

Defining virtual property in terms of the constitutional property clause

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Dissertation submitted in fulfillment of the requirements for the degree *Magister Legum* in Private Law at the Potchefstroom Campus of the North-West University

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May 2014



Acknowledgements

I am deeply appreciative of the many individuals who have supported my work and continually encouraged me through the writing of this dissertation in very difficult circumstances. Without their time, attention, encouragement, thoughtful feedback, and patience, I would not have been able to have finished my degree. It is my great pleasure to acknowledge people who have given me guidance, help and encouragement.

First and foremost, I owe it all to God for granting me the wisdom, health and strength to undertake this research task. He let me through all the difficulties and enabled me to finish my degree.

I would like to extend my sincere gratitude to my supervisor, Dr Wian Erlank, for introducing me to this exciting field of law. His good advice and support has been invaluable on both an academic and a personal level, for which I am extremely grateful. He always made himself available to clarify my doubts despite his busy schedules and I consider it as a great opportunity to have done my degree under his guidance and to learn from his research expertise.

I owe my deepest gratitude towards my better half, Christo Bekker, for his eternal support and understanding of my goals and aspirations. His infallible love and support has always been my strength. His patience and sacrifice will remain my inspiration throughout my life. Without his help, I would not have been able to complete much of what I have done and become who I am.

My parents, Willie and Jeanne, for all their love, support and understanding. I owe a lot to my parents, who encouraged and helped me at every stage of my personal and academic life. I truly miss my mother who unfortunately passed away shortly after receiving my result. Even though she will never be able to read my dissertation, I know that she is proud of me. All that I am or hope to be, I owe to my mother.

To my invaluable network of supportive, forgiving, generous and loving friends and colleagues: Monique Jordaan, Ilana Nezar, Wiseman Ngubo and Johan Schoeman. Without your blessings and encouragement, I would not have been able to finish this dissertation. Wiseman, thank you for taking time out of your busy schedule to read my chapters and provide your thoughtful feedback.

Finally, I would express my gratitude to my parents-in law, sister in law, my brothers, family and friends whose support and constant encouragement helped me through the hard times. My deepest appreciation is expressed to them for their love, understanding, and inspiration.

Abstract

This dissertation critically considers the question of whether the concept of “virtual property” may be understood to be included as a form of property in the constitutional property clause. The reason for this problem is that there is no definition of the property concept in the constitutional property clause. South African courts have not yet given clarity as to whether virtual property may be included, recognised and protected or to what extent such protection could be. There are different approaches and opinions for defining the concept of property. The importance of extending property protection to virtual property lies in the fact that virtual resources have a real-world value. Currently in South African law virtual property exists only in theory and is by no means a legal reality. Therefore any argument towards recognizing virtual property lies in a theoretical rather than practical approach towards protection.

The party who relies on constitutional protection for intangible property will have to prove the existence of the right and argue the reasons why the right in question should be protected in terms of the property clause. The constitutional protection that could be accorded to virtual property would be in terms of either an established category of intellectual property or a commercial property interest. If virtual property cannot be recognised as a thing according to South African private law because it is incorporeal, an exception to the rule could be created, if necessary by legislation. Otherwise, it could be accepted that the incorporeal aspect of virtual things, as an exception to the rule, does not have to stand in the way of their recognition as property. It is concluded that virtual property will be recognised reasonably easily as property for purposes of constitutional protection, in other words against state interferences. Virtual property could be protected against both private and state interferences in private and constitutional law.

Opsomming

Hierdie verhandeling stel 'n kritiese ondersoek in na die vraag of die konsep van “virtuele eiendom” beskou kan word as ‘n vorm van eiendom in die grondwetlike eiendomsklousule. Alhoewel daar verskillende opinies en benaderings is, is daar is egter geen konkrete definisie vir die eiendomskonsep in die grondwetlike eiendomsklousule nie. Die Suid-Afrikaanse howe het tot op datum nog nie duidelikheid gegee oor die vraag of virtuele eiendom erken en beskerm kan word as eiendom en die mate van beskerming wat dit kan geniet nie. Die belangrikheid vir die beskerming van virtuele eiendom is geleë in die feit dat virtuele eiendom 'n ekonomiese waarde het. In die Suid-Afrikaanse reg bestaan virtuele eiendom tans slegs in teorie en is geensins as 'n wetlike realiteit nie. Argumente vir die erkenning van virtuele eiendom is geleë in 'n teoretiese eerder as praktiese benadering tot die beskerming.

Die gene wat staatmaak op grondwetlike beskerming vir ontasbare eiendom sal die bestaan van die reg moet bewys asook die redes waarom die betrokke reg in terme van die eiendomsklousule beskerm moet word. Die grondwetlike beskerming wat aan virtuele eiendom verleen kan word sou in terme van 'n gevestigde kategorie van intellektuele eiendom of kommersiële eiendom wees. Virtuele eiendom kan nie erken word as 'n saak volgens die Suid-Afrikaanse privaatreë nie, want dit is ontasbaar. 'n Uitsondering op die reël kan deur wetgewing geskep word indien nodig. Indien die onstofflike aspek van virtuele eiendom as ‘n uitsondering beskou kan word, sal dit dus moontlik wees vir virtuele eiendom om erken te word. Daar sal uit hierdie studie bevind word dat virtuele eiendom wel beskerm kan word as grondwetlike eiendom. Dus sal virtuele eiendom beskerming kan geniet teen beide private sowel as staat inmenging asook in die private en grondwetlike reg.

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Abbreviations

<i>Berkeley Tech LJ</i>	<i>Berkeley Technology Law Journal</i>
<i>BUJ Sci & Tech L</i>	<i>Boston University Journal of Science & Technology Law</i>
<i>BUL Rev</i>	<i>Boston University Law Review</i>
<i>CILJSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
<i>CLJ</i>	<i>Cambridge Law Journal</i>
<i>CLR</i>	<i>California Law Review</i>
<i>EPLJ</i>	<i>European Property Law Journal</i>
<i>EULA</i>	<i>End User License Agreement</i>
<i>Harv LR</i>	<i>Harvard Law Review</i>
<i>Hastings LJ</i>	<i>Hastings Law Journal</i>
<i>JMH</i>	<i>Journal of Management History</i>
<i>McGill LJ</i>	<i>McGill Law Journal</i>
<i>NYL Sch L</i>	<i>Rev New York Law School Law Review</i>
<i>NYU LR</i>	<i>New York University Law Review</i>
<i>NW J Tech & Intell Prop</i>	<i>North Western Journal of Technology and Intellectual Property</i>
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>Pierce LR</i>	<i>Pierce Law Review</i>
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>Stan L Rev</i>	<i>Stanford Law Review</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TOS</i>	<i>Terms of Service</i>
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg</i>
<i>USA</i>	<i>United States of America</i>
<i>U Chi L Sch Roundtable</i>	<i>University of Chicago Law School Roundtable</i>

Chapter 1: Introduction

1.1 Introduction and problem statement

Charles woke up one day and went online to check his bank balance.¹ Despite repeated attempts, he got the same response “Your username and password is not valid”. Any attempt on changing his username or password was blocked by a no authorisation message. On the way to work he stopped at an ATM to withdraw cash and again attempted to retrieve his balance. The ATM machine “ate” his card. He drove to work and stopped by the shop to pick up breakfast. As he ran his credit card through the card slot, the transaction was declined.

Once at the office he called his bank. The person on the other end of the line informed him that his accounts had been closed. He was connected to the manager who told Charles that the bank had discovered that, as a result of an error in the code of the online banking application, he was able to open an account at a much higher rate than typically offered by the bank. The manager went on to explain that the bank’s policy was to close accounts for customers who took advantage of such system exploits as it is not fair to other customers. Charles’s system access had been blocked, his banking and credit accounts had been closed, and all of his assets had been confiscated. He was left penniless and confused.

In the real world Charles can turn to bank regulators and law officials to assist him in this case. Unfortunately for the owners of virtual property in South Africa there is no recourse for the confiscation or theft of their virtual property, since these assets enjoy no property-like protection. Therefore virtual property can be expropriated by the developers, with no available remedies available to the users or owners of this property.

¹ This example is similar to the example used by DaCunha in his article, see DaCunha 2009 http://works.bepress.com/nelson_dacunha/1 3-4.

The full history of virtual worlds is beyond the scope of this dissertation.² This brief overview is only to illustrate how the development of these worlds has promoted new social structures and how it leads up to the notion of virtual property. The concept of virtual worlds³ has been around even before computers. Virtual worlds can be seen in the fictional literature *The Lord of the Rings* trilogy and *The Hobbit* of J.R.R Tolkien.⁴ These books are set in a fictional world and imaginary geographic areas. Other examples of virtual worlds in literature are Dan Brown's *The Da Vinci Code* and the Harry Potter series, created by JK Rowling. A fantasy-wargame called *Dungeons and Dragons (D&D)* was developed, based on Tolkien's world and stimulates the adventures of various characters from the books. This game was described as a role-playing game,⁵ due to the players identifying with the characters that they play.

Fictional worlds evolved with the dawn of the computer age.⁶ In 1976 the first computerised role playing world ADVENT, was created by Will Crowther.⁷ The game's virtual world is based in a cave and interaction with the player is purely textual. In 1979, Multi-User Dungeon (MUD) was developed by Roy Tubshaw and Richard Bartle.⁸ The biggest distinction between ADVENT and MUD is the ability to interact with other users, as ADVENT is a single player game. Modern virtual worlds use a graphical representation of a user called an avatar.⁹ These modern virtual worlds are MMORPGs or "Massively Multiplayer Online Role Playing Games" and examples include Everquest

2 See generally for more details on the history of virtual worlds: Cuciz 2001. <http://archive.gamespy.com/articles/january01/muds1/index3.shtm>; Erlank *Property in Virtual Worlds* 17-42; Lastowka and Hunter 2004 *CLR* 14-29; Juul 2001 <http://www.jesperjuul.net/thesis/2-historyofthecomputergame.html>.

3 A virtual world is an interactive simulated environment accessed by multiple users through an online interface.

4 For a biography on the work and life of J.R.R Tolkien see The Biography Channel website 2013 <http://www.biography.com/people/jrr-tolkien-9508428>.

5 A role-playing game can be described as a fantasy game where the player uses his imagination to interact with and use the fantasy environment. It consists of elements of acting, storytelling, social interaction, war games, and dice rolling. The player and his or her companions in the game are able to create their own characters, which develop and grow with each adventure they complete. See Lastowka and Hunter 2004 *CLR* 16.

6 DaCunha 2009 http://works.bepress.com/nelson_dacunha/1.

7 DaCunha 2009 http://works.bepress.com/nelson_dacunha/1.

8 DaCunha 2009 http://works.bepress.com/nelson_dacunha/1.

9 An avatar is the player's virtual body representation inside the virtual world, otherwise also known as the player's character. See: Castronova E 2001 *CESifo Working Paper* 3; Wikipedia Contributors "Avatar" 2013 <http://en.wikipedia.org/wiki/Avatar>.

and World of Warcraft. World of Warcraft is an example of a structured role playing game.¹⁰ Launched in 2004, this game currently has over 10 million subscribers.¹¹

The popularity of virtual worlds has increased as seen in the development of online games, virtual worlds¹² and social networks.¹³ On 07 October 2013 the United Nations released a report projecting that by the end of 2013, 40 per cent of the world's population will be online.¹⁴ This is an estimation of 2.7 billion people.¹⁵ As virtual worlds become increasingly powerful and lifelike, people utilize them for countless real-world purposes, including commerce, education, medicine, law enforcement, and military training.

Currently in South African law virtual property exists only in theory and is by no means a legal reality.¹⁶ Therefore any argument towards recognizing virtual property lies in a theoretical rather than practical approach towards protection.¹⁷ There is no clearly defined definition for the term "virtual property".¹⁸ Virtual property can be described as a computer code that is stored on a remote source system where one or more persons are granted certain powers to control the computer code to the exclusion of others.¹⁹ Virtual property is software code that is designed to behave like and have the qualities of a physical real-world chattel. However, virtual property is incorporeal and exclusionary which distinguishes it from real-world property.²⁰ Virtual property is a troublesome form of property, since certain interests may be protected as intellectual property, others under the law of contract or certain interests should enjoy similar protection as incorporeal property in private law.²¹

10 Camp 2007 *Hastings Law Journal* 4.

11 Camp 2007 *Hastings Law Journal* 4.

12 The largest and most common type of virtual world is the "MMORPG" or "Massively Multiplayer Online Role Playing Game" and examples include Everquest and World of Warcraft.

13 Facebook, Twitter and LinkedIn are a few examples of social networks.

14 Anon 2013 <http://www.un.org/apps/news/story.asp?NewsID=46207&Cr=internet&Cr1>.

15 Anon 2013 <http://www.un.org/apps/news/story.asp?NewsID=46207&Cr=internet&Cr1>.

16 Hurter 2009 *CILJSA* 303.

17 Nelson 2010 *McGeorge Law Review* 283.

18 Blazer 2006 *Pierce Law Review* 137.

19 Blazer 2006 *Pierce Law Review* 141.

20 Hurter 2009 *CILJSA* 304.

21 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 52.

For the purpose of this dissertation, the term “virtual property” will include well-known intangibles that are not associated with virtual worlds, like bank accounts,²² domain names,²³ URLs (uniform resource locators),²⁴ websites,²⁵ and email accounts.²⁶ Virtual property further includes objects that only exist in virtual worlds²⁷ and other intangibles that take on the same function and form as their real-world counterparts like ebooks, mp3’s, apps and music.²⁸

Section 25 of the *Constitution of the Republic of South Africa*, 1996 contains a clause that guarantees the protection of property as a fundamental right.²⁹ There is no description of exactly what the constitutional concept of property entails.³⁰ The Constitution does not contain a comprehensive definition of “property” or “property rights” and section 25(4) of the Constitution only indicates that for purposes of constitutional protection, property is not limited to land. The Constitutional Court has indicated that the idea of property as corporeal objects, whether movable or immovable, will be a point of departure in determining the constitutional concept of property.³¹ However, Van der Walt argues that incorporeal or intangible property should qualify as property for purposes of constitutional protection.³² It is important to take into consideration that the constitutional property concept will probably differ from the private

22 Bank accounts may be regarded as being one of the earliest forms of virtual property. See: Fairfield 2005 *BUL Rev* 1057.

23 Fairfield 2005 *BUL Rev* 1055; Lastowka and Hunter 2004 *California Law Review* 29; Hurter 2009 *CILJSA* 303.

24 Fairfield 2005 *BUL Rev* 1055; Lastowka and Hunter 2004 *CLR* 29.

25 Fairfield 2005 *BUL Rev* 1055; Hurter 2009 *CILJSA* 303; Lastowka and Hunter 2004 *CLR* 29.

26 See generally: van Erp *Servitudes: the borderline between contract and (virtual) property* 4; Fairfield 2005 *BUL Rev* 1049, 1055; Erlank *Virtual property – protection and remedies*.

27 These are the items that a user encounter and use by means of interaction between their avatars as well as the virtual world and are items like swords, houses, castles and land. See Fairfield 2005 *BUL Rev* 1058-1064; Lastowka and Hunter 2004 *CLR* 29. For a discussion of how property inside virtual worlds functions in the real world legal system, see Erlank *Property in virtual worlds* available at <http://ssrn.com/abstract=2216481>.

28 Erlank 2013 *EPLJ* 183 - 193..

29 Currie and De Waal *Bill of Rights Handbook* 534.

30 Van der Walt *Constitutional Property Law* 27.

31 *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC) para 51.

32 Van der Walt *Constitutional Property Law* (2005) 65; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

law concept.³³ Therefore the exact meaning and scope has to be determined for every individual case.³⁴ In South African private law, as in Roman-Germanic tradition, objects of property rights are generally limited to corporeal or tangible objects.³⁵ Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects, such as virtual property.³⁶

This dissertation critically considers the question of whether the concept of “virtual property” may be understood to be included as a form of property in the constitutional property clause. The reason for this problem is that there is no definition of the property concept in the constitutional property clause. South African courts have not yet given clarity as to whether virtual property may be included, recognised and protected or to what extent such protection could be. There are different approaches and opinions for defining the concept of property.³⁷ According to Van der Walt³⁸ the constitutional protection that could be afforded to virtual property would in all probability be in terms of either an established category of intellectual property or a commercial property interest.

The importance of extending property protection to virtual property lies in the fact that virtual resources have a real-world value.³⁹ Virtual world currency, accounts and items are sold in grey markets.⁴⁰ In 2011 Blizzard Entertainment announced that their

33 Van der Walt *Constitutional Property Law* (2005) 113; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

34 Van der Walt *Constitutional Property Law* (2005) 113; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

35 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

36 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* (2001) 5; 318-319; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

37 Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 4-5; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 1; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 217-229.

38 Van der Walt *Constitutional Property Law* (2011) 150.

39 Castronova 2003 <http://www.terranoa.blogs.com/terranoa/2004/08.virtualworlde.html>.

40 According to Wikipedia a grey market is the trade of a commodity through distribution channels

forthcoming MMORPG, Diablo III, will include a currency-based auction house, wherein players will be able to buy and sell in-game items for real-world money.⁴¹ The virtual property industry was worth \$2.9 billion in 2012.⁴² Virtual goods in social games on Facebook were worth \$1.6 billion in 2012.⁴³ Second Life is a virtual world and users are allowed to make and sell in-game items for a profit.⁴⁴ In 2009 Second Life users transferred \$567 million among themselves.⁴⁵ For the reason that virtual property gives rise to items that hold real-world value, legal consideration towards protection and in certain circumstances governance is important.

By investigating whether the definition of “constitutional property” includes virtual property, recommendations can be made on how the court should identify virtual property and under which circumstances it should be protected. These recommendations may be of particular value to South African courts in deciding cases where it should be determined if virtual property as incorporeal property enjoys similar protection as constitutional property.

1.2 Research question

The research question for this dissertation is “To what extent does the definition of property in terms of section 25 of the Constitution include virtual property?”

This dissertation will therefore investigate whether the concept of “constitutional property” may be understood to include virtual property as a form of property in the constitutional property clause and therefore enjoys similar protection

which, while legal, are unofficial, unauthorized, or unintended by the original manufacturer. The most common type of grey market is the sale of imported goods (brought by small import companies or individuals not authorized by the manufacturer) which would otherwise be more expensive in the country they are being imported to. See Wikipedia Contributors “Grey Market” 2013 http://en.wikipedia.org/wiki/Grey_market.

41 Blizzard Entertainment Inc 2011 <http://us.battle.net/d3/en/services/auction-house/info#q16>

42 Eldon 2011 <http://techcrunch.com>.

43 Eldon 2011 <http://techcrunch.com>.

44 Mesiano-Crookston 2013 <http://www.lawyersweekly.ca/index.php?section=article&articleid=1912>.

45 Mesiano-Crookston 2013 <http://www.lawyersweekly.ca/index.php?section=article&articleid=1912>.

1.3 Hypotheses

It is expected that this research will find that virtual property can be included within the constitutional concept of property. The mere fact that virtual property is not explicitly mentioned in the Constitution does not mean that these objects are not protected. If virtual and real-world characteristics are compared there will be *essentialia* common to both property systems. Theoretically, certain objects of intellectual property can be reclassified as virtual property and therefore the definition of “property” in terms of the Constitution should be interpreted to include virtual property. This research will further find that virtual property does exist as property even though it is incorporeal and is not only found within virtual worlds.

South African property law focuses on corporeality as a requirement for accepting an object of property as being a thing. As will be shown in the civil law systems, property is defined much wider under constitutional law than in private law. Since the Constitutional Court held that the constitutional property clause is wide enough to protect all the property interests that require protection, it will be concluded that it is possible to protect virtual property in constitutional law even if it is not recognised in private law.

1.4 Methodology

This study will be a literature study, comprising of an exploration of legislation, study of case law, electronic sources, text books and academic articles to critically analyse the definition of “constitutional property” and “virtual property”. It will be investigated if virtual property may be included and protected as property for purposes of the constitutional property clause.

Since there is a paucity of Constitutional court cases in South Africa dealing with the concept of virtual property as constitutional property, it is necessary to seek some guidance from foreign law. In terms of section 39(1) (c) of the *Constitution of the Republic of South Africa, 1996*, a court, tribunal or forum may consider foreign law when

interpreting the constitution. The foreign law jurisdictions to be used will comprise of the USA and Germany. The USA's common law is chosen due to the fact that most virtual worlds are governed by End User Licence Agreements, which contain a choice of law clauses that designates US law as the contract governing law where possible. In Anglo-American legal tradition there is no distinction either between the property concept in private and constitutional law. Most of the available research material dealing with the concept of virtual property originates there. Germany is chosen due to the fact that it has a constitutional property clause similar to the South African Property Clause. South African property law, as in Roman-Germanic tradition, focuses on corporeality as a requirement for accepting an object of property as being a thing. Germany provides the best guidelines in terms of legislation and case law to determine if virtual property as incorporeal objects will enjoy similar protection as constitutional property.

The focus of the comparative study is not to compare the foreign international constitutional property in relation to South African constitutional property, but to investigate and see how constitutional property in both South African and foreign law is used and developed to move away from the narrow "tangible thing concept" to rather include incorporeal objects that are non-physical objects like immaterial property and virtual property.

1.5 Overview of chapters

It is important to establish whether property is defined in terms of the private law or constitutional law. In chapter two the definition of property is investigated. The concept of property differentiates, depending on whether the term is used in the private or constitutional law context. This chapter will only focus on the private law concept of property. The different approaches and options for defining the concept of property is investigated by discussing the narrow and wide approach to the property concept in different legal traditions. The property concept in Anglo-American legal traditions is discussed due to the much wider approach attached to the meaning of property. The narrow approach followed in Roman-Germanic legal traditions is investigated and

discussed due to the similar approach followed in South African private law. The problematical issue with the real-world classification of a thing as something that must be corporeal or tangible is discussed, as well as the developments of any exceptions to this requirement in South African law. The characteristics and classification of things are discussed in further detail to give a better understanding about the concept of things in South African private law. The characteristics of things are studied to investigate any similarities between things and the characteristics of virtual property.

Chapter three will focus on the constitutional concept of property and more specifically the question of whether virtual property will be included under this property clause. South African law is used as an analogy to emphasize how the private law concept of property is narrow, but the constitutional concept of property is wide. In the Anglo-American legal tradition there is no distinction between the property concept in private and constitutional law.⁴⁶ In South African private law objects of property rights are generally limited to corporeal objects.⁴⁷ Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects.⁴⁸

In addition this chapter will also investigate the context of “property” in terms of section 25 with specific reference to the inclusion of incorporeal objects and rights. This will be achieved by examining the prominent cases that deal with the constitutional concept of property. The following cases will be discussed: *The First Certification Case*,⁴⁹ *FNB Case*⁵⁰ and *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of*

46 Erlank *Property in Virtual Worlds* 215-216.

47 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255; Erlank *Property in Virtual Worlds* 217-229.

48 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255; Erlank *Property in Virtual Worlds* 217-229.

49 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

50 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service: First*

*South Africa.*⁵¹ Examples of property in terms of section 25 will be discussed. Any guidelines will be applied to determine if virtual property as incorporeal objects will enjoy similar protection as constitutional property. If virtual property is included under the constitutional property concept it will also be protected by the property guarantee.

The purpose of chapter four is to define the concept of virtual property and investigate the characteristics that would enable the court to identify virtual property. The characteristics of virtual property will be discussed in further detail to provide a better understanding of these features. The characteristics of things referring to corporeality, impersonal nature, independence, appropriability, and use and value will be compared in order to investigate any similarities between things and the characteristics of virtual property. It is useful to compare the characteristics of virtual property with those of corporeal property or things to see where the differences and similarities lie. This comparison is further important to establish the justification for recognition. It is important to take into consideration that virtual property is designed to behave like and have the same qualities of physical real-world property. The social and economic importance of virtual property will be briefly discussed as part of the introduction to this chapter.

To emphasize how the contractual and intellectual property interests and virtual property rights are protected by developers and providers in virtual worlds and online games, the Terms of Service and End User Licence Agreements of World of Warcraft⁵² and Second Life⁵³ will be investigated and discussed. This discussion will also illustrate how the virtual worlds operate on a contract-based right system. An important question to consider is whether virtual property should be classified as a property right, a contractual right granted in terms of a registration agreement by the service provider or an intellectual property interest. In most instances ownership will be derived from the

National Bank of SA Ltd T/A Wesbank v Minister of Finance 2002 (4) SA 768 (CC); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

51 2002 (1) BCLR 23 (T) at 29G-H; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

52 World of Warcraft 2013 <http://www.worldofwarcraft.co./legal/termsofuse.html>.

53 Second Life Terms of Service can be found at <http://secondlife.com/corporate/tos.php>.

terms of a contract, where a developer gives a user the right to use or own virtual property.⁵⁴

This chapter will also briefly examine the various arguments and normative justifications for considering virtual property as a new class of property. The normative justifications to support the extension of property rights to virtual property will be discussed briefly as well as other alternative justifications. The three normative theories that will be discussed are the Lockean labour theory,⁵⁵ the utilitarian theory of Bentham,⁵⁶ and the personality theory based on Hegel.⁵⁷

The development in case law on the aspect of virtual property will be discussed. Reported cases in China, Taiwan, Netherlands, South Korea, New Zealand and Canada will be investigated.⁵⁸ From the discussion of the cases it will be illustrated that virtual property is mostly protected in terms of criminal law.

Chapter 5 provides an overview on the preceding chapters. An analysis of the concept of property will be done. The analysis will be based on the private and constitutional concept of property. The question whether constitutional property law can extend to virtual property in relation to protection of these potential property interests will be answered.

54 Nelson 2010 *McGeorge Law Review* 298; Erlank *Property in Virtual Worlds* 98-115.

55 Locke *Two Treatises of Government* (1690, Laslett P ed 1988); Erlank *Property in Virtual Worlds* 144-157.

56 Bentham *An Introduction to the Principles of Morals and Legislation* (1789, Burns JH & Hart HLA); Erlank *Property in Virtual Worlds* 157-165.

57 Hegel *Hegel's Philosophy of Right* (1896, Knox TM Trans 1967); Erlank *Property in Virtual Worlds* 165-180.

58 Erlank *Property in Virtual Worlds* 90-98.

CHAPTER 2: PRIVATE LAW CONCEPT OF PROPERTY

2.1 *Concept of Property and Things*

2.1.1 *Introduction*

Property is a word with such a wide variety of meaning that it is always impossible to define accurately or exhaustively.¹

The right of people in and/or over certain objects or things are regulated by the South African Property law.² The function of property law includes the harmonisation of individual interests in property, the guarantee and protection of rights with respect to property, and the control of proprietary relationships between persons, as well as their rights and obligations.³

The purpose of this chapter is to investigate the definition of property. The concept of property also differentiates, depending on whether the term is used in the private or constitutional law context. It is important to take into consideration that the constitutional property concept will in all probability differ from the private law concept.⁴ This chapter will only focus on the private law concept of property. There are different approaches and opinions for defining the concept of property.⁵ These different approaches are investigated by discussing the narrow and wide approaches to the property concept in different legal traditions. The property concept in Anglo-American legal traditions is discussed due to the much wider approach attached to the meaning of property in this jurisdiction. The more narrow approach followed in Roman-Germanic legal traditions is

1 Currie and De Waal *Bill of Rights Handbook* 536.

2 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 5.

3 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 5.

4 Van der Walt *Constitutional Property Law* (2005) 113; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255; Erlank *Property in Virtual Worlds* 215-229.

5 Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 4-5; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 1; Erlank *Property in Virtual Worlds* 215-229; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

investigated and discussed due to the similar approach followed in South African private law. The narrow approach only includes corporeal things as in the concept of property. The problematical issue with the real-world classification of a thing as something that must be corporeal or tangible is discussed, as well as the developments of exceptions to this requirement in South African law. The characteristics and classification of things are discussed in further detail to give a better understanding of the concept of things in South African private law. These characteristics will be studied to investigate any similarities between things and the characteristics of virtual property.

2.1.2 *Anglo-American tradition*⁶

In Anglo-American private law property is always defined widely.⁷ Property is defined to refer to a “. . . bundle of rights or expectations in a tangible or intangible thing that are enforced against third parties, including the government.”⁸ These bundles of rights include, the right to use, possess, exclude and alienate things.⁹ The term “property” is mostly used to refer to the rights with regard to property and no attention is paid to objects of property as there is no difference between private law and constitutional law.¹⁰

American and Commonwealth constitutional law acknowledges a broad scope of objects that are regarded as property and include personal and creditor's rights, intellectual property interests, other commercial interests and certain social or welfare interests.¹¹ “Things” are also defined widely and for example include interests in land, chattels and intangibles.¹²

6 Erlank *Property in Virtual Worlds* 215-216; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 220-229.

7 Van der Walt *Constitutional Property Law* (2005) 83; Van der Walt *Constitutional Property Law* (2011) 114-115; Erlank *Property in Virtual Worlds* 215.

8 Nelson, Stoebuck and Whitman *Contemporary Property* 5; Erlank *Property in Virtual Worlds* 215.

9 Erlank *Property in Virtual Worlds* 215.

10 Van der Walt *Constitutional Property Law* (2005) 82; Erlank *Property in Virtual Worlds* 216..

11 See Van der Merwe and de Waal *The Law of Things and Servitudes* 25; Van der Walt *Constitutional Property Law* (2005) 83 and fns 81, 82; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 7; 324-325; Currie and De Waal *The Bill of Rights Handbook* 539.

12 Nelson, Stoebuck and Whitman *Contemporary Property* 5; Erlank *Property in Virtual Worlds* 216.

2.1.3 Roman-Germanic tradition¹³

The term “property” in the private law either refers to a right¹⁴ to a legal object or the object¹⁵ to which the right relates. It therefore consists of a person’s ability to undertake certain actions¹⁶ with certain kinds of objects. Even though real rights have things as their objects, not all rights relating to things are real rights.¹⁷ Intellectual properties such as ideas are protected by rights which are not real rights since their objects have no physical existence.¹⁸ The legislature may grant statutory rights for the benefit of one party to a contract that are enforceable against the other party and often also against everyone else.¹⁹ When the term property is used in Roman-Germanic law it includes everything that has a monetary value or can be regarded as an asset in an estate.²⁰ Both corporeal objects (like a house) and incorporeal objects (like personal rights and shares in a company) are included in the wide definition of property.²¹

The German civil code (*BürgerlicheGesetzbuch – BGB*) explicitly restricts the objects of property rights to corporeal things. The objects of property interests are defined in terms of “things”. In terms of §90 of the civil code (*BGB*) of 1900 these things are restricted to corporeal objects.²²

13 Erlank *Property in Virtual Worlds* 217-223.

14 Property rights include the following: real rights, personal rights, immaterial property rights, real rights to other patrimonial objects, statutory personal rights created in contracts; and statutory rights against the state to certain resources or performances. See Badenhorst, Pienaar and Mostert *Silberberg & Schoeman’s The Law of Property* 44; Erlank *Property in Virtual Worlds* 217.

15 Objects of property rights can be: things, immaterial property, performances and patrimonial rights (real rights, personal rights and immaterial property rights) serving as the object of limited real rights. See Badenhorst, Pienaar and Mostert *Silberberg & Schoeman’s The Law of Property* 44.

16 These actions include the right to use, possess, exclude and alienate things. See Erlank *Property In Virtual Worlds* 215.

17 Erlank *Property in Virtual Worlds* 217.

18 Erlank *Property in Virtual Worlds* 217.

19 These statutory rights are granted property like protection. See Erlank *Property in Virtual Worlds* 215; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman’s The Law of Property* 10.

20 Du Bois (Ed) *Wille’s Principles of South African Law* 409.

21 Van der Merwe and De Waal *The Law of things and Servitudes* 5; Erlank *Property in Virtual Worlds* 218.

22 *SachenimSinne de Gesetzessindnurkörperliche Gegenstände* (things in terms of the law are restricted to corporeal objects). Van der Walt *Constitutional Property Law* (2005) 79 fn 64; Van der Walt *Constitutional Property Law* (2011) 117; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 210-220.

2.1.4 South African private law²³

There are different approaches and opinions for defining the concept of property in South African law.²⁴ In South African private law, as in the Roman-Germanic tradition, objects of property rights are generally limited to corporeal objects.²⁵ Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects.²⁶ Writers like WA Joubert²⁷ and CG van der Merwe²⁸ give preference to a narrow interpretation of things which includes only incorporeal things in the concept of property.²⁹ This interpretation can be related to a certain interpretation of the doctrine of private law rights to which they adhere.³⁰ Incorporeal things are merely considered exceptions in terms of this interpretation.³¹

The narrow approach has been criticized and some authors and courts now appear to work with a wider concept of property.³² Cloete provides an observation in his LLD dissertation on how the prevailing notions of society can influence the restriction of

23 Erlank *Property in Virtual Worlds* 217-223; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

24 Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 4-5; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 1.

25 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2, 4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319.

26 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2, 4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319.

27 Joubert *Grondslae van die persoonlikheidsreg*; Joubert *'n Realistiese benadering van die Subjektiewereg* 12-15, 98-115; Erlank *Property in Virtual Worlds* 220-221.

28 Van der Merwe *Sakereg* 18-19; Erlank *Property in Virtual Worlds* 220-221.

29 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4; Erlank *Property in Virtual Worlds* 220-221.

30 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4; Erlank *Property in Virtual Worlds* 220-221.

31 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4; Erlank *Property in Virtual Worlds* 220-221.

32 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 78 fn 64; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Erlank *Property in Virtual Worlds* 220-221.

incorporeality.³³ He observes that the narrow interpretation of the thing concept is not generally accepted as correct and discusses the role that the wider meaning of the constitutional property concept has had on the development of the private law concept of things.³⁴ Cloete comprehensively examines the history of the preference of the narrow approach to the concept of property and therefore only accepts corporeal things as objects of property. He states that this preference can be related to a certain interpretation of the doctrine of private law rights.³⁵ This preference occurred in the 1950's due to the reception of the Pandectist theory in South African private law by authors such as WA Joubert and CG van der Merwe.³⁶ Cloete concludes that incorporeal objects and rights can be accommodated either within the existing private law concept, or within the wider constitutional law concept.³⁷ He proposes that in certain circumstances *ad hoc* legislation should be introduced to provide better protection for particular categories of objects or interest in property.³⁸ A good example for the acceptance of incorporeal property under the constitutional property concept is shares.³⁹

Property law, in comparison to the law of things, includes a broader range of relations, including not only the object, but also the rights to such objects.⁴⁰ In South African law a “thing” is considered to be object which occupies space and is capable of being perceived by any of the five senses.⁴¹ The term “thing” in a judicial sense is more

33 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg*; Erlank *Property in Virtual Worlds* 220-221.

34 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4,113,318-319; Erlank *Property in Virtual Worlds* 220-221.

35 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4; Erlank *Property in Virtual Worlds* 220-221.

36 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4,78-80; 316; Erlank *Property in Virtual Worlds* 220-221.

37 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 4,113,318-319; Erlank *Property in Virtual Worlds* 220-221.

38 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 331-333; Erlank *Property in Virtual Worlds* 220-221.

39 Shares have been accepted as incorporeal moveable property in *Cooper v Boyes NO and Another* 1994 (4) SA 521 (C).

40 Van der Merwe and De Waal *The Law of things and Servitudes* 5; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 25.

41 Kleyn and Borraine *Silberberg & Schoeman: The Law of Property* 30.

narrowly defined in and only refers to corporeal objects.⁴² The term “thing” only refers to the object of a right and therefore does not create confusion between a right and its object.⁴³ The characteristics of things will be discussed in further detail to give a better understanding of the concept of things in South African private law. These characteristics will also be studied to investigate any similarities between things and the characteristics of virtual property.

2.2 Characteristics of things⁴⁴

2.2.1 Introduction

The characteristics of things include: corporeality, impersonal nature, independence, appropriability, and use and value.⁴⁵ There is a narrow or broad approach for defining the concept of things in South African law.⁴⁶ The narrow or strict approach is where all five characteristics of things contribute to determining whether a legal object qualifies as a thing.⁴⁷ The broader or more flexible approach is followed where the five characteristics are regarded as guidelines rather than a requirement in determining whether a legal object is a thing.⁴⁸

42 Van der Merwe and De Waal *The Law of Things and Servitudes* 5.

43 Du Bois (Ed) *Wille's Principles of South African Law* 409; Erlank *Property in Virtual Worlds* 231-239.

44 See generally: Van der Merwe *Sakereg* 24; Du Bois (Ed) *Wille's Principles of South African* 412; Van der Merwe and De Waal *The Law of Things and Servitudes* 12; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 14-19; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 21-24; Erlank *Property in Virtual Worlds* 231-239.

45 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 14; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 24; Erlank *Property in Virtual Worlds* 231-239.

46 Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 24.

47 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 24.

48 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 24.

2.2.1.1 Corporeality⁴⁹

The classification of a thing as corporeal or incorporeal will depend on the beliefs of the community rather than the strict adherence to the principle of natural science.⁵⁰ Corporeal things in the civil law tradition have been those things that were tangible or perceivable by the external senses.⁵¹ Real rights and personal rights that function as objects of limited real rights are classified as incorporeal things in property law.⁵² An object is classified as corporeal if it is tangible.⁵³ It therefore occupies space and can be perceived by any of the five external senses.⁵⁴ Gravity, heat, radio activity, sound and electricity can be perceived by the external senses, but they are excluded from the definition of a thing in South African law as they cannot be described in terms of space.⁵⁵

Several incorporeal things have been recognised in South African law in contrast to the strict adherence that only corporeal objects can qualify as things.⁵⁶ The following subjective rights are currently recognised in South African law: real rights (with things as objects), personal rights (with performance as an object), intellectual property rights (with intellectual property as objects), and personality rights (with aspects of personality as objects).⁵⁷ This recognition is obtained from both statute⁵⁸ or case law,⁵⁹ especially where the object of the real right is another subjective right.

49 See generally: Van der Merwe *Sakereg* 27; Du Bois (Ed) *Wille's Principles of South African Law* 412; Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 14-19; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 21; Erlank *Property in Virtual Worlds* 231-235.

50 Kleyn and Boraine *The Law of Property* 30.

51 Van der Merwe *Sakereg* 36; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 33.

52 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 33.

53 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 21.

54 Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 14; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 21.

55 Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 21.

56 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 35.

57 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 35; Erlank *Property in Virtual Worlds* 233.

58 Examples where a right in other rights has been acknowledged by the courts and the legislature include a usufruct in respect of mineral rights, and real security rights in respect of real rights to

2.2.1.2 Impersonal nature⁶⁰

A thing must be of an impersonal nature and external to man.⁶¹ Humans cannot be regarded as things as they function as legal subjects and not objects.⁶² Human corpses or parts of corpses⁶³ could qualify as things, as this will apply with the provision that they fall outside of legal commerce.⁶⁴

2.2.1.3 Independence⁶⁵

Things must have an independent legal existence.⁶⁶ The law does not require that things should be physically independent from their environment.⁶⁷ A thing acquires legal independence when it is physically or juridically individualised.⁶⁸ Division of things into

land such as long leases, personal servitudes, mineral rights and leases of mineral rights.

- 59 Examples where incorporeal things have been recognised in case law are: *Le Riche v PSP Properties* CC [2005] 4 All SA 551 (C); *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) (creditor's right to the use of a telephone and bandwidth system installed on business premises); *Graf v Buechel* 2003 (4) SA 378 (SCA) (company director's loan account); *Ben-Tovin v Ben-Tovin* 2001 (3) SA 1074 (C) (shares in a company providing shareholders with a claim against the company); *Badenhorst v Balju Pretoria Sentraal* 1998 (4) SA 132 (T) (membership interest in a close corporation); Refer to Erlank *Property in Virtual Worlds* 233.
- 60 Van der Merwe *Sakereg* 23; Du Bois (Ed) *Wille's Principles of South African Law* 414; Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 19; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 22; Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Erlank *Property in Virtual Worlds* 236.
- 61 Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 22.
- 62 Van der Merwe and De Waal *The Law of Things and Servitudes* 13; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 22.
- 63 Limbs may only be traded in accordance with the *Human Tissue Act* 65 of 1883. This act further makes provision for the possibility to donate and make available human bodies and tissue for the purpose of education and research.
- 64 Van der Merwe and De Waal *The Law of Things and Servitudes* 13.
- 65 See generally: Van der Merwe *Sakereg* 25; Du Bois (Ed) *Wille's Principles of South African Law* 414; Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 14, 21; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 23; Erlank *Property in Virtual Worlds* 237.
- 66 Van der Merwe and De Waal 14; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 23.
- 67 Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 23.
- 68 Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 23.

movable and immovable is not only of theoretical but also of the greatest practical importance.⁶⁹

2.2.1.4 Appropriability/ Susceptibility to human control⁷⁰

Things must be susceptible to human control.⁷¹ If an object is not susceptible to human control it does not qualify as a thing.⁷² Control refers to the possibility of enforcing and protecting the right in the thing.⁷³ Certain things for example celestial bodies such as the sun, moon and planets are not susceptible to human control.⁷⁴

2.2.2.5 Use and value⁷⁵

Things must be of use and value to a person.⁷⁶ Value can be economic or sentimental.⁷⁷ Use and value are determined by looking at the object in context.⁷⁸

69 Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Kleyn and Borraine *The Law of Property* 30.

70 See generally: Van der Merwe *Sakereg* 26; Du Bois (Ed) *Wille's Principles of South African Law* 415; Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 21; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 23; Erlank *Property in Virtual Worlds* 238.

71 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 23.

72 Van der Merwe and De Waal *The Law of Things and Servitudes* 14; Erlank *Property in Virtual Worlds* 238.

73 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 23.

74 Van der Merwe and De Waal *The Law of Things and Servitudes* 14.

75 See generally: Van der Merwe *Sakereg* 27; Du Bois (Ed) *Wille's Principles of South African Law* 415; Van der Merwe and De Waal *The Law of Things and Servitudes* 15; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 22; Mostert and Pope (Ed) *The Principles of the Law of Property in South Africa* 24; Erlank *Property in Virtual Worlds* 238-239..

76 Van der Merwe *Sakereg* 27; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 24.

77 Van der Merwe and De Waal *The Law of Things and Servitudes* 15; Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 24.

78 Mostert and Pope (Ed) *The Principles of The Law of Property in South Africa* 24.

2.3 **Classification of things**⁷⁹

2.3.1 *Introduction*

Things were traditionally classified according to their relation to man or according to their own nature.⁸⁰ The division according to their relation to man is subject to the question whether something is susceptible to private ownership or not.⁸¹ Distinction is made between things that are in commerce⁸² (*res in commercium*) and things that are outside of commerce (*res extra commercium*).⁸³ Things outside of commerce are additionally divided into common things (*res communes*), public things (*res publicae*), things belonging to corporate bodies (*res universitatis*) and religious things (*res divini iuris*).⁸⁴ The division according to the nature of the objects distinguishes between corporeals and incorporeals; single and composite things; movables and immovables; tangibles and non-tangibles; consumables and non-consumables; and divisible and indivisible things.⁸⁵

79 Van der Merwe *Sakereg* 27; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 23; Du Bois (Ed) *Wille's Principles of South African Law* 416; Van der Merwe and De Waal *The Law of Things and Servitudes* 10, 15; Erlank *Property in Virtual Worlds* 240-253.

80 Van der Merwe *Sakereg* 27; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 24.

81 Van der Merwe and De Waal *The Law of Things and Servitudes* 15; Erlank *Property in Virtual Worlds* 240.

82 Refers to things that can be privately owned or be the objects of other real rights. See Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 24.

83 Refers to things that are not susceptible to private ownership for example celestial bodies such as the sun, moon and planets.

84 Van der Merwe and De Waal *The Law of Things and Servitudes* 15; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 24

85 Kleyn and Borraine *Silberberg & Schoeman: The Law of Property* 29-41.

2.3.2 Classification according to nature⁸⁶

2.3.2.1 Corporeal and incorporeal things⁸⁷

Corporeal things were those things that were tangible or perceivable by any of the five external senses.⁸⁸ In Roman law corporeal things were tangible, while incorporeal things and rights were intangible.⁸⁹ Real rights and personal rights that function as objects of limited real rights are classified as incorporeal things in property law.⁹⁰

2.3.2.2 Movable and immovable things⁹¹

Things are considered to be movable if they can be moved from one place to another without damage or losing its identity.⁹² Movables and immovables can either be corporeal or incorporeal.⁹³ Corporeal immovable things can for example be a plot of land as indicated on a general plan and registered in the Deeds Office.⁹⁴ A corporeal movable thing, is any tangible thing that is not immovable, for example a car. Examples of incorporeal movable things include shares in a company, a pledge, or a usufruct over movables, trademarks and copyright and in general all incorporeal things which are not considered to be movable.⁹⁵

86 Erlank *Property in Virtual Worlds* 244-251.

87 The corporeality requirement of things is discussed in chapter 2 above at 2.2.1.1; See also Erlank *Property in Virtual Worlds* 244.

88 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 33.

89 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 29.

90 Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 33.

91 Van der Merwe *Sakereg* 39; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 30-35; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 34-35; Erlank *Property in Virtual Worlds* 245-247.

92 Immovable things are usually are units of land, including all things that are permanently attached to the land. See Van der Merwe and De Waal *The Law of Things and Servitudes* 24; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 32; Erlank *Property in Virtual Worlds* 245-247.

93 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 32-35; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 34-35.

94 Van der Merwe *Sakereg* 42.

95 Van der Merwe *Sakereg* 26.

This distinction between movable and immovable is not only of theoretical but also of practical importance as the applicable law often differs substantially between these two classes of things. A few examples of situations where different legal rules will apply include the following: transfer of ownership; the sale of a debtor's assets in execution; contracts to alienate immovable things; real security; and criminal law.

In respect of immovable things, for a valid transfer of ownership, registration in the deeds registry is required with the intention of transferring ownership. The transfer of movable things takes place by delivery also with the intention of transferring ownership. With regard to a judgement debt section and/or the sale of a debtor's assets in execution section 66(1) (a) of the *Magistrates' Court Act* 32 of 1944 provides that:

Whenever a court gives judgement for the payment of money . . . such judgment, in case of failure to pay such money forthwith . . . shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgement . . . or the court, on good cause shown, so orders, then against the immovable property. . .

Based on the above a debtor's movable assets must first be attached to try to recover the debt, and only if that is insufficient to cover the debt may the immovable assets be attached.⁹⁶ Certain formalities must be adhered to when alienating immovable things as prescribed in legislation.⁹⁷ The contract of sale of land must be reduced to writing and signed by both parties thereto or by their agents acting on their written authority to be enforceable or have any effect.⁹⁸ No other formalities are needed to alienate movable things, except that credit agreements in respect of things must meet the criteria requirements and formalities set out in legislation.⁹⁹ Real security is provided by means of the registration of mortgages over immovable things. In the case of real security over movable things, the real security is provided by means of a pledge or the registration of a notarial bond. This distinction is also of significant importance in the field of criminal

96 Van der Merwe and De Waal *The Law of Things and Servitudes* 29.

97 *Alienation of Land Act* 68 of 1981; *Property Time-Sharing Control Act* 75 of 1983 and the *Sectional Titles Act* 95 of 1986.

98 S2 of the *Alienation of Land Act* 68 of 1981.

99 *National Credit Act* 34 of 2005.

law. As illustration theft can only be committed in respect of movable property and arson can occur only in respect of immovable property.¹⁰⁰

2.3.2.3 Divisible and indivisible things¹⁰¹

Divisible things can be divided into smaller components while retaining its nature and function, and the value of the smaller components is not less than the value of the undivided thing.¹⁰² A piece of land can be divided into smaller pieces while retaining its value, nature and function.¹⁰³ An example of an indivisible thing is a vehicle as it cannot be divided into smaller pieces without changing the value, nature and function of the thing.¹⁰⁴

2.3.2.4 Consumable and non-consumable things¹⁰⁵

Things are consumable when they are consumed, depleted or destroyed as a result of being used in accordance through their normal use.¹⁰⁶ For example wine, oil and bread are to be classified as consumable.¹⁰⁷ Land, houses and paintings are non-consumable as they remain the same if used normally and are only subject to normal wear and tear.¹⁰⁸ Money is also regarded as a consumable thing and will be considered as consumed once it has been spent or mixed in such a way that the different coins and notes cannot be identified.¹⁰⁹

100 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 32.

101 Erlank *Property in Virtual Worlds* 247.

102 Van der Merwe *Sakereg* 49.

103 Erlank *Property in Virtual Worlds* 247.

104 Van der Merwe and De Waal *The Law of Things and Servitudes* 24; Van der Merwe *Sakereg* 49; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37.

105 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37; Erlank *Property in Virtual Worlds* 248.

106 Van der Merwe *Sakereg* 48; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37.

107 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37.

108 Van der Merwe and De Waal *The Law of things and Servitudes* 23; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37.

109 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 37; Erlank *Property and Virtual Worlds* 248; *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (N).

2.3.2.5 Fungible and non-fungible things¹¹⁰

The classification of fungible and non-fungible things finds application in the law of contracts and succession.¹¹¹ Things are non-fungible when they are individually determined and have unique characteristics or value, and are therefore considered irreplaceable for example original paintings.¹¹² Fungible things are defined by reference to weight, measure or number for example 50 kg fertilizer. Fungible things can be replaced by any other similar thing.¹¹³ Due to sentimental reasons a fungible thing may become a non-fungible thing in certain circumstances, for example a wedding ring.¹¹⁴

2.3.2.6 Singular and composite things¹¹⁵

Things are either classified as single (*res singularis*) or composite (*res universalis*).¹¹⁶ A singular thing refers to an individual thing, which is not composed of any other distinct components and therefore exists independently, for instance a piece of wood.¹¹⁷ Composite things can be described as consisting of different parts or components that are treated by law as a unit.¹¹⁸ Composite things have lost their individuality by either being organically or mechanically united into a single entity, like a vehicle.¹¹⁹

110 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38; Erlank *Property and Virtual Worlds* 248-249.

111 If a non-fungible thing be destroyed that has to be delivered in terms of a contract of sale, it will not be permissible to replace it with an identical thing. Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38.

112 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38; Erlank *Property in Virtual Worlds* 249.

113 Van der Merwe *Sakereg* 43; Van der Merwe and De Waal *The Law of Things and Servitudes* 22.

114 Erlank *Property in Virtual Worlds* 249.

115 Erlank *Property in Virtual Worlds* 249-251.

116 Van der Merwe *Sakereg* 49; Van der Merwe and De Waal *The Law of Things and Servitudes* 21; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38; Erlank *Property and Virtual Worlds* 249.

117 Van der Merwe *Sakereg* 51; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38.

118 Van der Merwe and De Waal *The Law of Things and Servitudes* 21; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

119 Van der Merwe and De Waal *The Law of Things and Servitudes* 21; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

Composite things consist of a principal thing, accessory thing, auxiliary thing and fruits.¹²⁰ A principal thing is capable of independent existence from the composite thing and can in itself be the object of a real right, for example a house or a vehicle.¹²¹ An accessory thing has lost its independence by being merged with or mixed with the principle thing, such as a window of a house.¹²² Auxiliary things can exist separately from the principle things, but for the purposes of property law, they are no longer regarded as an independent thing.¹²³ Examples are keys, padlocks, loose steps and ladders of lofts. Fruits are produced by the principal thing without destruction or consumption, and are regarded as an accessory before they are separated.¹²⁴ Examples include, milk, wool and dividends on shares.¹²⁵

2.3.3 Classification according to their relation to a person¹²⁶

2.3.3.1 Non-negotiable things¹²⁷

Non-negotiable things fall outside of the commercial sphere as they cannot be privately owned. This includes common things that are common to all people, but belong to no one for example running water.¹²⁸ Therefore natural resources falls outside of legal commerce that is available to all people (*res omnium communes*).¹²⁹ Secondly it includes public things, which are owned by the state and used directly for the benefit of the public (*res publicae*).¹³⁰ Examples are public roads, national parks and the beach. The third type relates to things belonging to corporate bodies (*res universitatis*), for example theatres and churches that belong to municipalities and statutory boards, and

120 Van der Merwe *Sakereg* 51; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

121 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

122 Van der Merwe *Sakereg* 51; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

123 Van der Merwe *Sakereg* 52; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 39.

124 Van der Merwe *Sakereg* 54.

125 Van der Merwe *Sakereg* 56.

126 Erlank *Property in Virtual Worlds* 241-244.

127 Van der Merwe *Sakereg* 27; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 31-33; Erlank *Property in Virtual Worlds* 241-243.

128 Van der Merwe *Sakereg* 30; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 25.

129 Van der Merwe *Sakereg* 30.

130 Van der Merwe *Sakereg* 31.

not to individuals.¹³¹ The last type in this category is called religious things (*res divini iuris*) and used to be outside of commerce.¹³²

2.3.3.2 Negotiable things¹³³

Negotiable things are subject to private ownership and are either owned by a person or not owned by a person. Things owned by a natural person or things in a deceased or insolvent's estate (*res alicuius*), are examples of the first type.¹³⁴ The second type refers to things that even though they are capable of being owned, they are not owned at a particular point of time by anyone (*res nullius*).¹³⁵ Examples include wild animals, birds and fish that have not been owned by anyone.¹³⁶ There are several possibilities of *res nullius*. Such as things that have never been privately owned like wild animals, fish and bees before they are captured; things abandoned by their owners, and wild animals, birds and bees regaining their freedom.¹³⁷

2.4 Conclusion

This chapter investigated the definition of property in the private law. The different approaches to the property concept were further investigated by looking at the narrow and wide approaches encountered in different legal traditions. Anglo-American private law attaches a wide meaning to property and no focus is placed on the corporeality requirement of a property object. Jurisdictions that follow this approach focus more on the rights than on property objects. Due to this wide approach it will be possible to include virtual property as part of Anglo-American private law. Recognition of virtual property in Anglo-American law will be possible as it will only require good justification. In Roman-Germanic traditions property is usually narrowly interpreted in private law.

131 Van der Merwe *Sakereg* 28; Mostert and Pope (eds) *The Principles of the Law of Property in South Africa* 29-30; Van der Merwe and de Waal *The Law of Things and Servitudes* 16.

132 Van der Merwe *Sakereg* 35.

133 Van der Merwe *Sakereg* 29; Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 28.

134 Van der Merwe *Sakereg* 29.

135 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 28.

136 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 28.

137 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 28.

Corporeality is a requirement for accepting an object of property as being a thing. It will be much easier to include virtual property in Anglo-American legal traditions than in Roman-German legal systems.

The characteristics of things referring to corporeality, impersonal nature, independence, appropriability, and their use and value were discussed. These characteristics give a better understanding of the concept of things in South African private law. The characteristics of things were studied to investigate any similarities between things and the characteristics of virtual property. The characteristics of virtual property will be compared to these characteristics in chapter four. It is useful to compare the characteristics of virtual property with those of corporeal property or things to see where the differences and similarities lie. This comparison is further important to establish the justification for recognition. In terms of the characteristics of things the focus was on the strict adherence to corporeality as a requirement for accepting an object as being a thing.

As discussed this narrow approach is not universally accepted especially in South Africa. This is seen due to the development in South African law that allow for exceptions where incorporeal objects are accepted as property as well as arguments for the widening of the definition. This exception and widening of the definition will allow for the protection of virtual property in private law. Protection and recognition of virtual property can also be done by legislation and therefore granting these rights property-like protection. It is possible that in circumstances where private law does not provide protection for virtual property, it could be protected by constitutional law for constitutional reasons. If private law should provide protection for virtual property, it is possible that constitutional protection will automatically follow.

CHAPTER 3: DEFINITION OF PROPERTY FOR PURPOSES OF CONSTITUTIONAL PROTECTION

3.1 Constitutional concept of property

3.1.1 Introduction

A constitution sets out the basic principles of a society. It creates a structure for government and lays out the rights and duties of the highest order. These basic rules of social and political cooperation are not only established as superior law, they also set an example for citizens by emphasizing the most important aspects of the society. The constitutional protection of property rights is an important aspect of social governance. The right to own and use property rights is an important aspect of social governance. The right to own and use property, to work and to better oneself economically, is one of the core essential human rights. Besides the aspect of human dignity, constitutional limitations on a government's power to confiscate property, whether by an outright taking of title or by excessive regulation, help create a trust in a government – a belief in the “credible commitment” of a government – that serves economic growth.¹

The constitutional property concept is different from the private law concept.² The difference between the concept of property in private law and constitutional law is based on the reasons for recognition and protection.³ In private law the purpose is to obtain property right protection against competing private parties.⁴ In constitutional law the purpose is to obtain bill of rights type of protection against the state.⁵ Therefore, when defining the concept of property, one has to determine the exact meaning and scope for every individual case.⁶ It is also important to establish whether property is defined in terms of the private law or constitutional law.

1 Drobak and Stube *The Constitutional Protection of Property Rights: Lessons from the United States and Germany* 1-2.

2 Van der Walt *Constitutional Property Law* (2005) 113.

3 Van der Walt *Constitutional Property* 113; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168; Erlank *Property in Virtual Worlds* 215.

4 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168.

5 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168.

6 Van der Walt *Constitutional Property* 113; *Commissioner of Customs and Excise v Bank of Lisbon International Ltd* 1994 (N).

This chapter will focus mainly on the constitutional concept of property. The South African law is used as an analogy to emphasize how the private law concept of property is narrow, but the constitutional concept of property is wide. Anglo-American and Roman-Germanic legal traditions will be investigated to see if there is a distinction between the concept of property in the private law and constitutional law as in South Africa. In Anglo-American legal tradition there is no distinction between the property concept in private and constitutional law. In South African private law, as in Roman-Germanic tradition, objects of property rights are generally limited to corporeal objects.⁷ Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects.⁸

Based on this question guidance will be sought from foreign law. The focus of the comparative study is to investigate and see how constitutional property in both South African and foreign law is used and developed to move away from the narrow "tangible thing concept" to include incorporeal objects that are non-physical objects like immaterial property and virtual property. Germany is chosen due to the fact that it has a constitutional property clause similar to the South African Property Clause. The constitutional concept of property is further investigated across other jurisdictions to see if there are any guidelines than can be used by South African courts. It is useful to consider approaches followed in other jurisdictions of what the concept of property entitles for purposes of constitutional protection. These general approaches may be of particular value to South African courts in deciding cases where it should be determined if virtual property as incorporeal objects should enjoy protection as constitutional property and therefore be included as a form of property in the constitutional property clause.

7 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Erlank *Property in Virtual Worlds* 223-229; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

8 See generally: Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 9; Badenhorst, Mostert and Pienaar *Silberberg and Schoeman's The Law of Property* 2,4, 13; Van der Walt *Constitutional Property Law* (2005) 61; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 5; 318-319; Erlank *Property in Virtual Worlds* 223-229; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 168-255.

In addition this chapter will investigate the context of “property” in terms of section 25 with specific reference to the inclusion of incorporeal objects and rights. This will be achieved by examining the prominent cases that deal with the constitutional concept of property. The following cases will be discussed: *The First Certification Case*,⁹ *FNB Case*¹⁰ and *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*.¹¹ The first two cases support a much wider approach to the concept of property. As will be shown the court supported a narrower approach to concept of property in the last case.

Examples of property in terms of section 25 will be discussed. Any guidelines will be applied to determine if virtual property as incorporeal objects will enjoy similar protection as constitutional property. In addition, the question of whether virtual property will be included under the property clause in terms of section 25 will be answered. If virtual property is included under the constitutional property concept it will also be protected by the property guarantee.

3.1.2 *The South African constitutional property clause*

Section 25 of the Constitution provides:

25. Property. –
- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
 - (2) Property may be expropriated only in terms of law of general application –
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
 - (3) . . .
 - (4) For the purposes of this section –

9 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 1171-175.

10 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service: First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 190-194.

11 2002 (1) BCLR 23 (T) at 29G-H; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175-186.

- (a) the public interest includes the nation's commitment to land reform, and to reform is to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- ...

Section 25 of the *Constitution of the Republic of South Africa*, 1996, contains the constitutional property clause,¹² which guarantees the protection of property as a fundamental right.¹³ However, there is no detailed description of exactly what the constitutional concept of property entails.¹⁴ The Constitution does not contain a comprehensive definition of "property" or "property rights" and section 25(4) of the Constitution only indicates that property is not limited to land for purposes of constitutional protection. The meaning of constitutional property involves two aspects, namely, the objects of property rights¹⁵ and the context and scope of property rights.¹⁶ Section 25 could refer to physical property itself, or to those things with respect to which legal relations between people exist. This means that the property clause protects people from having their property expropriated by the state without compensation. Further, section 25 could also refer to the set of legal rules governing the relationship between individuals and physical property, in other words property rights.¹⁷ Property rights include the right to use, possess, exclude and alienate things.¹⁸

12 Section 28 of the Interim Constitution provided that:

- (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interest of those affected.

13 Currie and De Waal *Bill of Rights Handbook* 534.

14 Van der Walt *Constitutional Property Law* 27.

15 An object of property rights involves a question whether a wider or narrower category of objects should be recognized as property rights for purposes of the constitutional property guarantee. See Van der Walt *Constitutional Property Law* 61.

16 Content and scope of property rights involves the question whether the entitlement that accompanies property as a right should be treated strictly or generously in constitutional law. See Van der Walt *Constitutional Property Law* 61.

17 Currie and De Waal *Bill of Rights Handbook* 536.

18 Currie and De Waal *Bill of Rights Handbook* 536; Erlank *Property in Virtual Worlds* 217.

Van der Walt provides the following guidelines on how the meaning of section 25 has to be determined:

The meaning of section 25 has to be determined, in each specific case, within an interpretive framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed and interpreted in every individual case.¹⁹

Property means rights in property that are evidently vested in a claimant that have some patrimonial value.²⁰ If property means property rights for purposes of section 25, it seems obvious that this section protects the right of ownership rather than simply ownership of corporeal things.²¹ Real rights in the private law will possibly be included under the concept of property for purposes of section 25.²² These real rights include ownership, mortgage, lease, servitude,²³ mineral rights²⁴ and liens.²⁵ Property for purposes of section 25 can also be seen as those resources that are taken to constitute a person's wealth, and that are recognized and protected by law.²⁶ Such resources are legally protected by private law rights, real rights in the case of physical resources,²⁷ contractual rights or personal rights in the case of performance²⁸ and intellectual rights in the case of intellectual property.²⁹

19 Van der Walt *Constitutional Property* 15-16.

20 Van der Walt *Constitutional Property Clauses: An Comparative Analysis* 349 – 353; Currie and De Waal *Bill of Rights Handbook* 538.

21 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* 349 – 353; Currie and De Waal *Bill of Rights Handbook* 538.

22 Currie and De Waal *Bill of Rights Handbook* 538.

23 See *Ex parte Optimal Property Solutions* CC 2003 (2) SA 136 (C) para 19 where the court held that those restrictive conditions on title deeds are reciprocal servitudes and the real rights they confer are property for purposes of section 25.

24 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T).

25 See *Attorney-General of Lesotho v Swissbourg Diamond Mines (Pty) Ltd* 1997 (8) BCLR 1122 (Lesotho CA) where the court considered registered mining leases to be property protected by the property right of the *Lesotho Human Rights Act*.

26 Currie and De Waal *Bill of Rights Handbook* 539.

27 See *Ex parte Optimal Property Solutions* CC 2003 (2) SA 136 (C) para 19 where the court held that those restrictive conditions on title deeds are reciprocal servitudes and the real rights they confer are property for purposes of section 25.

28 Shares are personal rights stemming from personal obligations between a shareholder and the company.

29 Intellectual property such as ideas, inventions and trademarks is protected by rights which are

When considering the purposes and content of the property clause it is necessary, as Van der Walt states –

. . . to move away from a static, typically private-law conceptual view of the constitution as a guarantee of the status quo to a dynamic, typically public view of the constitution as an instrument for social change and transformation under the auspices [and I would add ‘and control’] of entrenched constitutional values.³⁰

Van der Walt proposes a general rule, namely that the inclusion of these incorporeal objects should depend on the questions whether the objects can exist independently and whether the rights have vested or been acquired by the claimant according to normal law, common law or statute depending on the particular right.³¹

3.1.3 *The First Certification Case*³²

The Constitutional Court was required to decide whether the Constitution conformed to the Constitutional principles as set out in the Interim Constitution on the validity of the Constitution.³³ The Constitutional Court responded to an objection that the constitutional property clause did not provide for the protection of intellectual property and minerals rights.³⁴

The Court held that:

Although it is true that many international conventions recognise a right to intellectual property, it is much more rarely recognised in regional

not real rights since their objects have no physical existence.

30 Van der Walt *Constitutional Property* 11.

31 Van der Walt *Constitutional Property Law* 87-88.

32 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 171-175.

33 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 75; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 171-175.

34 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 75; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 171-175.

conventions protection human rights and in the constitutions of acknowledged democracies.³⁵

The above judgement was interpreted to mean that it was not a universally accepted norm to include a specific right to intellectual property or mineral rights in a separate constitutional clause or as a separate fundamental human right.³⁶ The Court concluded that the term 'property' is wide enough, to include rights and interests that need to be protected according to international human rights standards. Alexander³⁷ is of the opinion that the *First Certification case* supports a broad interpretation of constitutional property. He argues that since mineral rights and intellectual property rights are not universally recognised rights, there is no need to explicitly specify them in a separate clause as they are generally understood to be included in the general category of 'property' under the constitutional property clauses.³⁸

According to Van der Walt³⁹ there is no universally recognized norm for the formulation of a constitutional property clause, particularly not as far as the description of property is concerned.⁴⁰ It is unusual to specify all the types of property that are generally accepted as 'property' for purposes of a constitutional property clause.⁴¹ He argues that where no specific reference is made to any categories of property, the conclusion drawn should rather be that all categories of property would be included under the property clause, provided that it is not specifically excluded.⁴² Any such category of property should

35 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 75; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 171-175.

36 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) par 74; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 171-175.

37 Alexander *The Global Debate over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

38 Alexander *The Global Debate over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 174.

39 Van der Walt *Constitutional Property Law* (2005) 85-87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

40 Van der Walt *Constitutional Property Law* (2005) 85; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

41 Van der Walt *Constitutional Property Law* (2005) 85; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

42 Van der Walt *Constitutional Property Law* 86-87; Van der Walt *Constitutional Property Clauses* 324; Alexander *The Global Debate Over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 174-175.

probably be included as long as the law recognises it as property.⁴³ He further states that where a property interest is recognised in private law, such categories should be included as property for purposes of the property clause.⁴⁴ Based on this argument it does not mean that a specific class of property such as virtual property is excluded simply because it is not explicitly mentioned. Alexander agrees with the idea that a wider scope of constitutional property should be accepted where no categories of property are specified.⁴⁵

3.1.4 FNB Case⁴⁶

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service: First National Bank of SA Ltd T/A Wesbank v Minister of Finance* (hereafter referred to as the *FNB-case*), the court set out the methodology that should be followed in a constitutional property dispute. In this case the Constitutional Court did not find it necessary to decide whether the property was property for purposes of the constitutional property clause, since the property in question was movable corporeal property. They further found it 'practically impossible to furnish and judicially unwise to attempt a comprehensive definition of property for purposes of section 25'.⁴⁷

With regard to the type of objects acknowledged as property under the Constitution, it was indicated that the idea of property as corporeal, whether movable or immovable, will be a point of departure in determining the constitutional concept of property.⁴⁸ The court specifically stated that they were not at all concerned with incorporeal property.

43 Van der Walt *Constitutional Property Law* (2005) 87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

44 Van der Walt *Constitutional Property Law* (2005) 87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175.

45 Alexander *The Global Debate Over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 174.

46 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service: First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)

47 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) par 51; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 190-194.

48 *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC) para 51; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 190-194.

Roux⁴⁹ argues that there is no reason based on the *FNB* case judgment to suggest that the court would not grant constitutional property protection to incorporeal property if it were faced with such a case. Van der Walt⁵⁰ agrees that incorporeal interests that are accepted as property in private law should on principle be protected under the constitutional property clause.⁵¹ In these circumstances the general rule should be followed as proposed by Van der Walt. Therefore the inclusion of these interests under the protection of section 25 should probably depend on the question regarding their independent existence and the vesting in or acquisition of these rights by the claimant according to normal law in terms of common law and/or legislation.

3.1.5 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*⁵²

In this case the Transvaal High Court decided that mineral rights were not “property” in terms of the meaning of section 25. The reason provided that it was decided in the *First Certification* case that the right to mineral rights is not a universally accepted fundamental right. The court further held that the drafters of the Constitution would have explicitly protected mineral rights as in the case in other jurisdictions if they had intended for mineral rights to be protected.⁵³ It is viewed by Van der Walt that the court came to the incorrect conclusion regarding the constitutional protection of mineral rights as property.⁵⁴ This decision could have an effect on other interests such as shares, intellectual property rights, debts and other commercial monetary claims, commercial

49 Woolman, Roux and Bishop (Eds) *Constitutional Law of South Africa* 46; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 193.

50 Van der Walt *Constitutional Property Law* (2005) 87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 193.

51 Van der Walt *Constitutional Property Law* (2005) 87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 193.

52 2002 (1) BCLR 23 (T) at 29G-H; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175-186.

53 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) (at 29G-H); Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 175-186.

54 See Van der Walt *Constitutional Property Law* (2005) 87; Van der Walt 2002 *SA Public Law* 258-279 for a detailed discussion on the reasons as proposed by Van der Walt why the court came to the incorrect conclusion regarding the constitutional protection of minerals rights as property; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 176-177.

licences, permits and quotas, and whether these interest are property under section 25.⁵⁵

This judgement should have followed van der Walt's argument based on the judgement of the *First Certification* case. He argues that where no specific reference is made to any categories of property, the conclusion drawn should rather be that all categories of property would be included under the property clause, provided that it is not specifically excluded.⁵⁶ Alexander also agrees with the idea that a wider scope of constitutional property should be accepted where no categories reference is made to any categories of property.⁵⁷ Any category of property should be included as long as the law recognises it as property.⁵⁸ He further states that where a property interest is recognised in private law, such as mineral rights, it should be included as property for purposes of the property clause.⁵⁹

3.2 Property in section 25

Van der Walt distinguishes between three groups of examples where the existence of property would be argued in terms of section 25 of the Constitution.⁶⁰

The first group consists of real rights in land (immovable corporeal property) and movable corporeal property.⁶¹ The protection of property rights in this group is the easiest. It will probably not even be necessary to argue the presence of property, as long as the existence of the right itself is proven.⁶²

55 Van der Walt 2002 *SA Public Law* 261 fn 11; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 176-177.

56 Van der Walt *Constitutional Property Law* 86-87; Van der Walt *Constitutional Property Clauses* 324; Alexander *The Global Debate Over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 176-177.

57 Alexander *The Global Debate Over Constitutional Property* 163; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 176-177.

58 Van der Walt *Constitutional Property Law* 87; Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 176-177.

59 Van der Walt *Constitutional Property Law* 87.

60 Van der Walt *Constitutional Property Law* (2005)118-119.

61 Van der Walt *Constitutional Property Law* (2005)118.

62 Van der Walt *Constitutional Property Law* (2005)118.

The second group concerns incorporeal property, mostly in the form of rights. The party who relies on constitutional protection will have to prove the existence of the right and argue the reasons why the right in question should be protected in terms of the property clause.⁶³ Examples in this group include personal rights in land; personal rights in movable tangible property; rights in immaterial property (copyright, patents, trademarks, confidential commercial information); commercial rights based on contract (debts, claims, goodwill, shares in a company).⁶⁴ Personal rights derive from a contract or legislation and therefore they belong in this second group.⁶⁵ Generally these rights are protected if the right has vested and the protection is socially justified.⁶⁶ Proof of the right in immaterial property is usually adequate to justify its protection as property.⁶⁷ These rights are usually recognized as property either in private or commercial law.⁶⁸ For commercial rights based on contracts, proof of the right is accepted as enough justification for protection.⁶⁹ Based on the authority in foreign law, it can be justified to protect rights in this group as property in terms of section 25.⁷⁰

The third group includes debts and claims not based on contract. The protections of the rights in this group are mostly problematic, although there are some guidelines in foreign law.⁷¹ This group includes welfare claim rights against the state that is not based on contract (pension, medical benefits, and subsidies).⁷² Only some of these rights are regarded as property and will be afforded protection.⁷³ In German law, three requirements are used to distinguish between protected and unprotected welfare rights.⁷⁴ This public law entitlement must accrue to a beneficiary exclusively, be based only on personal or own efforts and serve to ensure or secure the personal survival of

63 Van der Walt *Constitutional Property Law* (2005) 118.

64 Van der Walt *Constitutional Property Law* (2005)118.

65 Van der Walt *Constitutional Property Law* (2005)118.

66 Van der Walt *Constitutional Property Law* (2005)118.

67 Van der Walt *Constitutional Property Law* (2005)118.

68 Van der Walt *Constitutional Property Law* (2005)118.

69 Van der Walt *Constitutional Property Law* (2005)118.

70 Van der Walt *Constitutional Property Law* (2005)118.

71 Van der Walt *Constitutional Property Law* (2005)119.

72 Van der Walt *Constitutional Property Law* (2005)119.

73 Van der Walt *Constitutional Property Law* (2005)119.

74 Van der Walt *Constitutional Property Law* (2005)119.

the beneficiary.⁷⁵ Other examples that form part of this group include licences, permits and quotas issued by the state.⁷⁶ Some of these rights are regarded as property only if they have vested in the claimant and are regarded as valuable assets.⁷⁷

3.3 Comparative law on the concept of property⁷⁸

3.3.1 Introduction

According to Section 39(1) (c) of the *Constitution of the Republic of South Africa, 1996*, a court, tribunal or forum may consider foreign law when interpreting the constitution. As mentioned before, the focus of the comparative study is not to compare the foreign international constitutional property with South African constitutional property, but to investigate and see how constitutional property in both South Africa and foreign law is used and developed to move away from the narrow "tangible thing concept" to include incorporeal objects that are non-physical objects like immaterial property and virtual property.

It is useful to consider approaches followed in other jurisdictions of what the concept of property entitles for purposes of constitutional protection. These general approaches may be of particular value to South African courts in deciding cases where it should be determined if virtual property as incorporeal objects should enjoy protection as constitutional property and therefore be included as a form of property in the constitutional property clause.

3.3.2 The United States of America⁷⁹

American and Commonwealth constitutional law accepts a wide range of objects as property. Examples include but are not limited to personal and creditor's rights,

75 Van der Walt *Constitutional Property Law* (2005) 101-102, 119.

76 Van der Walt *Constitutional Property Law* (2005) 119.

77 Van der Walt *Constitutional Property Law* (2005) 119.

78 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 220-229.

79 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 2.

intellectual property interests, other commercial interests (claim to a bank account) and certain social or welfare interests (also referred to as “new property”).⁸⁰

The Fifth Amendment⁸¹ to the US Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, [. . .] nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

The Fifth and Fourteenth Amendments to the US Constitution together form the oldest, most well-known constitutional guarantee of property rights. The Fourteenth Amendment⁸² provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The US Courts have interpreted that property includes a number of rights with an economic value but that are not traditionally regarded as property.⁸³ Therefore it is suggested that the definition of property for purposes of constitutional protection should not be restricted to real rights.⁸⁴ Van der Walt states that the property concept for the purposes of the Fifth and Fourteenth Amendments is interpreted widely in American case law.⁸⁵ The American property concept has always been wider than in Roman-Germanic law, as American law is based on English common law, which defines

80 Van der Walt *Constitutional Property Law* (2005) 83 fns 81. 82; Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 7, 324-325; Currie and de Waal *The Bill of Rights Handbook* 539.

81 The Fifth Amendment 1791 of the *Constitution of the United States of America* 1787.

82 The Fourteenth Amendment 1868 of the *Constitution of the United States of America* 1787.

83 These rights include for example the right to a driving license, the right to tenure in employment, or to high school education. See Chaskalson *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth* 388; Currie and De Waal *The Bill of Rights Handbook* 539.

84 Currie and De Waal *The Bill of Rights Handbook* 539.

85 Van der Walt *Constitutional Property Clauses* 441.

property exceptionally widely.⁸⁶ The distinction between public and private law is less strict in the Anglo-American law than in the case of Roman-Germanic law.⁸⁷

3.3.3 Council of Europe

Article 1 of the First Protocol to the European Human Rights Convention contains a property guarantee as follows:

- (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
- (2) No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for the law and by the general principles of international law;
- (3) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties.

The property guarantee, according to which every natural or legal person is entitled to the “peaceful enjoyment of their possessions”, has been interpreted by the European Commission of Human Rights and the European Court of Human Rights as if it refers to property.⁸⁸ Therefore this property concept is interpreted widely to include both corporeal and incorporeal things.⁸⁹

3.3.4 Germany⁹⁰

Germany has a constitutional property clause similar to the South African Property Clause. Therefore it provides the best guidelines in terms of legislation and case law to determine if virtual property as intangible objects will enjoy similar protection as

86 Van der Walt *Constitutional Property Clauses* 441.

87 Kellerman *The Constitutional Property Clause and Immaterial Property interests* 221.

88 See Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118 and van der Walt *Constitutional Property Law* (2005) 81 fn 72, 73 for a list of case studies.

89 See Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118 and Van der Walt *AJ Constitutional Property Law* (2005) 81 fn 72, 73 for a list of case studies.

90 Kellerman *The Constitutional Property Clause and Immaterial Property Interests* 210-220.

constitutional property. The German Basic Law property Clause, Art 14 GG, reads as follows:

- (1) Property and the right of inheritance shall be guaranteed. Their substance and their limits shall be determined by law.
- (2) Property entails obligations. Its use should also serve the public interest.
- (3) Exportation shall only be permissible in the public interest. It may only be ordered by or pursuant to the law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.⁹¹

In terms of the German *Civil Code*, property (*Eigentum*) is restricted to tangible, corporeal things.⁹² According to Van der Walt,⁹³ although the term *Eigentum* is used in the property clause of the Basic Law,⁹⁴ the Federal Constitutional Court decided in the *Warenzeichen*⁹⁵ case that the scope of property for the purposes of this guarantee should not merely be determined from the private law concept of corporeal things, but from the property clause itself.

Alexander⁹⁶ agrees that the constitutional concept of property is not dependent upon the private law concept. He further mentions that the German Federal Constitutional Court places little weight on the text of the constitution itself as it relies on the 'fundamental purpose' of property as a constitutional right, rather than a direct textual interpretation.⁹⁷

91 See van der Walt *Constitutional Property Clauses: A Comparative Analysis* 121 for a discussion on an appropriate translation.

92 *BürgerlichesGesetzbuch* – BGB § 903.

93 Van der Walt *Constitutional Property Clauses* 151.

94 Basic Law of the Federal Republic of Germany (*Grundgesetzfür die Bundesrepublik Deutschland*) 1949.

95 *BVerfGE* 51, 193 [1979] (*Warenzeichen* case) 218.

96 Alexander *The Global Debate over Constitutional Property* 124.

97 Alexander *The Global Debate over Constitutional Property* 124.

Van der Walt⁹⁸ states that the private law concept of property was used as a point of departure in the development of the constitutional property concept. Therefore all traditional private-law property interests were automatically accepted as constitutional property under Article 14.⁹⁹ *Eigentum* is interpreted widely as property and consequently a wide range of incorporeal interests are recognized as objects of property for purposes of the property clause.¹⁰⁰ The constitutional concept of property is therefore interpreted wider than the private law concept, which only includes corporeal things, and these two concepts are kept separate in the German law.¹⁰¹

Even though a wide interpretation of “property” is accepted for the purpose of Article 14 this wide concept does not mean that any right or interest that is of patrimonial value would be recognised as property under this guarantee.¹⁰² There are two general requirements that restrict the constitutional guarantee provided by Article 14. The first requirement is that only concrete rights are protected and not merely the general patrimony, wealth or estate of a person. The second and last requirement entails that only rights vested or acquired in terms of private law, including the applicable legislation, are protected and not mere expectations.¹⁰³ This functional or purposive approach to the definition of property can be followed in South African law when the courts are forced to decide whether incorporeal property qualifies for the protection of section 25. The South African private law is part of the Roman-Germanic tradition and therefore for purposes of section 25 property can refer to both corporeal and incorporeal things.

98 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 152; See also Alexander GS *The Global Debate over Constitutional Property* 124-125.

99 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 152, Kellerman *The Constitutional Property Clause and Immaterial Property interests* 212.

100 This include shares, patent rights, trademark rights, copyright, and the rights of performing artists, contractual money claims, debts and so forth. See Kellerman *The Constitutional Property Clause and Immaterial Property interests* 212.

101 Cloete *Onstoflike Sake in die Nuwe Suid-Afrikaanse Sakereg* 326.

102 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153.

103 Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 153; Kellerman *The Constitutional Property Clause and Immaterial Property interests* 217.

3.4 Conclusion

From the analysis of the term property it is clear that there is no definitive meaning for the concept of property in both private law and constitutional law. This chapter focussed mainly on the constitutional concept of property and more specifically the question of whether virtual property will be included under this property clause. As seen by the discussion of case law the courts are cautious not to restrict the constitutional definition of property. Therefore the courts will have to provide further clarity on the constitutional context and scope of property. The courts should not hesitate to allow the circumstances and requirements of each case to influence the development of the constitutional notion of property, regardless of what the situation in private law might be.

In addition this chapter investigated the context of “property” in terms of section 25 with specific reference to the inclusion of incorporeal objects and rights. The three groups of examples where the existence of property can be argued was discussed. The first group includes immovable and movable corporeal property like land. In terms of this group only the right itself has to be proven. The second group includes incorporeal property in the form of rights for example rights in immaterial property. These rights are protected if the right has vested and the protection is socially justified. Rights in this group are protected either in private law or commercial law. Virtual property can be included under this second group based on protection in terms of either an established category of intellectual property or a commercial property interest. The third and last group includes debts and claims not based on contract for example pension, medical benefits and subsidies. Only some of these rights are regarded as property and therefore afforded protection.

The following prominent cases were discussed *The First Certification Case*, *FNB Case* and *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*. The first two cases support a much wider approach to the concept of property. However, the court supported a narrower approach to concept of property in the last case.

The South African law was used as an analogy to emphasize how the private law concept of property is narrow, but the constitutional concept of property is wide. Anglo-American private law attaches a wide meaning to property and no focus is placed on the corporeality requirement of a property object. Jurisdictions that follow this approach focus more on the rights than on property objects. Therefore there is no distinction between the property concept in private and constitutional law. Due to this wide approach it will be possible to include virtual property as part of Anglo-American private and constitutional law. Recognition of virtual property in Anglo-American law will be possible as it will only require good justification.

In Roman-Germanic traditions property is usually narrowly interpreted in private law. Corporeality is a requirement for accepting an object of property as being a thing. This narrow approach is not universally accepted especially in South Africa. This is seen due to the development in South African law that allows for exceptions where incorporeal objects are accepted as property as well as arguments for the widening of the definition. This exception and widening of the definition will allow for the protection of virtual property in private law. Protection and recognition of virtual property can also be done by legislation and therefore granting these rights property-like protection. As shown in the civil law systems, property is defined much wider under constitutional law than in private law. It is possible that in circumstances where private law does not provide protection for virtual property, it could be protected by constitutional law for constitutional reasons. If private law should provide protection for virtual property, it is possible that constitutional protection will automatically follow. Since the Constitutional Court held that the constitutional property clause is wide enough to protect all the property interests that require protection, it can be concluded that it is possible to protect virtual property in constitutional law even if it is not recognised in private law.

Objects of property rights are generally limited to corporeal objects. Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects. Based on this question guidance was sought from foreign law. Based on the analysis it can be concluded that at least some incorporeal things will be

included as property in the general property clause. Incorporeal things that are accepted as property in private law should on principle be protected under the constitutional property clause. Foreign examples indicate that constitutional property should include certain rights in rights, intellectual property and other commercial property interests.

If virtual property cannot be classified as a property right and the interest can only be enforced based on a contractual right granted in terms of a registration agreement by the service provider, then Van der Walt's test must be considered to determine if virtual property can be protected as constitutional property. The inclusion of these intangible objects should depend on the questions whether the objects can exist independently and whether the rights have vested or been acquired by the claimant according to normal law, common law or statute depending on the particular right.¹⁰⁴ A claim based on a contractual right would have vested or required according to statute depending on the particular right. The party will further have to prove that the objects can exist independently.

The party who relies on constitutional protection for intangible property will have to prove the existence of the right and argue the reasons why the right in question should be protected in terms of the property clause.¹⁰⁵ The constitutional protection that could be accorded to virtual property would be in terms of either an established category of intellectual property or a commercial property interest. Therefore it can be concluded, virtual property could be protected against both private and state interferences in private and constitutional law. Erlank argues that the only issue is the question whether the incorporeal aspect of virtual property could be included under an existing exception in South African law, or whether it can be expanded to include virtual property.¹⁰⁶

104 Van der Walt *Constitutional Property Law* (2005) 87-88.

105 Van der Walt *Constitutional Property Law* (2005) 118.

106 Erlank *Property in Virtual Worlds* 229.

CHAPTER 4: VIRTUAL PROPERTY

4.1 *Introduction*

The purpose of chapter four is to define the concept of virtual property and investigate the characteristics to enable the court to identify virtual property. The characteristics of virtual property will be discussed in further detail to provide a better understanding of these characteristics. The characteristics of things referring to corporeality, impersonal nature, independence, appropriability, use and value will be compared to investigate any similarities between things and the characteristics of virtual property. It is useful to compare the characteristics of virtual property with those of corporeal property or things to see where the differences and similarities lie. This comparison is further important to establish the justification for recognition. It is important to take into consideration that virtual property is designed to behave like and have the same qualities of physical real-world property. The social and economic importance of virtual property will be briefly discussed as part of the introduction to this chapter.

To emphasize how the contractual and intellectual property interests and virtual property rights are protected by developers and providers in virtual worlds and online games, the Terms of Service and End User Licence Agreements of World of Warcraft¹ and Second Life² will be investigated and discussed. This discussion will also illustrate how the virtual worlds operate on a contract-based rights system.

Legal academics have debated over the justification to support the extension of property rights to virtual property.³ This chapter briefly examines the various arguments and normative justifications for considering virtual property as a new class of property. The normative justifications to support the extension of property rights to virtual property will be discussed briefly as well as other alternative justifications. The three normative

1 World of Warcraft 2013 <http://www.worldofwarcraft.co./legal/termsfuse.html>.

2 Second Life Terms of Service can be found at <http://secondlife.com/corporate/tos.php>.

3 See in general: Fairfield 2005 *BUL Rev* 1047-1102; Lastowka and Hunter 2004 *CLR* 1-74; Nelson 2010 *McGeorge Law Review* 1-33; Erlank *Property in Virtual Worlds* 141-181.

theories that will be discussed are the Lockean labour theory,⁴ the utilitarian theory of Bentham,⁵ and the personality theory based on Hegel.⁶

The development in case law on the aspect of virtual property will be discussed. Reported cases in China, Taiwan, Netherlands, South Korea, New Zealand and Canada will be investigated.⁷

4.2 Virtual property concept

4.2.1 Introduction and definition

According to Tech Crunch, a technology news site, the virtual property industry was worth \$2.9 billion in 2012 and continues to grow.⁸ Currently in South African law virtual property⁹ exists only in theory and is by no means a legal reality.¹⁰ Therefore any argument towards the recognition of virtual property lies in a theoretical rather than practical approach towards protection.¹¹ This chapter will critically argue that the recognition and protection of virtual property is not only theoretical but also practical as it can form part of the private property law and constitutional law.¹² Examples of virtual property include well-known intangibles that are not associated with virtual worlds, like bank accounts,¹³ domain names,¹⁴ URLs (uniform resource locators),¹⁵ websites,¹⁶ and email accounts.¹⁷ Virtual property also includes objects that only exist in virtual worlds¹⁸

4 Locke *Two Treatises of Government* (1690, Laslett P ed 1988).

5 Bentham *An Introduction to the Principles of Morals and Legislation* (1789, Burns JH & Hart HLA)

6 Hegel *Hegel's Philosophy of Right* (1896, Knox TM Trans 1967).

7 Erlank *Property in Virtual Worlds* 90-98.

8 Eldon 2011 <http://techcrunch.com>.

9 Lastowka and Hunter 2004 *CLR* 1-74.

10 Hurter 2009 *CILJSA* 303.

11 Nelson 2010 *McGeorge Law Review* 283.

12 For arguments based on the theoretical approach only refer to Nelson 2010 *McGeorge Law Review* 283.

13 Bank accounts may be regarded as being one of the earliest forms of virtual property. See Fairfield 2005 *BUL Rev* 1057.

14 Fairfield 2005 *BUL Rev* 1055; Lastowka and Hunter 2004 *CLR* 29, Hurter 2009 *CILJSA* 303.

15 Fairfield 2005 *BUL Rev* 1055; Lastowka and Hunter 2004 *CLR* 29.

16 Fairfield 2005 *BUL Rev* 1055; Hurter 2009 *CILJSA* 303; Lastowka and Hunter 2004 *CLR* 29.

17 van Erp *Servitudes: the borderline between contract and (virtual) property* 4; Fairfield 2005 *BUL Rev*

and other intangibles that take on the same function and form as their real-world counterparts like ebooks, mp3's, apps and music.¹⁹

The popularity of virtual worlds has increased as seen in the development of online games,²⁰ virtual worlds²¹ and social networks.²² The most important reason for protection of virtual property is due to the value of virtual property. The exchange of virtual goods or property for real-world money is a big business phenomenon. Users are able to trade virtual goods ranging from weapons to real estate and characters on online auction sites and in some cases in in-game marketplaces. In 2009 a space station in an online universe called Entropia sold for more than \$330,000.²³ Jon Jacobs sold a virtual space station for \$635 000 in 2010.²⁴ In 2011 Blizzard Entertainment announced that their forthcoming MMORPG, Diablo III, will include a currency-based auction house, wherein players will be able to buy and sell in-game items for real-world money.²⁵

Since virtual property gives rise to items that hold real-world value, legal consideration towards protection and in certain circumstances governance is important. An important question to consider is should virtual property be classified as a property right, a contractual right granted in terms of a registration agreement by the service provider or an intellectual property interest. In most instances ownership will be derived from the terms of a contract, where a developer gives a user the right to use or own virtual property.²⁶

1049,1055.

18 These are the items that a user encounter and use by means of interaction between them, their avatars as well as the virtual world and are items like swords, houses, castles and land. See generally: Fairfield 2005 *BUL Rev* 1058-1064; Lastowka and Hunter 2004 *CLR* 29. For a discussion of how property inside virtual worlds functions in the real world legal system, see Erlank *Property in Virtual Worlds* also available at <http://ssrn.com/abstract=2216481>.

19 Erlank 2013 *EPLJ* 183-193.

20 Dota is an example of an online game.

21 A virtual world is an interactive simulated environment accessed by multiple users through an online interface. The largest and most common type of virtual world is the "MMORPG" or "Massively Multiplayer Online Role Playing Game" and examples include Everquest and World of Warcraft.

22 Facebook, Twitter and LinkedIn are a few examples of social networks.

23 Anon 2010 www.psfk.com/2010/01/virtual-space-station-sold-for-330000.html

24 Chiang 2010 www.forbes.com

25 *Blizzard Entertainment, Inc.* 2011 <http://us.battle.net/d3/en/services/auction-house/info#q16>

26 Nelson 2010 *McGeorge Law Review* 298.

There is no clearly defined definition for the term “virtual property”.²⁷ However, virtual property can be described as a computer code that is stored on a remote source system where one or more persons are granted certain powers to control the computer code to the exclusion of others.²⁸ It is also software code that is designed to behave like and have the qualities of a physical real-world chattel.²⁹ Fairfield³⁰ narrows down the definition of what should be classified as virtual property by making use of the characteristics proposed by him and concludes that virtual property is similar to things in the real world.³¹ Fairfield purposes rivalrousness, persistence and interconnectivity as characteristics of virtual property.³² Virtual property is rivalrous, because if one person owns and controls it, others do not.³³ It is persistent as it does not go away when you turn off your computer, unlike the computer’s software.³⁴ Virtual property is further interconnected as other people can interact with it.³⁵ The characteristics of virtual property will be discussed in further detail to provide a better understanding of these characteristics.

4.2.2 Characteristics of virtual property³⁶

4.2.2.1 Introduction

The following characteristics may be found in virtual property in mimicry of tangible property: Rivalry, Persistence, Interconnectivity, Secondary markets and Value added by users.

27 Blazer 2006 *Pierce Law Review* 137.

28 Blazer 2006 *Pierce Law Review Property* 141.

29 Hurter 2009 *CILJSA* 304.

30 Fairfield 2005 *BUL Rev* 1047-1102, *Erlank Property in Virtual Worlds* 255.

31 Fairfield 2005 *BUL Rev* 1047-1102, *Erlank Property in Virtual Worlds* 255.

32 Fairfield 2005 *BUL Rev* 1047-1053.

33 Fairfield 2005 *BUL Rev* 1049.

34 Fairfield 2005 *BUL Rev* 1049.

35 Fairfield 2005 *BUL Rev* 1050.

36 See generally: Fairfield 2005 *BUL Rev* 1047-1053; Blazer 2006 *Pierce Law Review* 142; Erlank *Property in Virtual Worlds* 272-285; Hurter 2009 *CILJSA* 303.

Fairfield claims that rivalrousness, persistence and interconnectivity are characteristics of virtual property that are shared with real-world property.³⁷ Virtual property needs all three characteristics to exist.³⁸ Blazer included two *indicia* in addition the three characteristic proposed by Fairfield to help determine if something is protectable as virtual property due to the economic value held by virtual property.³⁹ The two *indicia* are secondary markets and value added by users.⁴⁰ This definition is wider than the traditional Roman-Germanic private law approach to property, but narrower than the wider constitutional property concept.⁴¹ An example to explain the characteristics In terms of virtual property is a URL. An owner of a URL can exclude others people from posting content to that URL, as it is rivalrous.⁴² Only one website can exist at a given address.⁴³ Other people can interact with the content without violating the owner's interest in it.⁴⁴

4.2.2.2 Rivalry⁴⁵

Possession of a virtual property object is often limited to one person or a small number of persons.⁴⁶ Virtual property is therefore owned and controlled by one person or a small number of persons to the exclusion of others.⁴⁷ Exclusivity is a function of rivalrousness.⁴⁸ An example of rivalrous virtual property is an URL. Another example includes an email account as no two people can have the same email address.⁴⁹ The information will continue to be stored on the service provider's server, unless same is

37 Fairfield 2005 *BUL Rev* 1053.

38 Erlank *Property in Virtual Worlds* 274.

39 Blazer 2006 *Pierce Law Review* 142; Erlank *Property in Virtual Worlds* 274.

40 Blazer 2006 *Pierce Law Review* 142.

41 Erlank states that the characteristics proposed are sufficient to identify virtual property and that the two *indicia* will be helpful when it is difficult to make a decision in borderline cases. See Erlank *Property in Virtual Worlds* 273.

42 Fairfield 2005 *BUL Rev* 1055.

43 Fairfield 2005 *BUL Rev* 1055.

44 Fairfield 2005 *BUL Rev* 1055.

45 See generally: Fairfield 2005 *BUL Rev* 1049, 1053-1054; Blazer 2006 *Pierce Law Review* 137-161 at 142-143; Erlank *Property in Virtual Worlds* 275-277.

46 Fairfield 2005 *BUL Rev* 1049; Erlank *Property in Virtual Worlds* 275.

47 Fairfield 2005 *BUL Rev* 1049.

48 Fairfield 2005 *BUL Rev* 1049.

49 Fairfield 2005 *BUL Rev* 1055.

deleted by the owner.⁵⁰ People can communicate with the email address and therefore an email account is interconnected.⁵¹

Fairfield explains the rivalrousness of virtual property as follows:

We often desire the power to exclude in cyberspace too, and so we design that power into code. By design, we make code that can only be possessed by one person. Thus rivalrousness exists also in code. If one person controls rivalrous code, nobody else does.⁵²

Interest in non-rivalrous resources is protected by Intellectual property.⁵³ Erlank argues that the important determining factor seems to be the question of whether the virtual property is rivalrous or not. If the object is seen as virtual property and is non-rivalrous, then it would normally be part of and protected by intellectual property. If the object is rivalrous then it should be classified and protected as virtual property.⁵⁴

4.2.2.3 Persistence⁵⁵

Even though virtual property it is intangible, it is persistent.⁵⁶ Virtual property continues across user sessions even after logging off.⁵⁷ In some instances, the property exists for public view even when its owner is not logged into the virtual world. This functionality is seen in virtual worlds where other users can see a user's virtual house for example, even if the user is not logged on at that moment. Although the user and/or owner of the URL only logs onto the servers from time to time, the user relies on the persistent nature of the URL to store the information until this information is deleted. The developers have a responsibility to ensure the persistence of a virtual property is

50 Fairfield 2005 *BUL Rev* 1054-1055.

51 Fairfield 2005 *BUL Rev* 1054-1055.

52 Fairfield 2005 *BUL Rev* 1054.

53 Fairfield 2005 *BUL Rev* 1050.

54 Erlank *Property in Virtual Worlds* 264, 277

55 See generally: Fairfield 2005 *BUL Rev* 1047-1102; Blazer 2006 *Pierce Law Review* 137-161; Erlank *Property in Virtual Worlds* 272-285.

56 Blazer 2006 *Pierce Law Review* 144. Fairfield 2005 *BUL Rev* 1054.

57 Fairfield 2005 *BUL Rev* 1049.

maintained.⁵⁸ Developers have to ensure that they create and maintain the virtual world as well as the servers it is hosted on, in order to make the virtual world and the property in it persistent.⁵⁹ Users will not be willing to invest in the acquisition of the virtual property if it is not persistent and subsequently it would become valueless.⁶⁰

The nature of virtual property already differs from real-world property due to the fact that virtual property is almost never capable of existing without the co-operation of others.⁶¹ Examples of property that functions in a similar way can be found in the real world. In terms of patrimony that is held in a traditional bank account, the customer has to rely on his bank to ensure the persistence of his property.⁶² Although bank accounts are traditionally regarded as intangible property, bank accounts may be regarded as being one of the earliest forms of virtual property.⁶³

Persistence is also the inherent characteristic of traditional property.⁶⁴ This characteristic ensures that property is maintained while it is not being used. Blazer uses the example of a parked car that is left alone by its owner at the beginning of the day.⁶⁵ While the owner is away, the car does not vanish or cease to exist. The owner harbours a reasonable expectation that the car will still exist and be subject to his control upon returning later the day. Fairfield compares persistence to the example that after a statue has been sculpted and placed in a city square, it is expected that the statue will remain in that same place and continue to exist for hundreds of years.⁶⁶

58 Erlank *Property in Virtual Worlds* 275.

59 Erlank *Property in Virtual World* 275 fn 229.

60 Erlank *Property in Virtual Worlds* 278.

61 Erlank *Property in Virtual Worlds* 275 fn 230.

62 Erlank *Property in Virtual Worlds* 275 fn 230.

63 Fairfield 2005 *BUL Rev* 1057.

64 Blazer 2006 *Pierce Law Review* 144.

65 Blazer 2006 *Pierce Law Review* 144.

66 Fairfield 2005 *BUL Rev* 1054.

4.2.2.4 Interconnectivity⁶⁷

The third characteristic of virtual property is interconnectivity and this correlates with the virtual world requirement of interaction.⁶⁸ Virtual property has a presence in the virtual world as other people can interact with it and therefore may affect or be affected by other people and other objects.⁶⁹ Other people can interact with the content of URL without violating the owner's interest in it.⁷⁰ Interconnectivity enables multiple users to be online and simultaneously interact with the same virtual world and making use of the same common resources.⁷¹ Social interaction is one of the main features and requirements in a virtual world, as it ensures that the virtual world just does not become a normal single player game.⁷² Due to the network effects, interconnectivity is responsible for increasing the value of virtual property.⁷³ Subsequently persistence protects the investment by ensuring that it lasts for a long time.⁷⁴

4.2.2.5 Secondary markets⁷⁵

Secondary markets are one of the two *indicia* proposed by Blazer in addition to Fairfield's three characteristics as discussed above.

Wikipedia defines a secondary market as follows:

The secondary market, also known as the aftermarket, is the financial market where previously issued securities and financial instruments such as stock, bonds, options, and futures are bought and sold. The term secondary market is also used to refer to the market for any goods or

67 See generally: Fairfield 2005 *BUL Rev*1049; Blazer 2006 *Pierce Law Review* 142; Erlank *Property in Virtual Worlds* 280-281.

68 For a discussion on the virtual world requirement of interconnectivity refer to Erlank *Property in Virtual Worlds* 52-54.

69 Fairfield 2005 *BUL Rev* 1049.

70 Fairfield 2005 *BUL Rev* 1055.

71 Erlank *Property in Virtual Worlds* 280.

72 Erlank *Property in Virtual Worlds* 280.

73 Fairfield 2005 *BUL Rev* 1050.

74 Erlank *Property in Virtual Worlds* 281.

75 See generally: Blazer 2006 *Pierce Law Review* 137-161 at 146; Erlank *Property in Virtual Worlds* 281-283

assets, or an alternative use for an existing product or asset where the customer base is the second market (for example, corn has been traditionally used primarily for food production and foodstock, but a “second’ or ‘third’ market has developed for use in ethanol production).⁷⁶

According to Erlank based on the above definition if applied to virtual property, secondary markets will refer to the market and trade in virtual property that were never primarily intended to be traded in such a fashion.⁷⁷

Virtual property can be created, traded, bought, and sold. Users and businesses have become reliant on the existence of secondary markets.⁷⁸ Dependence on secondary markets is often individual players’ sole method of income and therefore they expect to have a protectable property interest in their virtual property.⁷⁹ Virtual property has a real-world value. Virtual world currency, accounts and items are traded in gray markets.

Wikipedia defines a gray market as follows:

A grey market (also spelled gray market), or parallel market, is the trade of a commodity through distribution channels which, while legal, are unofficial, unauthorized, or unintended by the original manufacturer. The most common type of grey market is the sale of imported goods (brought by small import companies or individuals not authorized by the manufacturer) which would otherwise be more expensive in the country they are being imported to. An example is drugs being imported into nearby wealthier nations where the drug manufacturer charges a higher price for a similar or equivalent product.⁸⁰

Castronova⁸¹ estimated that gross national product (GNP) of Everquest to be roughly \$135 million in 2001.⁸² The global secondary market turnover was estimated at 880 million dollars in 2005. World of Warcraft, Second Life and EVE, are developing their own independent economies with the help of their online communities, pushing beyond

76 Wikipedia contributors “Secondary Market” 2013 http://en.wikipedia.org/wiki/Secondary_market

77 Erlank *Property in virtual worlds* 282 fn 251.

78 Blazer 2006 *Pierce Law Review* 147, Erlank *Property in Virtual Worlds* 282.

79 Erlank *Property in Virtual Worlds* 282, 283.

80 Wikipedia contributors “Gray Market” 2013 http://en.wikipedia.org/wiki/Gray_market

81 Castronova *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*.

82 Castronova *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 32-33.

the boundaries of virtual video games into the world of hard monetary value. The existence of these marketplaces means that expert players and users can sell their virtual property for cash. Time spent “working” in the game can translate into real income, a practice known as “gold farming.”⁸³ World of Warcraft, with a population of over 10 million, has become infamous for gold farming. Demand for Warcraft’s virtual goods has given rise to sweatshop-like gold farms in developing countries like China, where labourers spend days in the game churning out virtual value for scant wages and their in-game earnings are sold at a profit to Western players.⁸⁴

Real money commerce in a virtual market has grown to become a multibillion dollar industry. In 2006 Anshe Chung, also known as Ailin Graef in real life, graced the cover of BusinessWeek as Second Life’s first real-world millionaire, which she earned from profits made entirely from the sale of virtual goods.⁸⁵

4.2.2.6 Value added by users⁸⁶

The last *indicium* proposed by Blazer is value added by users and is described by him as follows:

*Contributing to the value of an intangible resource should not automatically entitle the contributor to a property interest in the resource – just as spraying graffiti on a building should not automatically entitle the graffiti artist to a property interest in the building. Rather, where the nature of an interest in an intangible resource is such that its hold qualifies for legal protection, there is a high likelihood that the user has, at some point, added value to the resource. Simply put, a person is likely to improve and customize property that he believes belongs exclusively to himself and, by recognising and encouraging this activity, the law of property ultimately benefits all people. Thus, value-added-by-user indicates, rather than creates, protectable virtual property interest.*⁸⁷

83 Chayka 2013 <http://www.psmag.com/business-economics/the-real-value-of-virtual-economies-eve-world-of-warcraft-64593/>.

84 Lehdonvirta and Ernkvist 2011 “<http://www.infodev.org/publications> 9-21.

85 Hof “2006 *BusinessWeek*.

86 See generally: Blazer 2006 *Pierce Law Review* 142; Erlank *Property in Virtual Worlds* 283-285.

87 Blazer 2006 *Pierce Law Review* 148.

Users may enhance the value of virtual resources by customizing and improving the resource.⁸⁸ Users may assume that they have obtained an ownership interest in virtual property, because they have put in the effort to customize and improve the property.⁸⁹ The value of a resource varies according to a person's ability to use it for creating or experiencing some effect. Value is the most important factor that a court will take into consideration when deciding to afford virtual property interest property-like protection. The Labour theory⁹⁰ is a normative justification in the debate over ownership of virtual property, as users claiming property often justify their right to own and sell virtual property on the grounds that they have laboured to create it or to procure it and therefore increased the value.⁹¹

4.2.2.7 Conclusion

Rivalrousness, persistence and interconnectivity are characteristics that are shared with real-world property.⁹² The three characteristics and the two *indicia* can help the courts to determine if something is virtual property and whether there is a protectable interest in that virtual property. All three characteristics are necessary for virtual property to exist. The two *indicia*, secondary markets and value added by users, will help the courts in borderline cases to determine if virtual property should be afforded legal protection.

4.3 Current governance of virtual property⁹³

4.3.1 Introduction

Virtual property is classified under the heading of intellectual property as it is intangible and immaterial and therefore governed under the law of intellectual property.⁹⁴ Initial rights are allocated to intellectual property holders and subsequent rights are governed

88 Blazer 2006 *Pierce Law Review* 148.

89 Blazer 2006 *Pierce Law Review*, Erlank *Property in Virtual Worlds* 285.

90 This normative justification will be discussed briefly later in more detail.

91 Nelson 2010 *McGeorge Law Review* 289-293.

92 Fairfield 2005 *BUL Rev* 1053.

93 See Erlank *Property in Virtual Worlds* 98-115 for his discussion on EULA's and TOS.

94 Fairfield 2005 *BUL Rev* 1050, Blazer 2006 *Pierce Law Review* 142.

by licence agreements like EULA's, which contain a choice of law clause that designates US law as governing law where possible.⁹⁵ A number of qualities distinguish virtual property from intellectual property for example persistence, interconnectivity and rivalry.

Abrahamovitch⁹⁶ proposes three levels where property can possibly be identified within virtual worlds. At level one all virtual property is computer code and protected by copyright law.⁹⁷ Erlank argues that a player's account could also fit into this first level.⁹⁸ The protection in this instance is by means of the contractual agreement between the user and developer.⁹⁹ Copyright in virtual worlds can be separated into two levels. The first level is the basic virtual world environment that is located in the original software and is created by the platform owner.¹⁰⁰ The second level consists of user-created works that are either formed within or imported into the virtual world environment by the user.¹⁰¹ The second level of virtual property consists of identifiable objects or items inside the virtual world that resemble real-world items like avatars, swords, buildings etc.¹⁰² On the third and last level it is possible to identify in-game virtual property as intellectual property.¹⁰³

Current trademark owners who already have a vested interest and strong financial incentive to protect their brand names and goodwill are pursuing and protecting their own interests.¹⁰⁴ Every virtual world and games, for example Second Life and World of Warcraft expressly reserve any ownership right in the virtual items that are periodically created in the virtual world or game. EULAs state that the game developer and/or operator have exclusive control and ownership of the game and the virtual items therein

95 Fairfield 2005 *BUL Rev* 1050.

96 Abrahamovitch *Virtual Property in Virtual Worlds* 1-2. See also Erlank *Property in Virtual Worlds* 256.

97 Abrahamovitch *Virtual Property in Virtual Worlds* 1-2. See also Erlank *Property in Virtual Worlds* 256.

98 Erlank *Property in Virtual Worlds* 256.

99 Erlank *Property in Virtual Worlds* 256.

100 Dougherty and Lastowka *Copyright: Copyright Issues in Virtual Economies*.

101 Dougherty and Lastowka *Copyright: Copyright Issues in Virtual Economies*.

102 Abrahamovitch *Virtual Property in Virtual Worlds* 1-2. See also Erlank *Property in Virtual Worlds* 256.

103 Abrahamovitch *Virtual Property in Virtual Worlds* 1-2. See also Erlank *Property in Virtual Worlds* 256.

104 This is done by lobby groups and licensing contracts to prevent the acceptance of normal property rights and eliminating the surfacing of new virtual property rights by means of the use of a combination of EULAs and TOS See Fairfield *BUL Rev* 1050.

have no legal significance or status. This approach protects them from exposure to liability arising from disputes involving ownership of virtual property.

As almost no court and/or legislature in South Africa have recognized virtual property interest a combination of contract and intellectual property will currently control the relationship between internet users and services providers.¹⁰⁵ To emphasize how the contractual and intellectual property interests and virtual property rights are protected by developers and providers in virtual worlds and online games, the Terms of Service and End User Licence Agreements of World of Warcraft¹⁰⁶ and Second Life¹⁰⁷ will be investigated and discussed. Users need to justify their virtual property claims and therefore normative justifications to support the extension of property rights to virtual property will be discussed briefly, as well as other alternative justifications.

4.3.2 *Click-wrap agreements*¹⁰⁸

Game and virtual world developers and/or providers take steps to secure ownership of all property and intellectual property rights to users' creations in virtual worlds and games.¹⁰⁹ This is done by inserting provisions in their Terms of Service and End User Licence Agreements, to which users were required to consent in order to play the game or participate in the virtual world.¹¹⁰ These instruments are also referred to as click-wrap agreements and are similar to shrink-wrap agreements.¹¹¹ Click-wrap agreements require the user to manifest their consent by clicking an "ok" or "agree" button on a dialog box or pop-up window. Rejection is indicated by clicking "cancel", "I do not agree" or closing the window and the user will not be able to gain access to the product or service.

105 Duranske *Virtual Law* 141.

106 World of Warcraft 2013 <http://www.worldofwarcraft.co./legal/termsfuse.html>.; Erlank *Property in Virtual Worlds* 98-115

107 Second Life Terms of Service can be found at <http://secondlife.com/corporate/tos.php>; Erlank *Property in Virtual Worlds* 98-115.

108 Erlank *Property in Virtual Worlds* 98-115.

109 Duranske *Virtual Law* 141.

110 Duranske *Virtual Law* 141.

111 Pistorius 2004 *SA Merc LJ* 568-576.

A click-wrap agreement was defined in the case of, *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d. Cir. 2002) as follows:

A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labelled "Back" and used to return to an earlier step of the download preparation; one labelled "No," which if clicked, terminates the download; and one labelled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the software.

Both click-wrap and shrink-wrap agreements are examples of contracts of adhesion, because they force a user to accept the whole content of the contract.¹¹²

The concluding statement to World of Warcraft's EULA, for example states that

"I hereby acknowledge that I have read and understand the foregoing License Agreement and agree that by clicking „Accept“ or installing the Game. I am acknowledging my agreement to be bound by the terms and conditions of this License Agreement"¹¹³

With these agreements, the developers retain the right for themselves to unilaterally change the contents of the contracts. The only available remedy to a user is non-participation in the game and/or virtual world. The user is left with only two choices when confronted by the EULA or TOS, to both agree and accept all the terms of the contract, or refuse to progress with the installation of the client software, and as a result the user will not be able to access the game and/or virtual world. Under South African law these agreements seem to be an accepted method of expressing intent to enter into

112 Erlank *Property in Virtual Worlds* 98-115.

113 Blizzard "World of Warcraft - End User License Agreement" 2013 *World of Warcraft* at <http://www.worldofwarcraft.com/legal/eula.html>

a contract. Pistorius states Section 24(2) of *the Electronic Communications and Transactions Act 25 of 2002*, is construed as being designed to include the statutory acknowledgment of the click-wrap and web-wrap mechanisms for expressing intent, but it is open-ended and neutral.¹¹⁴

4.3.3 *World of Warcraft*

World of Warcraft was developed in 2004 and is currently the world's number one subscription-based multiplayer online role-playing game.¹¹⁵ In 2013 the expansion *World of Warcraft: Mists of Pandaria* sold approximately 2.7 million copies during the first week of its launch.¹¹⁶ The game currently has over 10 million subscribers.¹¹⁷ According to Blizzard a World of Warcraft subscriber is defined as meaning the following:

World of Warcraft subscribers include individuals who have paid a subscription fee or have an active prepaid card to play World of Warcraft, as well as those who have purchased the game and are within their free month of access. InternetGameRoom players who have accessed the game over the last thirty days are also counted as subscribers. The above definition excludes all players under free promotional subscriptions, expired or cancelled subscriptions, and expired prepaid cards. Subscribers in licensees' territories are defined along the same rules.¹¹⁸

The End User Licence Agreement denies any property including virtual property rights that could give rise to a user claim against a developer and/or provider.¹¹⁹ World of Warcraft is a good example of the above provisions. Blizzard Entertainment, which owns and operates World of Warcraft, includes the following in its End User Licence Agreement:

World of Warcraft – Ownership: All rights an title in and to the Program and the Service (including without limitation any user accounts, titles,

114 Pistorius 2009 12(1) *PELJ* 1-27 at 18.

115 Blizzard 2013 <http://eu.blizzard.com/en-gb/company/press/pressreleases.html?id=10055893>.

116 Blizzard 2013 <http://eu.blizzard.com/en-gb/company/press/pressreleases.html?id=10055893>.

117 Blizzard 2013 <http://eu.blizzard.com/en-gb/company/press/pressreleases.html?id=10055893>.

118 Blizzard 2013 <http://eu.blizzard.com/en-gb/company/press/pressreleases.html?id=10055893>.

119 Horowitz *Competing Lockean Claims to Virtual Property* 444.

computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, “applets” incorporated into the Program, transcripts of the chat rooms, character profile information, recordings of games played on the Program, and the Program client and server software) are owned by Blizzard or its licensors.¹²⁰

Users of World of Warcraft do not obtain any virtual property rights within this virtual world or outside the world that is directly related to the game play. Blizzard does not recognize these rights as seen below in their Terms of Services.

Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Program. You agree that you have no right or title in or to any such content, including the virtual goods or currency appearing or originating in the Game, or any other attributes associated with the Account or stored on the Service. Blizzard does not recognize any virtual property transfers executed outside of the Game or the purported sale, gift or trade in the “real world” of anything related to the Game. Accordingly, you may not sell items for “real” money or otherwise exchange items for value outside the Game.¹²¹

4.3.4 *Second Life*

In 2003 Linden Lab announced that it would recognize participants’ full intellectual property protection for the digital content they created or otherwise owned in Second Life.¹²² Consequently, Second Life avatars can buy, own and sell virtual property ranging from cars and homes.¹²³

Phillip Rosedale, the Chief Executive Officer of Linden Lab stated the following with regard to Linden Lab’s recognition of rights to virtual property in a press release made available on Second Life’s website in 2003:

120 World of Warcraft Terms of Use Agreement <http://www.worldofwarcraft.co./legal/termsfuse.html>

121 World of Warcraft, Terms of Use Agreement <http://www.worldofwarcraft.co./legal/termsfuse.html>

122 Important to take into consideration that this announcement was made before the case of *Bragg v. Linden Research, Inc.*, 487 F.Supp.2d 593 (E.D. Pa. 2007) where it was found that certain aspects of the Second Life click-wrap agreement were “unconscionable, and therefore unenforceable.”

123 Although users purchase virtual property using the virtual currency of “lindens”, lindens are bought and sold for real US dollars.

Until now, any content created by users for persistent state worlds, such as Everquest or Star Wars Galaxies, has essentially become the property of the company developing and hosting the world. We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.

Currently Second Life formally recognizes user's intellectual property rights, but makes it clear that users do not retain any property rights in the objects on Second Life, regardless of intellectual property rights users may have in content they create.

You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation and data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.¹²⁴

The intellectual property right clause in Second Life states the following:

You retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and other users of Second Life.¹²⁵

Based on the above clause, Linden Lab is only granted the right to delete the content and use the content in testing, maintenance and advertising.

The patent clause in Second Life's Terms of Services reads as follows:

You also understand and agree that by submitting your Content to any area of the Service, you automatically grant (or warrant that the owner of such Content has expressly granted) to Linden Lab and to all other users of the Service a non-exclusive, worldwide, fully paid-up, transferable, irrevocable, royalty-free and perpetual License, under any and all patent rights you may have or obtain with respect to your Content, to use your

124 Second Life, Terms of Service <http://secondlife.com/corporate/tos.php>.

125 Second Life, Terms of Service <http://secondlife.com/corporate/tos.php>.

content for all purposes within the Service. You further agree that you will not make any claim against Linden Lab or against others users of the Service based on any allegations that any activities by either of the foregoing within the Service infringe your (or anyone else's) patent rights.¹²⁶

In terms of the TOS of Second Life it is clear that Linden Lab retains ownership of a user's account and related data, regardless of intellectual property rights users may have in content they create. Based on the first provision of the patent clause a user agrees that Linden Lab, as well as every user of Second Life, gets an automatic licence to any patent that the user is granted on any inventions within this virtual world.¹²⁷ The second provision stated that a user agrees that by signing on to Second Life, they cannot sue any other user, or Linden Lab, for infringing any of their patent rights for activity that takes place within this world.¹²⁸ Users must agree to these provisions as stated above in order to log in to Second Life.

3.3.5 Conclusion

From the analysis above it is clear developers create only a contractual relationship between itself and users of virtual world and/or accounts. The right of the user to use the game is defined as a "limited, non-exclusive licence to use the property". Users do have personal property interests in a virtual world.¹²⁹ The question is whether these contractual rights are recognised by the law and therefore provided property-like protection to these interests.¹³⁰ This question is important for the possible recognition of virtual property, seeing as the question whether virtual property relations are based on contractual rights or on property rights are directly influenced by the restrictions in terms of the EULA in the real world.

126 Second Life, Terms of Service <http://secondlife.com/corpotate/tos.php>.

127 Duranske *Virtual Law* 144.

128 Duranske *Virtual Law* 145.

129 Similar to such personal property interests as short-term leases and time-sharing rights based on shareblocks: Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 48; 83; 430-435; 494; Pienaar *Sectional Titles* 287; 411-416, Erlank *Property in Virtual Worlds* 98-115.1;

130 For example, the *huurgaatvoorkoop* rule for short-term lease and legislation for shareblocks schemes. Pienaar GJ *Sectional Titles* (2010) 287; Badenhorst, Pienaar and Mostert *Silberberg & Schoeman's The Law of Property* 83-85; 431-435; 494; Erlank *Property in Virtual Worlds* 98-115

4.4 *Justification for recognition of virtual property*

4.4.1 *Introduction*

Users need to justify their virtual property claims.¹³¹ When users wish to claim property rights against virtual world developers, one must consider normative justifications for user property when deciding whether to ignore the terms of an EULA. Lastowka and Hunter¹³² attempt to find a justification for virtual property by making use the most popular normative accounts of property. These three normative theories are the Lockean labour theory,¹³³ the utilitarian theory of Bentham,¹³⁴ and the personality theory based on Hegel.¹³⁵

Legal academics have debated on the justification to support the extension of property rights to virtual property.¹³⁶ The three normative theories will be briefly discussed to indicate that they support a qualified conclusion that virtual objects claimed as property are property in reality. Alternative justification is based on the desire to protect virtual property due to the real-world value.¹³⁷ Another justification is based on the idea that extending property rights to virtual resources will enable the creation of efficient markets for these resources, allowing beneficial development.¹³⁸ Fairfield argues that if we do not have a good theory of virtual property it will be poorly used.¹³⁹

131 Horowitz *Competing Lockean Claims to Virtual Property* 445.

132 Lastowka and Hunter 2004 *CLR* 1-74; Erlank *Property in Virtual Worlds* 141-180.

133 Locke *Two Treatises of Government* (1690, Laslett P ed 1988); Lastowka and Hunter 2004 *CLR* 1-74; Erlank *Property in Virtual Worlds* 141-180.

134 Bentham *An Introduction to the Principles of Morals and Legislation* (1789, Burns JH & Hart HLA); Lastowka and Hunter 2004 *CLR* 1-74; Erlank *Property in Virtual Worlds* 141-180.

135 Hegel *Hegel's Philosophy of Right* (1896, Knox TM Trans 1967); Lastowka and Hunter 2004 *CLR* 1-74; Erlank *Property in Virtual Worlds* 141-180.

136 See in general: Fairfield 2005 *BUL Rev* 1047-1102; Lastowka and Hunter 2004 *CLR* 1-74; Nelson 2010 *McGeorge Law Review* 1-33; Erlank *Property in Virtual Worlds* 141-181.

137 Nelson 2010 *McGeorge Law Review* 41.

138 Nelson 2010 *McGeorge Law Review* 41.

139 Fairfield 2005 *BUL Rev* 1081.

4.4.2 Labour Theory Justification¹⁴⁰

This theory is based on the idea that users should gain rights in virtual property they spend time, money and effort developing. The virtual property gains value through the expense of this labour. The Lockean Labour theory is used to justify the extension of property rights between users and developers.¹⁴¹ Developers' labour-based claims to their worlds severely limit user property rights.¹⁴²

When developers labour to produce virtual products, they have a greater initial labour based claim to ownership of such products.¹⁴³ A developer's virtual property right can be transferred to users, but not where the developers intend to retain its right.¹⁴⁴ As mentioned before Second Life formally recognizes user's intellectual property right, but makes it clear that users no retain any property rights in the objects on Second Life, regardless of intellectual property rights user's may have in content they create.

Nelson proposes reasons why it could not be reasonable to extend property rights to virtual property based on this theory as virtual property resources for example in an online game do not exist in a state of nature.¹⁴⁵ Users do not "produce" the products they claim as property when they earn them through battles with virtual beasts or purchase them through trade with virtual shopkeepers.¹⁴⁶ In this instance the property has already been plucked from nature, laboured upon by the game's developer and offered to the users for consumption.

140 See in general: Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

141 Horowitz *Competing Lockean Claims to Virtual Property* 443-457; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

142 Horowitz *Competing Lockean Claims to Virtual Property* 445; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

143 Horowitz *Competing Lockean Claims to Virtual Property* 453; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

144 Horowitz *Competing Lockean Claims to Virtual Property* 444; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

145 Nelson 2010 *McGeorge Law Review* 1-33; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

146 Horowitz *Competing Lockean Claims to Virtual Property* 453; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 141-181.

If users wish to use this to establish strong competing interests to virtual property in an attempt to convince courts to ignore the terms of a EULA, they will have to explain how users come to obtain a greater right, when developers have explicitly retained an initial property right.¹⁴⁷ Just because property rights are restricted by means of contract does not automatically mean that a user does not have any property-like protection. Property interests can be protected by personal rights deriving from contract, for instance if the real world law recognises the importance of these interests and provides property-like protection for them.¹⁴⁸ On conclusion a user can have rights in virtual property, beyond the contractual rights acquired from the EULA.¹⁴⁹

4.4.3 *Utilitarian theory*¹⁵⁰

The second theory is based on utilitarian justification for real world property rights in the virtual world, based on the economic importance that virtual property has on the felicific calculus.¹⁵¹ When applied to property law, utilitarianism is used to provide a general justification on the basis that private property interests should be granted to someone (or something) if the overall effect of the granting will be that the overall utility or social welfare will be increased by it.¹⁵²

This is qualified as applicable only to certain items, since the creation of most virtual-world assets seems to have almost no benefit for society on an individual basis.¹⁵³ As example they compare a ground-breaking novel to the creation of an avatar.¹⁵⁴ The value on an individual basis is increased if viewed on a large-scale perspective, bearing in mind the amount of capital that is traded within virtual worlds.¹⁵⁵ Because of this high value for the individual as well as the collective economic value of all the individual

147 Horowitz *Competing Lockean Claims to Virtual Property* 453.

148 Erlank *Property in Virtual Worlds* 115-116.

149 Erlank *Property in Virtual Worlds* 115-116.

150 See generally: Bentham *An Introduction to the Principles of Morals and Legislation* (1789, Burns JH & Hart HLA; Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 157-165.

151 Lastowka and Hunter 2004 *CLR* 45; Erlank *Property in Virtual Worlds* 160.

152 Lastowka and Hunter 2004 *CLR* 44; Erlank *Property in Virtual Worlds* 159.

153 Lastowka and Hunter 2004 *CLR* 45; Erlank *Property in Virtual Worlds* 161.

154 Lastowka and Hunter 2004 *CLR* 45; Erlank *Property in Virtual Worlds* 161.

155 Erlank *Property in Virtual Worlds* 161.

items placed together, there are utilitarian grounds for granting property rights in those items.¹⁵⁶

Lastowka and Hunter describe this effect as follows:

From the utilitarian perspective, a societal good is composed simply of aggregate individual goods. Since millions of people labour to create objects of value in virtual worlds, there are utilitarian grounds for granting property rights based on the value of the transactions to the individual users. Even on this narrow view of the social utility of avatars and virtual assets, utilitarianism provides adequate justification for considering these artefacts property. Indeed, virtual property might be analogised to patents, the majority of which, overwhelming evidence shows, are worthless to society.¹⁵⁷

Lastowka and Hunter raises two objections to the granting of property rights based on the application of utilitarianism to virtual world property.¹⁵⁸ The first objection is regarding the application of utilitarianism to the field of intellectual property law.¹⁵⁹ This objection does not really affect the claim of property rights in virtual items, but is rather an indication that virtual property rights might need to be limited in the same way as intellectual property rights.¹⁶⁰ The second objection is that the effect of granting virtual property rights to individual users could be that the welfare of other virtual world participants and the developers will be reduced.¹⁶¹ Lastowka and Hunter state that this objection is misplaced and one should realise that the utilitarian theory is used as justification for the creation and not the allocation of property interests.¹⁶²

156 Lastowka and Hunter 2004 *CLR* 45.

157 Lastowka and Hunter 2004 *CLR* 45.

158 Lastowka and Hunter 2004 *CLR* 45.

159 Lastowka and Hunter 2004 *CLR* 45.

160 For example limitations might be placed on the time, subject matter or scope of the virtual property rights. See Lastowka and Hunter 2004 *CLR* 45.

161 Lastowka and Hunter 2004 *CLR* 45, 50.

162 Lastowka and Hunter 2004 *CLR* 45, 50.

4.4.4 Personality theory¹⁶³

Hegel is of the opinion that property should be seen as an extension of one's personality.¹⁶⁴ This theory is based on the fact that property rights are related to human rights such as liberty, identity and privacy.¹⁶⁵ Radin describes the personality theory as the idea that property rights are linked to personhood and identity.¹⁶⁶ Property rights are justified when objects are inseparably bound up with the personality and liberty of their owner.¹⁶⁷

Property can either be personal or fungible.¹⁶⁸ Due to the subjective sentimental value of something for a specific person, there should be a property interest in that thing.¹⁶⁹ Personality theory determines that property rights should be recognised in order to fulfil the need for self-realisation and other human needs, even in the absence of any other normative justifications for the existence of property rights in such items.¹⁷⁰ Examples include wedding rings, homes and body parts, and will also include virtual homes and wedding rings.¹⁷¹ If something is not regarded as personal property it is fungible property, and this type of property is replaceable.¹⁷² The test to determine whether things are fungible or personal is whether the things and the rights in it have become bound up with the individual.¹⁷³ Things are non-fungible when they are individually determined and have unique characteristics or value, and are therefore considered irreplaceable for example original paintings.¹⁷⁴ Fungible things are defined by reference

163 See in generally: Hegel *Hegel's Philosophy of Right* (1896, Knox TM Trans 1967); Radin *Property and Personhood* 957-1015; Lastowka and Hunter 2004 *CLR* 1-74, Erlank *Property in Virtual Worlds* 165-180; Erlank *Property in Virtual Worlds* 165-180.

164 Hegel *Hegel's Philosophy of Right* (1896, Knox TM Trans 1967).

165 Lastowka and Hunter 2004 *CLR* 48.

166 Radin *Property and Personhood* 957; Erlank *Property in Virtual Worlds* 168.

167 Radin *Property and Personhood* 798; Erlank *Property in Virtual Worlds* 168.

168 Radin *Property and Personhood* 959; Erlank *Property in Virtual Worlds* 168.

169 Radin *Property and Personhood* 959-960; Erlank *Property in Virtual Worlds* 168.

170 Lastowka and Hunter 2004 *CLR* 48; Erlank *Property in Virtual Worlds* 168.

171 Erlank *Property in Virtual Worlds* 168.

172 Radin *Property and Personhood* 960; Erlank *Property in Virtual Worlds* 168.

173 Radin *Property and Personhood* 959; Erlank *Property in Virtual Worlds* 169.

174 Kleyn and Boraine *Silberberg & Schoeman: The Law of Property* 38; Erlank *Property in Virtual Worlds* 249.

to weight, measure or number for example 50 kg fertilizer. Fungible things can be replaced by any other similar thing.¹⁷⁵

This theory is very useful for the application in the field of virtual property as no distinction is made between virtual property and real world property.¹⁷⁶ A person can feel as connected to their virtual property as they are to their real-world property.¹⁷⁷ If virtual property is protected as property the purchase and sales of virtual property will be legitimate transactions, contracts for such sales will be legal, valid and binding.¹⁷⁸ Therefore users have a right to legal recourse in the event that their virtual property is stolen, converted or otherwise misappropriated.¹⁷⁹

Unfortunately, treating virtual goods as personal property would not address the problems as personal property may be subject to restricted alienability.¹⁸⁰ The issue of real money trade will fall away if these items are determined to be inalienable.¹⁸¹ Property rights of developers would be fungible and the users' right will be favoured to enjoy more protection.¹⁸² Other reasons include the decrease or elimination of the value of virtual goods due to alteration of the difficulty of acquisition through modifications in the game play or duplication of virtual items by game operators; modification or deletion of virtual items by other operators; illegitimate duplication of virtual items by means of third party exploitations of errors or weaknesses in the games' source code; the third party use of computer programs that automatically play online games to acquire virtual items; game operators suspending or terminating user accounts as a result of violations of the terms of service (such as abusive or obscene communications); and game operators shutting down or otherwise ceasing to support games due to declining player

175 Van der Merwe *Sakereg* 43; Van der Merwe and De Waal *The Law of Things and Servitudes* 22.

176 Erlank *Property in Virtual Worlds* 172.

177 Erlank *Property in Virtual Worlds* 172.

178 Herzfeld 2012 <http://www.forbes.com/sites/oliverherzfeld/2012/12/04/what-is-the-legal-status-of-virtual-goods/>.

179 Herzfeld 2012 <http://www.forbes.com/sites/oliverherzfeld/2012/12/04/what-is-the-legal-status-of-virtual-goods/>.

180 Bartle *Pitfalls of Virtual Property* 9; Erlank *Property in Virtual Worlds* 175.

181 Erlank *Property in Virtual Worlds* 177.

182 Erlank *Property in Virtual Worlds* 176.

participation and/or revenues, insolvency or sale of the operators, or any other reason.¹⁸³

4.4.5 *Alternative Justifications*

Nelson justifies the acceptance of virtual property by using the Lockean Labour theory, theft protection and deterrence and market efficiency.¹⁸⁴ Fairfield's argument for the reason for protection of virtual property rights is due to the need to protect users of virtual property from the theft of their virtual property objects from third parties, both inside and outside the virtual world.¹⁸⁵ Users need property rights in virtual worlds or resources in order to protect themselves against others who illegally gain access of their virtual property.¹⁸⁶ This argument for this justification is that if virtual property rights are backed up by property law, law enforcement and the courts will have to take the theft of virtual property more seriously.¹⁸⁷ Users will therefore be provided with remedies that can be enforced against third parties.¹⁸⁸

Alternative justification is based on the desire to protect virtual property due to the real-world value.¹⁸⁹ Another justification is based on the ideas that extending property rights to virtual resources will enable the creation of efficient markets for these resources, allowing beneficial development.¹⁹⁰ Fairfield argues that if we do not have a good theory of virtual property it will be poorly used.¹⁹¹ He further argues that this good theory of virtual property is also important for the future development of the internet.¹⁹²

183 Herzfeld 2012 <http://www.forbes.com/sites/oliverherzfeld/2012/12/04/what-is-the-legal-status-of-virtual-goods/>.

184 Nelson 2010 *McGeorge Law Review* 1-33.

185 Fairfield 2005 *BUL Rev* 1047-1102.

186 Nelson 2010 *McGeorge Law Review* 1-33.

187 Nelson 2010 *McGeorge Law Review* 41.

188 Nelson 2010 *McGeorge Law Review* 41.

189 Nelson 2010 *McGeorge Law Review* 41.

190 Nelson 2010 *McGeorge Law Review* 41.

191 Fairfield 2005 *BUL Rev* 1081.

192 Fairfield 2005 *BUL Rev* 1081.

4.4.6 Conclusion

Lastowka and Hunter concluded the following after investigating the three normative theories of property mentioned above:

The three main normative theories of property, then, all provide strong normative grounds for recognizing that property rights should inhere in virtual assets, whether chattels, realty, or avatars. Depending on the theory one adopts, the limitations on rights in virtual property may be uncertain. Nonetheless, our conclusion is that there seems to be no reason under traditional theories of property to exclude virtual properties from legal protection. Further, based on the earlier discussion, we can conclude that there is no descriptive disconnection between our real-world property system and virtual assets. From both descriptive and normative positions, owners of virtual assets do, or should possess property rights.¹⁹³

Just because property rights are restricted by means of contract does not automatically mean that a user does not have any property-like protection. Property interests can be protected by personal rights deriving from contract, for instance if the real-world law recognises the importance of these interests and provides property-like protection for them, generally by means of consumer-type legislation.¹⁹⁴ A user can have rights in virtual property, beyond the contractual rights acquired from the EULA.

The arguments for the recognition of virtual property support a qualified conclusion that virtual objects claimed as property are property in reality. As within the real-world, the normative theories have limits and justifications and relying on them will depend on the purpose of recognition in each case.¹⁹⁵

193 Lastowka and Hunter 2004 *CLR* 73.

194 Erlank *Property in Virtual Worlds* 115-116.

195 Erlank *Property in Virtual Worlds* 181.

4.5 Characteristics of virtual property compared to real-world property characteristics¹⁹⁶

4.5.1 Introduction

It is useful to compare the characteristics of virtual property with those of corporeal property or things to see where the differences and similarities lie. This comparison is further important to establish the justification for recognition. These shared characteristics constitute the reason why virtual property may be protected as property in the constitution. It is important to take into consideration that virtual property is designed to behave like and have the same qualities of physical real-world property.¹⁹⁷

4.5.2 (In) corporeality¹⁹⁸

Erlank states that when he applies the characteristics of corporeality to virtual world things he defines them as (in)corporeal due to the fact that they are not regarded as corporeal in terms of real-world physics, but they are regarded as being corporeal or tangible by virtual world players.¹⁹⁹ This conclusion by Erlank is based on the crossing of the conceptual barrier and due to technological advances. Based on the requirement of corporeality for things, virtual property will be classified as an incorporeal thing that is recognised as property as an exception to the rule. The easiest way to create this exception is by creating legislation. As seen elsewhere in this dissertation other incorporeal things have already been recognised as property in South African law.²⁰⁰

196 Erlank *Property in Virtual Worlds* 286-293.

197 Hurter 2009 *Comparative and International Law Journal of Southern Africa* 304.

198 Erlank *Property in Virtual Worlds* 287-288.

199 Erlank *Property in Virtual Worlds* 287.

200 This includes shares, patent rights, trademark rights, copyright, and the rights of performing artists, contractual money claims, debts and so forth.

4.5.2 *Externality*²⁰¹

This requirement is to exclude humans and human body parts from being objects. In a virtual world a user is represented by his avatar. This avatar is regarded as an object of a property right.²⁰² Because avatars are not humans, the characteristic of externality is not an issue for the recognition of virtual property in the real world.²⁰³

4.5.3 *Independence*²⁰⁴

Independence is given by the code that separates and rebuilds the individual bits of code into recognisable and manageable entities. Once the data is transferred from the storage server and created into identifiable things on the screen, the independence of the virtual item is attained.²⁰⁵

4.5.4 *Appropriability*²⁰⁶

Virtual things are controlled by the computer. The software enables the user to manipulate his avatar and virtual items in the same way as would be possible in the real world. Virtual items are explicitly designed to be appropriable and susceptible to control by avatars.²⁰⁷

4.5.5 *Use and value*²⁰⁸

According to Erlank the virtual objects that are not susceptible to avatar or user control would not be regarded as having the characteristic of use and value.²⁰⁹ This is based on

201 Erlank *Property in Virtual Worlds* 288-289.

202 Erlank *Property in Virtual Worlds* 288.

203 Erlank *Property in Virtual Worlds* 289.

204 Erlank *Property in Virtual Worlds* 290.

205 Erlank *Property in Virtual Worlds* 290.

206 Erlank *Property in Virtual Worlds* 290-291.

207 Erlank *Property in Virtual Worlds* 290.

208 Erlank *Property in Virtual Worlds* 291-292.

209 Erlank *Property in Virtual Worlds* 291.

the fact that in the real world a virtual thing should also be a thing that could be subject to human control. The characteristic of being of value is the most important for the court to take into consideration when deciding to afford a virtual property interest with protection or not. Virtual property has an inherent economic value or has accrued value for its holder. In certain circumstances labour and money were invested in the creation of these interests. Sentimental value is also recognised in virtual property. As mentioned before the most important reason for protection of virtual property is due to the value of virtual property.

4.5.6 Conclusion

Virtual things seem to have many similar characteristics to those of real-world things. The characteristics of corporeality and externality have to be applied differently to virtual things than to real-world things. As proposed by Erlank these differences will not be a problem for protection of virtual property as property.²¹⁰ Incorporeality is not a problem due to the fact that real-world property law already recognises certain exceptions to this requirement.²¹¹ Avatars are not seen as humans and therefore externality will not be a problem for recognition of virtual things as property.

4.6 *Legal status of virtual property in other jurisdictions*²¹²

4.6.1 Introduction

The development in case law on the aspect of virtual property will be discussed. Reported cases in China, Taiwan, Netherlands, South Korea, New Zealand and Canada will be investigated. From the discussion of the cases it becomes clear that virtual property is mostly protected in terms of criminal law. Most of the reasons provided by

210 Erlank *Property in Virtual Worlds* 291-292.

211 This include shares, patent rights, trademark rights, copyright, and the rights of performing artists, contractual money claims, and debts.

212 Erlank *Property in Virtual Worlds* 90-98.

the court for protection of virtual property are due to the economic and sentimental value that virtual property holds for an owner of a virtual property object.

4.6.2 *China*²¹³

Several Chinese cases have recognised virtual property rights.²¹⁴ As illustrated in the cases below it is clear that Chinese courts focus on the fact that virtual property has value and that virtual property is transferable between players and/or users as a reason to justify protection.²¹⁵

In *Li Hongchen v. Beijing Artic Ice Technology Development Co.* the court ruled that the virtual-world developer (defendant) was required to restore a player's virtual property to him after it had been stolen by a third party due to hacking of the player's account. The court found the developers responsible for the loss suffered due to the security loopholes in their software that enabled the hackers to steal the property.²¹⁶ This case is significant because although the court used principles of contract law in reaching its decision, its reasons for doing so were to protect a distinct property right. The right of the owner protected was the right of the owner to control the property against the world, not merely as against the party who committed a wrongful action.

In circumstances where the criminal behaviour extends past the virtual and into the real world, it is clear that the criminal law can apply. This is illustrated in the case of Qui Chengwei, who was a player in the virtual world of Legend of Mir II.²¹⁷ He had earned a particularly rare weapon, a Dragon Sabre, in an online quest. He loaned this weapon to another man, Zhu Caoyuan, who without his permission sold the weapon.²¹⁸ When the assistance of the police was called, he was told that the theft was not a crime, since

213 Erlank *Property in Virtual Worlds* 91-93.

214 Erlank *Property in Virtual Worlds* 91-93.

215 Erlank *Property in Virtual Worlds* 91-93.

216 Ma 2009 *Online Games and Virtual Property*; Erlank *Property in Virtual Worlds* 91-93

217 BBC News 2005 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm>; Erlank *Property in Virtual Worlds* 91-93.

218 BBC News 2005 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm>.

virtual property is not regarded as a protectable asset under the then current law.²¹⁹ Chengwei attacked the alleged thief at his residence, stabbing the 26-year-old Caoyuan several times and killing him.²²⁰ Chengwei was sentenced to death for a real murder, however the sentence was commuted to life in prison.²²¹ The case is important in the area of virtual theft as it illustrates one of the ways in which theft can occur inside a virtual world. The other significant impact of this case is that it focused both political and public attention on the matter of legal protection of virtual property.

In the case of *Chen Xiao Fan*, Chen was an employee of a virtual world developer and worked on the game of *Westward Journey Online II*. He used his position to steal virtual items from accounts, which he subsequently sold to other players for a profit. He was found guilty of the theft of goods. The virtual items were tangible goods because of the nature. This case is important because the court highlighted the fact that virtual property has value and that it is transferable between parties.

In light of this general increase in the occurrence of virtual property theft in China, the country's Public Security Ministry published an advisory letter regarding virtual property theft in order to assist police with punishing such crimes.²²²

4.6.3 Taiwan

The legal status of virtual property is dealt with under the Taiwanese Criminal Code, in which virtual objects are considered property if they possess characteristics such as rivalrousness, are alienable and are transferable.²²³

219 BBC News 2005 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm>; Erlank *Property in Virtual Worlds* 91-93.

220 BBC News 2005 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm>; Erlank *Property in Virtual Worlds* 91-93.

221 BBC News 2005 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/4397159.stm>; Erlank *Property in Virtual Worlds* 91-93.

222 Abramovitch and Cummings "Virtual Property, Real law: The Regulation of Property in Video Games (2007) 6:2 *CJLT* 73 at 78.

223 Fairfield 2005 *BUL Rev* 1086.

The Taiwanese Ministry of Justice declared on 23 November 2001, that “virtual objects are property, ... [and] that actions on such objects or accounts sound in property, ...[including] theft of such property [are] fully punishable under criminal law.”²²⁴

Taiwan has developed an extensive jurisprudence, numbering in the hundreds of cases, involving the protection of personal virtual property through the use of such offences as criminal theft, fraud, and robbery offences.²²⁵

The account and valuables of Online games are stored as electromagnetic records in the game server. The owner of the account is entitled to control the account and valuables’ electromagnetic record, to freely sell or transfer it. Although the above accounts and valuables are virtual, they are valuable property in the real world. The players can auction or transfer them online. The accounts and valuables are the same as the property in the real world. Therefore there is no reason not to take the [virtual property] to be the subject to be protected by the larceny or fraud in criminal law.²²⁶

Taiwan determined that virtual property qualifies as electromagnetic records and should be considered movable property in cases of fraud and theft carrying a maximum sentence of up to three years’ imprisonment.²²⁷

4.6.4 Netherlands²²⁸

On 31st January 2012, the Supreme Court of the Netherlands found that items in the online game RuneScape had been stolen from a player. The case dates back to 2007 when two teenagers used physical force and threatened a 13-year-old boy to log into his Runescape account, in order to hand over his virtual mask and amulet.²²⁹ The court found the teenagers guilty of theft.²³⁰

224 Fairfield2005 *BUL Rev* 1086.

225 Fairfield 2005 *BUL Rev* 1087.

226 Taiwan Ministry of Justice Official Notation no 039030 (90) as cited in Fairfield 2005 *BUL Rev* 1086.

227 Abramovitch and Cummings *CJLT* 78.

228 Erlank *Property in Virtual Worlds* 95-97.

229 Rechtbank (District Court) Leeuwarden 21 October 2008, LJN BG0939; Erlank *Property in Virtual Worlds* 95-97.

230 Kuchera 2008 0<http://arstechnica.com/gaming/news/2008/10/dutch-court-imposes-real-worldpunishment-for-virtual-theft.ars>>; Erlank *Property in Virtual Worlds* 95-97.

The court held that:

A [user] has the factual and exclusive power over the items in his possession. Only the victim could, after logging into Runescape, use the amulet and mask. Because of the theft he no longer has exclusive actual power. The fact that the game Runescape has an owner and/or producer is not relevant. For instance, the owner of a passport is the state, but this passport can be stolen from the citizen to which this passport belongs. ... that as a consequence of the digitalisation of our society a virtual reality cannot in all respects be considered as pure illusion, that would exclude committing of criminal acts.²³¹

The important aspect of this case is that the court ruled that virtual items have value due to the effort and time invested in obtaining them. The court made reference to cases of electricity theft which is a similar intangible good but certainly has properties of power and control, and consequently can be stolen.

The second case involved a group of teenagers charged with theft of virtual furniture from the virtual world Habbo Hotel (now Habbo).²³² The teenagers used a “phishing” scam to obtain users’ passwords and then proceeded to access their accounts and transfer virtual furniture to their own accounts and their own virtual rooms. Because transfer and control of valuable (virtual) items was established the judge concluded that theft had occurred and three of the teenagers were convicted.²³³

4.6.5 South Korea²³⁴

South Korean law dictates that online virtual property holds value independent of the game developer and that there is no fundamental difference between virtual property and money deposited in the bank.²³⁵ The number of virtual property offences has risen

231 Rechtbank (District Court) Leeuwarden 21 October 2008, LJN BG0939; Erlank *Property in Virtual Worlds* 95-97.

232 Rechtbank (District Court) Amsterdam 2 April 2009, LJN BH9789, BH9790, and BH9791; Erlank *Property in Virtual Worlds* 95-97.

233 BBC News 2010 www.bbc.co.uk/news/10207486; Erlank *Property in Virtual Worlds* 95-97.

234 Erlank *Property in Virtual Worlds* 94.

235 Meland 2006 <http://www.law360.com/articles/5280/can-virtual-property-gain-legal-protection>.

from 675 in 2000 to 10,187 in 2003.²³⁶ This continues to rise with South Korean police receiving 22,000 cybercrime complaints related to virtual property theft in 2004.²³⁷

4.6.6 *New Zealand*

In New Zealand, theft of virtual property is probably actionable under the Crimes Act since the 2003 amendment, when the definition of property in relation to theft was amended to include intangible items.²³⁸

In *Police v Davies*, New Zealand courts have already confirmed that a contract which gives access or use to cyberspace is, at the very least, a right or interest in that intangible property.²³⁹ Davies was convicted of the theft of Internet access by downloading pornography and music from an Internet connection at his place of work. On appeal the High Court confirmed that the contractual arrangement giving access and use of the Internet created a property interest satisfying the definition in the Crimes Act. The Court suggested that Internet usage being the transmission of digital data was also a “thing in action” further confirming property rights in the virtual domain.²⁴⁰

The application of the above case can be used in terms of a EULA and subscription which gives the user an interest in their virtual property. Even if EULA and subscription were not a “thing in action” it would at the very least create an interest in the virtual property.

236 Leong 2006 www.rodyk.com/page/Resources/article/59; Erlank *Property in Virtual Worlds* 94.

237 Leong 2006 www.rodyk.com/page/Resources/article/59; Erlank *Property in Virtual Worlds* 94.

238 Property in Terms of the *Crimes Act* 1961 in New Zealand now includes: real and personal property, and any estate or interest in any real or personal property,[money, electricity,] and any debt, and any thing in action, and any other right or interest.

239 *New Zealand Police v Daniel Davies* [2007] DCR 147 at 150.

240 *Davies v Police* (2007) 23 CRNZ 818 at [32-34].

4.6.7 Canada

In the case of *Tucows.Com Co v Lojas Renner S.A.* [2011] O.J. No. 3557, the Ontario Court of Appeal recognized that virtual items attracted property rights and were property for the purposes of determining where a lawsuit about a domain name ought to occur.

4.7 Conclusion

Based on the discussion in this chapter it is clear that virtual property does exist and holds real-world value. The purpose of this chapter was to define the concept of virtual property and investigate the characteristics to enable the court to identify virtual property. The characteristics of virtual property will be discussed in further detail to provide a better understanding of these characteristics. Rivalrousness, persistence and interconnectivity are characteristics that are shared with real-world property. The three characteristics and the two *indicia* can help the courts to determine if something is virtual property and whether there is a protectable interest in that virtual property. All three characteristics are necessary for virtual property to exist. The two *indicia*, secondary markets and value added by users, will help the courts in borderline cases to determine if virtual property should be afforded legal protection.

The characteristics of things including corporeality, impersonal nature, independence, appropriability, and use and value were compared with the characteristics of virtual property. Virtual property is designed to behave like and have the same qualities of physical real-world property. The characteristics of corporeality and externality have to be applied differently to virtual things than to real-world things. These differences are not a problem for protection of virtual property as property. Incorporeality is not a problem due to the fact the real-world property law already recognises certain exceptions to this requirement. Avatars are not seen as humans and therefore externality will not be a problem for recognition of virtual things as property.

This chapter also briefly examined the various arguments and normative justifications for considering virtual property as a new class of property. The three normative theories that were discussed are the Lockean labour theory, the utilitarian theory of Bentham, and the personality theory based on Hegel. The arguments for the recognition of virtual property support a qualified conclusion that virtual objects claimed as property are property in reality. The three normative theories provide strong normative grounds for the recognition and protection of property rights in virtual objects even beyond the terms of the contract.

The development in case law on the aspect of virtual property will be discussed. Reported cases in China, Taiwan, Netherlands, South Korea, New Zealand and Canada will be investigated. From the discussion of the cases it becomes clear that virtual property is mostly protected in terms of criminal law. The main reason provided by the courts for protection of virtual property are due to the economic and sentimental value that a virtual property holds for an owner of virtual property object.

From the analysis above it is clear developers create only a contractual relationship between itself and users of virtual world and/or accounts. The right of the user to use the game is defined as a "limited, non-exclusive licence to use the property. Property interests can be protected by personal rights deriving from contract, for instance if the real-world law recognises the importance of these interests and provides property-like protection for them. A user can have rights in virtual property, beyond the contractual rights acquired from the EULA. Therefore the rights in the virtual objects should be protectable and enforceable, even beyond the scope of the contract.

CHAPTER 5: OVERVIEW AND CONCLUSION

5.1 Overview

Chapter two investigated the definition of property in the private law. The different approaches to the property concept were further investigated by looking at the narrow and wide approaches encountered in different legal traditions. Anglo-American private law attaches a wide meaning to property and no focus is placed on the corporeality requirement of a property object. Jurisdictions that follow this approach focus more on the rights than on property objects. Due to this wide approach it will be possible to include virtual property as part of Anglo-American private law. Recognition of virtual property in Anglo-American law will be possible as it will only require good justification. In Roman-Germanic traditions property is usually narrowly interpreted in private law. Corporeality is a requirement for accepting an object of property as being a thing. It will be much easier to include virtual property in Anglo-American legal traditions than in Roman-German legal systems. The characteristics and classification of things was discussed in further detail to give a better understanding about the concept of things in South African private law.

The characteristics of things referring to corporeality, impersonal nature, independence, appropriability, and use and value were discussed. These characteristics gave a better understanding of the concept of things in South African private law. The characteristics of things were studied to investigate any similarities between things and the characteristics of virtual property. In terms of the characteristics of things the focus was on the strict adherence to corporeality as a requirement for accepting an object as being a thing.

Chapter three investigated the context of “property” in terms of section 25 with specific reference to the inclusion of incorporeal objects and rights. The three groups of examples where the existence of property can be argued was discussed. The first group includes immovable and movable corporeal property like land or cars. In terms of this

group only the existence of the right itself has to be proven. The second group includes incorporeal property in the form of rights for example rights in immaterial property. These rights are protected if the right has vested and the protection is socially justified. Rights in this group are protected either in private law or commercial law. Virtual property can be included under this second group based on protection in terms of either an established category of intellectual property or a commercial property interest. The third and last group includes debts and claims not based on contract for example pension, medical benefits and subsidies. Only some of these rights are regarded as property and therefore afforded protection.

The following prominent cases was discussed in chapter three, *The First Certification Case, FNB Case and Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*. The first two cases supported a much wider approach to the concept of property and it will be possible to protect virtual property in constitutional law even if it is not recognised in private law in terms of the judgement in these cases. However the court supported a more narrow approach to concept of property in the last case. Based on this judgement, it will not be possible to protect virtual property as constitutional property. Chapter three further discussed the constitutional concept of property and more specifically the question of whether virtual property will be included under this property clause. The context of “property” in terms of section 25 was investigated with specific reference to the inclusion of incorporeal objects and rights. The South African law was used as an analogy to emphasize how the private law concept of property is narrow, but the constitutional concept of property is wide. The guidelines in foreign law can be used by South African courts to accept virtual property as incorporeal property as constitutional property.

The purpose of chapter four was to define the concept of virtual property and investigate the characteristics to enable the court to identify virtual property. The characteristics of virtual property were discussed in further detail to provide a better understanding of these characteristics. Rivalrousness, persistence and interconnectivity are characteristics that are shared with real-world property. The three characteristics and

the two *indicia* can help the courts to determine if something is virtual property and whether there is a protectable interest in that virtual property. All three characteristics are necessary for virtual property to exist. The two *indicia*, secondary markets and value added by users, will help the courts in borderline cases to determine if virtual property should be afforded legal protection.

The characteristics of things included corporeality, impersonal nature, independence, appropriability, and use and value were compared with the characteristics of virtual property. Virtual property is designed to behave like and have the same qualities of physical real-world property. The characteristics of corporeality and externality have to be applied differently to virtual things than to real-world things.

To emphasize how the contractual and intellectual property interests and virtual property rights are protected by developers and providers in virtual worlds and online games, the TOS and EULA of World of Warcraft and Second Life was investigated and discussed. From this analysis it is clear that developers create only a contractual relationship between itself and users of virtual world and/or accounts. The right of the user to use the game is defined as a “limited, non-exclusive licence to use the property. However, a user can have rights in virtual property, beyond the contractual rights acquired from the EULA. Therefore, virtual objects should be protectable and enforceable, even beyond the scope of the contract.

5.2 Conclusion

Based on the discussion in this dissertation it is clear that virtual property does exist and holds real-world value. Examples of virtual property include well known intangibles that are not associated with virtual worlds, like bank accounts, domain names, URLs websites, and email accounts. Virtual property also includes objects that only exist in virtual worlds and other intangibles that take on the same function and form as their real-world counterparts like ebooks, mp3's, apps and music.

The focus of this dissertation is the question whether constitutional property law can extend to virtual property in relation to protection of these potential property interests. Virtual property does exist as property. The problem is that it is not generally recognised as an object of property rights and protected as property in South Africa.

From the analysis of the term property it is clear that there is no definitive meaning for the concept of property in both private law and constitutional law. As seen by the discussion of case law the courts are cautious not to restrict the constitutional definition of property. Therefore the courts will have to provide further clarity on the constitutional context and scope of property. The courts should not hesitate to allow the circumstances and requirements of each case to influence the development of the constitutional notion of property, regardless of what the situation in private law might be. The different approaches to the property concept were further investigated by looking at the narrow and wide approaches encountered in different legal traditions. Anglo-American private law attaches a wide meaning to property and no focus is placed on the corporeality requirement of a property object. Due to this wide approach it will be possible to include virtual property as part of Anglo-American private law. Recognition of virtual property in Anglo-American law will be possible as it will only require good justification. In Roman-Germanic traditions property is usually narrowly interpreted in private law. Corporeality is a requirement for accepting an object of property as being a thing. It will much easier to include virtual property in Anglo-American legal traditions than in Roman-German legal systems.

The South African law was used as an analogy to emphasize how the private law concept of property is narrow, but the constitutional concept of property is wide. Anglo-American private law attaches a wide meaning to property and no focus is placed on the corporeality requirement of a property object. Jurisdictions that follow this approach focus more on the rights than on property objects. Therefore there is no distinction between the property concept in private and constitutional law. Due to this wide approach it will be possible to include virtual property as part of Anglo-American private

and constitutional law. Recognition of virtual property in Anglo-American law will be possible as it will only require good justification.

In German law, the constitutional property concept is not restricted to property protected in private law although all private law property rights are included under the property concept. A wider property concept is used, including both corporeal and incorporeal property. In terms of the characteristics of things the focus was on the strict adherence to corporeality as a requirement for accepting an object as being a thing. Therefore the essential question is whether constitutional property includes rights and interests in incorporeal objects. Based on this question guidance was sought from foreign law. Based on the analysis it can be concluded that at least some incorporeal things will be included as property in the general property clause. Incorporeal things that are accepted as property in private law should in principle be protected under the constitutional property clause. Foreign examples indicate that constitutional property should include certain rights in rights, intellectual property and other commercial property interests.

This exception and widening of the definition of property will allow for the protection of virtual property in private law. Protection and recognition of virtual property can also be done by legislation and therefore granting these rights property like protection. Property is defined much wider under constitutional law than in private law. It is possible that in circumstances where private law does not provide protection for virtual property, it could be protected by constitutional law for constitutional reasons. If private law should provide protection for virtual property, it is possible that constitutional protection will automatically follow.

If virtual property cannot be classified as a property right and the interest can only be enforced based on a contractual rights granted in terms of a registration agreement by the service provider, then Van der Walt's test must be considered to determine if virtual property can be protected as constitutional property. The inclusion of these intangible objects should depend on the questions whether the objects can exist independently and whether the rights have vested or been acquired by the claimant according to

normal law, common law or statute depending on the particular right. A claim based on contractual right, would have vested or required according to statute depending on the particular right. The party will further have to prove that the objects can exist independently. Property interests can be protected by personal rights deriving from contract, for instance if the real-world law recognises the importance of these interests and provides property-like protection for them, generally by means of consumer-type legislation. Virtual property has an inherent economic value or has accrued value for their holder. In certain circumstances labour and money were invested in the creation of these interests. In German law before an interest can be recognised and protected as constitutional property, the interest must have the purpose of securing a sphere of personal liberty in the patrimonial field for an individual. This requirement can find applicability in the South African constitutional law.

The party who relies on constitutional protection for intangible property will have to prove the existence of the right and argue the reasons why the right in question should be protected in terms of the property clause. The constitutional protection that could be accorded to virtual property would be in terms of either an established category of intellectual property or a commercial property interest. If virtual property cannot be recognised as a thing according to South African private law because it is incorporeal, an exception to the rule could be created, if necessary by legislation. Otherwise, it could be accepted that the incorporeal aspect of virtual things, as an exception to the rule, does not have to stand in the way of their recognition as property. Virtual property will be recognised reasonably easily as property for purposes of constitutional protection, in other words against state interferences. Virtual property could be protected against both private and state interferences in private and constitutional law. Therefore it can be concluded, that it is possible to include virtual property within the definition of section 25.

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