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A Practical Look at Virtual Property

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NOTE

A PRACTICAL LOOK AT VIRTUAL PROPERTY

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INTRODUCTION

In June of 2005, a Chinese court in Shanghai delivered a verdict in a case whose facts might be considered fanciful, if not for the tragic and violent outcome that had come to pass. Qui Chengwei was a player in a "massively multiplayer online role playing game" ("MMORPG")[1] called Legend of Mir II ("Legend of Mir").[2] In the course of his game playing, Qui and a friend succeeded in a difficult quest, which rewarded them with a sword—the Dragon Sabre—a virtual weapon only of use to characters in the computer-generated game world of Legend of Mir.[3] They subsequently lent the weapon to Zhu Caoyuan, who, without permission, sold the Dragon Sabre in an online auction for the equivalent of $870 U.S. Dollars.[4] Qui, upset at the loss of his "property," approached the authorities to file a theft report, but he was given no remedy since Chinese laws did not recognize his virtual goods as a type of property.[5] Left without recourse, Qui ultimately sought out Zhu, the virtual thief, and the confrontation culminated with Qui stabbing Zhu to death[6] in a

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1 *See infra* Part I. A notable difference between an MMORPG and a traditional computer game—where the player interacts solely with the computer—is that an MMORPG offers a virtual world where the inhabitants are not computer-controlled. Rather, they are other human players, linked together by the Internet. *See* Aleks Krotoski, *Online: Virtual Trade Gets Real: Buying Virtual Goods on the Internet Is One Thing; Killing for it Is Quite Another*, GUARDIAN (London), June 16, 2005, at 23.

2 *See* Krotoski, *supra* note 1.

3 *See id.*; *Virtual Game, a Double-Edged Sword Hanging Over Real World in China*, XINHUA ECON. NEWS SERVICE, June 22, 2005 [hereinafter *Virtual Game*].

4 *Virtual Game*, *supra* note 3.

5 *Id.*

6 *Id.*

"real world" murder.[7] Qui was prosecuted and received a death sentence, but the sentence was suspended due to his voluntary surrender to the police shortly after committing the murder.[8]

Had Qui's initial complaint arisen in the United States, one might erroneously conclude that Zhu's wrongdoing would be directly addressed by any number of common law or statutory remedies.[9] Zhu's interference with Qui's Dragon Sabre would seem to place his action squarely within the realm of the torts of conversion[10] and trespass to chattels.[11] Alternatively, in our Information Age, there would at least be a modern statute to cover such conduct since legislatures have already acted to recognize the existence of computer-related crimes.[12] For example, the language of the federal wire fraud statute is broad enough to encompass a variety of unlawful activity accomplished by way of computers communicating over the Internet.[13] The

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[7] Please note that while the murder in the Qui case serves to emphasize dramatically the passion some people have for virtual worlds, the murder is not the focus of this paper. There appears to be no question that Qui committed an unjustifiable homicide. The more interesting issue is whether the legal system should have treated the Dragon Sabre as a legally recognized form of property, rather than merely disregarding Qui.

[8] *Id.*

[9] *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1050 (2005) ("[N]o distinct protection for property rights in virtual property has appeared in the United States . . . . ").

[10] "Conversion is an intentional *exercise of dominion or control* over a chattel which so *seriously interferes with the right of another* to control it that the actor may justly be required to pay the other the full value of the chattel." RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965) (emphasis added). "A bailee, agent, or servant who makes an unauthorized delivery of a chattel is subject to liability for conversion to his bailor, principal, or master unless he delivers to one who is entitled to immediate possession of the chattel." *Id.* § 234.

[11] "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." *Id.* § 217; *see* Mark D. Robins, *Electronic Trespass: An Old Theory in a New Context*, COMPUTER LAW., at 1 (July 1998) (explaining that trespass to chattels may be a better claim to make in response to cyber-wrongdoing because some courts require physical property to be involved in a conversion claim, whereas trespass claims have already been extended to cover intangible contacts such as smoke invading a piece of land).

[12] *See generally* Arthur J. Carter, IV & Audrey Perry, *Computer Crimes*, 41 AM. CRIM. L. REV. 313 (2004) (discussing federal and state treatment of computer crimes). There are three categories of computer crimes. "First, a computer may be the 'object' of a crime;" for example, it may be physically stolen. *Id.* at 316. Alternatively, a computer may be the "subject" of a crime, as in the case of a virus attack. *Id.* at 316–17. Finally, and most consistent with Qui's situation, a computer may be the instrument to commit other crimes. *See id.* at 318.

[13] *See* 18 U.S.C. § 1343 (2000).

problem is nevertheless somewhat more complex. Looking to the language of these laws, they speak of resolving encroachments upon the plaintiff-victim's "chattel," "rights," "property," and such. Thus, the first issue would be whether Qui had a protected property interest to begin with.

In this thought experiment, the principal question is whether a United States court would recognize Qui's underlying rights in his virtual goods. Scholars have put forth a variety of theories as to how the rights of virtual world residents should be properly delineated. Some would argue that because virtual items like the Dragon Sabre are not physical property, pure contract law should apply.[14] If Qui's rights were indeed circumscribed only by the minimal terms of his contractual agreement with the company providing Legend of Mir, however, he would probably be in a tremendously difficult situation.[15] Others would maintain that existing intellectual property law will transition into virtual worlds to protect value.[16] Part of the function of patent[17] and copyright law[18] is to protect the works of

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> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for *obtaining* money or *property* by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be *transmitted by means of wire, radio, or television communication* in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned . . . .

Id. (emphasis added); *see also* United States v. Pirello, 255 F.3d 728, 730 (9th Cir. 2001) (finding a violation of the wire fraud statute where defendant collected thousands of dollars from would-be buyers who responded to his Internet posting of sale advertisements for nonexistent computers).

[14] *See* Frances Gibb, *Real Law of Contract Applies in Fantasy Land*, TIMES (London), Feb. 19, 2005, at 42 (" '[T]he laws governing buying and selling virtual items will be the normal laws of contract.' " (quoting Anna Cook, an intellectual property specialist at the London law firm Wedlake Bell)).

[15] Suffice to say that these contracts grant users almost no rights to game content whatsoever. If that was the beginning and end of the analysis, it would provide little room for comment. *See infra* Part IV.A (discussing end user licensing agreements).

[16] *See* Timir Chheda, Note, *Intellectual Property Implications in a Virtual Reality Environment*, 4 J. MARSHALL REV. INTELL. PROP. L. 483, 484 (2005) (arguing that "in a world not grounded in physicality, intellectual property (IP) law is king") (footnote omitted).

[17] *See* 35 U.S.C.A. § 101 (2001) ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent . . . ."); 35 U.S.C.A. § 271(a) (2001) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports

inventors and authors from would-be infringers of their creations. Yet this provides no security for Qui, since he was not the creator of the Dragon Sabre. There is an inherent dichotomy in holding intellectual property rights in a work versus owning the chattel that is a manifestation of that work.[19] Thus, neither contract nor intellectual property law provide a palatable solution. A third avenue for Qui is to seek rights in the sword in a manner consistent with his actions. Implicit in Qui's filing of a theft report was a belief that the sword belonged to him, not unlike a tangible piece of personal property. Indeed, the problem with treating virtual items akin to the Dragon Sabre exclusively as intellectual property is that they are purposely designed to act like personal property, at least within the confines of the virtual world in which they exist. So, yet another group of commentators would treat the Dragon Sabre as "virtual property"[20]—computer code crafted to *act* like real world objects (i.e., intangible items) governed by common law concepts of personal property.[21]

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into the United States any patented invention during the term of the patent therefor, infringes the patent.").

[18] *See* 17 U.S.C.A. § 102(a) (2005) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

[19] In *Forward v. Thorogood*, 985 F.2d 604 (1st Cir. 1993), Mr. Forward was given demo tapes as a memento by a grateful band whom he had helped to achieve success. *Id.* at 604–05. He planned to sell the tapes for commercial release, and the band objected. *Id.* The court dismissed the argument that the "copyright ownership is based on his ownership and possession of the tapes," and agreed with the band that it never surrendered its copyright in the tape contents. *Id.*

[20] Joshua A.T. Fairfield, an associate professor at the Indiana University School of Law at Bloomington, and noted computer law scholar, attributes three behaviors to property in virtual worlds that make them more like tangible physical property: rivalrousness, persistence, and interconnectivity. "If I hold a pen, I have it and you don't. Rivalrousness. If I put the pen down and leave the room, it is still there. That is persistence. And finally, you can all interact with the pen—with my permission, you can experience it. That is interconnectivity." *See* Fairfield, *supra* note 9, at 1054. This is in contrast to the typical single-user computer program. Rivalrousness does not exist because copies of such program could be made and distributed to many—although it would likely be a violation of intellectual property laws. When you turn off the computer and go away, the program no longer runs; it is not persistent. Finally, a single-user program is not interconnected: no one else may experience it at any one time but you.

[21] *See id.* at 1058; *see also id.* at 1064 ("If an intangible object is rivalrous, there is no reason to treat the ownership of the property purely as a matter of intellectual property.").

This paper explores how a United States court would resolve Qui's property claim had the events actually transpired on our shores. Would he be able to establish rights in the sword and prevail? This article submits that he would not, though it is by no means a settled question. Given the popularity of MMORPGs,[22] it is reasonable to conclude that a dispute involving virtual items is just around the corner.[23] Part I provides an elementary overview of MMORPGs. Part II addresses a question lingering in most readers' minds: why tackle this issue at all if it

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[22] *See 'World of Warcraft' Sets New Milestone with 1.5 Million Subscribers Worldwide; Blizzard's MMORPG Achieves Unprecedented Global Success*, BUS. WIRE, Mar. 17, 2005 (lauding World of Warcraft, a U.S.-based MMORPG, for achieving a benchmark in growth).

[23] Legal issues are not novel in the world of MMORPGs. The American MMORPG Ultima Online reportedly is sued between eight and twelve times a year in small claims court. *See* Dave "Fargo" Kosak, *Ten Reasons You Don't Want To Run a Massively Multiplayer Online Game*, GAMESPY.COM, Mar. 7, 2003, http://archive.gamespy.com/gdc2003/top10mmog/index2.shtml. If the popularity of MMORPGs continues to rise in the U.S. to the extent it has for example, in South Korea, where they are "as mad about gaming as the U.K. is about football," virtual property issues will surely be litigated. *See* Mark Ward, *Does Virtual Crime Need Real Justice?*, BBC NEWS ONLINE, Sept. 29, 2003, http://news.bbc.co.uk/1/hi/technology/3138456.stm. In the first six months of 2003, South Korea had 22,000 reported cybercrimes related to online gaming. *Id.*

A notable incident involving virtual property in the context of MMORPGs arose in the U.S., but never made it to trial. BlackSnow Interactive, a U.S. company, ran a lucrative business selling characters and virtual items acquired in the MMORPG Dark Age of Camelot. Julian Dibbell, *Black Snow Interactive and the World's First Virtual Sweat Shop*, JULIANDIBBELL.COM, http://www.juliandibbell.com/texts/blacksnow.html (last visited Mar. 6, 2006). Mythic, the game's developers, learned of this activity and shut down BlackSnow's accounts, claiming a violation of their intellectual property rights. *Id.* BlackSnow responded with a lawsuit against Mythic. *Id.* Later, a summary judgment and fine imposed on BlackSnow due to a previous shady business venture caused the company's principals to "skip town," leaving their attorney fees in the Mythic case unpaid. *Id.* As a result, their lawyers dropped the case against Mythic, and the answer to the question of who owns virtual items acquired in an MMORPG—the game company or the player—was never answered. *Id.* In a twist that made the case even more surreal, it was later learned that BlackSnow had acquired its sale items by way of a "virtual sweatshop." *Id.* It had established a facility in Tijuana, Mexico, hiring local workers at "piecework" wages to play "Dark Age of Camelot" around the clock in order to acquire valuable virtual loot and goods. *Id.; see also* Michele Mandel, *Money for Nothing; Michele Mandel Reports Big Game Hunters are Getting Rich in the Cyber Jungle*, TORONTO SUN, Mar. 13, 2005, at 36 (discussing the virtual sweatshop).

Who can say when such a case will make it to court? Perhaps the seeds have already been planted. *See SPJ 1201 Beat*, STEVENS POINT J., Dec. 1, 2004, http://www.wisinfo.com/journal/spjrecords/282048991323880.shtml (seeking redress, a Wisconsin player of the MMORPG Final Fantasy filed a claim of theft alleging he was swindled out of a virtual item).

is "only a game?" Part III analyzes the Qui case in light of existing case law in analogous fields. Finally, Part IV scrutinizes the law of End User License Agreements ("EULAs"), the contracts that users agree to abide by as conditions of using most software, including MMORPGs.

I. WHAT ARE MMORPGS?

Anyone with a passing familiarity with pop culture can probably trace the milestones of computer game development, from the single-user arcade experience of "Pacman" to later games like "Doom," which featured the innovative ability of allowing multiple users to engage in simultaneous combat against one another over a computer network. Today's MMORPGs—employing very sophisticated virtual worlds for players to explore—are still a relatively novel experience to many. These virtual worlds are computer simulated environments that offer many features of the real world: three-dimensional structures, topography, physical laws, and mechanisms allowing residents to interact with the world, such as locomotion and communication with other residents.[24] The "massively multiplayer online" description is due to the fact that MMORPGs can be host to thousands of players, and even millions in the most popular games, anywhere in the world. Since MMORPGs serve a worldwide audience, they must be available twenty-four hours a day, and the virtual worlds are constantly changing due to the interaction of their residents.[25] MMORPGs are typically commercial ventures, with players paying a subscription fee to the game company for access.[26] The game company's broad responsibility, in turn, is to manage the system and to provide interesting content for the players' consumption.[27]

A virtual world user is embodied by an "avatar"—a three-dimensional graphical representation of himself—which is the visage that other denizens of the virtual world see during player-

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[24] *See* Wikipedia: The Free Encyclopedia, Virtual World, http://en.wikipedia.org/wiki/Virtual_world (last visited Mar. 6, 2006).

[25] *See id.* The virtual worlds are "persistent." They keep changing and evolving even while a player sleeps.

[26] *See* Wikipedia: The Free Encyclopedia, MMORPG, http://en.wikipedia.org/wiki/Mmorpg (last visited Mar. 6, 2006).

[27] *See id.*

to-player interaction.[28] The avatar also facilitates the "role playing" aspect of MMORPGs.[29] Role playing entails a player building a background for himself in the virtual world.[30] This can include taking on a vocation,[31] interacting with the online community within the MMORPG, or developing a reputation through one's actions.[32]

The synergy of the role playing experience in conjunction with the potential to interact with thousands of avatars controlled by people worldwide can make for a compelling experience. From a competitive aspect, many prefer playing against human opponents, because they are more resourceful and masterful than computer-controlled adversaries in traditional games.[33] For others, the MMORPG environment itself is the attraction, providing an escape from the real world.[34] Many find that the multiplayer environment helps to reinforce existing friendships as well as to provide the chance to forge new ones.[35] Likewise, engaging in group activities and quests fosters a sense of teamwork and collective achievement that is not available in single-user computer games.[36] Achievement is an important end unto itself in playing MMORPGs. Achieving goals within the game empowers the player's avatar[37] by making it stronger and

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[28] *See* Wikipedia: The Free Encyclopedia, Virtual World, *supra* note 24.

[29] Note that since an avatar is a computer image, there is no constraint that a player's avatar actually bear any physical similarity to the real-life gamer. Physical beauty, gender, race, and even species are all malleable.

[30] *See* Wikipedia: The Free Encyclopedia, MMORPG, *supra* note 26.

[31] *See, e.g.*, World of Warcraft Community Site, Classes, http://www.worldofwarcraft.com/info/classes/ (last visited Mar. 6, 2006) [hereinafter World of Warcraft] (describing vocations available to characters in the game such as priest, hunter, or warrior). World of Warcraft happens to be a fantasy-oriented MMORPG, populated by knights, mages, and such, but this is not the steadfast rule. Thematically, an MMORPG can invoke any genre imaginable.

[32] *Cf.* Wikipedia: The Free Encyclopedia, Computer Role-Playing Game, http://en.wikipedia.org/wiki/Computer_role-playing_game (last visited Mar. 12, 2006). For example, players who are frequently uncivil to others are referred to by the pejorative term "griefer." Wikipedia: The Free Encyclopedia, Griefer, http://en.wikipedia.org/wiki/Griefer (last visited Mar. 12, 2006).

[33] *See* Nick Yee, *Why Do You Play?*, THE DAEDALUS PROJECT: THE PSYCHOLOGY OF MMORPGS, April 15, 2004, http://www.nickyee.com/daedalus/archives/000777.php?page=1 (quoting various MMORPG players).

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] Many MMORPGs give the player what amounts to a "hero's journey." Dr. Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 30 (2004). Goals are provided so that players feel that they

more skilled,[38] which in turns allows the avatar to achieve greater goals. The cycle continues; thus, the avatar not only becomes stronger, but the player feels a sense of empowerment.

Closely linked to the user's need for achievement is the concept of "property," a feature of immense popularity and invariably one of the basic elements of the gaming experience.[39] In short, MMORPGs featuring accumulation of property have succeeded, at least in part, because "people enjoy fiddling with virtual property enough to play games that feature it."[40]

Having explored the player's perspective, what then are the concerns of the game company's administrators? "Virtual worlds are continually evolving. New content is added, old content is updated, exploits are curtailed, bugs are removed, and gameplay is rebalanced."[41] Put succinctly, in the world of MMORPGs, the administrators of games are necessarily "God" for all practical purposes, able to control every aspect of the game world to the point of deleting avatars in order to maintain a balanced play area.[42]

II. ISN'T IT JUST A GAME?

A persisting doubt in the mind of some readers might be that fantasy objects in MMORPGs—swords, shields, armor, and the like—are too trivial to receive any legal adjudication as to their status. Despite the perception that MMORPGs are only games, the commerce of exchanging real world money for virtual objects, which have utility only in the context of a virtual world, is enormous.[43] Such transactions have an aggregate value worth

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are advancing. *Id.* at 30–31. Thus a mechanism is necessary to differentiate between avatars at varying points of achievement. *Id.* at 31. Metrics exist that establish the "level" of an avatar, which ideally should indicate the status and skill of the player. *Id.*

[38] *See* Yee, *supra* note 33 (quoting various MMORPG players).

[39] *See* James Grimmelmann, Note, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147, 148–49 (2004) ("If one had to choose a single canonical feature of multiplayer online games, there would be no contest. Property is invariably among the first features implemented in any game . . . .").

[40] *See id.* at 149.

[41] Bartle, *supra* note 37, at 27.

[42] *Cf. id.* at 29–30 ("Any alteration that gives something to one group of players will *by definition* take something away from another group. The decisions are hard . . . but ultimately they are for the designer alone to make.").

[43] An economist once calculated the wealth being produced by Norrath, the name of the virtual world in the Everquest MMORPG, by tallying the numbers from player auctions. *See* Ania Lichtarowicz, *Virtual Kingdom Richer than Bulgaria,* BBC

hundreds of millions of real world dollars annually.[44] A number of the participants in the business, surprisingly, might be best termed investors or speculators. Case in point, virtual real estate can be a big-ticket item in MMORPGs. The most celebrated virtual real estate transaction on record was a £13,700 purchase of a virtual island in the MMORPG Project Entropia, realized by an anonymous Australian player;[45] he hopes to turn a profit by renting out the land to other players, as well as by selling hunting and forestry rights.[46] As might be expected, however, the lucrative market for virtual items exists mostly to serve run of the mill MMORPG players.[47]

As discussed above, advancing in strength and status is a typical feature of MMORPGs.[48] Powerful virtual paraphernalia with which a player may equip his avatar can go far toward achieving these ends. A player with more real world money than time or willpower to build his avatar from the bottom up might make a cost benefit analysis. A rational choice, after completing such an analysis, could be to use real world currency in order either to buy virtual property as a means of enhacement, or to purchase the avatar of an experienced player.[49] Accordingly, virtual property transactions allow "experienced gamers . . . to

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NEWS ONLINE, Oct. 12, 2002, http://news.bbc.co.uk/2/hi/science/nature/1899420.stm. Per capita, the Everquest players were producing $2,266 a year. *Id.* That would place Norrath slightly above Bulgaria in terms of gross national product per capita at the time of the study. *Id.* Put another way, that makes Norrath the 77th richest country in the world. *Id.*

[44] *See* IGE.com, Our Business, http://www.ige.com/corporate.aspx?id=business &lang=en (last visited Mar. 12, 2006) (referencing estimates that the 2005 market for virtual goods was approaching $900 million); Mandel, *supra* note 23 (estimating that $880 million a year is being traded worldwide in game items, currency, and characters).

[45] *See* Andrew Murray-Watson, *Real Profits from Virtual Worlds: The Landscapes May Be Imaginary but Players of Computer Games Are Starting To Trade in Real Money, Says Andrew Murray-Watson*, SUNDAY TELEGRAPH (London), Jan. 9, 2005, at 03 (stressing this wasn't the act of an "obsessed gamer," but rather was the act of someone who was as "brutally commercial as any property investor in the real world").

[46] *Id.*

[47] *Id.*

[48] *See supra* Part I.

[49] *See* Mandel, *supra* note 23 (discussing how numerous players are now selling their bounty, and even their characters, for thousands of dollars to those without the time or will to do the "virtual grunt work" themselves).

cash in on years of hard work,"[50] but it is not surprising, then, that when "[h]ard-core players invest so much time and money into building a powerful online character . . . loss or theft . . . prompts some to take violent action."[51]

Despite the players' interest in the trade of virtual property, for the most part it is not sanctioned by the gaming companies providing MMORPGs.[52] Game developers would argue that players who effectively buy status noticeably detract from the gameplay value of the MMORPG.[53] If part of the draw of MMORPGs is a model of achievement and growth,[54] then any notion of status—i.e., my avatar is "better" than yours—is nullified by such purchases. This is because it is impossible to maintain a true status-hierarchy when an inexperienced newcomer can simply start playing with a herculean, purchased avatar.[55]

Still, a thriving grey market exists to satisfy this hunger for virtual items. Consumers, however, must bear the risk of shady dealing. Many web sites have sprung up to accommodate this secondary market for virtual items bought and sold outside of the

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[50] . . . *And the Gamers Spending Real Money in a Fantasy World*, IRISH INDEPENDENT, Mar. 2, 2005.

[51] Jonathan Watts, *Harsh Reality of China's Fantasy Craze: Online Games Blamed for Thefts, Suicides and Murders*, GUARDIAN (London), Mar. 31, 2005, at 15.

[52] For example, the World of Warcraft licensing agreement provides that: "You [the player] agree that you shall not, under any circumstances . . . exploit the Game or any of its parts, including without limitation the Game Client, for any commercial purpose . . . ." World of Warcraft Community Site, World of Warcraft End User License Agreement, http://www.worldofwarcraft.com/legal/eula.html (last updated June 1, 2006) [hereinafter World of Warcraft License Agreement].

[53] The player who artificially advances himself loses the gaming experience; after all, the fun of playing the game is doing things. An officer at Sony described it quite colorfully:

> The economies in the real world are designed to grow and progress toward an improved standard of living so that eventually you don't have to slay dragons for food—you go to a supermarket and get dragon burgers . . . .
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> We don't want people [in the MMORPG] to get to a point where they just go out for dragon burgers. . . . That would not make for an interesting game.

Mike Musgrove, *Virtual Games Create a Real World Market*, WASH. POST, Sept. 17, 2005, at A01 (quoting Ralph Koster, chief creative officer at Sony Online Entertainment).

[54] *See supra* Part I (discussing the sense of achievement and strength often associated with playing MMORPGs).

[55] *See* Bartle, *supra* note 37, at 32–33 (describing the importance of maintaining the "integrity of the level hierarchy").

game space.[56] Scams are known to occur,[57] and there is no "virtual equivalent" of the Securities and Exchange Commission to regulate the trading of MMORPG goods and services.[58]

Considering the high volume of virtual property commerce, the ability of virtual property transactions in the aggregate to affect real world economics—by both the weight of the money changing hands and the opportunity for abuse—gives them significance above and beyond their importance in the game context. Thus, a case like Qui's deserves a thorough analysis.

III. PRECEDENTS IN ANALOGOUS FIELDS

Since virtual property—in the context of virtual worlds—is still a novel concept in this country, a court faced with Qui's case might find it helpful to examine existing case law in similar fields, including professional sports and domain name litigation.

A. Professional Sports

An understandable analogy to MMORPGs is found within professional sports because, like in an MMORPG, professional

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[56] *See, e.g.*, DAoC Treasures—Platinum for Dark Ages of Camelot, http://www.gamingtreasures.com (last visited Mar. 12, 2006) (trading for goods within the MMORPG Dark Ages of Camelot); IGE.com, Our Business, *supra* note 44 (purporting to operate "the world's largest secure network of buying and selling sites for massively multiplayer online game . . . virtual currency and assets on the Internet"); Itembay, http://www.itembay.com (last visited Mar. 9, 2006) (representing a Korean trading web site); The MMORPG Exchange, http://www.themmorpgexchange.com (last visited Mar. 8, 2006) (representing a virtual currency exchange where users convert real and MMORPG currencies). eBay also accomodates the trading of virtual goods. eBay, http://video-games.listings.ebay.com/Internet-Games_W0QWfclZ3QQfromZR11QQsacatZ1654QQsocmdZListingItemList (last visited July 23, 2006).

[57] Consider this fascinating example: after the web site acts as a facilitator to bring the trading parties together, real world currency first changes hands between the parties, via Paypal for example. *See, e.g.*, DAoC Treasures—Platinum for Dark Ages of Camelot, Payment Options, http://www.gamingtreasures.com/payment/ (last visited Mar. 12, 2006) (opining that "PayPal is perhaps the quickest and easiest way" to pay for a purchased item). To exchange the virtual item, the parties' avatars must meet within the MMORPG "where the hand over (no hands are actually involved of course) takes place." Robert X. Cringely, *Pay Acquaintance: When It Comes To Selling Virtual Property, PayPal Isn't Always Your Pal*, PBS.org: I, Cringely, May 6, 2004, http://www.pbs.org/cringely/pulpit/pulpit20040506.html. The unscrupulous buyer can later retract the payment claiming the exchange did not occur. *Id.* Without evidence of the transfer—like a paper receipt—PayPal retrieves the money from the seller. *Id.*

[58] *See* Murray-Watson, *supra* note 45.

athletes are acting within the context of what is popularly considered a game, or at least not "real life." In *Hackbart v. Cincinnati Bengals, Inc.*,[59] the Tenth Circuit considered whether an intentional blow struck in the context of a football game gave rise to tort liability.[60] Hackbart was a professional football player for the Denver Broncos.[61] During an in-game play against the Cincinnati Bengals, Hackbart blocked Charles Clark—a Bengals player—by throwing his body in front of him.[62] Hackbart remained kneeling on the ground.[63] Clark, infuriated by the block as well as an interception during the preceding play, struck Hackbart with his right forearm with enough force to cause a severe neck fracture.[64] In deciding Hackbart's tort claim, the district court found in favor of the defendant, reasoning that football is not so much a game as a "species of warfare[,] and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable."[65] The United States Court of Appeals for the Tenth Circuit reversed and remanded the case, finding that "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."[66] In fact, the rules of the game specifically prohibited the type of misconduct in which Clark engaged.[67]

In *PGA Tour, Inc. v. Martin*,[68] another case in which game play was in discord with the rule of law, the United States Supreme Court resolved a conflict between the Americans with Disabilities Act and the rules of professional golf.[69] Casey Martin was a talented golfer, afflicted since birth with Klippel-Trenaunay-Weber Syndrome.[70] The disease, a degenerative circulatory disorder, atrophied his right leg and resulted in his inability to walk an eighteen-hole golf course.[71] The "Conditions

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[59] 601 F.2d 516 (10th Cir. 1979).
[60] *Id.* at 518.
[61] *Id.* at 519.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 518–19.
[66] *Id.* at 520, 527.
[67] *Id.* at 521.
[68] 532 U.S. 661 (2001).
[69] *Id.* at 664–65.
[70] *Id.* at 668.
[71] *Id.*

of Competition and Local Rules," are a set of bylaws that apply to PGA professional tours, and they require all players to walk the course.[72] Martin's request to use a golf cart during a tournament was denied, and he filed suit under the Americans with Disabilities Act.[73] The Court performed a painstaking analysis of the rules of golf in order to resolve whether a departure as requested by Martin "might alter such an essential aspect of the game of golf [so] that it would be unacceptable even if it affected all competitors equally."[74] Ultimately, the court affirmed a decision in favor of Martin, stating, "we have no doubt that allowing Martin to use a golf cart would not fundamentally alter the nature of petitioner's tournaments."[75]

It is difficult to synthesize a coherent rule from these cases. *Hackbart* stands for the proposition that the nature of a game is not a shield for tortious conduct. The *Martin* opinion, considering its logical converse, supports the notion that had Martin's request altered an essential aspect of golf, then no accommodation of his needs would have been granted, despite the Americans with Disabilities Act. The natural conclusion is that game-related transgressions of law will not be analyzed in a vacuum. The rules of the game were deemed valid considerations by the courts in both cases.

Our hypothetical court could first consider the rules of an MMORPG to determine the threshold issue of whether wrongdoing in fact occurred, before deciding any underlying property issues. Like other games, the virtual worlds of MMORPGs are governed by rules. "The rules are written (embodied in the code) and unwritten (embodied in the expectations of the players). People can deny the existence of unwritten rules, but they cannot deny the existence of coded rules."[76] We have seen how, in the interest of role playing, a player has considerable latitude in crafting his position within an MMORPG.[77] There is no requirement that an avatar be a hero or a villain. An avatar can be anything, from the knight errant to the unprincipled rogue.[78] Depending upon the nature of the

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[72] *Id.* at 666.
[73] *Id.* at 664–65, 669.
[74] *Id.* at 682.
[75] *Id.* at 690.
[76] Bartle, *supra* note 37, at 26.
[77] *See supra* Part I.
[78] *See* World of Warcraft, *supra* note 31.

virtual world, thievery and trickery may well be a completely acceptable form of behavior in which an avatar may engage.[79]

> Generally speaking, the destruction of virtual property or the killing of one avatar by another raises no problem that would require special state regulation, as long as it occurs within the rules of the game. The ability to destroy or steal another's virtual possessions, or exterminate another character, is part of what it means to participate in the medium.[80]

The difficulty arises because the boundary between the real and the game worlds is not discreet. Events in the virtual world can trickle into the real world, as it did for Mr. Qui. Though the professional sports precedents may yet be useful to a court adjudicating certain game-related virtual property disputes, in a sense both *Hackbart* and *Martin* are distinguishable from Qui. In those two cases, the issues were confined to events within the field of play. The facts are not clear, but it appears that Zhu did not simply use a "steal" capability[81] provided by the game's

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[79] *See* F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 310 (2004) (quoting Ultima Online Support, Harassment Policy and Reporting, http://support.uo.com/harass.html (last visited Mar. 7, 2006)) ("[A]nything considered a valid play style in Ultima Online is not considered harassment.") (internal quotation marks omitted). An avatar who steals from other players, however, will be marked as a "criminal." *See* Ultima Online, Britannian Etiquette, http://www.uo.com/newplayer/newplay_2.html (last visited Mar. 7, 2006).

[80] Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 72 (2004).

[81] In some games, nefarious exploits making unorthodox use of in-game mechanics have been the object of grudging praise. In the MMORPG EVE Online—a science fiction-oriented game focusing on space combat—players role-playing as pirates stole an entire virtual dreadnought warship. *Grand Theft Dreadnought: EVE Online Crimeplay Rolls On*, SECOND LIFE HERALD, Nov. 6, 2005, http://www.dragonscoveherald.com/blog/index.php?p=1008 [hereinafter *Grand Theft Dreadnought*]. The scale of this operation has been compared to purloining the "Death Star" of Star Wars fame, *Another Massive Heist in EVE Online*, POOR MOJO NEWSWIRE, http://www.poormojo.org/pmjadaily/archives/005433.html (last visited Mar. 7, 2006) [hereinafter *Another Massive Heist*], or, in real world terms, pilfering an entire aircraft carrier, *Grand Theft Dreadnought*, *supra*. All virtual warships in EVE Online feature an automatic anti-collision system to prevent them from inflicting damage on each other in congested environments. *Grand Theft Dreadnought*, *supra*. With the help of a spy, the pirates waited until the target battleship was unoccupied by any enemy personnel. *Another Massive Heist*, *supra*. Then pirate ships maneuvered close enough to the target to bump it out of its dock with their anti-collision shields. *Id.*; *Grand Theft Dreadnought*, *supra*. Pirates landed their own pilot aboard the ship and proceeded to fly it away. *Another Massive Heist*, *supra*; *Grand Theft Dreadnought*, *supra*. All the while, the pirates had another group staging a diversion to draw attention away from the heist. *Another Massive Heist*, *supra*; *Grand Theft Dreadnought*, *supra*. The dreadnought was worth

designers. Thus, Zhu's motivation was not to role play a thief in the context of the game. His acts broke the boundary between the virtual and real worlds, and Qui justifiably deserves consideration for a real world legal remedy.

B. Kremen v. Cohen[82]*: Domain Name Litigation*

With the advent of the Internet, courts have considered other cases of intangible property arising from cyberspace, but perhaps none quite as uncanny as the Qui case; *Kremen v. Cohen*, however, comes very close. In 1994, Gary Kremen foresaw the commercial potential of the domain name "sex.com," and registered the name to his business—Online Classifieds—through Network Solutions, a domain name registrar.[83] Stephen Cohen, a con man of "boundless resource and bounded integrity," also saw the business prospects inherent in sex.com, and embarked on a mission to swindle it from Kremen.[84] Cohen sent Network Solutions a letter he claimed to have received from Online Classifieds, which declared that Online Classifieds abandoned its interest in sex.com and authorized its transfer to Cohen's corporation.[85] Network Solutions accepted the letter at face value and transferred sex.com to Cohen, who subsequently turned it into an online pornography empire.[86] Kremen began a struggle to regain the domain name and his lost profits.[87] He was later awarded a favorable judgment in federal district

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about two to five billion units of in-game currency. *Grand Theft Dreadnought*, *supra*. The administrators of EVE Online have given their tacit approval by allowing the feat to stand unpunished. *Id.* The true brilliance of the operation, in the author's opinion, was the bandits' employment of an emergent property of EVE Online, using the anti-collision system in a new and interesting way not contemplated by the designers.

An even more celebrated heist in EVE Online netted $16,500 worth of virtual goods, when the assets of an entire virtual corporation were looted in conjunction with the assassination of its CEO in an in-game contract killing of the CEO player's avatar. *See* Mark Wallace, *Simply Amazing*, Walkerings, Aug. 5, 2005, http://www.walkering.com/walkerings/2005/08/simply_amazing.html.

[82] 337 F.3d 1024 (9th Cir. 2003).

[83] *Id.* at 1026.

[84] *Id.*

[85] *Id.* at 1026–27.

[86] *Id.* at 1027. The transfer occurred despite the "transparent claim" in the letter that Online Classifieds had no Internet connection, which was a ploy to explain why the fake letter was being communicated via Cohen. *Id.* at 1026–27.

[87] *Id.* at 1027.

court,[88] but Cohen's assets could not be found.[89] Unable to collect against Cohen, Kremen sued Network Solutions instead, claiming, among other things, that Network Solutions had committed the tort of conversion by mishandling the domain name.[90]

It is worth briefly mentioning that the Second Restatement of Torts takes a rather strict view of the conversion of intangible properties, requiring that some physical document represent the intangible property right—that is, there must be a document in which intangible rights are merged.[91] Different jurisdictions follow this suggestion to different degrees. There are three major views on the subject. "Jurisdictions falling into the first category do not expressly require merger in order to demonstrate right of possession."[92] The jurisdictions in the second category embrace the merger requirement to varying degrees,[93] but "none have gone to the lengths of the Ninth Circuit[, which stated in *Kremen*] that electronic documents will suffice for the merger doctrine."[94] The third category represents jurisdictions that offer no tort of conversion for intangible property, entirely relying on other remedies such as intellectual property laws.[95] The merger issue would doom a virtual property claim like Qui's if confined to a jurisdiction adhering to the strictest view of intangible property. For the purposes of this Note, therefore, we will presume that Qui satisfies all merger requirements.

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[88] The court ordered sex.com and Cohen's profits to be returned to Kremen, and awarded $40 million in compensatory and $25 million in punitive damages. *Id.* at 1027.

[89] Cohen wired his money to offshore accounts, stripped his real estate of all fixtures, and left the country. *Id.* Kremen even resorted to posting a bounty on the sex.com web site for anyone who would bring Cohen to justice. *Id.* The bounty hunter approach did not work. *Id.*

[90] *Id.* at 1027–28.

[91] The Second Restatement of Torts states:

> (1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.
>
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.

RESTATEMENT (SECOND) OF TORTS § 242 (1965).

[92] Courtney W. Franks, Comment, *Analyzing the Urge To Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of* Kremen v. Cohen, 42 HOUS. L. REV. 489, 517 (2005) (footnote omitted).

[93] *See id.* at 518–21 (discussing four subcategories).

[94] *Id.* at 519.

[95] *Id.* at 522.

The *Kremen* court applied a three-pronged test to determine whether a property right exists in an intangible object.[96] " 'First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity.' "[97] The domain name, sex.com, satisfied this test.[98]

Would a property right exist in Qui's Dragon Sabre under the test employed in *Kremen*? In the context of the virtual world, the sword would have a definite look and feel and other attributes given to it by its programmer. Implicitly, Qui, through his avatar, would have to possess the Dragon Sabre in the virtual world in order to wield it as a weapon. Also mentioned as a sub-factor by the *Kremen* court, the Dragon Sabre—like sex.com—was a valuable object that could be bought and sold.[99] Based on the available facts, Qui acquired the sword legitimately through customary channels in the MMORPG.[100] He completed a quest and was rewarded with the sword, which he retrieved and kept as his own.

It might appear clear-cut that Qui had a property interest in the Dragon Sabre, but there are logical and legal obstacles to this conclusion. Recall that administrators of MMORPGs have absolute control over the activities that transpire within them.[101] To elaborate further, part of the reason administrators have this control is to protect the "game conceit": "When people play games, they agree to abide temporarily by a set of rules which

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[96] *See* Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003).

[97] *Id.* (quoting G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 903 (9th Cir. 1992) (footnotes omitted)).

[98]

> Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars . . . and they are now even subject to in rem jurisdiction . . . .
>
> Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's.

Id. (citations omitted).

[99] *See id.*

[100] *See supra* Introduction.

[101] *See supra* Part I.

limits their behavior (i.e., restricts their freedom), in exchange for which they gain whatever benefits the game offers."[102] From time to time, an administrator may have to discipline players who have stepped outside the boundaries of play. Another justification for an administrator's power is to foster the continued evolution of the virtual world.[103] These dual responsibilities, in combination, force game administrators to make sometimes difficult and unpopular choices.[104] "Virtual world administrators cannot please all their players all the time . . . . While this design principle is respected, . . . the virtual world can continue to evolve and improve. Anything that served to limit this process would limit the virtual world's evolution."[105]

An administrator's omnipotence extends to all aspects of virtual items, as well.[106] Not only can an administrator subordinate any property interest a player might have, but the inherent nature of virtual worlds as computer-generated environments makes it difficult to classify their contents as possessable. Anyone who has owned a computer can attest to the fact that computers, like all machines, are not one hundred percent reliable. Disasters can occur and data can be lost despite the most diligent backup strategy.[107]

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[102] *See* Bartle, *supra* note 37, at 23.

[103] *See supra* Part I.

[104] A game developer might assert that an egregious way players breach the game conceit is by purchasing virtual goods or avatars rather than by advancing in the normal manner prescribed by the MMORPG. *See* Bartle, *supra* note 37, at 35. Accordingly, a game administrator should be completely within his rights to exterminate a traded avatar simply for existing. *Id.*

[105] *Id.* at 30.

[106] An example given by Dr. Richard A. Bartle is illustrative. Suppose you buy for your avatar a "Sword of Shininess" for $500. *Id.* at 37. The next day, the administrator could legitimately mint a thousand new Swords of Shininess in the interest of balanced gameplay. *Id.* The decrease in the value of your sword would immediately be felt. *Id.* Worse yet, the administrator could, alternatively, simply drop all the Swords of Shininess from the MMORPG under the same reasoning. *Id.* Then your $500 would be gone in an instant. *Id.*

[107] There are, of course, valid business reasons why an MMORPG company would not want players to retain any rights in their virtual possessions. Consider a hypothetical: on day one, all is well in our MMORPG, World of Happiness. On day two, likewise, another day of game playing concludes without incident. On day three, a catastrophic, unanticipated computer breakdown occurs that requires a temporary shutdown of World of Happiness. Data has been lost, and the best the technicians can do is to restart World of Happiness, but with a backup of the state of the world on day two. What happens to all the virtual property transactions that occurred during the course of day two? A game company would want no part in the

As a matter of common sense and logic, MMORPGs are such dynamic and ephemeral environments that it is by no means certain that any player can truly hold a stake in virtual properties. When virtual goods can be taken away in an instant or lost at the accidental flick of a power switch, it is debatable whether any property interest is more than strictly illusory.[108]

There are also legal obstacles to granting Qui any property rights in the Dragon Sabre. Consider the End User Licensing Agreement ("EULA") for World of Warcraft as fairly indicative of the terms players must agree to before participating in most MMORPGs:

> All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by [the licensor].[109]

If explicitly retaining ownership of all content in the game was not enough, the game company can even further limit the player's rights in the agreement:

> [The company providing World of Warcraft] may change, modify, suspend, or discontinue any aspect of the Game at any time. [It] may also impose limits on certain features or restrict your access to parts or all of the Game without notice or liability. *You have no interest, monetary or otherwise, in any feature or content contained in the Game.*[110]

Finally, an agreement may feature a clause best described as an "end of the world" provision, which contemplates shielding the company from liability in the event of any disruption to the virtual world:

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recriminations and cross-recriminations of players seeking redress of protected property interests.

[108] Joshua Fairfield would argue that the level of control required in an MMORPG and interests in virtual property can be reconciled. *See* Fairfield, *supra* note 9, at 1097–98. That we own property subject to risk is not a new concept. *Id.* at 1098. For example, a bankruptcy of a corporation deprives a stockholder of all value, yet no one questions whether a stock is property. *Id.*

[109] World of Warcraft License Agreement, *supra* note 52.

[110] *Id.* (emphasis added).

> Further, [the licensor shall not be] liable in any way for any loss or damage to player characters, virtual goods (e.g., armor, potions, weapons, etc.) or currency, accounts, statistics, or user standings, ranks, or profile information stored by the game and/or the service. [The licensor] shall not be responsible for any interruptions of service, including without limitation ISP disruptions, software or hardware failures, or any other event which may result in a loss of data or disruption of service.[111]

In such a climate, it is not certain that players acquire any rights to claim even possession of items in most MMORPGs pursuant to the plain language of average EULAs.

C. *What Is the Smallest Change in the Facts that Would Let Qui Prevail When Applying* Kremen*?*

Clearly, a property dispute involving a virtual world that openly holds itself out as a gaming environment is not an optimal test case for the establishment of virtual property rights. Virtual worlds devoted to gaming, however, are not the only choices available. Suppose Qui's dispute arose in one of these alternate environments. If courts took into account the rich array of activities besides gaming that take place in these worlds, it could well be compelling enough to cut against the assessment that virtual game items should not be recognized. Consider as an example the virtual world known as "Second Life."[112] It is perhaps more apt to call Second Life a social experiment than a game. "Games typically have a goal, and Second Life does not. At least, no more of a goal than real life, or RL, as it's called inside the world."[113] "Second Life is not about armed conquest, explosions or amassing point totals. It simply is about living in a different place, a place where virtually nothing is impossible."[114] Residents of Second Life engage in a wide range of activities that mirror real world pursuits, which most ordinary people would probably consider both sensible and laudable.

Residents routinely contribute and hold fundraising events for real world charities they support. They have participated in the American Cancer Society's "Relay for Life," raising real world

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[111] *Id.*

[112] *See* Second Life, What Is Second Life?, http://secondlife.com/whatis/ (last visited Mar. 12, 2006).

[113] *See* Joe Stafford, *Virtual World Without Limitations*, COX NEWS SERVICE, Jan. 22, 2005.

[114] *Id.*

donations by allowing avatars to run on a virtual track built for this purpose.[115] Following the hardship and carnage in the wake of Hurricane Katrina, Second Life has raised thousands of dollars for the victims, including the proceeds of a celebrity date auction worth $2500.[116] The dates were, of course, virtual dates within the world of Second Life.[117]

Though it is possible to use various web sites as "ATMs"[118] to exchange real world cash into Linden dollars, the currency of Second Life (named after Linden Lab, developer of Second Life),[119] residents can take on jobs within Second Life to generate Linden dollars directly in order to pay for their virtual activities.[120] A type of expenditure that regularly occurs is the payment of property taxes. Second Life's business model revolves around charging virtual property taxes to residents who are owners of virtual real estate.[121] As in other virtual worlds, goods are bought and sold, and residents may be both consumers and creators[122] of these goods.[123] Second Life provides the tools to

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[115] *See* ACS, Second Life Relay For Life, http://www.cancer.org/docroot/GI/content/GI_1_8_Second_Life_Relay.asp (last visited Mar. 5, 2006). Relay for Life is a fundraising event started in 1985, when a surgeon ran around a track in Tacoma, Washington for twenty-four hours to generate money for the American Cancer Society. *Id.* The relay continues in the USA and other countries, but Second Life Relay for Life was the first time the relay was able to transcend all physical and geographic boundaries by utilizing cyberspace as a venue. *See id.* Residents of Second Life who have participated in Relay for Life can even obtain a Relay for Life t-shirt—strictly virtual, of course—to be worn by their avatars. *See id.*

[116] *See* Tom Loftus, *Virtual Worlds Reach Out to the Real One*, MSNBC.COM, Sept. 15, 2005, http://www.msnbc.msn.com/id/9338984/print/1/displaymode/1098/.

[117] *Id.* In terms of charitable activity, "no virtual world matches that of 'Second Life.' " *Id.* Not only have Second Life residents donated money for Hurricane Katrina and the American Cancer Society, but they were also active in tsunami relief as well as in support for a veterans' organization. *Id.*

[118] *See* Second Life, Economy, http://secondlife.com/whatis/economy.php (last visited Mar. 5, 2006). "Many of these sites even offer in-world 'ATM' machines to facilitate transactions." *Id.*

[119] *See* Linden Lab, About Linden Lab, http://lindenlab.com/about (last visited Mar. 5, 2006).

[120] Leslie Fraser, a resident of Second Life, uses the creation tools to build and sell virtual furniture as a means of going "to dance clubs and pay[ing] her rent inside the game." *See* Mandel, *supra* note 23.

[121] *See* Stafford, *supra* note 113 (discussing how money is acquired from virtual property taxes).

[122] Users of Second Life even have the power to design and create entire buildings, if they own a nice piece of real estate in the virtual world. *See* Posting of Phillip Torrone to MAKE: Blog, Making Things in the Virtual World: Second Life Primer, http://www.makezine.com/blog/archive/2005/08/making_things_i.html (Aug. 31, 2005, 12:28 A.M.).

create such content.[124] Even more interestingly, jobs are by no means constrained only to artisan occupations, such as using one's Second Life tools to create virtual goods; players can leverage their real world strengths to generate wealth as well.[125]

Goods created by Second Life users have even found some limited utility in the real world. Nathan Keir, known within Second Life by his avatar's title "Kermitt Quirk," developed a videogame that combined elements of Tetris and Bingo.[126] It became a hit within the virtual world, earning Keir $4,000 from fellow members.[127] This attention caught the interest of the outside world as well; a real world company has licensed Tringo for distribution outside of Second Life for a fee " 'in the low five figures.' "[128]

Furthermore, real world politics are a source of lively debate in Second Life. As the 2004 presidential election neared in the United States, virtual world displays devoted to endorsing either the Kerry/Edwards or Bush/Cheney tickets appeared.[129] Not only

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123 *See* Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 87–88 (2004) ("Forty-two percent of Second Life users create objects from scratch . . . [,] more than 44% have successfully sold an object to another user . . . [, and s]eventy-seven percent have bought one or more objects from other users . . . .").

124 *See id.* at 87 (comparing Second Life with other virtual worlds).

125 Consider the variety of professionals that would be needed to carry out a wedding in Second Life (or the real world for that matter):

> Specialization abounds in Second Life, with users focusing on everything from acting as project managers, salespeople, agents and event coordinators . . . . The combination of these users would allow an event coordinator to plan a wedding that required the project manager to hire builders and artists to build a new church. The coordinator could hire the caterer, dressmakers, and others to complete the objects and clothing for the wedding. Finally, skilled photographers would be in high demand to take in-world snapshots to create the wedding album. This importation of real world skills into the online space is very different from roleplaying online worlds . . . .

Id. at 92.

126 *See* Mandel, *supra* note 23.

127 *See Id.*

128 *See id.* (quoting Keir); *Tringo Fever—Catch It!*, SECOND OPINION (Linden Lab, San Francisco, CA), Mar. 3, 2005, http://secondlife.com/newsletter/2005_03_03_archive.php.

129 *See* Post to Second Life: New World Notes, So Very Kerry, http://secondlife.blogs.com/nwn/2004/08/so_very_kerry_a.html (Aug. 8, 2004, 2:10 PST) (describing one resident that "festooned the [virtual] elevated platform with Kerry balloons, Kerry posters, Kerry photos, and free pro-Kerry banners and signs, which [other residents] can take and place on [their] own property"). At least one

are real world politics an issue, but the residents of Second Life, like their real world brethren, often take issue with how the powers that be affect their lives. At one point, residents became so displeased with the tax system[130] that they engaged in open virtual civil disobedience—a virtual Boston Tea Party.[131] The developers of Second Life responded to the protest[132] and subsequently adopted a new tax regime.[133]

Perhaps not content with mere Internet-based avatar interaction, Second Life is bringing web surfing into its list of features. Now residents of the virtual world can access the Internet seamlessly without the nuisance of switching to a browser window on their real world personal computer, making for a truly immersive virtual life.[134]

Some residents have come to realize that the utility of virtual worlds can be applied to treat real world medical ailments. For instance, Asperger's Syndrome is a disorder like autism; those afflicted have difficulty with normal human interaction.[135] John Lester, information director for the

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poll seemed to establish Second Life as a Democratic bastion, with the Kerry ticket far outpacing Bush at the time of the article. *See id.*

[130] The tax system in effect at that time in Second Life dealt with a problem in virtual worlds, and perhaps the real world as well:

> [G]ame worlds and inventories have a tendency to become "littered" with increasingly worthless junk. . . . Even worse, for a social, environmentally-rich game like Second Life, the landscape becomes littered with them.
>
> Second Life chose to deal with this problem proactively by imposing a tax on all objects, payable in in-game currency. The "Linden tax," named after the game's developer, gives players an incentive to get rid of things they don't really want any more.

LawMeme, On the Second Life Tax Revolt, http://research.yale.edu/lawmeme/modules.php?name=News&file=print&sid=1222 (last visited Mar. 11, 2006). This unfairly burdens users who are creating the most bold and grandiose content from which other users derive the most enjoyment. *See id.*

[131] Avatars donned American colonial garb and engaged in several symbolic protests, complete with virtual tea crates. *See id.*

[132] Linden, in fact, praised the creativity of the activists! *See id.*

[133] *See id.* Under the current system, "[p]layers pay $9.95 to enter the world, and need never pay another penny if they choose. But if they want to build a house or open their own shop, they need to buy space and pay fees." Stafford, *supra* note 113; *see* Second Life, Land Pricing & Use Fees, http://secondlife.com/whatis/landpricing/php (last visited July 24, 2006).

[134] *See* Second Life, SL Feature Proposal Detail, http://secondlife.com/vote/get_feature.php?get_id=5 (last visited Mar. 11, 2006).

[135] *See* Joseph Goedert, *Virtual World Helps Asperger's Sufferers Cope with the Real One*, HEALTH DATA MGMT., June 2005, at 10, *available at* http://www.healthdatamanagement.com/HDMSearchResultsDetails.cfm?articleId=10924.

neurology department at Massachusetts General Hospital, purchased a virtual island in Second Life named Brigadoon in order to provide an environment for Aspgerer sufferers.[136] It is hoped that Brigadoon will offer a place where its residents can develop socialization skills and learn from their mistakes without real world consequences.[137]

Some educators have also begun to realize the intriguing possibilities that a virtual world—with predominantly the same rules as the real world—can offer as a teaching aid. Wells Fargo has developed a string of virtual islands in Second Life for what they call Project Stagecoach Island.[138] The goal is to provide the young people that visit with a lesson in financial responsibility:[139]

> Stagecoach Island players are given $30 in imaginary money with which to buy clothes, pay for rides and the like. The idea, though, is to teach the players to save money—they earn 10 percent per day on "deposits"—and to learn new things about money management through a series of quizzes that, when completed, reward players with $5 of new funds.[140]

Hopefully, players can learn the value of money in a fun and appealing way.

The most ambitious contemplated use of Second Life is the creation of a digital environment as rich as that of the real world. This would entail expansion beyond the small number of computers maintained by Linden Lab that run Second Life. From the start, Second Life was designed to grow as a distributed environment.[141] There is no reason why—from a technical standpoint—a person with the Linden Lab software could not host a few acres of virtual real estate on his own computer, which would be seamlessly integrated with the rest of Second Life.[142] Because Second Life features transactions of

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136 *See id.*

137 *See id.*

138 *See* Daniel Terdiman, *Wells Fargo Launches Game Inside 'Second Life,'* ZDNET NEWS, Sept. 15, 2005, http://news.zdnet.com/2100-1040_22-5868030.html.

139 *See id.*

140 *Id.*

141 *See* John Borland, *A Virtual World with Peer-to-Peer Style*, CNET NEWS.COM, May 9, 2005, http://news.com.com/A+virtual+world+with+peer-to-peer+style/2100-1025_3-5698499.html (" 'Second Life' is built on a distributed model, in which numerous servers are connected together, each one representing about 16 acres of land in the digital world. Those patches of digital space are seamlessly connected together to create the world as experienced by visitors.").

142 *See id.* ("Today, all of those servers are run by [sic] Linden Labs, but the

virtual goods and transfers of real world currency, the step of opening up the economy in this manner has not yet been taken.[143] Nevertheless, systems even more open than Second Life already exist. Individual users can run their own corner of the virtual world, with its own unique rules and appearance. Commentators hope that these developments will lead to a "radical transformation of the way that games are developed, and even of the way people communicate and manipulate information online."[144]

Applying the *Kremen* analysis[145] to a virtual world like Second Life more easily yields the conclusion that a plaintiff can have a property interest in virtual goods. Second Life is an open system with no set goal, no story to tell, and no gameplay for administrators to balance. In short, there is less need for administrators to intervene and tinker with avatars' possessions, because absolute freedom is the entire point of this virtual experience. The central theme is free-form user creation of the world's contents. Yet, even Second Life still bears some resemblance to its MMORPG brethren. Its terms of service read:

> These data, and any other data including content, . . . account history and avatar names residing on Linden's servers, may be deleted, altered, moved or transferred at any time for any reason in Linden's sole discretion. You acknowledge that, notwithstanding any copyright or other rights you may have with respect to items you create using the service, and notwithstanding any value attributed to such content or other data by you or any third party, Linden does not admit, provide or guarantee, and expressly disclaims (subject to any underlying rights in the content), any value, cash or otherwise, attributed to content or accumulated status or other data.[146]

This unfortunately tends slightly to deflate the argument that Second Life is distinguishable from other MMORPGs.

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world was built to ultimately support a peer-to-peer model, where players might add their own 16-acre plot into the world from their own computer . . . .").

[143] *See id.*

[144] *See id.* (discussing peer-to-peer and open source projects).

[145] *See supra* Part III.B (explaining three-pronged test).

[146] *See* Second Life, Terms of Service, http://secondlife.com/corporate/tos.php (last visited Mar. 8, 2006).

IV. THE END USER LICENSE AGREEMENT

A court applying the *Kremen* framework could possibly find a valid possessory interest in Qui's virtual property; this is consistent with the natural expectation of virtual world dwellers who—like in their real world existence—have actual ownership over what they acquire.[147] The barrier to this outlook is the EULA, which reinforces the position that virtual property interests are not real.

A. *What is a EULA?*

A consumer/user who pays for a piece of software should not think that he or she has actually "purchased" that software in the truest sense of the word. Rather, he or she has actually licensed certain rights to use that software. Those rights are delineated by licensing agreements sometimes referred to as "shrinkwrap"[148] or "clickwrap"[149] agreements, which tend to be lengthy and detailed. "Are all these shrinkwrap and 'clickwrap' agreements really enforceable? After all, the manufacturers know perfectly well that customers have neither the time nor the expertise to read them, and often the agreements are hidden in boxes until well after the customers have paid up."[150]

ProCD, Inc. v. Zeidenberg[151] is a landmark case in this field. The plaintiff, ProCD, spent over ten million dollars compiling data from three thousand telephone directories into a searchable

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147 *See* Phil Lee, *Opinion: Phil Lee*, LAW. (United Kingdom), May 16, 2005, at 14 ("Many players believe that, where they have spent money and/or time acquiring virtual assets, they should be entitled to legal protection against the theft or destruction of those assets.").

148 For a piece of software purchased in a typical retail store, the agreement would be inside the display box enclosed in the clear plastic shrink wrap; hence the name. *See* James Gleick, *Click OK to Agree* (1998), http://www.around.com/agree.html.

149 Not all software transactions involve physical media. In the event that a user downloads software from the Internet, the means to become a licensee is a clickwrap agreement. Before committing, the terms of the license are displayed on the computer screen, and the user must affirmatively click on a button to accept. James Gleick laments his experience: "[T]he screen presented me with the first few lines of a 2,000-word contract. Below this was a button marked 'I Agree.' There was also a button marked 'Cancel.' I looked in vain for a button marked 'Let's Negotiate—My Lawyer Will Be in Touch with Your Lawyer.'" *Id.*

150 *Id.*

151 86 F.3d 1447 (7th Cir. 1996).

computer database.[152] It sold both commercial licenses and more restricted consumer licenses to the data; the latter were encoded on CD-ROM disks.[153] The outside of the consumer box stated that the software was subject to an enclosed license, which prohibited commercial uses.[154] The user's manual contained the license, which also appeared on users' screens every time the program was run.[155]

Zeidenberg purchased a consumer package of the database at a retail store and ignored the license restrictions.[156] He formed a corporation to resell the data at prices below those offered by ProCD.[157] The District Court held that "placing the package of software on the shelf is an 'offer,' which the customer 'accepts' by paying the asking price and leaving the store with the goods . . . ."[158] Despite the notice on the box, however, the court found that the restrictions in the shrinkwrap license were not part of the contract: "One cannot agree to hidden terms . . . ."[159]

The Court of Appeals for the Seventh Circuit reversed, noting that it would be nearly impossible to print the entire license terms on the exterior of the box.[160] It compared the transaction to the purchase of concert and airline tickets, drugs, and other consumer goods where the purchaser pays money up front and later receives the tickets with more detailed terms included.[161] If the terms are objectionable, the purchaser can return the goods for a refund.[162] When Zeidenberg used the software, he accepted the license terms, creating a contract that included the terms of the shrinkwrap license.[163]

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152 *See id.* at 1449.

153 *See id.* at 1450.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *See id.* at 1451. "Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike." *Id.*

161 *See id.* at 1451.

162 *See id.*

163 *See id.* at 1452 ("ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did.").

The *ProCD* analysis is still followed, despite outcomes that might be contrary to the relative equities involved.[164] That the terms of EULAs tend to be binding, even when depriving a plaintiff of a cause of action, is probably dispositive of Qui's claim. A literal reading of the typical restrictive MMORPG EULA means Qui loses in the United States; but can a EULA be overcome?

B. *Overcoming the EULA as Bad Public Policy*

Commentators have argued passionately that EULAs that

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[164] In *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the Hills ordered a computer from Gateway over the telephone. *Id.* at 148. Gateway's standard terms and conditions specified that the Hills were permitted thirty days to return the computer at their expense. The terms also required that any disputes with Gateway be submitted to arbitration. The Hills did not read the terms closely enough to discover the arbitration clause, and they kept the computer beyond thirty days before complaining about defects. Eventually the Hills brought a class-action suit against Gateway, and Gateway asked the court to enforce the arbitration clause. *Id.* Like *ProCD*, Gateway shipped the computers to the Hills with an "accept or return" offer. *Id.* at 1149. Thus, there were three options for consumers to protect themselves: request a copy of the terms before purchase, consult public sources such as computer magazines and web sites, or inspect the documents and return the computer if they found the terms objectionable. *Id.* at 1150. The arbitration clause was held binding. *Id.* at 1151.

Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002), involved a forum selection clause. *Id.* at 1008. Verizon DSL customers experienced difficulties with frequent disruptions in service. *Id.* at 1009. After three months of waiting for consistent service, the plaintiff canceled the service and filed a class action suit. *Id.* Verizon's customers had signed up for the service online; the forum selection clause was contained in a clickwrap license that appeared in a small computer window in which only a portion of the agreement was visible. *Id.* at 1010. Significantly, the forum selection clause in the license specified Virginia, because Virginia is one of only two states that do not provide a class action procedure. *Id.* at 1010–11. The clause was found to be enforceable. *Id.* at 1015. Since Virginia was Verizon's home state, the court found that this scenario was less sinister than it may have otherwise appeared. *Id.* at 1012. Also, the agreement gave the plaintiff thirty days after registration to cancel the service and receive a full refund. *Id.* at 1013.

One notable exception to the *ProCD* trend is *Williams v. America Online, Inc.*, No. 00-0962, 2001 Mass. Super. LEXIS 11 (Mass. Super. Feb. 8, 2001). *Williams* involved a class action against America Online for damages caused to the plaintiffs' computers during installation of AOL Version 5.0. *Id.* at *1–2. The AOL software, upon installation, changed the configurations on the plaintiffs' computers in order to prevent access to non-AOL service providers' software. *Id.* at *2. The AOL subscribers all entered into AOL's clickwrap Terms of Service, which included a forum selection clause requiring all claims to be heard in Virginia. *Id.* at *2–3. Evidence was provided that the computer re-configuration occurred before the clickwrap agreement was displayed on their screens. *Id.* at *4. Thus, the damage would have occurred whether they agreed to the terms or not. *Id.* The court refused to enforce the clickwrap agreement. *Id.* at *12.

take away all property rights from virtual world residents should not stand. For example:

> 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 resisting the systematic expropriation of emergent online property forms by use of contract.[165]

Second Life was discussed partly to describe the limitless potential that virtual worlds have to offer users in all manner of human endeavors, but also to illustrate a mental trap of sorts. It is very easy to overly romanticize the appeal of virtual worlds, and to let that mindset color judicial decision-making. A very sympathetic court could well apply a *Kremen* analysis to provide a plaintiff with a remedy, yet the commercial nature of current virtual worlds makes this result difficult to justify. The real battle is to establish full fledged ownership of virtual property over the EULA concerns. The arguments in favor of this essentially posit that the current state of affairs—i.e., the lack of explicit recognition of virtual property—is contrary to good public policy embodied in the notion that virtual worlds have value and should be nurtured.[166] Though virtual worlds are without a doubt emotionally compelling and visually stunning, there must still be rational justifications for a court to create new law in their name.

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[165] Fairfield, *supra* note 9, at 1083–84 (footnotes omitted).

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> A good theory of virtual property is also important to the future of the [I]nternet. If we protect virtual property, the [I]nternet could become a three-dimensional global virtual environment. The possibilities for medical, commercial, social, military, artistic, and cultural advancement offered by such a virtual environment have just begun to be explored. Thus, we should care about the protection of virtual property not only because markets already value it immensely, but because we will all come to value it more due to the potential it offers for societal advancement.

Id. at 1051 (footnote omitted).

Despite the fact that virtual world residents think of virtual goods in the same way as tangible properties and that the relative equities favor these residents,[167] reasons abound why a court would not treat virtual items as property. The conceptual barrier that virtual items—especially in the context of virtual worlds[168]—are trivial, imaginary constructs, not deserving of property recognition, is the first hurdle. That virtual goods, with few exceptions,[169] have absolutely no utility in the real world, helps to reinforce this obstruction. Virtual worlds are simply not sufficiently mainstream for most people to take seriously the loss of a Dragon Sabre.[170]

Even if it is accepted that virtual goods are valuable, is there an imperative for legal recognition of this belief? Despite the restrictive EULAs in existence, the latest development in the industry is to grant virtual world residents more rights rather than to take them away. The MMORPG known as Entropia was built from the ground up to feature a market economy based on the U.S. dollar, secure trading of virtual items, and the ability to change virtual assets back into real money.[171] Until recently, Sony, creator of the Everquest MMORPG, was extremely resistant to players engaging in the trade of virtual items outside of the game world.[172] Today, Sony has reversed course and officially sanctions such commerce through its own secure trading web site.[173] In the most striking and innovative

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[167] "If platform owners encourage real world commodification of virtual worlds, encourage people in these worlds to treat virtual items like property, and allow sale and purchase of these assets as if they were property, they should not be surprised if courts . . . start treating virtual items as property." Balkin, *supra* note 80, at 78.

[168] Of course, intangible properties in and of themselves are not a new concept. Your bank account is not a pile of money so much as it is a "bunch of ones and zeroes in a database." Krotoski, *supra* note 1 (internal quotation marks omitted).

[169] *See supra* notes 126–29. and accompanying text (discussing popularity of puzzle-based videogame originating in MMORPG).

[170] *See* Ward, *supra* note 23 (considering whether "virtual crime need[s] real justice").

[171] *See* Will Knight, *Virtual World Will Run on Real Cash*, NEWSCIENTIST.COM, Dec. 13, 2002, http://www.newscientist.com/article.ns?id=dn3180.

[172] eBay and Yahoo auctions were a prime outlet for Everquest items. Sony cracked down on the practice, and both Ebay and Yahoo removed all Everquest auctions as violations of Sony's intellectual property rights. *See* Greg Sandoval, *eBay, Yahoo Crack Down on Fantasy Sales*, CNET NEWS.COM, Jan. 2, 2002, http://news.com.com/eBay%2C+Yahoo+crack+down+on+fantasy+sales/2100-1017_3-251654.html.

[173] *See* Musgrove, *supra* note 53 (predicting that other companies may follow Sony's lead); *see also* Station Exchange: The Official Secure Marketplace for

development, Second Life granted full intellectual property rights, enforceable in the real world, to content created by its residents.[174]

An even more fundamental question is whether a theory of virtual property is needed to encourage people to participate in, and to cultivate the progress of, virtual worlds. Though granular data per country is not generally available, the growth of subscriber-ship in MMORPGs has been nothing short of explosive. The number of accounts has grown from approximately two hundred fifty thousand in 2000 to well over nine million in 2005.[175] Judging by the growth curve, there is no evidence that this popularity is on the decline, and there is little apparent need for an external impetus to stimulate development.

Furthermore, the social problems stemming from online games create uncertainty as to whether virtual worlds should continue to expand unchecked. A twenty-eight-year-old South Korean man recently collapsed and died after a fifty hour marathon gaming session.[176] In addition to the Qui case, China has had its share of juvenile delinquency and even suicides tied to online games.[177] In response, the government took the drastic step of imposing certain gaming limitations. For example, players who descend into virtual worlds for more than three consecutive hours will have the abilities of their avatars limited; abilities will be severely diminished after five hours.[178] Once the

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EverQuest II Players, http://stationexchange.station.sony.com (last visited Mar. 6, 2006) (explaining how Sony's virtual marketplace operates).

[174] *See* Amy Kolz, *Real Virtuality: The Worlds in Online Games Are Imaginary—But the Property Isn't.*, AM. LAW., Dec. 2004, at 38, 38 (discussing Linden Lab's decision, joking that "[y]ears from now, it may be that 'Second Life' could be as prominent on bar exams as contract law," and noting Linden Lab's recognition that "the game's property and economic policies could eventually support virtual property claims in real courts"); Second Life, IP Rights, http://secondlife.com/whatis/ip_rights.php (last visited July 30, 2006) ("You create it, you own it—and it's yours to do with as you please.").

[175] *See* MMOGCHART.com, http://www.mmorpgchart.com/ (last visited Mar. 6, 2006).

[176] *See S Korean Dies After Games Session*, BBC NEWS ONLINE, Aug. 10, 2005, http://news.bbc.co.uk/1/hi/technology/4137782.stm ("We presume the cause of death was heart failure stemming from exhaustion." (quoting South Korean police official) (internal quotation marks omitted)).

[177] *See Virtual Game*, *supra* note 3 (noting that "[q]uite a few Chinese parents have rebuked cyber games as 'e-heroin' ").

[178] *See China Imposes Online Gaming Curbs*, BBC NEWS ONLINE, Aug. 25, 2005, *available at* http://news.bbc.co.uk/2/hi/technology/4183340.stm.

penalty threshold is triggered, avatars will only be restored after the player takes a five-hour break.[179]

With the considerable uncertainty surrounding the current status and future of virtual worlds, establishing a policy favoring their advancement is not as unambiguous as it might seem at first glance. For the time being, however, it is likely that the EULAs will remain firmly in place.

CONCLUSION

Perhaps one day, not far in the future, every computer connected to the Internet will be a little piece of 3D virtual real estate. When that comes to pass, some of the more perplexing issues implicated by virtual property may become more clear-cut. Today, a very sympathetic court might turn to *Kremen* as a source of relief for virtual property disputes in extraordinary cases. Notwithstanding a EULA, *Kremen* can still give players a kind of possessory interest within the narrow confines of the game, subject to the inherent limitations, vagaries, and uncertainties of the virtual world. This path is far from a certainty, however, due to the conceptual difficulties involved. Moreover, it would not be easy to divorce today's virtual worlds from other Internet services,[180] software, or games in which licensing agreements still dominate. When virtual worlds become less game-like and more open, mainstream, and highly integrated into our lives, perhaps virtual properties will receive the legal recognition they deserve.[181]

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[179] *See id.*

[180] Though email is highly valued by its users, agreements with the email provider give no recourse if an account's contents are accidentally wiped out. *See* Evan Hansen, *Hotmail Incinerates Customer Files*, CNET NEWS.COM, June 3, 2004, http://news.com.com/2102-1038_3-5226090.html?tag=st.util.print.

[181] As society in general recognizes the emerging value of intangible objects, their legal status may change. A probate court in Michigan recognized ownership interests in email: the emails of a soldier slain in the Iraq war were passed to his heirs, vindicating reasonable perceptions that emails are not unlike tangible paper documents or diaries. *See* Tresa Baldas, *Slain Soldier's E-Mail Spurs Legal Debate*, NAT'L L.J., May 4, 2005, *available at* http://www.law.com/jsp/article.jsp/law/LawArticleFriendly.jsp?id+1115111120713.