

Virtual worlds and online theft after the Runescape saga

The Dutch Supreme Court ruled last January that the theft of virtual goods should be regarded as a criminal offence. This unique decision surprised many within the industry and many believe it has set a precedent for similar cases. Steven James and Sam Kempsey, of Latham and Watkins, examine the potential legal impact of this ruling and explore the channels of litigation that this ruling could open up, both in a criminal and a civil context.

Digitalisation of society

The notion that taking something intangible, virtual, and seemingly 'valueless' from another player in a computer game could constitute theft and thus a criminal offence would come as a surprise to many. This however, forms the basis of what may prove to be a seminal decision by the Dutch Supreme Court, who, on 31 January 2012, ruled that the theft of virtual goods was indeed a criminal offence. As noted by the Court, 'due to the digitalisation of society, a virtual reality has been created, all aspects of which cannot be dismissed as mere illusion'.

Runescape and MMORPG's

The facts in question concern the immensely popular online fantasy game Runescape, which at the time of writing has 175 million registered users² and is one of the largest, most expansive free MMORPG's (massively multiplayer online role-playing game) in the world. Players create an online persona and complete various quests and develop skills, being rewarded along the way with the ability to use, among others, a wider variety of the game's weapons.

In 2007, two youths assaulted a

third and forced him to log onto the game and 'drop' his possessions, most notably a virtual 'amulet' and a 'knife', thus allowing one of the assailants' Runescape characters to 'pick' them up. The youths were convicted of assault and also for the theft of the 'goods', the latter conviction making it to the Dutch Supreme Court on appeal. The appeal was rejected on the grounds that despite the inherent intangibility of the possessions, the victim had invested 'time and energy' in obtaining them and they were in the 'exclusive domain' of the victim at the time that the offence was committed. The result could be rationalised as supporting a claim to possessory title over no title at all.

Virtual items

Virtual worlds, avatars and virtual items are big business. The current market for virtual items is estimated to be worth around US\$5bn³. A well-known example of a virtual world is Second Life, the virtual online world which enables users, or 'residents', to interact with each other through their avatars and buy and sell virtual goods including buildings, art and clothes using Second Life's own internal currency, with some users earning in excess of a million dollars by using the site. Virtual items are therefore valuable 'commodities' which can be traded in the same way that physical goods can, although there has been little or no case law on the topic to guide the courts.

Kremen -v- Cohen⁴

Despite the lack of both common law and statutory guidance, a global trend towards an acceptance of the applicability of property rights to intangible objects has emerged, and had started well before the Runescape case. As far

back as 1994, and in the early days of the World Wide Web, Gary Kremen saw the potential in the domain name 'sex.com' and duly registered the name to his business. Stephen Cohen had also spotted the commercial value of the domain name and fraudulently obtained it by posing as a representative of Kremen's business and authorising its transfer to Cohen's corporation. The US Federal Court was concerned as to whether property rights could exist in an intangible object and this formed the backbone of the litigation. It was held that a domain name could be considered 'property' as it was 1) capable of precise definition; 2) capable of exclusive possession; and 3) the putative owner could establish a legitimate claim to exclusivity.

In his review of the 'Kremen Cohen' case, the commentator Allen Chein sagely predicted: 'given the popularity of MMORPG's, it is reasonable to conclude that a dispute involving virtual items is just around the corner'⁵. Indeed, domain name disputes over the misappropriation of a third party's trade marks or other rights are now a common part of the contemporary legal landscape, whether dealt with through the courts or the tailor made WIPO/UDRP procedure. The theft of virtual items in a computer game is arguably only a logical extension of that, albeit the shift from civil to criminal liability is a marked one within the guise of intangible property rights.

The Runescape judgment on virtual items is only of direct and immediate applicability to Dutch law. It is apparent, however, that, as the aforementioned cases and commentaries have illustrated, there has over the last decade, been an increasing acceptance of the concept of 'virtual property' as

being equivalent to physical property by courts of all jurisdictions. This should not be surprising given that copyright itself is an intangible right whose theft can give rise to both civil and criminal liability⁶. It is therefore seemingly only a matter of time before a similar case makes its way to the courts of England & Wales.

England and Wales

Theft of virtual items in England and Wales constitutes 'dishonestly appropriating property belonging to another with the intention of permanently depriving the other of it'.¹⁷ Taking the Runescape case as an example, there was clearly (i) dishonesty, (ii) an appropriation, and (iii) an intent to permanently deprive the victim of his online persona's possessions. However, the interpretation of 'property that belongs to another' is considerably murkier. The rationale behind s.4 of the Theft Act 1968, which was drafted very widely to define property as 'money and all other property, real or personal, including things in action and other intangible property', can arguably be justified as being 'an appreciation of the nature of 'property' within a society at any particular point in time'¹⁸. Such a broad definition gave leeway to the inevitable temporal changes in what property was conceived to be as a result of societal and technological catalysts. The definition is so broad that the Act actually goes so far as to list specific exclusions to what may constitute property, including wild animals and electricity, but not intangible intellectual rights, including copyright.

Such a broad definition, coupled with the increased prevalence of IP black letter law (illustrating a willingness to recognise proprietary rights in intangible items) make it entirely plausible

In such a fast-moving area as information technology, it is hard to predict how courts, of all jurisdictions, will interpret the judgements that emerge within the guise of virtual property. It is however clear from the cases referred to, that courts have shown a diminished reluctance to dismiss virtual items as intangible, valueless and with no real proprietary rights attached to them.

that the English courts would be willing to view virtual goods as property in criminal proceedings under the Theft Act 1968.

The IP perspective

A major stumbling block in theft proceedings in the English Courts may arise however, when the court came to decide whether the possessions actually belonged to the victim.

When players register to play Runescape, they agree with the game's publisher 'Jagex' that all intellectual property will remain Jagex's property. Furthermore, the terms and conditions of use state that 'Jagex owns all rights in the Jagex products and you are only granted permission to use such products, subject to, and in accordance with these Terms and Conditions'.

Such permission is granted by way of a 'non-exclusive, non-transferable licence for the period of membership' and it is made clear that 'all materials, including without limit all information, software, data, text, photographs, graphics, sound and video' are protected by copyright and other intellectual property rights. This permission to use the software or End User Licence Agreement (EULA) is therefore intended to limit the rights to which the user has access.

It should therefore follow that if a provider such as Jagex defines a virtual object as being their property to which a Runescape user only has a limited right of use, if the object is 'stolen' then nothing of consequence has happened to the user as the item was never theirs. It is for this reason that the Dutch Supreme Court's ruling may raise eyebrows, as the victim did not actually own, at least in the 'conventional sense', the 'digital DNA' that constituted the amulet and the mask. Ownership of

virtual items apparently need only be the product of the 'time and energy' spent obtaining them. As noted, it may be sufficient that the complainant has a possessory title for the time being of the 'goods' which is a better title than the thief, who has no right or title at all.

Virtual and real world blurring

It does seem a strange concept that intellectual property that belongs to a publisher could have what we could term 'frozen ownership rights', that can be transferred to a third party (who has acceded that the publisher owns all rights to the items) just by their use of that intellectual property over a temporal period.

It is perhaps easier to understand such a concept if we accept 'the inherent dichotomy in holding intellectual property rights in a work versus owning the chattel that is a manifestation of that work'. As technology becomes both more advanced, and prevalent in 21st century society, computer code is increasingly crafted to produce virtual items that act like real world objects. As a result, viewing virtual items such as the Runescape mask and amulet exclusively as intellectual property is possibly shortsighted, and subjecting these items to the common law principles of personal property is arguably easier to justify. It could therefore be that, in a criminal context, the English courts would be willing to view virtual items as 'property belonging to another'.

Floodgates of criminal litigation

It may well prove to be, that the Runescape case represents a paradigm shift in how courts view the legal rights associated with virtual items. The ramifications however, of giving virtual items the same proprietary rights as, for

want of a better word, 'real items', should be carefully considered. If someone was to steal your phone for example, they could potentially be liable for not just the theft of the handset but also for the plethora of 'virtual items' that you had invested 'time and energy' in obtaining. Consider the theft of the players that you had spent seasons negotiating for on an i-phone football manager app, or the cars that you had accumulated by winning races on a racing app. Applying the Dutch Supreme Court's judgment, such items could be caught by the ruling.

Civil actionability?

The Runescape judgment arguably represents such a significant change in attitude towards virtual items that it is not incomprehensible that they could also gain rights in civil proceedings. In the case *Jarvis v Swan Tours*⁹, the plaintiff, Mr Jarvis bought a holiday in Switzerland advertised by Swan Tours, which failed to deliver on almost every aspect of the advertised package deal. Mr Jarvis was awarded damages for the cost of his holiday, but was also awarded damages for disappointment, distress, upset and frustration caused by the breach. If such a judgment was applied to the facts of the Runescape case, it is far from beyond the realms of fantasy that a victim of virtual theft may not just be able to claim the 'time and energy' lost but could also claim damages for the loss of enjoyment of using the virtual items to defeat his online adversaries?

There is a further issue that merits consideration if courts are to increasingly recognise gamers proprietary interests in virtual items. If, hypothetically, Runescape's servers were to suffer an unprecedented crash and consequently users lost some of the

items that they had invested time and energy in obtaining, users could seemingly bring an action in tort for negligence as well as for distress, upset and frustration. Certainly it would be easier for a claimant to show loss following the Runescape and *Kremen* judgments. The proposition of 175 million potential claimants would no doubt sit uncomfortably with a game producer such as Jagex.

Conclusion

In such a fast-moving area as information technology, it is hard to predict how courts, of all jurisdictions, will interpret the judgements that emerge within the guise of virtual property. It is however clear from the cases referred to, that courts have shown a diminished reluctance to dismiss virtual items as intangible, valueless and with no real proprietary rights attached to them.

To what extent such a shift will transpose itself into the mind-set of the courts of England and Wales is unclear. There are a multitude of reasons why the courts would potentially reject an argument that virtual items are property. Most striking of all is the conceptual barrier that virtual items are imaginary constructs that are simply not deserving of property recognition. Nowhere within the virtual item spectrum is such a barrier more apparent than amongst the sphere of virtual worlds. Such a notion is only reinforced by the inherent lack of real world utility that such items possess.

What is clear, however, is that as we continue to witness an increased technological presence on a global level, the prevalence, value and protection of the virtual item will increase. The courts may have deep rooted conceptual issues with virtual items gaining real

rights; however, as virtual worlds become less game-like and more mainstream, it is not inconceivable that such pre-conceptions will be set aside in favour of a revised understanding of 'property'.

Steven James Associate
Sam Kempsey Trainee Solicitor
 Latham & Watkins
 steven.james@lw.com
 sam.kempsey@lw.com

1. Google translation with amendments by R. Reynolds; <http://finance.ultraknowledge.com/actionbar/79545/>
2. Official website: <http://www.runescape.com/gameguide.ws>
3. The Virtual Items and Public Policy White Paper 2012. (The Virtual Policy Network).
4. 337 F.3d 1024 (9th Cir. 2003).
5. A Practical Look At Virtual Property, A.Chein, *St John's Law Review*, Vol.80, 1059-1088.
6. Copyright, Designs and Patents Act 1988, Ch 2, ss 16 -21.
7. Theft Act 1968.
8. 'A Revised 'Property' Concept for the New Millennium?' J. Lipton, *International Journal of Law and IT Int J Law Info Tech* (1999) 7 (2): 171, 1 June 1999.
9. *Jarvis v Swans Tours Ltd* [1972] EWCA Civ 8.