

More Than *Just* Games: Virtual Property Rights In Massively Multiplayer Online Games

C H R I S S T A L M A N S *

MASSIVELY MULTIPLAYER ONLINE (MMO) GAMES ARE PLAYED ON the internet and can support hundreds of thousands of players simultaneously.¹ MMO games enable players to “interact with one another in real-time in a shared environment, even though these users may be separated by vast geographic distances.”² Players can acquire virtual property by completing tasks within the game or by purchasing items with real world currency.

The purpose of this paper is to explore the legal issues related to virtual property rights in MMO games. Part I will briefly describe why MMO games should be considered as more than *just* games. Part II will examine the current status as to whether virtual property is “property” in a legal sense, and whether it belongs to MMO game players rather than to game creators. Part III will argue that it is important and beneficial to recognize virtual property in favour of MMO game players and will address some common criticisms of recognizing virtual property. Conflicts involving virtual property in MMO games are inevitable and it is hoped that an evaluation of the current state of the law will allow for a better resolution when these issues reach Canada.

For the purpose of this paper, virtual property rights will be defined as in-world objects, including avatars (or characters), items, user accounts, and land that can be possessed by one user to the exclusion of others in MMO games. This paper is not interested in intellectual property rights within MMO games.

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¹ Roger McFarlane, *Network Software Architecture for Real-Time Massively Multiplayer Online Games* (M Sc Thesis, McGill University School of Computer Science, 2005) [unpublished], online: eScholarship <<http://digitool.Library.McGill.ca>>.

² *Ibid* at 14.

There is an important distinction between property-averse worlds and property-promoting worlds.³ MMO games that feature property-averse worlds state in their end user licensing agreements (EULA) and terms of service (TOS) that players cannot gain virtual property rights in the game and that the sale of game items can result in disciplinary action.⁴ For example, in December 2005, Blizzard Entertainment, the maker of World of Warcraft, shut down 18,000 player accounts for selling game assets on third-party auction sites.⁵

Linden Lab's Second Life is an example of a property-promoting world in that it "purports to protect the virtual and intellectual property rights of its users"⁶ and allows the open sale of virtual property. The CEO of Linden Lab, Philip Rosendale has stressed this concept and publically stated "[y]ou create it, you own it—and it's yours to do with as you please."⁷ However, the EULA and TOS of Second Life are less emphatic about acknowledging virtual property rights. Second Life's TOS state that users:

acknowledge that Virtual Land is a limited license right and is not a real property right or actual real estate, and it is not redeemable for any sum of money from Linden Lab . . . [and] agree that Linden Lab has the right to manage, regulate, control, modify and/or eliminate such Virtual Land as it sees fit and that Linden Lab shall have no liability to [users] based on its exercise of such right.⁸

This discrepancy was relevant in the Evans class-action case, discussed below.⁹

I. MORE THAN JUST A GAME

MMO games are not *just* games. In 2005, it was estimated that up to 100 million people worldwide participated in an online digital world.¹⁰

³ Steven J. Horowitz, "Competing Lockean Claims to virtual Property" (2007) 20 Harv JL & Tech 443 at 445 [Horowitz].

⁴ *Ibid* at 445-446.

⁵ Peter Brown & Richard Raysman, "Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property" (2006) 2 Indian JL & Tech 87 at 93 [Brown & Raysman].

⁶ Horowitz, *supra* note 3 at 448.

⁷ Joakim Baage, "Five Questions with Philip Rosedale, Founder and CEO of Linden Lab, Creator of Second Life" (21 December 2006), online: digitalmediawire <<http://www.dmwmedia.com>>.

⁸ Second Life, *Terms of Service*, Part 6 (19 May 2011), online: Second Life <<http://secondlife.com/corporate/tos.php?lang=en-US#tos6>>.

⁹ *Evans v Linden Research*, 2011 US Dist Lexis 11106 (QL) [*Evans v Linden Research*]; for further discussion of this case, see text accompanying note 20.

This widespread following has transformed MMO games into big business. For example, “a real-life language teacher became a Second Life real estate agent and made over \$1 million [in 2006].”¹¹ It is estimated that in 2007 “approximately \$1.8 billion changed hands for virtual goods.”¹² Participation within MMO games has increased dramatically and includes many “[r]eal world businesses such as Dell, Mazda, Adidas, Coca-Cola . . . [which] have established a presence in Second Life.”¹³

This high level of value combined with increasing membership has led to many consequences. First, the theft of virtual property has become problematic. For example, South Korea had 22,000 claims of virtual theft reported to the police in 2004.¹⁴ Second, tax authorities in the United States and elsewhere are concerned that profits from the sales of virtual property are going unreported. Consequently, in its 2008 Annual Report to the United States Congress, the National Taxpayer Advocate recommended that the Internal Revenue Service “proactively” address issues arising from virtual worlds.¹⁵ The Australian Tax Office has already acted and requires money earned from the sale of virtual property to be reported and taxed like other types of income.¹⁶

A third problem is ‘gold farming’ or using workers to perform repetitive actions in MMO games and then selling the virtual property earned by these workers at a profit.¹⁷ In 2007, it was estimated that ‘gold farming’ operations in China alone employed over 100,000 people.¹⁸ One issue is the treatment of the foreign workers in these “point-and-click

¹⁰ David Barboza, “Ogre to Slay? Outsource It to China”, *The New York Times* (9 December 2005), online: The New York Times <www.nytimes.com>.

¹¹ Emma Boyes, “Second Life realtor makes \$1 million” *Gamespot UK* (27 November 2006), online: Gamespot <<http://www.gamespot.com>>.

¹² Julian Dibbell, “The Life of the Chinese Gold Farmer” *The New York Times* (17 June 2007), online: The New York Times <www.nytimes.com>.

¹³ Second Life, “Brand Promotion” (10 March 2008), online: Second Life <http://secondlifegrid.net/how/brand_promotion> (as cited in U.S., Department of the Treasury: Internal Revenue Service, National Taxpayer Advocate: 2008 Annual Report to Congress, (2008) at 217)[IRS] (the author necessarily relied on the description of the original source in the secondary literature).

¹⁴ Mark Ward, “Does Virtual Crime Need Real Justice?”, *BBC News* (29 September 2003), online: BBC News <<http://news.bbc.co.uk>>, cited in Brown & Raysman, *supra* note 5 at 89.

¹⁵ IRS, *supra* note 13 at 213-226.

¹⁶ Nick Miller, “Virtual world: tax man cometh” *The Age* (31 October 2006), online: The Age <<http://www.theage.com.au>>.

¹⁷ Richard Scott, “The Business End of Playing Games” *BBC News* (25 April 2007), online: BBC News <<http://news.bbc.co.uk>>.

¹⁸ Julian Dibbell, “The Life of the Chinese Gold Farmer” *The New York Times* (17 June 2007), online: The New York Times <<http://www.nytimes.com>>.

sweatshops.”¹⁹ Another concern is whether these actions violate the EULA with the particular game and whether “property” earned from gold farming can be seized by the game creator.

A recent lawsuit was directly concerned with the concept of virtual property. *Evans v. Linden Research Inc.* was a class action lawsuit filed by players of the MMO game Second Life on April 15, 2010 in Philadelphia, Pennsylvania.²⁰ The plaintiffs sought damages from the defendant as compensation for “intentionally, without plaintiffs . . . consent and without lawful justification” interfering with the plaintiffs’ property rights in virtual land without paying consideration.²¹ This suit sought only \$5 million but the statement of claim alleged that the defendants induced, through false representations of ownership, over 50,000 land buyers to spend upwards of \$100 million (US) on virtual land.²² The case has been transferred to a California court where it is pending.²³

These issues underline the importance of determining the legal status of virtual property in MMO games and its regulation. Further, the combination of the popularity of MMO games and the large amount of money related to virtual property creates a situation where a conflict is inevitable.

II. CURRENT LEGAL STATUS OF VIRTUAL PROPERTY

Property recognized within a virtual world is not necessarily recognized in the real world. To date no cases concerning virtual property have been heard in Canada.²⁴ However, the findings of other legal regimes could assist Canada in determining whether or not to recognize virtual property as property in the ‘real world.’

The popularity of MMO games in Asia has led to countries in this region being the most forward-thinking regarding virtual property law. In

¹⁹ “When Virtual Becomes Reality” (14 August 2004), online: EchoDitto <<http://www.echoditto.com/node/109>>.

²⁰ *Evans*, *supra* note 9.

²¹ *Ibid* (Statement of Claim at paras 255-257), online: Virtual Land Dispute Class Action <virtuallanddispute.com>.

²² *Ibid* at paras 99 & 100.

²³ *Evans v Linden Research Inc*, No 3:11CV01078 (ND Cal 2011).

²⁴ A search for the term “virtual property” in the databases LexisNexis, Quicklaw and CanLII returned no Canadian decisions on 19 June 2011.

2001, the Taiwanese Ministry of Justice passed a regulation which stated: “virtual objects are property, are alienable and transferable . . . and . . . the theft of such property is fully punishable under criminal law.”²⁵ The rationale for this decision was that “virtual property qualifies as electromagnetic records and should be considered moveable property in cases of fraud and theft.”²⁶ The regulation elaborates that “[a]lthough the above accounts are virtual, they are valuable property in the real world. The players can auction or transfer them online. The accounts and valuables are the same as property in the real world.”²⁷ “Critically, the regulation expressly allocates the right to control the electromagnetic record of the virtual property to the owner of the code object, not the owner of the server on which the code happens to reside.”²⁸

South Korea also took an early interest in virtual property regulation. This is understandable because “[o]ver forty-one percent of South Korean teenagers spend significant amounts of time in virtual worlds.”²⁹ In 2001, the Korean Government reached an executive determination that a clause in software giant NCsoft’s EULA which banned ownership in virtual property was found valid and in accordance with South Korea’s antitrust laws.³⁰ It should be pointed out that this was a determination to uphold a contract term and not necessarily an underlying principle of law. However, it is expected that other MMO game creators would write very similar clauses into their MMO games’ EULAs, effectively preventing MMO players from owning virtual property.

The ability to sell, and prosecute persons for the theft of virtual property, remains in South Korea even if the ownership of the property is “either ambiguous or located in the virtual environment creator.”³¹ However, a consumer group has “filed a complaint against NCsoft with

²⁵ Joshua A. T. Fairfield, “Virtual Property” (2005) 85 BUL Rev 1047 at 1086 [Fairfield, “Virtual Property”] (the author necessarily relied on the description of the original source in the secondary literature).

²⁶ Brown & Raysman, *supra* note 5 at 98.

²⁷ Fairfield, “Virtual Property,” *supra* note 25, citing Taiwan Ministry of Justice Official Notification No. 039030(90) [emphasis in the original] (the author necessarily relied on the description of the original source in the secondary literature).

²⁸ Fairfield, *ibid* at 1087.

²⁹ Chopin, *The Way to Cage People in the Matrix*, DDANZI-ILPO (1 February 2004) at 21, cited in Fairfield, “Virtual Property,” *ibid* at 1088.

³⁰ Fairfield, “Virtual Property,” *ibid*, citing Unggi Yoon, *Research on Legal Policy of MMORPG-Item Cash Trade* (2004) [unpublished, on file with Joshua Fairfield] (the author necessarily relied on the description of the original source in the secondary literature).

³¹ *Ibid*.

South Korea's antitrust regulatory agency to establish virtual rights."³² Fairfield suggests that this is an attempt to prevent the MMO game creators from abusing their monopoly position.³³ This idea will be covered more thoroughly below.

China's recognition of virtual property rights was crystallised in *Li Hongchen v. Beijing Arctic Ice Technology Development Co.*³⁴ An individual who played in the virtual world of *Hongyue* (Red Moon) had his account hacked and all of his items stolen. The player sought help from both the game creators and police but was refused assistance.³⁵ Consequently, a lawsuit was filed against the game designer and the Beijing Second Intermediate Court ordered the restoration of property to the player. The decision was affirmed by the Court of Appeal.³⁶ Adrian wrote that this case stood for the proposition that a "player has a property right in virtual objects that could be recognized in a real-world court."³⁷

A few cases concerning virtual property in the United States of America (US) have come up but have not been fully resolved. For Example, *BlackSnow Interactive v. Mythic Entertainment, Inc.* is a case where the plaintiff, BlackSnow, was gold farming through the employment of Mexican labourers, in Mythic Entertainment's (Mythic) game *Dark Age of Camelot*.³⁸ Mythic terminated the plaintiff's account for violation of the EULA and the plaintiff responded by suing Mythic for unfair business practices.³⁹ Lee Caldwell, a partner with BlackSnow stated in a press release:

What it comes down to is, does a . . . player have rights to his time, or does Mythic own that player's time? It is unfair of Mythic to stop those

³² Fairfield, "Virtual Property", *ibid*, citing Kim Tong-hyung, "Panel expands probe into game makers" Korea Herald (6 April 2010), online: Korea Herald <<http://www.koreaherald.com>>.

³³ Fairfield, "Virtual Property", *ibid* at 1089.

³⁴ As cited in Fairfield, "Virtual Property," *supra* note 25 at 1084 (the author necessarily relied on the description of the original source in the secondary literature).

³⁵ Angela Adrian, *Law and Order in Virtual Worlds: Exploring Avatars, Their Ownership and Rights* (New York: Information Science Reference, 2010) at 105 [Adrian].

³⁶ Cited in Fairfield, "Virtual Property," *supra* note 25 at 1084.

³⁷ Adrian, *supra* note 35 at 105.

³⁸ *Ibid* at 104.

³⁹ Anders Ericksson & Kalle Grill, "Who owns my avatar? Rights in Virtual Property" (Paper delivered at the DiGRA 2005 Conference: Changing Views-Worlds in Play, Vancouver, June 2005) at 2.

who wish to sell their items, currency or even their own accounts, which were created with their own time.⁴⁰

However, the court was unable to address this question when the plaintiff dropped the case due to other legal complications.⁴¹

The next case concerning virtual property rights in the US was *Bragg v. Linden Research, Inc.*⁴² Linden Research, Inc., the creator of Second Life, confiscated the plaintiff's virtual property and froze his account to prevent his access to the game because he purchased property at a below market price through an auction loophole.⁴³ "The plaintiff filed suit and Second Life filed a motion to compel arbitration"⁴⁴ pursuant to the EULA. In regards to the arbitration motion Judge Robreno stated:

Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes through the TOS [terms of service] demonstrate that the arbitration clause is not designed to provide Second Life participants an effective means of resolving disputes with Linden. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor.⁴⁵

This ruling meant that the plaintiff could proceed to court to argue his position that users can assert virtual property claims against creators. However, the parties settled privately.⁴⁶

The statement of claim for the Evans class-action case (discussed above) was filed in April 2010.⁴⁷ It is hoped that this case will be resolved by the court and give a meaningful precedent to help determine the legal status of virtual property. However, based on the cases mentioned above, I expect that this case will also settle privately.

⁴⁰ Julian Dibbell, "OWNED! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State" (Paper delivered at State of Play Conference, New York Law School, New York, November 2003), citing an unavailable press release from Mythic.

⁴¹ *BlackSnow Interactive v Mythic Entertainment Inc*, No 8:2002-cv-00112 (CD Cal 2002).

⁴² 487 F Supp 2d 593 [Bragg].

⁴³ *Ibid* (Counterclaim and Answer to Complaint, Defendant at para 16).

⁴⁴ Michael L. Rustad, *Internet Law: In a Nutshell* (St. Paul, Minnesota: Thomson Reuters, 2009) at 118 [Rustad].

⁴⁵ *Bragg*, *supra* note 42 at para 51.

⁴⁶ Marty Linden, "Resolution of Lawsuit" (4 October 2007) online: Second Life <<http://lindenlab.wordpress.com/2007/10/04/resolution-of-lawsuit/>>.

⁴⁷ *Evans v Linden Research*, *supra* note 9.

The approach that the Canadian legal system takes to virtual property will most likely be informed by the decisions of the other legal regimes. Canada will likely follow the case law approach seen in both the US and China rather than the legislative path seen in Taiwan for two reasons. First, this is a novel issue that will likely reach a courtroom before it reaches the legislature. Second, MMO games are not as popular in Canada as in the Asian countries discussed above.⁴⁸ Consequently, there is no comparable social pressure or need for the Canadian government to act in regards to the regulation of virtual property.

The flexibility of the common law is another factor which favours the adoption of the case law approach in Canada. Ancient personal property torts have seamlessly adapted to the modern legal system despite being inundated with technologies that were never anticipated.⁴⁹ An example of this includes the personal property tort of conversion which was originally intended to protect tangible chattels but has been applied to intangible property related to technology.⁵⁰ For example, misappropriated source code for an inventory system was found by a California court to be a conversion of intangible data.⁵¹ Although an American case, this clearly illustrates the adaptability of the common law.

From a practical perspective, one expects that when this issue arrives before a Canadian court, virtual property will be treated like any other asset and the court will apply existing laws that are not virtual property specific. However, a critical approach to this issue could conclude that it does not matter whether virtual property is legally recognized. Support for this position can be made in the comparison of Taiwan and Korea. Both countries have taken different approaches to virtual property. Whereas Taiwan expressly states that virtual property belongs to MMO game players, Korean law currently sees the status of virtual property as ambiguous or belonging to the MMO game creator. Yet, both countries have the ability to prosecute crimes involving virtual property and have secondary marketplaces for virtual property.

⁴⁸ David Spratley, "Virtual property—it's not physical but it has value for video gamer", *The Lawyers Weekly* 25:47 (21 April 2006) 9 at 12, online: [The Lawyers Weekly <http://www.lawyersweekly.ca>](http://www.lawyersweekly.ca).

⁴⁹ Rustad, *supra* note 44 at 143.

⁵⁰ *Ibid* at 159-162.

⁵¹ *Ali v Fasteners for Retail, Inc.*, 544 F. Supp. 2d 1064 (E.D. Calif. 2008) as cited in Rustad, *ibid* at 161.

One must ask whether the determination of the legal status of virtual property will have a significant impact in Canada. I submit that tremendous advantages would accrue from recognizing players' virtual property rights in MMO games against game creators. This argument is explored in the next section.

III. BENEFITS OF THE RECOGNITION OF VIRTUAL PROPERTY

A. Consumers

1. *Arbitration Clauses*

There are gods, and they are capricious and [they] have way more than ten commandments. Nobody knows how many because everyone clicked past them.⁵²

An important benefit of recognizing virtual property is protecting individual players from the power imbalance enjoyed by the MMO game companies. This inequality is largely based on the EULA and TOS agreements. These agreements can include codes of conduct or other rules that are intended to create an even playing-field for interactions between players. However, I suggest that these agreements are tools wielded by MMO game companies to benefit themselves to the detriment of the players.

Evidence of this power imbalance can be found in the *Bragg* decision on the motion to compel arbitration (discussed above).⁵³ The decision was critical of Second Life's EULA and found the agreement unconscionable for many reasons. First, the cost-sharing arrangement between the parties was far more expensive to the plaintiff than it would have been if he had filed his complaint with the court.⁵⁴ Next, the forum selection clause was inappropriate because it required players to travel to one location in the United States for arbitration regarding a dispute over minimal funds.⁵⁵

⁵² Raph Koster, "What are the lessons of MMORPGs today?" (24 February 2006), online: Raph Koster's Website <<http://www.raphkoster.com>>, cited in Brian Sites, Curtis Peele & Joshua Fairfield "End-User License Agreements: The Private Law in Video Games and Virtual Worlds" in Ross Dannenberg et al, eds *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (USA: American Bar Association, 2010) at 6.

⁵³ *Bragg*, *supra* note 42.

⁵⁴ *Ibid* at 609-610.

⁵⁵ *Ibid*.

Also, the confidentiality clause was unconscionable because the court was concerned that this would place the company “in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, the company accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract.”⁵⁶

By offering an expensive solution for problems that involve comparatively small sums of money, Linden Labs, creator of Second Life, seems to be purposely sabotaging a system designed to resolve problems between the game creator and players. It appears that the main purpose for this system is to discourage players from pursuing their complaints against the game company while creating the illusion of a fair and effective remedy. The idea of frustration and purposeful prevention is especially evident when compared to the system of resolution in place in Second Life for conflicts between players.

Second Life currently has a system in place for disputes between players that is completely within the virtual world. This system adjudicates harassment complaints between players that are in violation of community standards and is completely handled by Linden Labs.⁵⁷ The adjudicator hears the complaint and provides an appropriate punishment, which includes a warning, account suspension or termination.⁵⁸ Finally, the results of these disciplinary hearings are published and made available to other players of Second Life.

This system of resolution is in sharp contrast to what is available to players who have a dispute with Linden Labs. The in-world resolution of disputes between players is easily accessible, affordable and decisions are published for all players to see. The contrast between the simplicity of the player versus player arbitration and the complexity of the player versus creator arbitration supports the notion that the system for resolving disputes between players and the creator was intentionally made complex to discourage complaints against the creator, Linden Labs.

Linden Lab’s current dispute resolution system could be transformed into an efficient system that is comparable to their current player dispute model. The greatest hurdle for this would be that in order to maintain neutrality and ensure the integrity of the process, arbitrators could not be

⁵⁶ *Ibid* at 611.

⁵⁷ *Ibid* at 45.

⁵⁸ *Ibid*.

Linden Labs employees. Independent arbitrators would be very expensive for players, especially if Linden Labs were not to make a sizeable contribution, and could make arbitration financially unreasonable unless the virtual property in dispute is valuable. However, an appropriate cost-sharing arrangement between the parties could resolve this. Also, technologically savvy lawyers are available as arbitrators due to the presence of law firms⁵⁹ and a private law bar on Second Life.⁶⁰ The lack of such an accessible system is not due to lack of ability or finances, but simply due to power imbalances. Ultimately, it seems that the goal of the game company is to prevent disputes with players from coming forward.

2. *Lock-in and High Switching Costs*

Another problem due to inequality between the game creator and player is lock-in and high switching costs. Lock-in is the act of preventing players from removing or liquidating virtual property in an attempt to maintain them as customers of a specific game. If a player decides to leave to try another game and his property is locked-in, then this creates a high switching cost because the time and possibly money invested in this virtual property is lost. Lock-in ensures high switching costs, helping game creators retain customers. Lock-in is most easily achieved by prohibiting the sale of virtual property through an appropriately worded EULA, which if followed would mean that all of the time and value invested in a character would be lost upon switching games.

Support for this idea can be found in Blizzard Entertainment's 2006 Investors Report filed with the Securities and Exchange Commission. The maker of World of Warcraft states in the report that "[a]dvantages that accrue to highly successful [MMO role-playing games . . . include] high consumer switching costs—the player has to leave their characters and friends!"⁶¹ Game creators, such as Blizzard, the company behind World of

⁵⁹ For example, Davis LLP has a location on Second Life. Davis LLP, News Release, "Davis LLP Second Life Presence Featured in National Post Article" (12 March 2008), online: Davis LLP <<http://davis.ca>>, citing Julius Melnitzer, "Virtual worlds ripe for real lawsuits", *National Post* (12 March 2008) FP 9, online: National Post <<http://www.nationalpost.com>>.

⁶⁰ See "About the SL Bar Association" (accessed 1 June 2011), online: SL Bar Association <<http://www.slba.info>>.

⁶¹ Vivendi Games, "Introduction to Vivendi Games" (June 2006) at 15, online: Vivendi <<http://www.vivendi.com>>, cited in Joshua A.T. Fairfield, "Anti-Social Contracts: The Contractual Governance of Virtual Worlds" (2008) 53 McGill L.J. 469 at 470 [Fairfield, "Anti-Social Contracts"].

Warcraft, use restrictive EULAs that deny players property rights as a method to retain customers and increase profits.

There is a solution to prevent players from suffering from high switching costs: simply, do not allow gaming companies to lock-in virtual property. The property cannot be transferred to other games because of dissimilar platforms, but the property could be sold and the proceeds used in one's next virtual world adventure.⁶² Fairfield uses the analogy of a home-owner in a neighbourhood he dislikes. The simplest solution is to sell the property and move to another community.⁶³ However, there is a more contemporary example that better illustrates this problem.

If cell phone customers could not take their phone numbers with them when they transferred to another company, then customers would be locked-in to their existing providers by the high switching cost associated with having to disseminate new telephone numbers to their social networks. This would prevent some customers from changing providers regardless of their experience with the company. However, if phone numbers were recognized as belonging to customers, then individuals would be free to transfer their numbers and business to competitors. This would lead cell phone companies to offer better service in an attempt to retain customers.

The argument put forward by Fairfield works well in regards to worlds that are property-promoting. An example of this would be Second Life which allows for the open sale of goods and has an exchange rate between US currency and the in-world currency of Lindens.⁶⁴ However, Fairfield fails to acknowledge the difficulties with property-averse or closed worlds.

An example of a property-averse world is Blizzard's World of Warcraft, which is a role-playing game that prohibits the sale of virtual property.⁶⁵ A criticism of Fairfield's approach in application to such a world is the possibility of commodification, or the inflation of virtual property value through its sale which injures innocent players. However, one possible solution is offered below.

The game creator could establish an auction system that sells virtual property. Commodification could be minimized by decreasing the strengths of the player's user account before it is sold to minimize the

⁶² Fairfield, "Anti-Social Contracts", *ibid* at 471.

⁶³ *Ibid*.

⁶⁴ Benjamin Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds*, (Chicago: American Bar Association, 2008) at 4 [Duranske].

⁶⁵ Horowitz, *supra* note 3 at 445-446.

effect on innocent players. Further, the game creator could take a percentage of the sale to operate the auction. A criticism with this proposal is that the devaluation of the player's account would disregard property rights by only allowing the player to sell their virtual assets at a decreased price.

Another criticism of Fairfield's approach is that the selling of virtual property in a property-averse world will always lead to commodification and there is no true solution to avoid this outcome. If the black market trade of virtual property was to continue without punishment, such as the black market that exists for World of Warcraft,⁶⁶ innocent players would be injured. The possible repercussions for purchasing virtual property on the black market acts as a deterrent that limits commodification. For example, if a World of Warcraft player is found using a 'black market account' the game creator could terminate the account and render it valueless.⁶⁷ Strong EULAs that prevent the sale and purchase of virtual goods in property-averse worlds will limit commodification but do have other negative consequences. Commodification will be fully addressed below.

EULAs create a power imbalance between MMO game creators and players by preventing virtual property rights to pass to players. This allows for inappropriate resolution systems to be used and for players to be locked-in and suffer high switching costs. Commentators have argued that it is bad public policy to have EULAs that take property rights from players.⁶⁸ Fairfield is a strong advocate against such EULAs and argues:

To state that such EULAs presumptively knock out any emergent property rights is to beg the question: why should we permit consensual agreements that prevent formation of property rights in the first instance any more than we tolerate other consensual restraints on alienation? *The function of property law is in large part to resist contractual limitations on property use.* If the restraint on alienation limits the property in question to low-value uses, we term it an unreasonable restraint, and do not enforce it. Thus, *property law provides a rationale and a mechanism for*

⁶⁶ World of Warcraft virtual property can be sold and purchased at IGE.com <<http://www.ige.com/>>.

⁶⁷ See Blizzard Entertainment World of Warcraft "Terms of Use Agreement" (9 December 2010), online: Blizzard Entertainment <<http://us.blizzard.com>> (the World of Warcraft Terms of Use state that "[Y]ou may not sell in-game items or currency for "real" money, or exchange those items or currency for value outside of the Game" and "[M]ost account suspensions, terminations and/or deletions are the result of violations of this Terms of Use of EULA").

⁶⁸ Allen Chein, "A Practical Look at Virtual Property" (2006) 80 St John's L Rev 1059 at 1086.

*resisting the systematic expropriation of emergent online property forms by use of contract.*⁶⁹

The recognition of virtual property would lead to many positive changes. For example, it could lead to suitable resolution systems, eliminate lock-in and mitigate high switching costs.

Presumably, the newfound freedom for a player to leave his current MMO game due to the absence of lock-in, and lower switching costs, would lead creators to make changes beneficial to players in an attempt to retain them as customers. Such changes could include being more responsive to customer complaints about property loss or damage caused by the creator. For example, a group of plaintiffs filed a lawsuit in South Korea against NCsoft, the maker of Lineage, when a piece of virtual property was lost due to a program or server error.⁷⁰ Increasing the competitive pressure on MMO companies would likely lead to more effective and prompt dispute resolution between those companies and their customers.

Overall, the recognition of virtual property would benefit consumers. Further, this property recognition would decrease the power imbalance between MMO game parties and allow players to enjoy the property rights that they deserve.

B. Economic Benefits

Recognizing virtual property would be beneficial to real world economies centred around MMO games. China has taken this approach. As mentioned above, China recognized virtual property in *Arctic Ice*.⁷¹ After this decision, government initiatives were taken to help the prosecution of virtual theft.⁷² The purpose of this action was to make a secure environment in which a “competitive virtual world industry” could be developed.⁷³

The logic behind this decision was based on the premise that online subscriptions within China were expected to grow from \$159.7 million in

⁶⁹ Fairfield, “Virtual Property,” *supra* note 25 at 1083-1084 [emphasis added].

⁷⁰ Brown & Raysman, *supra* note 5 at 103.

⁷¹ Fairfield, “Virtual Property” *supra* note 25 at n 188.

⁷² *Ibid* at 1085 (the author necessarily relied on the description of the original source in the secondary literature).

⁷³ *Ibid*.

2003 to \$822.9 million 2008.⁷⁴ Further, it was estimated that in 2007, ‘gold farming’ operations in China alone employed over 100,000 people.⁷⁵ The recognition of virtual property as property and its protection through the prosecution of virtual theft creates a secure environment where an industry can flourish. This creates an opportunity not only to profit from the actions of MMO game players in China, but also throughout the world.

The Chinese model can be contrasted against the situation in South Korea. South Korea has been criticized for:

the lack of explicit property protection for virtual property [which] has resulted in endless antitrust and consumer protection litigation against environment creators on the one hand, and suits seeking injunctions against the sale of virtual property by owners of virtual property on the other.⁷⁶

This litigation creates an uncertain and difficult environment for establishing a strong industry based on virtual property in MMO games. Consequently, Fairfield suggests that these different models illustrate that the best path is to create “moderate protections for virtual property, in order to remain competitive, protect valuable allocations of resources, and limit the potential for abuse.”⁷⁷ The recognition of virtual property should lead to legal changes, whether legislative or at common law that would protect against virtual theft and assist in creating a more secure environment in which economic benefits of the MMO industry could increase.

C. Criticisms of Recognizing Virtual Property Addressed

1. *Commodification*

As described above, commodification results in the inflation of virtual property value through its sale, which injures innocent players. This injury is particularly relevant in objective-oriented games or, as Bartle calls them,

⁷⁴ *Ibid* at 1086, citing Lianfeng Wu & Jun-Fwu Chin, “China Online Gaming Market Sizing and Forecast” (2004), online: Int’l Data Group <www.idc.com> (the author necessarily relied on the description of the original source in the secondary literature).

⁷⁵ Julian Dibbell, “The Life of the Chinese Gold Farmer”, *The New York Times* (17 June 2007) online: N.Y. Times <www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html> [cited in Duranske, *supra* note 64 at 35].

⁷⁶ Fairfield, “Virtual Property,” *supra* note 25 at 1088.

⁷⁷ *Ibid* at 1089.

the “hero’s journey.”⁷⁸ This ‘heroic’ path involves starting a game where the character is weak, unequipped and lacking knowledge of its environment.⁷⁹ Through perseverance and time a character can transform from a ‘weakling’ to a ‘hero.’ However, the success of this journey can be soured if another player can achieve the same result by purchasing virtual property. Consequently, sales of virtual property lessen the value or accomplishment achieved by the honest player.

A real world implication of this phenomenon was a class action lawsuit between players of an MMO game and a third-party auction site called Internet Gaming Entertainment (IGE). In *Hernandez v. Internet Gaming Entertainment and IGE*⁸⁰ the plaintiffs alleged that IGE was acting in contravention of the EULA by selling virtual property and that this injures innocent players by devaluing their own currency and efforts.⁸¹ In addition, the plaintiffs claimed that the farming operations impacted on actual game play in that it reduced the amount of goods available and put their characters at a disadvantage unless they purchased items.⁸² This dispute was settled out of court.⁸³

The recognition of virtual property will have little impact on commodification. At present, gaming companies are unable to control the sale of virtual property on black markets, even with strong EULAs in place. It is acknowledged that the risk of account termination may serve as a strong deterrent to some players not to sell their virtual property and consequently decrease commodification. However, black markets will continue to operate whether or not virtual property is recognized. This is particularly true with the organized effort put forward by Asian countries like China as discussed above.

Also, I suggest that innocent players that achieve what Bartle calls the ‘hero’s journey’ should be satisfied with the playing experience and accomplishment of reaching their goal. Although these players may not receive the public prestige that they would ordinarily receive in these virtual worlds, they should be satisfied with accomplishing their goal without the assistance of purchased virtual property and the distinction of

⁷⁸ Richard A. Bartle, “Virtual Worldliness: What the Imaginary Asks of the Real” (2005) 49 *NYL Sch L Rev* 19 at 31 [Bartle].

⁷⁹ Duranske, *supra* note 64 at 35.

⁸⁰ Case No. 07-21403-Civ-Cohn/Snow (S.D. Fla. Aug. 29, 2007) [*Hernandez v Internet Gaming*]

⁸¹ *Ibid* (Amended Complaint at 10).

⁸² *Ibid* at 12.

⁸³ Fairfield, “Anti-Social Contracts” *supra* note 61 at 453.

being a 'purist'. Further, Fairfield simply suggests that "[c]ommodification is not a threat because the virtual objects concerned are already commodities."⁸⁴ Whether commodification is an 'all or nothing' proposition or a matter of degree it will continue to exist whether virtual property rights are recognized or not.

2. Threat to Online Communities

An additional concern involving the recognition of virtual property is the threat to online communities. This fear is based on the idea that allowing players to exit MMO games would encourage them to become disruptive and disregard the applicable codes of conduct.⁸⁵ While this is a valid concern, players should be in a virtual world of their free choosing. If a player does not value the environment, culture and rules of a given MMO, they should leave. Fairfield suggested that it would be best to allow players to leave MMO games that are uncomfortable and allow them to settle in communities that better suit them.⁸⁶

3. Increased Corporate Liability

Another criticism is that the recognition of real property could financially devastate game companies in the event of a catastrophic server failure. First, such an event occurring is highly unlikely. Second, this risk is a possibility for any technology-based company, including those outside of the MMO world such as online dating or online gambling, and affects MMO companies regardless of the state of virtual property rights. Third, it is expected that a backup system would be in place to minimize any damage. However, there is a related and likelier cause for concern.

What would happen if a gaming company wanted to close an underperforming virtual world after virtual property rights had been recognized? Even if property rights are recognized, creators will continue to employ EULAs and TOS agreements. These agreements should inform the player that investing either time or money into a game is a risky, speculative endeavour. Also, the player could be warned that if the MMO game does not maintain a certain population after a specified period of time, the creator has the right to end the game. If a land speculator can

⁸⁴ Fairfield, "Virtual Property," *supra* note 25 at 1102.

⁸⁵ *Ibid* at 1100.

⁸⁶ *Ibid* at 1102.

lose in the real world then he can also lose in the virtual world. Game companies should warn players of this risk.

Companies can limit their liability with appropriately worded exclusion clauses in their agreements. The idea of limiting one's liability for the loss or damage to another's property is well known in law. This is evident by looking at the warnings posted in parking lots⁸⁷ or the warnings printed on the back of a coat check ticket.⁸⁸

If a world were to close, the gaming company could choose from several practical solutions. First, many games are run on different servers throughout the world. Consequently, if one of the worlds were underperforming then the two worlds could be combined. Even where worlds cannot be merged due to a language barrier or lack of financial viability, there are still other solutions available.

South Korean NCsoft, maker of Lineage, closed its North American servers on June 29, 2011 because it intended to focus on its customers in South Korea, China, Taiwan and Japan.⁸⁹ The closure was due to the lack of financial viability in the North American market. NCsoft intends to compensate its North American customers through the refund of unused playing-time, an appreciation program which allows for two months of free play and the use of special items.⁹⁰

Another solution available to a closing MMO world is that the company could give a specified deadline and allow the players to sell their property; any losses could be seen as a risk of property speculation. A market solution would be to create an inter-game property exchange that would monetize the value of the property held in the soon-to-be-defunct game. This would not be a direct transfer of property from one game to another but rather another game creator could offer virtual world currency from their game as an incentive to the player to try this new world. This process is better than a basic coupon or free sign-up because the new game creator is sure that their incentives are going to true MMO game enthusiasts based on the existing virtual property they own from the prior game. This step could be taken by the original game company or a competitor that wishes to gain a whole world of new customers.

⁸⁷ See *Thornton v Shoe Lane Parking*, [1971] 1 All ER 686 (CA).

⁸⁸ See *Parker v South Eastern Rly Co* (1877), 2 CPD 416 (CA).

⁸⁹ Lineage, News Release, "NA servers closing 6/29" (22 May 2010) online: Lineage <http://www.lineage.com/news/na_servers_closing_6/29.html>.

⁹⁰ Lineage, News Release, "Rewards and Refunds" (22 May 2010) online: Lineage <http://www.lineage.com/news/lineage_refund_policy.html>.

IV. CONCLUSION

This paper explored the approaches of different legal regimes to the recognition of virtual property rights and argued that the recognition of virtual property rights is good public policy. As the combination of increasing popularity and wealth found in MMO games makes a legal conflict over virtual property rights inevitable, Canada can, and should, learn from these other legal regimes. Additionally, common criticisms about the recognition of MMO virtual property were addressed; and concerns of commodification, destruction of online groups and increased corporate liability were rebutted.

The recognition of virtual property rights would benefit game players as consumers by decreasing the power imbalance between MMO game players and creators. This recognition would include the creation of an effective resolution system and the loss of lock-in restrictions that cause high switching costs. Also, allowing customers to switch between MMO worlds by removing lock-in restrictions would encourage MMO game companies to improve their offerings in order to retain customers. Granting virtual property rights to players, as well as creating basic rules to protect these rights, would stimulate the growth of economies both virtual and real while simultaneously providing consumer protection. Overall, I hope that this paper has effectively made the case for virtual property recognition and shown that MMO games are more than just games.