

Virtual Worlds And Digital Rights

Can Stealing An Online Gamer's IP Or Magic Sword Mean Real-World Legal Hot Water?

By Sean F. Kane

Today's virtual worlds — sometimes also called digital or synthetic — evolved from text-based role-playing games such as Dungeons & Dragons. The predecessors of the "Massively Multiplayer Online Role-playing Games" (MMPORGs) of today began for the most part in the late 70s and early 80s when various individuals first engaged in the role-playing game behavior online. The online text-based commands and prompts allowed the players to act out various fantasies without the close proximity requirement that is inherent in the earlier written and oral gaming forms. As the online technology grew, so did the nature and complexity of the interactive games, including the addition of videogame graphics to the text-based game elements. In the '90s, the current state of online MMPORGs began offering a real-time socially interactive component that was not available on traditional offline console gaming. While the physical space and landscape is simulated in the virtual environment of today, the social interactions are real since virtual characters, or "avatars," in the digital world are controlled and operated by a real person and not just by strict computer code. While these games are currently used mostly as an avenue for play and social interaction, if the proliferation of online entrepreneurship continues, the games will likely be more focused on commerce, research and work or work-related activities.

The original virtual worlds were built by private gaming companies for their subscriber base, and were fully controlled by the designers (the so-called "game gods") and their all-encompassing End-User Licensing Agreements (EULA). These agreements detailed the rights and obligations that the players were subject to if they wished to play in that particular virtual world. As discussed herein, as new MMPORGs emerge, these licensing agreements have become less encompassing and the individual players are gaining more and more rights — which will lead to some very interesting intellectual property issues.

In the last few years, MMPORGs have exploded in usership — some reports state that 100 million people worldwide are logging on to play in one of the various digital worlds. Examples of some of these worlds include: The Sims, Second Life, City of Heroes, There.com, World of Warcraft and Everquest. These and other digital worlds can run the gamut from pseudo-Tolkein, Medieval-Arthurian, sex fetish or to more realistic depictions of the modern everyday existence. What they all have in common is that they were designed and programmed to promote social interaction among the various players.

The application and use of real world physical laws by game designers — to create a three-dimensional landscape that persists and develops whether or not any particular gamer is playing — reinforces the sense that the virtual world is a real place. A vast majority of the players spend a considerable amount of time engaged in

game play. In fact, some statistics state that between 20-30 million regular participants in the virtual world are so involved in game play that they spend more time in the digital society than at their jobs or in real world activities. A South Korean man, who quit his job to have more time to play games, actually died on Aug. 6, 2005 of heart failure due to exhaustion after playing an online battle simulation game for 50 hours — only stopping for short respites to use the bathroom and take brief naps. U.S. citizens reportedly make up about half of the subscribers in the virtual worlds, with Asian countries accounting for a majority of the remainder. In fact, differing reports claim that from 10% to 40% of the South Korean population plays an online game with some frequency. The gamers work, play and interact with other individuals from around the world without ever needing to leave the location of their computer. It is likely that the type of information discussed above was what led the Hon. Richard Posner to comment recently that legal scholars would do well to study the issues surrounding videogames.

VIRTUAL ECONOMY

The majority of online games do not have a distinct win or lose scenario. Instead, they are designed to allow for gamers to build up their Avatars in the virtual society by earning virtual currency and developing skills that make their characters more powerful. Property, both real and personal, can be purchased or created in the virtual world and used by the avatars. As such, the virtual-world society works much like that of a real-world society. However, since certain gamers do not wish to invest the time and effort necessary to cre-

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ate a character and build up the level of wealth and status that the game makes available after many hundreds of hours of play, a secondary market has arisen to cater to these individuals. Many gamers have begun to sell their digital goods, property or avatars for real-world money on eBay and other auction Web sites. In certain cases, these items have sold for significant sums, as demonstrated by a virtual island that recently sold for \$30,000.

Some research has stated that last year alone approximately \$1 billion traded hands as part of this secondary market. Moreover, the amount of untapped intellectual property value that exists within these virtual worlds is quite vast and only continues to grow. For those who dispute the value of online digital property, consider that in reality most wealth is not all that different — it's not in the physical form of a pile of hard currency, but in digital form existing within the servers of a bank, brokerage house or other financial institution.

A few years ago, the BBC published an article under the headline "Virtual Kingdom Richer Than Bulgaria." The basis for this article was that the per-capita gross national product of Avatars within a realm in the game Everquest was higher than the average income of a citizen in certain Eastern European countries. Virtual entrepreneurs have noted this and attempted to cash in on it in various ways, including setting up digital sweatshops where third-world laborers play online games around the clock, obtaining and creating virtual avatars, properties and goods that can then be sold for real-world cash. Others have created virtual businesses offering products or services to the digital community in exchange for payment in digital currency. Some examples of the most popular

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and successful businesses are avatar clothing designers and avatar entertainment complexes that offer anything from games of chance to virtual skydiving.

One such digital clothing designer was even asked to present her designs at a recent Italian fashion show. The show's organizer was subsequently contacted by the designer and informed that her attendance would not be possible since her designs were merely for virtual clothes. People may wonder why individuals would spend so much time creating virtual jobs for themselves just to receive payment in virtual dollars; however, the digital currency can be spent in the virtual world offering various opportunities. There are even Avatars which have obtained some form of virtual fame due to their actions or accumulated virtual wealth.

Those who do not play the game for its virtual opportunities, but as a way to make money in the real world, can convert their digital earning into real cash through Web sites such as www.GamingOpenMarket.com. These sites allow virtual currency arbitrage trading, converting digital currency to U.S. cash at the prevailing rate in the same manner that an international currency exchange would.

VIRTUAL JUSTICE?

Since intangible intellectual property of all kinds has real-world value and can be relatively easily converted, the question arises as to what legal standard should be applied to the virtual world. The growing commercialization of the virtual-world will inevitably subject it to real-world laws and regulations as players seek protections for their valuable IP. If virtual-world currency and goods being traded have a real-world value, won't the courts and government eventually step in to protect, regulate and tax these digital assets?

The answer will potentially depend on whether players are allowed ownership of an item they obtained or created in the virtual world. Certain proponents of ownership argue that allowing creator ownership of virtual property will foster

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creativity. Others say that judicial determination of the ownership of a virtual “Bone Crusher Mace” is a waste of the court’s valuable time. While the U.S. courts have not provided an ownership standard to follow in this regard as of yet, in China in 2003 a court ruled that a game developer had to compensate a player after a hacker broke into his virtual account and stole his digital currency and property.

If virtual property has real-world value, could a game designer be held liable for destruction of property if it pulled the plug on a game due to business or monetary issues without proper compensation to the gamers? Additionally, how would the virtual economy suffer if virtual real estate or monetary assets were taxed by the city, state or federal government? For that matter, which jurisdiction would have claim over the assets since they exist in the ether that is the digital world? Would virtual disputes be adjudicated in the courts or is there a need for virtual courts, judges, arbitrators or mediators to determine a just outcome. Who should sit on these virtual courts, the game designers, neutral third parties or the government? All of these questions will eventually need to be determined as the virtual systems grow in size, number and membership.

EULA AND THE CLOSED WORLD

Every virtual game world comes with an EULA, which the players must agree to if they wish to play the game. These rules are drafted by the designers and their lawyers to control and curtail antisocial behavior from the players. By accepting the terms of the EULA, players may waive significant individual rights. The EULA acts like a system of laws for the virtual world-creating a “closed world” — so named because the border between the real world and the virtual world is clearly defined by the EULA. This closed world is intended to differentiate the virtual world as a game not subject to the real-world laws and other

requirements. If a player fails to comply with the obligations of the closed world, the game gods have the ability to shut down an account, an act tantamount to the death penalty for an avatar. Under the general terms of these EULA, there is no sense of private property since the virtual world is wholly owned by the designers and builders.

Most EULAs insist that any intangible property or artifacts that exist in the game world are the property of the designers and not owned by the players. The players may accumulate them in the course of the game, but merely use them by license of the game designer. Therefore, if the computer code allows individuals to steal property or kill other players’ avatars, which the gamers ultimately do not own, have any property rights been violated? The game designers advocate an interpretation of the law in which the EULA is determined to be controlling. Game designers, through trade organizations such as the International Game Developers Association, seek to limit governmental interference in the online and console based virtual worlds. Under this argument, if we cede legal control to virtual world property to the game designers and EULA, we essentially negate the need to look to laws and governmental interference to protect players’ rights. Certain proponents of no virtual world ownership tout the EULA as the panacea to any issues regarding the need for real world law enforcement in the virtual world. Since the EULA controls what can and cannot be done and who is vested with ownership of virtual property, there is no reason to look past its terms and conditions.

There is a certain amount of historical validity in these arguments. Football, hockey and other sports are played by individuals who know that there is an inherent risk in playing the game. However, the courts have generally considered there to be a “magic circle” around these sports that limit the liability for injury unless the parties have acted outside the rules of the game. If the rules of liability have carved out magic circles in these games, it is possible that the

law could consider the EULA to have acted in a similar manner relating to the rules of a virtual world. Under this theory, then, there is no claim for theft, arson, murder, etc., if the game allows for such actions. However, given the value of the items involved, this would seem to be too easy an excuse to make. While a certain amount of physical punishment may be expected in sports, murder is not. Regardless of whether the rules for football specifically banned murder or omitted any mention of it, no court could possibly say that it is allowable under a magic circle theory. Why, then, would the argument stand that an EULA should be able to decriminalize certain otherwise wrongful acts merely by allowing for them, or omitting prohibitive mention of them?

The rights of the individual player ultimately is what a court may find important to protect — not merely what may be easy for the game designer. Stealing a football during play is very different from stealing goods worth thousands of dollars in a virtual world, since the football will be put back in play for all players to use while virtual goods may be sold or otherwise never again seen by its previous owner. The game gods’ reliance on the EULA may ultimately be their undoing, and subject them to the type of suit that the Chinese courts have already adjudicated.

CLOSED V. OPEN WORLDS

On the other hand, “open worlds,” such as Second Life, have been designed where the barrier between the real world and the virtual world is much more porous. The creation of these open worlds is making the questions of rights and obligations much more difficult to resolve in favor of EULA control. In the open world of Second Life, individual players retain ownership of all the real-world rights to their creations in the virtual world. They are considered the owners of all the IP that they create. In certain online realms today, up to 80% of the content has been created by the users. If the open-world trend continues and is adopted

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by more and more game designers, there will be a significant need to regulate and protect the IP ownership. Moreover, in these open worlds, individuals or virtual businesses are flourishing but generally not complying with the various real-world legal obligations and requirements. Since people are channeling themselves via an avatar or online personality, the argument can be made that their actions have effect in the real world. Given that an electronic signature is a legally valid means of consent, then why not attach legal implications to the actions of ones virtual alter ego?

VIRTUAL CRIMES

One of the earliest examples of a putative virtual crime occurred in 1993 (reported by Julian Dibble, *A Rape in Cyberspace*, Village Voice, Vol. XXXVII, No. 51 (Dec. 21, 1993)). The circumstances involved the posting of a real-time non-consensual written description of the rape of another player in an online game. However, while the writer's conduct was somewhat repulsive to many, the elements of this case did not rise to the level of an actionable crime since the virtual crime did not contain all of the elements of the crime in the real world. Here, the elements of a physical rape were obviously not present; moreover, the author's textual description was protected by his First Amendment right.

The question then arises: Can any action against an avatar in the digital

world be considered a crime? I think that the courts will ultimately determine an affirmative answer to this query. Given the amount of time and energy that players put into their virtual creations and the relative value of the IP in the secondary market, their injury or loss at the hands of another player or individual hacking the game world may cause real psychological and monetary harm to the victimized player. This possibility itself may be an argument for allowing such acts to be actionable crimes

Other game-related crimes are much less nebulous than as virtual or virtual-related crimes. In South Korea, two individuals recently manipulated a virtual world server to create virtual currency worth over \$1 million in real currency on the virtual currency trading Web sites.

However, this is not new. Utilizing flaws or hacking into the systems controlling the virtual world has occurred in the past to create virtual wealth for a player. Again, this may seem like a minor offense, but since this wealth was wrongfully created, it may have the effect of devaluing the economy and assets in the virtual world. Such an event would thereby affect the real world value of every avatar's virtual property that could result in substantial monetary damage. Moreover, it raises the question of whether creating virtual dollars, which can be converted to real-world money, is tantamount to counterfeiting or forgery? How different would it be from passing off fake U.S. dollars in the international market? Or hacking and changing bank

records? While the United States courts have not specifically dealt with these issues, other courts have faced and decided related claims. A recent report out of China tells the story of a 41-year-old man who stabbed an acquaintance who stole and sold his "Dragon Saber" in the MMORPG *Legend of Mir III* for approximately \$1000. When the individual sought the assistance of the police, he was told that the theft was not a crime since virtual property is not covered as a protectable asset. Thereafter, the individual attacked the alleged thief at his residence. While this may seem like an isolated offense, some reports have claimed that many thousands of virtual world-related crimes of a similar type may have been committed in the last few years. If these numbers are realistic, then it is only a matter of time before international governments begin to protect these rights as a way to provide a nonviolent means to provide justice or redress for virtual disputes.

The United States Computer Fraud and Abuse Act (18 U.S.C. §1030(a)(5)) could be used to grant some element of justice for a virtual crime or injury. The Act provides an actionable claim when one intentionally accesses a computer without or exceeding the individual's authorization and caused damage in excess of \$5000. While a more targeted set of laws may be required to deal with the various nuances of the virtual world, this act may be used as a starting point for more comprehensive legislation.

