs.

The feedback obtained through virtual arbitration cases could be used to improve the way the MMOG is being governed. [190] According to Kunze, developers are currently missing out on valuable feedback and therefore effectively shooting themselves in the foot when they force users to engage in expensive legal battles, as this has a choking effect on users, leading to the developer overlooking complaints that could be used in a way that is beneficial for the MMOG in general.[191] Kunze also argues that virtual arbitration is more suited for resolving disputes based around MMOGs and their virtual worlds as it is much faster than traditional remedies.[192] Virtual worlds undergo changes rapidly and traditional remedies might not be able to keep up, whereas virtual arbitration has the swiftness and adaptive capability to do so.

However, virtual arbitration cases are most likely to center around disputes concerning ownership of, and property rights in, virtual objects. EULAs will continue to contain clauses that provide the developers with ownership rights in everything the user creates and obtains in the MMOG. This potentially decides any kind of dispute involving questions of ownership of virtual objects and their respective property rights in favor of the developers. [193]

§2.5.5 Allow real money trading in user-to-user transactions

The most far-reaching suggestion is to explicitly allow real money trading amongst users in the EULA. Embracing this practice has potential benefits for the developer as well as allowing users to sell their hard-earned virtual items for real world currency.

Amending the EULA to allow for these types of transactions allows developers to take a share of each sale users make within the realm of the MMOG, increasing their revenue

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[188] Ackerman, *supra* note 19, p. 176.
[189] Kumar, *supra* note 187, p. 85.
[190] *Id.*
[191] Kunze, *supra* note 114, p. 116.
[192] *Id.*
[193] Barring the rare exception here and there, like Linden Lab´s *Second Life,* which acknowledges the users' rights in user-designed content brought into the MMOG.

with every transaction. As a matter of fact, this is a system that has already been embraced to some extent by certain developers of unscripted MMOG-environments. Linden Lab explicitly allows the sale of user-designed products in *Second Life,* while at the same time using the EULA to protect their own intellectual property (e.g. source code, etc.).[194] *Second Life* is a clear example of how this approach can be lucrative for the developer. However, it is worth repeating here that these user-designed objects are only allowed to be sold inside of the virtual world environment. Virtual objects that are exclusively designed by Linden Lab are still excluded from user-to-user real money trading and Linden Lab's EULA forbids user-to-user trading involving real world currency that takes place outside of *Second Life*'s virtual environment.[195]

Allowing real money trading between users opens MMOGs up to the type of user that likes to 'play the market', seeking to make a profit out of speculating on the virtual item market. Users having the ability to cash in their hard work makes it attractive for this group to invest time and effort in a MMOG.[196] The developers on the other side still find their intellectual property rights protected by the EULA in addition to having this influx of users lead to higher revenue streams. Thus creating a potential mutually beneficial system for developers and users of virtual worlds.

§2.6 Conclusion

EULAs are a type of adhesion contract currently governing the relationship between users and developers of MMOGs. They heavily favor the developers, the drafting party, as it allows them to impose, within the boundaries of the law, their set of rights and obligations on the users.

To what extend users willingly agree to be bound by the terms in these EULAs is questionable, as the 'take it or leave it'-approach leaves them with no other choice if they want to access the MMOG. American courts have ruled certain EULA terms to be unconscionable. Under EU law, as a way to protect the user as a consumer, directives are in place that obligate the developers to provide the users with the ability to read the EULAs – in plain and understandable terms – before entering the MMOG, and every time the EULA is amended thereafter. Certain EULA terms can also be considered unfair under EULA law, presenting users with the option to get these terms invalidated.

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[194] See: http://www.lindenlab.com/tos#tos2.
[195] *Id.*
[196] Kunze, *supra* note 114, p. 117.

However, developers retain the property rights in the virtual objects inside of the MMOG in addition to the underlying intellectual property rights, punishing the users that try to sell their accrued virtual wealth for real world currency. The fact that developers license the use of the MMOG – and the virtual objects therein – to the users, is in itself not unconscionable or unfair. With American courts (so far) unwilling to answer questions regarding the ownership of virtual objects, and the focus of EU law being on consumer protection and not on the distribution of property rights or the protection of invested economic interests, users – being mere licensees – are in a very disadvantaged position when it comes to their accrued virtual objects. This is especially problematic when their virtual objects get stolen or when they want to sell them for real world currency.[197]

Several proposals to change EULAs have also been discussed. In conclusion, one could say that of these proposed changes there were two – virtual arbitration and allowing real money trading – that have the potential to indeed help balance the position of the users and developers. However, one can also make a case for using property rights as a balancing mechanism instead, which could lead to an even more desirable outcome. The next chapter will examine such an approach further.

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[197] Either because the original user wants to liquidate his assets before leaving the MMOG for good, or because the objects are more highly desired by other users. To the point where these users are willing to pay real world currency for them.

Chapter 3: Property Rights in Virtual Objects

§3.1 Introduction

This chapter will make a case for users of MMOGs as rightholders, holding property rights in the virtual objects they acquire, as it is the best way to protect their interests – their invested economic interests in the objects – and to provide them, as a weaker party, with protection in the case that (property) disputes arise with other users or with the developers. It will also explain that, when taking the right approach, this does not come at the cost of having to abandon the EULAs entirely. EULAs can still be used by developers to regulate other aspects of the MMOG, such as the underlying intellectual property rights or what happens in the case of termination of the MMOG. On the other hand, such an approach can even bring economic benefits to the developers.

Based on the characteristics shared between virtual objects and real world property, Fairfield[198] argues that virtual objects can indeed be considered objects of property and should be treated as such under law.[199] The third section will discuss examples of both American and European jurisprudence – the American *Kremen v. Cohen* case and the Dutch *Runescape* case – that showcase how both courts seemingly agree on a set of criteria that need to be met for virtual objects to qualify as objects of property. Once those criteria are met, neither court sees any reason to not provide virtual objects with the same status as real world property.

Legal commentators have come up with four theories to justify, from a normative perspective, why users of MMOGs should have property rights in their acquired virtual objects. The fourth section will examine these four theories and evaluate them. While property rights will not solve all the problems related to the EULAs[200], it will become clear that they can be very beneficial (to users) in terms of protection against theft as well as in an utilitarian sense.

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[198] Joshua Fairfield is an internationally recognized law and technology scholar, specializing in digital property, electronic contracts, and virtual communities. He is also an expert on virtual worlds and the protection of consumer interests in an age of mass-market consumer contracting (taken from: http://law2.wlu.edu/faculty/profiledetail.asp?id=242, last visited February 2015). His work is often referenced by other scholars discussing whether or not users of MMOGs have rights concerning virtual objects.
[199] While his article is specifically aimed at the American common law regime, of note here is that Fairfield makes no distinction between common law and civil law when he discusses the similar characteristics between virtual objects and physical real world property. It is only after he has discussed these similarities that he focuses on the common law property regime. See: Fairfield, *supra* note 133, p. 1053, 1063 et seq.
[200] It will not change much about the fact that users do not read the terms and EULAs will continue to be adhesion contracts that favor the developer.

The fifth section outlines from a legal perspective which rights users stand to gain from having property rights in their virtual objects. As these rights and the implications thereof are subject to change based on different legal regimes, this section will examine the impact on both the U.S. common law regime and the Continental European civil law regimes of France, The Netherlands, and Germany.[201]

The sixth section explains what type of approach needs to be taken with regard to distributing property rights in virtual objects, to ensure that this change away from EULAs governing property rights is beneficial to both users and the developers. The final section explains why users having property rights in their virtual objects is not something developers need to fear. On the contrary, this section will explain how the right approach can be beneficial to both parties.

§3.2 Classifying virtual objects as objects of property

Fairfield provides us with three characteristics of real world objects of property, which can help define whether virtual objects are to be considered objects of property rights.[202]

The first characteristic is that of rivalrousness, meaning that an object that is being used or consumed by one user cannot be used or consumed by other users. Most code is designed to be non-rivalrous, meaning that it can be enjoyed by several people at the same time without this conflicting with the enjoyment of others. It is this non-rivalrousness that enables a person to easily copy it.[203] However, not all code is designed to be non-rivalrous. An example of this would be email addresses. Once a specific address is given to a person, only that person can send and receive mail through this address; the address will be made unavailable for any subsequent person trying to claim it as their own.[204] It is in this category that we also find the virtual objects in MMOGs. Developers have designed their code in such a way that virtual objects can only be enjoyed by one person at a time. If one user is wielding a sword, other users will be unable to wield that sword, sell it, or perform other acts with it.

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[201] Because there is currently no harmonized EU-wide property rights regime, the focus will be on the French, Dutch, and German regimes as these are the countries with the most MMOG-related activity in the EU. See: http://www.gamasutra.com/view/news/115803/Study_60_Percent_Of_Western_World_Plays_Games.php (a chart showing the percentage of the population participating in MMOGs to be over 10% of the total population in each of these countries).

[202] Fairfield, *supra* note 133, p. 1053.

[203] An example of this would be a digital song. If one copies a digital song from a friend, then both can listen to the song at the same time without preventing the other from doing so. Both parties will, after sharing, be able to access the song simultaneously without needing permission.

[204] Fairfield, *supra* note 133, p. 1053.

This also includes the inability to make copies. Taking these factors into consideration, virtual objects can be considered rivalrous, a characteristic they share with real world objects of property.

The second characteristic is persistence. The object has to exist at all times regardless of whether the user is interacting with it. For this to apply to virtual objects they need to exist while the user is offline as well as when they are online. In MMOGs this is the case for objects in the user's inventory or their equipment. These will remain stored on the server the MMOG runs on when the user is logged off and will still be there when the users logs in.[205]

The third characteristic is that of interconnectivity. Objects in the real world affect their surroundings, including people who are not the owner of the object, by the laws of physics.[206] Even if one does not own an object in the real world, one still has the possibility to interact with it; to experience it. According to Fairfield, interconnectivity also leads to the creation of value.[207] It is through interacting and experiencing objects not currently owned that a demand for them is created. As others experience objects they do not own, these objects may become desirable, and thus marketable, to them.[208] To meet this characteristic in virtual worlds, users that do not have a virtual object in their possession should still be able to interact with it. While one user might have an item in their possession, other users can experience it as it will still show up on their computer screens.[209] They can see other users utilizing their swords to cleave through monsters, they can walk around in houses designed by other users, and so on. Thus, as other users can experience – and sometimes interact with – virtual objects despite these objects being in the possession of other users, the characteristic of interconnectivity is present. In addition, this interconnectivity also creates value in the virtual worlds. As users see others wield a rare sword – with special abilities or effects – they might come to desire obtaining such a sword of their own, breeding demand which contributes to the rapid expansion of the economies of virtual worlds.

One can argue that, based on the similar characteristics between virtual objects and real world objects of property, virtual objects in a user's possession could be considered objects of property as well. They are rivalrous in that only one person can use them at any given time, persistent in that they exist without the user being there, and interconnective in

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[205] Fairfield, *supra* note 133, p. 1054.

[206] P. Yu, *Intellectual Property and Information Wealth: Copyright and related rights,* Westport: Greenwood Publishing 2007, p. 398.

[207] Fairfield, *supra* note 133, p. 1054-1055.

[208] *Id.*

[209] A. Lakhani, *Commercial Transactions in the Virtual World: Issues and Opportunities*, Kowloon: City University of Hong Kong Press 2014, p. 133.

that they still allow other users to experience them even when they are not the ones to possess the objects.

However, courts – and legislators – have long been reluctant to accept virtual objects as objects of property. It were the landmark cases of *Kremen v. Cohen VP BVI LLC* – where the American court opened the door for the classification of virtual objects as objects of property – as well as the Dutch HR *Runescape* case that can be seen as a change in direction.[210]

§3.3 *Kremen v. Cohen* and *Runescape*

§3.3.1 Kremen v. Cohen
The case of *Kremen v. Cohen VP BVI LLC* is arguably the first time an American court demonstrated willingness to acknowledge virtual objects as objects of property, as the United States Court of Appeals for the Ninth Circuit ruled that it is possible to have virtual objects – the object in question was a domain name – that should be given the qualification of 'object of property' and have them be subject to the law of conversion.[211]

The court provided three criteria to determine whether a virtual object deserves the status of property and determined that, if these criteria are met, property rights in virtual objects should be granted. These criteria come in the form of the following three-part test:

"First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the owner must have established a legitimate claim to exclusivity."[212]

These three characteristics can easily be applied to virtual objects. You can precisely define them, as the coding required to create a virtual object is unique to that object and to that object only.[213] Users who are in the possession of virtual objects can exclude other users from possessing or controlling the object. A user also has a claim to exclusivity as they are the only one capable of possessing or controlling the object without first needing to be granted permission, which can be considered their reward for investing time and effort into

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[210] Available online at: http://caselaw.findlaw.com/us-9th-circuit/1483800.html and http://www.rechtspraak.nl/organisatie/hoge-raad/nieuws/pages/afhandigmakenvanvirtueelamuletenmaskeruitspelrunescapeisdiefstal.aspx, respectively.
[211] Ackerman, *supra* note 19, p. 148.
[212] Kremen v. Cohen VP BVI LLC, 337 f.3d 1024, 1026 (9th Circ. 2003), available online at: http://caselaw.findlaw.com/us-9th-circuit/1483800.html (See under 'Conversion').
[213] Ackerman, *supra* note 19, p. 149.

obtaining the object. Therefore, virtual objects pass the three-part test and can be considered objects of property.

§3.3.2 Runescape

In the Dutch HR *Runescape* case, two teenagers used force to threaten another teenager into transferring a precious amulet and mask in the MMOG *Runescape*[214] from the victim's account to their account. The question the Dutch Supreme Court faced in its decision was whether or not it is possible to steal something that only exists in virtual form, as well as the implied question of whether or not it is possible to own something that only exists in virtual form.

The court ruled that, because the amulet and mask held significant value to the parties involved in the taking, it is also possible to take this value away from the victim.[215] In addition, the victim's exclusive ability to decide what to do with the objects was infringed on by the suspects when they exerted violence to force the victim to transfer the items.[216] They infringed on his claim to exclusivity. The fact that the objects were virtual was irrelevant, as earlier jurisprudence existed in which the Supreme Court had stated that non-physical objects can be considered goods as long as they represent real value and when one person gains control over the object, another person loses theirs (exclusivity).[217] Given that both these criteria were present, the court saw no reason to differentiate between virtual objects and physical objects when it comes to theft of property.[218]

What we see here is a similar test as applied in *Kremen v. Cohen VP BVI LLC*, with the exception of the legitimate claim argument. The virtual objects can be clearly defined as an amulet and mask. The victim having the objects in his possession made it so that others could not possess them, so it is possible to exclusively control or possess them. Additionally, while not a necessary criterion, there even is an exclusive claim to the virtual objects that the victim obtained when he acquired them through playing the MMOG *Runescape*.

Note here, however, that this was a case of criminal law. Art. 310 Sr (Dutch Criminal Code) works with a broad definition of what can be the subject of theft, namely "any good". When compared to the definition in art. 3:2 BW (Dutch Civil Code) – "Goods are materials

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[214] See: http://www.runescape.com/
[215] HR 31 januari 2012, LJN BQ9251 (Runescape).
[216] *Id.*
[217] HR 23 mei 1921, NJ 1921, 564 (Electriciteitsarrest).
[218] HR 31 januari 2012, LJN BQ9251 (under 7.III).

that can be subject to human control"[219] – it becomes clear that objects that meet the criteria of art. 310 Sr do not necessarily also meet the criteria of art. 3:2 BW. While scholars have come up with various explanations as to why virtual objects should fall within the scope of this art. 3:2 BW (Dutch Civil Code), for now this debate is of an academic nature only.[220] At the very least, however, the Dutch Supreme Court recognizes that property rights can exist in virtual objects in a criminal law context.[221]

Nonetheless, based on the outcome of the three-part test outlined by the American court, as well as the similar test applied by the Dutch court, one can come to the conclusion that courts, at the very least, see no reason – in today's society – to differentiate between virtual objects and physical real world objects when it comes to acknowledging property status.[222]

The next step is now to examine what justification there is for having users as the property rightholders in their virtual objects. In the following section four normative theories for justification will be discussed, two of which make a solid argument for property rights in virtual objects for users.

§3.4 Theories justifying users as property rightholders in virtual objects

There are four theories provided by (legal) commentators to justify users of MMOGs holding the property rights in the virtual objects they acquire. These theories are: the Lockean Labor theory, the Personhood theory, the theory of Theft Protection and Deterrence, and the Utilitarian theory. The following sections will explain all four theories as well as discuss whether or not they provide a suitable justification for distributing property rights to users.

§3.4.1 Lockean Labor Theory

The first theory is Locke's theory of labor, a relatively old theory, which presents an argument for granting users property rights that is outdated and too simplistic. This theory

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[219] H. Picot & A. Duisberg, *Recht der Computer- un Videospiele, The Law of Video and Computer Games*, Berlin: Erich Schmidt Verlag 2013, p. 410-411.
[220] *Id.* Explaining that art. 310 Sr (Dutch Criminal Code) uses a wider definition of 'property', which made it easier for virtual objects to fall under the scope of this definition.
[221] J. Chao, 'Recognizing Virtual Property Rights, It's About Time', *Student Scholarship* 2010-paper 45, p. 10. Available online at:
http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1044&context=student_scholarship.
[222] According to van Engelen, the ECJ in UsedSoft v. Oracle also acknowledged that property rights can exist in intangible objects. See: D. van Engelen, ´UsedSoft v. Oracle: the ECJ quietly reveals a new European property right in "bits & bytes"', European Property Law Journal 2012, vol. 1-2, p. 327.

awards property rights to the first person who, through labor, takes resources out of nature and uses them to create new property. [223] In the words of Locke:

"Whatsoever man removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[224]

According to this theory, users should have rights in the virtual property that they create because this property is created through their labor.[225] The users of MMOGs spend time and effort acquiring virtual objects. They labor to obtain the objects they deem desirable. Through interacting with the environment they take resources out of it, which they subsequently turn into other objects through their labor.

An example often used to illustrate this is that of a user trying to create a sword. The nature of the virtual world provides him with nodes of ore to mine and trees to chop down for wood. He will then visit any of the major hubs, find a forge and forge a sword out of the materials he procured from the virtual environment. Based on this theory it is only fair that he should be rewarded for his efforts and the labor he invested in creating that sword.[226]

When applying the Lockean Labor theory, it would only be fair that the user who mixes his or her labor also gains the property rights in the new virtual object(s). Property rights can act as a suitable reward for labor invested under this theory as it would provide the user with protection against developers or other users stealing items created or obtained through personal labor.

One thing to keep in mind when applying this theory to virtual property is that it originated in a time where society was not yet at a point where MMOGs – or the internet – even existed. It is therefore that this theory can be considered somewhat outdated.
There are also several other issues regarding the use of this theory to justify property rights in virtual objects for users.

First of all, the labor theory does not provide a solution for when one user sells his property to another user. Based on the theory, the first person would retain the property rights

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[223] K. Widerquist, 'Lockean Theories of Property: Justifications for Unilateral Appropriation', *Public Reason* 2010, vol. 2-1, p. 6.
[224] Nelson, *supra* note 21, p.290.
[225] *Id.*
[226] *Id.*

as it was his labor that created the property. The Lockean Labor theory does not justify a later acquisition of property rights with regard to an object that is not directly removed from nature.[227]

What also is problematic under this theory is the fact that it is the developers who created the MMOGs and the possibility to create virtual objects. It is through the labor of the developers that these items come into existence, so under this theory they would be the ones who are rewarded with property rights for the labor they invested into creating the MMOGs. The users are merely given permission to enjoy these worlds and the items inside of it.[228]

Cifrino provides an analogy using the game of Monopoly to illustrate how counter-intuitive it is to grant users property rights under this theory, as it is the labor of the developer that created the virtual objects in the first place.[229] If a person owns a game of Monopoly and, during a game, another person manages to obtain a street or piece of property on the board this does not mean that this person is entitled to keep the property card after the game is over.[230] They are merely being allowed to enjoy it until the game is over. Translated to virtual worlds this means that users are merely enjoying – with permission – the fruits of the labor the developers have invested into creating this world and the objects found therein.[231] Similar to the Monopoly-player who builds houses or hotels on the property he acquires during the game, when users of MMOGs use the resources of the virtual world to craft items they are using resources that have been plucked from the state of nature by others – the developers – before them.[232]

A final argument against the use of this theory is that courts have been rejecting it as a base for property acquisition.[233] The American courts in both *Pierson*[234] and *Feist*[235] rejected the idea of labor alone being the sole reason to bestow property rights. Work and effort are considered admirable by both courts, but not sufficient enough to be the sole justification for

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[227] Nelson, *supra* note 21, p. 291.
[228] *Id.*
[229] Cifrino, *supra* note 90, p. 252-253.
[230] Cifrino, *supra* note 90, p. 253.
[231] *Id.*
[232] Nelson, *supra* note 21, p. 291.
[233] Nelson, *supra* note 21, p. 292-293.
[234] Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).
[235] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).

gaining property rights.[236] Instead, both courts required that at the very least one other step is taken before property is gained, ruling against the application of the Lockean Labor theory.[237]

All things considered, the Lockean Labor theory is not a well-suited theory to justify an approach that grants property rights to users with.

§3.4.2 Personhood Theory

The second theory is the Personhood theory, created by Radin. A theory that provides a more solid basis for justification than Locke's but ultimately also falls short.

The Personhood theory considers property to be an extension of one's personality.[238] Through spending a lot of time with certain property, people grow sentimentally attached to it. It then becomes an integral part of their lives as well as a defining part of who they are as a person. Good real world examples of this are wedding rings. These meaningful possessions have a lot of sentimental value attached to them, to the point where they stop being merely an object but also become part of one's sense of identity.[239]

It is this type of property that Radin calls 'personal' property. This is property that has become very important to a person. To that individual it holds a value many times greater than its monetary value.[240] It is in this attachment that Radin sees justification for granting property rights. The greater the personal attachment is to an object, the greater the rights that should be granted to its owner should be.[241]

Radin describes what is known as 'fungible' property to be the opposite of 'personal' property.[242] This is property which can easily be replaced without affecting the individual.[243] An example of this would be money. Specific bills do not hold more value to individuals than other bills. This makes them easily replaceable. Property rights should not be granted for these types of property.

The idea of using property to add to one's sense of identity does not differentiate whether this property is virtual or not. The avatars that users create in MMOGs often over time develop beyond the point of merely being pixels. Through playing the MMOG, users will feel increasingly more connected with their avatars. Virtual avatars become as much a

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[236] Nelson, *supra* note 21, p.292.
[237] *Id*. In *Pierson* it was the mortal wounding of the fox, not merely giving it chase. In *Feist* it was an original expression of facts, which granted a property interest.
[238] Chao, *supra* note 221, p. 23.
[239] *Id.*
[240] Cifrino, *supra* note 90, p. 248.
[241] Cifrino, *supra* note 90, p. 249.
[242] Cifrino, *supra* note 90, p. 248.
[243] *Id.*

part of the user's identity as a real world wedding ring would. Even in early virtual worlds this was already the case. Castranova's research shows that 20% of the users involved in his research considered the virtual world to be their permanent place of residence.[244] Over time this has evolved to the point where countries, like South Korea, have passed legislation to restrict the amount of time youthful players are allowed to spend in MMOGs out of fear of addiction.[245]

It is clear that users can grow attached to virtual property as well as sculpt their identity with this property. Under Radin's Personhood theory this is a strong justification for allowing them the property rights to the property that they sculp their identity around or through which they express their individuality.[246] However, similar to the Lockean Labor theory, Radin's theory suffers from several flaws.

Under the Personhood theory, property that can be considered 'personal' property should be made inalienable from the market. This is based on the premise that, if a virtual object is really invaluable to a user, they cannot put a price on it.[247] What this means is that users can never sell this type of property. This becomes problematic when users try to sell 'personal' property like avatars. 'Personal' property should have the user so personally invested in it that it has become part of their identity, making it market inalienable. The main reason users want property rights is to be able to sell their virtual property, including avatars. This theory would either prevent them from doing so or would fall apart completely as a theory for justification. After all, we would need to start treating avatars as 'fungible' property so that they can be sold. This conflicts with the initial justification for property rights based on the fact that users so closely identify with their avatars that they can be considered 'personal' property.

The theory can also only be applied to limited types of virtual property. Avatars can be considered 'personal' property and thus rights can be given to their respective users. The same cannot be said for a piece of virtually mined ore or virtually chopped wood.[248] Applying personhood theory would require extensive research to determine which virtual goods would

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[244] Castranova, *supra* note 4, p. 22. "Perhaps the most striking finding is that a significant fraction, 20 percent, view themselves as people who 'live in' Norrath."

[245] A. Ashby, 'Korea Bans Overnight Play for Teens in Top Freemium MMOs', *Virtual World News 2010*, available online at: http://www.engagedigital.com/blog/2010/04/13/korea-bans-overnight-play-for-teens-in-top-freemium-mmos-2/.

[246] Chao, *supra* note 221, p. 24.

[247] Cifrino, *supra* note 90, p. 249.

[248] Similar in a way to real world currency, these crude goods are interchangeable in MMOGs. Users do not feel emotionally attached to a specific piece of Silver Ore or Pine Wood.

be protected through 'personal' property-status and which goods are treated as 'fungible'. Even then there is the problem of differing opinions. What to some users qualifies as 'personal' property, might be 'fungible' property to others.

§3.4.3 Theory of Theft Protection and Deterrence

The third theory is the theory of theft protection and deterrence. To protect the property of users of MMOGs against theft as well as to deter thievery in virtual worlds, Ledgerwood proposes to bestow users with property rights in their virtual property.[249] He argues that "a court's recognition of property rights makes users better off by increasing enforcement rights in virtual property."[250] This theory is in line with the view of both the American court and the Dutch court in that it acknowledges virtual objects as being objects of property that need to be protected.

The theory is, when applied to virtual environments like MMOGs, a relatively recent theory. It gained popularity around 2005 when a trademark case featuring two Chinese men, one of which was a user in the game *Legend of Mir*, took place.[251] The user had managed to obtain a very rare sword through investing time and effort into the MMOG. He lent the sword to his friend, who proceeded to sell the sword – without permission – for a significant sum of real world currency instead of returning it.[252] The victim took the case to the police, who said they were unable to take action because a virtual sword could not be considered property under the Chinese legal definition.[253] In frustration and anger, the victimized user stabbed his former friend to death and was subsequently sentenced to prison himself.[254]

It is common in the real world to have regulation in place which has as a purpose to deter thieves and to protect the innocent from falling victim to theft, so why not in virtual worlds as well? Virtual worlds currently suffer from a significant lack of interest from real world law enforcement. Often refusing to investigate the theft of virtual items because of reasons that can all be traced back to the fact that virtual or 'imaginable' – as Ledgerwood phrases it – objects hold no value nor have an immediate or recognizable negative effect on the community as a whole.[255] This can lead to the severely undesirable outcome where the

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[249] G. Ledgerwood, 'Virtually Liable', *Washington & Lee School of Law* 2009, vol. 66-2, p. 845.
[250] *Id.*
[251] See: http://news.bbc.co.uk/2/hi/technology/4397159.stm (summary of the case in english).
[252] Ackerman, *supra* note 19, p. 138.
[253] See: http://news.bbc.co.uk/2/hi/technology/4397159.stm.
[254] See: http://news.bbc.co.uk/2/hi/technology/4072704.stm.
[255] Nelson, *supra* note 21, p. 293.

victimized users will take matters into their own hands. This theory argues, that by granting property rights to users, situations like in the *Legend of Mir* case can be prevented.

Users having property rights in their virtual objects will make law enforcement and courts take virtual thefts more serious. In turn this will enable users to take more effective action against those who try to illegally access their accounts, as well as those who try to steal from them via (other) means that are not integral mechanics of the MMOG. Potential thieves are also more likely to be deterred from committing thefts out of an increased fear of being prosecuted. It will also significantly lower the chances of victims taking matters into their own hands as they now have other remedies available to them that do not involve potential severe negative consequences for the victimized user who goes too far in pursuit of justice.

South Korea acknowledges that virtual property can be subject to theft and has instituted a special police unit that researches cases of theft that take place in MMOGs.[256] This has led to the police more actively pursuing cases of virtual theft, as well as courts being less reluctant to pass a verdict on culprits guilty of theft of virtual objects.[257]

In the Netherlands, the Supreme Court ruled that virtual objects can be considered 'goods', in a criminal law sense of the word, in the aforementioned HR *Runescape* case.[258] Based on this qualification, the court concluded that virtual objects can also be subject to theft.[259] Therefore it is possible to steal them and any theft should be punished, including theft of virtual objects.[260]

This theory seems to already be a commonly accepted justification for users being property rightholders in virtual objects. The final theory to be discussed will provide an additional justification from a more economic perspective.

§3.4.4 Utilitarian Theory

The fourth and final theory is based on the economic principle of utilitarianism. This theory, created by Bentham, is based on the economic principle of efficiency. It dictates that resources are to be moved into the hands of the user who values these resources the highest.[261] The idea behind this is that the person who values a resource the most is also the

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[256] Fairfield, *supra* note 133, p. 1088.
[257] Yu, *supra* note 206 , p. 409.
[258] HR 31 januari 2012, LJN BQ9251. See *supra* §4.3.2 for the criteria the court used to determine this.
[259]*Id.*
[260]*Id.*
[261] Nelson, *supra* note 21, p. 294.

person who can use it most efficient and productive.[262] This will eventually lead to a society where the greatest good for the greatest number of people is created, because all resources are used most efficient and productive.[263]

The starting point of this theory is an efficient market. If a market is most efficient a resource will encounter no resistance in making its way to the person valuing it the most because there are no (notable) transaction costs. This will in turn lead to greater productivity, which leads to an increase in overall value, subsequently leading to a welfare increase for everyone.[264]

To use the example of the sword: the user who created the sword and wants to dispose of it should be able to sell it to users who value it more highly, through the auction house or via a website. Having this happen across the entire virtual world of the MMOG – in great quantities – will cause the overall welfare to increase.

Applying the theory to the world of MMOGs means that property rights for users are considered a necessity to ensure the greatest virtual welfare. These rights would help ensure that virtual property is always in the possession of the user who values it the most. If a user is looking for a specific virtual object, he will be less likely to pay a premium – or anything at all – if he does not have a certain amount of protection. Without property rights, users who value the object more highly will be reluctant to pay money for it as they will not become the owner of the object. As a result, the overall welfare is lower due to lack of protection. This will in turn negatively affect the overall utility of the MMOG community as virtual objects will not be in the possession of those who value them the highest, leading to less efficient use of these objects.

Property rights also allow users to 'cash out' of an MMOG, selling their avatar and their virtual possessions, without having to fear reprimands from the developers. From an utilitarian point of view this makes sense, as the user who wants to sell their avatar and objects obviously considers his current MMOG-experience to be less satisfying than that offered by alternative MMOGs. If the user is able to cash out, then they are free to move on to these alternative MMOGs, thus increasing their welfare.

The benefits in terms of welfare in this scenario are not solely limited to the user who moves from one MMOG to another. Unsatisfied users can provide developers with additional costs as their behaviour might discourage other users from playing the MMOG or result in a

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[262] *Id.*
[263] Chao, *supra* note 221, p. 15.
[264] Nelson, *supra* note 21, p. 294.

lot of complaints at the developers' address. If these unsatisfied users can cash out, the benefits for the developers and other users will be in exchanging unsatisfied users for new ones – who bought the previous user's account and are arguably more positive towards the MMOG – as well as in a better overall playing experience due to the previous users no longer causing disturbance. Hence, from a utilitarian point of view, the level of protection that comes with property rights in virtual property for users is beneficial to the overall utility (and welfare) of the community.

Another advantage that this theory brings forwards is that it gives more certainty.[265] Both users and outside investors would be more incentivized to invest in a MMOG when they are certain of the legal status and value of the virtual property they invest in.[266] A great example of how more certainty leads to more overall utility and welfare of the community is the increase in the trade of virtual objects in South Korea after the founding of the MMOG-police force. With users now feeling more protected in their endeavours in the trading of virtual objects, the volume of trades conducted increased significantly in a short timespan.[267] Having property rights in virtual objects would provide users with more additional layers of certainty, with the potential to see an even bigger increase in the amount of trades being conducted.

Auction sites such as eBay are currently making a significant effort to disallow the trade of virtual objects for real money on their sites as they fear legal action will be taken against them by the developer.[268] However, moving the property rights in these virtual objects to the users would take away this chilling effect. This potentially opens up the door for these auction sites to become vibrant and accessible virtual markets where virtual objects can easily find their way into the hands of those users who value them the highest.[269]

Building on the notion of how greater efficiency leads to greater welfare, an increase in investments in the MMOG would also benefit the developers. This can in turn potentially create a beneficial snowball-effect where the MMOG can be continuously improved using these investments, creating an ever greater amount of welfare for all parties involved. While a similar incentive could – arguably – be provided through amending the EULAs to allow for sales outside of the MMOG environment, unless they are amended to state that the property rights in virtual objects are explicitly transferred from the developers to the users upon

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[265] Fairfield, *supra* note 133, p. 1065-1067.
[266] *Id.*
[267] Yu, *supra* note 206, p. 409.
[268] Kunze, *supra* note 114, p. 117.
[269] *Id.*

acquiring the object in the MMOG, this will remain less incentivizing. The chilling effect will still be there as the developers continue to be the rightholders, causing a level of uncertainty for the users as there is always the possibility that the developers will disallow these types of trades again in the future. Something which has happened in the past.[270]

From a utilitarian point of view it would therefore make sense to extend property rights to the users of MMOGs, because this increases the overall utility and welfare for the community.[271] The next question is what level of protection the application of property rights to virtual objects would yield users.

§3.5 Rights covered by virtual property protection

The previous section outlined normative theories that argue for the users of MMOGs as the holders of property rights in their virtual objects. But which rights do users stand to gain from this? Property rights and their implications are not the same across all legal regimes. Therefore, before examining potential approaches to distributing property rights, it is important to examine exactly which rights such an approach would provide users with. Because of the different natures of common and civil law regimes, this section will discuss both situations separately. It will first discuss the situation under the American common law regime. Because EU law has not (yet) harmonized property rights, this chapter will focus on individual countries – France, The Netherlands, Germany – instead.

§3.5.1 American common law: chattel and the fragmentation of ownership

Under American law, there are two different types of property: real property and personal property (or: chattel).[272] Based on Fairfield's characteristics as well as the test from *Kremen v. Cohen VP BVI LLC*, it can be argued that virtual objects fall into the latter category. The characteristics of chattel are met as virtual objects can be possessed, can be used, can be enjoyed, can be transferred, and – as Fairfield explained – can be rivalrous.[273] Therefore, it would seem logical to have virtual objects qualify as chattel or to at least grant

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[270] An example of a MMOG where this occurred is Blizzard Entertainment's *Diablo III*. When this MMOG was launched it had an auction house, operated by the developer, where users could buy and sell virtual items in exchange for real world currency. This was initially one of the greatest aspects of the MMOG when it came to drawing in users. However, several months after the launch of *Diablo III*, this auction house was taken offline, as the developer claimed that they did not want people to have access to the virtual items they desire without actually playing the game trying to obtain them, upsetting a large part of their userbase. See: http://uk.ign.com/articles/2013/09/17/diablo-iii-auction-house-shutting-down-next-year.

[271] Chao, *supra* note 221, p. 15.

[272] Real property is property that is immovable: land and anything attached to it. Personal property is everything that is subject to ownership and can, contrary to real property, be moved.

[273] Lakhani, *supra* note 209, p. 132-133. This section also briefly mentions "persistence and interconnectivity" as required characteristics that are present.

them the same protection. There are several property rights with regard to chattel that users stand to gain when given property rights in their virtual objects. The most important ones being: the right to possess and own, the right to use, the right to transfer without limitation, the right to exclude, and the right to security in case of involuntary transfer and expropriation.[274]

First of all, users would gain the right to possess and own all virtual objects, that have been made available by the underlying code, that they can acquire. There is a large variety in the ways that users are able to acquire items or virtual currency inside of the MMOG. Examples of this include: through the completion of quests that have rewards that are pre-scripted by the developers, through trade with other users, or by crafting the item themselves. They would now have the right to possess and own all of these objects.

Giving users the right to use the virtual objects they acquire allows them to make use of the objects in any way they deem suitable, as long as it is possible within the virtual world of the MMOG. An example of this would be equipping a sword and using it to defeat monsters, but a user can also decide to instead display the same sword as an ornamental object on the wall of his virtual house. There is no rule that dictates how users should use the objects. This is left entirely up to the users and will remain one of the major appeals of MMOGs.

The most important right this would give users is the right to transfer. Transferring an object using virtual currency within the realm of the MMOG is already allowed by the developer in the EULA, but this right would give users the ability to go beyond this. Additionally, they can now freely operate on real money trading markets, selling their accrued virtual items for real world currency. This should, in part, satisfy the users' increasing need for more protection of their economic interests as it would disallow the developer the ability to close down the accounts of users engaging in real money trading.[275]

The aforementioned rights can be exercised freely by users because they will also possess the right to exclude other users from acquiring, using, or disposing of their property.[276] This right is to some extent already embedded in MMOGs through the underlying code. To begin with, users secure their account with personal account names and

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[274] *Id.* In addition to these rights, users also have the rights to: "manage how and by whome the property will be used, to income and profits generated by the property, to capital, to no durational limit to interest in property, and to any residuary interest emerging from the property".

[275] With the exception of accounts engaging in illegal black market activities such as scams. See: http://mmos.com/editorials/mmorpg-scams (list of common scams using items in MMOGs).

[276] Nelson, *supra* note 21, p. 295.

log-in passwords. Inside of the MMOG the user has to give other users the permission to interact with their property. Without this permission, other users cannot interact with the items. This right will also give them the proper means to take action against thieves, as they will now be able to demonstrate having a property interest in the objects.

An important characteristic of the American regime with regard to property rights is found in the so-called 'fragmentation of ownership'. It acknowledges full ownership, but it also recognizes that there can be more than one party with property claims in an object at the same time.[277] This concept of a collection of rights is often called the 'bundle of sticks', also by American courts[278], with each stick in the bundle symbolizing a different aspect of the property rights that together constitute full ownership. For users this means that, for example, they can have the rights to possess and use an object within the MMOG, while another user has the right to transfer this object if an opportunity arises.[279] Users can also opt to give their objects to other users for safekeeping without explicitly transferring ownership, the so-called 'bailment'.[280] This can be of importance when a user does not possess enough inventory space after an adventure to store all the acquired loot, but does not want to leave any valuable objects behind. In this scenario, the first user retains the property rights, as bailor, whereas the second user, the bailee, has a personal right to possess the object for a limited amount of time, based on an agreement between both users.[281]

Consequently, these rights do not conflict with the rights that the developers have in the underlying code and in the virtual world of the MMOG. The ownership of an object – a virtual object in this case – is different from the ownership of the intellectual property rights in this object, these two are separated.[282] Users are in their rights still limited to their acquired objects. They are, for example, still unable to make duplicates of these objects as this requires the consent of the party holding the intellectual property rights in these objects: the developers.

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[277] A. Clarke & P. Kohler, *Property Law: Commentary and Materials*, New York: Cambridge University Press 2005, p. 11.
[278] Ackerman, *supra* note 19, p. 143. See also: Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property -- the right to exclude others.")
[279] The MMORPG *Stash* allows it users to share any of the objects they acquire with other users. They can share any item they have obtained by simply giving it to the other user in-game. This allows the other user to possess and use the item while the original acquiring user can still transfer the object when presented with an opportunity to do so. See: http://frogdice.com/2015/01/29/stash-not-your-typical-mmo-we-are-re-imagining-the-genre/
[280] K. Hall, *The Oxford Companion to American Law*, New York: Oxford University Press 2002, p. 665.
[281] In this example, the bailee will eventually need to return the objects to the bailor.
[282] Fairfield, *supra* note 133, p. 1096.

§3.5.1 Continental EU law and full ownership

Unlike the American common law regime, the civil law regimes of Continental Europe do not work with the principle of 'fragmentation of ownership'. Instead, property rights are explained from the concept of 'full ownership'. The person who is considered the owner of an object has the most extensive rights in that object, seen in relation towards the object owned but also in relation to third parties.[283] Other parties with a property right in the object will not become its owner, instead holding a limited property right in the object.[284] Additionally, the principle of *numerus clausus* prevents parties from creating non-existent property rights when they so desire.[285]

When looking to provide users in the Continental EU with property rights, one has to be aware that there currently is no harmonized EU law dealing with (the distribution of) property rights. The ECJ has – in the *UsedSoft v. Oracle* case – shown a willingness to accept that intangible objects can be objects of property rights and even highlighted several rights that come with this.[286] However, so far, it has been left to the individual countries to regulate this. Therefore, it is important to notice that any rights given to users will be given to them under different legal regimes, which can lead to different outcomes based on the regime. To that extent, this section will briefly touch on the legal regimes in France, the Netherlands, and Germany – three European countries with a high percentage of MMOG-users[287] and similar property right-regimes[288] – and what rights users would have under these regimes to allow them to protect their interests better.

§3.5.1.1 France

Art. 544 of the French Code Civil reads:

"Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations."[289]

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[283] B. Akkermans & W. Swadling, Types of Property Rights – Immovables and Movables (Goods)', in: S. van Erp & B. Akkermans, *Cases, Materials and Text on Property Law*, Portland: Hart Publishing 2012, p. 214.

[284] *Id.*

[285] B. Akkermans, *The Principle of Numerus Clausus in European Property Law*, Antwerpen: Intersentia 2008, p. 19.

[286] Van Engelen, *supra* note 222, p. 327.

[287] See: http://www.gamasutra.com/view/news/115803/Study_60_Percent_Of_Western_World_Plays_Games.php (a chart showing the percentage of the population participating in MMOGs to be over 10% of the total population in each of these countries).

[288] Akkermans & Swadling, *supra* note 283, p. 212, 216.

[289] A translation of the French Civil Code is available online at: http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations

Akkermans and Swadling argue that the French definition of what constitutes 'things' should be viewed in a broad sense of the word, which means including virtual objects under this definition.[290] In France, ownership consists of the right to use, the right to enjoy, and the right to alienate.[291] These rights are based on the Latin formula of *usus, fructus,* and *abusus* and can be found in art. 544 of the French Code Civil.[292] If a user uses a mining pick to mine ore, he is exercising his right to use as well as his ability to enjoy the fruits (the ore), an example of both *usus* and *fructus*. The right to alienate – in the words of art. 544 Cciv: "the right to...dispose of things in the most complete manner" – includes not only the user's ability to destroy his objects, but also the ability to sell them; to transfer them to others (in exchange for money). Because of the exclusive nature of the concept of ownership, the user who is the owner of an object has the right to exclude or prevent others from interacting with the object; from infringing on their property rights.[293] Of course, the power of the owner is still limited, as seen in in the latter half of art. 544 Cciv, by statutes and regulations. This means, for example, that users can still be held accountable for their actions if they use the object to bring harm – or damage – upon other users.[294]

§3.5.1.2 The Netherlands
Art. 5:1 BW (Dutch Civil Code) reads:

"1. Ownership is the most comprehensive property right that a person, the 'owner', can have to (in) a thing.

2. The owner is free to use the thing to the exclusion of everyone else, provided that he respects the rights and entitlements of others to the thing and observes the restrictions based on rules of written and unwritten law.

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[290] Akkermans & Swadling, *supra* note 283, p. 216. Art. 516 Cciv determines that "property is movable or immovable", which would indicate an inclusion of virtual objects. Most virtual objects would qualify as movables under art. 528 Cciv and those objects that cannot be moved inside the MMOG-environment qualify as immovables under art. 517 Cciv.

[291] Akkermans & Swadling, *supra* note 283, p. 214.

[292] *Id.* In the definition from art. 544 Cciv it is clear that elements of *usus, fructus,* and *abusus* are present in the article: "The right to enjoy (fructus) and dispose (abusus)...used in a way (usus)".

[293] It is thus a so-called *erga omnes* right as it can be enforced against anyone trying to infringe on the user's property rights. See also art. 545 Cciv.

[294] See: http://virtuallyblind.com/2007/04/24/open-roundtable-allegations-of-virtual-rape-bring-belgian-police-to-second-life/ (explaining how, in early MMOGs, users could use an object called 'voodoo doll' to take over another user's avatar and commit virtual rape with it) and http://www.theguardian.com/technology/2007/jan/20/news.france (reporting on a virtual assault on the French Front National's headquarters in *Second Life*, with avatars putting up virtual posters comparing Front National's leader Le Pen with Hitler as well as throwing their virtual objects at Front National's avatars).

3. The owner of the thing becomes the owner of its separated fruits and benefits, except when another person is entitled to them."[295]

It is here, however, that a problem arises. What constitutes as a 'thing' can be found in art. 3:2 BW, which reads that: "'Things' are physical objects that can be controlled by humans". At first glance, this would exclude virtual objects from qualifying. However, if we take a closer look at the individual criteria, a case can be made for virtual objects to be considered 'things' in the sense of art. 3:2 BW, thus granting them the rights and protection found in art. 5:1 BW.

First of all, virtual objects can be controlled by humans. According to Van der Steur, the premise of this criterion lies in the ability to exclude others from using the object.[296] As explained earlier, virtual objects are rivalrous and users have the ability to deny other users access to their accrued virtual objects. Therefore, this criterion appears to be met.

The second criterion is the physical component: virtual objects need to have some sort of physical presence. Here, Van der Steur comes up with five criteria to test if, based on a functional approach[297], it is indeed possible for virtual objects to have such a presence. The object needs to take up space and be perceptible, which virtual objects do as they take up space in both the MMOG as well as through the electrons that give them their perceptible form that can be seen on the computer screen.[298] The third and fourth criterion require the object to, respectively, be unique[299] and represent value[300]. The uniqueness of a virtual object can be found in the database its information is stored on, where it has a unique ID-code that is only linked to one object. In Chapter 1 it has become clear that virtual objects represent real world value, fulfilling the fourth criterion. The fifth and final criterion is that of individuality.[301] Others have to be able to recognize that the object can be seen seperate from other objects in the MMOG-environment. This criterion is easy to fulfill as virtual objects are all, in their own way, unique and clearly distinguishable from other objects. A sword can be seen seperate from the suit of armor worn while wielding it as well as seperate from the forge

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[295] Available online at: http://www.dutchcivillaw.com/civilcodebook055.htm

[296] J.C. van der Steur, *Grenzen van rechtsobjecten, een onderzoek naar de grenzen van objecten van eigendomsrechten en intellectuele eigendomsrechten*, Deventer: Kluwer 2003, p. 127.

[297] This approach focuses on what can be considered a 'physical presence' from a legal perspective. This does not necessarily have to be identical to what constitutes as such under a scientifical approach. See: Van der Steur, *supra* note 296, p. 129.

[298] Van der Steur, *supra* note 296, p. 131.

[299] Van der Steur, *supra* note 296, p. 133.

[300] Van der Steur, *supra* note 296, p. 134.

[301] Van der Steur, *supra* note 296, p. 133.

in which it was forged. With virtual objects meeting Van der Steur's criteria, she makes a case for virtual objects having a physical presence in a functional sense of the word. With both criteria from art. 3:2 BW met, it seems like users of virtual objects could get the protection from art. 5:1 BW.

In terms of actual protection, the Dutch Civil Code shares similarities with the French Civil Code when it comes to ownership. Art. 5:1 BW contains the powers of *usus, fructus,*and *abusus*. Under this regime, users have the right to freely make use of the object as long as it does not violate any rights of others and is within the boundaries of the law. Additionally, they become the owner of any fruits produced by the object (art. 5:1(3) BW). The right to exclude others is present here as well, explicitly mentioned in the first half of art. 5:1(2) BW.

§3.5.1.3 Germany

In German law, art. 903 BGB (German Civil Code) contains the definition of ownership:

"The owner of a thing may, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion and exclude others from every influence. The owner of an animal must, when exercising his powers, take into account the special provisions for the protection of animals."[302]

German law has a similar definition as Dutch law when it comes to defining what a 'thing' is, in art. 90 BGB, but the criterion of human control is absent. Where virtual objects had a physical presence based on the criteria discussed in the previous section, the same can be said of virtual objects in MMOGs under German law.[303]

Art. 939 BGB considers the right of ownership as an indivisible power of an object which cannot be separated.[304] As long as there are no statutes or third-party rights that conflict with it, the owner has the right to deal with the object at his discretion, as well as to exclude others. Applying this to virtual objects would, again, mean that users have the right to use their object as they see fit, while also having the right to deny other users access to their object without their permission. Additionally, it also encompasses the user's ability to

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[302] Available at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3698
[303] Additionally, if CO_2 is considered to be a 'thing' under art. 90 BGB when it is captured in a container, then virtual objects can by analogy also be considered 'things' when they are captured in a container (the user's computer or the server the MMOG runs on). See: R. Grünwald, *Greenhouse Gas – Bury it into Oblivion: Options and Risks of CO_2 Capture and Storage*, Norderstedt: Books on Demand 2009, p. 84.
[304] Akkermans & Swadling, *supra* note 283, p. 215.

transfer the right of ownership to others, as it is at their discretion whether they want to continue being the owner or not.

§3.5.3 Conclusion

This section has examined which rights users would have if a property rights approach to virtual objects were to be taken. Under the American common law regime, virtual objects in MMOGs could qualify as chattel and, as such, users would receive the rights that are attached to this, most importantly the right to possess and own, the right to use, the right to transfer without limitation, the right to exclude, and the right to security in case of involuntary transfer and expropriation. This is quite close to the rights that users would have under Continental European regimes, which also give users the right to use, enjoy and dispose, alongside the right to exclude others from infringing upon their property. Additionally, while currently countries regulate property rights on an individual basis, making it sometimes difficult for virtual objects to qualify as object of property[305], a change might be on the horizon. With the ECJ in *UsedSoft v. Oracle* considering virtual objects to be subject to property rights, the door seems open for a EU-wide property rights approach that includes virtual objects within its regime.

The next section will outline several models that provide ways of distributing property rights in virtual objects. At least one of these models could act as an alternative to the governing of property rights in MMOGs through EULAS, while at the same time protecting the (underlying) interests of developers and other users.

§3.6 Models for distributing property rights in virtual objects

Having established which rights are associated with being the property rightholder – under different legal regimes – in virtual objects, the next step to applying property rights in virtual objects is determining how these property rights should be distributed. It also has to be clear to what extent the rightholder's property rights are subject to the rights of others.

Nelson provides us with two models: the positive approach under which developers hold the property rights, and the normative approach under which users hold the property rights.[306] The normative approach can be further divided into the carte-blanche approach and the qualified approach.

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[305] Such as, for example, under the Dutch or German regimes.
[306] Nelson uses the term 'positive approach' because this approach shares many similarities with the current EULA-system in that the developers are the rightholders in the virtual objects inside of their MMOGs and hold a position of power over the users. Additionally, it is based on taking existing intellectual property rights and extending these to also cover virtual objects. The 'normative' approaches, on the other hand, derive their

The positive model distributes the property rights in virtual objects to the developers of the MMOG.[307] This model is similar to the current EULA-model in that it takes the property rights that developers already have – concerning the MMOG's underlying hardware and code – and extends them to the objects inside their virtual worlds. This means that, under the positive approach, developers also hold the property rights in the virtual property inside their MMOG. With regards to this property the developers can do as they see fit when it comes to the acquiring, using, and disposing of the property.[308] Anything the users obtain, create, or otherwise find in their possession will remain the developer's property unless disposed of by the developers themselves. The positive approach thus keeps the imbalanced and privileged position of the developer intact, similar to how the EULAs currently do this.

The normative model on the other hand distributes property rights to the users of MMOGs. The carte-blanche approach is the most far-reaching variant of this model and gives users property rights that can be held against others without restrictions.[309] Once a piece of virtual property is acquired, the user can potentially bring legal action against anyone trying to interfere with their rights in the property. Including against the developers. The carte-blanche approach bestows too much power onto the users and puts them into a position that mimics the position EULAs put developers in.

This approach is quite extreme and has the potential to have a chilling effect on developers as they now have to fear potential lawsuits resulting out of this. A great example of how the carte-blanche approach can have negative consequences for both users and developers would be what happens when a developer decides to terminate the MMOG under this approach. No MMOG has eternal life. There will come a point in time for every MMOG where developers are faced with a dwindling userbase. Once the point is reached at which there is no feasible method of turning the MMOG profitable again, the developer will often decide to shut down the server to prevent further losses and to pursue other ventures. This creates a situation where the userbase is unable to log into the MMOG, making them unable to access their virtual property. However, at the time of termination the property rights are in

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name from the fact that this is how Nelson, using the theories of theft protection and deterrence and utilitarianism, envisions a justified approach to distributing property rights in virtual objects to users of virtual worlds. See: Nelson, *supra* note 21, p. 296-297.

[307] *Id.*

[308] Nelson, *supra* note 21, p. 296.

[309] *Id.* Nelson defines 'others' as being developers and other users.

the hands of the users. Under the carte-blanche approach this can lead to the heavily undesirable outcome of developers facing many, potentially significant, conversion claims. It is not entirely unthinkable that this will lead to the – for both parties undesirable – situation where developers decide to move away from MMOGs entirely in favor of other venues for revenue, as the financial risk that comes with such an endeavour does not outweigh the potential revenue.

Another downside to choosing this approach is that it lacks flexibility. Certain MMOGs require less rights than others. An example to illustrate this would be *EVE Online*, a virtual world where theft is an integral part of the MMOG. A virtual world whose mechanics provides users with the option – and sometimes even encourages them – to raid other users' vessels, stealing and plundering their items. In this scenario it is not against the rules of the MMOG to steal, as it is a feature that was intended by the developer. They explicitly allowed for this mechanic to exist in the MMOG-environment. A carte-blanche approach could lead to users taking legal action against other users for virtual objects stolen from them using, for example, the pickpocketing mechanic as it infringes on their property rights. This is a highly undesirable outcome for users – as it has a freezing effect on their ability to enjoy the full experience the MMOG offers them – as well as for the developers. They now need to either change the core mechanics that are integral to their MMOG or will eventually be forced to close the MMOG down entirely due to users staying away out of fear of legal actions taken against them. Due to this lack of flexibility and the fear of potentially devastating lawsuits in the case of termination of the MMOG, the carte-blanche approach should be discarded as well.

The qualified normative approach, however, provides the perfect framework for applying property rights in virtual objects with users as the rightholders. The qualified approach is a much less extreme approach that provides a good middle ground between the positive model and the carte-blanche approach. It still distributes the property rights in their virtual property to the users, but these rights are subject to the rights of others.[310] On one side they are still subject to the developers' underlying (intellectual property) rights in the MMOG's hardware and code. On the other they are subject to the rules of the MMOG and the conditions and exceptions it sets for interacting within its environment. This includes interaction with other users. As mentioned, some MMOGs might allow their users to do

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[310] *Id.*

things that other MMOGs do not, so it is important to have the rights of users be subject to the rights of other users as defined by the MMOG's unique and specific environment.[311]

Despite having property rights, under the qualified approach these rights of users are still subject to the mechanics of the MMOG. Through playing the MMOG the users accept the fact that, for example through the theft mechanic, property could be taken away from them. However, if property is stolen from them via other means – such as hacking – then they can take legal action against the thief. This provides other users with the confirmation and certainty that they can continue playing the MMOG as intended, without having to fear claims from other users for stealing their property through mechanics allowed by the MMOG. Unlike the carte-blanche approach, the qualified approach does offer the flexibility needed for users of different MMOGs to have property rights in their virtual objects, while at the same time ensuring that this does not come at the cost of gameplay mechanics that are integral to specific MMOGs.

Developers retain the right to terminate the MMOG under this approach, decreasing the financial risks associated with MMOGs. A user's right in virtual objects is subject to the rights of the developer, which includes the right to terminate the MMOG. Therefore, the user – through playing the MMOG – accepts the fact that at some point in time the developer can decide to terminate the MMOG, resulting in a loss of property for the user, without the possibility to take legal action to get compensation for this loss.

Revisiting the Dutch case of HR *De Beeldbrigade/X*, we see that the court applies a layered approach, stating that software can be the subject of a sale while at the same time the underlying intellectual property rights protecting the software are being respected.[312] Under the qualified normative approach, a similar type of layered approach can also be taken with regard to the selling of virtual objects. When a user sells an object to another user, what is sold are the characteristics of the object – such as the ability to vanquish foes, or the ability to provide the user with a personal space within the MMOG – and not the underlying code that enables the virtual object to have these characteristics. This approach would therefore allow users to engage in real money trading with other users, while developers retain the same level of protection they currently have.[313]

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[311] Nelson, *supra* note 21, p. 297.
[312] HR 27 april 2012, LJN BV1301 (De Beeldbrigade/X).
[313] As mentioned in the previous section, users that acquire the object would not be allowed to make duplicates of the object as this would require them to access the underlying code. For this they still require the explicit consent of the developers, as they are the intellectual property rightholders in this code.

The downsides associated with both the positive approach and the carte-blanche normative approach are seemingly absent in the qualified normative approach. Under the qualified normative approach users are, similar to the carte-blanche approach, the rightholders to property rights in their virtual objects. Thus they are provided with protection with regard to the property they acquire inside a MMOG. At the same time this approach does not leave developers and other users at their mercy. Developers still retain the property rights in the underlying code, as well as in the servers their virtual worlds run on. With this approach they will still be able to defend their property, including the software they created. Other users can continue playing the MMOG knowing that, as long as they play as intended, they have nothing to fear in terms of legal action from other users. The same is true for developers, who need not fear a potential financial disaster in the case of termination of the MMOG as long as this was not due to (gross) negligence or malfeasance on their side. Therefore, all things considered, the qualified normative approach is the most desirable approach to distribute property rights in their virtual objects to users.

§3.7 Virtual property rights: beneficial to both users and developers?

It is clear that the idea of having property rights in their virtual objects appeals to users of MMOGs. However, any attempt at a property rights approach should provide the developers with some sort of safeguard; ensure them that their interests in the MMOG – and its underlying code – are not in jeopardy. This section will clarify that taking a qualified normative approach to distributing property rights potentially provides a system that is beneficial to both users and developers, making it a desirable way to govern property rights in virtual objects in MMOGs. An approach that is arguably more suitable to govern the aspect of property rights in virtual objects than the current EULAs, but does allow for EULAs to continue to govern other aspects of the MMOGs as they currently do.

When trying to create a mutually beneficial scenario for users and developers one needs to ensure that, aside from users having property rights in their virtual objects, the rights that developers hold in their underlying intellectual property will not be in jeopardy. The qualified normative approach provides the perfect mix of protection for users and for developers, as users can hold property rights in virtual objects without developers seeing the level of protection of their intellectual property rights diminish.[314] The approach clearly acknowledges that property rights in virtual objects and intellectual property rights in the

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[314] Nelson, *supra* note 21, p. 297.

underlying software of the MMOG are different things, as well as that the rightholders to these respective rights are different entities. Ownership of virtual property under this approach does not mean that the intellectual property that accompanies this property will be infringed on.[315] Ackerman revisits the example of the virtual sword to explain this.[316] A user's property rights are limited to the original copy of the sword that he acquires. They do not include the underlying code that allows for the existence of this original sword. The user can make use of the original sword and he can even sell it to other users. However he does not have the right to make – and sell to other users – duplicates of the acquired sword, as this would infringe on the developers rights in the underlying code.[317]

Furthermore, developers can still retain the part of the EULA that deals with the licensing of the software in their EULAs.[318] This will allow users of the MMOG to clearly recognize, when contracting, that they will be rightholder in the virtual objects they obtain inside the MMOG, but that the rights in the underlying code will remain in the hands of the developers, limiting what the users are allowed to do with their objects.[319]

Developers also need to be ascertained that the distribution of property rights to users does not also extend the developers' liability in case of wrongful conduct occurring between users, similar to how current EULAs regulate this.[320] Only if the developer reasonably could have known of the wrongful conduct and failed to prevent this should the user be able to turn to the developer for liability.[321]

Additionally, when users are the ones holding the property rights in their virtual objects, they are no longer at the developers' mercy when it comes to theft of these objects. They are now capable of taking legal action against the thief. It is therefore also less likely

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[315] Ackerman, *supra* note 19, p. 184.

[316] *Id.*

[317] *Id.*

[318] Barker, *supra* note 73, p. 5.

[319] Initially, it will most likely be necessary to show users the boundaries of their right to use the object, as users are trying to determine the extent to which they can use their new rights. The EULAs can help with this, for example, through making it clear that they are not allowed to make duplicates of the items nor sell these duplicates.

[320] See for example: http://star-conflict.com/en/b/eula (the MMOG Star Conflict's EULA, specifically Section 4.3, last visited June 2015).

[321] Revisiting Kunze's proposal for changing the way developers can disclaim liability in EULAs, developers should not be able to disclaim liability for wrongful conduct by users – of which they were aware and did nothing to prevent – which is harmful to other users. Being aware of wrongful conduct inside their MMOG and failing to take action against this can be considered negligence by the developers and, as this does not qualify as an unforseen or uncontrollable event, they should not be able to disclaim liability in these situations. See also: Kunze, *supra* note 114, p. 116 and Ackerman, *supra* note 19, p. 184.

they will turn to the developer for liability when their objects are subject to theft. However, the developer can still assist the user whose virtual objects have been stolen even after the theft, as developers are able to track down to which avatars these objects were transferred – and the accounts connected to these avatars – and provide the victimized user with this information. Overall, this should protect the developers while at the same time have them remain incentivized to (actively) prevent wrongful behaviour from occurring within the MMOG. In turn this protects users as well.

The fear that property rights for users will cause an influx of black market operatives can be alleviated as well. In South Korea a crude version of the qualified normative approach is already implemented. The South Korean approach has legislation in place that grants property rights to users, but prohibits the commercial exploitation of virtual property.[322] What this means is that non-merchant users of virtual worlds in South Korea hold property rights in their virtual objects, have the protection that comes with these rights and the ability to freely participate in the trading of these objects for either virtual currency or real world currency.[323] At the same time, commercial trading of virtual objects by commercial parties is prohibited by the same legislation.[324] This approach could be applied to property rights in virtual objects in general as it is beneficial to users and developers. It attempts to maximize the enjoyment of the virtual worlds for 'real' users through giving them rights and allowing them to conduct trade.[325] At the same time it addresses the developers' concerns of an influx of black market operatives commercially exploiting the MMOG, reducing the enjoyment of others and driving 'real' users away from the MMOG.

Additionally, property rights take away uncertainty. As the utilitarian theory explains, potential users and investors are currently reluctant to invest in MMOGs where they have no protection. Auction sites stay away from virtual objects out of fear of legal action from the developers. Bestowing users with property rights grants them this protection, thus increasing the potential market of MMOG users. It also opens the door for the auction sites to provide a vibrant platform for users to sell their virtual objects.

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[322] J. Fairfield, 'The Magic Circle', *Washington & Lee Legal Studies Research Paper Series* 2008, working paper no. 2008-45, p. 17.
[323] Chao, *supra* note 221, p. 11.
[324] *Id.*
[325] *Id.*

Furthermore, once this chilling effect is taken away there is the potential for a better – more efficient and productive – functioning of MMOG-markets. Balancing the positions of users and developers through giving the former property rights could lead to a threefold economical advantage. More protection for users and an increase in userbase means a larger market for the developer-to-user transactions. This could lead to a (significant) increase in developer-to-user transactions being conducted, resulting in more revenue for the developers. As more potential users are willing to become actual users once they are assured their property is protected, this will increase the amount of users engaging in real money trading with other users. If developers take a cut out of every transaction that occurs they will see their revenue increase accordingly.[326] Lastly, with property rights no longer regulated through EULAs, developers can free up resources otherwise used to create and enforce these types of contract terms.[327] When the MMOG uses a standard EULA this cost reduction is fairly minimal and one could question whether this cost reduction alone is worth it. However, the advantage of this cost reduction should be seen as an additional benefit, not as the main reason for applying property rights to virtual objects and having users be the rightholders. Furthermore, even the smallest of cost reductions can still be considered an economical advantage, which allows developers to relocate some of these freed up resources to producing a better MMOG experience for their users.[328]

The qualified normative approach also provides users with more protection against other users of the MMOG. Part of the reason developers embraced the EULAs, was to ensure that unwanted behaviour in their MMOGs could be punished. However, in practice, developers would rarely take action, unless their own interests were at stake. So, under the EULA property rights approach, users have the freedom to do virtually anything as long as they do not attract the developers' attention. This leads to a lot of conflict amongst users.

In exchange for property rights, users have to give up some of their freedom in favor of more protection. They now bear (increased) responsibility for their actions towards the virtual objects of other users within the realm of the MMOG.[329] Having legislation that binds users and makes them responsible for their actions will lead to users having to abide by these provisions or suffer the consequences, not only towards the developers but to other users as

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[326] See, for the amount of revenue Linden Lab generates through users paying a transaction fee for every real money transaction made, *supra* note 61.

[327] Ackerman, *supra* note 19, p. 185.

[328] *Id.*

[329] Ackerman, *supra* note 19, p. 184.

well.[330] This gives developers a way to ensure that unwanted behaviour does not go unpunished – similar to how EULAs deal with this – while at the same time providing an additional layer of protection for other users of the MMOG. This approach has the potential to create a better playing experience for the users as well as a MMOG clear of unwanted behaviour for the developer. As the qualified normative approach allows for a property rights approach that exists alongside the EULAs, developers can still use the EULA to regulate what additional user behaviour is considered acceptable. This creates a situation where developers can still protect themselves and their MMOG-environment from unwanted behaviour from their users, while at the same time other users can protect their virtual objects better.

All in all, taking a qualified normative approach to property rights has the potential to be beneficial for both users and developers. On the one hand it allows the developers to continue to protect their interests in the underlying intellectual property rights through the EULAs, and on the other it protects the users. Providing the former with safeguards and the potential for great new revenue streams and the latter with a much desired way to protect their investment in virtual property as well as with protection against other users seeking to harm them or their property.

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[330] *Id.*

Conclusion

This paper set out to try and answer the question of whether there is an approach to property rights in virtual objects that is more beneficial to users and developers of MMOGs than the current way of relying on terms in the EULA to govern this.

To illustrate the increasing importance of this question and of virtual markets in today's world, the evolution these markets have undergone was outlined. With the evolution of the Bazaar model into the Real Money Trading model, developers and users have found ways to trade virtual objects with other parties in exchange for real world currency. This has led to users developing a need for more protection, to protect them from the developers holding too much power over them as well as with regard to the economic interests they have tied up in MMOGs.

EULAs in their current form are outdated types of contracts that greatly favor the developer and as such are ill-suited to provide users with the desired level of protection. The most important reason for this is that developers retain the property rights in the virtual objects under this approach. The fact that users can be deprived of their virtual objects, by the developer, at the developer's discretion, combined with the fact that users can do very little to protect their invested economic interests in the virtual objects, is one of the most important reasons to advocate for a change away from EULAs regulating property rights in virtual objects in MMOGs.

Several suggestions to amend EULAs in order to balance this have been discussed. However, these suggestions are either impossible to implement efficiently or do not (sufficiently) deal with the major underlying problems resulting from the developers being rightholders in the virtual objects inside their MMOGs. While allowing real money trading through EULAs seems attractive, the nature of the EULA – as an adhesion contract – does not provide the users with the guarantee that the developers will continue to allow this in the future, thus maintaining the chilling effect of current EULAs.

While American courts have so far avoided answering questions of ownership relating to virtual objects, the additional protection provided for EU-based users by EU directives ultimately falls short of providing the required protection as well. This can be contributed to the fact that the aim of these directives is to protect consumers instead of the economic interests that parties might have in the objects.

Instead, the outdated EULA terms dealing with the distribution of property rights in virtual objects found in the MMOG should be discarded in favor of a property rights approach that distributes the rights in their virtual objects to the users. The normative theory of theft protection and deterrence as well as the utilitarian theory provide solid normative arguments to justify taking such an approach. The rights that users stand to gain under both the American regime – with virtual objects treated in the same or in a similar way as chattel – and several continental European regimes – based on the Latin formula of *usus, fructus, abusus* – will provide users under both regimes with the protection they need to protect their objects from theft and the arbitrariness of the developers. Additionally, these rights also allow users to (freely) participate in real money trading.

Nelson's qualified normative approach to distributing property rights lends itself perfectly for ensuring that this is beneficial for developers and users alike. While this approach will not help solve all the problems associated with the EULAs – it will not make users more inclined to read them – it does go a long way in providing users with better protection and more certainty. Users having their rights be subject to the rights of others, as well as to the mechanical workings of the MMOG, will prevent situations similar to the current EULA approach, where one party holds great power over the other parties, from happening. Alternative dispute resolution in the form of virtual arbitration is an efficient way to ensure that potential disputes that do arise under this approach can be dealt with in a clean, neutral, and cost-efficient manner.

This approach will also be beneficial to developers. The fear which they have concerning their underlying intellectual property rights can be alleviated through clearly distinguishing virtual property from the underlying code of the MMOG. Here, EULAs can continue to serve as a layer of protection for developers, in that they can continue to license the underlying software to users. In addition to this, developers stand to benefit from potential new sources of revenue under such an approach. As it decreases the chilling effect EULAs currently have on MMOGs, by allowing users to (freely) engage in real money trading, new users and investors will find their way into the MMOGs.

In conclusion, and to answer the question raised in this paper, taking a qualified normative approach to property rights in virtual objects has the potential to be more beneficial than the current system of governing property rights through EULAs. This potential to create a mutually beneficial situation for both parties – where developers can continue to protect their intellectual property rights while reaping the economic benefits and

users can protect their invested interests better while engaging in real money trading – combined with the fact that current EULA terms are outdated and flawed, calls for the qualified normative approach as it manages to truly combine the best of both worlds. Real and Virtual.

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Dir. 2000/31/EC (Directive on electronic commerce)

Dir. 93/13/EEC (Directive on unfair terms in consumer contracts)

Dir. 2011/83/EU (Directive on consumer rights)

Appendix 1: Annex of Directive 93/13/EEC (Unfair terms in Consumer Contracts)

ANNEX

TERMS REFERRED TO IN ARTICLE 3 (3)

1. Terms which have the object or effect of:

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

(h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of subparagraphs (g), (j) and (l)

(a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

(b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

(c) Subparagraphs (g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

(d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.