Virtual Things, Virtual Possessio, and Possessory Protection Thereof

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2 Virtual Things, Virtual *Possessio*, and Possessory Protection Thereof

Aleksa Radonjić[*]

1 Introduction

The purpose of this paper is to check the hypothesis that virtual things are functionally similar to things in real life, and thus eligible to be the object of *possessio*, and possessory protection. Under the functional similarity, I mean that virtual things share some key characteristics with physical things, and that persons treat them, and use them in ways which are similar to the ways which they treat and use physical things, and that they have the same or similar functions or purposes as physical things.

In order to reach the definition of a virtual thing I will analyse relevant literature. After critically assessing the definitions and descriptions offered therein, I will offer my view on what are the essential elements of the notion of virtual thing. I will argue, based on these key elements, that there is significant functional similarity between the virtual things, and their real-world relatives. The established similarity does not mean that property law should be applied to virtual things without reservations. It does not mean that the users of virtual things are/should be the owners of virtual things just because these are functionally similar to real-world things. Defining virtual things is a separate issue from the issue of the allocation of the entitlements over them. However, defining them is a pre-condition for a meaningful discussion about the entitlements. The question of ownership and other entitlements over these objects has to be treated separately, and this exceeds the scope of this paper.

On the other hand, I acknowledge that users of virtual things have legitimate interests which need to be protected. First and foremost, they need to be protected from the dispossession of the virtual things they control. That is why I will contend that functional similarity between real-world things and virtual things makes the latter eligible to be the objects of *possessio*. Consequently, possessory protection of *possessio* of virtual things should be granted which is the way to protect certain legitimate interests of users of virtual things without prejudice to the entitlements over these objects.

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This contribution takes Serbian law as its starting point. However, the steps that I take in this analysis might serve as a blueprint for a similar analysis in a different legal system, because the questions I ask and seek answers to may be asked in any legal system familiar with the concept of *possessio* and possessory protection of *possessio*.

One final introductory remark about terminology is needed. I use the terms "physical/real-world things" and "virtual things". The former is used to denote the objects of the right of ownership and other rights in rem as is commonly understood in many civilian systems, and also known as *res corporales*. The other is used to denote their virtual/digital relatives. I opted for this term, instead of the term property because the latter may be misleading since it can be used to denote both things and entitlements over those things.[1]

2 VIRTUAL THINGS

Since the notion of virtual things is usually created by some reference to real-world things[2] it is for the best to define those real-world things first, and then look for a definition of virtual things. I will look at the definitions given by legal doctrine and by legislation.

The positive law in Serbia does not define things. There was the 2007 Draft Law on Property Rights and Other Real Rights (DLPRRR), which was never enacted.[3] It defined things as "any matter on which one can have factual control and ownership or other real right."[4] The latest version of the General Part of the Draft Civil Code of Serbia (DCCS) defines a thing as a material part of nature that may be controlled by a natural or juridical person, and which may be an object of the right of ownership or another right.[5] DCCS also states that various forms of energy which may be controlled or used by natural or juridical persons are deemed things.[6] These two definitions reflect the consensus in Serbian legal literature. Although the definitions offered in textbooks may vary in certain details, they all come down to the same three key features of things: that they are matter, which is

1 W Erlank, *Property in Virtual Worlds* (PhD theses on file with Stellenbosch University, South Africa, 2012), p. 217.

2 *See, e.g.* FG Lastowka & D Hunter, 'The Laws of the Virtual Worlds', *California Law Review*, Vol. 92, No. 1, 2004, p. 40; JAT Fairfield, 'Virtual Property', *Boston University Law Review* Vol. 85, 2005, p. 1047, pp. 1053-1055.

3 The Draft Law on Property Rights and Other Real Rights (DLPRRR), version in English available at: https://arhiva.mpravde.gov.rs/cr/news/vesti/zakonik-o-svojini-i-drugim-stvarnim-pravima-radni-tekst.html (accessed 25 May 2020).

4 DLPRRR, Article 15.

5 'Prednacrt Građanskog zakonika Republike Srbije, Opšti deo', član 128, available at: https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html (accessed 25 October 2019).

6 *Ibid.*

susceptible to human control, and which may be an object of the right of ownership or other right.[7] Similar definitions may be found outside the borders of Serbia too. For instance, the German Civil Code (BGB) defines things as corporal objects,[8] and the Dutch Civil Code (BW) defines them as tangible objects that can be controlled by humans.[9] Polish law and doctrine see things as material objects, whereas immaterial goods are not things.[10] Therefore, all immaterial objects are not things in Serbian law, and in some other civilian legal systems. This obviously excludes virtual things from the scope of rules applicable to things.

What are virtual things, then? I would like to start with the definition offered by Joshua Fairfield because it is to my best knowledge the most influential definition of virtual things there is. All other authors who published their work after Fairfield's seminal article "Virtual property", either build on, or comment, or criticise his definition, and his approach. So, what did he say? He said that, virtual property is computer code which is made persistent, rivalrous, and interconnected.[11] According to Fairfield these are the legally relevant traits that virtual property shares with things of the real world.[12] He refers to virtual things as objects of potential entitlements, not to entitlements themselves. This is because he describes factual characteristics of virtual objects, and not the particular powers or rights in a bundle. Therefore, I will further use the term virtual things when discussing Fairfield's three characteristics of what he calls virtual property. The first one means that virtual things exist in the server of the internet service provider, and they do not vanish after the user stops using them or after the user turns off the computer.[13] The second characteristic relates to the fact that when one person uses a virtual thing, no one else can use that particular virtual thing without the permission of the user.[14] The third feature means that other persons, not just the user, can experience the virtual thing.[15] To illustrate this Fairfield uses various examples, not just the objects in massively-multiplayer-online-roll-playing-games (MMORPGs), or in virtual worlds (which are not games *stricto sensu*) to which the majority of scholarly work is limited. He writes that if a person possesses an URL (among other examples), no one but that person can post content to that URL (rivalrousness), but "other

7 *See, e.g.* T Varadi & M Orlić, 'Pojam stvari u građanskom pravu', 1965 *Pravni život*, p. 15; O Stanković & M Orlić, *Stvarno pravo*, 9th edition, Beograd, Nomos, 1996, p. 6; R Kovačević- Kuštrumović & M Lazić, *Stvarno pravo*, Niš, Sven, 2006, p. 14; I Babić, *Uvod u građansko i stvarno pravo*, 5th edition, Beograd, Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik, 2012, p. 136.

8 BGB §90, available at: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0270 (accessed 1October 2019).

9 BW Art. 3:1, available at: http://www.dutchcivillaw.com/civilcodebook033.htm (accessed 1 October 2019).

10 P Pałka, Virtual Property. Towards a General Theory (PhD theses, on file at the EUI, Florence 2017), p. 152.

11 Fairfield, 2005, p. 1053

12 *Ibid.*

13 *Ibid.*, p. 1054.

14 *Ibid.*

15 *Ibid.*

people can interact with the content posted to the URL" (interconnectivity),[16] this also implies persistence because other persons would not be able to interact with the content on the URL if it was not persistent.[17]

The Dutch court used similar criteria in *RuneScape case* to determine that two teenagers committed theft by forcing another boy to transfer them digital in-game objects.[18] Namely, the Dutch court reasoned that they committed theft since the objects they acquired, although not tangible, were perceptible; the victim was forced to transfer the objects to the perpetrators being thus unable to access these objects anymore; and finally the object was of value to the parties.[19] The first two criteria reflect the criteria used by Fairfield. Perceptibility relates to interconnectivity because both terms refer to the fact that an object may be seen, or experienced by other persons. Rivalrousness is read from the fact that when the victim transferred the virtual objects to the wrongdoers, he did not have the access to these objects anymore. The persistence can be inferred from the facts of the case which show that the items stolen existed within the game for a longer period of time not just during the victim's activity within the game.[20]

The third criterion, the value to the player, deviates from Fairfield's definition. It could be understood as monetary value, or use value, either way this should not be the *conditio sine qua non*. Erlank gives a good example of the virtual thing that does not have any financial or use value. He says that a player of a MMORPG who has "the Staff of Gandalf" does not have any real use of it, and the staff does not have any economic value, but it is a status symbol.[21] In real life I could have a pebble as a memorabilia for someone or something. The economic value of a simple pebble would be insignificant, and the pebble would be quite useless, but I would cherish it for what it means to me, for what it symbolises. Same goes, as is seen, for the virtual things. The important thing to realise is that the value, in any meaning of the term, is not an intrinsic characteristic of an object, it is a reason why someone might want that object. However, it is not what makes that object an object. A thing is not a thing because it is valuable. One wants a thing because it is valuable in some way, but the same thing might be worthless to someone else, and it still would be a thing. Thus, the value should not be included in the definition of the virtual thing either.

Blazer uses Fairfield's criteria, and adds the existence of secondary markets, and value-added-by-users to the list.[22] But he calls these *indiciums* of virtual property, and thus

16 *Ibid.*, p. 1055
17 *Ibid.*
18 T Adriaans, 'Owning the Virtual Fruit. Protecting User Interests in Virtual Goods under Dutch Law' (Thesis, on file at the Tilburg University, The Netherlands 2017), p. 19.
19 *Ibid.*
20 *Ibid.*
21 Erlank, 2012, p. 292.
22 C Blazer, 'The Five Indicia of Virtual Property', *Pierce Law Review*, Vol. 5, No. 1, 2006, p. 142.

does not make them essential characteristics of virtual things. He writes that there could be a virtual thing even if there is no secondary market to trade that thing, but the existence of the market makes one more argument to recognise that virtual thing as property.[23] A similar argument is applied to the value-added-by-users. It just indicates that there should be some "protectable virtual property interest".[24] So, these additional criteria may be important when discussing the entitlements over virtual things, but they do not make virtual things what they are.

Erlank identifies what are deemed to be the essential features of things according to the law of his home country (South Africa),[25] and then he looks at whether there are any similarities between the real-world things so defined, and the virtual things.[26] His analysis shows that the fact that virtual things are not corporeal is the key difference between them and their real-world counterparts, but that it does not outweigh the "similarity in form and function that these share".[27] He further demonstrates that virtual things may be classified in almost the same manner in which real-world things are classified.[28]

If I take the same approach, and start with the definition of things accepted in Serbia, I will see that the corporality is also the key difference. As is seen in Serbian law, things are defined as parts of material nature which are susceptible to human control, and which may be objects of ownership or other right. The first condition obviously corresponds to corporality, and virtual things are not matter, hence not corporeal. As for the susceptibility to human control, virtual things are susceptible to it. The only difference is that they are controlled indirectly through the use of a computer or a mobile phone. Unlike physical things which may be touched and thus controlled directly by our own hands. When it comes to the third condition, the purpose of it is to underline that not all matter controllable by humans may be owned, or may be an object of another real right. A human being, a body of a living person, it is all matter, it is in fact controllable by another human being, but it is not allowed to treat them as things, nor to own them. This condition corresponds to the one of externality that Erlank identifies in South African law.[29] Since virtual things i.e. objects in MMORPGs, e-mail accounts, URLs etc. are obviously external to human beings the third condition of the definition of the thing in Serbian law is not an obstacle to establish legally and functionally relevant similarity between the physical and virtual things.

23 *Ibid.*, p. 147.
24 *Ibid.*, p. 148.
25 Erlank, 2012, p. 220.
26 *Ibid.*, pp. 286-294.
27 *Ibid.*, pp. 293-294.
28 *Ibid.*, pp. 295-303.
29 *Ibid.*, p. 288.

In fact, all these traits that virtual things share with real-world things are read from the ways in which persons use virtual things, and the relationships they have over these. When playing MMORPGs or enjoying virtual worlds, people use various virtual things which usually mimic real-world things. Via their avatars they use, for example, virtual swords to fight other avatars, or they use some in-game items just to make their avatar look better. People use e-mail accounts which are essentially digital counterparts of the PO boxes. People also enter legal relationships, aspects of which are virtual things. When a person makes an e-mail account, they are in a legal relationship with an internet service provider who stores this electronic mail box on the company's servers and enables the communication of mail to and from the e-mail box etc. People buy and sell virtual things for real money, sometimes huge amounts of it actually.[30] As we saw from the Dutch example above, people also steal virtual things using physical coercion.

But what are these persistent, interconnected, rivalrous objects? What is susceptible to human control and external to a person? It is not matter, as is clear. Otherwise we would not be talking about virtual things. When I shared my thoughts on this topic at the 2019 Young Property Lawyers Forum held in Glasgow, one of my colleagues suggested that virtual things fall in the category of *res incorporales* referring to Roman categorisation of things. However, this is wrong. Gaius said that incorporeal things are those that cannot be touched, which is common to virtual things indeed, but he also said that they exist only in law, and as an illustration mentioned obligations and inheritance.[31] Therefore, it is obvious that under incorporeal things he meant rights.[32] Virtual things are not rights. They may be objects of rights. Furthermore, unlike rights which exist only in law, virtual things exist within computer servers weather the law recognises their existence or not.[33] Are they a special type of code as Fairfield suggested?[34] Or are they bits in a particular context?[35] As Pałka notes, it is of course possible to reduce all virtual things to code, or even bits since the latter are the atoms of the digital world.[36] However, we would miss all the relevant traits and differences of virtual things, just as we would miss the same if we would have reduced all physical things to atoms.[37]

30 *See, e.g.* O Chiang, 'Meet The Man Who Just Made A Half Million Form Sale Of Virtual Property', *Forbes*, available at: https://www.forbes.com/sites/oliverchiang/2010/11/13/meet-the-man-who-just-made-a-cool-half-million-from-the-sale-of-virtual-property/2/#5961d720375c (accessed 1 June 2018).

31 Pałka, 2017, p. 149.

32 *Ibid.*

33 *Ibid.*, p. 110.

34 Fairfield, 2005, p. 1049.

35 M Meehan, 'Virtual Property: Protetcting Bits in Context', *Richmond Journal of Law & Technology*, Vol. 13, No. 2, 2006.

36 Pałka, 2017, p. 147.

37 *Ibid.*

Pałka also questions their persistence. He points out that the persistence of virtual things is relative in the sense that the existence thereof depends on the provision of services by internet service providers.[38] If someone has a g-mail account and Google switches off their servers or stops providing the service for whatever reason, that g-mail account will seize to exist. It is true that the existence of physical things is not dependent on someone else's actions, and that the persistence of virtual things is therefore relative compared to the persistence of physical things. In spite of this relativity, the persistence of virtual things seems stable enough to be legally relevant. This reality proves me right because no one would have opened a g-mail account for instance, and thus have entered a legal relationship over it, if its existence was not relatively stable. This relativity of persistence, meaning dependence on the service providers' actions is, on the other hand, important should we want to talk about the entitlements over virtual things. Should we want to establish real rights over them we would probably have to impose an obligation on service providers to sustain the service.[39] This only shows that the whole property law cannot be applied to virtual things without reservations, and that discussing entitlements over them probably deserves a whole thesis. On the other hand, this does not show that relativity of persistence of virtual things makes them less functionally similar to real-world things.

Moreover, Pałka writes that not all the virtual things are rivalrous illustrating this claim by reference to the Pokémon Go game.[40] The game is designed so that every player may catch the same Pokémon, consequently the fact that I have caught particular Pokémon does not preclude other players to catch the same Pokémon too.[41] Let us juxtapose a hypothetical example from the real world to the Pokémon Go case. Imagine I wrote a book and made many copies of it. Imagine I said that anyone who wants a copy of my book may have it for free as long as they come to a particular place to pick it up. So, when a person picks up a copy of my book, and holds it in their hands no one else can hold that particular copy but that person. Furthermore, let us imagine that there are as many copies of the book as there are persons interested into having it. However, some of those persons are not willing to make the effort and come to the pickup spot. Some of them find it easier to just steal or buy the copy from a person who did go to the pickup spot. This shows that the issue Pałka points the finger at, is not rivalrousness, but scarcity. It is true that these two are connected because rivalrousness becomes more relevant when the particular resource is scarce, but the example I used shows that the same issues may arise, less frequently though, even without the scarcity. If we return to the Pokémon go, we will see that the technology behind it made it possible to remove the scarcity. This does not mean

38 *Ibid.*, p. 107.
39 *Ibid.*, p. 177.
40 *Ibid.*, p. 107.
41 *Ibid.*

that there is no rivalrousness over a particular Pokémon, and that the same kind of disputes or arrangements over them may not arise between players as if Pokémon were scarce and as if there were not enough of Pokémon for every player. The disputes or arrangements may arise because the Pokémon is located in such a place that not every person would dare to go to and catch it,[42] but they would be willing to steal it from the person who did dare and caught it; or they would pay that brave person to catch the Pokémon for them. A problem may arise, for example, if subsequently that person refuses to transfer the Pokémon. Finally, players train their Pokémons and thus make them better and stronger.[43] This takes some time, money and in-game resources.[44] Some players might want to take a shortcut and pay someone else to do the work.[45] Or they might decide to follow the example of the boys from the *RuneScape case* referred to above. Either way the lack of scarcity does not necessarily erase the functional similarity between virtual and physical things.

On the other hand, this functional similarity does not mean that the notion of thing should be extended to encompass virtual things, as it was suggested in Serbian legal literature by Tešić.[46] That was the stance I too had held, before Pałka's arguments changed my mind. As is shown, virtual things exist only as long as service provider provides their services, so they are in the secondary mode of existence just as rights are.[47] But unlike the rights their existence is not dependent on the social norm or agreement[48] which again makes them resemble the physical things. They are also used for similar purposes as physical things are. So, I agree with Pałka that virtual things should be conceptualised as a new type of object in law because they do not fit into the existing concepts.[49] Pałka calls them digital objects or *res digitales*,[50] and I call them virtual things. In order to determine the notion of virtual things I start with Pałka saying that they are "objects existing within computer-operated environments, 'made up' of bits stored on hardware, processed by software and 'interactable-with' via user-interface", whose existence is dependent on

42 To give but one example of such an unwelcoming location that might deter any cautious person from going there to catch a Pokémon I will refer a reader to the news articles writing about Pokémon located in minefields in Bosnia, *see, e.g.* 'Pokémon Go players in Bosnia warned to steer clear of landmine', *The Guardian*, 20 July 2016, available at: https://www.theguardian.com/technology/2016/jul/20/pokemon-go-players-in-bosnia-warned-to-steer-clear-of-landmines (accessed 30 October 2019), 'Pokemon Go: Bosnia players warned of minefields', *BBC*, 19 July 2016, available at: https://www.bbc.com/news/world-europe-36841828 (accessed 30 October 2019).

43 Pałka, 2017, p. 62.

44 *Ibid.*

45 Meehan, 2006, p. 4.

46 N Tešić, 'Ima li svojine u virtuelnom svetu: O prirodi subjektivnih prava na elektronskim dobrima', 2008, *Pravni život*, pp. 198-199.

47 Pałka, 2017, p. 156.

48 *Ibid.*, p. 157.

49 *Ibid.*, p. 134.

50 *Ibid.*, p. 154.

action.[51] I modify this definition a little bit by adding the traits that Fairfield identified, and by changing 'interactable-with' with 'susceptible to human control' to underline the similarity to definitions of physical things. So, my definition is a compilation and it says that: *virtual things are rivalrous, persistent, interconnected objects built up of bits stored on hardware, processed by software and susceptible to human control via user-interface whose existence is dependent upon third party action.*

This definition is a general one in the same way the definition of things is. In order to make this new concept operable within the legal system it needs to be developed and virtual things need to be categorised as real-world things are.[52] However, I do not need to do this for the purposes of this paper. I have shown the functional similarity between virtual and physical things. The next step is to check if this functional similarity makes the former eligible to be the objects of *possessio* and consequently of possessory protection, which are legal institutions operating with the general notion of things.

3 POSSESSIO AND VIRTUAL THI

I use the Latin term *possessio* because I refer to a particular legal regime applicable to situations where a person has actual physical control over a thing, but not to all such situations, and applicable to situations where a person does not have physical control over a thing.[53] Had I used the term possession, the legal institution I had in mind could have been easily misinterpreted only as a physical control over a thing, which is not the same.

Now let us see what the legal institution of *possessio* entails under the law of Serbia. First, the *possessio* refers to a type of behaviour always directed towards a thing. If a person acts as if they have a real right over a thing, they would be a possessor, regardless of the actual entitlement or the lack thereof.[54] If I use a thing as if it were mine or as if I have any other real right allowing me to use it, I am a possessor. But if I use the thing strictly according to someone's instructions, I have a *detentio*.[55] For example, a construction company is not a possessor of the apartments they built, the investor is.[56] Also, I may be the possessor without any direct control over a thing. The actual possibility to establish direct control over a thing will suffice.[57] For instance, if I park my car and step away, I did not lose the *possessio* over it because I can take the direct control back any time I want. If

51 *Ibid.*, pp. 153-159.
52 *Ibid.*, p. 158.
53 V V Vodnelić, *Državina. Pojam, priroda, zaštita i razlog zaštite*, Beograd, Pravni fakultet Univerziteta Union u Beogradu i JP Službeni glasnik, 2015, pp. 20-21.
54 Stanković & Orlić, 1996, p. 33.
55 Ibid., p. 34.
56 S Vuković, *Sudska praksa iz svojinskopravnih odnosa*, 1st ed., Beograd, Poslovni Biro, 2003, pp. 431-432.
57 Vodinelić, 2015, p. 31.

I rent a thing to another person, we are both possessors according to the law of Serbia. I am an indirect possessor, thus without the direct control over a thing, and that other person is a direct possessor.[58] Finally, the law states that heirs have *possessio* over a deceased person's things in the moment of his/her death, hence even without having actual control over those things.[59] Persons can be co-possessors when there are two or more possessors of the same type over the same thing, co-owners being a good example.[60] But why is it important to determine if someone is a possessor? It is important because that person is entitled to preclude all others to interfere with his/her *possessio*,[61] and because the law grants protection to the possessor in a special kind of judicial proceedings, the possessory proceedings.[62]

The possessory protection of *possessio* is granted to the last peaceful holder of a thing regardless of the holder's entitlement.[63] Even a thief enjoys this kind of protection.[64] The plaintiff has to prove that they were the last peaceful holder of the thing, and that the defendant took the thing away or interfered with plaintiff's *possessio*.[65] The act of dispossession or interference needs to be unlawful in order for plaintiff to succeed.[66] The act shall be unlawful when it is committed without explicit statutory authorisation.[67] It is strictly forbidden to discuss any evidence regarding entitlement and rights in this proceeding.[68]

Now, as we have seen various situations are encompassed by the notion of *possessio*. In some situations a person exercises control over a thing directly, in some other situations the fact that a person is able to exercise control over a thing is good enough and sometimes total lack of control over a thing, or even lack of awareness of its existence, will be under the cloak of the legal regime of *possessio*. Professor Vodinelić says that the *possessio* denotes situations for which the legal regime of *possessio* is appropriate.[69] One of the reasons to apply the legal regime of *possessio* to a certain situation is to grant a person possessory protection.[70] So my question is: is it appropriate to apply legal regime of *possessio* to a situation where a person controls a virtual thing in order to provide them with possessory protection?

58 Stanković & Orlović, 1996, p. 34.
59 *Ibid.*
60 *Ibid.*, pp. 39-40.
61 Vodnelić, 2015, p. 33.
62 *Ibid.*, p. 46.
63 Stanković & Orlović, 1996, p. 50.
64 *Ibid.*, p. 55.
65 *Ibid.*, p. 50.
66 Vodinelić, 2015, p. 50.
67 *Ibid.*
68 Stanković & Orlović, 1996, p. 50.
69 Vodinelić, 2015, p. 28.
70 *Ibid.*

The functional similarity between physical and virtual things leads to the positive answer to this question. Persons use virtual things for fun or for business, they invest in them, they improve them, they sell them and buy them, in short, they treat them as they treat physical things. So why would the legal regime of *possessio* not be applicable to virtual things? Pałka writes that the *possessio* of virtual things "unlike traditional possession, is not exclusive – a few parties can 'possess' the object at the same time."[71] This should not be the problem under Serbian law given that, as is shown, *possessio* over the same object can be shared. There are situations of co-*possessio*, and of direct and indirect *possessio* in the same time. It may be unclear to which of the two the relationship between service provider and user corresponds. Namely, service provider controls the system within which the virtual thing exists, and thus always has, in a way, direct control in the same time as the user does.[72] This corresponds to the co- *possessio*. On the other hand, service provider usually remains passive regarding the virtual thing, and the user is the one who uses it, improves it when possible etc. so the content of the relationship here resembles the situation in which we have direct and indirect possessor, the service provider being the latter. The distinction may be important because Serbian courts tend to protect the co-possessor against another co-possessor only in the case of dispossession, not the interference, in spite of the fact that there is no foundation in law for such limited protection against the co-possessor.[73] Still, this is not a good enough reason not to apply legal regime of *possessio* to virtual things. Dispossession of the virtual things by the service provider is probably the most feared situation given that service providers typically reserve the right to do pretty much anything they wish with the virtual things, at least when it comes to games.[74] So this situation is covered even by the limited judicial interpretation I referred to earlier. Finally, it is doubtful that the providers would have business incentives to randomly take the virtual things away without a good reason.[75] So the fact that both user and provider have control over the virtual thing is not the reason not to apply the legal regime of *possessio* to virtual things.

On the other hand, one might argue that the new type of object in Serbian property law is not needed in order to protect the users of virtual objects. What may suffice for that purpose is a new approach to possessory protection of *possessio* in Serbian law. Namely, in Austria, according to the Austrian case-law, a person can be a possessor of a right (*Rechtbesitzer*) also in cases where a long-lasting state is established such as reception of

71 Pałka, 2017, p. 160.
72 *Ibid.*, p. 161.
73 Vodinelić, 2015, p. 129.
74 *See, e.g.* Pałka, 2017, pp. 47-65.
75 Pałka, 2017, p. 200.

a service of delivery of water or electricity.[76] A hint of a similar development (yet not a trend) in Serbian case-law may be read form the 2017 decision of the Commercial Appellate Court which implies that a person supplied with the electricity, water, or heat via electrical, water, or heating grid respectively, or supplied with other technical services via modern technologies, using that water, electricity, heat, or technical services has a *possessio* of a right to use these.[77] Hence the unauthorised disconnection of the user from the supply grid would constitute an act of interference with the user's *possessio*. Given that the use of a virtual object is in essence part of a service which is enabled by an internet service provider via modern technologies, the user of a digital object could be viewed as a *Rechtbezitzer* and therefore protected against the unfounded termination of service by an internet service provider via possessory action. However, this would not solve the problem of dispossession or interference in horizontal relationships.

In horizontal relationships the service is not terminated. Dispossession or interference is not an act of a service provider, but of another user. Users may interfere with other's *possessio* over virtual things in almost the same way as in the real world. For instance, Serbian courts held that there was interference with the plaintiff's possession when the defendant threatened the plaintiff and the plaintiff stopped using the thing because of the threats.[78] This really resembles the *RuneScape case* from the Netherlands. One might say that this is not enough since the dispossession or other act of interference with someone's virtual possession may be conducted via hacking. Then it would be hardly possible for a person to rely on possessory proceedings because it is unlikely that they would be able to find out who did the hacking, and one needs to know the identity of the defendant to institute the possessory proceedings.[79] So they would have to report the crime to the police or the prosecutor. However, the same problem arises when someone steals real-world things and the holder does not know the identity of the thief. In spite of that no one has suggested giving up possessory protection or *rei vindicatio* proceedings when it comes to real-world things.

Finally, one might object that the *possessio* in Serbian law is not applicable to virtual things given that we do not know what kind of entitlements exist over them, if any. However, the types of *possessio* in Serbian law are determined by the content of the possessor's behaviour meaning that the type depends on whether they act as if they were

76 V V Vodinelić, 'Šta se štiti u posesornom postupku? O pojmu i prirodi pojma državine (poseda)', *Zbornik PFZ*, Vol. 63, No. 3-4, 2013, p. 767.

77 Court order of the Commercial Appellate Court, Пж 4342/17, available at: http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/supa/viewAct/52dba863-c2a5-6e21-2c87-53f39d4ed31a, (accessed 25 May 2020).

78 Vodinelić, 2015, p. 130.

79 This follows from the Article 98 (3) of the Code on Civil Procedure of Serbia (ZPP, Sl. glasnik RS, br. 72/11, 49/13-Odluka US, 74/13-Odluka US, 55/14 i 87/18), available at: https://www.paragraf.rs/propisi/zakon_o_parnicnom_postupku.html (accessed 31 Ocotober 2019).

the owner, or as if they had some other real right.[80] Since we have not solved the conundrum of entitlements over virtual things one might conclude that we cannot have a meaningful discussion about the *possessio* over virtual things because we do not know to what rights does the possessor's behaviour correspond. However, we do not need to know this. This is important only when one is to acquire a right over a thing via *usucapio*. We do not need to know the particular type of *possessio* in order to protect the possessor from the unauthorised act of interference or dispossession. All that the plaintiff has to prove is that they were the last peaceful holder of the thing, and that the defendant took away the thing from them[81] or that they are unable to exercise the control over the thing in the full capacity due to the actions of the defendant.[82] The court would grant the protection whether or not the plaintiff claims he has ownership, lease, pledge or some other right because the rights are not important in the possessory proceedings. In other words, the protection of *possessio* is granted regardless the type of *possessio* at hand.[83] That is why it is perfect for the protection of legitimate interests of the users of virtual things until the question of entitlements over these things and the distribution of entitlements over them between the stakeholders is resolved.

Having in mind everything said, it is appropriate to apply legal regime of *possessio* to a situation where a person controls a virtual thing in order to provide them with possessory protection, at least under the legal regime of *possessio* in Serbian property law.

4 CONCLUSION

The purpose of this paper was to check the hypothesis that virtual things are functionally similar to things in real life, and thus eligible to be the object of *possessio*, and possessory protection as provided by Serbian law. In order to do this, I have considered similarities and differences between physical and virtual things and reached the conclusion that there is significant functional similarity between them. It means that persons treat and use both physical and virtual things in similar ways and for similar purposes. They enter legal relationships over these things. These relationships are not just between a service provider and a user, but between users too. Persons also commit crimes to acquire virtual things. They use technology, or they resort to more "classical" ways such as brute force and physical coercion. There are two key differences between virtual and physical things. These are corporality, and the mode of existence. These are such that they call for the

80 Stanković & Orlić, 1996, p. 33.
81 *Ibid.*, p. 50.
82 That is why the court held that the defendant interfered with his neighbours' possession by placing hives next to the border of their adjacent properties. For this *see* Vuković, 2003, p. 435.
83 Vodinelić, 2015, p. 128.

conceptualisation of virtual things as a new object in law next to corporeal things. Therefore, starting from Pałka's and Fairfield's definitions the following definition of virtual things is reached: *virtual things are rivalrous, persistent, interconnected objects built up of bits stored on hardware, processed by software and susceptible to human control via user-interface whose existence is dependent upon third party action.*

On the other hand, despite the differences regarding the mode of existence, and the corporality, the functional similarities between physical and virtual things make the latter eligible to be the objects of the legal regime of *possessio*. The mode of existence may prove important when discussing the allocation of entitlements over virtual things. Nevertheless, the possessory protection of *possessio* is granted regardless of the entitlements. Furthermore, persons may be dispossessed of their virtual thing just as they may be dispossessed of their physical thing. Someone may interfere with other person's peaceful enjoyment of a virtual thing just as someone may do the same regarding their physical things. The existence of co-*possessio*, and direct and indirect *possessio* in Serbian law covers both relationships between service provider and users, and between users. It is true that possessory protection of *possessio* over virtual things is ineffective when the dispossessor is unknown to the plaintiff, but this is not the problem of the object but of the type of procedure. The same is true for possessory protection of *possessio* over physical things. Finally, having in mind everything said, and given the established functional similarity between physical and virtual things, it is only reasonable, and appropriate to apply the legal regime of *possessio* to virtual things as well.

This extension of the legal regime of *possessio* to virtual things would make peace with the precept that we ought to treat similar cases similarly, which serves the consistency and coherency of a legal system, but not just on some abstract level, or in some *l'art pour l'art* way. Such extension would make quite concrete, real-life consequences: it would provide protection to legitimate interests of users of virtual things without prejudice to the solution of the issue of allocation of entitlements over these objects.