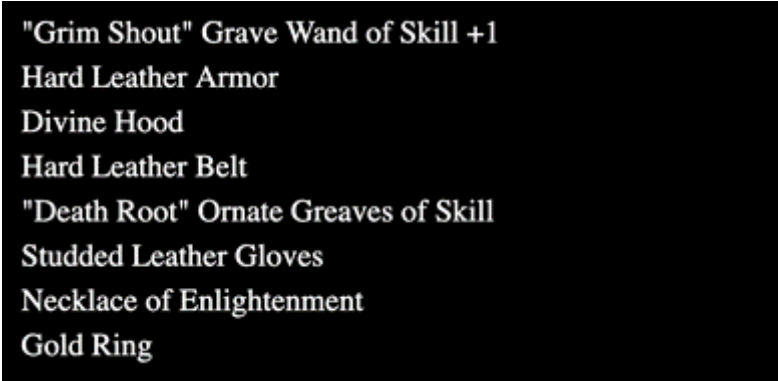


## How NFTs Will Impact Ownership of Virtual Items in Videogames

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Increasingly, more and more money is spent on virtual items in the virtual worlds of videogames. Consider: in the virtual simulation game *Second Life*, a digital coffee table can currently sell for anywhere between a few cents to several hundred dollars' worth of actual currency.<sup>[1]</sup> A sword from a Chinese MMORPG game, the *Age of Wushu*, once sold for \$16,000. And in 2011, a company bought an *entire virtual planet* in the game *Entropia* for \$6 million. <sup>[2]</sup> These virtual items, from different virtual worlds, have one thing in common—they pose unique challenges to pre-digital frameworks for property rights.

Non-Fungible Tokens (NFTs) are set to change not only the valuations of these items but also potentially provide more clarity on ownership. And they are going to be the next craze in the videogame industry. For instance, consider *Loot*. *Loot* is a community-based video game based nearly entirely on Ethereum-based NFTs. The NFTs in *Loot*—appropriately named *Loo*—are not art or visible items, but instead are simply images with text identifications of traditional fictional fantasy adventuring gear. Each NFT in the game is effectively a deed of ownership to a corresponding digital item. In this case, it's an image depicting a list of text, like this:



"Grim Shout" Grave Wand of Skill +1  
Hard Leather Armor  
Divine Hood  
Hard Leather Belt  
"Death Root" Ornate Greaves of Skill  
Studded Leather Gloves  
Necklace of Enlightenment  
Gold Ring

As DeCrypt explains, "That's all there is to it—and that's intentional."<sup>[3]</sup> *Loot* leaves it to the community to build around the tools these NFT's represent.

The Loot NFTs themselves have surged in value since the game was announced in late August. Just one week after the drop, the least expensive Loot NFT available on the OpenSea marketplace was priced at 15 ETH (\$59,600), and the site reported more than \$159 million worth of total trading in its first week.<sup>[4]</sup> A single Loot NFT sold for 250 ETH (\$954,000) last month. It previously sold for 0.08 ETH (\$305) the week before.<sup>[5]</sup>

Certainly, the NFT frenzy is itself multidimensional and cannot be attributed to any one thing. But one thing is clear—the smart contracts governing each NFT generally provide purchasers information of exactly what rights they will own when they buy that NFT. And many NFT purchasers are buying NFTs for that very reason: the belief that they own something with concrete value that can appreciate in actual market value.

NFTs serve as an exciting new development because property rights in videogames have consistently operated in a grey area with inconsistent frameworks to govern ownership and value. The traditional framework of property rights in the United States categorizes property into two major categories: tangible property and intangible property.

<sup>[6]</sup> Tangible property (e.g., real estate or physical goods) typically occupies a physical space and can be manipulated, while intangible property consists of a more ethereal set of rights such as those granted by contract or intellectual property laws. The issue with virtual items is that they do not neatly fit into any of these existing categories.

Virtual items share characteristics with tangible property in that they occupy a specific space (albeit virtual) and are limited by exclusivity and scarcity—if one person is using a virtual item, another person cannot use that same item at the same time.<sup>[7]</sup> The recent proliferation of NFTs may further increase the similarities between virtual items and tangible property because they allow for the authentication and verification of a chain of ownership for a virtual item.<sup>[8]</sup> For instance, NFTs one day may allow the exact virtual football thrown in the final play of a *Madden NFL* championship to be sold at an auction—blockchain technology would confirm the authenticity of the specific football compared to any other football compiled with the same generic lines of code.

Yet the very existence of virtual items is created and bound by intangible property concepts. Virtual items are created by lines of code which are the developer's intellectual property. When a player installs a game, they almost always are required to agree to the End User License Agreement (EULA), which in many cases, gives the developer complete property rights to any in-game assets.<sup>[9]</sup> This usually, but not always, includes a complete retention of a developer's intellectual property rights, even with regards to content that is created or designed by an individual player.<sup>[10]</sup> Because virtual items share features with multiple types of property law frameworks (tangible, contract, and intellectual property), there is no consistent framework of legal treatment (which ultimately affects the value of the property right itself).

Many scholars have called for and proposed various solutions to create specific property rights in favor of gamers, such as limiting the scope and power of EULAs,<sup>[11]</sup> passing legislation specific to protecting digital items,<sup>[12]</sup> or having courts create common law to decide the nature of rights over digital goods (much like the historical development real property law).<sup>[13]</sup> Some courts outside the United States have already recognized consumer property rights to virtual items. For instance, in 2019, a court in France ruled that consumers had a right to resell games they bought from the Steam store.<sup>[14]</sup> Likewise, a Finnish court ruled in 2010 that a defendant could be guilty of theft for hacking an MMORPG account and stealing a victim's virtual items.<sup>[15]</sup>

Increasing consumer rights in virtual items could lead to interesting ramifications for the gaming industry. Will a game developer be able to ban a player for bad behavior without providing them reasonable compensation for their acquired virtual items? Can a game developer be sued for negligence if a software glitch causes the destruction of a player's virtual items? If a game developer becomes defunct and stops supporting a game, will players be able to claim the residual value of their virtual assets from the bankruptcy estate?

And the biggest question of all is whether NFTs are the answer to some or all of these questions.

Stay tuned for our follow-up article exploring some of these topics and more.

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<sup>[1]</sup> Second Life Marketplace, available at: <https://marketplace.secondlife.com>

<sup>[2]</sup> Alex McAlpine, *10 Of the Most Expensive Items in Video Games Ever*, ESTNN (May 21, 2021), available at: <https://estnn.com/10-of-the-most-expensive-items-in-video-games-ever/>

<sup>[3]</sup> <https://decrypt.co/80108/what-is-loot-ethereum-nft-role-playing-phenonemon>

<sup>[4]</sup> *Id.*

<sup>[5]</sup> *Id.*

<sup>[6]</sup> Katja Weckström, *Chasing One's Tail: Virtual Objects As Intangible Assets, Intangible Property or Intellectual Property?*, 16 J. Internet L. 3, 4 (2012)

<sup>[7]</sup> Theodore J. Westbrook, *Owned: Finding A Place for Virtual World Property Rights*, 2006 Mich. St. L. Rev. 779, 782 (2006)

<sup>[8]</sup> *Value of NFTs to Video Games*, BLMP (Jul. 11, 2018), available at: <https://medium.com/@BLMPNetwork/value-of-nfts-to-video-games-a902fa4daf40>

<sup>[9]</sup> Justin M. Ackerman, *An Online Gamer's Manifesto: Recognizing Virtual Property Rights by Replacing End User Licensing Agreements in Virtual Worlds*, 6 Phoenix L. Rev. 137, 162 (2012)

<sup>[10]</sup> See *id.* at 165-66 (providing examples of EULAs from popular games such as World of Warcraft, the Lord of the Rings Online, Diablo III, Star Wars: The Old Republic). The notable exception that allows players to retain their intellectual property was Second Life. *Id.* at 166.

<sup>[11]</sup> See, e.g., Kenneth W. Eng, *Content Creators, Virtual Goods: Who Owns Virtual Property?*, 34 Cardozo Arts & Ent. L.J. 249, 278 (2016)

<sup>[12]</sup> Ackerman, *supra* note 3, at 182

<sup>[13]</sup> Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 Harv. J.L. & Tech. 443, 450 (2007)

<sup>[14]</sup> Sonia Elks, *Virtual Goldmine: In-game Goods Fuel Debate Over Digital Ownership*, Reuters (Nov. 25, 2019), available at: <https://www.reuters.com/article/us-global-videogames-property-analysis-t/virtual-goldmine-in-game-goods-fuel-debate-over-digital-ownership-idUSKBN1Y0032>

<sup>[15]</sup> Weckström, *supra* note 3, at 3.

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