

## Virtual Property in Massively Multiplayer Online Games

Who is killing or suing someone over what?

The video game industry has seen impressive growth rates for over a decade and recently has emerged from being an entertainment backwater inhabited by geeky high school kids to a multibillion dollar source of mainstream entertainment for people across the country and throughout the world. The video game industry has grown in the United States from a \$2.6 billion industry in 1996 to a \$7 billion industry in 2005<sup>1</sup> with a good portion of that money being spent on PC and online games. According to Jupiter Research, 4 in 10 Americans are PC Gamers and 1 in 3 Americans are Online PC Gamers. Not only are Americans playing PC games, but they are spending more and more time each week in front of their computers battling dragons, aliens, and each other. PC gamers currently spend an average of 18.5 hours per week playing games<sup>2</sup> and of those surveyed, 70 percent play some form of multiplayer online game.

In particular, the online game market has seen impressive recent growth and is projected to grow in North America from \$1.1 billion in 2005 to \$4.4 billion by 2010<sup>3</sup>. The online massively multiplayer online (MMO) game, a sub genre of the online game market, has seen North American game subscription revenue increase from \$50 million in 2001 to \$250 million in 2005, an increase of 500%. Blizzard's World of Warcraft (WoW) currently boasts 7.5 million subscription paying users worldwide with each one paying roughly \$12 per month: yearly gross revenue of over \$1 billion from one game alone.

The worldwide secondary market for Virtual Property will reach \$7 billion by 2009<sup>4</sup>.

China stands by verdict on virtual thief<sup>5</sup> - Upholding Yan's original 5,000 yuan (\$620) fine, the court said that online game players had spent time, energy and money gaining the game's equipment and adding value to the virtual goods, Xinhua news agency reported.

Organized crime is even starting to cash in on the value of the MMOs<sup>6</sup>.

Man arrested for Virtual Bully<sup>7</sup>

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<sup>1</sup> "Essential Facts About the Computer and Video Game Industry", Entertainment Software Association, 2006.

<sup>2</sup> "Report: Online Game Market to Reach \$4.4 Billion by 2010" (August 29, 2006) at <http://biz.gamedaily.com/industry/feature/?id=13652>

<sup>3</sup> Id.

<sup>4</sup> <http://ige.com/about>

<sup>5</sup> China stands by verdict on virtual thief

At [http://news.zdnet.com/2100-9588\\_22-6056849.html?tag=zdfd.newsfeed](http://news.zdnet.com/2100-9588_22-6056849.html?tag=zdfd.newsfeed)

<sup>6</sup> "Microsoft: Mobsters targeting MMOGs" (April 3, 2006) at

["http://www.gamespot.com/pc/rpg/worldofwarcraft/news.html?sid=6155784"](http://www.gamespot.com/pc/rpg/worldofwarcraft/news.html?sid=6155784)

<sup>7</sup> "Computer characters mugged in virtual crime spree" (August 18, 2005) at

["http://www.newscientist.com/article.ns?id=dn7865"](http://www.newscientist.com/article.ns?id=dn7865)

Shanghai tries 3 for counterfeiting virtual weapons<sup>8</sup>

EA confiscates \$15 Trillion in Ultima Gold<sup>9</sup>

EveOnline Bank Scam<sup>10</sup>

Counterfeiting of in-game currencies, extortion attempts by virtual "mafias", and the introduction of "fake" character accessories which are then sold at auction<sup>11</sup>.

Real Life Murder<sup>12</sup>

Deadly Plague Hits WoW<sup>13</sup>: To what extent can online gaming companies be held liable for damage or destruction caused to online players or their virtual property?

A few years ago, there was a brief flurry of interest in the legal question concerning how [offline laws fit into online virtual communities](#). This becomes [very tricky, very quickly](#) -- especially with the growing ability to [sell virtual goods](#) from these communities for real money. So, what happens when a virtual character steals from another virtual character and sells what they get for real money? The quick answer, some might say, would be that the thief is guilty of real-world theft, and deserves to be punished. However, since the stealing was allowed in the game, isn't it a part of the game? Worse, what if it's a major part of the game and encouraged? Suddenly the lines get *very* blurry. Over in Japan, someone has now [been arrested for creating an automated in-game bully](#) that would hang out in the popular game *Lineage II*, beat other characters up and steal their goods. Unfortunately, the article doesn't make it clear whether the arrest was for creating the bot... or for the thug-like virtual muggings. Either way, it raises some troubling questions. Even when real money is involved, the virtual world a totally made up world -- where the creators of that world can put in whatever restrictions they want. So, you could make a fairly convincing argument that if the game creators allow it, it's hard to see how it can be breaking the law (especially when players may come from all over the world, where the laws may differ). At worst, it could break the terms of service of the game -- which is why people (including game developers) need to start realizing that their terms of service are basically a [constitution for the game](#) and the game developers themselves play the role of the government in a game.

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<sup>8</sup> Shanghai tries 3 for counterfeiting virtual weapons (September 6, 2006) at <http://www.chinapost.com.tw/asiapacific/detail.asp?ID=89750&GRP=C>

<sup>9</sup> EA Cancels *Ultima Online* Accounts, Confiscates 15 Trillion Gold (July 7, 2006) at <http://www.gamespot.com/news/6153678.html>

<sup>10</sup> Cons in the virtual gaming world at "http://news.com.com/Cons+in+the+virtual+gaming+world/2100-1043\_3-6111089.html?tag=alert"

<sup>11</sup> The virtual crimewave (September 10, 2005) at <http://www.timesonline.co.uk/article/0,,22369-1772807,00.html>.

<sup>12</sup> Real-life murder in online gaming dispute  
At "http://www.cbc.ca/world/story/2005/06/08/gamer050608.html"

<sup>13</sup> Deadly plague hits Warcraft world at <http://news.bbc.co.uk/1/hi/technology/4272418.stm>

### The Current Market for MMOs

- PC gamers currently spend an average of 18.5 hours playing each week, while console gamers spend 13.6 hours, portable gamers 8.9 hours, and mobile gamers 4.6 hours. Furthermore, of those PC gamers surveyed, 70 percent play some form of multiplayer online game. (Parks Associates)  
<http://biz.gamedaily.com/industry/feature/?id=13652>
- Gamer NEVERDIE Rakes in \$100,000 USD in Virtual Reality -  
[http://www.marketwire.com/mw/release\\_html\\_b1?release\\_id=155690](http://www.marketwire.com/mw/release_html_b1?release_id=155690)

### Other Worlds

- Shakespeare Online – Edward Castronova announces *Arden – the World of Shakespeare* - 10/21/2006 -  
<http://www.virtualworldlets.net/Archive/IndividualNews.php?News=1725>
- MTV's Virtual Laguna Beach -  
<http://www.iht.com/articles/2006/09/18/yourmoney/mtv.php>

### Arguments for User Owned Virtual Property.

Independent Economic Value  
Sweat of the Brow  
Estoppel

- User accounts and characters
- Power leveling
- Objects
- Currency

“Virtual” is defined as Common alternative to logical; often used to refer to the artificial objects (like addressable virtual memory larger than physical memory) simulated by a computer system as a convenient way to manage access to shared resources. Dictionary.com.

“Property is the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way; to possess it; to use it; and to exclude everyone else from interfering with it.” Black’s Law Dictionary 5<sup>th</sup> Ed. @ 1095.

### **First Sale Doctrine.**

“[T]he **first sale doctrine** rarely applies in the **software** world because **software** is rarely “sold.” See [Adobe Sys. Inc. v. One Stop Micro, Inc., 84 F.Supp.2d 1086, 1091 \(N.D.Cal.2000\)](#) ( “[V]irtually all end users do not buy-but rather receive a license for-software. The industry uses terms such as ‘purchase,’ ‘sell,’ ‘buy,’ … because they are convenient and familiar, but the industry is aware that all software … is distributed under license.”). By licensing copies of their computer programs, instead of selling them, software developers maximize the value of their software, minimize their liability, control distribution channels, and limit multiple users on a network from using software simultaneously. See Christian H. Nandan, [Software Licensing in the 21st Century: Are Software “Licenses” Really Sales, and How Will the Software Industry Respond?, 32](#)

[AIPLA Q.J. 555. Wall Data Inc. v. Los Angeles County Sheriff's Dept.](#) 447 F.3d 769, 785 n. 9, C.A.9 (Cal.),2006. May 17, 2006

### **Contract Provisions**

Video game developers and publishers license the right to use the software through the use of the end user license agreement (EULA) (which governs use of the software resident on the game CD) and the Terms of Use (TOU) or Terms of Service (TOS) (which govern the use of the online component of the Game). Among the terms of the EULA and TOU/TOS are the end user's acknowledgement that all title, ownership rights and intellectual property rights in and to the game (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into the game, transcripts of the chat rooms, character profile information, recordings of games played on the game) are owned by the publisher or its licensors.

Additionally, publishers and game developers routinely limit the ability of the end users to transfer accounts and other "in game" items through the EULA and TOU/TOS.

### **Copyright**

The unauthorized transfer of virtual property infringes upon the exclusive rights of the copyright owner to make copies and derivative works. To establish copyright infringement, movants must demonstrate (1) that they own a valid copyright; and (2) that Microstar violated their alleged right to distribute derivative works. In *MicroStar vs. FormGen*, the EULA required the player created levels to be offered to others for free.

- Is virtual property a derivative work?
- If so, is the sale of the virtual property privileged as a fair use?
- Does the first sale doctrine privilege the sale of virtual property?
- If copyright law does not grant the copyright owner control over the market for virtual property, does it affirmatively prohibit such control? Or, can the right be obtained by contract?

#### Derivative Works

- **Is virtual property a derivative work?**
- "A work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted."
- If there is an aftermarket economic value, the copyright owner is entitled to exploit it.
- *Mirage Eds., Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)
- *Micro Star v. Formgen, Inc.*, 154 F. 3d 1107 (9th Cir 1988)
- The copyright owner does not own all conceivable aftermarket economic value.

- Lee v. A.R.T. Company, 125 F.3d 580 (7th Cir. 1997)
- Lewis Galoob Toys, Inc. v. Nintendo of America., 964 F.2d 965 (9th Cir. 1992)
- Ty, Inc. v. Pubs Int'l Ltd., 292 F.3d 512 (7th Cir. 2002)

#### Commerce in Virtual Property

- **Can commerce in virtual property be considered a Fair Use?**
- Yes: Lewis Galoob Toys, Inc. v. Nintendo of America., 964 F.2d 965 (9th Cir. 1992)
- No: Micro Star v. Formgen, Inc., 154 F. 3d 1107 (9th Cir 1988)

Even though a work may be fully protected under a valid copyright, the “fair use” doctrine may allow it to nevertheless be copied by an unauthorized party. In [17 U.S.C. section 107](#), Congress has set out four non-exclusive factors to be used in determining the applicability of the “fair use” doctrine: (1) the purpose and character of the use, including whether it is for commercial use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect and use upon the potential market for or value of the copyrighted work.

- **Does the first sale doctrine protect commerce in virtual property?**
- Is the transaction a “sale” or a “license”?
- Even if described as a “license” should it be considered a “sale” for policy reasons?

#### Copyright law

- **Does copyright law preempt control of virtual property?**
- **First Sale Doctrine**
- ProCD v Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (contractual restriction not preempted)
- Softman Prods. Co. v. Adobe Sys., Inc., 171 F. Supp.2d 1075 (C.D.Cal. 2001) ) (contractual restriction preempted)
- **Fair Use**
- Vault Corp. v. Quaid Software, 847 F.2d 255 (5th Cir. 1988)
- (contractual restriction preempted)
- Bowers v. Baystate, 320 F.3d 1317 (Fed Cir. 2003)
- (contractual restriction not preempted)

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[5] Although Microstar relies heavily on *Galoob*, which also upheld the defense of the fair use doctrine, it fails to recognize that in *Galoob* the court emphasized the fourth factor, and said that it was critical to its holding that Nintendo admitted that it had no future plans to put out something like the Game Genie. [964 F.2d at 971](#). In the present case however, movant has stated that it does have plans to put out a product very similar to Nuke It in the near future. As such, the court finds that Nuke It does affect the value of movants' copyrighted work.

#### Trademark law

- **Trademark Law Aspects of Virtual Property**

- Does trademark law give the trademark owner the right to exclude others from the market for virtual property?
- *Marvel Enterprises v. NCSoft Corp.*, 2005 WL 878090 (C.D.Cal.Mar. 9, 2005) (no “use in Commerce”)
- *1-800-Contracts v. When-U.com, Inc.* 414 F.3d 400 (2d Cir. 2005) (no “use in commerce”)
- *Playboy Enterprises, Inc., v. Netscape Communications Corp and Excite, Inc.*, 354 F 3d 1020 (9th Cir. 2004) (“use in commerce”)
- *GEICO v. Google, Inc.*, 330 F.Supp.2d 700 (E.D. Va. 2004) (“use in commerce”)

#### Anti-competition law

- **Competition Law Aspects of Virtual Property**
- Does antitrust law have any relevance to the IP owner’s attempt to control the virtual property aftermarket?
- *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992)
- Copyright Misuse
  - *Lasercomb v. Reynolds*, 911 F.2d 970 (4th Cir. 1990)
  - *Practice Mgt. v. AMA*, 121 F.3d 516 (9th Cir. 1997)
  - 
  - *In re Napster, Inc. Copyright Litigation*, 191 F.Supp.2d 1087 (N.D.Cal. 2002)

#### Terms of Use - WoW

- **Ownership.** All title, ownership rights and intellectual property rights in and to World of Warcraft (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, "applets" incorporated into World of Warcraft, transcripts of the chat rooms, character profile information, recordings of games played on World of Warcraft, and the World of Warcraft client and server software) are owned by Blizzard Entertainment or its licensors. World of Warcraft is protected by the copyright laws of the United States, international copyright treaties and conventions, and other laws. All rights are reserved. World of Warcraft may contain certain licensed materials, and Blizzard Entertainment's licensors may protect their rights in the event of any violation of this Agreement. TOU Sec. 10
- **Derivative Works.** Blizzard Entertainment expressly reserves the exclusive right to create derivative works based on World of Warcraft. This means that you may not create derivative works based on World of Warcraft, without the prior express, written permission of Blizzard Entertainment. TOU Sec. 2A
- **Sale of Items.** Blizzard Entertainment either owns, or has exclusively licensed, all of the content which appears in World of Warcraft. Therefore, no one has the right to "sell" Blizzard Entertainment's content, except Blizzard Entertainment! So Blizzard Entertainment does not recognize any property claims outside of World of Warcraft or the purported sale, gift or trade in the "real world" of anything

related to World of Warcraft. Accordingly, you may not sell items for "real" money or exchange items outside of World of Warcraft. TOU Sec. 8

#### Terms of Service - SecondLife

A company called Blacksnow Interactive came up with an ingenious way to make money off of virtual worlds. It went to Mexico and hired unskilled laborers to play Dark Age of Camelot around the clock, collecting virtual assets which Blacksnow then sold on eBay. After Mythic Interactive, the owners of Dark Age of Camelot, tried to put a stop to Blacksnow's business model on the grounds that it violated Mythic's intellectual property rights, Blacksnow sued Mythic for engaging in unfair business practices. The case never proceeded very far, since Blacksnow, a fly-by-night organization, eventually disappeared.

#### **Bragg**

The attorney, [Marc Bragg](#) of West Chester, Pennsylvania, says game developer Linden Lab unilaterally shut down his [Second Life](#) account, cutting off his access to a substantial portfolio of real estate and currency in the virtual world. He's demanding \$8,000 in restitution.

Bragg claims Linden Lab froze his account after a land deal went bad. The attorney said he found a legitimate way to purchase land at prices far below market rates, using an online [auction](#) on the *Second Life* website.

*Bragg v. Linden Research*, a civil complaint filed May 1 in West Chester's local district court, charges that Linden Lab "breached an auction contract by allowing the land to auction, accepting online payment, and then suspending plaintiff's account."

Bragg copied the URL for a legitimate auction, then swapped in the ID number for land not yet up for sale publicly, so there would be no minimum bid and few, if any, competing bidders.<sup>14</sup>

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<sup>14</sup> **2.6 Linden Lab may suspend or terminate your account at any time, without refund or obligation to you.** Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.

**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.** You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content).

**3.4 Linden Lab licenses its textures and environmental content to you for your use in creating content in-world.** During any period in which your Account is active and in good standing, Linden Lab gives you permission to create still and/or moving media, for use only within the virtual world environment

### Virtual Property and Real World Taxes

- [http://taxprof.typepad.com/taxprof\\_blog/2004/12/virtual\\_taxes\\_t.html](http://taxprof.typepad.com/taxprof_blog/2004/12/virtual_taxes_t.html)
- <http://www.nytimes.com/2005/05/29/business/yourmoney/29game.html?ex=1162443600&en=7f9af8a158288e9b&ei=5070>

A spokesperson for the [Australian Tax Office](#), in what is probably a world first, has said that if a virtual transaction has real world implications - if it can be attributed a monetary value - it attracts the attention of the Tax Office.<sup>15</sup> In her words:

“The real world value of a transaction may form part of your taxable income, even if it is in Linden dollars,”

The Chairman of the U.S. Congressional Joint Economic Committee (JEC), [Jim Saxton](#), believes taxing virtual economies would be a mistake. The goal of a forthcoming JEC study is to head off any premature attempt to impose tax on virtual economies.

### **Continuity**

A game publisher does not have the responsibility to its customers to maintain a game platform. If the publisher decides that the platform is no longer viable then it can discontinue that product line. *M. Leff Radio Parts, Inc., v. Mattel, Inc.* 706 F.Supp. 387 W.D.Pa., 1988. However, if the courts find that players have an ownership right in virtual property will the publisher have a responsibility to maintain the virtual world even if it becomes unprofitable?

### **In Game Torts**

*Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10<sup>th</sup> Cir.1979) “subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football.” “It is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules.”

### **Cheating**

A Korean court has sentenced two distributors of the "LinMate" bot to 24 months in jail and are levying a fine of 10 million won (about \$10,560 USD).

The accused are unrepentant, and still doubt that NCSoft really wants to pursue gamers using "farmers" and "bots." Some gamers blame the game developers, accusing them of

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of the Service ("in-world"), which use or include the "textures" and/or "environmental content" that are both (a) created or owned by Linden Lab and (b) displayed by Linden Lab in-world.

<sup>15</sup> Australian Tax Office Will Tax Income from Virtual Transactions

At <http://www.daledietrich.com/gaming/category/cases/virtual-property-cases/>

deliberately looking the other way when it comes to bots, because they may stand to lose profits if bots are banned.

"The Seoul Central District Court last week sentenced two distributors of 'LinMate' computer program to suspended jail terms of two years and a 10-million won penalty on the charge of obstructing NCSOft's operation of its 'Lineage' game.

"Bots," such as LinMate, are programs that plays games on "autopilot," without the presence of a gamer. They are used by lazy gamers who are bored of monotonous play (which begs the question of why they are playing in the first place). More significantly, illegal businesses use these programs to collect game items or virtual currency that convert to legal tender on trading Web sites.

"Many gamers have blamed game companies like NCSOft, saying that they have been deliberately overlooking the use of bots, because they are worried that they may lose profit if bots are banned. "We think that NCSOft themselves want those cheating tools to be used," says one bot programmer. "Many gamers pay service fees for two accounts at the same time, one for himself and one for the Bot. If NCSOft bans the use of Bot that means its revenue will decrease by half."

### **Defamation**

### **Jurisdiction**

Yahoo!, Inc. vs. La Ligue Contre Le Racism et L'Antisemitisme, 2001 U.S. Dist

### **Bibliography**

The Video Game Law Blog at

[http://www.davis.ca/community/blogs/video\\_games/archive/category/1029.aspx](http://www.davis.ca/community/blogs/video_games/archive/category/1029.aspx)

Video Game Law Blog at <http://www.daledietrich.com/gaming/>

Video Game Law, Jon Festinger

The State of Play, Law, Games, and Vitual Worlds, edited by Jack M. Balkin and Beth Simone Noveck