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Law and dispute resolution inside video games

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In recent years, technology has enabled an impressive development in video games. Virtual worlds have been created in which people play for many hours and invest a lot of money, but what happens if there is a dispute? How are property rights regulated within a video game? What mechanisms exist to resolve disputes?

Within video games, in addition to purchasing objects, real estate can also be purchased. There are cases where people have invested more than €500,000 in acquiring property in a video game.

If someone were to steal the property, what defence mechanisms does the owner have? In fact, is someone who purchases an object inside a video game really the owner?

In the real world, these questions would be very easy for any jurist to answer. The problem is that in virtual worlds, the laws of a country usually do not apply, and frequently minors or people who do not have a clear identity are involved.

On the other hand, there are ancillary but equally relevant issues: intellectual property issues, ownership issues with respect to in-game items, in-game regulation, and questions of ownership of the video game itself.

These issues present a high degree of uncertainty while at the same time gaining more and more prominence, both economically and socially.

This article will offer an overview of the main issues in order to provide the reader with a background to understand the topic and offer a possible solution.

In addition, it will offer a reflection on how we should approach the problem; whether this problem should be approached from a legal perspective or not and whether this perspective should be more in line with common law or continental law.

Finally, it should be noted that the importance of dispute resolution in video games is important, as games such as Roblox or Fortnite are being the precursors of the metaverse.

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1 Introduction

<1>

Video games are often seen as something for children, ignored and not given much attention. However, it is important to reflect and be aware of their impact. People are spending an increasing amount of money and time on video games (MOLOT 2021). In fact, in 2010, a “real estate” inside a video game was sold for \$635,000. This amount is an example of how much people are willing to invest inside a video game (MOLLOY 2018).

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In recent years, the economic impact of video games has increased, as has the expansion of virtual worlds. Recently, companies such as Facebook have started to talk about the concept of the metaverse (DAVIES 2021), which, in a way, originates from the virtual worlds of video games. Due to this situation, legislation on this topic may be required. This fact gives room for several important points to be addressed, which in turn are points of conflict.

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As a first point, a person can invest a lot of money in a game, either for leisure or with the intention to invest. In the real world, if an investor has a dispute over an investment located in a foreign state, there is “investment arbitration” (which has a different set of formal requirements from the virtual world). But, in a virtual world there is no constitution or legislation as such, there are binding “Terms and Conditions” for all users. Colin Rule (pers. comm.), who has solved disputes for PayPal and eBay users, said that the administrator of a video game does not have the authority of a judge or an arbitrator, but “the power of a God” because they have control of the software, in the sense that they could resolve disputes however they wanted and withdraw funds from one account and add them to another, since the users gave their consent at the time of registration (MISHCON DE REYA LLP 2022).

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As a second point, related to the first, it is interesting to consider what hierarchies exist within a virtual world and how they are structured. In the real world, there is a constitution, a separation of powers, and legislative bodies, but in video games there are no democratic systems, and in some cases a dispute can be left to the discretion of players between the ages of 12 and 16. I suggest that the reader imagine for a moment a construction arbitration in which a company has invested several million euros, and the arbitrator who decides on the case is a 16-year-old child.

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The third point is an interesting analysis: when purchasing an object in a virtual world, what is being purchased? On the one hand, there is the image of the object, which is subject to copyright, on the other hand, the existence of the object is part of a code, and finally, the simple access to a video game is not granted because the players own the video game when they purchase it, but because what they purchase is a licence.

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In this article the applicable law and dispute resolutions inside video games will be discussed. First the rights of property inside video games will be dealt with; secondly it will be ventured whether there are any applicable laws; then, it will be explained how disputes are solved, and finally a conclusion and a possible solution will be given.

2 Property

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First of all, when a player “purchases a game”, he/she is not purchasing a game, but a licence to play the video game. These licences are subject to “Terms and Conditions” or a “Licence agreement”. Once the player has the licence, they can play the game.

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Once the player can play, they can enter “servers” where they are in a “virtual world”. These servers sometimes belong to the owner of the video game, in other cases they are virtual servers created by individuals. Once the player is on the server, in addition to playing, he/she can acquire items. Servers have their own rules in addition to the “use policy” inside a video game.

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Items within video games can be acquired in two ways: legally and illegally. The legal way is to acquire items directly from the owner of the game, the owner of the server, or through authorised suppliers. The illegal way is to acquire them through unauthorised suppliers, or by using various types of cheats.

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In the case of legal acquisition, the question is: what is acquired? The object that is displayed on the screen is a design. Such designs are protected either because they have been registered as designs (in the relevant country or countries) or because of copyright law. In the case of copyright, the artistic work is automatically protected according to the Berne Convention of 1886. The design that appears on the screen (e.g. a sword) appears because there is a code that makes it appear. The code is protected by copyright as long as there is a minimum of originality (there are aspects such as the format or files that are not protected under EU Law) (SAMUELSON 2016; cf. ECJ Judgment *SAS Institute Inc. v World Programming Ltd* (C-406/10, ECLI:EU:C:2012:259), which ruled the protection of computer programs). So in fact, what is really being acquired is a licence to use the object within the video game, and in most video games, the purchase and sale of objects is only allowed within the game, meaning that there is a barrier to their transfer. However, in practice, players go to different websites to sell their items for real money outside the game.

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Therefore, from the legal point of view, a player who buys a sword in a game does not have

the ownership of the sword. What they really have is a usufruct, a licence to use it within the game. In various legal systems there is a clear difference between ownership and possession. In the case of the virtual sword, due to the different constraints on the player, it is arguably a situation of possession without ownership. However, this is a very controversial topic, F. Gregory Lastowka or Dan Hunter consider that property rights should exist inside video games (WHITE 2006).

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It should be noted that illegal buying or selling is one of the main problems within video games, and that a lot of players profit from such methods. In some cases, it is not only items that are sold illegally, but also licences to access video games (PHILIPS 2020). In this context, the possibility of acquiring “real estate” should be considered, as there is a real estate investment market within video games, and there are pages that analyse it.

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However, the entry of NFTs (Non Fungible Tokens), cryptocurrencies and the use of blockchain technology could be a game changer. There is currently a trend of outsourcing video game content, viz. by introducing the use of cryptocurrencies or similar assets, players are being incentivised to trade outside of a game's internal market, as many games are becoming an investment for players. I imagine, and this is my personal opinion, that by allowing the entry of cryptocurrencies and therefore favouring trade, players will end up having an ownership right over objects (most likely, with limitations regarding copyright rights) in order to favour transactions outside the game.

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In the real world, when a person purchases a property, it is very clear what formalities must be carried out and what protections are granted by law. But are video game properties protected? One of the things that differentiates property in games from real property is that in games property is usually “indestructible”. That is, in many games it cannot be depreciated by use or destroyed. Property is generated through a code and players have the power to acquire and transmit it within the game.

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Ownership of property is a “**right in rem**”. Rights *in rem*, in some countries are *numerus apertus* and in others they are *numerus clausus*. In 1930, the German jurists who established civil law doctrine were brilliant, their work was used as a reference for many civil codes across Europe and Asia (BAUR/STÜRNER 2009). These jurists considered that rights *in rem* should be *numerus clausus*, as they considered that all types of rights “already existed”. Nowadays, as a result of technological advances, “virtual worlds” exist in which the existence of different possible rights applied to the same thing (ownership, design, use, concessions etc.) mean that we are faced with a reality that is, and probably will be, different, especially when the involvement of artificial intelligence and the volatility of the three important factors in any dispute (Location, Time and Identity) are taken into account. It is therefore tempting to speculate on whether there will be more types of rights in the future.

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Property rights within video games are not recognised in all countries, and even if they may be recognised in some countries, there is the question “Against whom can I enforce it?”. A developer may be in one country, the server located in another country, the owner in a third country and the person trying to usurp the property right in yet another country. This raises the question: should we go to the mechanisms of private international law to decide jurisdiction, or should a new law be established specifically for these cases? Therefore, in the conclusion of this article, it will be discussed whether there should be a regulation and, if so, to what extent this matter should be regulated.

3 Legal Background

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In terms of legal background, there are different “sources of law”: national law, the terms and conditions of the game, licence agreement and server rules or use policy. In terms of laws, there are few countries that have legislated on video games. In the jurisprudence of the United States, the Netherlands or England, offences related to the theft of objects within video games are recognised.

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Among the countries that have a relevant legislation, China protects “virtual assets” in article 127 of the Chinese Civil Code; Taiwan and New Zealand have provisions in their penal codes (RUMBLES 2011) and South Korean law recognises and protects virtual property rights for users of virtual worlds, while prohibiting the commercial exploitation of virtual property (CHAO 2010).

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There are three important stakeholders in a game: The owner or publisher (the company that owns the rights of the video game), the developer (the company that creates the video game) and the distributor (the company that sells the video game, either globally or in a specific market). In many cases, these stakeholders are companies within the same company group. Terms and conditions or licence agreements are drawn up by either the owner or by the distributor, and the responsibility for their enforcement may vary according to the game, structure or agreements between the companies.

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Not all video games are server-based, only those where online play is allowed. There are games where the servers are created and controlled by the company (e.g. New World or Lost Ark), games in a blended situation (e.g. Fortnite) and games where the servers are created and controlled by players (e.g. Minecraft or Roblox). The server rules are set by the server owner and interpreted and enforced by the moderators. Rules on player-controlled servers are usually simple, basic and very much related to morality (e.g. no stealing, no cheating software, etc.). Thus unlike legal systems, which usually try to regulate all relationships (e.g.

in a civil code, criminal code, rules of procedure), rules in video games run on player-controlled servers are more like the guidelines of a religion that do not regulate absolutely everything. In the case of servers controlled by companies, the games' rules are more oriented towards good behaviour (e.g. no swearing) and avoiding losing money (e.g. prohibiting the sale of items on websites like eBay). However, this is a very general rule only and depends on the specific game.

4 Dispute Resolution

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Before explaining how dispute resolution works, it is necessary to know what kinds of disputes exist. Disputes can be: (a) between companies, (b) between players, or (c) between players and companies. The reasons for disputes can be manifold, ranging from IP-related issues to issues concerning fraud and theft. Intellectual property disputes are often between companies, often related to copyrights, in-game designs, trademarks or even patents. Some cases are *Atari v. North American Philips* (US Court of Appeals for the Seventh Circuit - 672 F.2d 607, Decided March 2, 1982, <https://law.justia.com/cases/federal/appellate-courts/F2/672/607/331150/>) or *Magnavox Co. v. Activision, Inc.* (1985 WL 9469 (N.D. Cal. 1985), USA).

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However, there are also disputes between players and companies regarding intellectual property. One example is the Dota case. In the video game *Warcraft III*, developed and owned by Blizzard, players were allowed to create "mods" (modifications to the game). Some players created a modification called "Dota", which was so large that they created a new game within the existing game. Later these players were hired by Valve, a different company, and created a "new game" (called Dota2). The dispute between Valve and Blizzard was settled in the case *Blizzard Entertainment, Inc. v Valve Corporation* (United States District Court, N.D. California No. 3:15-cv-04084-CRB, 2015). Afterwards, Blizzard included in its usage policies that the intellectual property rights of mods created within a Blizzard game would belong to Blizzard, as it is a transformation of the original work. Although there are currently no disputes due to the recency of the development, it is likely that they will arise in the future, as Blizzard is one of the largest companies in the video game industry. It must be added that the disputes between Blizzard and Valve continue (ORLAND 2017, 2020).

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What happens with disputes between players? Normally companies refuse to accept that a player has ownership rights within a game, so if there is a dispute over ownership, the player has no standing to complain (see *EVE Online End User License Agreement*, <https://community.eveonline.com/support/policies/eve-eula-en/>). However, if there is a fraud or scam between players, the company usually temporarily or permanently bans the player who caused the infringement, but there is not always "restitution" (especially if the fraud was committed on non-game platforms, e.g. eBay). In other cases, companies leave it up to the

players to resolve disputes between themselves and ignore the problem. The player then finds themselves without an efficient way to resolve their disputes (WHITE 2016). To get a closer view of the reality, I had an extended conversation with some people who are involved in moderating/administering online games. All of them conceded that when companies resolve disputes between players (either "acting as a judge" or as a mediator) they usually have certain interests. Usually, the player who invests the most money in the game or who has the closest relationship with the moderator is the player who benefits the most from the dispute.

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Fraud and scamming among players are common, there are different types of fraud (software exploit, identity theft, fraud in virtual world markets, theft on corporate assets etc.), however, they can be divided into two categories: (a) fraud against the company, and (b) fraud against the players. An example of fraud against the company occurred in a game called "Second Life" where a way was found to illegally obtain land for free. Fraud between players can range from practices such as phishing up to buying and selling an object different from what was agreed upon. The motivation for fraud can be both economic and for fun, and the problem is that players often overestimate the protection of their assets. Many of them do not read the Licence agreement or the use policies. A new type of video game is currently being developed, viz. video games related to cryptocurrencies, in which an initial capital is invested to be able to play, and cryptocurrencies can be won by playing (such as Axie Infinity, Illuvium), such games are likely to increase the number of types of frauds (DILLA 2013).

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How are disputes resolved? There are different mechanisms depending on the type of game, i.e. whether they are centralised (the servers are controlled by the company, e.g. New World or Eve Online), or decentralised (where the control is more diffuse, e.g. Minecraft or Roblox). In order to know the mechanisms, I personally contacted eight people who work, or worked, in companies like Mojang or Innogames, among others, and whose job is to resolve disputes in video games.

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In centralised games, the company that owns the server has different people who are in charge of making sure that everything runs smoothly (they are called moderators or administrators). When two players have a dispute, a complaint is submitted to the moderator. Depending on the game, the moderator can have absolute power or a simple mediation function. If he/she has absolute power, they can punish a player by confiscation of an object, temporary or permanent expulsion etc.; each game has its own sanctions. In games with more diffuse control, there is a "server owner", who appoints administrators/moderators to manage the server. Disputes are usually resolved by a kind of binding mediation, where the parties explain the dispute and the moderator takes a decision.

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There are several differences between the two systems: In centralised games, moderators always are adults and decisions are usually final. With decentralised control servers, the problem is that in many cases the moderators are minors, e.g. Minecraft. According to the vast majority of legal systems, minors are not considered to have capacity to contract, as this is acquired at the age of majority. The non-contractual liability caused by the actions of minors is the responsibility of their legal guardian or parents. There are video games that ignore these facts, saying that it is the players who are in charge of managing the servers, and other video games that in their policies of use establish a minimum age to be able to play, the problem then is the lack of an effective mechanism to verify the age of the player. When a person downloads a betting or an investment app, that requires an identity document, but this is not the case for most video games.

Thus, as a way of generating curiosity in the reader, the question is raised here to what extent the terms and conditions should be valid in the case of a child who accepted them lied about age, or to what extent there can be an obligation of restitution in the case of a minor making in-game microtransactions with a parent's credit card. In the European Union, Apple users can cancel microtransactions during the first 14 days (KLEINMAN 2019).

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Notwithstanding the above, most disputes between gamers are not related to the involvement of minors, but to fraud or scams. In 2005, for instance, it was reported that in China a 41-year-old man had called the police because he had lent a sword to another gambler who then sold it on the internet (BROWN/RAYSMAN 2006). In South Korea, more than 22,000 problems related to the theft of property within video games were reported in 2003 (WARD 2003). However, a distinction must be made between a (contractual) dispute in a video game and a virtual crime. A contractual dispute may be avoided by reading the terms and conditions and the use policy of the game in order to know whether the company is responsible for any losses of the players. To cite an example for a fraud, however, in 2007 a bank was created in the game EVE Online which functioned as a "Ponzi scheme" (paying profits to earlier investors with funds from later investors) and the game refused to return the money to those who had invested (WHITE 2006).

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What happens in disputes between the player and the developer? Disputes between player and developer can arise for many reasons, one of the most recurrent in practice is the non-compliance with community rules or terms and conditions. In these cases, the game support sanctions the player according to his or her actions, applying the rules of the game. Compared to real-world law, it would be like trying to appeal a traffic ticket: a citizen opposing a decision of the authority will normally have some difficulty in proving that it was the policeman who was wrong.

In the said type of conflict, a situation likely to be most concerning is donations for the development of video games. There are a lot of cases of fraud, in which case the national legal system would apply (DE ALEDO 2020).

Disputes can also arise because what is purchased is a licence. The licence is subject to "Terms and Conditions"; "Terms and Conditions" or "Licence agreements" usually specify that the developer/distributor is not liable for the loss of items within the video game. In addition, many companies, especially in the United States, often include arbitration clauses in adhesion contracts, and it can be costly for a gamer to go through a dispute.

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What happens if the game disappears or closes? Developers and/or owners are usually incorporated as companies. In that case, there are two options: If the disappearance is based on demonstrable fraud (as has happened with developers who asked for donations to develop games and then never developed them), this could be a situation that breaks the limitation of liability that commercial companies usually have. However, if the cause of the closure is justified, the developer will most likely not be liable, and in the event that it is, the limitation of liability will be that of the type of corporation. Notwithstanding the above, it is necessary to say that in many "Terms and Conditions" it is stated that the objects will belong to the player as long as the game exists. In video games, unlike in the banking system, there is no "Deposit Guarantee Fund" that can protect players or offer them compensation. It can be difficult to reclaim the items, unless the terms and conditions do not oppose this.

5 Conclusion

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There are three main problems with current dispute resolution mechanisms: (a) lack of transparency, (b) lack of fairness, and (c) absolute power. This is also important in the context of why video games with virtual worlds such as Roblox are being the inspiration for the metaverse, a reality we will see in the coming years.

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As for the lack of transparency, virtual worlds are currently evolving into a different system. In the past, when a commercial operation was carried out, the important thing was whether the other party was trustworthy, but now and in the future, we will see that this detail will not matter. Instead, our trust will be placed in the architecture of the blockchain system with which the transactions are carried out. So it may well be the case that in the future our concern is about the system by which the moderator is chosen and not who the moderator is (MISHCON DE REYA LLP 2022).

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As for the lack of impartiality, after conversations with people who play games and people who work for game companies, I found out that many moderators are not impartial, and that their decisions favour the player who brings the most money to the server. However, I think

that the criterion of impartiality/independence known of arbitration could be established here.

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As far as absolute power is concerned, the point is that since the administrator/moderator owns the software, he/she has a power that no judge has in any democratic state. A moderator not only resolves a dispute, they are able to transfer funds from player X to player Y, expropriate items and even ban players. Moreover, in many cases the decisions of moderators are not subject to appeal.

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The last paragraphs will address the following points: A) Is regulation possible? If so, how incisive? and B) What solutions or alternatives could be offered?

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A) Is regulation possible? If so, how incisive?

I consider that despite the numerous conflicts, it is very complicated to establish a regulatory framework due to several reasons, but mainly because it is necessary to establish a body that enforces the rules in case a regulatory framework is established. What would be extremely complicated, now, however, could be done by AI (artificial intelligence) in the future. Because of the constant evolution, I think it would be better to apply a common law type of regulation, as it adapts more quickly than civil law. Moreover, given the characteristics of virtual worlds, a diffuse control would be better.

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B) What solutions can be offered?

I consider that, as easily implementable solutions, there should be a disclaimer explaining that the money invested inside a video game can be lost (as happens with investment apps in many countries), and another one making parents aware of the possible responsibilities they may have for their children's behaviour. Finally, it should be noted that the current systems are what the metaverse will be based on, and that video games are becoming a space for investment as well as entertainment.

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