

# Legal Realities of Virtual Property

*Tiffany Tang*

## Abstract

*With increasing technological advancements and the soaring popularity of online gaming, the concept of 'virtual property' is becoming an ever-present issue. However, despite the growing overlap of virtual worlds and real life, 'virtual property' is yet to be legally recognised as property under Australian common law. Considered with the complex issue of enforceability at the forefront, this paper acknowledges that it is inevitably necessary to develop a legal conception and framework for 'virtual property'. This is particularly so, given the growing real world expectations and status accorded to such property by society, which may lead to potentially severe real-life ramifications.*

## I. Introduction

With technological advancements and the soaring popularity of online gaming, the concept of 'virtual property' is becoming an ever-present issue. However, despite the growing overlap of virtual worlds and real life, virtual property is yet to be legally recognised as property under Australian common law. This raises the question: should virtual property be considered property? In considering this issue, this essay will focus on the policy issue of enforceability.

Section one will state the parameters of virtual property adopted and whether virtual property so defined falls within the Australian common law conception of property. Section two will consider the enforceability issue which arguably supports the notion not to invest property rights in virtual property due to the intricate complexity involved. Ultimately, this essay acknowledges that eventually some legal rights will need to be attached to virtual property out of necessity.

## II. Section One

### *Definitions*

For current purposes, 'virtual property' will be limited to the in-game virtual assets one acquires in virtual worlds such as *Legend of Mir*.<sup>1</sup> The methods of acquiring

---

<sup>1</sup> Michael Meeham, 'Virtual Property: Protecting Bits in Context' (2006) 13 *Richmond Journal of Law Technology* 1, 6; Theodore J. Westbrook, 'Owned: Finding a Place for Virtual World Property Rights' (2006) *Michigan State Law Review* 779, 786.

these virtual assets include in-game trading, prizes on completion of tasks and even real-life purchases.

Property is a ‘description of a legal relationship [between people] with a thing’.<sup>2</sup> In Australia, property is hence commonly conceived as a ‘bundle of rights’<sup>3</sup> which consists of three primary factors: the right to use and enjoy, the right to exclude others from use and enjoyment, and the right to alienate.<sup>4</sup> Furthermore, intangibility does not prevent a thing from being considered as property.<sup>5</sup>

*Does ‘virtual property’ fit under the ‘bundle of rights’ conception?*

This essay acknowledges that virtual worlds are products of gaming developers and hence ultimately subject to the conduct rules and regulations imposed by them.<sup>6</sup> This overriding power and control may arguably diminish or place conditions on any rights a player may have in relation to virtual property. However, due to virtual property only being present within virtual environments, a player’s relations with this bundle of rights will be considered in the limited context of virtual worlds despite the other real-life factors.

*Right to use and enjoy*

Generally, within virtual worlds, subject to certain rules, players arguably have the right to use and enjoy the virtual assets they accrue as they please.<sup>7</sup> For instance, virtual money acquired from the completion of tasks can be used by the player to purchase in-game items if they wish.

*Right to exclude*

Considered within the context of the virtual world, players who possess a particular item arguably have the right to exclude others from using and enjoying that same object.<sup>8</sup> In virtual worlds, such as *The Legend of Mir*, players can exclude others from possessing and using the particular weaponry that they have acquired from gaining experience within the game.

<sup>2</sup> *Yanner v Eaton* (1999) 201 CLR 351, 366–7.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Milirrupum v Nabalco* (1971) 17 FLR 141, 171 (Blackburn R); Brendan Edgeworth et al, *Sackville Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013), 5–6.

<sup>5</sup> Alisa B Steinberg, ‘For Sale – One Level 5 Barbarian for 94 800 Won: The International Effects of Virtual Property and the Legality of its Ownership’ (2009) 37 *Georgia Journal of International and Comparative Law* 390; David P Sheldon, ‘Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods’ (2007) 54 *UCLA Law Review* 759.

<sup>6</sup> Sheldon, above n 5, 764.

<sup>7</sup> Kurt Hunt, ‘This Land is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights’ (2007) 9 *Texas Review of Entertainment Sports Law* 163.

<sup>8</sup> Steinberg, above n 5, 389; Ethan E White, ‘Massively Multiplayer Online Fraud: Why the Introduction of Real World Law in a Virtual Context is Good for Everyone’ (2008) 6 *Northwestern Journal of Technology and Intellectual Property* 233.

*Right to alienate*

Subject to certain conditions on the transfer of virtual goods placed by gaming developers, virtual property is arguably alienable. Generally, virtual assets may be given, sold or purchased within virtual environments between players using virtual currency.<sup>9</sup> It is worth noting that this transferability of virtual goods has transcended virtual worlds and entered the real-life trading market.<sup>10</sup> Virtual property can now be purchased and sold using real money, and such transactions are even facilitated through third party sites.<sup>11</sup> While it may be argued that certain types of alienation are limited or even banned, these limitations do not necessarily mean that this property right is forfeited.<sup>12</sup>

*Conclusion*

Considered in this highly limited sense, virtual property may constitute property. However, due to the breadth and vagueness of virtual property, it is difficult to reach a definite conclusion. Furthermore, due to virtual property being confined within virtual environments, which in turn are ultimately controlled by gaming developers, the existence of any player's rights may be weakened. Nevertheless, it is worth noting that courts have recognised that although not all these rights may exist, that does not necessarily mean that no property exists.<sup>13</sup>

### III. Section Two

In considering whether or not virtual property should constitute as property, one significant policy concern that must be addressed is the issue of enforceability. Assuming virtual property is legally recognised as property, there hence arises the necessity for an appropriate legal structure to ensure such a recognition is enforced and protected. However, difficulties stemming from two basic issues arise.

Firstly, the vagueness and possibly unlimited breadth of virtual property makes it inherently difficult to clearly define its limits.<sup>14</sup> For instance, the capability for intricate customisations of different games results in unique rules being applicable to individual virtual worlds.<sup>15</sup> This vast diversity consequently causes problems when developing appropriate laws to consistently regulate virtual property. An

<sup>9</sup> Steinberg, above n 5, 382.

<sup>10</sup> Allen Chin, 'Note: A Practical Look at Virtual Property' (2006) 80 *St. John's Law Review* 1066; Westbrook, above n 1, 786

<sup>11</sup> Peter Brown and Richard Raysman, 'Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property' (2006) 2 *The Indian Journal of Law and Technology* 90; Susan H. Abramovitch, and David L. Cummings, 'Virtual Property, Real Law: The Regulation of Property in Video Games' (2007) 6 *Canadian Journal of Law and Technology* 75.

<sup>12</sup> Edgeworth et al, above n 4, 6.

<sup>13</sup> *Ibid* 5.

<sup>14</sup> Dan E. Lawrence, 'It Really Is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property' (2008) 47 *Washburn Law Journal* 510.

<sup>15</sup> *Ibid* 542.

enforceable right, and consequently a possibility of legal action, in one game may not be present or appropriate in another.<sup>16</sup> For instance, some games such as *Grand Theft Auto* permit violence and crimes such as theft.<sup>17</sup> This contrasts to other games, such as *Second Life*<sup>18</sup>, where crimes are arguably forbidden on moral grounds.<sup>19</sup> Therefore, due to the fluid and indeterminate nature of virtual worlds, property rights (if recognised) may need to be decided on a case by case basis depending on the particular context.<sup>20</sup> Additionally, as the technological terrain continues to evolve, the suggested legal structure must be capable of adapting to fast changing climates.<sup>21</sup> Otherwise, the applicable law may become outdated and hence a hindrance rather than an aid.

Secondly, the ‘international scope’<sup>22</sup> of virtual worlds raises a cross-jurisdiction issue. The ability of virtual worlds to transcend traditional State boundaries hence allows players to interact with others from different jurisdictions.<sup>23</sup> In the event of a dispute, this raises serious concerns regarding which laws should be applied and how the relevant laws are to be enforced overseas. This is especially significant if virtual property is to be recognised as legal property due to the fact that property rights attract significant remedies.<sup>24</sup> Furthermore, the potential sphere of enforceability is further widened as property rights (unlike contractual rights) are enforceable against third parties. In response to this potential breadth, a common objection to the recognition of property rights is that the law of contract is available. However, the enforcement of contractual conditions is arguably insufficient to accommodate the expanding interconnectedness of virtual worlds, as contractual rights are only enforceable between the parties to a contract.<sup>25</sup> Within this context, contracts primarily exist between players and the gaming developers (in the form of End User License Agreements or Terms of Service) rather than between the players themselves.<sup>26</sup> Consequently, a player would have no contractual remedies against a third party player. This interconnectedness of virtual worlds consequently necessitates some considerations of international law, and the interaction and cooperation between different countries. However, as seen

---

<sup>16</sup> Ibid 543.

<sup>17</sup> Nelson DaCunha, ‘Virtual Property, Real Concerns’ (2010) 4 *Akron Intellectual Property Journal* 64.

<sup>18</sup> Matt Weinberger, ‘Second Life was 13 years early to virtual reality – and it’s getting ready to try again’, (30 March 2015, *Business Insider Australia*).

<sup>19</sup> DaCunha, above n 17, 63–4.

<sup>20</sup> Lawrence, above n 14, 543.

<sup>21</sup> Ibid 542.

<sup>22</sup> Ross A Dannenberg (ed) et al, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (American Bar Association, Section of Intellectual Property Law, 2010), 216.

<sup>23</sup> Ibid 217.

<sup>24</sup> Wayne Morgan, Property Law Lecture (Lecture, The Australian National University, 18 February 2016).

<sup>25</sup> Joshua A. T. Fairfield, ‘Virtual Property’ (2005) 85 *Boston University Law Review* 1092–3.

<sup>26</sup> DaCunha, above n 17, 45.

in other fields of international law, it is difficult to develop a consistent law of global application that is equally enforced.<sup>27</sup>

Overall, the difficulty of enforceability stemming from the indefinite and international scope of virtual property is a persuasive reason against recognising it as property. Fears of opening a Pandora's box may be the reason behind a general reluctance to recognise property rights in virtual property.

#### IV. Conclusion

Under Australian common law, it is difficult to conclude definitely that virtual property falls within the bundle of rights conception, primarily due to the breadth of the term. However, should virtual property ever be recognised, the pressing issue of enforceability must be addressed. Without means of enforcement when disputes arise, the recognition of virtual property would be moot. Unfortunately, fears of opening the floodgates to new litigation stemming from the inherent difficulty of virtual property enforcement may deter courts from recognising such proprietary rights.

Nevertheless, with the continual growth in popularity of virtual gaming and rising economic values of virtual property, it is inevitable that a legal conception of virtual property will be necessary. As reality and virtual worlds increasingly overlap, the need to develop a legal system to regulate virtual property will increase. Furthermore, as more people come to treat virtual property as actual property,<sup>28</sup> real-life crimes stemming from virtually-based disagreements (such as in the case of Qui Chengwei<sup>29</sup>) may become more rampant if no legal recourse is provided to players when disputes arise.<sup>30</sup> However, while a legal framework is needed, virtual property may not necessarily be dealt with through the law of property.

---

<sup>27</sup> Dannenberg (ed) et al, above n 22, 217; DaCunha, above n 17, 72.

<sup>28</sup> Hunt, above n 7, 159.

<sup>29</sup> Chein, above n 10, 1059–60; Westbrook, above n 1, 789.

<sup>30</sup> Meeham, above n 1, 47.

## References

- Abrahams, Nick, 'Issues for Corporates and Regulators in Second Life and Virtual Worlds' (2007) 26 *Communications Law Bulletin* 5
- Abramovitch, Susan H and David L Cummings, 'Virtual Property, Real Law: The Regulation of Property in Video Games' (2007) 6 *Canadian Journal of Law and Technology* 73–5
- Brown, Peter and Richard Raysman, 'Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property' (2006) 2 *The Indian Journal of Law and Technology* 87–90
- Chein, Allen, 'Note: A Practical Look at Virtual Property' (2006) 80 *St. John's Law Review* 1059–66
- Christ, Roxanne E and Curtis A Peele, 'Virtual Worlds: Personal Jurisdiction and Click-Wrap Licenses' (2008) 20 *Intellectual Property and Technology Law Journal* 1
- Cowie, Tom, "'Grand Theft Auto generation" to blame for spike in crime: Chief Commissioner', *The Age* (online, 17 March 2016) <<http://www.theage.com.au/victoria/grand-theft-auto-generation-to-blame-for-spike-in-crime-chief-commissioner-20160316-gnl2v9.html>>
- DaCunha, Nelson, 'Virtual Property, Real Concerns' (2010) 4 *Akron Intellectual Property Journal* 35–72
- Dannenberg, Ross A (ed), Steve Mortinger, Roxanne E Christ, Chrissie Scelsi and Farnaz Alemi, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (American Bar Association, Section of Intellectual Property Law, 2010) 216–7
- Edgeworth, Brendan, Chris Rossiter, Margaret Stone and Pamela O'Connor, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 9th ed, 2013) 5–6
- Fairfield, Joshua A T, 'Virtual Property' (2005) 85 *Boston University Law Review* 1047–93
- Hunt, Kurt, 'This Land is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights' (2007) 9 *Texas Review of Entertainment & Sports Law* 141–63
- Kunze, Jason T, 'Regulating Virtual Realms Optimally: The Model End User License Agreement' (2008) 7 *Northwestern Journal of Technology and Intellectual Property* 102
- Lawrence, Dan E, 'It Really Is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property' (2008) 47 *Washburn Law Journal* 505–43
- Ludwig, Jordan L, 'Protections for Virtual Property: A Modern Restitutionary Approach' (2011) 32 *Loyola of Los Angeles Entertainment Law Review*
- Meeham, Michael, 'Virtual Property: Protecting Bits in Context' (2006) 13 *Richmond Journal of Law & Technology* 1, 6, 47
- Milirrpum v Nabalco* (1971) 17 FLR 141 (Blackburn J)
- Morgan, Wayne, Property Law, (Lecture, The Australian National University, 18 February 2016)

- Moses, Lyria Bennett, 'The Applicability of Property Law in New Contexts: From Cells to Cyberspace' (2008) 30 *Sydney Law Review* 639
- Rumbles, Wayne, 'Theft in the Digital: Can You Steal Virtual Property?' (2011) 17 *Canterbury Law Review* 354
- Sheldon, David P, 'Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2007) 54 *UCLA Law Review* 751–9
- Shen, Leah, 'Who Owns the Virtual Items?' [2010] *Duke Law & Technology Review*, <<http://dltr.law.duke.edu/2010/08/25/who-owns-the-virtual-items/>>
- Steinberg, Alisa B, 'For Sale – One Level 5 Barbarian for 94,800 Won: The International Effects of Virtual Property and the Legality of its Ownership' (2009) 37 *Georgia Journal of International and Comparative Law* 381–90
- Tseng, Yen-Shyang, 'Governing Virtual Worlds: Interration 2.0' (2011) 35 *Washington University Journal of Law & Policy* 547
- Volanis, Nikolaos, 'Legal and policy issues of virtual property' (2007) 3 *International Journal of Web Based Communities* 332
- Weinberger, Matt, 'Second Life was 13 years early to virtual reality – and it's getting ready to try again', (30 March 2015, *Business Insider Australia*)
- Westbrook, Theodore J, 'Owned: Finding a Place for Virtual World Property Rights' [2006] *Michigan State Law Review* 779–89
- White, Ethan E, 'Massively Multiplayer Online Fraud: Why the Introduction of Real World Law in a Virtual Context is Good for Everyone' (2008) 6 *Northwestern Journal of Technology and Intellectual Property* 228–33
- Yanner v Eaton* (1999) 201 CLR 351 336–7