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Virtual Inheritance: Assigning More Virtual Property Rights

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ABSTRACT

Increasingly, our daily lives revolve around and rely on the Internet and digital world. We will inevitably accumulate some amount of virtual wealth in the form of email accounts, social networking profiles, and even digital replicas (or avatars) of ourselves. As we populate the Internet with traces of our lives, the ugly truth is that none of that virtual wealth really or absolutely belongs to us. This note explores the concept of “virtual inheritance,” or the idea of transferring one’s virtual property rights—a right to which we should be entitled. By revealing how the right to transfer is frustrated in the virtual game world context, this note will bring to light the growing need for a legal framework that would acknowledge an individual’s right to one’s virtual property.

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INTRODUCTION

Traditionally, granting Blackacre “to A and his heirs” has transferred an absolute possessory interest from the property owner to the ascertained individual and subsequently his heirs. Conveying the interest in Blackacre has ordinarily happened as expected provided that the property was either tangible or intellectual. However, if Blackacre existed online and in a virtual game world—that is, if Blackacre were virtual property—then the concept of conveyances and future interests become less clear.

The main objective of this note is to support the legal recognition of virtual property by acknowledging its present value and by realizing its future worth. In particular, this note will focus on one of the bundle of rights that accompany property—the right to transfer—as it applies to a virtual game world context. Further, this note will explore the legal implications of recognizing “virtual inheritance,” or the transfer of virtual property rights.

This note is organized in five sections: Part I endorses the legal recognition of virtual property as property and supports that contributing-users should have rights. Part II describes the current climate of virtual property in the virtual game world industry with a focus on the idea of virtual inheritance and why there is a pressing need for a governing framework. Part III discusses the conflicting interests among virtual game developers and users and the legal implications as it relates to virtual inheritance. Part IV purports a framework to govern an

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owner's right to transfer as it should apply to virtual property in a virtual game world context. Part V provides a case study with regard to the inheritability of email addresses. This note concludes by maintaining the importance of transferring the present value of virtual property to the future.

I. The legal recognition of virtual property

The virtual world has reached a tipping point from “play” to “reality.”¹ Virtual reality is becoming so realistic that users blur the line between virtual fiction and real life. Actions online have prompted users to react in a very real manner. For instance, in October 2008, Tokyo police arrested a woman whose sudden divorce in a virtual world made her so angry that she killed her online husband's digital persona.² The woman accessed the man's account by using his identification and password, and deleted his virtual avatar.³ Although the woman was not plotting any real world retribution or murder, she was jailed on “suspicion of illegally accessing a computer and manipulating electronic data.”⁴ If convicted, she could face real world penalties of a fine up to \$5,000 or imprisonment up to five years.⁵ In another incident in August 2008, a U.S. woman was charged with plotting the real-life abduction of a boyfriend she met on a virtual

¹ BENJAMIN TYSON DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 72 (2008).

² *Japanese Woman Arrested for Virtual-World 'Murder,'* FOX NEWS, <http://www.foxnews.com/story/0,2933,443767,00.html> (last visited Oct. 24, 2008).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

game world.⁶ Another online episode prompted police to arrest a teenager for “swindling virtual currency worth \$360,000 in an interactive role playing game by manipulating another player’s portfolio using a stolen ID and password.”⁷

People regard their virtual, second lives with as much significance as they do their real lives. Equally, people value their virtual property as much as they do their real and tangible possessions. Virtual properties—such as email addresses, websites, avatars, video game characters, virtual accessories, and any other intangible digital commodities—are more prevalent and abundant today than ever before. Although virtual property is not physical or tangible, proprietors of virtual property consider themselves to be owners of such property.⁸ To some extent, “owners” of virtual property place a value on it because they are able to control it and exclude others from it.⁹ Additionally, the idea of ownership in virtual property is reinforced because owners can increase the value in it and exchange its worth with other people.¹⁰

With the continued materialization of virtual property, it is imperative that it be legally recognized as property for three reasons. Firstly, by deeming virtual property as property, it legalizes other areas of virtual law and other legal consequences in the real world.¹¹ For example, a user cannot be charged with the crime of theft unless the victim had a right to the real

⁶ *See supra* note 2.

⁷ *Id.*

⁸ *See* Charles Blazer, *The Five Indicia of Virtual Property*, 5 *PIERCE L. REV.* 137 (2006).

⁹ *Id.*

¹⁰ *Id.*

¹¹ DURANSKE, *supra* note 1, at 79 (A property law analysis of the virtual world is a “necessary precursor”).

or virtual property in question.¹² In another real world situation, a Dutch court convicted two teens of virtual theft.¹³ A 15 and 14-year-old coerced a 13-year-old boy into transferring a “virtual amulet and a virtual mask” from an online adventure game to their accounts.¹⁴ Lawyers argued that virtual goods do not really exist, and that transferring them does not conflict with the rules of the game.¹⁵ The Dutch court held otherwise, finding that the victim lost actual control over the virtual goods when the thieves forced the victim to transfer the goods to them.¹⁶ Two boys were sentenced to conditional detention and community service for the virtual theft.¹⁷ Although this situation is set in an international court, the Dutch court underscored an important point that is also raised by Benjamin Duranske, a leading practitioner in the virtual law field.¹⁸ If virtual property is not legally recognized as property, there is “very little point to enforcing contracts created in a virtual world if the subject matter of the contract can’t be owned to begin

¹² DURANSKE, *supra* note 1.

¹³ Benjamin Duranske, *Netherlands Court Finds Criminal Liability and Sentences Two Youths for Theft of Virtual Goods*, VIRTUALLY BLIND, Oct. 22, 2008, <http://virtuallyblind.com/2008/10/22/netherlands-theft-virtual-good/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ VeeJay Burns, *Court Ruling in the RuneScape Case*, MINDBLIZZARD, Oct. 26, 2008, http://blog.mindblizzard.com/2008/10/court-ruling-in-runescape-case_26.html.

¹⁷ *Id.*

¹⁸ About Benjamin Duranske, <http://virtuallyblind.com/about-me/> (last visited February 8, 2009) (Benjamin Duranske is one of the leading practitioners on virtual law. He was the editor and primary contributor to *Virtually Blind* from early 2007 to late 2008).

with.”¹⁹ As such, it is vital for users and for key developers that virtual property be accepted as property.

Secondly, while property in a virtual world is intangible as well as intellectual, virtual property is unique because it was deliberately designed to behave like traditional property.²⁰ In effect, virtual property is an asset in digital form.²¹ Avatars in virtual game worlds can acquire virtual property such as land, real estate, and personal belongings, just as an individual acquires these assets in the real world. In the course of possessing virtual property, there are two important characteristics, which resemble the way in which real property is acquitted, that should be noted: First, both real and virtual property are unique to the individual or avatar. For virtual property, that particular avatar acquired by creation or through transactions of purchase, of barter, or of exchange. In the real world, property purchased or created would also be exclusive to the individual owner. Consequently, because of the initiative toward acquisition, the individual and avatars should inherently own the real and virtual property, respectively. Second, both real and virtual property are an extension of the individual. Within the virtual world, the virtual property constitutes a user’s personal space and virtual imprint; it is an extension of that individual’s presence online. Even after a user logs offline, that virtual property holds and retains that individual’s virtual existence.

Considering these two natural inclinations, when individuals `acquire virtual possessions, they rely on the value of virtual property to give meaning to their virtual environment—and so

¹⁹ DURANSKE, *supra* note 1, at 79.

²⁰ See Bobby Glushko, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007).

²¹ *Id.*

do the virtual world developers.²² Lastly, virtual property should be recognized legally because without that value, why bother? Beyond the virtual window, the real world also relies on that value. Transactions for virtual property not only happen within the virtual worlds, but also take place in reality and across different online forums. Sales of virtual property did occur on eBay until the company banned the sales to avoid “complex legal issues.”²³ Most sales were illegal and inconsistent with developers’ contractual agreements.²⁴ Fact is, however, virtual property is more just a game.

The social and economic importance of virtual property is evident. Legally recognizing virtual property will legitimize it and go further to protect user’s property rights. Virtual creations and virtual interactivity exist because of users’ investments and contributions. By validating virtual property, it encourages the beneficial growth and technological innovation of the Internet, where user-contributed content has brought the Internet into a vibrant and rich existence.

However, recognizing virtual property may be complicated given the limitations of technology. Virtual game worlds, such as Second Life and Entropia Universe, are a form of “malleable technology,” where users contribute to the game.²⁵ Considering a traditional

²² See Kurt Hunt, *This Land Is Not Your Land: Second Life, Copybot, and the Looming Questions of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141 (2007).

²³ *Ebay’s Ban on Virtual Property Auctions*, Associated Content, Sept. 12, 2007, http://www.associatedcontent.com/article/372287/ebays_ban_on_virtual_property_auctions.html.

²⁴ *Id.* at 10.

²⁵ See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999) (“Cyberspace has no nature; it has no particular architecture that cannot be changed. Its architecture is a function of its design [or its code] . . . Enabling *individual* choice

principle in property law—Locke’s labor theory²⁶—if an individual exerts labor into something unowned, ownership is created and established for the laborer.²⁷ As applied, because users contribute and add to the virtual world, the property that they labor over should belong to them. However, that concept is problematic in the virtual property context. The individual is exerting his labor into something owned—a space generated by and with tools provided by the game developer. Although designed on an individual’s own time and by his own effort, the individual’s virtual property lies on the physical server of the game developer.

While contractual agreements currently govern ownership rights, developers continue to muddle the waters with its innovation. Add to the uncertainty of ownership, in September 2008, MindArk²⁸ began recognizing user-contributed content by drafting wills for virtual property.²⁹ A representative of MindArk reported that the virtual world pioneer “will begin to draw up wills for their customers to cover the things they own in their virtual computer world.”³⁰ The representative went on to comment that drafting wills is “a natural development.”³¹

may require collective modification of the architecture of cyberspace, just as enabling *collective* choice may require modification of this architecture.”).

²⁶ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publishing 1980) (1689) (“Labo[r] put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right”).

²⁷ *Id.* at 20 (“Common right to everyone until laborer makes it his own”).

²⁸ MindArk, <http://www.mindark.com/> (last visited Oct. 3, 2008) (MindArk operates, develops, and markets Entropia Universe).

²⁹ Benjamin Duranske, *Entropia Creates Virtual Property Wills; Sweden Implements Tax Rules for Virtual Property*, VIRTUALLY BLIND, Sept. 9, 2008, <http://virtuallyblind.com/2008/09/09/entropia-wills/>.

As a result of MindArk's revolutionary proposition, this note was prompted. It is a natural movement to recognize virtual property as property, albeit some distinct complications inherent to the digital environment on which it exists. There is one undeniable broad notion—the attributes of virtual property can be supported by common-law concepts. For example, the common-law property concept of “relativity of title” is that ownership is not a person's relationship to things, but a person's relationship to others.³² Virtual environments are hubs for social play and immersion. A user's virtual property rights, as is with real property rights, are a manifestation of one's rights in relation to other virtual residents and even the game developer.

Another property law concept is the “bundle of sticks” that accompanies property rights. The bundle of rights includes the right to possess, to use, to exclude, to occupy, to sell, to dispose, to bequeath, and to transfer.³³ These rights can also be exercised by a user in the virtual context. In the virtual world, a user can possess a virtual home. His avatar can use and occupy it, and at the same time, exclude other avatars from entry.

However, given MindArk's effort, the right to bequeath and to transfer brings to light some unique problems inherent with virtual property. The next section of this note will provide additional background information that lay the groundwork for the legal implications of virtual inheritance.

³⁰ Posting of Emelie Usurper Andersson to <http://www.entropiaforum.com/forums/general-discussion/125367-article-about-virtual-wills-entropia.html> (Sept. 4, 2008, 12:09 GMT) (where the actual article is in Swedish, but a translated version is posted at Entropia Forum).

³¹ *Id.*

³² See generally *Int'l News Service v. Associated Press*, 248 U.S. 215 (1918); *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Pierson v. Post*, 3 Cai. R. 175 (N.Y.Sup. 1805) (These cases illustrate the traditional concept of “relativity of title”).

³³ See generally *id.* (These cases also illustrate the “bundle of rights” that accompanies property).

II. Current climate of virtual property and its inheritability

The current climate of virtual development is brewing into a perfect storm that warrants legislative or judicial attention. Progressive strategies, constructed by key developers of virtual worlds, are revealing new legal issues, particularly dealing with an individual's actual, real world rights to virtual property. Confusion exists partly because individuals are pumping money in and out of these virtual worlds and alternatively because their rights are governed by contractual agreements.

For example, Second Life³⁴ allows their virtual residents to buy, sell, and trade with other residents using "Linden dollars."³⁵ The use of actual, converted money blurs the line between contractual provisions that limit a user's rights to a user's right justified by one's own investments and the ownership of the virtual property. Another virtual world, Entropia Universe,³⁶ not only allows users to convert real world funds into Entropia Universe currency ("PED"), but also allows users to transfer their accumulated PED back into real money.³⁷ Users are able to develop their virtual avatars and build their virtual lives through this wealth conversion, exchange, and accumulation.

³⁴ Second Life, <http://secondlife.com/> (last visited Sept. 18, 2008) (Second Life is a 3-D virtual world created by real-world individuals that establish themselves as virtual residents in this virtual reality).

³⁵ *Id.* (The Linden Dollar is Second Life's own unit of trade. Linden dollars are actual, converted monies that can be used to pay for goods and services).

³⁶ Entropia Universe, <http://www.entropiauniverse.com/> (last visited Sept. 29, 2008) (The Entropia Universe dubbed itself as the "first virtual universe with a real case economy").

³⁷ *Id.* (Users can convert their virtual money into real money through Entropia Universe's unique "Real Cash Economy" exchange).

By way of their investments, individuals and users are essentially contributors, creators, and shareholders of the virtual game worlds.³⁸ By supplying money, time, expertise, and innovation, users transform and contribute to their and others' virtual world experience. Even when users log offline, their virtual impressions impact other's interaction with the virtual world. This attribute of virtual property is significant because if virtual property can still belong to a user upon logging off, should it not also belong to a user who chooses to transfer that virtual property upon his death. Rather than giving ownership to the individual, an individual's property rights exist only to the extent not restricted by Terms of Service agreements signed prior to opening a virtual world account. Generally, those contractual agreements do not allow full ownership. While the game developer has an interest in the scope of ownership, individuals should be able to realize their virtual property in some manner.

Moreover, as virtual property evolved and its exchange progresses as a business, some foreign governments have created taxation schemes for an individual's income from virtual property. In 2006, Entropia Universe reported a turnover of 3.6 billion PED, or \$360 million.³⁹ To "validate this business sector,"⁴⁰ the Swedish government implemented and imposed what some have dubbed a "virtual tax."⁴¹ China also plans to impose a personal income tax on profits

³⁸ See John Baldrice, *Mod as Heck: Frameworks For Examining Ownership Rights In User-Contributed Content*, 8 MINN. J. L. SCI. & TECH. 681 (2007).

³⁹ See *supra* note 36.

⁴⁰ Posting of Dan Miller to Economics of Virtual Worlds, <http://www.freemogamer.com/2008/09/project-entropia.html> (last visited Dec. 3, 2009).

⁴¹ Joey Seiler, *MindArk Working on Wills for Virtual Property; Swedish Government Implementing Virtual Taxes*, VIRTUAL WORLD NEWS, (Sept. 9, 2008) <http://www.virtualworldsnews.com/2008/09/mindark-working.html>.

from virtual money.⁴² In China, “[s]uccessful online video game players and Internet surfers . . . have found ways to make real money from virtual assets.”⁴³ One reason for a virtual tax is to counter the fast growth and real monetary conversion of virtual currency, which may lead to inflation or illegal laundering of money.⁴⁴ The Chinese government, through its new 20 percent virtual tax, mainly targets people who buy virtual currency from gamers and surfers, and sell it to others at a marked-up price.⁴⁵ However, some believe that the tax can help better protect the property right of virtual game world users.⁴⁶ While foreign governments have imposed virtual taxes, the U.S. Congress has only investigated the idea of taxing such virtual transactions.⁴⁷

Among users of Second Life, the top three nationalities are American, Brazilian, and Japanese.⁴⁸ With so many Americans investing in virtual worlds, the United States should address this issue. A senior economist for the U.S. Congressional Joint Economic Committee recognizes that “to a certain degree the law has fallen ‘behind’.”⁴⁹ Ownership, property rights,

⁴² Posting of Juliet Ye to The Wall Street Journal, China Journal, <http://blogs.wsj.com/chinarealtime/2008/10/31/real-taxes-for-real-money-made-by-online-game-players/> (Oct. 31, 2008, 6:17 EST) (The Chinese government will impose a personal income tax of 20% on profits from virtual transactions).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Adam Reuters, *U.S. Congress launches probe into virtual economies*, FOX NEWS, Oct. 15, 2006, <http://secondlife.reuters.com/stories/2006/10/15/us-congress-launches-probe-into-virtual-economies/>.

⁴⁸ See *supra* note 2.

⁴⁹ Reuters, *supra* note 47.

and all that virtual property entails must be decided.⁵⁰ In terms of tax law, certain areas of virtual property management trigger actual consequences. For example, when people “cash out of virtual economies,” or transfer their virtual assets into real world money, such a realization is considered income and must be reported to the Internal Revenue Service.⁵¹ While that example illustrates some certainty, other situations are less clear such as the appreciation of virtual assets.⁵² For instance, in the real world, if an asset increases in value or produces income, then that income is taxable.⁵³ However, it is less apparent whether or not “virtual income and capital gains that never leave the virtual economy” is taxable.⁵⁴

Currently, for both property and taxation issues arising from the rapid emergence of the virtual world and its economy, virtual world developers have been resolving such issues through contractual solutions and game architecture. For example, in Second Life’s Terms of Service, transferring one’s account to another is impermissible.⁵⁵ In another virtual world MapleStory,⁵⁶ the game developer created its own tax system and built it into each virtual transaction in an effort to curb any “small tremor of inflation.”⁵⁷ There, the system collects a small tax percentage

⁵⁰ Reuters, *supra* note 47.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Second Life: Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Oct. 17, 2009).

⁵⁶ MapleStory, <http://www.maplestory.com/> (last visited Oct. 17, 2009).

⁵⁷ Game FAQs Review MapleStory, <http://www.gamefaqs.com/computer/doswin/review/R97847.html> (last visited Oct. 17, 2009).

from a buyer before the in-game money reaches the seller.⁵⁸ As a result of contracts and programming, an individual's right to his property is limited. These business decisions ultimately lead to legal issues, as evinced by the following case:

A. *Bragg v. Linden Research, Inc.*⁵⁹

The Eastern District Court of Pennsylvania was presented with a case that dealt with “the novel questions of what rights and obligations grow out of the relationship between the [developer] of a virtual world and its resident-customers.”⁶⁰ The court there quickly observed that, “[w]hile the property [at issue] and the world where it is found are ‘virtual,’ the dispute is real.”⁶¹ Although the legal issue itself was procedural in nature, the context under which the claim arose indicates the need for a framework, supplemental to contractual agreements, to govern an individual's rights to virtual property.

In November 2003, Second Life began recognizing virtual property rights by granting “participants’ full intellectual property protection for the digital content they create or otherwise owned in Second Life.”⁶² The plaintiff in this case was fully engaged in his second life.⁶³ He not only purchased numerous virtual land parcels, but also started his own business.⁶⁴ “In his second life, [the plaintiff] digitally crafted ‘fireworks’ [and sold them] to other avatars for a

⁵⁸ Wikipedia: Virtual Tax, http://en.wikipedia.org/wiki/Virtual_tax (last visited Oct. 17, 2009).

⁵⁹ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

⁶⁰ *Id.* at 595.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 596-97.

⁶⁴ *See Bragg*, 487 F. Supp. 2d at 596-97.

profit.”⁶⁵ At the same time, he also acquired virtual items from other avatars.⁶⁶ Further, the plaintiff also paid taxes on his land.⁶⁷

The dispute in this case was triggered in 2006 when the plaintiff purchased an entire region of virtual land for \$300.⁶⁸ The plaintiff allegedly accessed a land auction site for property and purchased a parcel that had yet been released for auction. By doing so, he acquired that virtual land below Second Life’s cost. As a result, the company confiscated the land purchased and froze the plaintiff’s account, alleging that the property was improperly acquired through an “exploit.”⁶⁹ Plaintiff filed this suit alleging conversion, fraud, unjust enrichment and breach of contract.

Although the parties eventually settled outside the court, the dispute illuminated the point that ownership rights are a natural development given decisions made by the company itself. The court mentioned several statements made by Philip Rosedale, the creator of Second Life, with regard to the company’s initial announcement to recognize ownership rights. In a press release posted on Second Life’s website, Rosedale stated that:

“We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The

⁶⁵ See *Bragg*, 487 F. Supp. 2d at 597.

⁶⁶ *Id.*

⁶⁷ *Id.* at 596-97, n.7 (“Linden taxes virtual land. In fact, according to Bragg, by June 2004, Linden reported that its ‘real estate tax revenue on land sold to the participants exceeded the amount the company was generating in subscriptions.’”).

⁶⁸ *Id.* at 597.

⁶⁹ *Id.*

preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds."⁷⁰

In an interview, Rosedale remarked, "Land ownership feels important and tangible. It's a real piece of the future."⁷¹ On another occasion, he acknowledged that "what you have in Second Life is real, and it is yours. It doesn't belong to us. You can make money."⁷²

In *Bragg*, Second Life suspended the plaintiff's account for investigation, and then closed the account for violating the Terms of Service, which thereby dissolved his virtual assets.⁷³ The plaintiff declared that his actual losses were between \$4,000 and \$6,000 in U.S. dollars. Users are led to believe that they have ownership over their accounts. Because "it's my account," the account holder should have a bundle of rights to the virtual property within that account. Although rights are governed by the contractual agreement to which the user blindly assents, property law should default the rights to the user before contractual agreements direct the rights away.

Private-sector solutions have provided much of the framework for the governance of virtual property thus far. The next section focuses on some of these private business solutions and underscores why they are deficient.

⁷⁰ *Bragg*, 487 F. Supp. 2d at 596 (citing Press Release, Linden Lab, *Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Services* (Nov. 14, 2003)).

⁷¹ *Id.* at 596 (citing Michael Learmonth, *Virtual Real Estate Boom Draws Real Dollars*, USA TODAY, June 3, 2004).

⁷² *Id.* (citing Michael Fitzgerald, *How Philip Rosedale Created Second Life*, INC. MAGAZINE, Feb. 1, 2007).

⁷³ *Id.* at 597 (Linden Lab's usual procedure for closed accounts).

III. The interplay and conflicted interests of key virtual players

In order for virtual reality to exist, there are relationships between a user and the game developer and between a user and other users. These relationships often give rise to conflicts in the virtual world and in the real world. Through their avatars, users “form and break contracts, create works of art, invent new technologies, make money, lose money, buy and develop virtual property, create new brands, defraud each other, defame each other, steal from each other, and attack each other.”⁷⁴ At the same time, users could purchase virtual land, “make improvements to that land, exclude other [avatars] from entering onto the land, rent the land, or sell the land to other users for a profit.”⁷⁵ Avatars can virtually create, buy, and sell any digital items fathomable. The interaction between avatars is “limited only by the human imagination.”⁷⁶

However, in order to participate, users sign Terms of Service agreements with virtual reality world developers. Of the two relationships, the most problematic is the relationship between a user and the game developers, especially when it comes to the idea of virtual inheritance. A game developer’s contractual agreements ultimately govern users’ rights to their virtual property. The following are some of the relevant provisions of Second Life’s and of Entropia Universe’s contractual agreements:

Second Life’s Terms of Service⁷⁷

§ 3.2—You retain copyright and other intellectual property rights with respect to Content you create in Second Life, *to the extent that you have such rights under*

⁷⁴ See DURANSKE, *supra* note 1, at 15.

⁷⁵ Bragg, 487 F.Supp.2d at 596.

⁷⁶ *Id.* at 595-96.

⁷⁷ Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Oct. 22, 2009).

applicable law. By submitting your Content, you automatically grant to Linden Lab:

(a) a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive *right and license to*

(i) *use, reproduce and distribute your Content* within the Service as permitted by you through your interactions on the Service, and

(ii) use and reproduce (and to authorize third parties to use and reproduce) any of your Content in any or all media for marketing and/or promotional purposes

(b) the perpetual and irrevocable *right to delete* any or all of your Content from Linden Lab's servers and from the Service, and

(c) a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive *right and license to copy, analyze and use any of your Content as Linden Lab may deem necessary* or desirable for purposes of debugging, testing and/or providing support services in connection with the Service.

§ 3.3—Linden Lab *retains ownership of the account* and related data, regardless of intellectual property rights you may have in content you create or otherwise own.

Entropia Universe's End User License Agreement⁷⁸

§4—Ownership

The System, including, but not limited to, computer code, text, graphics, audio files, logos, button icons, images, characters, items, concepts, data compilation and software, is the property of MindArk and protected by Swedish and international copyright laws.

All virtual items are part of the System and MindArk retains all rights, title, and interest in all parts including, but not limited to Avatars and Virtual Items; these retained rights include, without limitation, patent, copyright, trademark, trade secret and other proprietary rights throughout the world.

As part of your interactions with the System, you may acquire, create, design, or modify Virtual Items, but you agree that you will not gain any

⁷⁸ Entropia Universe: End User License Agreement, <https://account.entropiauniverse.com/legal/eula.xml> (last visited Oct. 22, 2009) (emphasis added).

ownership interest whatsoever in any Virtual Item, and you hereby assign to MindArk all of your rights, title and interest in any such Virtual Item.

You hereby grant MindArk the worldwide, perpetual, irrevocable, royalty-free, right to exercise all intellectual property rights for any content you may upload to the Entropia universe, including, but not limited to, user-to-user communications.

Ideally, when a user creates a certain virtual property, he should retain the right in that property. He should be able to transfer that virtual property, or his account, in a will. However, here are some problems with that premise: Suppose you build a virtual car using virtual materials and services that you purchased, acquired, and enlisted from other residents (e.g., virtual tires, virtual body frame, and services of a virtual painter). Once you have built that virtual car, you should be entitled to rights of that virtual creation against any other users. Hypothetically, you are the absolute owner because you can exclude other users from your virtual car, sell or trade it with other users, or do what you will to it in the virtual world. However, what happens when you try and place that virtual property or your account which contains that virtual car in your living will? Due to the signed contractual agreements that you accepted, your virtual property ultimately belongs to the developer. And, upon your death, your virtual property no longer exists in your name, but on the developer's server.

Given that Entropia Universe's parent company recently began drafting wills for virtual property,⁷⁹ section 7 of its End User License Agreement, which retains ownership of virtual items and materials for the game developer, must be reconciled with who actually owns what is being transferred.

⁷⁹ Duranske, *supra* note 29.

A. Contractual agreements are problematic

In February 2009, Facebook changed its terms of service,⁸⁰ causing an uproar among many users, who began to question: who actually owns the content shared on the social network site?⁸¹ The former provision stated that any content uploaded would expire when the user closed an account.⁸² The updated provision initially read:

“You hereby grant Facebook an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to (a) use, copy, publish, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), any User Content you (i) Post . . . or (ii) enable a user to Post . . . and (b) to use your name, likeness and image for any purpose.”⁸³

After three days of pressure from angry users and consumer advocacy groups, Facebook eventually reverted its contract, which now “appear[s] to give [users] perpetual ownership of their contributions to the service.”⁸⁴ Currently, in early March 2009, Facebook is taking a

⁸⁰ Facebook, <http://facebook.com> (last visited Feb. 18, 2009) (Facebook, a social utility that helps people communicate more efficiently with their friends, family and coworker, is a company that develops technologies to facilitate the sharing of information through the social graph, which creates a digital mapping of a person’s real-world social connections.).

⁸¹ Brian Stelter, *Facebook’s Users Ask Who Owns Information*, N.Y. TIMES, Feb. 16, 2009, available at <http://www.nytimes.com/2009/02/17/technology/internet/17facebook.html>.

⁸² Chris Walters, *Facebook’s New Terms Of Service: “We Can Do Anything We Want With Your Content. Forever.”* THE CONSUMERIST, Feb. 15, 2009, available at <http://consumerist.com/5150175/facebooks-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever.html>.

⁸³ *Id.*

⁸⁴ Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES, Feb. 18, 2009, available at <http://www.nytimes.com/2009/02/19/technology/internet/19facebook.html>.

democratic approach by hosting virtual town-hall forums and asking its users to help shape its governance policies.⁸⁵

Ironically, virtual property “is recognized by the black market, denied by providers, and limited only by somewhat suspect contract provisions in potentially unenforceable click-through agreements.”⁸⁶ If virtual property were legally recognized, these contractual agreements would conflict with any virtual property rights granted, especially the right of conveyance. While some argue that Terms of Service and End User Licensing agreements indirectly provide rights to users, there is a more direct approach: “[T]he law should proactively protect certain rights of virtual world users and game players, via either legislation or interpretation of existing law.”⁸⁷

According to Joshua Fairfield, a law professor at Washington and Lee University School of Law, “[c]ontracts cannot, by their very nature, provide for every legal need of large and shifting online communities [but] courts can use basic common law principals to provide online communities with the private property, dignitary and personal protections, and freedom of speech that communities need to thrive.”⁸⁸ Inevitably, when various parties are involved, each with competing interests, disputes will arise. As the court in *Bragg* recognized, “[w]hile the property and the world where it is found are ‘virtual,’ the dispute is real.”⁸⁹ Contractual agreements should not be the only structure by which we resolve these real disputes.

⁸⁵ Anupreeta Das, *Facebook Lets Users Comment on New Terms of Service*, REUTERS UK, Feb. 27, 2009, available at <http://uk.reuters.com/article/technologyNews/idUKTRE51P7PE20090227>.

⁸⁶ DURANSKE, *supra* note 1, at 114.

⁸⁷ *Id.* at 25.

⁸⁸ *Id.* (citing Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Online Communities*, 53 McGill L.J. 427 (2007), available at <http://ssrn.com/abstract=1002997>).

⁸⁹ *Bragg*, 487 F.Supp.2d at 595.

B. Other implications of virtual inheritance

As evinced, virtual property rights rest solely with game developers and contractual guidelines. Whether virtual property is governed by propertization or by regulation, there are general, inherent problems with virtual inheritance.

For instance, what, in virtual property, is actually being transferred and conveyed, and ultimately inherited? With respect to copyright laws, the content actually being copyrighted must be specified when concerning virtual creations. Virtual innovations can include text (fiction and code), digital images, characters or avatars, building designs, music, multimedia and three-dimensional environments.⁹⁰ Although it is your virtual property, it physically exists on the developer's server. Although your virtual creation, your innovation is only as novel as the developer allows it to be through the architecture, or "code," of the virtual game world because "no genuine 'creation' occurs that is not entirely anticipatable by the game provider based on resources and programming."⁹¹

However, instead of allowing the conveyance of the code and digital make-up of the virtual property, the value of the virtual property should be transferable because that, to some extent, is a user's investment. With the current trend toward a real monetary equivalence of virtual property, this helps to make transfer easier. Individuals rely on the *value* of virtual property. When an individual chooses to convey that property, he ultimately wants to entrust that value to someone. Notwithstanding the "physical" or "digital" composition of virtual property, individuals should only be able to convey the value. That value should be restricted

⁹⁰ Daniel C. Miller, *Determining Ownership in Virtual Worlds*, 22 REV. LITIG. 435, 445 (2003).

⁹¹ DURANSKE, *supra* note 1, at 101.

and allowed to be transferred only to an immediate family member. The next section of this note proposes a framework for virtual inheritance.

IV. Proposed framework for virtual inheritance

Game providers could “either (1) grant ownership of virtual property created in the world to the world’s or game’s users, who would take possession and ownership of these assets upon receipt in-world, with all that implies, or (2) essentially ‘lease’ the objects to users as part of the provider’s agreement with users of the virtual world or game—that is, retain ownership.”⁹²

A. Licenses or leases are more suitable

Instead of contractual agreements that take away rights, the more suitable solution is a lease or license. The license itself is the property interest that is conveyed. Individuals and the virtual world sector have relied on the value of virtual property to mean something. Contractual agreements that take away individual’s rights should be secondary to an individual’s desire to do what he wants with his property. Individuals should be able to transfer that value. Unless the individual has not designated his property according to his desires, contractual agreements that take away rights should be null and void. If an individual waives his rights and does not choose to transfer his property, contractual agreements should be the default. Where an individual has conveyed his virtual property, a court should uphold the individual’s rights over contractual agreements.

Because of the nature of virtual property and the competing interest in its value, individuals should only be able to convey that value to an immediate family member. In the

⁹² DURANSKE, *supra* note 1, at 101-02.

alternative, individuals should be permitted to convey their virtual property such that it will limit the possible exploitation of the value of virtual property.

B. The “brick-and-mortar” equivalence

The value of virtual property is technically a lease between the user and the game developer to utilize a space on their server. Similarly, a team in the National Football League (NFL) allows individuals to purchase a space in an arena to watch home football games. A season ticket holder purchases the lease for a particular seat and subjects himself to guidelines with regard to his account. Those guidelines, or contractual agreements, govern the transferability of his seat. For example, the following is an excerpt of an NFL team’s guidelines⁹³ with regard to transferring season ticket accounts:

Season Ticket Handbook:

Transfer of Seats

“It is very important for the Falcons to *protect and reward long-time Season Ticket Holders* by allowing them the chance to upgrade their seat locations rather than allowing Season Ticket Holders to transfer accounts or sell them to third parties. Therefore, *any attempt to sell or otherwise transfer season ticket privileges to third parties will not be recognized by the Falcons and may result in cancellation of all season ticket privileges.*”⁹⁴

“*The transfer of an account or seat location to any person or company is not permissible (see exceptions below) whether by request to transfer the account into another name or by an attempt to transfer the seat locations below by sale, gift, transfer by will or trust, property settlement, transfer to creditors or any other means.*”⁹⁵

⁹³ Atlanta Falcons: Season Ticket Handbook, *available at* http://www.atlantafalcons.com/Venues/Season_Ticket_Holders/Handbook.aspx (last visited Dec. 10, 2009) (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Id.*

“Any court order directing distribution of season tickets to a person not listed as the season ticket holder, whether bankruptcy or otherwise, will result in the Falcons exercising its right to immediately withdraw the license represented by the tickets, including any season ticket renewal privileges, upon refund by the Falcons of all amounts paid for games that have not yet been played.”⁹⁶

EXCEPTIONS TO THIS POLICY ARE:

- *“Transfers to a Season Ticket Account Holder's immediate family member (spouse, parent, child or sibling).*
- *Company name changes (due to acquisition or merger) or transfers between company name and company owner.”⁹⁷*

Season tickets have both a monetary and a non-monetary value. While the football team limits the monetary transfer of that right, it does not limit the non-monetary conveyance to immediate family members or within a corporation. So long as that value is retained with that season ticketholder’s estate or with that company, the value and transfer thereof will be honored by the football team.

In the virtual context, individuals should be allowed to transfer the non-monetary value of their virtual property to their immediate family members. A way to limit exploitation may be to only permit the entire account as a whole be transferred as opposed to singular digital assets. Monetary transfers should be prohibited because of the competing interest of who actually owns the intellectual property between the user and the game developer. Also, another problem with monetary transfers is that not all virtual property is assessed on the same scale or exchange rate.

As with season tickets to sporting events, leagues and teams do not restrict transfers completely. Rather, they limit to whom accounts can be transferred. By doing so, individuals cannot sell their seats to third-party companies that mark-up the cost of tickets in a secondary market. Upon death, seats can be conveyed to family members.

⁹⁶ *See supra* note 93.

⁹⁷ *Id.*

Because real money is being invested in the virtual world, individuals should retain some ownership of their virtual property. Game developers should alter their contractual agreements to reflect that ownership stake. If an individual has made his intention clear in a will, the game developer should honor the execution of the user's wishes. Where an individual has conveyed his virtual property, a court should uphold individual's rights over contractual agreements. If an individual waives his rights and does not choose to transfer his property, contractual agreements should be the default. The bottom line is, however, that an individual should be able to convey his virtual property to family.

The license is essentially the property interest here. The individual may convey the interest to family, who ultimately receives it subject to an expiration date. At such time, family members may choose to renew the agreement, thereby extending their ownership.

C. As applied for the governance of domain names

The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for managing the assignment of domain names and IP addresses.⁹⁸ In November 2008, ICANN modified its policy for the transfer of domain names, effective March 15, 2009.⁹⁹ The modified policy provides that a domain name can be transferred if the recipient of the domain name obtains express authorization from the grantor.¹⁰⁰ The registration, or lease, of a domain is the property right conveyed.

⁹⁸ See Internet Corporation for Assigned Names and Numbers (ICANN), <http://www.icann.org/> (last visited Feb. 21, 2009).

⁹⁹ ICANN: Policy on Transfer of Registration between Registrars, <http://www.icann.org/en/transfers/policy-en.htm> (last visited Feb. 21, 2009).

¹⁰⁰ *Id.*

Virtual property acquired by individuals in a virtual game world should be transferable under a similar framework. Because virtual game worlds involve not only an individual's time and effort, but also money, virtual property should be owned by the individual as a lease. Should the individual choose the transfer that lease, he should be able to do so. The next section provides a case study of virtual inheritability with regard to email addresses.

V. Case Study: Inheritability of email addresses

Email is a form of virtual property that is unique and personal to an individual. Once an individual dies, how are email accounts treated? By evaluating how email address can be inherited, it will provide guidance on how virtual creations in virtual game worlds may be conveyed or transferred.

In the news, a deceased Marine's parents requested access to their son's Yahoo email account.¹⁰¹ Initially, Yahoo, Inc. refused to provide the family with access because its internal privacy policy explained that email accounts are terminated when account holders die. The family went to court, where a probate court judge in Oakland County, Michigan granted the family an order compelling Yahoo to turn over the account.¹⁰²

Yahoo's Terms of Service states that e-mail accounts are nontransferable, and rights to e-mail contents or passwords terminate upon death. However, this provision of the agreement was intended to apply to transferring accounts. It was not intended for accessing the contents of the

¹⁰¹ Ariana Eunjung Cha, *After Death, a Struggle for Their Digital Memories*, THE WASHINGTON POST, Feb. 3, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A58836-2005Feb2.html>.

¹⁰² Stefanie Olsen, *Yahoo releases e-mail of deceased Marine*, CNET NEWS, Apr. 21, 2005, http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html.

account nor to ownership of the information in the account.¹⁰³ While Yahoo owns the right to an account after a user dies, the content of the account should ideally still belong to the estate of the decedent.

By terminating an account upon a user's death, companies like Yahoo are depriving a decedent's "estate and his successors access to potentially significant intellectual property resources."¹⁰⁴ If the deceased had printed out his emails and left them somewhere, the printouts "would be considered his personal property and would have likely become part of his estate."¹⁰⁵ Similarly, if the emails were stored in the hard drive of his personal computer, the physical object, the computer, would ultimately become part of his estate as well.¹⁰⁶

Personal correspondence may have tremendous historic or economic value—e.g., letters from historical figures have contributed greatly to our understanding of history.¹⁰⁷ The problem in cyberspace is that the ownership of e-information is linked with the ownership of the medium, a server in which the data is stored.¹⁰⁸ Balancing an heir's right to the decedent's estate and an email host's priority of protecting users' privacy must be reconciled.

¹⁰³ Mark D. Rasch, *A Corporal's Death Starts a Dispute on E-Mail Ownership: Should email accounts perish along with their owners?*, LAW.COM, Mar. 23, 2005, <http://www.law.com/jsp/article.jsp?id=1111485911670>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Rasch, *supra* note 103.

In practice, email messages, instant messages, and personal files on a computer or store online are considered private unless the individual publicly circulates that e-information.¹⁰⁹ The problem ultimately is where a decedent did nothing to make his intentions known:

In theory, a broad durable power of attorney properly executed and delivered to third parties could allow someone to have access to electronic assets, but this does not deal with the problem at Yahoo where an account simply ‘disappears’ upon death or inactivity. There is no requirement that these e-mail providers give the attorney-in-fact that password, or otherwise keep the account alive. Thus, as a practical matter, access to the IP dies with the owner, absent a court order stating otherwise.¹¹⁰

The bottom line is that people should make arrangements that dictate what happens to their property, both real and virtual, in a will to be executed upon death. “So when you create a free e-mail account, whether with an Internet service provider or with a free service, you should also create an ‘Internet Living Will[,]’ designating who can have access to your electronic assets in the event of death or incapacitation, and the scope of their authority to act on your behalf.”¹¹¹ Therefore, according to an individual’s will, virtual property licenses are transferrable.

CONCLUSION

By the interpretation of existing laws, the virtual world is not an exception its governance. Contract law should not be the only way that we define how the virtual world functions within the confines of our real existence. Through a mixture of contract and property

¹⁰⁹ Jennifer Farwell, *Death & Digital Data: What Happens To What You Leave Behind?*, SMART COMPUTING.COM, Sept. 1, 2007, <http://www.smartcomputing.com/Editorial/article.asp?article=articles/2007/s1809/09s09/09s09.asp&articleid=42187&guid=>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

law, licenses or leases are the most suitable way to balance the interest between users and game developers.

There are benefits to permitting virtual inheritability. By doing so, individuals' creations and labor is rewarded. It encourages productive and creative explorations into technology. Moreover, it promotes creativity. Advancements in technology have boosted our generation to a new level. These advancements will continue as long as people are allowed to imagine and explore untouched virtual depths. Recognizing virtual inheritance is another step toward validating people's creations and the value in their designs, thus, encouraging individuals to continue inventing.

Recognizing virtual inheritability will also build upon the existing virtual economy. This new business avenue is growing fast and game developers continue to build upon its growth. By recognizing people's investments, virtual inheritance will drive future growth.

For consumers of virtual property, the lesson here is that it is important to make one's last wishes and intentions known. People should make arrangements that dictate what happens to their property, both real and virtual, in a will to be executed upon death.

It is vital to support the legal recognition of virtual property by acknowledging its present value and by realizing its future worth.