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Protections for Virtual Property: A Modern Restitutionary Approach

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PROTECTIONS FOR VIRTUAL PROPERTY: A MODERN RESTITUTIONARY APPROACH

"Why would anyone pay $50,000 for a virtual property?"[1]

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Virtual online worlds have become a staple of modern society. Through an avatar, individuals may enter into virtual worlds, where they can do anything from completing epic quests to speculating on virtual "real estate." Many virtual worlds have unique currencies, which have real-world value because of the high demand for in-game property. Disputes over virtual property, however, remain mostly, if not entirely, ungoverned by any body of law. This Comment seeks to address how to handle conflicts that arise over virtual world property. It concludes that the reemerging law of restitution, as promulgated in the *Restatement (Third) of Restitution and Unjust Enrichment*, provides the breadth and flexibility necessary to properly resolve legal disputes that have, and will continue to arise over virtual property in virtual worlds.

I. INTRODUCTION

As foreign as they may seem, virtual worlds[2] have become an increasingly potent economic force.[3] For example, economists estimated that in 2007, the total gross domestic product of virtual worlds surpassed seven

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1. Regina Lynn, *Stroker Serpentine,* Second Life*'s Porn Mogul, Speaks*, WIRED (Mar. 30, 2007), http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/03/sex_drive0330.

* J.D., Loyola Law School, 2011; B.A., University of Maryland, College Park, 2008. The author would like to give special thanks to Professor Bob Brain for his extremely helpful guidance in selecting and narrowing this topic to a manageable level. Additionally, the author would like to thank the staff of Volumes 31 and 32 of the *Loyola of Los Angeles Entertainment Law Review* for its hard work editing this article. Particular gratitude is owed to Chief Production Editors Matt Carter and Jenna Spatz, as well as to Jackie Lecholtz-Zey and Jay Jeffrey Fragus.

2. *See infra* Part II.A.

3. Bobby Glushko, Note, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507, 507 (2007); *see also* Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043–44 (2004) (stating that video games are becoming increasingly lucrative).

billion dollars.[4] The proliferation of virtual worlds has attracted an immense and continually growing population of users.[5] The global video game market, which was worth around $56 billion in 2010, is now "twice the size of the recorded music industry," and sales are expected to rise to $82 billion by 2015.[6]

Perhaps the most surprising feature to those unfamiliar with virtual worlds is the vast commercial economy present in each game. Each world's currency fluctuates with the American dollar from day to day based on rates of supply and demand—no different from the euro or the British pound.[7] Like in the real world, almost any item a user is willing to pay for is available for purchase.[8] This item becomes the user's virtual property. However, unlike tangible personal property and real property, virtual property does not exist.[9] Herein arises the problem this Comment seeks to address.

In their current state, exchanges between individual gamers in virtual worlds are "relatively ungoverned under the laws of most countries."[10] Contributing to this problem is the fact that it is difficult to equate "a bundle of mathematic algorithms . . . simulat[ing] the look and utility of a real-world good" with something one would purchase in a real-world store.[11] Nevertheless, it is indisputable that virtual property, both real and personal, is valuable to at least a segment of the population.[12] As such, protections must be in place to ensure that peoples' rights are protected.

This is not the first comment to propose protections for virtual property rights.[13] However, most prior scholarship has focused on applying the common law of property or contracts to virtual worlds.[14] By contrast, this

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4. Glushko, *supra* note 3, at 507.

5. Alisa B. Steinberg, Note, *For Sale—One Level 5 Barbarian for 94,800 Won: The International Effects of Virtual Property and the Legality of Its Ownership*, 37 GA. J. INT'L & COMP. L. 381, 385 (2009).

6. *All the World's a Game*, THE ECONOMIST (Dec. 10, 2011), http://www.economist.com/node/21541164.

7. *See* ASHLEY SAUNDERS LIPSON & ROBERT D. BRAIN, COMPUTER AND VIDEO GAME LAW: CASES, STATUTES, FORMS, PROBLEMS & MATERIALS 511 (2009).

8. *See id.* (listing items available for purchase, such as clothes, cars, property, concerts, and VIP rooms in clubs).

9. *Id.* at 509.

10. Steinberg, *supra* note 5, at 384.

11. Theodore J. Westbrook, Comment, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 780 (2006).

12. *See, e.g.*, Farnaz Alemi, *An Avatar's Day in Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games*, 11 UCLA J.L. & TECH. 1, 4–5 (2007).

13. *See, e.g.*, Steinberg, *supra* note 5, at 412–19; Westbrook, *supra* note 11, at 804–11.

14. *See, e.g.*, Steinberg, *supra* note 5, at 395–98; Westbrook, *supra* note 11, at 801–04.

paper argues that the reemerging law of restitution and unjust enrichment should be used to protect virtual property rights until state legislatures or courts take the opportunity to craft their own unique laws. Part II of this Comment provides a background into virtual worlds and disputes over virtual property. Part III discusses the current governance of virtual worlds, past proposals to reform this governance, and the deficiencies of the current model and proposed models. Part IV provides an overview of the law of restitution and unjust enrichment, using the *Restatement (Third) of Restitution and Unjust Enrichment* ("*Restatement (Third)*")[15] and various federal and state cases, in addition to courts' interpretation of this complex and misunderstood body of law. Part V discusses a proposed application of restitution and unjust enrichment principles to virtual property rights. Lastly, Part VI contains concluding remarks on the matter.

II. BACKGROUND: VIRTUAL WORLDS AND VIRTUAL PROPERTY

A. Video Games vs. Virtual Worlds

As many readers may be unfamiliar with what exactly constitutes a virtual world, some background will be helpful. First, virtual worlds must be distinguished from typical video games. Video game law scholars Lipson and Brain identify two discernible characteristics:

> (1) [A] "game" is static in the sense that nothing happens in the world once "Game Over" appears, whereas virtual worlds are active 24/7 and constantly change, even when a particular player is not in them; and (2) virtual worlds allow for interaction among all the many thousands of users [or more] who may be logged on at the same time.[16]

This distinction raises the question: what attracts users to dedicate so much time and money to virtual worlds when there is no clear objective or endgame involved?

In an influential article, authors F. Gregory Lastowka and Dan Hunter suggest such enjoyment lies in the "rich social interaction" that virtual worlds provide.[17] While some virtual worlds resemble a traditional video

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15. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (Discussion Draft 2000).

16. LIPSON & BRAIN, *supra* note 7, at 505–06.

17. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 6 (2004) (noting that the average player of EverQuest, a popular virtual world, "spends about twenty hours a week within the . . . world").

game, in that they contain elements of completing quests and adventures, others center on the social interactions between users.[18] For example, in one world known as There, users can have a drink at a tiki bar or hike a volcano.[19] It is easy to see how this opportunity could appeal to someone who lacks the wherewithal to enjoy this vacation in the real world or to someone who is simply looking for a new social scene.

B. Economic Implications of Virtual Worlds

Virtual worlds do not simply provide their users with social opportunities and other intangible benefits, such as exploring an exotic place.[20] Like the real world, virtual worlds offer fertile ground for business ventures.[21] This fact is perhaps the most intriguing aspect of virtual worlds, as it may be perplexing to grasp how one can earn an income from participating in something that essentially is intangible.

Virtual worlds such as Second Life have become so popular that "it is now possible to work in a fantasy world to pay rent in reality."[22] For example, one Michigan resident, while unemployed for three and a half years, earned a sole income of approximately $25,000 per year by trading artifacts in the virtual world Ultima Online.[23] In Ultima Online, virtual goods range from a $5 pair of sandals to a $150 battle axe to a $750 fortress.[24] Much more uncommon, but still in existence, are people who have amassed a vast amount of wealth participating in virtual worlds.

A 2006 study reported that at least ten users of Second Life earned over $200,000 from in-game commercial activity.[25] For example, "Anshe Chung" is the first virtual world millionaire.[26] Chung amassed approximately one million dollars in assets in Second Life and other virtual worlds.[27] Chung, the avatar of Ailin Graef (CEO of Anshe Chung Studios), obtained this fortune by selling virtual real estate.[28]

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18. Glushko, *supra* note 3, at 509–10.
19. Lastowka & Hunter, *supra* note 17, at 8–9.
20. *See, e.g.*, *id.* at 1.
21. *See* Alemi, *supra* note 12, at 2–4.
22. Lastowka & Hunter, *supra* note 17, at 11.
23. Alemi, *supra* note 12, at 4–5.
24. LIPSON & BRAIN, *supra* note 7, at 512.
25. *Id.* at 513.
26. Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1051 n.221 (2009).
27. *Id*.
28. Kurt Hunt, Note, *This Land Is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141, 143 (2007).

Regrettably, the prospect of money inevitably invites crime and fraud.[29] Like the real world, virtual worlds have become home to fraudulent investment schemes that swindle users out of substantial amounts of money.[30] The tolerance of this deceit, the considerable latitude given to players in perpetrating these schemes, and the impunity that accompanies it, account for a large part of the problem of virtual worlds.

C. The Real World Consequences of Having No Virtual Property Protections

The following incidents will serve as baseline paradigms for the remainder of this Comment to help illustrate important principles articulated within. The first set illustrates the types of conflicts that can arise among users of virtual worlds. The second describes a district court case that will serve as a paradigm for conflicts between users and developers.

1. Paradigm 1: Conflicts Among Users

Several financial scandals have precipitated conflict among virtual world users.[31] One notable scandal occurred in EVE Online[32] when the EVE Investment Bank defrauded its investors of $125,000.[33] One avatar, known as "Cally," created the Eve Investment Bank, which promised large-scale investors a yield of nine percent interest.[34] Cally collected hundreds of billions of Inter Stellar Kredits (the in-game currency) over a nine-month period and eventually vanished, taking all of the investors' money.[35] The disappearance of such an immense sum of money from market circulation "sent shockwaves through the virtual economy and threw the EVE Online community into chaos."[36]

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29. *See, e.g.*, srfto, *Stealing in Virtual Worlds Is a Real Crime*, GOSSIP GAMERS (Jan. 20, 2009, 2:59 PM) http://www.gossipgamers.com/stealing-in-virtual-worlds-is-a-real-crime/ (recounting the story of a young boy defrauded of his in-game items by an adult scammer).

30. *See infra* Part II.B.1.

31. Glushko, *supra* note 3, at 521–22.

32. *See id.* at 521–23 (describing the EVE Online scandal).

33. *Id.* at 521.

34. *Id.*

35. *Id.*

36. *Id.* at 522.

A similar situation resulted with the Ginko Financial Bank in Second Life.[37] Ginko Financial promised an exorbitant forty-four percent annual return on investments.[38] "Nicholas Portocarrero," the avatar who ran the bank, would not reveal his investments.[39] After two major financial events occurred in Second Life, investors panicked and tried to withdraw more funds than Ginko Financial had available.[40] Eventually, Ginko Financial declared itself to be insolvent, and Portocarrero ceased logging into Second Life.[41] Many analysts agree that Ginko Financial was a Ponzi scheme.[42] Overall, Ginko Financial Bank owed approximately $740,000 in obligations to its investors.[43]

Unfortunately, the consequences of disputes among virtual world users can be far more tragic than financial loss.[44] In June 2005 Qiu Chengwei, a Legend of Mir III player, murdered another player over an in-game property dispute.[45] Qiu had lent the victim a rare, enchanted in-game sword, which the victim then sold for approximately $870.[46] After Qiu contacted the authorities, who "refused to take any steps to redress the injury," Qiu tragically and fatally took matters into his own hands.[47]

These scenarios illustrate why protections providing for the recovery of virtual property are essential. The avatar who ran Ginko Financial Bank was able to leave Second Life with impunity, leaving "no trail for authorities to follow, if there had been any authorities."[48] Furthermore, in the aftermath of the Ginko incident, a *Los Angeles Times* article reported: "There have been some calls for the government to step in, but Washington

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37. *See* Amanda J. Penick, Comment, *Legal Recourse When Virtual-World Banks Pack Up Their Toys and Go Home*, 77 U. CIN. L. REV. 233, 237–40 (2008) (describing Ginko Financial Bank's economic status).

38. *Id.* at 237–38.

39. *Id.* at 238.

40. *See id.* at 239–40.

41. *Id.* at 240.

42. *Id.*

43. Penick, *supra* note 37, at 240.

44. Westbrook, *supra* note 11, at 789 (explaining that the events in virtual life have real-world consequences).

45. *Id.*

46. *Id.*

47. *Id.*

48. Alana Semuels, *Virtual Bank's Second Life Scheme Raises Real Concerns*, L.A. TIMES, Jan. 22, 2008, at C1.

is pretty much scratching its head right now. 'Most members of Congress don't understand what this is all about . . . .'"[49]

2. Paradigm 2: Conflicts Between Users and Developers

Bragg v. Linden Research, Inc. became the first case to test virtual property rights in an American court.[50] Marc Bragg's avatar, "Mark Woebegone," was "a moderately successful nightclub owner and inventor in Second Life."[51] Bragg also invested in virtual land—an investment he claims was "induced" by representations made by the operators of Second Life, Linden and its CEO Philip Rosedale.[52] Bragg purchased a parcel of land, known as "Taessot," by "exploiting a loophole within Second Life's auction software."[53] After Linden learned of this improper purchase, it froze Bragg's account, which "effectively confiscat[ed] all of the virtual property and currency that he maintained . . . [in] Second Life."[54] Linden did not compensate Bragg and intended to resell his land and nightclub to another user.[55] Bragg brought suit under several causes of action, including "violations of the Pennsylvania Unfair Trade Practices and Consumer Protection law, fraud, conversion, intentional interference with contractual relations, breach of contract, unjust enrichment, and tortious breach of the covenant of good faith and fair dealing."[56] Linden, pursuant to Second Life's Terms of Service ("TOS"), moved to compel arbitration.[57]

Unfortunately, the court did not rule on any issue other than the arbitration clause of the TOS.[58] One commentator called *Bragg* a "missed opportunity."[59] The court merely held that the compulsory arbitration clause was unconscionable, and thus, unenforceable.[60] Bragg and Linden ultimately settled out of court, leaving the question of virtual property rights in

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49. *Id.* (quoting Dan Miller, a senior economist with the Congressional Joint Economic Committee).

50. Steven J. Horowitz, Note, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 449 (2007); *see* Steinberg, *supra* note 5, at 406, 410 (describing two previous lawsuits that did not go to trial).

51. Glushko, *supra* note 3, at 524.

52. Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 596–97 (E.D. Pa. 2007).

53. Steinberg, *supra* note 5, at 411; *Bragg*, 487 F. Supp. 2d at 597.

54. *Bragg*, 487 F. Supp. 2d at 597.

55. Glushko, *supra* note 3, at 525.

56. Steinberg, *supra* note 5, at 411.

57. *Bragg*, 487 F. Supp. 2d at 603.

58. Steinberg, *supra* note 5, at 411–12.

59. *Id.* at 412.

60. *Id*. at 411–12.

the United States unanswered.[61] The U.S. courts and legislatures are no further along in regulating virtual property than many years ago, when the virtual world industry was first emerging.[62] It is in this context that my proposal is rooted. However, a discussion of relevant law must come first.

III. THE LAW OF VIRTUAL WORLDS

This section is broken down into two parts. The first part discusses the contracts between users and developers that are currently the only source of governance of virtual worlds, in addition to past proposals that other authors have posited. The second part discusses the current inadequacies of the existing system and the flaws of prior proposals.

A. Current and Proposed Protections for Virtual Property

1. Terms of Service and End User Licensing Agreements as Governing Devices

Because of the failure of *Bragg v. Linden Research, Inc.* to articulate any law governing virtual property,[63] the sole source of governance over virtual worlds and virtual property lies in the software's Terms of Service ("TOS") or End User License Agreements ("EULAs").[64] These agreements create a contract[65] between the software developer and the user, which enumerate specific rights and prohibitions that accompany gameplay. If users decline to agree to the TOS or EULA, they are prohibited from entering the "world."[66] Professor Balkin provides the following explanation of the typical TOS and EULA:

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61. *Id.* at 412.

62. *See id*. at 384–85.

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

64. *See* Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 429 (2008) [hereinafter *Anti-Social Contracts*].

65. There is a circuit split regarding the enforceability of contracts of this type (known also as "clickwrap" or "shrinkwrap licenses"). For example, in the well known case of *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996), Circuit Judge Easterbrook wrote, "[s]hrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)." In contrast, in *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002), then-Circuit Judge Sotomayor wrote that these agreements were unenforceable if "a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms before responding to defendants' invitation . . ."

66. For example, the preface to the Second Life TOS provides:

> This agreement ("Agreement" or the "Terms of Service") describes the terms on which Linden Research, Inc. and Linden Research United Kingdom, Ltd. (col-

> [G]ame designers can control what goes on in the game through contract. In most cases, in order to participate in virtual worlds, players must agree to the platform owner's Terms of Service . . . or End User License Agreement . . . . The EULA covers features of proper play and decorum that cannot easily be written into the code. Game designers enforce social norms in the game space by kicking out (or threatening to kick out) people who violate the EULA.[67]

Another commentator claims that the purpose of the EULA is to "protect the investments of the world-makers, to curb liability, and to allow game developers to retain a measure of control over the goings-on in the virtual world."[68] In short, the TOS and EULA appear to favor the rights of the developer over the rights of the user. With this in mind, the following paragraphs will examine the role of the TOS and EULA in the arena of virtual property.

At a virtual world's creation, the developer has property rights to everything in it.[69] The development of a virtual world is obviously an exacting task. However, conflicts over ownership are bound to arise, as they did in *Bragg*,[70] when users are permitted to bring their own objects into, or create objects within, the developer's world.[71] If users devote their time and ef-

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> lectively "Linden Lab") offer you access to Second Life . . . . This offer is conditioned on your agreement to all of the terms and conditions contained in the Terms of Service, including the policies and terms linked to or otherwise referenced in this Agreement.
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> By using Second Life, you agree to and accept these Terms of Service. If you do not so agree, you should decline this Agreement, in which case you are prohibited from accessing or using Second Life.

Terms of Service, SECOND LIFE, http://secondlife.com/corporate/tos.php (last visited Mar. 15, 2012) [hereinafter *Second Life TOS*].

67. Balkin, *supra* note 3, at 2049.

68. Westbrook, *supra* note 11, at 788–89.

69. LIPSON & BRAIN, *supra* note 7, at 510. This is consistent with John Locke's labor-desert theory, which states that if an individual (in this case, the developer) has invested time and labor into developing and acquiring possessions, that individual deserves property rights. Horowitz, *supra* note 50, at 450–54. Horowitz discusses two compelling claims in his article. First, under Locke's theory, users should have property rights as they have "invested time and effort in developing their avatars and acquiring in-world possessions . . . ." *Id.* at 450. In contrast, developers have a similar claim as the development and maintenance of virtual worlds requires a vast amount time and effort as well. *Id.* The author concludes that in Lockean terms, game developers have a strong claim to their world and the products they create; however, their claim to user-created goods is "much weaker." *Id.* at 453–54.

70. *Bragg*, 487 F. Supp. 2d 593.

71. LIPSON & BRAIN, *supra* note 7, at 510.

fort to creating or acquiring unique items, it would seem apparent that they should have a claim of ownership to those items. Rather than deferring to "default notions of copyright to decide ownership rights," game developers have placed these rights in their respective EULAs and TOS agreements.[72]

Unsurprisingly, these TOS and EULAs insulate, or are at least written to insulate, game developers from any suit regarding virtual property. For example, while users maintain the intellectual property rights to their original content submissions to Second Life,[73] the TOS state, "[y]ou agree that Linden Lab has and may exercise the right in its sole discretion to pre-screen, refuse, or delete any Content or services from the Service or disable any user's access to the Service without notice or liability . . . ."[74] Other virtual world TOS and EULAs contain similar provisions.[75]

From these various TOS and EULA provisions, there is a trend toward developer omnipotence over virtual property rights. This trend holds true even if users retain intellectual property rights to their creations, as they do in Second Life. As seen in *Bragg* and the Second Life TOS,[76] a user can invest time and money into creating or maintaining property, only to lose it with no compensation or justification. This model is unsustainable in a rapidly growing industry. In 2004, Lastowka and Hunter suggested: "We will likely see courts rejecting EULAs to the extent that they place excessive restrictions on the economic interests of users . . . . [W]e can expect a large number of lawsuits rooted in these property-rights disputes."[77] Surprisingly, *Bragg* is the only suit to have come to light thus far. However, this fact does not reflect virtual world participants' demand for

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72. *Id.*

73. *Second Life TOS*, *supra* note 66, § 7.1.

74. *Id.* § 4.3.

75. For example, the EVE Online EULA states,

> [y]ou have no interest in the value of your time spent playing the Game, for example, by the building up of the experience level of your character and the items your character accumulates during your time playing the Game. Your Account, and all attributes of your Account, including all corporations, actions, groups, titles and characters, and all objects, currency and items acquired, developed or delivered by or to characters as a result of play through your Accounts, are the sole and exclusive property of CCP, including any and all copyrights and intellectual property rights in or to any and all of the same, all of which are hereby expressly reserved.

End User License Agreement, § 11(B), EVE ONLINE, http://www.eveonline.com/pnp/eula.asp (last visited Feb. 21, 2012); *see also World of Warcraft Terms of Use,* § 7, BLIZZARD.COM, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last visited Feb. 21, 2012).

76. *Bragg*, 487 F. Supp. 2d 593; *Second Life TOS*, *supra* note 66, § 4.3.

77. Lastowka & Hunter, *supra* note 17, at 50–51.

rights.[78] For instance, one virtual world theorist proposed a "Declaration of the Rights of Avatars," modeled after the French Declaration of the Rights of Man and the U.S. Bill of Rights.[79]

Regrettably, players do not have a similar doctrine of rights.[80] Rather, as one author argues, it is the EULAs that "function as a mix between a constitution and a holy book."[81] Scholars criticize this model, whereby players remain bound by the strict terms of the TOS or EULA of their respective worlds.[82] The next section explores several past proposals providing alternatives to the status quo.

2. Prior Proposals to Protect Virtual Property

This subsection briefly discusses scholarship concerning protections for virtual property, including (a) the application of the common law of property and (b) the application of the common law of contract to virtual worlds.

a. Property law

Scholars advocate for the application of common law property to virtual property interests, which is perhaps the most obvious answer to the problem of the lack of virtual world property rights.[83] On a theoretical level, several articles extensively discuss the application of the very foundations of property theory to virtual property ownership and interests.[84] Other scholars take a more practical approach, advocating that the common law of property be used to provide protections for virtual property interests.[85]

For example, one commentator argues, "certain virtual property shares many of the characteristics [of] actual property, and should not be excluded from legal protection as property simply because it initially seems

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78. *Id.* at 51 (stating that some believe avatars should have a political voice).

79. *See id.*

80. *Id.* at 52–53 (arguing that rights for virtual worlds are controversial).

81. Glushko, *supra* note 3, at 516.

82. *See Anti-Social Contracts*, *supra* note 64, at 429 (arguing that EULAs are not the "best tool" for governing virtual worlds); *see also* Fairfield, *supra* note 26, at 1022 (arguing that game creators should not exert so much control over users).

83. Lastowka & Hunter, *supra* note 17, at 50.

84. *See* LIPSON & BRAIN, *supra* note 7, at 509–10 (applying traditional property laws to virtual worlds). *See generally* Horowitz, *supra* note 50 (arguing that users have strong property rights in virtual worlds); Lastowka & Hunter, *supra* note 17, at 44–50 (applying utilitarian and personality theories of property, in addition to the Lockean theory).

85. *See* Hunt, *supra* note 28, at 172 (arguing that virtual worlds should be entitled to protection under common property laws).

unfamiliar."[86] Thus, applying the common law of property to virtual worlds would provide adjudicative bodies with a set of predictable and equitable rules.[87] Another author suggests the possibility of implementing an adverse possession standard in virtual worlds.[88] Yet another interesting article analyzes whether various aspects of the common law of property, such as the laws of finders, gifts, abandonment, and adverse possession, apply within Second Life.[89] Although some of these traditional property concepts, such as the law of gifts, actually apply within virtual worlds, the authors are careful to note that the applicability of these concepts is limited in scope.[90] The foregoing are a few examples of the common law of property's application to virtual worlds; several other scholars have made similar suggestions. Still, other authors have suggested applying contract law to protect virtual property rights.[91]

b. Contract law

Because contracts (in the forms of TOS and EULAs) are the only governing feature of virtual worlds, a relatively large body of scholarship addresses contract law's application to virtual worlds.[92] Much is written on the deficiencies of TOS and EULAs governing virtual worlds,[93] but less is written on applying contractual remedies to facilitate virtual property protection.[94] The two, however, are inextricably linked, causing some authors to apply contractual remedies to virtual worlds.[95]

Kurt Hunt, author of a leading article on the topic, argues that virtual world users have the potential to assert contractual defenses of unconscionability, misrepresentation, and promissory estoppel in response to the "EULA problem."[96] Regarding unconscionability, Hunt asserts that in order

86. *Id.*

87. *Id.*

88. Steinberg, *supra* note 5, at 420.

89. *See* Elizabeth Townsend Gard & Rachel Goda, *The Fizzy Experiment:* Second Life*, Virtual Property and a 1L Property Course*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 915, 935–40 (2008).

90. *See id.* at 957.

91. *See Anti-Social Contracts*, *supra* note 64, at 432 (stating that contract law governs online communities).

92. *See, e.g.*, *id.* at 435–38.

93. *See supra* Part III.B.1.

94. *See Anti-Social Contracts, supra* note 64, at 438 (stating that there is a significant literature gap in examining the application of contract law to virtual worlds).

95. *See id.* (arguing that people erroneously believe that contract law has unlimited ability to govern virtual worlds).

96. Hunt, *supra* note 28, at 153.

for the court to "void[] any part of a virtual world EULA," it must issue a holding of *substantive* unconscionability—a holding he believes is possible.[97] Similarly, in his view, misrepresentation may be utilized to allow a user to recover "without ever having to reach the question of property rights in virtual property."[98] Lastly, Hunt states that there may be a potential cause of action under the doctrine of promissory estoppel.[99] For example, a court may find that game creators induced players to invest real money in the game based upon "the apparent 'realness' of their in-game money."[100]

While these arguments are persuasive, their application is limited by their own very nature and by that of current virtual world governance and functionality.[101] In contrast, the law of restitution and unjust enrichment, which will be discussed in later sections, provides the breadth and flexibility that traditional property and contract law do not.[102]

B. The Lack of Virtual World Protections

Because of this issue's novelty, there is very little case law or statutory authority to critique. Even so, the current state of the law is arguably imperfect. Part 1 of this subsection discusses the inadequacies of TOS and EULAs to govern virtual worlds, and Part 2 discusses the shortcomings of other authors' proposals.

1. EULAs and TOS Are Insufficient to Govern Virtual Worlds

As discussed above,[103] the creators of virtual worlds use TOS and EULAs as substitutes for the law that governs real-world activity.[104] These contracts, however, are insufficient governing mechanisms. As virtual worlds become more advanced and more closely reflect the real world, a contract, no matter how sophisticated and detailed, will simply be unable to handle the gamut of scenarios that will inevitably arise.[105] One author writes, "[p]roperty and tort systems are good examples of the kind of background, default rules that communities need but that contracts cannot cheaply provide. Protection of private property and protection of personal

97. *Id.* at 154.
98. *Id.* at 155.
99. *Id.* at 155–56.
100. *Id.* at 155.
101. *See generally supra* Part III.A.1.
102. *See generally infra* Part IV.
103. *See supra* Part III.A.1.
104. *See generally Anti-Social Contracts*, *supra* note 64, at 429.
105. *See id.* at 429–30.

and dignitary interests are . . . critical to online communities . . . ."[106] The law is not restricted to contract because contract is limited in scope—namely, protecting against the unjust breach of a promise.[107] As seen in the EVE Online and Second Life financial scandals, the injuries that users can sustain in virtual worlds extend beyond the scope of contract law.[108]

The United States lags behind other nations in enforcing virtual property rights.[109] For example, South Korea applies its criminal law to enforce virtual world norms. Chinese courts apply labor law to virtual worlds, stating that a "game service provider must return virtual property to [a] player who has worked to obtain it."[110] Likewise, the Hong Kong police instituted a Technology Crimes Division, whose province includes virtual world property theft.[111] By contrast, U.S. courts have taken no action to resolve the problem of virtual property disputes.[112] Furthermore, this author knows of no agency that specializes in, or even responds to, disputes in virtual worlds. Accordingly, as of this writing, virtual worlds in the United States are governed solely by "private law contract."[113]

Regrettably, the contracts that govern virtual worlds do not provide adequate protection for even the most basic property interests.[114] For example, the developers of EVE Online took no action against the avatar known as Cally who perpetrated the scandal.[115] The reason given for failing to take punitive action against the avatar was that she had not violated any rule of the game.[116] However, one author, after having read and analyzed the EVE Online TOS and EULA, concluded that the "TOS clearly

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106. *Id.*

107. Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2108 (2001).

108. Glushko, *supra* note 3, at 520–22; Penick, *supra* note 37, at 237–40.

109. *See Anti-Social Contracts*, *supra* note 64, at 430 (stating that the U.S. relies on private contract law to govern virtual worlds, while many other countries favor public legislation).

110. *Id.*

111. *See* Steinberg, *supra* note 5, at 409.

112. *See id.* at 410–12 (stating that *Bragg* was a "missed opportunity" for U.S. courts and quoting game developer Raph Koster: "The [virtual world] industry has once again managed to dodge legal questions regarding ownership of 'virtual property.'").

113. *See Anti-Social Contracts*, *supra* note 64, at 430.

114. *See, e.g.*, Glushko, *supra* note 3, at 527–28 (stating that existing EULAs are inadequate to govern virtual worlds, which will become increasingly apparent as those virtual worlds continue to grow).

115. *See* Hannah Yee Fen Lim, *Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1053, 1063 (2009); *see supra* Part II.B.1.a.

116. *See* Lim, *supra* note 115, at 1063.

forbids . . . any form of pyramid scheme . . . ."[117] This exemplifies a fundamental problem of contractual governance of virtual worlds; users and developers can interpret the governing contracts in completely different ways. In the EVE Online investment scandal, the developer did not discipline the user because the developer believed no violation of the TOS occurred; however, a legal scholar reached the opposite conclusion.[118]

It is also worth noting that had the developer reached the conclusion that Cally violated the TOS, terminating Cally's account was the only remedy available to injured players.[119] While this remedy might provide some vindication for injured players, it clearly will not leave them financially whole. Based on the foregoing paragraphs, contract law cannot solely sustain the governance of virtual worlds. While contract law may be appropriate in some instances, the field is not broad enough to protect the rights of users on its own.

2. Current Proposals Cannot Effectively Protect Virtual World Users' Virtual Property Rights

a. Property law

Proposals to treat virtual property as real property (meaning tangible real-world property, not land), and, therefore, provide it with common law property protections, are persuasive.[120] In fact, over the past two centuries, traditional property law has evolved to provide far greater protections for intangible property interests—namely, in the area of intellectual property.[121] Despite this shift, property law is likely insufficient to fully protect virtual property interests.[122]

First, there is a serious question whether courts will consider property that is acquired in the virtual world. In *Bragg v. Linden Research, Inc.*, the Pennsylvania District Court had the opportunity to recognize a virtual property right in Marc Bragg's virtual real estate and personal property,[123]

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117. *Id.* at 1064.

118. *See id.*

119. *Id.* at 1064 (noting that neither the EULA nor TOS for EVE Online contains a clause to recompense players who have been defrauded).

120. *See Anti-Social Contracts*, *supra* note 64, at 452 (noting that a real property-type system would be a "significant step forward" in providing legal rights for virtual world members).

121. Lastowka & Hunter, *supra* note 17, at 40–41.

122. *See Anti-Social Contracts*, *supra* note 64, at 451–52 (noting that work is required before property law can be applied to online property).

123. *Bragg*, 487 F. Supp. 2d at 595.

but chose not to rule on the issue.[124] It is reasonable to believe that other courts may follow a similar path of avoidance.[125]

Furthermore, courts may be hesitant to apply doctrines such as adverse possession to virtual worlds.[126] Adverse possession "generally creates an absolute title to real property in fee simple, which is as good as title by patent from the state or title by deed from the record owner . . . ."[127] There is no "title" involved in the acquisition of virtual real property. Moreover, there are no virtual world equivalents to recording systems or title assurance—items traditionally associated with real property acquisition.[128] Consequently, judges may be unable to apply this doctrine to virtual property. Lastly, issues exist regarding conferring virtual real property in "fee simple." If, for instance, the developer went out of business and was forced to shut down its servers, the shutdown would effectively deny virtual real property owners of a true fee simple absolute.

Applying property law to the paradigms listed in the background section of this Comment further demonstrates its inadequacy to govern virtual worlds.[129] First, in a conflict among users, such as the EVE Online and Second Life Ponzi schemes, property law likely offers no remedy.[130] Because disputes of this variety often focus on virtual currency,[131] virtual currency first must be classified as a type of property. A virtual personal property classification makes the most sense in this instance. Even so, there are no clear property principles that would provide recovery in this context. While an aggrieved user may sue for conversion or trespass to chattels, these are causes of action in tort, and recovery in property would be difficult.

Recovery might be easier under the *Bragg* paradigm. Recall that in *Bragg*, virtual real property was confiscated from the plaintiff.[132] It is possible that the plaintiff in such a paradigm may be able to successfully assert

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124. Steinberg, *supra* note 5, at 410–12 (explaining that because Bragg settled, courts were unable to "make a strong statement for the existence of virtual property as *legally protected property*") (emphasis added).

125. *See id.* at 412 (noting that when the virtual worlds industry has confronted the issue of the existence of legally protectable virtual property in the courts, the industry takes measures to dodge the legal question).

126. *Id.* at 412–17.

127. 3 AM. JUR. 2D *Adverse Possession* § 1 (2009).

128. *See e.g.*, *Second Life TOS*, *supra* note 66, § 7.

129. *See supra* Part II.B.1.

130. Glushko, *supra* note 3, at 528 (suggesting that EULAs are not sufficient to invest property rights in players); Penick, *supra* note 37, at 237.

131. Glushko, *supra* note 3, at 521–22; Penick, *supra* note 37, at 237.

132. *Bragg*, 487 F. Supp. 2d at 597.

a wrongful taking argument.[133] Some governments have the power of eminent domain that allows "a governmental entity to take privately owned property and convert it to public use."[134] A plaintiff might creatively argue that game developers are effectively the government of the virtual world that they created. Therefore, under the U.S. Constitution, if developers take privately owned land, the taking must be for public use, or just compensation is required.[135] Although a stretch, it is not inconceivable that a court would hold developers to this standard.[136] However, this argument only applies to conflicts between users and developers and provides no remedy to users in conflict with other users. Consequently, while there are compelling arguments for applying traditional property law to virtual worlds, judges may feel uncomfortable doing so.

b. Contract law

As discussed in Part III.B.1, existing TOS and EULAs provide inadequate protections for virtual world property rights. This short subsection explains why several more specific doctrines of contract law also do not provide the necessary protections for virtual world users.

One author has suggested using the doctrines of unconscionability, misrepresentation, and promissory estoppel to protect virtual world users by voiding existing EULAs and TOS.[137] These arguments are persuasive, yet they suffer from one flaw that renders them insufficient to provide adequate virtual property protections: these doctrines provide virtually no protections in the first paradigm of this paper—conflicts between users.

When users enter a virtual world, they enter into a "clickwrap" agreement with the developer.[138] While this clickwrap agreement may be an enforceable contract governing conduct in a virtual world, it is not an agreement between users. In the event of a legal dispute between users, there is no contract between the two parties (unless the users entered into a private contract, or an implied contract existed). In effect, the contract doc-

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133. *See* Glushko, *supra* note 3, at 529.

134. 26 AM. JUR. 2d *Eminent Domain* § 2 (2004).

135. *See* U.S. CONST. amend. V.

136. *See generally* Glushko, *supra* 3 note, at 529 (analogizing the act of developers deleting accounts to the act of governments taking property); *Anti-Social Contracts, supra* note 64, at 1058 (comparing constitutional and federal causes of action to the state of remedies available to "denizens of virtual worlds").

137. Hunt, *supra* note 28, at 153–56.

138. *See* Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 21–22 (2d Cir. 2002) (discussing how users would enter into such an agreement).

trines of unconscionability, misrepresentation, and promissory estoppel would be irrelevant in most conflicts of this variety.

On the other hand, these doctrines might be relevant for the *Bragg* paradigm. The *Bragg* court held that the arbitration provision of the EULA in question was procedurally and substantively unconscionable.[139] There are compelling reasons, many of which have been mentioned in this Comment, explicating why a court may hold a TOS or EULA term substantively unconscionable. Terms that allow developers to confiscate or remove user content (property) at any time and for any reason[140] almost beg a holding of substantive unconscionability. Nevertheless, one significant problem with using contract law remains: contractual uncertainty.

Therefore, while contract law may provide some protections in the case of a conflict between a virtual world user and a developer, the existing state of TOS and EULAs limit the protections contract law is capable of providing when the conflict is between users. The last two parts of this Comment explore an alternative that provides superior protection to virtual property rights than property and contract law. This alternative is the law of restitution and unjust enrichment.

IV. RESTITUTION AND UNJUST ENRICHMENT

The law of restitution and unjust enrichment is a vast and complex area of the law. The goal of Subpart A is to provide a concise and cohesive background to the guiding principles of restitution and a few specific areas of the law that pertain to the problem at hand. Subpart B provides a critique of modern courts' misapplication of this area of law.

A. The Law of Restitution and Unjust Enrichment

1. Defining Restitution and Unjust Enrichment

The basic principle of restitution and unjust enrichment appears simple on its face. Section 1 of the *Restatement (Third) of Restitution and Unjust Enrichment* ("*Restatement (Third)*") states, "[a] person who is unjustly enriched at the expense of another is liable in restitution to the other."[141]

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139. *Bragg*, 487 F. Supp. 2d at 611.

140. *Second Life TOS*, *supra* note 66, § 4.3.

141. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (Discussion Draft 2000) (defining in the comments the terms "restitution" and "unjust enrichment" and explaining that they are inextricably linked with each other. First, comment a states that liability in restitution is "the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plain-

Despite this apparent simplicity, scholars, judges, and lawyers remain uncertain about the law.[142] As Professor Kull, a leading scholar in the field, argues, "[s]ignificant uncertainty shrouds the modern law of restitution."[143] This uncertainty exists notwithstanding the fact that restitution is a "fundamental part of our law."[144]

A vigorous and ongoing academic debate surrounds the definition of restitution and unjust enrichment.[145] The broadest controversy surrounding the law of restitution focuses on whether restitution is a body of law in itself, or whether it is merely remedial.[146] *Restatement (Third)* controversially adopts the former approach, stating:

> A more important misconception is that restitution is essentially *a remedy*, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution . . . is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies. . . . .[147]

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tiff." Comment b addresses unjust enrichment as a "term of art" and states, "[t]he substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability.").

142. Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1191 (1995); *see* JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 7 (1951) (arguing that the rule of unjust enrichment, like a mathematic equation, appears easy to apply, but, in reality, the concept changes throughout history along with cultural norms); *see also* Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE L. REV. 933, 936 (2008) ("Many lawyers, judges, and professors misunderstand and misstate basic restitution principles.").

143. Kull, *supra* note 142, at 1191; *see* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1277 (1989) ("Few law schools teach a separate course in restitution [and] no restitution casebook is in print . . . ."); *see also* Rendleman, *supra* note 142, at 936 (stating "many smaller American states lack a decision on particular restitution points" and that states of all sizes have "muddled restitution analysis or have made just plain incorrect restitution decisions").

144. HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 1 (James Crawford & David Johnston eds., 1997).

145. *See* Kull, *supra* note 142, at 1193 ("[A] threshold problem confronting the American law of restitution . . . is one of definition.").

146. Sherwin, *supra* note 107, at 2108 (arguing that there are three different ways to understand restitution law: (1) providing correction to unjust results, (2) solving restitution problems, and (3) expressing a common theme); *see also* Kull, *supra* note 142, at 1191 (arguing that restitution should not be viewed as a remedial option).

147. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. h (Discussion Draft 2000) (emphasis omitted).

In short, restitution, according to the *Restatement (Third)*, is an independent substantive body of law, no different from tort or contract law, containing its own rights and remedies.[148]

The concept of restitution as an independent substantive body of law may seem foreign to many in the legal community.[149] It is not often that one hears of a claimant suing in restitution.[150] For example, if a person steals a hundred-dollar bill from another, the injured party may elect to sue in tort, perhaps for conversion, instead of restitution.[151] However, as Professor Kull notes, this wrong both "simultaneously injures the plaintiff and enriches the defendant."[152] Accordingly, two separate bases for liability exist—unjust loss and unjust enrichment—and the plaintiff may pursue whichever method he or she pleases.[153] In the majority of cases, however, the distinction between types of recovery is merely in name, as the plaintiff will ultimately have the hundred dollars returned, regardless of the avenue chosen.[154]

2. The Substantive Law of Restitution

Restitution is a body of law where "(1) substantive liability is based on unjust enrichment, (2) the measure of recovery is based on defendant's gain instead of plaintiff's loss, [or] (3) the court restores to plaintiff, in kind, his lost property or proceeds."[155] This perspective is the same as that reflected in the *Restatement (Third)*.[156]

First, comment a to Section 1 of the *Restatement (Third)* states, "[t]he source of liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff."[157] Professor Kull's second component is reflected in section 2(1), which states,

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148. *Id.*

149. *See* Kull, *supra* note 142, at 1222 (commenting that case books and treatises describe restitution as a remedy and not as an independent source of liability).

150. *See id.* (arguing that plaintiffs sue to recover damages and do not distinguish between whether restitution is a remedy for a wrong in another area of substantive law or an independent source of liability).

151. *Id.* at 1225 (citing an example from Laycock, *supra* note 143, at 1283).

152. *Id.*

153. Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 500–01 (2007); *see also* Kull, *supra* note 142, at 1225.

154. Saiman, *supra* note 153, at 501.

155. Kull, *supra* note 142, at 1224 (quoting Laycock, *supra* note 143, at 1293) (emphasis omitted).

156. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. h (Discussion Draft 2000).

157. *Id.* § 1 cmt. a.

"Liability in restitution is based on and measured by the receipt of a benefit . . . ."[158] This concept is, of course, contrary to "damages, which measures the remedy by the plaintiff's loss . . . ."[159] Nevertheless, it is important to remember that the receipt of a benefit alone does not necessarily induce liability in restitution; the enrichment must be one the law treats as unjust.[160] Lastly, Professor Kull's third component of restitution is seen in Section 4 of the *Restatement (Third)*, which states, "[t]he function of remedies in restitution is to prevent or redress the unjust enrichment of one or more persons at the expense of the plaintiff."[161] This may be accomplished by a "reformation of instruments," a monetary judgment that removes any unjust enrichment, or the court may confer a superior right to a piece of property, fund, or other item in dispute by the plaintiff.[162]

The above are merely a few provisions contained in the *Restatement (Third)*, and it is important to note that the provisions are part of a discussion draft. As such, they are subject to change. However, in the seven tentative drafts published since the project began in 2000, the introductory sections (1–4) have remained unchanged.[163] Although there are more than four sections to the *Restatement (Third)*, the majority are irrelevant to this Comment.[164] However, several of the relevant provisions will now be discussed. A leading treatise states:

> Cases in which there is no tort or relevant contract are often the most difficult cases for determining unjust enrichment. We can see that the unjust enrichment conception of restitution will be most important in dealing with cases where title reasoning does not

158. *Id.* § 2(1).

159. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 369 (2d ed. 1993).

160. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. a (Discussion Draft 2000).

161. *Id.* § 4(1).

162. *Id.* § 4(2).

163. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT Reporter's Introductory Memorandum (Tentative Draft No. 1, 2001) ("The four sections of Chapter 1 will be revised and submitted for approval only at the completion of the rest of the project."); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 1–4 (Tentative Draft No. 7, 2010).

164. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 5 (Discussion Draft 2000) (discussing instances that give rise to liability in restitution).

> readily work—especially in cases in which the benefit to the defendant derives from services, money or other intangibles. . . . [165]

This concept is extremely important to this Comment. Since it is debatable whether virtual property is governed by traditional property law; whether one can be compensated for a virtual tort (if that even exists); or whether TOS or EULAs allow for recovery in contract, a body of law applicable to situations falling within gray areas of the law is particularly useful. Professor Sherwin argues that "unjust enrichment as a legal principle . . . encourages judicial creativity."[166] It is this judicial creativity upon which my argument is predicated.

The *Restatement (Third)* contains many provisions inducing liability in restitution.[167] First, section 6 states, "[p]ayment of money resulting from a mistake as to the existence or extent of the payor's obligation . . . gives the payor a claim in restitution . . . ."[168] Perhaps more important is section 9, stating in pertinent part, "[a] person who confers on another, by mistake, a benefit *other than money* has a claim in restitution as necessary to prevent the unjust enrichment of the recipient."[169] This provision is particularly important, as it directly recognizes and allows for recovery in restitution for conferred benefits other than money. This language is broad and will play an important role in this Comment's proposal. Lastly, section 13 provides a third relevant provision, stating, "[a] transfer induced by fraud or by an innocent, material misrepresentation is subject to rescission at the instance of the transferor or a successor in interest."[170] Rescission under this section includes a claim to the recovery of benefits conferred.[171] In short, this section allows recovery in the event a transaction for money, goods, or any other benefit, was induced by fraud or misrepresentation.

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165. DOBBS, *supra* note 159, at 375; *see also* Saiman, *supra* note 153, at 491 ("[R]estitution is shown to be a body of positive law that accounts for recoveries *not captured* by traditional contract and tort doctrine.") (emphasis added).

166. Sherwin, *supra* note 107, at 2113.

167. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 6(2), 9(1), 13(1) (Discussion Draft 2000).

168. *Id.* § 6(2).

169. *Id.* § 9(1) (emphasis added).

170. *Id.* § 13(1).

171. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 15 (Tentative Draft No. 1, 2001).

B. Courts' (Mis)Application of Restitution

Courts have not handled restitution with a deft hand.[172] In fact, one commentator complains that two courts' handlings of restitution and unjust enrichment were "little short of gibberish."[173] These words are neither used often nor lightly in describing judicial opinions. However, they are often warranted in commenting on many courts' handling of restitution.

Unless the *Restatement (Third)* is incorrect in its assertion that restitution is an independent substantive body of law, a surprising number of courts handle restitution erroneously.[174] For example, the Alaska Supreme Court wrote, "[u]njust enrichment is not itself a theory of recovery. 'Rather, it is a prerequisite for the enforcement of the doctrine of restitution; that is, if there is no unjust enrichment, there is no basis for restitution.'"[175] This statement accurately reflects the *Restatement (Third)*'s view of restitution and unjust enrichment.[176] The court continues, however, stating, "[r]estitution also is *not* a cause of action; it is a *remedy* for various causes of action."[177] The misconception that restitution is merely a remedy is a common one.[178]

Although restitution and unjust enrichment often overlap with contract and tort law, such overlap does not justify misapplying the principles of restitution and unjust enrichment.[179] There are many instances where contract, property, tort, and other areas of law overlap; however, in none of those cases is property considered the sole remedy. Perhaps the most egregious error involving restitution came in a Connecticut Appellate Court opinion. There, the court correctly cited a *Restatement (Third)* provision, but the citation incorrectly included the word "contracts": "Restatement (Third), *Contracts*, Restitution and Unjust Enrichment, § 2(d) (Discussion

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172. Kull, *supra* note 142, at 1195 (noting the uncertainty in this area of law).

173. James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 56 (2007).

174. *See generally* Kull, *supra* note 142, at 1195–96 (discussing how modern courts' and counsels' lack of familiarity with restitution law affects case outcomes).

175. Reeves v. Alyeska Pipeline Serv. Co., 926 P.2d 1130, 1143 n.17 (Alaska 1996) (quoting Alaska Sales & Serv., Inc. v. Millet, 735 P.2d 743, 746 n.6 (Alaska 1987)).

176. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (Discussion Draft 2000).

177. *Reeves*, 926 P.2d at 1143 n.17 (citing *Alaska Sales & Serv., Inc.*, 735 P.2d at 746) (emphasis added).

178. *See* Kull, *supra* note 142, at 1195–96 (noting that if restitution continues to be neglected, it will return to its pre-Restatement status where it was largely classified as remedial).

179. *See* Laycock, *supra* note 143, at 1283–90 (discussing this overlap and distinguishing restitution as a source of liability and a measure of recovery).

Draft March 31, 2000)."[180] Recall that the *Restatement (Third)* states that restitution is an independent body of law, *analogous* to contract, not dependent on it.[181]

Although the Connecticut Appellate Court's error is particularly egregious, it is by no means the only error courts have made implementing the law of restitution. There are too many instances to name, but even with the advent of the *Restatement (Third)*, courts have been slow to correctly apply the law of restitution.[182] Accordingly, courts must learn the law of restitution, and must begin to apply it correctly if the law of restitution has any hope of legitimization.

V. PROPOSAL

Finally, with an understanding of virtual worlds, restitution, and unjust enrichment, and their current shortcomings in the law, the confluence of this emerging legal issue with this flexible remedial body of law—the heart of this paper—may now be discussed. This section correctly applies the law of restitution, as articulated in the *Restatement (Third) of Restitution and Unjust Enrichment* ("*Restatement (Third)*"), to the two paradigms employed throughout this paper. This application demonstrates the superiority of restitution over contract law and property law in protecting virtual property rights. Before proceeding to this application, a brief summary of overarching restitution principles is warranted.

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180. United Coastal Indus., Inc. v. Clearheart Constr. Co., 802 A.2d 901, 906 (Conn. App. Ct. 2002) (emphasis added).

181. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. h (Discussion Draft 2000); *see also* Sherwin, *supra* note 107, at 2108 (noting that tort law is based on "unjust harm," contract law is based on "unjust breach of promise," and restitution is based around "unjust enrichment").

182. Courts in various jurisdictions have misapplied the law of restitution. *See, e.g.*, Paracor Fin., Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996) ("[U]njust enrichment is an action in quasi-contract . . . ."); Allstate Ins. Co. v. Administratia Asigurarilor de Stat, 948 F. Supp. 285, 312 (S.D.N.Y 1996) (stating that unjust enrichment and *quantum meruit* "'are related theories that are best addressed as a whole[,] since the latter is merely the means by which the former is remedied'") (quoting Newman & Schwartz v. Asplundh Tree Expert Co., 917 F. Supp. 265, 270 (S.D.N.Y. 1996)); Williams v. Nat'l Hous. Exch., Inc., 949 F. Supp. 650, 653 (N.D. Ill. 1996) (stating that "[u]njust enrichment is a quasi-contractual theory of recovery" and that if an express contract existed between the parties in dispute, there could be no claim for unjust enrichment); Melchior v. New Line Prods., Inc., 131 Cal. Rptr. 2d 347, 357 (Ct. App. 2003) (citing Dinosaur Dev. Inc. v. White, 265 Cal. Rptr. 525, 527 (Ct. App. 1989)) (stating that unjust enrichment is "synonymous" with restitution and that this is not a theory of recovery).

A. Brief Redux

Restitution is particularly useful for protecting virtual property because of its flexibility and general principle of preventing unjust enrichment.[183] It emerged "to avoid unjust results in specific cases—as a series of innovations to fill gaps in the rest of the law."[184] Although the *Restatement (Third)* has attempted to unify a series of principles that result in unjust enrichment, the general principle that "unjust enrichment must be disgorged" still remains.[185]

Professor Kull noted, "[t]he central problem of the law of restitution is to identify those instances of enrichment that the law regards as unjust; in other words, to distinguish benefits that have to be paid for from those that we can retain without payment."[186] One cannot reasonably argue that the perpetrators of the financial schemes discussed in the background section of this Comment can justly retain the virtual currency they obtained through their fraud. This conclusion is amplified by applying both Professor Kull's three-pronged analysis of restitution and the *Restatement (Third)*. These three central components of restitution will now be applied to both paradigms.

B. Restitution Under Paradigm 1

Recall that Professor Kull's first component of restitution, which is reflected in *Restatement (Third)* section 1, is that a person who is unjustly enriched is liable in restitution.[187] This is the most basic example of restitution and can be clearly applied to the first paradigm concerning virtual property disputes.[188] The perpetrators of the Second Life and EVE Online scandals, and the Legend of Mir III sword thief, were unjustly enriched by any sense of the definition. These individuals took advantage of innocent users who entrusted their virtual currency or personal property with others.[189] The users' trust was then violated by the perpetrators' deceptive acts.[190]

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183. Sherwin, *supra* note 107, at 2108.

184. Laycock, *supra* note 143, at 1278.

185. *Id.*

186. Kull, *supra* note 142, at 1226.

187. *Id.* at 1224 (quoting Laycock, *supra* note 143, at 1293); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (Discussion Draft 2000).

188. *See supra* Part II.B.1.a.

189. Westbrook, *supra* note 11, at 789.

190. *Id.*

Opponents of this proposal might cite comment b of section 1, which states, "[i]n reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment."[191] However, the scope of what this Comment is meant to address is outside the current problem. Comment b provides the following instances as examples where unjust enrichment does not apply: (1) "the performance of a valid contract that was too hard a bargain"; and (2) "profits made through another's misfortune."[192] The first example is inapplicable in the financial scheme cases, unless a contract between users existed, and none did. The second example is also inapplicable because the perpetrators of these schemes did not profit through anyone's misfortune; they profited through fraud and misrepresentation.

Fraud and misrepresentation are covered under section 13 of the *Restatement (Third)*.[193] The Second Life and EVE Online victims have a strong case under section 13(1), which states, "[a] transfer induced by fraud . . . is subject to rescission . . . . Rescission under this section includes a claim to the recovery of benefits conferred."[194] In the case of financial schemes, fraud induced the transfer of virtual currency.[195] Users would not have transferred their virtual currency had they known the transferee would simply flee with it. Furthermore, the Legend of Mir III player who transferred his sword to his friend surely intended for it to be returned; otherwise, he would not have murdered this friend.[196] Had the player been allowed to recover the value of the sword, or the sword itself, this tragic crime may have been prevented. In short, in disputes between virtual world users, where no contract exists, section 13 provides a compelling means of recovery. This is not to say that this section provides the exclusive means for recovery under restitution—far from it. However, until more disputes arise in virtual worlds, any other hypothetical is purely conjectural.

Professor Kull's second component of restitution and section 2 of the *Restatement (Third)* both state that liability in restitution is measured by the defendant's gain, rather than by the plaintiff's loss.[197] This section is far

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191. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (Discussion Draft 2000).

192. *Id.*

193. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 13(1) (Tentative Draft No. 1 2001).

194. *Id.*

195. *See supra* Part II.B.1.a.

196. Westbrook, *supra* note 11, at 789.

197. Kull, *supra* note 142, at 1224 (quoting Laycock, *supra* note 143, at 1293); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (Discussion Draft 2000).

more straightforward to apply than the previous section. The only determination to be made here is the amount by which the defendant was unjustly enriched. This can be calculated by measuring the in-game market value of the virtual property wrongfully confiscated. In the cases of the financial scandals or the virtual sword, restitution can be measured by using current virtual currency exchange rates to calculate the U.S. dollar amount of virtual currency wrongfully obtained. For example, the Legend of Mir III player who sold the sword was unjustly enriched by the amount for which he sold the sword, approximately $870.[198]

Lastly, Professor Kull's third component of restitution and section 4 of the *Restatement (Third)* is that the court will restore to plaintiff the amount necessary to eliminate the unjust enrichment of the defendant.[199] This amount will be determined the same way as the amount in the preceding paragraph—by using virtual currency rates or the in-game market value of the virtual property in question. Using the Legend of Mir III example, if the court found that the defendant was unjustly enriched $870 by wrongfully selling another individual's sword, it could then award the plaintiff $870 in restitution.

C. Restitution Under Paradigm 2

As observed several times throughout this Comment, a different dynamic exists when the dispute is between a virtual-world developer and a virtual world user, such as the conflict that occurred in *Bragg v. Linden Research, Inc*.[200] Chapter 4 of Part II of the *Restatement (Third)* contains instances of liability in restitution arising when two parties have formed a contract.[201] For example, section 31 allows for restitution where a contract fails for indefiniteness or fails "to satisfy an extrinsic requirement of enforceability such as the Statute of Frauds."[202] Comment a of section 31 states that "[t]here are . . . numerous additional reasons why [a] . . . contract might be . . . 'unenforceable[,]'" such as improper contract formation.[203] Comment a states that these other grounds for unenforceability are covered

198. Westbrook, *supra* note 11, at 789.

199. Kull, *supra* note 142, at 1224 (quoting Laycock, *supra* note 143, at 1293); *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 (Discussion Draft 2000).

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

201. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT ch. 4, pt. II, introductory note (Tentative Draft No. 3, 2004).

202. *Id.* § 31(1)(a)–(b).

203. *Id.* § 31 cmt. a.

by Section 9.[204] Recall that Section 9 allows for recovery when a benefit *other than money* is unjustly conferred on a recipient.[205]

Applying these rules to the *Bragg* case,[206] it is possible that had the court employed the *Restatement (Third)*, Bragg would have been compensated for his virtual property.[207] Because the court ruled that part of the EULA was unconscionable, the court could have potentially invalidated the contract or specific provisions of the contract.[208] Therefore, even if Bragg had violated the contract first, if the contract was unenforceable, Bragg's violation should not matter. The virtual real property and personal property in question should be classified as a benefit conferred other than money. Linden Lab would have been unjustly enriched by its retention and resale of Bragg's virtual property. Therefore, under sections 2 and 4 of the *Restatement (Third)*, Linden would be required to compensate Bragg under the law of restitution.[209]

The situation that occurred in *Bragg* is obviously not the only dispute that might potentially arise between users and developers.[210] Fortunately, the breadth of the law of restitution would likely provide for recovery in the event a user is wrongfully deprived of virtual property.[211] The analysis in the foregoing paragraph regarding the enforceability of contracts in sections 31 and 9 would remain applicable.[212] Therefore, incorporating the analysis of prior commentators, if plaintiffs could successfully argue misrepresentation or other contractual protections by a developer,[213] they could recover in restitution under sections 31 and 9.[214] This further demonstrates

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204. *Id.*

205. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 9(1) (Discussion Draft 2000) ("A person who confers on another, by mistake, a benefit other than money has a claim in restitution as necessary to prevent the unjust enrichment of the recipient.") (emphasis added).

206. *Bragg*, 487 F. Supp. 2d.

207. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31(1)(a)–(b) cmt. a (Tentative Draft No. 3, 2004); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(1)–(2) (Discussion Draft 2000).

208. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).

209. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 2(1), 4(1)–(2) (Discussion Draft 2000).

210. *See Bragg*, 487 F. Supp. 2d at 595.

211. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31(1)(a)–(b) (Tentative Draft No. 3, 2004).

212. *Id.*; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 9(1) (Discussion Draft 2000).

213. *See* Hunt, *supra* note 28, at 155.

214. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31(1)(a)–(b) (Tentative Draft No. 3, 2004); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 9(1) (Discussion Draft 2000).

the span and flexibility of restitution in incorporating other areas of more traditional law, which a court may not feel comfortable applying to protect interests in virtual property.

The analysis under this paradigm for Professor Kull's second and third components of restitution is the same as under the first paradigm.[215] In brief, the court would determine how much the plaintiff was unjustly enriched and subsequently compensate the plaintiff for that amount. This concept can be easily illustrated by applying the *Bragg* paradigm.[216] A court would simply take the value that Linden Lab, or any other developer involved in a dispute, earned by selling Bragg's confiscated land and award Bragg this value in restitution, assuming, of course, that this action constituted unjust enrichment.

VI. CONCLUSION

Virtual worlds continue to increase in number and popularity.[217] If the technology and sophistication of virtual worlds continues to progress, more and more disputes will inevitably arise. The issue can only avoid litigation for so long, and a court will eventually be forced to rule on it. Accordingly, courts must begin to consider the manner in which they will adjudicate claims over virtual property. If applied correctly, restitution and unjust enrichment could provide the protections long overdue for virtual property. Restitution has the breadth and elasticity necessary to cover both paradigms articulated in this Comment.[218] Regardless of whether a court chooses to adopt property, contract, tort, restitution, or any other body of law, it is indisputable that protections for virtual property are necessary.

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215. Kull, *supra* note 142, at 1224.

216. *Bragg*, 487 F. Supp. 2d at 595.

217. *See supra* Part I.

218. *See generally* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31(1)(a)–(b) (Tentative Draft No. 3, 2004); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 9(1) (Discussion Draft 2000).