

From Jack M. Balkin and Beth Simone Noveck, eds., *The State of Play: Law and Virtual Worlds*

Virtual Crime

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Ever since creation's peaceful dawn was startled by the death cry of the murdered Abel and Jehovah placed his mark upon Cain and set him forth a 'fugitive and a vagabond,' cursed from the earth that had opened its mouth to receive his brother's blood from his hand, there has been a never-ending conflict between those who make the laws and those who break them.¹

In a recent article, we explored the emerging social phenomenon of virtual worlds and the legal issues raised by these environments.² We focused upon two primary questions. First, we asked whether the virtual items and properties currently being bought and sold by residents of virtual worlds should be regarded as property in a legal sense. We concluded that no obvious reason exists prohibiting the recognition of legal interests in intangible virtual properties. Second, we explored the question of whether the current technocratic, corporate, and anarchic governance systems in virtual worlds should be problematic from the standpoint of democratic governance. We concluded that due to the unique nature of the virtual spaces and the unusual and varied conventions that govern interpersonal actions within these spaces, the governance of virtual worlds is a very complicated question and would be better left to internal and market-driven forces.

In this essay, we will look at a third issue that is largely derivative of the two issues previously explored. Private property systems inevitably present the potential for social conflict by granting private ownership rights that can be infringed by trespass and conversion. In the essay, we will explore the issue of non-consensual appropriation and destruction of virtual properties and ask whether these behaviors might be seen as truly criminal. We will conclude that such conflicts will generally not give rise to criminal liability, but that some activities involving the exploitation of game software for financial gain may give rise to criminal liability under computer trespass statutes.

1. Defining “Virtual Crime”

Initially, we would like to emphasize our wariness of the general concept of a “virtual crime.” One of the first and most well-known “virtual crimes” was the “rape in cyberspace” reported by

journalist and author Julian Dibbell. Dibbell was a participant in the LambdaMOO MUD, a multi-participant text-based virtual environment. The “rape” in question was essentially a real-time non-consensual textual description of the violent sexual mutilation of an online community member to other community members. The surface appearance of the “rape” was the display, on the computer monitors of several community members, of graphic and offensive textual sentences that seemed to originate from the victim. The “rapist,” Mr. Bungle, was the screen name of the typist of those descriptions. As commentators have noted, Mr. Bungle’s acts were insufficient to form a basis for criminal prosecution.

Many legal scholars have referenced Dibbell’s report, including Professor Susan Brenner, who wrote an article referring to the Bungle incident as a “true” virtual crime. Brenner concluded that other varieties of virtual crimes, if they could be described as crimes at all, would need to have all the elements of real crimes, and thus were not really a meaningfully new variety of criminal activity. Professor Orin Kerr recently gave a similar skeptical appraisal of the Bungle incident, disagreeing with Professor Lawrence Lessig’s suggestion that there could be a valuable “link” between actual rape and the LambdaMOO “rape in cyberspace.” Kerr has said that such a link is “tenuous at best: It is the link between a brutal rape and a fictional story of a brutal rape. Surely the difference is more striking than any similarity.”

Part of the problem with the notion of the LambdaMOO rape as a “virtual crime” lies in the word “virtual” itself. According to standard dictionaries, “virtual” in some cases refers to things which are practically the same in effect as the term modified, and in other cases it simply refers to representations of things created, simulated, or carried on by means of a computer or computer network. The latter definition gained its popularity in the 1990’s, when the word “virtual” became almost as much a buzz-word for technophiles and marketers as “low carb” is today. “Virtual” was used to describe almost all things that involved technology—especially Internet technology. Popular media embraced “virtual reality.” Internet-dependant communities were described as “virtual communities,” online booksellers were called “virtual bookstores,” and programs that mimicked the functions of appliances were called, e.g., “virtual alarm clocks.” Handheld games were called “virtual pets” and an annoying animation of a paper clip that came with Microsoft Office software was called a “virtual assistant.” As the cyberspace scholar Marie Laure-Ryan has observed, this widening of the term “virtual” threatens to render it virtually meaningless.

The term virtual crime can be just as meaningless as the term “virtual pet” if it is defined to include all computer-generated simulations of crime. Realistic digital simulations of mass murder occur every day on the computer monitors of those playing Grand Theft Auto III and on home entertainment centers displaying DVDs of Hamlet. Such “virtual crimes” are the subject of policy debate because they trouble many legislators and cultural commentators. However, even the representations of villainy that occur in interactive games are generally understood as speech and nothing more, and thus are within the scope of constitutional free speech protections. Like Professor Kerr has said, these activities are essentially stories.

A narrower definition of virtual crimes might equate virtual crimes with cybercrimes, defining cybercrimes as crimes committed against a computer or by means of a computer. Obviously, computers (like bookstores, alarm clocks, and paper clips) can be utilized in the furtherance of criminal conduct and there are many state and federal statutes that expressly criminalize certain types of conduct involving computer networks. But, these crimes are real crimes with real consequences. In this case, there is a risk presented by conflating the actual with the “virtual” because doing so makes computer crimes seem less serious than real crimes. Those who share “virtual” programs and files (and violate copyright law in the process) are spending jail time in real penitentiaries.

But there is still a proper place for the term “virtual crime.” A Japanese man recently hacked into another person’s virtual world account, sold her virtual house to another player for real cash, and pocketed the proceeds. This type of activity might be described as a virtual crime because it refers to a crime which “Exist[] or result[] in essence or effect, though not in actual fact, form, or name.” This is the older sense of the modifier “virtual,” and would include those crimes that somehow evoke and approach the effect and essence of real crime, but are not considered crimes. To us, this seems to be the exact nature of “virtually criminal” activities such as the “rape in cyberspace” that occur within the context of virtual worlds and are decried by participants. Such “crimes” may cause real psychological, social, and financial harms to their victims and they may grossly transgress reasonable and sensible civic expectations of behavior, but they are not activities that tend to fall within the scope of existing criminal prohibitions due, in part, to the unique nature of virtual spaces.

As Lawrence Lessig noted several years ago, many people are spending more time in virtual worlds and it is slowly becoming impossible to ignore these places of cyberspace. It is

also slowly becoming impossible to ignore the fact that virtual crimes are occurring. If we expect virtual worlds to be increasingly important and to resist to external attempts at legal regulation, we can expect virtual crimes to be an increasing cause of concern for the communities engaging in the design and experience of virtual worlds.

2. The Bone Crusher Dilemma

To introduce the concept of virtual property crimes, we can return to an incident once again described by Julian Dibbell. During the year 2003, Dibbell took a career turn to become a professional trader of virtual goods within the world of Britannia, the virtual world environment of the game Ultima Online. With the help of his tiny avatar, Mr. Dibbell traded virtual currency and chattels that he acquired within the virtual world of Ultima Online for U.S. dollars via PayPal. The scope of his operations and ambitions were modest in comparison to other virtual goods traders. However, he did make thousands of real dollars in profit in the course of his last few months.

Like other virtual worlds, Ultima Online lacks a specific quantifiable “win/lose” outcome, making it arguably a place more than a game. In other words, the precise goals of Ultima Online are not completely clear and one does not ever “lose” the game unless the player stops paying a monthly subscription fee. Most players, however, do have clear goals in virtual worlds, and the predominant goal is to seek the virtual empowerment of their avatars. Players overcome challenges and obstacles set out by the game designers, and in the course of that play they obtain virtual power and wealth for their avatars. Within virtual worlds like Britannia, one can depend on the general rule that if an avatar has “lived” in a virtual world for a longer time, it will be more powerful and wealthy (in the environment) than the avatar of a new player. Longer investments in the labor of avatar existence lead, almost inevitably, to greater powers for the avatar.

The acquired power, in the form of virtual property, can be transferred to other avatars in the form of gifts or mutual beneficial economic exchanges. As Julian Dibbell has demonstrated, the economy of Britannia and other virtual worlds intersects significantly with our own, and is currently running around US \$3.5m per annum. And as economist and virtual world theorist Ted Castronova has explained, one can readily calculate a real-world hourly wage for player activities in virtual worlds as well as exchange rates for various virtual currencies. So, given the

overlap of the real economy and the virtual economy of Britannia and our economy, one might well ask the question: Should virtual property crimes be recognized as real property crimes?

It is a common occurrence in virtual worlds that some avatars will surreptitiously make off with the valuable possessions of other avatars. Such “stolen” possessions may then be offered for sale to other avatars in exchange for U.S. dollars. The sale of virtual assets generally violates the standard license agreements of most games, but we might additionally ask whether, if the items were procured by theft, the sale constitutes a sale of stolen property in violation of the criminal law. Indeed, this was precisely the moral conundrum that Julian Dibbell found himself in when his avatar was offered an opportunity to “fence” a stolen virtual weapon (a “Bone Crusher mace”) for real money.

At first glance, the fencing of the Bone Crusher for U.S. dollars would seem to fall within the literal text of criminal statutes in many states. The Model Penal Code states “a person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner.”³ There is no general exemption to the statutory provisions for thefts that take place in virtual worlds.

Of course, while the language of the Model Penal Code may seem clear, one faces an interpretive difficulty in applying such statutory language to a realm constituted solely of images. René Magritte noted this problem at the heart of language by writing next to a representation of a pipe: “Ceci N'est Pas Une Pipe.” (“This is not a pipe.”). Similarly, the Bone Crusher mace is not a mace, but just the representation of a medieval weapon on a personal computer. One might conclude, due to the medium, that the theft of the Bone Crusher was simply a representation of theft, not a true theft intended to fall within the ambit of the Model Penal Code. Indeed, one might reasonably predict that since Ultima Online is commonly understood to be a computer game, the gut reaction of state and federal prosecutors to the theft would be to view it as analogous to the gruesome murder of a little pizza-shaped avatar at the hands of Inky, Blinky, Winky, or Clyde.

We think this gut reaction is a good thing for virtual worlds. Conflating PacMan with Ultima Online, as many skeptics seem inclined to do, would leave the social problems of virtual worlds in the hands of the communities that understand those problems. External legal regulation of virtual worlds would be kept at bay, but not out of the sort of respect that John Perry Barlow

once demanded. Instead, a healthy disrespect for the activities of virtual communities would shield them from outside interference. The short-term result, however, would still be the same.

We have doubts about the long term, however. The economic spillover effects of virtual crimes may lead some victims to petition real world courts for more extensive involvement, as has already occurred in Asia. Virtual chattels like Bone Crushers are currently being created, traded, and socially valued in ways that are generally compatible with traditional theories of property. The money that Julian Dibbell made from fencing the stolen representation was perfectly real. So if real cash is paid for representations, and if (as we have previously argued), there seems to be no strong case for denying virtual objects the status of property, it is predictable that someday a victim of a serious virtual crime will make the case that the words “property,” “owner,” and “stolen” in the Model Penal Code encompass “chattels” like Bone Crusher maces.

The intangibility of the representation in such a case may not be a significant stumbling block to the application of criminal law. The Ninth Circuit recently concluded that the deceitful conversion of an Internet domain name is actionable in California.⁴ Domain names, like Bone Crushers, are often viewed as being property interests by their owners, but are essentially nothing more than representations. The idea that a domain name is a property interest may seem like a social fiction. But property law itself is a social fiction. If a domain name can indeed be “stolen,” then perhaps it follows logically that a Bone Crusher mace—a similar artifact at the intersection of software, databases, and networks—should be equally capable of being “stolen.” If the occurrence looks like theft of property, is socially perceived as theft of property, and has the economic impact of theft of property, then Judge Kozinski’s common sense summary of the issue of domain name theft would seem to apply to the theft of Bone Crusher maces: “the common law does not stand idle while people [unlawfully dispose of] the property of others.”

3. The Laws of Game Rules

But we are skeptical that Julian Dibbell could be prosecuted for fencing stolen property. In our view, his freedom from a punitive fine or jail term has little to do with the intangibility of the Bone Crusher representation. Instead, we believe his primary defense to a charge of theft would be that Ultima Online is styled as a game where Bone Crusher maces are designed to be stolen. In other words, within the Ultima Online setting, Bone Crusher maces have a property status similar to the status of basketballs on a basketball court in the physical world.

Like basketballs, Bone Crushers have clear value in the context of the game. Other players of the game appropriate this value when basketballs are “stolen.” We unambiguously refer to this activity “stealing”—the same word we use to describe criminal conversion or theft. The loss of a basketball game can have serious emotional and financial consequences for a basketball player. However, no player would dream of responding to a basketball’s “theft” by petitioning the legal system for a remedy. Instead, the available self-help remedy must be perfected consistent with the rules of the game, which prohibit state intervention in disputes over ball ownership. The norms of game play supercede the standard rules of society, and the “magic circle” of game-play will only be broken when a player violates the game rules.⁵ A violation of game rules will result in a stoppage of play and a penalty of some sort, for example, the return of the basketball back to the prior game owner.

While this game/non-game distinction is perfectly clear, it has social implications that can be fairly radical and perhaps normatively problematic. For instance, intentionally killing someone by throwing a rock at his head would almost certainly result in an indictment for criminal murder. For most of us, there is an intuition that a person should spend a substantial amount of time in jail for that type of activity. By comparison, however, what is our reaction to a pitcher that kills a batter by throwing a “beanball” or a player that seriously injures another participant in a game of hockey? One of the best known cases of beaming involved Ray Chapman of the Cleveland Indians, who died on August 16, 1920, when he was hit in the head with a fastball thrown by Carl Mays. The circumstances indicate that Mays intentionally hurled a potentially lethal projectile at Chapman’s skull. However, despite an abundance of witnesses, Mays was never indicted for manslaughter.

Analogously, civil torts committed during the course of games are not only determined simply by the laws of negligence, but also take into account game rules. As the Tenth Circuit noted in *Hackbart v. Cincinnati Bengals, Inc.*,⁶ “subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football.” Thus, the Tenth Circuit has recognized that the game world of professional football is fundamentally at odds with the social imperatives of tort law—yet law, not football, gives way in this conflict. Where the game rules prohibit certain actions, however, the law of tort will resume its rightful place, as the Tenth Circuit made clear: “[I]t is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules. . . .”

Even the United States Supreme Court has seen fit to pursue the proper interpretation of game rules in deciding how to apply congressionally enacted statutes. In *PGA Tour, Inc. v. Martin*,⁷ the Supreme Court looked to the rules of golf to determine if Casey Martin should be permitted to use a golf-cart to drive between golf holes pursuant to the Americans with Disabilities Act (“ADA”). The Court stated that the “walking rule that is contained in [PGA's] hard cards, based on an optional condition buried in an appendix to the Rules of Golf, is not an essential attribute of the game itself.” Hence, Justice Stevens stated, because the walking rule was not an essential rule of golf, the ADA required the accommodation of the gold cart for Casey Martin. This implies, of course, that if the walking rule were essential to golf, no accommodation would have been required.

Justice Scalia seemed rather incensed at this intrusion of Congressional statutes upon the sphere of private game rules. He asked: “Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher's turn at the plate can be taken by a "designated hitter")? If members of the public do not like the new rules. . . .they can withdraw their patronage. But the rules are the rules. They are (as in all games) entirely arbitrary. . . .” The majority’s opinion in the Martin case, as well as Scalia’s dissent, both demonstrate the give and take that occurs when game rules are subject to legal regulation. In essence, the law often recognizes and respects the separate social orderings created by game rules, and gives that ordering substantial leeway.

If it is true that potential criminal prosecutions may be somehow defused by the rules of baseball and that negligence bows to football, perhaps virtual crime prosecutions will be equally unlikely due to the ground rules of computer games. After all, the societal stakes of computer games are much lower—players do not place their physical safety at risk by playing *Ultima Online*. The harms suffered by victims within virtual worlds is generally only an emotional and social discomfort and, to some extent, a putative financial harm where player have the right to trade virtual properties.

If the rules of virtual worlds indeed can play an important part in determining whether Julian Dibbell’s fencing of the *Bone Crusher* was a virtual crime, it is clearly important to ascertain the rules that govern the game of *Ultimate Online*. As we explain below, however, the rules of most virtual worlds are difficult to analogize to the rules of more traditional games.

4. The Lawlessness of Computer Games

Computer games are inherently different than real space games, in that they are creatures of software. Software creates the physics of computer games, gives meaning to game components, and enables player behaviors. One might argue, therefore, that the software code of a game constitutes the “rules” (if any) of the game. By contrast, physical space games such as football, baseball, and basketball, are all governed by external, quasi-legal rule systems that guide both actions and outcomes. These external rule systems constrain the actions of players and game items.

In the physical game of football, one cannot cross the line of scrimmage before the ball is snapped, not because it is not possible, but because doing so will result, according to the rules, in a stoppage of play and a punitive sanction. Likewise, in baseball, a batter cannot run the bases after hitting a foul ball, not because this is physically impossible, but because it would be futile and nonsensical pursuant rules of baseball. These player-internalized rules can be analogized to legal rules and norms. One does not walk into a stranger’s home because laws and norms prospectively limit otherwise possible physical actions by the known threat of resulting formal and social sanctions.

When software rules constrain player actions, on the other hand, the player has no ability to undertake impermissible actions. So while a game program’s interface must be learned (A=left, S=right), a game like Space Invaders cannot be explained in a series of prohibitions and entitlements similar to the rules governing football, baseball, or solitaire. Certainly, players adapt their behavior to avoid losses, but no possible potential actions are prohibited by any “rules” of Space Invaders. Likewise, impartial referees are not needed when two people play Combat on a vintage Atari 2600 console because the game code fulfills that function. Therefore, “cheating” at Space Invaders or Combat is impossible without modifying the game’s code, which serves as its rule set. The prohibition against code-breaking is the primary “rule” of computer games—players are not permitted to “win” games by severing the game designer’s Gordian knots. This reliance on software as rules is perhaps the most significant difference between computer games and physical games.

Virtual worlds, to some extent, are just a massively social implementation of traditional genres of computer games. They depend primarily on software rules because, like Space Invaders, they are fundamentally code. The software code of Britannia is what makes the theft of Bone Crusher maces possible and therefore putatively “legal” as all actions are legal when

playing traditionally lawless computer games. But unlike traditional computer games, virtual worlds do not rely exclusively on software as for their rule systems. Instead, unlike most other computer games, virtual worlds are accompanied by explicit textual rule sets that are carefully drafted by lawyers and game designers and designed (at least in part) to curtail anti-social behaviors. These non-software rules of virtual worlds are often expressed in standard End-User License Agreements. Players may be additionally required to assent to Terms of Service, Rules of Play, and other varieties of contractual agreements.

For instance, in *Ultima Online*, the written code endorses the game's software code by explicitly granting players what appears to be permission to steal from other players. While code-enabled harassment is expressly forbidden by the *Ultima Online* rules, there is a particular carve-out that clearly removes the theft of another player's virtual property from the scope of harassment. As the current policy reads:

[A]nything considered a valid play style in *Ultima Online* is not considered harassment. In other words, player killing and thievery... is not considered harassment. By valid, we mean that there are gamer mechanics created around these play styles. . . .such as. . . .the thieving skill, bounty systems, murder counts, the existence of guards, etc. *Ultima Online* is a role-playing game that encourages various play styles, and players should seek ways of protecting themselves against these play styles through game mechanics. . . .

So, according to both the software code of the game and the contractual agreement to which one must assent in order to play *Ultima Online*, thievery is simply a "play style." One's redress for being victimized by a thief is to resort to game mechanics.⁸ If stealing Bone Crusher maces is indeed a permissible activity pursuant to both the software and the contractual provisions in *Ultima Online*, it would seem that the theft of a Bone Crusher mace could not possibly constitute an unlawful conversion. Likewise, even though there is no common law doctrine that exempts in-game property thefts from the scope of criminal law, it seems highly unlikely that virtual property "crimes" which are entirely consistent with software and contractual game rules would be criminally prosecuted.

We should add that the software licenses provide an additional reason for removing inter-avatar theft from the scope of property crimes. Most virtual world EULAs insist that the intangible artifacts in the game are the properties of the game company and never "owned" by players. Bone Crushers therefore never leave the exclusive possession of Electronic Arts,

because they never leave Britannia. Because the game owners are not deprived at any time of their property, arguably game properties can never be “stolen” pursuant to the language of the Model Penal Code.

We do not wish to be overly sanguine about this conclusion, which seems to neatly eviscerate the notion of player rights in virtual worlds. There is some theoretical potential for the legal recognition of player entitlements to virtual property and to the legal prohibition of virtual property crimes. In the PGA Tour case discussed above, for instance, the PGA was essentially a game owner and it had expressly promulgated the rules of a competition that forbid Casey Martin to use a golf cart. Yet the Supreme Court did not defer to the PGA’s rules of golf when they conflicted with the needs of a disabled player. Similarly, courts and legislators may conceivably refuse to defer to the private orderings created by contract and software in the case of virtual worlds. But we cannot, at this point, predict under what circumstances legislatures and courts will be willing to depart from the current default rule of nearly absolute wizardocracy. As we explain in the next section, we predict that the issue of virtual property crime, in the short term, will more likely have real legal teeth if game owners, rather than the game players, are the ones to press courts to recognize the existence of virtual property.

5. “Real” Virtual Crimes

By concentrating the legal control of and rules regarding virtual property in their own hands, game owners and designers may essentially disarm many of the difficult legal issues stemming from inter-avatar property crimes. However, placing the issue in the hands of the game owners does not defuse the issue entirely, but simply shifts the focus of the legal analysis from a myriad of avatar-players to a handful of corporate persons that create, own, and administer virtual worlds.

Game owners are not eager to recognize the legal existence of virtual property because the issue is generally associated with player ownership of their own swords and light sabers. Historically, game owners have been hostile toward player-run markets for virtual property and viewed the “sale” of virtual property by players as a form of cheating. Analogies have been drawn to meritocracies in sports, where transferring rights to achievement by payment is seen as reprehensible behavior. When athletes throw games, they risk disgrace and even criminal charges.

But Ultima Online is not a typical game. Virtual world designers generally design with the intent that players will trade virtual properties and currencies.⁹ Indeed, a brisk social trade in virtual properties is generally a goal of designers, who see it as a sign of a healthy virtual economy and an enjoyable game. It is not the practice of exchange that game owners find distressing, but instead they lament the intrusion of external economic forces on what they would rather be an independently ordered sphere game play. In other words, game developers strive to create the illusion of property ownership and a vibrant economy, but wish to keep player ownership, as a legal matter, strictly a matter of illusion.

It is not unusual for game companies today to ban the accounts of individuals who engage in the business of virtual goods trading. There are legitimate reasons for game companies to take this stance. Many virtual world participants believe that trading virtual goods for real money is unethical, and breaks the spirit of the game. Designers warn that organized player hoarding and trading can destabilize virtual economies in ways that ruin game play. The perception that such unauthorized player sales are free riding on game company investments probably also plays a significant part in the general owner antipathy toward the concept of virtual property.

However, game owners may find that the concept of virtual property is a two-edged sword. Virtual world owners have long faced difficulties in policing the security of their systems against exploiters. Combining sophisticated code exploits with virtual property markets can be big business. In South Korea, a 22-year-old student and an accomplice manipulated a virtual world server and made off with 1.5 billion won, or approximately US\$1.2million. The federal Computer Fraud and Abuse Act (“CFAA”)¹⁰ would seem to apply to such activities. A criminal violation of Section 1030 requires three main elements to be made out: First, the defendant must have intentionally accessed a computer. Second, the access must have been without authorization or exceeding the scope of the defendant’s authorization. In the case of most security breaches, these two facts can be established. The third requirement of the CFAA, however, is that the damaging resulting from the unauthorized access must be over \$5000. Could the theft of virtual properties constitute real damage under the CFAA?

A recent case attempted to shed some light on that issue. On July 30, 2003 in Law Vegas, U.S. District Court Chief Judge Philip M. Pro heard a CFAA case of the United States v. J.B.Weasel. Mr Weasel stood accused of directing an avatar called “Terron” to hack into another

player's account in the virtual world of GettaLife, strip him of his virtual assets (especially his prized "Staff of Viagra") and leave his avatar naked and defenseless in the game. The case was fictional ("get a life" is a common epithet cast at those who frequent virtual worlds), but the lawyers, the law, and the judge were all real. The moot court was conducted at the 2003 "BlackHat Conference" of network and computer security specialists. The most interesting outcome was a jury finding regarding the real value of virtual assets. Ted Castronova was an expert witness for the prosecution and argued that the virtual assets were indeed worth over five thousand dollars. As Castronova recounts:

"Defense counsel Jennifer Granick mounted a strong counter-argument, namely that we might, as a society, decide that it is just too difficult to classify game-related damages as real, just as we shy away from taking cases of lost sexual favors to court, even though there clearly are damages. This powerful argument suggests that losses in something we agree to call a "game" should also be free from legal oversight, even though, in fact, the distinction between game and life is arbitrary. In the end, jury and audience disagreed with this cultural stratagem, preferring instead Prosecutor Richard Salgado's argument that human activity in the allegedly virtual space is not virtual at all. It is real activity and has real values and thus, in principle, it deserves the full attention of policy and law."

If such a finding obtains in a real courtroom, it would have the potential of effectively criminalizing the unauthorized creation and "theft" of virtual properties from game owners. A quintessential example would be a "gold dupe" where a player would, though exploiting flaws in the game code, generate duplicate currency. If one has sufficient game accounts and machines exploiting this sort of dupe, it is possible to create so much gold that it devalues the in-world currency. Of course, for the exploiter, a dupe can generate a substantial number of real world dollars before the real/virtual currency exchange rate falls off the cliff.

Dupes and exploits obviously don't make sense as "theft" offenses, even though the individual currency "pieces" might be considered property of the game owners. The catching point is that a duper or exploiter is, in some sense, creating new value, not destroying existing value. Yet the devaluation of virtual currencies through massive exploits can wreak havoc on the experience ordinary players and in certain case, frustration and dissatisfaction with broken game economics may lead some players to terminate game subscriptions. Thus, game owners can potentially point to real economic harms created by the "theft" (via creation) and sale of virtual

currencies. These harms may, in turn, give rise to criminal prosecutions for property crimes via computer trespass statutes.

Conclusion

As we have demonstrated, the problem of virtual crime, like all legal issues that arise in the settings of virtual worlds, is exceedingly complicated. Only time will tell if one day, an ambitious prosecutor will decide to indict the next Mr. Bungle and assert thereby that virtual worlds are meaningfully different than their video games ancestors. If such a prosecution should indeed occur, we will share the concern of virtual world designer Richard Bartle, the co-author of MUD1: “My only concern here is that laws may be drawn up prematurely, without proper consultation with those who ‘get’ virtual worlds, and we could be stuck with something unsuitable or unworkable as a consequence.”¹¹

As the Honorable Loretta A. Preska has noted, “Judges and legislators faced with adapting existing legal standards to the novel environment of cyberspace struggle with terms and concepts that the average American five-year-old tosses about with breezy familiarity.”¹² Judge Preska continued in a footnote: “I recall in this respect a particularly confusing item of testimony elicited at the evidentiary hearing: Ms. Kovacs, plaintiffs' expert witness with respect to the Internet, testified that on one occasion while she was in a MUD (a MultiUser Dungeon), a malefactor sicced his ‘virtual dog’ on her because she had trespassed on his domain. Fortunately, the other inhabitants of the MUD came to her rescue, vehemently protesting the unfriendliness of the virtual canine attack. Relieved as I was that the story had a happy ending, I must admit that it afforded me a window into an entirely unknown world.”

Judge Preska’s comments were admirably honest, and show that Bartle has a point. Some degree of confusion and category mistake would almost inevitably result from judicial attempts to interpret traditional criminal laws in order to police player behaviors in virtual worlds. Ironically, if we wish to preserve the benefits of virtual worlds as free and independent social experiments, it may be best if we keep the criminal law at a safe distance.

¹ Guy H. Thompson, *Missouri Crime Survey*, 1926, 12 A.B.A.J., 626, 632.

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- ² F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 Cal. L. Rev. 1 (2004).
- ³ Model Penal Code § 223.6.
- ⁴ *See Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (“Like a share of corporate stock or a plot of land, a domain name is a well-defined interest...”).
- ⁵ *See* JOHAN HUIZINGA, *HOMO LUDENS* 13 (1955); ROGER CAILLOIS, *MAN, PLAY AND GAMES* 7 (Meyer Barash tras. 1961).
- ⁶ *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).
- ⁷ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).
- ⁸ BRAD KING & JOHN BORLAND, *DUNGEONS AND DREAMERS* 160-62 (2003).
- ⁹ RICHARD BARTLE, *DESIGNING VIRTUAL WORLDS* 297-312 (providing “Tips for a Successful Virtual Economy”).
- ¹⁰ Computer Fraud and Abuse Act of 1986, 18 USCA § 1030 (1996).
- ¹¹ RICHARD BARTLE, *DESIGNING VIRTUAL WORLDS* 621 (2004).
- ¹² *ALA v. Pataki*, 969 F.Supp. 160 (SDNY 1997).