

VIRTUAL PROPERTY, VIRTUAL RIGHTS: WHY CONTRACT LAW, NOT PROPERTY LAW, MUST BE THE GOVERNING PARADIGM IN THE LAW OF VIRTUAL WORLDS

Abstract: Virtual worlds such as World of Warcraft and Second Life have recently exploded in popularity. As users of these worlds acquire virtual assets, conflicts inevitably arise. These conflicts are currently resolved through the terms of End User License Agreements (“EULAs”) between users and developers. Many commentators, however, criticize EULAs as being too one-sided and argue for courts to acknowledge traditional common law property rights in virtual property. These arguments invoke three theoretical justifications for virtual property rights: Lockean labor theory, personhood theory, and utilitarianism. This Note argues that each of these theories is a poor fit for virtual property, and that contract law should remain the dominant paradigm. There is demand for virtual worlds with a wide variety of user rights, and, unlike generally applicable property law, a EULA-based contractual scheme allows the developers of virtual worlds the flexibility to efficiently respond to such demand.

INTRODUCTION

Marc Wobegone had found a loophole.¹ By manipulating an Internet address, he gained access to an auction for a piece of land earlier than the seller intended and won the auction with a bid far below the minimum.² Wobegone, a lawyer, had scoured the terms of service for the auction website and believed that exploiting this loophole was not prohibited.³ The seller, Linden Research, thought otherwise.⁴

The fallout for Wobegone was extraordinary.⁵ Linden not only unilaterally retook possession of the parcel, it seized and resold all other property owned by Wobegone—from real estate to personal possessions and bank ac-

¹ Hannah Yee Fen Lim, *Virtual World, Virtual Land but Real Property*, 2010 SING. J. LEGAL STUD. 304, 313–14.

² *Id.* Wobegone was able to bypass the seller’s reserve price of \$1000. *Id.*

³ *See id.*

⁴ *See id.*

⁵ *See id.*

counts.⁶ More shockingly, Linden did everything in its power to erase Woebegone's identity and threw him into exile.⁷

This sequence of events was possible only because Woebegone lived in the virtual world of Second Life, an online three-dimensional world developed and run by Linden.⁸ Woebegone was, in fact, merely an avatar created by Marc Bragg, a Pennsylvania lawyer.⁹ Furthermore, the parcel of land in question was "virtual" real estate that—just like all of Woebegone's personal property—existed only in the world of Second Life.¹⁰

In 2007, after Bragg's Second Life account was frozen and his avatar deleted, he sued Linden in federal court.¹¹ Bragg argued that Linden's penalties and punishments violated Bragg's property rights in his virtual property.¹² According to Linden, no such rights existed per the terms of service contract agreed to by Bragg before joining Second Life.¹³ Linden argued its actions were squarely within its rights spelled out in the terms of the contract.¹⁴

As Bragg's case illustrates, the tension between the contractual powers of virtual-world developers and the alleged property rights of users persists.¹⁵ Because courts have not resolved the issue, many legal commentators, concerned about the unequal nature of these user-developer contracts, have argued for increased user property rights in virtual worlds.¹⁶ These arguments rely on a num-

⁶ See *id.* at 314.

⁷ See *id.*

⁸ *Id.* at 304, 313–14.

⁹ *Id.* at 313.

¹⁰ *Id.*

¹¹ See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 595 (E.D. Pa. 2007).

¹² *Id.*; GREG LASTOWKA, VIRTUAL JUSTICE 17–18 (2010) (discussing the arguments posed by the parties in Bragg's case). In Bragg's case, the court never reached the question of his property rights. See 487 F. Supp. 2d at 611–13. Instead, it addressed the preliminary question of the unconscionability of an End User License Agreement ("EULA") arbitration clause. *Id.*; *infra* notes 106–110 and accompanying text (discussing Bragg's case). The parties settled before the case was decided on the merits. LASTOWKA, *supra*, at 17–18.

¹³ LASTOWKA, *supra* note 12, at 17–18; see also Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 5 (2006) (noting that "terms of service" is one of many labels for contracts between virtual-world users and developers).

¹⁴ LASTOWKA, *supra* note 12, at 17–18.

¹⁵ See *Bragg*, 487 F. Supp. 2d at 595–97; LASTOWKA, *supra* note 12, at 17–18; Lim, *supra* note 1, at 313.

¹⁶ See, e.g., Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1052–53 (2005); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 43–50 (2004); Justin Ackerman, Note, *An Online Gamer's Manifesto: Recognizing Virtual Property Rights by Replacing End User License Agreements in Virtual Worlds*, 6 PHOENIX L. REV. 137, 182–86 (2012); Theodore J. Westbrook, Note, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 804–10.

ber of theories, including labor theory,¹⁷ personhood theory,¹⁸ and utilitarianism.¹⁹ Other commentators have advocated for the continued application of contract law in determining the rights and responsibilities of users and developers.²⁰ These arguments focus on essential differences between real-world and virtual property, the rights of virtual-world developers, and the economic consequences of implementing a traditional property regime in virtual worlds.²¹

This Note argues that each traditional justification for property rights is inadequate in a virtual-world setting.²² The contract rights forged by End User License Agreements (“EULAs”) offer virtual-world developers the opportunity to tailor user rights to an optimal level.²³ Some virtual worlds may call for little or no protection for users’ virtual property; others may necessitate extensive protections that go beyond even traditional property rights.²⁴ A one-size-fits-all property rights regime, lacking the precision of a EULA-based approach, would negatively affect virtual worlds—harming developers and users alike.²⁵

Part I of this Note begins by grappling with the problem of defining “virtual property,” continues by explaining the nature of virtual worlds and the kinds of property assets found therein, and concludes by examining the law’s treatment of EULAs.²⁶ Part II examines three philosophical justifications for recognizing increased property rights in virtual assets as an alternative to EULAs.²⁷ Part III then explains how each traditional property justification is

¹⁷ See *infra* notes 120–127 and accompanying text (discussing labor theory).

¹⁸ See *infra* notes 128–149 and accompanying text (discussing personhood theory).

¹⁹ See *infra* notes 150–166 and accompanying text (discussing utilitarianism).

²⁰ See, e.g., John William Nelson, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, 41 MCGEORGE L. REV. 281, 307–08 (2010); Dan E. Lawrence, Note, *It Really Is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property*, 47 WASHBURN L.J. 505, 508 (2008); Jacob Rogers, Note, *A Passive Approach to Regulation of Virtual Worlds*, 76 GEO. WASH. L. REV. 405, 423 (2008).

²¹ See, e.g., Nelson, *supra* note 20, at 308 (arguing that property rights in virtual worlds would have negative economic effects); Lawrence, *supra* note 20, at 515–24 (describing the unique technological traits of virtual worlds); Rogers, *supra* note 20, at 421–23 (discussing the benefits of a contract law regime).

²² See *infra* notes 173–181, 182–195, 196–234 and accompanying text (discussing how each of the three traditional justifications for property rights is unsuited for virtual worlds).

²³ See Lawrence, *supra* note 20, at 540–41.

²⁴ See *infra* notes 243–272 and accompanying text (analyzing the different rights necessitated by different kinds of virtual worlds).

²⁵ See Nelson, *supra* note 20, at 307–09; *infra* notes 235–288 and accompanying text (arguing that contract law allows developers to offer the optimal level of rights to users).

²⁶ See *infra* notes 30–110 and accompanying text.

²⁷ See *infra* notes 111–166 and accompanying text.

flawed when applied to virtual property.²⁸ Finally, Part IV concludes that only contract law allows developers to offer the optimal level of rights to users.²⁹

I. VIRTUAL PROPERTY IN VIRTUAL WORLDS

An exact definition of “virtual property” remains elusive.³⁰ One early influential article attempted to define the titular class as computer code that mimics real-world objects.³¹ That article asserted that such code is imbued with three characteristics shared by real-world property: rivalrousness,³² persistence,³³ and interconnectivity.³⁴ Subsequent commentators have variously modified this definition,³⁵ taken a more categorical approach,³⁶ or even objected to the label itself.³⁷

This Part examines a class that qualifies as virtual property under any definition: assets in virtual worlds.³⁸ Section A introduces virtual worlds and sketches some of their different formats.³⁹ Section B then explores the different kinds of property-like assets that can be found in these virtual worlds.⁴⁰ Finally, Section C examines the current legal framework governing these worlds: the EU-LA.⁴¹

²⁸ See *infra* notes 167–234 and accompanying text.

²⁹ See *infra* notes 235–288 and accompanying text.

³⁰ Lawrence, *supra* note 20, at 509–10.

³¹ See Fairfield, *supra* note 16, at 1052–53. “Code” is the set (or part of the set) of textual instructions that makes up computer programs. See J. Dianne Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, A Starting Point*, 29 B.C. L. REV. 803, 803 (1988).

³² Fairfield, *supra* note 16, at 1053–54. Rivalrous code cannot be used by more than one person at a time. *Id.*

³³ *Id.* at 1054. Persistent code exists regardless of whether it is in use or not. *Id.*

³⁴ *Id.* at 1054–55. Interconnected code interacts with other code and can be experienced by individuals other than the owner. *Id.*

³⁵ Compare *id.* (characterizing virtual property as having rivalrousness, persistence, and interconnectedness), with Charles Blazer, Note, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137, 139 (2006) (adopting the three earlier characteristics and adding two additional indicia of virtual property: (1) the creation of “secondary markets” to trade virtual property; and (2) “value-added-by-users”—individuals who seek to enhance the value of their virtual property).

³⁶ See Jennifer Gong, Note, *Defining and Addressing Virtual Property in International Treaties*, 17 B.U. J. SCI. & TECH. L. 101, 107 (2011) (grouping virtual property into four categories: avatars, domain names, virtual chattels, and intellectual property).

³⁷ See Nelson, *supra* note 20, at 284–85 (proposing exchanging the term “property” for the term “resources”).

³⁸ See *infra* notes 42–110 and accompanying text; see also Fairfield, *supra* note 16, at 1063 (discussing objects in virtual worlds as virtual property); Blazer, *supra* note 35, at 150 (same); Gong, *supra* note 36, at 110–14 (same).

³⁹ See *infra* notes 42–61 and accompanying text.

⁴⁰ See *infra* notes 62–93 and accompanying text.

⁴¹ See *infra* notes 94–110 and accompanying text.

A. What Are Virtual Worlds?

“Virtual worlds” are persistent online environments that permit social interaction within a graphical interface.⁴² These worlds take many forms.⁴³ The most popular virtual world, Blizzard Entertainment’s World of Warcraft, is a “Massively Multiplayer Online Roleplaying Game,” or “MMORPG.”⁴⁴ Each user creates a virtual character, or “avatar,” and then pilots it through a three-dimensional game world in which it fights monsters, explores, and interacts with other players.⁴⁵ World of Warcraft is billed as a game and contains many traditional game elements such as combat, a point system, and set goals for the user to accomplish.⁴⁶ Advancing an avatar to the point where the user can experience all of the game’s content is very time consuming.⁴⁷ In the original 2004 iteration of the game, it took approximately 456 hours (nineteen days) to do this, and Blizzard has constantly expanded the game’s content since then.⁴⁸ Indeed, the game’s success—and its \$1.5 billion in annual revenue for Blizzard—is attributable to the fact that users never run out of things to do.⁴⁹

Other virtual worlds, such as Linden Lab’s Second Life, forego combat and monsters to focus purely on social interaction.⁵⁰ As in World of Warcraft, Second Life users create avatars to explore the world and interact with each other.⁵¹ Instead of adventuring against computer-controlled enemies, however, Second Life users engage in activities that are more social.⁵² For instance, us-

⁴² See Fairfield, *supra* note 16, at 1058–64.

⁴³ *Id.*

⁴⁴ See Brett Burns, Note, *Level 85 Rogue: When Virtual Theft Merits Criminal Penalties*, 80 UMKC L. REV. 831, 831, 836 n.44 (2012) (discussing World of Warcraft and its popularity).

⁴⁵ See Jennifer Miller, Note, *The Battle over “Bots”: Anti-Circumvention, the DMCA, and “Cheating” at World of Warcraft*, 80 U. CIN. L. REV. 653, 653 (2011) (providing an overview of World of Warcraft).

⁴⁶ See *id.*

⁴⁷ *Id.* at 653–54.

⁴⁸ See *id.* (tallying time to experience the game’s content); Joel Falconer, *Blizzard Launches Fourth World of Warcraft Expansion, Mists of Pandaria*, TNW (Sept. 25, 2012, 9:13 AM), <http://the-nextweb.com/apps/2012/09/25/blizzard-launches-world-warcraft-expansion-mists-pandaria/>, archived at <http://perma.cc/32K8-Z2YD>. Blizzard has published four major expansion packs for World of Warcraft and in November 2013 announced a fifth is upcoming. See *World of Warcraft: Warlords of Draenor Revealed!*, WORLD OF WARCRAFT (Nov. 8, 2013, 11:55 AM), <http://us.battle.net/wow/en/blog/11514710/world-of-warcraft-warlords-of-draenor-revealed-11-8-2013>, archived at <http://perma.cc/NY5A-ZV55>.

⁴⁹ See Miller, *supra* note 45, at 653–54.

⁵⁰ See Lim, *supra* note 1, at 308. Linden Lab “explicitly rejects calling Second Life ‘a game.’” *Id.*

⁵¹ See *id.*

⁵² See *id.*

ers can design virtual clothing, shop at virtual stores run by other users, and attend virtual social events.⁵³

Game-oriented virtual worlds have social elements, and social-oriented worlds have game-like elements; many successful virtual worlds are a mixture of the two types.⁵⁴ For example, EVE Online—a spaceship simulator—pairs combat against computer and user opponents with a complex in-world economy that is driven by user resource collection, manufacturing, and sales.⁵⁵ Zynga's new Farmville 2, accessed through Facebook, challenges users to build their farm to bigger and more productive heights, but users must also interact with friends to progress to this end.⁵⁶

Virtual worlds have exploded in popularity over the past decade.⁵⁷ World of Warcraft alone has over ten million subscribers,⁵⁸ and there are over thirty million accounts registered for Second Life.⁵⁹ Companies such as Microsoft maintain virtual offices in Second Life, and the eminent Judge Richard Posner of the U.S. Court of Appeals for the Sixth Circuit has given a talk via a Second Life avatar.⁶⁰ The success of virtual worlds, combined with the large time investment they require, has given rise to a new kind of market: real-world dollars being traded for virtual-world assets.⁶¹

⁵³ See *id.*

⁵⁴ Compare Chapter III: *Playing Together*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/guide/playing-together>, archived at <http://perma.cc/NWC9-ELRG> (last visited Jan. 22, 2014) (explaining “guilds,” player-created groups that exist for purposes of socializing and helping members out), with *Linden Realms*, SECOND LIFE, <http://secondlife.com/destinations/realm?lang=en-US>, archived at <http://perma.cc/39XC-TS26> (last visited Jan. 22, 2014) (describing Second Life areas with gameplay elements such as completing quests and collecting items).

⁵⁵ See *All You Need to Know About EVE: What Is EVE Online?*, EVE ONLINE, <http://www.eveonline.com/faq/what-is-eve-online>, archived at <http://perma.cc/Y9QY-8LUM> (last visited Jan. 22, 2014) (“Around 95% of every item or ship in EVE is made by the players from scratch and sold through EVE’s central market system.”).

⁵⁶ See *Farmhands!*, FARMVILLE 2 (AUG. 30, 2012, 2:06 PM), http://zyngablog.typepad.com/farmville_2/2012/08/farmhands.html, archived at <http://perma.cc/VK5S-D9SD> (detailing how users may recruit other users as farmhands to help on their own farm).

⁵⁷ See *Total Active Subscriptions*, MMODATA.NET, <http://users.telenet.be/mmodata/Charts/TotalSubs.png>, archived at <http://perma.cc/TM96-LYTE> (last visited Jan. 22, 2014) (illustrating the increase in virtual-world players).

⁵⁸ Alex Ziebart, *World of Warcraft Subscriber Numbers Remain over 10 Million*, WOW INSIDER (Nov. 7, 2012, 4:55 PM), <http://wow.joystiq.com/2012/11/07/world-of-warcraft-subscriber-numbers-remain-over-10-million/>, archived at <http://perma.cc/8KQU-GT6E>.

⁵⁹ Daniel Voyager, *Second Life User Concurrency 2012 Summer Update*, DANIEL VOYAGER’S BLOG (July 21, 2012), <http://danielvoyager.wordpress.com/2012/07/21/second-life-user-concurrency-2012-summer-update/>, archived at <http://perma.cc/A3SC-QY4C>.

⁶⁰ Lawrence, *supra* note 20, at 545 n.236.

⁶¹ See Peter J. Quinn, Note, *A Click Too Far: The Difficulty in Using Adhesive American Law License Agreements to Govern Global Virtual Worlds*, 27 WIS. INT’L L.J. 757, 761–63 (2010).

B. *What Sort of Assets Exist in Virtual Worlds?*

Many virtual-world assets closely parallel real-world objects.⁶² A World of Warcraft avatar may purchase a mining pick, trek out into the mountains to mine some ore, smelt the ore into bars, forge the bars into a sword, sell the sword to another user, and then use the proceeds to purchase a pet dog.⁶³ Although not all of these are common activities for many in the real world—World of Warcraft *is* a fantasy world, after all—each of the items involved has a readily identifiable real-world analogue that can be treated just like the real thing.⁶⁴ The virtual world of Second Life is similar.⁶⁵ For example, it features thousands of different items of clothing and accessories, many designed and sold by other users.⁶⁶ In both worlds, the virtual objects are rivalrous, persistent, and interconnected.⁶⁷ The snappy three-piece suit purchased in Second Life cannot be duplicated and owned by others, it will stay where it is put, and it can be seen by others—the same as for a three-piece suit purchased in the real world.⁶⁸

Other virtual-world assets more closely resemble real property.⁶⁹ The developers of Second Life will periodically release more “real estate” in their virtual world by holding online auctions.⁷⁰ Users may buy the land, and then subdivide it, develop it, rent it, or resell it as they see fit.⁷¹ Linden Lab—at least at first—explicitly endorsed the analogy to real-world real property, with its chief executive officer stating in interviews that Linden “sold the title” to the buyers, and that the virtual real estate was theirs “free and clear.”⁷²

Users may desire these virtual assets for several, often overlapping, reasons.⁷³ For example, the items may aid progression for the user in the virtual

⁶² See Alfred Fritzsche V, *Trespass to (Virtual) Chattels: Assessing Online Gamers’ Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity*, 8 U.C. DAVIS BUS. L.J. 235, 240–41 (2007).

⁶³ See *id.*

⁶⁴ See *id.* For example, virtual ore, like real ore, may be found, used, bought, and sold. See *id.*

⁶⁵ See *Avatar*, SECOND LIFE, <http://secondlife.com/whatis/avatar/>, archived at <http://perma.cc/MBR6-MXUL> (last visited Jan. 22, 2014).

⁶⁶ See *id.* (“[T]here are thousands of unique clothing, hair and fashion accessories that can be found in Resident-owned shops.”).

⁶⁷ See Fairfield, *supra* note 16, at 1052–53.

⁶⁸ See *Shai* Alfonso 3 Piece Suit, SECOND LIFE MARKETPLACE, <https://marketplace.secondlife.com/p/Shai-Alfonso-3-Piece-Suit/160832>, archived at <http://perma.cc/63H7-HRJG> (last visited Jan. 9, 2014).

⁶⁹ See Lim, *supra* note 1, at 317.

⁷⁰ See *id.*

⁷¹ *Id.* at 312–13.

⁷² See *id.*

⁷³ See Fritzsche, *supra* note 62, at 236–37; see also Westbrook, *supra* note 16, at 780 (describing items in virtual worlds).

world.⁷⁴ In *World of Warcraft*, acquiring a new weapon may allow the user to defeat a new foe, and acquiring a new horse may grant access to a new area.⁷⁵ In *Second Life*, buying prime real estate for a new shop may allow the avatar to make significant real-world income.⁷⁶ Alternately, items may provide a unique appearance, allowing the user to customize their avatar's looks, or may even serve as a status symbol.⁷⁷

Users' avatars have no easy parallel in the real world, but still may qualify as a form of virtual property.⁷⁸ For example, time spent in virtual worlds often grants avatars certain benefits.⁷⁹ Apart from the accrual of virtual wealth, these benefits can take the form of unique avatar skills or powers.⁸⁰ As a result, such benefits may compel new users to purchase an older avatar from another user, rather than start with a brand new avatar of their own.⁸¹

Whether or not the law sees these assets as property, many users have proceeded to treat them as such by buying and selling them for real-world money.⁸² Since the inception of virtual worlds, a lively market—known as “real money trading” (“RMT”)—has emerged for these assets.⁸³ Recent estimates posit that this virtual property market may exceed \$1 billion in transactions annually.⁸⁴ Entire third-party companies have sprung up to facilitate these exchanges.⁸⁵ *Second Life* land barons have become millionaires.⁸⁶

Developers are divided on RMT: some view it as undermining their control over the user experience, whereas others see it as a potential new source of revenue.⁸⁷ A number of developers explicitly forbid both the transfer of avatars

⁷⁴ See Fritzsche, *supra* note 62, at 241.

⁷⁵ See *id.*

⁷⁶ See Alec Levine, Comment, *Play Harms: Liability and the Play Conceit in Virtual Worlds*, 41 MCGEORGE L. REV. 929, 930 (2010) (detailing the story of Anshe Chung, who made over \$1 million in the real world via *Second Life* real estate sales).

⁷⁷ See Fairfield, *supra* note 16, at 1098 (noting that rare virtual items may have “social cachet”).

⁷⁸ See Quinn, *supra* note 61, at 764–65. One potential real-world parallel to user avatars may, in fact, be the users themselves. See *infra* notes 128–149 and accompanying text (explaining the personhood theory of property).

⁷⁹ See Fritzsche, *supra* note 62, at 241.

⁸⁰ *Id.* (“With each level, players acquire new abilities and access to more difficult areas of the virtual world.”).

⁸¹ See Quinn, *supra* note 61, at 764–65 (noting the value of used MMORPG accounts).

⁸² See *id.* at 761–63.

⁸³ *Id.*

⁸⁴ *Id.* at 762. Additionally, *Second Life* recently claimed that it surpassed the \$1 billion mark in user-to-user transactions. *Id.*

⁸⁵ Steven Chung, Note, *Real Taxation of Virtual Commerce*, 28 VA. TAX REV. 733, 740 (2009) (reporting one popular RMT site as making \$880 million in sales in 2004).

⁸⁶ See Levine, *supra* note 76, at 930.

⁸⁷ See Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 46 (2007) (discussing different developer approaches to RMT).

and the exchange of any virtual-world assets for money.⁸⁸ A common concern is that allowing users to “pay to win” is harmful to the developer’s bottom line, as some users will perceive this spending as unfair and quit.⁸⁹ Alternately, developers may be wary of being drawn into disputes between users.⁹⁰

Other developers, however, have embraced RMT, running virtual storefronts themselves or facilitating user-to-user trading.⁹¹ After originally forbidding the practice, EverQuest II—a fantasy world much like World of Warcraft—granted permission for users to participate in limited RMT, with the developer taking a cut off the top of all sales.⁹² For Linden Lab, real-money trading is not just tolerated, it is a selling point for Second Life.⁹³

C. Existing Law Governing Virtual Worlds: The EULA

The rights of users in their avatars and virtual assets are currently governed almost exclusively by EULAs and their variants.⁹⁴ A EULA forms the contractual agreement between a user and the developer, and describes exactly what rights the user does and does not have.⁹⁵ For example, a developer might

⁸⁸ See, e.g., *Guild Wars 2 Rules of Conduct*, GUILD WARS 2, <https://www.guildwars2.com/en/legal/guild-wars-2-rules-of-conduct/>, archived at <http://perma.cc/WX5-MPJQ> (last visited Jan. 9, 2014) (forbidding buying or selling any “game Account or game Content”); *World of Warcraft Terms of Use*, BLIZZARD ENT., http://us.blizzard.com/en-us/company/legal/wow_tou.html, archived at <http://perma.cc/KK4M-6BN5> (last updated Aug. 22, 2012) (stating that Blizzard does not recognize any “real world” transactions of World of Warcraft items or accounts).

⁸⁹ See Chung, *supra* note 85, at 741.

⁹⁰ See *id.*

⁹¹ See Camp, *supra* note 87, at 46 (describing the official EverQuest II auction site); Rogers, *supra* note 20, at 415 (describing the “LindeX,” Second Life’s exchange market where users can trade Second Life currency for dollars).

⁹² Jamie J. Kayser, *The New-New World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59, 80 (2006). The developers of EverQuest II no longer permit direct trading for real-world money. *EverQuest II & Live Gamer FAQ*, EVERQUEST II (Nov. 10, 2011), <https://forums.station.sony.com/eq2/index.php?threads/everquest-ii-live-gamer-faq.519057/>, archived at <http://perma.cc/TXQ6-G5YR> (explaining the closure of RMT services in EverQuest II). They do, however, allow users to design and submit virtual items for sale in the developer’s store, with a portion of the proceeds going back to the player. See *Create New Items for the EverQuest II Marketplace!*, EVERQUEST II, <https://www.everquest2.com/player-studio>, archived at <http://perma.cc/5AXQ-T5P5> (last visited Jan. 9, 2014).

⁹³ Julia Layton, *Can I Make My Living in Second Life?*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/social-networking/information/second-life-job.htm>, archived at <http://perma.cc/8AAJ-ZHTC> (last visited Jan. 22, 2014) (noting that Second Life encourages users to make real-world money from their virtual-world activities). Users can easily convert real-world cash to Linden dollars, allowing them to effectively buy or sell Second Life items with real money. *Id.*

⁹⁴ Jankowich, *supra* note 13, at 5. Variants include terms of service, terms of use, and codes of conduct, among others. *Id.* This Note refers to them collectively as EULAs.

⁹⁵ Fritzsche, *supra* note 62, at 241.

agree to grant the user access to the virtual world so long as the user agrees to not use offensive avatar names or engage in any unsanctioned RMT activity.⁹⁶

Developers need to control user behavior in order to protect the integrity of the virtual world and guarantee a positive user experience.⁹⁷ Disruptive users could, for example, verbally harass other users or undermine the virtual-world economy, thereby driving away business.⁹⁸ Although user restraints could theoretically be programmed into the underlying virtual-world code, this is not always technically feasible.⁹⁹ Thus, EULAs offer an easier, more flexible way to control user behavior.¹⁰⁰

EULAs have been characterized as “clickwrap,” a reference to real-world “shrinkwrap” contracts that are accepted upon removing the shrinkwrap from a product.¹⁰¹ Upon launching a virtual-world program, users are faced with the terms of the agreement, and can either click “I accept” (opening the virtual shrinkwrap and proceeding), or “I do not accept” (terminating the program).¹⁰² This take-it-or-leave-it approach has led to criticism that developers are exploiting unequal bargaining power, with users not getting a fair deal for all the rights they relinquish via the EULA.¹⁰³ Such agreements have also been criticized as too long and too confusing, which can discourage users from even reading them.¹⁰⁴

⁹⁶ See *id.* at 242–43.

⁹⁷ See Jankowich, *supra* note 13, at 8 (noting that developers need to use EULA provisions to minimize risk to their business).

⁹⁸ See, e.g., Daniel Terdiman, *Cheaters Slam ‘Everquest II’ Economy*, CNET (Aug. 11, 2005, 4:51 PM), http://news.cnet.com/Cheaters-slam-Everquest-II-economy/2100-1043_3-5829403.html, archived at <http://perma.cc/3M7T-ETHD> (relating how some users illicitly caused a 20% increase in inflation overnight in one virtual-world economy); Mark Ward, *When the Tech Becomes Unfriendly*, BBC NEWS (Feb. 9, 2010, 8:11 AM), <http://news.bbc.co.uk/2/hi/technology/8504520.stm>, archived at <http://perma.cc/DZH8-ZXW2> (describing harassment in virtual worlds); see also Ran Bantam, *The World of Warcraft Funeral Ambush: An Outsider’s Perspective*, YAHOO! VOICES (Jan. 8, 2009), <http://voices.yahoo.com/the-world-warcraft-funeral-ambush-outsiders-2404718.html>, archived at <http://perma.cc/84TV-KGAH> (telling how a group of users attacked a virtual funeral for a deceased user and questioning whether they broke any rules).

⁹⁹ See Jankowich, *supra* note 13, at 11–12.

¹⁰⁰ See *id.*

¹⁰¹ LASTOWKA, *supra* note 12, at 92.

¹⁰² See Jankowich, *supra* note 13, at 7.

¹⁰³ See, e.g., Joshua A.T. Fairfield, *Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds*, 38 WM. MITCHELL L. REV. 43, 44–45 (2011) (criticizing EULAs’ restrictions on users’ intellectual property rights); Jankowich, *supra* note 13, at 15 (criticizing EULAs as ambiguous, inaccessible, and overly restrictive of users). EULAs can cause users to waive both virtual-world rights and real-world rights. See, e.g., *Bragg*, 487 F. Supp. 2d at 611 (discussing a mandatory arbitration provision in Second Life’s EULA); *World of Warcraft Terms of Use*, *supra* note 88 (stating that World of Warcraft users have no intellectual property rights in their in-game creations).

¹⁰⁴ See, e.g., Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, 54 B.C. L. REV. 1, 29–30 (2013) (discussing Facebook’s “Statement of Rights and

Criticism notwithstanding, courts generally uphold such clickwrap contracts, analyzing them as they would any other contract.¹⁰⁵ One notable exception occurred in 2007 in the United States District Court for the Eastern District of Pennsylvania case *Bragg v. Linden Research, Inc.*¹⁰⁶ In *Bragg*, the court did not enforce an arbitration provision in a Second Life EULA, finding the provision both procedurally and substantively unconscionable.¹⁰⁷

The decision in *Bragg* surprised legal scholars.¹⁰⁸ Nevertheless, many remain convinced that *Bragg* is the exception, not the rule, and that courts will continue to broadly approve of virtual-world EULAs.¹⁰⁹ Perhaps the best takeaway from *Bragg* is that a EULA is a contract like any other, and that traditional contract law defenses such as unconscionability are as applicable as ever.¹¹⁰

Responsibilities” and noting that few users read it); Jankowich, *supra* note 13, at 12–20 (criticizing EULAs generally).

¹⁰⁵ See, e.g., *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1255 (10th Cir. 2012); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150–51 (7th Cir. 1997); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 231, 236 (E.D. Pa. 2007); *LASTOWKA, supra* note 12, at 91. This trend can be traced back to 1996, when the U.S. Court of Appeals for the Seventh Circuit first upheld a physical shrink-wrap contract as valid. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448–49 (7th Cir. 1996) (upholding a license even though the terms were inside the product’s packaging); see also Caitlin J. Akins, Note, *Conversion of Digital Property: Protecting Consumers in the Age of Technology*, 23 LOY. CONSUMER L. REV. 215, 224–25 (2010) (stating that the 1996 U.S. Court of Appeals for the Seventh Circuit case *ProCD, Inc. v. Zeidenberg* “paved the way” for courts to accept clickwrap agreements).

¹⁰⁶ See 487 F. Supp. 2d at 611; *supra* notes 1–14 and accompanying text (discussing the facts of *Bragg*).

¹⁰⁷ See 487 F. Supp. 2d at 597 n.8, 611–13. Unconscionability is a contract law defense based on the idea that the contract was inequitable in its formation (owing to vastly disparate bargaining power) or in its terms (being too one-sided). See *id.* at 605; 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 18.1, 18.10 (4th ed. 2010). The provision in question would have required *Bragg* to settle his dispute through binding arbitration, which would have been conducted in San Francisco, California. *Bragg*, 487 F. Supp. 2d at 604. The provision was found procedurally unconscionable as a contract of adhesion—a take-it-or-leave-it contract with no opportunity for term negotiation. *Id.* at 605–07. The court also found it substantively unconscionable because its terms were one-sided enough in Linden’s favor to “shock the conscience.” *Id.* at 607–12.

¹⁰⁸ *LASTOWKA, supra* note 12, at 95 (noting that the *Bragg* decision surprised academics); see, e.g., Francis J. Mootz III, *After the Battle of Forms: Commercial Contracting in the Electronic Age*, 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 271, 311–12 (2008) (contrasting *Bragg* with several cases that analyze unconscionability differently); Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006–2007*, 63 BUS. LAW. 219, 227 (2007) (describing the *Bragg* decision as “so wrong on so many grounds”); Cory S. Winter, Note, *The Wrap on Clickwrap: How Procedural Unconscionability Is Threatening the E-Commerce Marketplace*, 18 WIDENER L.J. 249, 277 (2008) (stating that the *Bragg* court “got it wrong”).

¹⁰⁹ *LASTOWKA, supra* note 12, at 95; see, e.g., Mootz, *supra* note 108, at 309 (labelling *Bragg* an outlier); Moringiello & Reynolds, *supra* note 108, at 227 (calling *Bragg* an “exception”).

¹¹⁰ See 487 F. Supp. 2d at 603–06 (applying standard contract law to a Second Life EULA); see also *Feldman*, 513 F. Supp. 2d at 236 (stating that courts “apply traditional principles of contract law” in analyzing clickwrap contracts).

II. TRADITIONAL JUSTIFICATIONS FOR GRANTING PROPERTY RIGHTS TO VIRTUAL ASSETS

Where a market develops, legal protections often follow.¹¹¹ Nevertheless, although virtual worlds and the RMT market have existed for over a decade, the law has had little to say on the subject of virtual property rights.¹¹² When cases do reach courts, EULAs and contract law govern the outcomes.¹¹³ Legal scholars, growing increasingly concerned over the possibility of EULAs unfairly abrogating user rights, have turned to property law.¹¹⁴ In arguing for increased property rights in virtual worlds, commentators offer various theoretical justifications, with three predominating: Lockean labor theory, personhood theory, and utilitarianism.¹¹⁵

This Part examines these three main justifications for property rights and their application to virtual property in virtual worlds.¹¹⁶ Section A discusses Lockean labor theory.¹¹⁷ Section B then turns to the more modern personhood theory.¹¹⁸ Finally, Section C considers utilitarian justifications for property rights.¹¹⁹

¹¹¹ Cf. Computer Software Copyright Act of 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (codified at 17 U.S.C. § 101 (2012)) (expanding copyright protection to cover computer programs); DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 443–44 (2d ed. 2004) (explaining how the nascent commercial banking industry prompted significant changes to eighteenth-century English law).

¹¹² See Ryan Krieghauser, Note, *The Shot Heard Around Virtual Worlds: The Emergence and Future of Unconscionability in Agreements Related to Property in Virtual Worlds*, 76 *UMKCL REV.* 1077, 1086 (2008); see also *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 612–13 (E.D. Pa. 2007) (ruling on the unconscionability of a EULA arbitration provision, but not on the merits of the plaintiff's virtual property rights). One possible reason is that many disputes are arbitrated or settled out of court, producing no precedent. See *Lim*, *supra* note 1, at 313–15; see also *Evans v. Linden Research, Inc.*, No. C-11-01078 DMR, 2013 WL 5781284, at *1 (N.D. Cal. Oct. 25, 2013) (approving a class action settlement between the Second Life developer and users).

¹¹³ See, e.g., *Evans v. Linden Research, Inc.*, No. C 11-01078 DMR, 2012 WL 5877579, at *12 (N.D. Cal. Nov. 20, 2012) (granting class certification after examining a EULA); *Bragg*, 487 F. Supp. 2d at 612–13 (ruling on a provision of a EULA).

¹¹⁴ See, e.g., *Fairfield*, *supra* note 16, at 1076–89 (offering primarily utilitarian justifications for the application of property law to virtual property); *Lastowka & Hunter*, *supra* note 16, at 43–50 (exploring utilitarian, Lockean, and personality theories for the application of property law to virtual property).

¹¹⁵ See Michael A. Carrier & Greg Lastowka, *Against Cyberproperty*, 22 *BERKELEY TECH. L.J.* 1485, 1493 (2007) (calling these “the three most important justifications for property”).

¹¹⁶ See *infra* notes 120–166 and accompanying text.

¹¹⁷ See *infra* notes 120–127 and accompanying text.

¹¹⁸ See *infra* notes 128–149 and accompanying text.

¹¹⁹ See *infra* notes 150–166 and accompanying text.

A. Lockean Labor Theory

Labor theory offers one normative explanation for the recognition of virtual property rights.¹²⁰ John Locke, writing in 1690, proposed that when someone removes something from nature, “he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property.”¹²¹ Under Locke’s theory, therefore, an individual obtains a property interest in an object simply by investing labor into it.¹²² For Locke, this interest was a natural right, a simple extension of ownership of the body used to perform the labor.¹²³

The application of Locke’s theory to virtual property is straightforward.¹²⁴ Because users expend their labor, time, and skill in virtual worlds to acquire virtual assets, they deserve property rights in those assets.¹²⁵ Users who have, over the course of years, amassed a great amount of virtual wealth via shrewd trades with other users, should have some protection if, say, a rival hacks into their account and steals their wealth.¹²⁶ Similarly, a user who has devoted a great deal of time becoming skilled and famous as a virtual-world craftsman deserves security from having his creations unilaterally removed from the world by the developer.¹²⁷

¹²⁰ See Westbrook, *supra* note 16, at 791–95 (applying labor theory to virtual property); see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT 133–46 (Thomas I. Cook ed., Hafner Press 1947) (1690) (articulating the first formulation of the labor theory of property).

¹²¹ LOCKE, *supra* note 120, at 134.

¹²² *Id.*

¹²³ See *id.* (“[E]very man has a property in his own person The labour of his body and work of his hands, we may say, are properly his.”).

¹²⁴ See Lastowka & Hunter, *supra* note 16, at 46–48 (applying Lockean labor theory to virtual property).

¹²⁵ *Id.*; see LOCKE, *supra* note 120, at 134. In *Li Hongchen v. Beijing Arctic Ice Technology Development Co.*, this argument convinced a Chinese court to hold a virtual-world developer liable after a user’s account was hacked. See HONG XUE, CYBER LAW IN CHINA 81–82 (2010) (discussing the *Li Hongchen* case); Fairfield, *supra* note 16, at 1084 (same); *On-line Game Player Wins Virtual Properties Dispute*, CHINADAILY (Dec. 19, 2003, 5:01 PM), http://www.chinadaily.com.cn/en/doc/2003-12/19/content_291957.htm, archived at <http://perma.cc/69SE-F766> (same).

¹²⁶ See Lastowka & Hunter, *supra* note 16, at 46–48; LOCKE, *supra* note 120, at 134; see also Burns, *supra* note 44, at 831–34 (relating multiple instances of virtual theft); *supra* notes 73–77 and accompanying text (discussing the value of virtual property to virtual-world users).

¹²⁷ See Lawrence, *supra* note 20 at 521–23. Developers, particularly of game worlds, must from time to time alter or remove virtual items to correct bugs or “rebalance” their virtual world. *Id.*

B. Personhood Theory

An alternate justification for virtual property rights is rooted in personhood theory.¹²⁸ Professor Margaret Jane Radin first espoused this theory of property in her 1982 article, *Property and Personhood*.¹²⁹ The theory focuses on the relationship between objects and individuals, and the effect such a relationship should have on property rights.¹³⁰ For Radin, property can be classified on a continuum between two poles.¹³¹ At one end lies “personal” property, or property that has, in some sense, become fused with one’s self, and therefore holds value to an individual beyond its monetary value.¹³² Classic examples include a home, a wedding ring, or one’s own body.¹³³ At the other end of the continuum lies “fungible” property, or property that may be replaced without any harm to the individual.¹³⁴ The archetypical example of fungible property is money; individuals do not have personal attachments to particular bills or coins.¹³⁵ Under this theory, the property relationship defines the classification because objects are not inherently personal or fungible.¹³⁶ Whereas for a watchmaker, a watch may be fungible property ready to be sold, the same watch may prove to be a precious heirloom for another, and thus personal property.¹³⁷ Although Lockean theory may have afforded the watchmaker

¹²⁸ See, e.g., Lastowka & Hunter, *supra* note 16, at 48–50 (outlining virtual property rights based on personhood theory justifications); Westbrook, *supra* note 16, at 797–801 (same). See generally M. Scott Boone, *Virtual Property and Personhood*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 715 (2008) (examining the application of personhood theory to virtual property and the potential problems that arise); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (outlining the personhood theory of property).

¹²⁹ See generally Radin, *supra* note 128. Personhood theory has roots in the philosopher Friedrich Hegel’s conception of the relationship between free will and objects. Carrier & Lastowka, *supra* note 115, at 1504–06 (discussing Hegelian ideas and virtual property).

¹³⁰ See Boone, *supra* note 128, at 722–23; Radin, *supra* note 128, at 957–58.

¹³¹ See Boone, *supra* note 128, at 722–23; Radin, *supra* note 128, at 986.

¹³² See Boone, *supra* note 128, at 722–23; Margaret Jane Radin, *The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 426 (1995) [hereinafter Radin, *Memorial Lecture*]. Radin also recognized that some property relationships may be negative—only positive property relationships that support “human flourishing” qualify as personal under her theory. Boone, *supra* note 128, at 726–28; see Radin, *supra* note 128, at 968–70. In determining which are good and which are bad, Radin takes a pragmatic approach and recommends looking to “entrenched moral views.” Boone, *supra* note 128, at 727–29; see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1908 (1987) [hereinafter Radin, *Market-Inalienability*].

¹³³ Boone, *supra* note 128, at 723; Radin, *supra* note 128, at 959.

¹³⁴ Boone, *supra* note 128, at 723; Radin, *supra* note 128, at 960.

¹³⁵ Boone, *supra* note 128, at 723; Radin, *supra* note 128, at 960.

¹³⁶ Boone, *supra* note 128, at 724; Radin, *supra* note 128, at 960.

¹³⁷ See Boone, *supra* note 128, at 725; Radin, *supra* note 128, at 960.

property rights because of his labor invested, personhood theory recognizes no additional rights if the maker has no attachment to the watch.¹³⁸

Personhood theory recommends affording greater protections to personal property.¹³⁹ According to this theory, the more attached an individual is to a piece of property, the greater the rights the law should grant.¹⁴⁰ For example, personhood theory endorses rent control laws, which place the fungible interests of the landlord second to the personal interests of the tenant.¹⁴¹ Furthermore, under personhood theory, personal property should become “market inalienable,” meaning it may be given away, but never sold.¹⁴² If, for example, the heirloom watch is truly personal property and thus invaluable to its owner, the owner should not be able to sell it for any amount of money.¹⁴³

Arguments for applying personhood theory to property in virtual worlds naturally focus on the attachment between the user and the avatar.¹⁴⁴ Users often spend a significant amount of time logged in as their avatar, and it seems inevitable that some sense of self becomes bound up in the avatar and its acquisitions.¹⁴⁵ Users may develop personal relationships with their avatars because they allow users to transcend their real-world identities and depict a more ideal self.¹⁴⁶ For example, the user may design the avatar to meet his or her wishes—if the user is short, the avatar can be tall (or even shorter, or have purple skin, or wings).¹⁴⁷ The user may employ the avatar to accomplish fantastic feats beyond the scope of the user in real life, such as flying or using magical abilities.¹⁴⁸ The avatar may even be part of a larger network of friends

¹³⁸ See LOCKE, *supra* note 120, at 134 (explaining labor theory); Boone, *supra* note 128, at 725 (explaining personhood theory); Radin, *supra* note 128, at 959–60 (same); *supra* notes 120–127 and accompanying text (discussing Lockean labor theory).

¹³⁹ See Boone, *supra* note 128, at 729–30; Radin, *supra* note 128, at 978–79.

¹⁴⁰ See Boone, *supra* note 128, at 729–30; Radin, *supra* note 128, at 978–79.

¹⁴¹ Boone, *supra* note 128, at 729.

¹⁴² *Id.* at 730; see Radin, *supra* note 128, at 986 n.101 (supporting inalienability for personal property).

¹⁴³ See Boone, *supra* note 128, at 730; Radin, *supra* note 128, at 986 n.101.

¹⁴⁴ See Lastowka & Hunter, *supra* note 16, at 48.

¹⁴⁵ Boone, *supra* note 128, at 732.

¹⁴⁶ See *Avatar*, *supra* note 65 (“You can create an avatar that resembles your real life or create an alternate identity. The only limit is your imagination. Who do you want to be?”).

¹⁴⁷ See *id.* For an example of a short, purple, winged avatar, see the race of “Arasai” avatars from the virtual world of EverQuest II. *Player Races*, EVERQUEST II, <https://www.EverQuest2.com/races>, archived at <http://perma.cc/BNH6-GFVJ> (last visited Jan. 9, 2014) (click “Evil”; then click “Arasai”).

¹⁴⁸ See, e.g., *New to Aion*, NCSOFT, <http://na.aiononline.com/about-aion/new-to-aion>, archived at <http://perma.cc/QN43-SMGU> (last visited Jan. 9, 2014) (“Soar through the skies with thrilling character flight.”); *What Is World of Warcraft*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/guide/>, archived at <http://perma.cc/P4FT-QWUZ> (last visited Jan. 18, 2014) (explaining the magical abilities of some classes of avatars).

and social connections valued by the user that is unavailable outside of the virtual world.¹⁴⁹

C. Utilitarian Justifications for Virtual Property

A third family of justifications for recognizing virtual property rights springs from utilitarian theories.¹⁵⁰ Utilitarianism originated with the eighteenth century philosopher Jeremy Bentham.¹⁵¹ Under utilitarianism, the rightness or wrongness of an action is determined solely by its consequences: the preferable course of action is the one that creates the greatest happiness for the greatest number of people.¹⁵² Under Bentham's formulation, "happiness" was simply the net balance of pleasure and pain.¹⁵³

To this end, proponents of recognizing virtual property rights generally offer two utilitarian justifications, one based in deterrence of negative behavior, and the other in economics.¹⁵⁴ The deterrence theory argues that greater property rights would expose malfeasors to criminal prosecution or real-world liability, thereby deterring any would-be perpetrators from acting, and thus increasing social utility.¹⁵⁵

Little such deterrence exists today, as real-world authorities often decline to investigate any claims of virtual-world theft or fraud.¹⁵⁶ Police will not pursue such virtual crimes if, in the eyes of the law, nothing of value is lost.¹⁵⁷ If the law recognized property rights in virtual objects and avatars, a thief could be held civ-

¹⁴⁹ See Lastowka & Hunter, *supra* note 16, at 26–27 (describing how interactions between avatars in EverQuest can lead to the formation of large "guilds" and even marriages between users).

¹⁵⁰ See *id.* at 44–46. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), reprinted in THE UTILITARIANS 17 (Dolphin Books 1961) (1789) (articulating utilitarian theory).

¹⁵¹ See Lastowka & Hunter, *supra* note 16, at 44 n.225.

¹⁵² *Id.* at 44.

¹⁵³ BENTHAM, *supra* note 150, at 17.

¹⁵⁴ See, e.g., Fairfield, *supra* note 16, at 1084–86, 1101–02 (providing examples of deterrence and arguing for economic efficiency); Burns, *supra* note 44, at 851 (arguing that property rights protected by criminal law would deter virtual-world wrongdoers).

¹⁵⁵ See Burns, *supra* note 44, at 851.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* In 2008, Minnesotan Geoff Luurs logged into his account for the virtual world Final Fantasy XI, only to discover that four years' worth of virtual goods and avatar development were gone—deleted or sold by a third party who co-opted Luurs's account information. Earnest Cavalli, *Police Refuse to Aid in Virtual Theft Case*, WIRED (Feb. 4, 2008, 1:25 PM), <http://www.wired.com/gamelifelife/2008/02/police-refuse-t>, archived at <http://perma.cc/C83D-PLHR>. Luurs priced the loss at nearly \$4000. *Id.* When he went to the police, however, they refused to pursue the matter, maintaining that anything stolen was "devoid of monetary value," and that, therefore, there was no crime to investigate. *Id.*

ilily liable, or even convicted of a crime.¹⁵⁸ Fear of liability or punishment would deter would-be thieves, and users would gain peace of mind.¹⁵⁹ The result, in utilitarian terms, would be an increase in the overall social good.¹⁶⁰

In addition, supporters of utilitarian virtual property justifications argue that recognition of virtual property rights would increase investment in virtual worlds and foster economic efficiency.¹⁶¹ Greater rights lead to greater certainty, which in turn both encourages investment and increases economic efficiency.¹⁶² Users and outside investors are more likely to invest in a virtual world if they are certain of the legal status (and value) of its virtual content.¹⁶³ Greater investment increases the welfare of both the users and the developers by allowing developers to improve and extend the lifespan of virtual worlds.¹⁶⁴ Investment also encourages innovation, leading to useful technological advances and the development of new resources and markets, which should improve the general welfare of the economy.¹⁶⁵ Furthermore, the certainty afforded by virtual property rights would make transactions involving virtual assets more efficient, just as property rights make real-world property transfers more efficient.¹⁶⁶

III. THE TRADITIONAL THEORIES' FAILURES IN THE VIRTUAL-WORLD CONTEXT

Each of these three theories—labor theory, personhood theory, and utilitarianism—has been offered to justify the recognition of virtual property rights.¹⁶⁷ The unique nature of virtual property and virtual worlds, however, makes the application of these traditional theories problematic.¹⁶⁸

¹⁵⁸ Burns, *supra* note 44, at 851. Other countries recognize virtual-property crimes. *Id.* at 845. For example, in January 2012, the Supreme Court of the Netherlands upheld the conviction on theft charges of two youths who had robbed a classmate of virtual items by threatening him with a knife in the real world. See HR 31 januari 2012, NJ 2012, 536 m.nt. N. Keijzer (Neth), available at <http://translate.google.com/translate?hl=en&sl=nl&tl=en&u=http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BQ9251> (unofficial translation); Burns, *supra* note 44, at 848–49.

¹⁵⁹ Burns, *supra* note 44, at 851.

¹⁶⁰ See LASTOWKA, *supra* note 12, at 130–31; Burns, *supra* note 44, at 851.

¹⁶¹ See Fairfield, *supra* note 16, at 1101–02. “Economic efficiency” refers to the use of resources in a manner that maximizes the production of goods and services. See Nelson, *supra* note 20, at 294. Efficiency increases the size of the economy, which in turn, improves the general well-being of society. *Id.* (noting that “a rising tide lifts all boats”).

¹⁶² See Fairfield, *supra* note 16, at 1065–67.

¹⁶³ See *id.*

¹⁶⁴ See *id.* at 1065–67, 1086.

¹⁶⁵ *Id.* at 1065–67.

¹⁶⁶ *Id.* at 1101–02.

¹⁶⁷ See Lastowka & Hunter, *supra* note 16, at 43–50.

¹⁶⁸ See Carrier & Lastowka, *supra* note 115, at 1500–11; Nelson, *supra* note 20, at 290–92, 307–09.

This Part returns to each of the three theories and exposes the problems posed by applying them in the virtual-world context.¹⁶⁹ Section A tackles the problems in applying Locke's labor theory to virtual property.¹⁷⁰ Section B then questions the appropriateness of applying personhood theory to what seems to be largely fungible virtual property.¹⁷¹ Finally, Section C concludes with a utilitarian analysis that demonstrates how the recognition of user property rights—rather than improving user happiness—could instead spell the end of virtual worlds.¹⁷²

A. Problems Applying Lockean Labor Theory to Virtual Worlds

Lockean labor-based justifications for virtual property rights are fundamentally flawed, both in Locke's original form and in modern permutations.¹⁷³ As Locke admitted, his theory was only to explain the origin of property rights of the person who first claimed the resources out of nature.¹⁷⁴ After a person's labor grants the initial natural right to a resource, Locke acknowledged that man-made law would step in to delineate the contours of those rights and govern disputes among rights-holders.¹⁷⁵ Users may acquire virtual assets "in the wild" in the context of the virtual world, but the resources are certainly not in the state of nature as Locke envisioned.¹⁷⁶ Virtual worlds are made by individuals, and thus any labor done within them cannot qualify as taking resources out of nature.¹⁷⁷

Even acknowledging that users labor to acquire virtual objects, the ensuing rights to them must be wholly secondary to the property rights of the developers who created the virtual worlds themselves.¹⁷⁸ Person A's purchase of

¹⁶⁹ See *infra* notes 173–234 and accompanying text.

¹⁷⁰ See *infra* notes 173–181 and accompanying text.

¹⁷¹ See *infra* notes 182–195 and accompanying text.

¹⁷² See *infra* notes 196–234 and accompanying text.

¹⁷³ See *infra* notes 174–181 and accompanying text.

¹⁷⁴ See LOCKE, *supra* note 120, at 134 ("I shall endeavor to show how men might come to have a property in several parts of that which God gave to mankind in common . . .").

¹⁷⁵ *Id.* at 143. ("[L]abour, in the beginning, gave a right of property . . . [T]he several communities [later] settled the bounds of their distinct territories and, by laws within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began . . .").

¹⁷⁶ Compare *id.* at 134 (analyzing property rights in acorns and apples), with Molly Stephens, Note, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513, 1516–19 (2002) (discussing the complex client-server code interaction underlying the user's experience of virtual worlds).

¹⁷⁷ Cf. LOCKE, *supra* note 120, at 143 (noting that the labor-based origination of property rights does not apply after resources are initially removed for nature).

¹⁷⁸ See Nelson, *supra* note 20, at 291 (arguing that a blacksmith's rights in a sword come from initially buying the raw metal—not from the labor of forging it).

Park Place in a game of Monopoly should not entitle Person A to keep the card after the game is over if the set belongs to Person B.¹⁷⁹ In a similar manner, developers invest their labor to create virtual worlds; users are merely enjoying the fruits of that labor with permission.¹⁸⁰ Such enjoyment does not alter the underlying ownership of the property.¹⁸¹

B. Problems Applying Personhood Theory to Virtual Worlds

Several problems attend personhood-based justifications for virtual property rights.¹⁸² First, the concept of personal property lies in tension with the ultimate end of many supporters of virtual property rights: the ability to sell their virtual property for real-world money.¹⁸³ Radin's theory contends that personal property, being so bound up in the person that it possesses unquantifiable value, must be market-inalienable.¹⁸⁴ Individuals that treat their avatars or virtual possessions as personal property, therefore, should not be able sell them.¹⁸⁵ Yet many users advocate for property rights in virtual assets precisely because they want to preserve the financial value of their virtual property.¹⁸⁶ If such property is to be sellable, it must be fungible property (i.e., virtual cash)—and not personal property (i.e., virtual wedding rings).¹⁸⁷ Consequently, the personhood approach cannot be used to afford rights to *all* virtual property, thereby losing much of its force.¹⁸⁸

Even accepting that personhood theory justifies increased protections for the subset of virtual assets that qualify as personal property, identifying that subset remains problematic.¹⁸⁹ Property relationships only qualify as personal if they are “good” relationships—in Radin's terms, those conducive to “human

¹⁷⁹ See *id.* This example exposes a broader flaw in Locke's theory: it cannot handle situations such as borrowing or sharing, where owners want to allow use of their property without creating any other property rights. See Carrier & Lastowka, *supra* note 115, at 1501.

¹⁸⁰ See Nelson, *supra* note 20, at 290–91 (arguing that developers—not users—deserve virtual-world property rights from their labor).

¹⁸¹ See *id.*

¹⁸² See *infra* notes 183–195 and accompanying text.

¹⁸³ See Boone, *supra* note 128, at 722, 732; Radin, *Market-Inalienability*, *supra* note 132, at 1908.

¹⁸⁴ Boone, *supra* note 128, at 730; see Radin, *Market-Inalienability*, *supra* note 132, at 1853.

¹⁸⁵ See Boone, *supra* note 128, at 736.

¹⁸⁶ See *id.*; Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 n.8 (E.D. Pa. 2007) (noting that the plaintiff sought compensation for his seized virtual property).

¹⁸⁷ See Boone, *supra* note 128, at 730–32 (expressing the difficulty of classifying some virtual property as personal property); Radin, *supra* note 128, at 59–60.

¹⁸⁸ See Boone, *supra* note 128, at 730–32.

¹⁸⁹ See *id.* at 731–32.

flourishing,” as judged through the lens of “entrenched moral views.”¹⁹⁰ Inasmuch as one can find a consensus, current societal views toward virtual worlds are not overwhelmingly positive.¹⁹¹ Addiction to virtual worlds is increasingly treated as a disease.¹⁹² Several popular television series have featured episodes where individuals commit either suicide or homicide as a result of their involvement in a virtual world.¹⁹³ And politicians routinely question the link between real-world violence and violence in video games, including some virtual worlds.¹⁹⁴ Thus, even if a particular user has a personal relationship with a virtual asset, it is not clear that the law should afford the asset the heightened protection of personal property.¹⁹⁵

C. Problems Applying Utilitarian Justifications to Virtual Worlds

A utilitarian analysis weighs the costs of a proposed action against the ensuing benefits.¹⁹⁶ In the context of virtual worlds, the utilitarian justifications of promoting deterrence and economic efficiency are outweighed by the actual economic costs that would result from affording rights to virtual property.¹⁹⁷

In the first instance, because the threat of harm to virtual property in the United States is neither widespread nor imminent, the actual utility in deterrence remains low.¹⁹⁸ Although virtual worlds are growing in popularity, they remain a niche industry.¹⁹⁹

¹⁹⁰ See MARGARET JANE RADIN, REINTERPRETING PROPERTY 4–5 (1993); Boone, *supra* note 128, at 727–28 (summarizing the evolution of Radin’s terminology).

¹⁹¹ See Boone, *supra* note 128, at 734.

¹⁹² See, e.g., Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 485 n. 15 (2012) (discussing the possible inclusion of Internet and video game addiction to the international psychiatric diagnostic manual, the DSM); Deana Pollard Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1078–79 (2012) (same); Abby Ohlheiser, “Internet-Use Disorder” Being Added to New Edition of DSM, SLATE (Oct. 2, 2012, 12:10 PM), http://www.slate.com/blogs/the_slatest/2012/10/02/internet_addiction_diagnosis_dsm_revision_to_include_internet_use_disorder_as_a_possible_condition_for_further_study_.html, archived at <http://perma.cc/P3G7-CSSZ> (same).

¹⁹³ See Boone, *supra* note 128, at 733–34 (noting such plotlines in episodes of *Law & Order: SVU*, *CSI: New York*, *NCIS*, and *NUMB3RS*).

¹⁹⁴ See, e.g., *Connecticut St. Sen. Wants Task Force on Video Game Violence*, CBS NEW YORK (Feb. 15, 2013, 11:43 AM), <http://newyork.cbslocal.com/2013/02/15/connecticut-st-sen-wants-task-force-on-video-game-violence/>, archived at <http://perma.cc/LZ98-BP8B>; Will Oremus, *U.S. Senator: “I Think Video Games Is a Bigger Problem Than Guns,”* SLATE (Jan. 30, 2013, 3:26 PM), http://www.slate.com/blogs/future_tense/2013/01/30/senator_lamar_alexander_says_video_games_are_bigger_problem_than_guns.html, archived at <http://perma.cc/Z4P5-XEHH>.

¹⁹⁵ See Boone, *supra* note 128, at 732–34; Radin, *supra* note 128, at 68–70.

¹⁹⁶ See BENTHAM, *supra* note 150, at 17; LASTOWKA, *supra* note 12, at 130–31; *supra* notes 150–166 and accompanying text (introducing utilitarianism).

¹⁹⁷ See *infra* notes 198–234 and accompanying text.

¹⁹⁸ See LASTOWKA, *supra* note 12, at 130–31. *But see* Andrea Vanina Arias, *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 EMORY L.J. 1301, 1304

Moreover, the cost of implementing protections for virtual property would be high.²⁰⁰ This is not to say that real harms have not been suffered by the victims of virtual property theft, but rather that affording full property rights and importing the heavy hand of the law into virtual worlds may not be the most efficient way to prevent those harms.²⁰¹ Allowing the real-world legal system to become the primary means of resolving disputes in virtual worlds would lead users to fear lawsuits from other users, chilling participation in virtual worlds.²⁰² Because the crimes or tortious behavior occurred “on the property” of the virtual worlds, their developers will likely be dragged into court as well, with their costs passed on to users.²⁰³ Even if not joined as a party, developers—as custodians of records and experts on their virtual world—would still likely be involved in such cases.²⁰⁴ The international reach of virtual worlds also raises logistical and jurisdictional issues, further complicating such lawsuits.²⁰⁵

Besides becoming entangled by disputes between users, developers themselves could be targeted by lawsuits.²⁰⁶ Developers could be held liable for

(2008) (arguing that there are no authoritative studies of virtual-world theft in the United States and arguing, based on anecdotes, for increased regulation). Note that the utility calculus may be different if the incidence rate is higher; in Korea, for example, where a higher percentage of the population participates in virtual worlds, the societal benefit of increased regulation would be greater. *See id.* (providing Korean cybercrime statistics).

¹⁹⁹ *Cf. Total Active Subscriptions*, *supra* note 57. The total number of virtual-world users worldwide in 2012 was estimated at twenty-two million—a large number, but small compared to overall worldwide population. *Compare id.* (indicating twenty-two million users), with *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 9, 2014) (indicating that the world population exceeds seven billion people). In contrast, consider the ubiquity of Facebook, which has acquired 1.19 billion users. FACEBOOK, FACEBOOK REPORTS THIRD QUARTER 2013 RESULTS 1 (2013) (reporting Facebook’s active membership as of September 2013).

²⁰⁰ *See infra* notes 201–232 and accompanying text.

²⁰¹ *See Rogers*, *supra* note 20, at 423 (noting that courts are ill-equipped to analyze claims arising out of virtual worlds).

²⁰² LASTOWKA, *supra* note 12, at 140–42.

²⁰³ *See id.* at 141 (“[W]hen users *do* sue each other, virtual world developers are inevitably caught in the middle.”).

²⁰⁴ *Id.*

²⁰⁵ *See Andrew Cabasso*, Note, *Piercing Pennoyer with the Sword of a Thousand Truths: Jurisdictional Issues in Virtual Worlds*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 383, 403 (2012); Zachary Schaengold, Note, *Personal Jurisdiction over Offenses Committed in Virtual Worlds*, 81 U. CIN. L. REV. 361, 363–65 (2012); *Alliance and Horde Armies Grow with Launch of Mists of Pandaria*, BLIZZARD ENT. (Oct. 4, 2012), <http://us.blizzard.com/en-us/company/press/pressreleases.html?id=7473409>, archived at <http://perma.cc/ND87-R5BY> (indicating that World of Warcraft has a global reach).

²⁰⁶ *See LASTOWKA*, *supra* note 12, at 139–40 (noting that property entitlements for users almost always pose litigation risks for developers).

both intentional harms (e.g., stripping a user of items they use to harass others) and unintentional harms (e.g., bugs in the code causing the deletion of virtual items).²⁰⁷ Whereas the utility gains from granting users property rights would be small, the new expenses and risks to developers would outweigh any proposed economic incentives designed to encourage innovation.²⁰⁸

Such full-scale property protections are also inherently incompatible with both the short-term operation of virtual worlds and their long-term lifecycles.²⁰⁹ These worlds are incredibly complex constructs, with developers adding new content constantly.²¹⁰ It is inevitable that some additions impact the virtual world in unexpected ways, either as unforeseen consequences of intentional changes or as undetected errors in the underlying virtual-world code.²¹¹ For example, a new skill intentionally introduced into World of Warcraft may unintentionally trivialize some challenges, or a new interface feature in Second Life may be bugged, allowing users to create items that are one-hundred times larger than intended.²¹² In such cases, the developers must take swift action to correct the problems before they spread.²¹³ Such action could consist of an adjustment to avatars or objects in the world, or, in extreme cases, a rollback of the entire world to an earlier point in time.²¹⁴ In either scenario, the developers' fixes could damage or even destroy users' virtual property.²¹⁵

Developers may even alter the virtual world for business-related reasons, again influencing the value of virtual property.²¹⁶ For example, in 2005, Linden Lab altered the means by which users could travel through Second Life by replacing fixed "telehub" buildings with individual avatar teleportation.²¹⁷ The value of virtual real estate near telehubs, formerly prized for their proximity to these high-traffic areas, tumbled.²¹⁸ The developers likely believed that this decision, designed to improve the user experience for many, would ultimately

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See *infra* notes 210–227 and accompanying text.

²¹⁰ See Lawrence, *supra* note 20, at 515–16 (noting the pressures on developers to reprogram their virtual worlds).

²¹¹ See *id.* at 521–23 (describing how developers must "rebalance" worlds in reaction to unforeseen consequences and defects).

²¹² See *id.*; see also *supra* notes 42–53 and accompanying text (describing the virtual worlds of World of Warcraft and Second Life).

²¹³ See Lawrence, *supra* note 20, at 521–22.

²¹⁴ See John William Nelson, *Fiber Optic Foxes: Virtual Objects and Virtual Worlds Through the Lens of Pierson v. Post and the Law of Capture*, 14 J. TECH. L. & POL'Y 5, 20 (2009).

²¹⁵ See *id.*

²¹⁶ See LASTOWKA, *supra* note 12, at 140.

²¹⁷ See *id.*

²¹⁸ *Id.*

be profitable for the company.²¹⁹ If virtual landowners near telehubs had traditional property rights, however, the developers may have been liable for the reduction of their property's value.²²⁰

In the long term, many virtual worlds also face a common technological problem: obsolescence.²²¹ Although developers may add content consistently across a span of years, updating the underlying code can be a much more daunting task.²²² For example, World of Warcraft has been operating for nine years, but has yet to launch a major overhaul of its graphics engine.²²³ Instead, developers have traditionally focused on producing a whole sequel from scratch, allowing them to update technical elements while also tweaking the user experience.²²⁴ The virtual world EverQuest, launched in 1999, suffered a sharp drop in users with the 2004 launch of EverQuest II.²²⁵ Eventually, the expectation is that a virtual world becomes so technologically eclipsed by competitors that it no longer becomes profitable to run.²²⁶ This was recently the case with the long-running superhero game, City of Heroes, which ended in late 2012 after a run of eight years.²²⁷

If the users of such obsolete virtual worlds are afforded full property rights, developers would be exposed to tremendous liability.²²⁸ Developers who wish to shut down their servers would face an array of undesirable options.²²⁹ They could simply pull the plug and risk lawsuits.²³⁰ Or, they could separately settle with each user who holds virtual property of value within their world, negotiating to buy the property or otherwise gain permission to end the virtual world.²³¹ Developers could very well be induced to “constructively

²¹⁹ See *id.*

²²⁰ See Lawrence, *supra* note 20, at 523–24.

²²¹ See *id.* at 518–19.

²²² See *id.*

²²³ See Messiah, *World of Warcraft: Mists of Pandaria Review*, TENTONHAMMER.COM, <http://www.tentonhammer.com/reviews/wow/mists-of-pandaria>, archived at <http://perma.cc/U2DP-6UGW> (last updated Oct. 1, 2012), (“On a technical graphics level [World of Warcraft’s latest expansion] is significantly behind the times.”).

²²⁴ See Lawrence, *supra* note 20, at 518 n.71.

²²⁵ See *Subscriptions: 150k–1m*, MMODATA.NET, <http://users.telenet.be/mmodata/Charts/Subs-2.png>, archived at <http://perma.cc/XZF2-XHHJ> (last visited Jan. 9, 2014) (showing a twenty percent dip in EverQuest subscribers).

²²⁶ Lawrence, *supra* note 20, at 518–19.

²²⁷ See Kate Cox, *MMO Developer Paragon Studios Closing: City of Heroes to Shut Down by End of Year*, KOTAKU (Aug. 31, 2012, 2:53 PM), <http://kotaku.com/5939702/mmo-developer-paragon-studios-closing-city-of-heroes-to-shut-down-by-end-of-year>, archived at <http://perma.cc/UG54-U8D2>.

²²⁸ See Lawrence, *supra* note 20, at 520–21 (describing the end of virtual-world lifecycles and the resulting alienation of virtual property).

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *id.*

evict” their users by not further supporting their virtual worlds and hoping the users are driven elsewhere.²³²

Ultimately, short-term bug fixes, medium-term business decisions, and long-term obsolescence create serious problems for any utilitarian justification.²³³ Forcing developers of virtual worlds out of business is likely not the scenario envisioned by those arguing for increased virtual property rights.²³⁴

IV. CONTRACT LAW CAN PROVIDE THE OPTIMAL LEVEL OF RIGHTS FOR EACH VIRTUAL WORLD

With property law theories proving inadequate, contract law should continue to govern virtual worlds.²³⁵ This is not simply because there is no better alternative, but rather because contract law provides virtual worlds with something necessary for their prosperity: flexibility.²³⁶

Developers are free to, through the terms of their EULAs, craft systems of rights that are purposefully tailored to their unique virtual world.²³⁷ The result is an efficient ecosystem of virtual worlds that caters to a wide variety of users who demand a varying array of rights.²³⁸

This Part argues that the flexibility required by virtual-world developers and users makes the current EULA-based system preferable to a property rights regime.²³⁹ Section A posits that some virtual worlds require lesser rights than traditional property law provides.²⁴⁰ Section B, conversely, notes that other virtual worlds benefit from greater rights than those provided by property law.²⁴¹ Finally, Section C concludes by arguing that because of economic conditions, developers will continue to be responsive to user demands for virtual property protection, thereby obviating the need for property law protection.²⁴²

²³² See *id.*

²³³ See *supra* notes 209–232 and accompanying text.

²³⁴ Cf. Lawrence, *supra* note 20, at 524 (arguing that property rights would backfire on users because litigation would ruin developers); Westbrook, *supra* note 16, at 796–97 (discussing the benefits of property rights to users but questioning whether they outweigh harms to developers).

²³⁵ See Lawrence, *supra* note 20, at 508; Rogers, *supra* note 20, at 423; *supra* notes 167–234 and accompanying text (exploring the flaws in traditional property theories when applied to virtual worlds).

²³⁶ See Lawrence, *supra* note 20, at 540–41.

²³⁷ See *id.*

²³⁸ See *id.*; see also Nelson, *supra* note 20, at 308 (arguing that virtual property rights will cause economic inefficiency).

²³⁹ See *infra* notes 243–288 and accompanying text.

²⁴⁰ See *infra* notes 243–256 and accompanying text.

²⁴¹ See *infra* notes 257–272 and accompanying text.

²⁴² See *infra* notes 273–288 and accompanying text.

A. Users of Some Virtual Worlds Demand Fewer Rights

Many virtual worlds are deliberately less protective of user virtual-property rights.²⁴³ This springs not from some sinister desire to minimize user rights—but rather from the users themselves demanding a world without such property rights.²⁴⁴

These virtual worlds *purposely* allow users to engage their avatars in behavior that would otherwise be criminal or tortious in the real world.²⁴⁵ The practice of allowing avatars to injure or rob each other exists in many virtual worlds today, including EVE Online.²⁴⁶ Developers permit avatars in EVE to commit piracy by destroying others' spacecraft or swindle other users through various scams.²⁴⁷ Despite the real-world illegality of such behavior, the developers of EVE not only allow these actions, they encourage them.²⁴⁸ EVE's continued success indicates that users find that the enjoyment of such a Wild West environment outweighs the risks of having property stolen or destroyed by other users.²⁴⁹ Attaching civil or criminal liability for such conduct would

²⁴³ See, e.g., *About, RUST*, <http://playrust.com/about/>, archived at <http://perma.cc/CK84-DEZ8> (last visited Jan. 23, 2014) (describing a persistent post-apocalyptic virtual world where other users can “kill you and take your stuff”); *Five Frequently Asked Questions About Petitions in EVE Online*, EVE ONLINE (May 31, 2011), <https://www.tentonhammer.com/eve/guides/politics/faq-petitions>, archived at <http://perma.cc/JL2B-Z8CQ> (noting that the developer of the virtual world EVE Online will not compensate users for virtual-property loss caused by other users); Giuseppe Nelva, *PS4 Exclusive Deep Down Gets New Info: Greatswords, Memento Buffs; Online Corpse Looting and More*, DUALSHOCKERS (Dec. 29, 2013, 2:33 PM), <http://www.dualshockers.com/2013/12/29/ps4-exclusive-deep-down-gets-new-info-greatswords-memento-buffs-online-corpse-looting-and-more/>, archived at <http://perma.cc/3SPD-68RB> (reporting that an upcoming virtual world will allow users to kill and steal from other users' avatars).

²⁴⁴ See *infra* notes 245–256 and accompanying text. For example, one such world, EVE Online, had its highest subscription numbers ever in 2013 despite ten years of users killing and stealing from each other. See Brendan Drain, *EVE Online Hits 500,000 Subscribers, Heads into Second Decade*, MASSIVELY (Feb. 28, 2013, 6:00 AM), <http://massively.joystiq.com/2013/02/28/eve-online-hits-500-000-subscribers-heads-into-second-decade/>, archived at <http://perma.cc/RAB4-V6BD>.

²⁴⁵ See LASTOWKA, *supra* note 12, at 119–20.

²⁴⁶ See, e.g., *id.* (noting that “ruthless behavior is part of [EVE]’s culture”); *About*, *supra* note 243 (describing similar features in the virtual world Rust); *Player vs. Player*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/pvp/>, archived at <http://perma.cc/DM3V-9CA7> (last visited Jan. 9, 2014) (outlining the combat that takes place between avatars).

²⁴⁷ See LASTOWKA, *supra* note 12, at 119–20 (recounting a virtual-world Ponzi scheme executed by one EVE user and the developer’s subsequent refusal to impose a punishment).

²⁴⁸ See Omri Petite, *EVE Online Producer: “I Don’t Ever Want EVE to Be Nice and Fluffy,”* PC GAMER (Dec. 6, 2012, 5:29 PM), <http://www.pcgamer.com/2012/12/06/eve-online-retribution-fluffy/>, archived at <http://perma.cc/5BT9-BQQG> (quoting EVE Online’s executive producer as wanting the virtual world to be “dark and dangerous”).

²⁴⁹ See *Subscriptions: 150k–1m*, *supra* note 225 (showing a steady increase in EVE’s users from 2003 to 2012).

force developers to change or shut down their virtual worlds—an unwanted result for developers and users alike.²⁵⁰

Similarly, other virtual-world developers are moving to lessen user property rights, having discovered that such rights are indirectly interfering with the user experience.²⁵¹ For example, in the virtual world *Diablo III*, the freedom to use a virtual “auction house” to buy and sell items was actually driving users away.²⁵² Although this auction house was a much-touted feature at the game’s launch, less than eighteen months later, its developers were forced to reverse their stance.²⁵³ The auction house’s efficiency at making a universe of virtual goods available to all users turned out to be unwanted by those same users.²⁵⁴ Much of the appeal of *Diablo III* was discovering the best items for oneself, rather than simply buying them.²⁵⁵ Restricting the users’ ability to alienate their virtual property runs contrary to traditional property rights, but in the virtual world of *Diablo III*, it is exactly what market forces demanded.²⁵⁶

²⁵⁰ See Lawrence, *supra* note 20, at 546 (arguing that rigid property rights would doom such worlds).

²⁵¹ See, e.g., Andrew Goldfarb, *Diablo III Auction House Shutting Down Next Year*, IGN (Sept. 17, 2013), <http://www.ign.com/articles/2013/09/17/diablo-iii-auction-house-shutting-down-next-year>, archived at <http://perma.cc/UN84-Y89T> (describing an action taken by the developers of the virtual world *Diablo III* that will limit user sales of virtual property).

²⁵² See *id.* (describing the developer’s perception that “[the auction house] ultimately undermines *Diablo*’s core game play”); Jason Schreier, *Blizzard Kills Diablo III Auction Houses*, KOTAKU (Sept. 17, 2013, 2:17 PM), <http://kotaku.com/blizzard-kills-diablo-iii-real-money-auction-house-1335035020>, archived at <http://perma.cc/HZ47-UBKS> (referring to the auction house as “*Diablo III*’s most despised feature”). This auction house allowed users to buy and sell virtual items for either virtual “gold pieces” or for real-world cash. Goldfarb, *supra* note 251.

²⁵³ See *Diablo III Beta Announcement*, BLIZZARD ENT., <http://us.blizzard.com/en-us/company/events/diablo3-announcement/#summary>, archived at <http://perma.cc/4T46-VPJZ> (last visited Jan. 18, 2014) (calling the auction house one of “a treasure trove of new features”); Goldfarb, *supra* note 251 (describing the decision to shut down the auction house).

²⁵⁴ See Goldfarb, *supra* note 251; Mike Williams, *Blizzard Killing Diablo III’s Real-Money Auction House*, US GAMER, <http://www.usgamer.net/articles/blizzard-killing-diablo-iiis-real-money-auction-house>, archived at <http://perma.cc/UG73-9VF6> (last visited Jan. 9, 2014) (“Prior to *Diablo III*’s launch in May 2012, you could hear the gaming community’s collective shudder when it was announced that the game would be always-online and have a real-money auction house.”).

²⁵⁵ See Goldfarb, *supra* note 251.

²⁵⁶ See Merrill I. Schnebly, *Restraints upon the Alienation of Legal Interests: I*, 44 YALE L.J. 961, 964 (1935) (discussing the origin and benefits of the policy against restraints on alienation); Michael McWhertor, *Blizzard President Mike Morhaime on Razing Diablo 3’s Auction House, Rebuilding Titan*, POLYGON (Nov. 9, 2013, 5:37 PM), <http://www.polygon.com/2013/11/9/5085172/blizzard-mike-morhaime-diablo-3-auction-house-titan-reboot>, archived at <http://perma.cc/6AD6-BXDL> (illustrating one instance of where the market called for lesser rights). Blizzard’s president acknowledged the company’s mistake: “‘It hurt the [long-term] engagement in the game, and will in the long run hurt the life of the game,’ he said. By cutting it, ‘more people will show up and we’ll be rewarded financially.’” McWhertor, *supra*.

B. Whereas Users of Other Virtual Worlds Demand Greater Property-like Rights

In contrast, not all virtual worlds are lawless states of nature.²⁵⁷ Many users who invest hundreds of hours into developing their avatar or creating virtual goods for other avatars likely desire increased protections.²⁵⁸ Granting increased rights in virtual property is one incentive developers can use to attract these users.²⁵⁹ For example, some users will pay for access to a virtual world in which the EULA guarantees recompense in the case of hacking or bugs, or provides user-friendly dispute resolution processes when conflicts arise with other users.²⁶⁰ Certain virtual worlds have already pioneered this approach, offering users attractive rights via their EULAs.²⁶¹ Linden Lab, for example, altered its EULA in November 2003 to allow users to own all intellectual property rights in anything they create inside of Second Life.²⁶² Users have subsequently sold their virtual creations in the real world—an attractive proposition.²⁶³ Furthermore, as mentioned above, EverQuest II has allowed RMT and plans to continue the practice in its successor, EverQuest Next.²⁶⁴

Other developers have taken this a step further and granted users rights *beyond* those found in a normal property-rights regime.²⁶⁵ Blizzard, for example, offers a free “item restoration” service in World of Warcraft.²⁶⁶ If users accidentally destroy a virtual item, Blizzard will provide them with a new

²⁵⁷ See Rogers, *supra* note 20, at 421 (outlining the increased user rights provided in Second Life and EverQuest II).

²⁵⁸ See Westbrook, *supra* note 16, at 792–93.

²⁵⁹ Rogers, *supra* note 20, at 421.

²⁶⁰ See *id.* (describing the “tremendous popularity” of increased user rights); see also Burns, *supra* note 44, at 831–35 (describing conflicts between users that developers did not resolve); Lawrence, *supra* note 20, at 523 (describing bugs that can destroy virtual property). One virtual world recently began allowing users to sit on tribunals to adjudicate disputes between other users, meting out punishments for bullying or offensive language. Cabasso, *supra* note 205, at 395.

²⁶¹ See Kayser, *supra* note 92, at 80 (describing EverQuest II user rights); Rogers, *supra* note 20, at 421 (describing Second Life user rights).

²⁶² See Rogers, *supra* note 20, at 421.

²⁶³ See *id.* (describing a Second Life user who developed a game for avatars that was subsequently sold to a publisher for use on real-world cell phones).

²⁶⁴ See Kayser, *supra* note 92, at 80. EverQuest Next takes this practice one step further, allowing creators to retain an interest in their creations after selling them: “For example . . . one player could make a tower and sell that,” and then “[a]nother player could put that tower on a castle and sell the castle, with the tower-making player getting a cut of each castle sale.” Stephen Totilo, *Two Astounding New EverQuest Games Are Coming. Full Details.*, KOTAKU (Aug. 2, 2013, 3:00 PM), <http://kotaku.com/two-astounding-new-EverQuest-games-are-coming-full-de-1002721647>, archived at <http://perma.cc/32E-6837>.

²⁶⁵ See *Battle.net Item Restoration*, BATTLE.NET, <https://us.battle.net/support/en/article/battle-net-item-restoration>, archived at <http://perma.cc/9D3W-3SFS> (last updated Jan. 14, 2014).

²⁶⁶ See *id.*

one.²⁶⁷ Furthermore, Blizzard offers this service even if the user *intentionally* destroyed an item and later regretted the decision.²⁶⁸ That kind of protection goes far beyond what the law provides for physical property.²⁶⁹ The government will not deliver a new umbrella if one was forgotten on the bus, and it certainly will not give out a new umbrella if the first was thrown out on purpose.²⁷⁰

In sum, a wide array of virtual worlds exist, and users are hardly condemned to universal mistreatment at the hands of developers.²⁷¹ Developers are using EULAs to grant precisely the level of rights that users want—whether that is no rights, rights far beyond those typically provided by property law, or an amount somewhere in between.²⁷²

C. Economic Pressures Will Ensure That Virtual World Developers Grant the Appropriate Rights to Users

A EULA-based regime allows for the widest possible spectrum of user rights, and with such a regime in place, market pressures will ensure that this potential actually ripens into a variety of virtual worlds.²⁷³ Developers cannot afford to alienate users by mistreating them vis-a-vis their rights in virtual property: developers granting an attractive suite of user rights will flourish and those getting it wrong will suffer.²⁷⁴

The saturated state of the virtual-world market intensifies pressure on developers, ensuring that they offer the wide spectrum of rights allowed by a contract law regime.²⁷⁵ After growing steadily for a decade, total subscriber-

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See U.S. CONST. amend. V (indicating that the government will reimburse owners for takings, but providing no right of replacement for property lost through private action).

²⁷⁰ See *id.* The author can locate no statute authorizing umbrella replacement.

²⁷¹ See MJ Guthrie, *Infographic Offers Noobs a Summary of the US MMO Industry*, MASSIVELY (Jan. 9, 2013, 1:00 PM), <http://massively.joystiq.com/2013/01/09/infographic-offers-noobs-a-summary-of-the-us-mmo-industry/>, archived at <http://perma.cc/8MG6-XY9F> (tallying fifty million virtual-world users in the United States across 499 virtual worlds). Compare *supra* notes 243–256 and accompanying text (illustrating how some virtual worlds have more restricted property rights), with *supra* notes 257–270 (describing the more robust user property rights provided in other virtual worlds).

²⁷² Compare *supra* notes 243–256 and accompanying text (illustrating how some virtual worlds have more restricted property rights), with *supra* notes 257–270 and accompanying text (describing the more robust user property rights provided in other virtual worlds).

²⁷³ See Rogers, *supra* note 20, at 421 (noting that developers must offer appropriate user rights in order to compete).

²⁷⁴ See *id.*

²⁷⁵ See *id.*; Jason Winter, *MMO Market “Peaked”?*, GAMEBREAKER.TV (July 11, 2012), <http://www.gamebreaker.tv/mmorgp/mmo-market-peaked/>, archived at <http://perma.cc/P7Y9-SHWN> (discussing the state of the virtual-world market).

ship among virtual worlds has plateaued.²⁷⁶ With a limited base of users to draw from, developers must take strides to make their product more attractive than the competition's.²⁷⁷ Compounding this problem, these worlds are designed to be highly time-consuming, such that most users cannot viably consume more than one at a time.²⁷⁸ If an individual virtual world contains nearly unlimited content, users have little motivation to devote time and money to a second.²⁷⁹ And once a user has invested a significant amount of time in one world, competitors must offer significant benefits to entice them to switch to another.²⁸⁰ As a result, companies must aggressively innovate both to attract new users and to retain their existing users in the face of competitors' innovations.²⁸¹ Part of this innovation naturally includes careful consideration of the bundle of virtual rights to offer users.²⁸²

The march of technological progress only further ensures that developers aggressively update their virtual worlds—and corresponding suites of user rights—to best meet demand.²⁸³ Every virtual world will ultimately be threatened by a competitor's newer, more technologically advanced virtual world.²⁸⁴ An effective way to stave off such competition and retain users is to offer an appropriate level of virtual property rights.²⁸⁵

²⁷⁶ See *Total Active Subscriptions*, *supra* note 57 (showing a trend of steadily increasing virtual-world users from 1998 to 2009, but stagnant or negative growth from 2009 to 2012); Winter, *supra* note 275.

²⁷⁷ See Winter, *supra* note 275.

²⁷⁸ See Miller, *supra* note 45, at 653–54 (providing an example of the steep time investment required by virtual worlds); *supra* notes 47–48 and accompanying text (same).

²⁷⁹ Cf. Miller, *supra* note 45, at 653–54 (describing how the virtual-world business model focuses on providing limitless content to users).

²⁸⁰ See Jankowich, *supra* note 13, at 8 (quoting a virtual-world designer who stated that having users “build their own buildings, build a character, [and] own possessions” provides a “barrier to departure”).

²⁸¹ See Cabasso, *supra* note 205, at 395 (discussing the virtual world League of Legends's player tribunal, whereby players adjudicate disputes between other players); McWhertor, *supra* note 256 (noting that Blizzard had already scrapped and “rebooted” development for its as-of-yet unreleased virtual world, Titan, throwing away several years of work); *Round Table*, EVERQUEST NEXT, <https://www.everquestnext.com/round-table>, archived at <http://perma.cc/R63D-YZC5> (last visited Jan. 9, 2014) (allowing users to give direct feedback on the development of an upcoming virtual world); Totilo, *supra* note 264 (discussing the continuing financial interest users will have in their EverQuest Next creations).

²⁸² Compare Rogers, *supra* note 20, at 421 (discussing how Second Life has *increased* virtual property rights to retain users), with *supra* notes 251–256 and accompanying text (discussing how Diablo III is *decreasing* virtual property rights to retain users).

²⁸³ See *supra* notes 221–227 and accompanying text (describing the obsolescence problem inherent to virtual worlds).

²⁸⁴ See Lawrence, *supra* note 20, at 520–21.

²⁸⁵ See *id.*

A EULA-based regime makes such tailoring possible.²⁸⁶ Moreover, the broad spectrum of rights springing from the combination of a contract law regime and a competitive marketplace can lead EULAs to offer protections meeting or exceeding those offered by traditional property law.²⁸⁷ With such protections in place, a one-size-fits-all property law regime simply is not needed, as it would quash the diversity of virtual worlds and offer no additional benefits.²⁸⁸

CONCLUSION

With virtual worlds continuing to boast millions of subscribers, disputes are inevitable. The EULAs that currently govern such disputes allow virtual world developers to tailor solutions to the unique nature of virtual worlds. Attempts to inject traditional property rights—whether based on Lockean, personhood, or utilitarian theories of property—into virtual worlds are misguided. At best, they represent an incoherent endeavor, with each theory mapping incompletely or imperfectly onto virtual property. At worst, enforcement of such rights in virtual property could lead to liability that renders the operation of virtual worlds unsustainable. Instead of imposing such property rights, contract law should continue to govern. EULAs allow developers to appropriately tailor user rights to user demand, with the highly competitive virtual-world market ensuring that users get what they want. A property law regime would be the end of the virtual world as we know it; contract law should make users feel just fine.

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²⁸⁶ See *id.* at 540–41.

²⁸⁷ See *supra* notes 265–70 and accompanying text (discussing the steps taken by some developers to provide rights beyond those typically found in property law).

²⁸⁸ See Carrier & Lastowka, *supra* note 115, at 1511 (arguing that “excessive protection tends to limit choice and raise prices for consumers”); *supra* notes 196–234 and accompanying text (discussing how a utilitarian balancing test cuts against regulating virtual worlds under a traditional property law regime).