

Journal of
• Virtual Worlds Research

ISSN: 1941-8477

Legal and Governance
Challenges



September, 2013
Volume 6, No. 3

Volume 6, Number 3

Legal and Governance Challenges

September 2013

Managing Editor

Yesha Sivan,
Metaverse Labs Ltd.
Tel Aviv-Yaffo Academic College, Israel

Guest Editors

Melissa de Zwart,
University of Adelaide, Australia

Dan Hunter,
QUT Law School, Australia

Greg Lastowka,
Rutgers University, USA

Coordinating Editor

Tzafnat Shpak



The JVWR is an academic journal. As such, it is dedicated to the open exchange of information. For this reason, JVWR is freely available to individuals and institutions. Copies of this journal or articles in this journal may be distributed for research or educational purposes only free of charge and without permission. However, the JVWR does not grant permission for use of any content in advertisements or advertising supplements or in any manner that would imply an endorsement of any product or service. All uses beyond research or educational purposes require the written permission of the JVWR. Authors who publish in the Journal of Virtual Worlds Research will release their articles under the Creative Commons Attribution No Derivative Works 3.0 United States (cc-by-nd) license. The Journal of Virtual Worlds Research is funded by its sponsors and contributions from readers.



Volume 6, Number 3
Legal and Governance Challenges
September, 2013

Dutch Supreme Court 2012: Virtual Theft Ruling a One-Off or First in a Series?

Arno R. Lodder
Internet Governance Group,
Department Transnational Legal Studies
VU University Amsterdam

Abstract

In January 2012 the Dutch Supreme Court decided that virtual objects and pre-paid accounts can be stolen. This paper examines the Supreme Court's Runescape decision and discusses virtual theft. Virtual theft is legally interesting from various perspectives. First, the rules of Runescape do not allow items to be stolen and are designed to make illegal transfer of objects impossible. Second, normally a person loses ownership of property in case of theft, but the owner of the virtual objects is the producer of the game and loses nothing. Therefore, theft is taking place between two avatars under the all-seeing eye of the owner. Third, it is not clear why classification as theft is preferred over hacking and the transfer of data. This question was reinvigorated during the writing of this paper, when at the same time both a leading cybercrime scholar and a prominent criminal law scholar argued against the theft classification. Following the Runescape decision, the position of participants in virtual worlds towards objects remain the same, but we can anticipate more cases on the theft of virtual items generally over the next five to ten years.

1. Introduction

The Runescape case painfully shows the blurring border between the physical and virtual worlds. Jealousy leading to physical violence is not new, but maltreatment and putting a knife at someone's throat is quite something if we are dealing with what is called by some "mere bits and bytes". Two boys threatened another player and forced him to hand over a virtual mask and amulet. This did not happen only inside the virtual world, however; the Runescape threat took place offline, in real life.

What would be the appropriate course of action after such an incident? You could inform the producer of Runescape about the forced transfer of objects. But would he believe you? Also, from the perspective of the game owner, what happened seemed to be a mere transfer of virtual objects according to the rules of the game.

You could also go to the police and report the physical threat. In September 2007 the actual Dutch victim did go to the police, and the prosecutor charged the offenders with virtual theft. After the Leeuwarden Court made an initial ruling in 2008, and the Arnhem Court of appeal ruled in 2009, the Dutch Supreme Court ultimately concluded, on 31 January 2012, that virtual objects can be stolen. Theft is an old crime, mentioned even next to murder in the eighth commandment. Does it make sense to consider involuntary transactions in virtual worlds as members of a category at least as old as the days of Moses?

There is a long standing and still ongoing debate on whether a player can own objects, even if a game's terms of service say he cannot. Does theft imply that the player of the game actually had ownership over the objects? Dutch law distinguishes three different 'ownership' concepts: you can own an object, you can possess an object, and you can hold an object (for someone else). In case of theft, the thief becomes the possessor, but the original owner remains the legal owner. Note that the three different positions towards an object do not apply to ownership of intellectual property rights. Although ownership of virtual objects is often discussed in the realm of intellectual property, theft in criminal law is not about intellectual property law.

This paper analyzes the Runescape case from various perspectives and supports two main conclusions. It argues why the Dutch Supreme Court is correct in qualifying the taking away of virtual objects as theft, and why hacking and taking over data is not applicable. The remainder of the paper is structured as follows. First the Runescape case is briefly outlined. Next, the relation between the rules of virtual worlds and criminal law are discussed. Subsequently the role of the third party is analyzed, asking if and how virtual objects represent value. Finally, the paper revisits the old discussion of whether hacking is not a more appropriate criminal classification.

2. The Dutch Supreme Court on Runescape Theft

The Habbo Hotel case from 2007 was the first in which the Dutch prosecutor decided to apply the concept of theft to the taking away of virtual objects. This case was taken to the court of Amsterdam but this court decided the case in 2009,¹ so after the first ruling in the Runescape case. Also, the Amsterdam Habbo Hotel case was not appealed.² Therefore, the Runescape case is the more interesting decision.³

¹ Three suspects got convicted for both hacking (as reported by the producer of the game) and theft (as reported by the players), Court of Amsterdam 2 April 2009, *LJN* no. BH9789, BH9790, BH9791 (almost identical cases, but the three suspects were convicted in separate rulings).

² See Lodder 2011 for more details on the Leeuwarden Court and Arnhem Court of Appeal as well as the Habbo case.

³ See also *Extract from the judgment LJN no. BQ9251* via <http://bit.ly/2012Rune>.

2.1 The Facts⁴

On September 5, 2007, the 15-year-old primary suspect and his 14-year-old companion planned to rob the Runescape account of a 13-year-old boy. A couple of days before the incident the young victim had looted some very valuable game items from a (virtual) dead man and had become very wealthy and powerful in Runescape. The suspects decided to take the victim to their apartment the next day, and to use violence if necessary.

On September 6, 2007 the two offenders arrived in the apartment with the 13 year old victim. He was not prepared to hand over his virtual money and items to the offenders, so they started to beat and kick him, and also tried to strangle him. When all this violence did not have the desired effect, both went to the kitchen and grabbed some knives. They made threatening gestures at the victim--one of the offenders had a big butcher's knife and started to scream "I'll kill you!"

The victim was so scared that he did log in to the game. In the meantime one of the offenders logged into another computer on his Runescape account. The other offender used the Runescape account of the victim and "dropped" the desired items. Subsequently the first offender picked up these items: a very valuable amulet as well as a mask, and coins of the victim's account.

2.2 Lower Court Leeuwarden 2008

The case was first decided by the Leeuwarden Court on October 21, 2008.⁵ At the time of legal drafting in 1886, the crime of theft was restricted to physical objects. However, after a Supreme Court ruling on theft of electricity on May 23, 1921, a stolen good no longer had to be tangible. Since the court found that the other conditions for theft--i.e. that the amulet and mask had value and could be taken away--were fulfilled, a Dutch court for the first time determined that the taking away of virtual objects could be qualified as theft.

2.3 Court of Appeal Arnhem 2009

The appeal was decided on November 10, 2009. The defense argued that the mask and amulet were neither tangible nor had any economic value, and therefore were not goods. With regard to the tangibility question, the Court of Appeal referred to the above mentioned 1921 electricity case. Regarding the value question, the Court indicated that over the years the concept of economic value has been recognized to include the value as understood by the possessor of the item. The latter was easily proven by, e.g., the facts of the case. Another objection was that the online game and everything that happened within the virtual world remained in the possession of the producer of the game, so theft as such is impossible. The Court of Appeal stated that this interpretation of "belongs to" was too restrictive,⁶ since a player has the factual and exclusive power over the items in his possession.

2.4 Supreme Court Decision

The Supreme Court did not add much substantially new to the above observations. The appeal had not really challenged the scope of the issues as set forth in the prior decisions.

⁴ Based on Lodder 2011.

⁵ Judgment LJN no. BG0939

⁶ "... taking away a good that belongs to..."

Basically, the Supreme Court made three points. First, the defense argued that virtual objects were not goods, but virtual illusions consisting of "bits and bytes". The Supreme Court indicated that, for the victim as well as the offenders, the items had value, and that value could be taken away. Second, the defense argued that objects are data and therefore not goods. The Supreme Court stated that the boundaries between data and goods are not always clear and that they sometimes become blurred. It concluded that simply because a thing is data does not exclude it from being a good as well. Third, the defense argued that the theft of objects is part of the Runescape game. The Supreme Court found that this claim was questionable, but that given the violence used in the case, the argument needed no further discussion.

3. Rules of the Game and Criminal Law

Before further analyzing the role of the third party, the producer of Runescape, it is necessary to shed some light on the relation between criminal law and the rules of the game.

Criminal law and virtual worlds are not a natural fit. Virtual worlds are mainly about fantasy and adventures,⁷ and in most jurisdictions people are not subject to punishments for bad thoughts only. What people think is part of their private sphere that governments should particularly respect, as recognized by fundamental rights on freedom of speech and privacy. Only once thoughts are expressed, publically, should law become relevant. Virtual worlds are open to large groups of people so they are, in a sense, public, but they also create their own environment apart from daily life. The well-known magic circle concept (Fairfield 2009) nicely reflects this assumption that what happens within a game should be judged within that game.

However, sometimes borders are crossed, including those of criminal law (Duranske 2008, p. 57). Whether this is the case also depends on the nature of the game. If my avatar in World of Warcraft is bullying and insulting every other avatar that is not blond and blue eyed, this might amount to discrimination. It is different, however, if I am impersonating Archie Bunker in a game, and make racist comments as part of my portrayal of that character. The rules of the game do make a difference to the application of the law.

3.1 What Crimes Are Legally Possible?

The exact relationship between the rules of the virtual world and criminal law is not self-evident. Intuitively, one would expect that only if the rules of the virtual world are violated, criminal law might become relevant. This is the case in sports. As long as you stick to the rules you can never be held civil or criminal liable for your acts (as long as playing the game itself is not illegal). However, even within the boundaries of the rules of the virtual world, behavior in the case of e.g., discrimination, libel or intellectual property infringements might lead to the applicability of criminal law.

Criminal law can be applied to virtual worlds, but not all crimes can occur in virtual worlds. Some criminal acts, such as murder, simply cannot take place online. On this point I do partly agree with Kerr (2008):

“Existing law will not recognize virtual murder, virtual threats, or virtual theft. While these “offenses” may appear to users as the cyber-version of traditional crimes, existing law requires proof of physical elements rather than virtual analogies.”

⁷ Brenner 2008 discusses what she calls fantasy crime, due to the moment of writing largely focusing on Second Life.

For the murder part I agree, but criminal threats may occur in virtual worlds. In the case of acts concerning communication, like threats and insults, the exact medium used does not really matter. There are no physical elements involved anyway. As far as virtual theft is concerned, discussions about virtual theft were already taking place at the moment Kerr wrote the language quoted above, but one faction in that debate has continually believed that theft should always concern physical objects.

In Germany, some say “Sache sind sache”.⁸ In the past I have indicated that this illustrates dogmatic inflexibility, whereas internet law needs “out of the box”-thinking. Academically my previous position has merits, but practically the critique is not fully correct since Germany also has, next to theft, an article that deals with the taking away of electricity.⁹ However, the taking away of gasses and volatile substances are qualified as ordinary theft. Inclusion of these non-tangible items opens the possibility that virtual objects might also be the subject of theft in Germany. Virtual objects are singular and can be transferred between parties, making them bear more resemblance to physical objects than to electricity. The fact that copying computer data has not been qualified as theft does not create a conflict, since the argument there is that you cannot take something away if the original owner still holds possession. I will come back to this distinction later.

3.2 Do Virtual Objects Have Value?

In the case of ordinary theft, value is not decisive. Objects can even be stolen if they are economically of little or no value, like a pencil or the claws of your first cat. For intangible items, the notion of economic value was introduced in the Supreme Court’s electricity case. The Court of Appeal in Arnhem indicated that over the years, value has been interpreted more broadly to include, amongst other things, emotional value. This broader concept makes it easier to apply theft to virtual items, since proof of economic value is not that easy.

Games have an economy of their own (Castronova 2006), and usually forbid trade of items outside the game. There are, of course, virtual worlds that allow outside trade, but most do not. There is often a lively trade of items and avatars, so there is practical economic value. This economic value, however, only exists due to the violation of the rules of the game. In this case, theft would only be possible in the case of economic value, what criminal law would protect would be a value that only exists due to the violation of contractual rules. This is not really something the prosecutor should spend much effort on, especially because according to the rules of most games, the producer can decide at any given moment to stop the game.¹⁰ This would mean that all player-possessed value automatically disappears. The broader concept of value is of help here. The criminal acts intrinsically prove the value of the objects: if they did not have value, who would ever bother to phish and hack, or to threaten and beat someone to obtain those objects?

⁸ Freely translated: an article of property is a physical object. For instance stated during a virtual crime meeting in Heidelberg early 2009.

⁹ § 242 Strafgesetzbuch and § 248c respectively.

¹⁰ See Van Kokswijk & Lodder (2008). From a consumer law perspective one could argue that such a term is not valid, but the producer could argue that you pay your monthly fee for access to the virtual world and enjoy being there. Once you can no longer enjoy the virtual world you do not have to pay either.

3.3 Is Theft Technically Possible?

A last point worth noting is that enforcement of some norms in technical environments can be perfect (Zittrain 2008, p. 122f.). If you do not want avatars to fly or to shoot, you can simply make it technically impossible. Some virtual worlds use technical means to monitor communication and filter out indecent utterances, but you can never be completely sure that nothing will slip through. In the case of the taking away of virtual items, you can. If you do not want avatars to steal, they cannot steal. An interesting anecdote concerns the virtual world Britannia where an avatar was banned because he stole objects, but was allowed to participate again when he successfully argued that if the producer of the game did not want objects to be stolen, he could make it technically impossible (Lastowka 2010, p. 12-13). This adds an interesting angle to the Dutch cases of virtual theft: what happened in the game did not conflict with the rules of the game. The stealing could not take place in-game, but external factors (violence, hacking) were needed to illegally transfer the objects.

4. Ownership and the Role of the Third Party

The role of the third party in the Runescape case can be approached from different angles. One position is that theft is impossible, because the producer of the game remains owner of the objects at all times. Another position is that, as a result of the Runescape verdict, ownership by players is now acknowledged. Identifying the precise role of the third party requires an analysis in which criminal and private law are combined. Internet lawyers are used to cross disciplines often studied in separation, e.g. criminal law and civil law. The concept of virtual theft has been long debated, and almost intrinsically combines civil law elements (contracts, terms of service, ownership) and criminal law elements (taking away, goods). One reason the verdict of the Dutch Supreme Court is interesting is that, to some extent, it seems to turn the earlier discussion upside down. In the past, commentators often argued that if players could own the objects they possessed, theft would be possible. The Runescape decision skips directly to the conclusion. Logically, does this mean that the original premise (ownership) is true? Not necessarily. But if not, what can we learn from the verdict?

4.1 On Ownership, Possession and Holdership

The Dutch civil code recognizes three positions in relation to property. First the owner is the one who has the most far-reaching rights regarding the object. Second the possessor is the one who has factual possession and owns what he possesses. The possessor is assumed to be the owner. The most important case in which the possessor is not the owner is the case of theft. The thief is a possessor, but not the owner: ownership is not lost through theft. Third, there is the holder, the one who has factual possession but acknowledges the owner and so does not act as if he owns what he possesses.

In the part of the Dutch Civil code on obtaining and losing goods, civil ownership and theft meet.¹¹ Normally, transfer of property is only possible if the transferor has a right to make the transfer. One exception is that, in case the transferor is not legitimized, someone still becomes owner if he acted in good faith and the transfer involved remuneration. The original owner who lost possession through *theft* can claim its ownership within three years.¹² This is a peculiar situation, since during those three years, a single property can have two owners.

What are the positions of the parties in the Runescape case? The producer of the game owns the objects, so how do we interpret this theft from a civil law perspective?

¹¹ Article 86 of book 3 of the Dutch Civil Code.

¹² There are some exceptions to this general rule, but they are not relevant for the present paper.

4.2 Three Examples of Theft Involving Third Party Owners

The Runescape case is interesting in light of the relation between the offender, the victim and the third party, the producer of the game. That is why an analogy with a simple game of (for instance) Monopoly misses a crucial element: the third party.

The Runescape case mentions the example of a stolen passport. The owner of the passport is the Dutch government; the citizen only is a holder. However, if the passport is taken away, the citizen will go to police and report a theft. Also, he will go to the government and ask for a new passport. The damage to the citizen from the theft is the cost of obtaining a new passport, the inconvenience of not having a passport for a while, and issues related to (misuse) of his identity. The latter is probably the only damage for the government, that others might misuse this passport for, e.g. passing borders. What matters here is that this is a case of theft with a victim who was not the owner. The victim will report the theft of *his* passport, not on behalf of the state. From the perspective of the police it basically does not make much difference from whom an object was stolen, the investigation primarily concerns the thief. The fact that the police or a judge acknowledges theft does not make the citizen owner of the passport. Similarly, in the Runescape case, neither the victim nor the thief can claim legal ownership. The main difference with virtual worlds is that the producer of a game, unlike the state, does not suffer harm and can even restore the virtual object (cf. passport) back into the possession of the victim. This does not, however, make unimportant the act of taking away in the case of virtual objects. Whatever happens after the taking away, during the time the object is taken away, the victim does suffer.

A stolen rental car is comparable to a passport, except that the owner of the rental car does suffer. Not much happens to the assets of the direct victim of theft. He does not lose a car, the rental company does. The company cannot make a new car (like the government) or put the car back in the possession of the direct victim (like the game producer). Again, the victim reports theft but this does not make him the owner. What makes this case different from the passport and the Runescape situation is that some third party can actually become the legal owner of the car--if he obtained it in good faith and paid for it.

Could this principle be applied to virtual objects? If someone acquired, in-game, the stolen object in good faith and for remuneration, he has a right to the object. Not literally, since the producer remains owner. But analogously, one could argue so.

A final example concerns a case of kart robbing. Assume you are in New York City and decide to go to 333 North Bedford Road for an afternoon of kart racing. It seems to be your lucky day, since the kart you are in appears to be the fastest one. Suddenly two other people block your way, threaten you, and force you to get out of your kart. Would you go to the police and report 'kart jacking' or theft? Probably not, you would go to the owner of the kart complex and complain about the activities of the other two kart racers. The owner of the circuit has similar powers as the game producer. The environment is also under his control and not directly part of daily life. This case is almost like the Runescape case. The difference here is that although, after brute violence, criminal law could enter the scene, it would never become a case of theft. This is because there is no distinction here between "in game" and in real life. In this situation, both coincide. This is a distinction. What happened in game in the Runescape case cannot be recognized as irregular per se, but only after knowledge is obtained about the external circumstances the Runescape case becomes relevant for criminal law.

4.3 Who Is the Owner?

What the three examples have in common is that the third party in each case (state, rental company, kart complex owner) has ownership, and neither the victim of theft nor the thief ever can

claim ownership. In my opinion, the Runescape case therefore has no consequence for the qualification of the position of avatars towards objects. Criminal and civil law are not the same in this respect. What is important in criminal law is that an object is taken away from someone who has exclusive powers. Just as the person who hired a car has exclusive powers, the avatar does have these powers concerning the virtual objects. What remains different is that the third party in the case of virtual worlds does not suffer loss, just as the owner of the kart complex does not suffer a loss. Victims of theft in the case of virtual worlds do suffer, since they no longer have control over their virtual objects. This 'having' is criminally relevant, but it does not qualify as civil law property. So, apart from the fact that most game producers probably do not care what the Dutch Supreme Court decided, the Supreme Court did not state that the victim or perpetrators of the crime were owners of the objects. The Supreme Court only indicated that they had exclusive power. This does not impede on the right of the producer.

5. No Theft but Hacking and Taking Over Data?

Due to the special circumstances in both the Habbo hotel and Runescape case, one could question whether the Supreme Court decision is a meaningful precedent. The violence in the Runescape case was very serious, and in the Habbo Hotel case the phishing and hacking took place on a large scale. At the core, however, the Supreme Court explained why the transfer of a virtual object from one account to the other can be qualified as theft. This has wider meaning. Basically all transfers of virtual objects against the will of a participant in a game can be reported as theft. A complaint might be enough, but remember, the producer can only see what happens in the game. It is good to know, as a victim, that you can turn to the police. Whether the police will take subsequent action depends on the nature of the case, but being acknowledged as a victim is an important first step.

Viersma & Keupink (2006) argued that it is impossible for an avatar to steal, because prior hacking always has to take place. As the Britannia example illustrated, this is true: as far as objects can be taken away in game, the assumption is that the producer of the game wants this to happen and it can never be theft. However, the fact that you have to take over the account of another avatar first before you can transfer items to your account does not necessarily mean that it cannot be theft too. The objects were taken from someone by illegal means (threats, hacking) with the purpose of obtaining power over the objects. It is true that, if one looked at the transfer only from within the game, it could not be recognized as theft. However, if we do take into account what happened in real life, the result of these activities qualifies as theft. It can be compared to forcing someone to use his online bank account to transfer money to your account. For the bank, it does not look like theft. However, once the bank is informed about the threat, they will admit it is theft. You can also report theft to the police. Threats are punishable too, as is hacking, but that does not disqualify what happened as theft. Compare it to ordinary robbery: Suppose I look mean and scream to someone to hand over his wallet before I start beating him. If I succeed, I am a thief.

Since 2006, my above position was confirmed by the Dutch judiciary at least four times.¹³ What surprised me at the time of the first ruling was that many classic criminal lawyers also did not object to this classification of virtual theft. I actually expected some debates, but they did not take place. Only a few authors did not agree with the virtual theft rulings, but the majority, including the most prominent authors, acknowledged virtual theft.

Interestingly enough, at this moment, two prominent scholars from two different areas (criminal law and cybercrime) have reached (independently from each other) the very same conclusion. Both

¹³ Habbo Hotel in first instance, and the Runescape case in three instances.

Rozemond and Koops have argued that it would have made more sense to qualify what happened as hacking and the taking away of data.¹⁴ This crime is regulated in Article 138ab of the Dutch Criminal Code. Is there something this ‘virtual lawyer’ can add to this strong opposition?

5.1 Virtual Objects as Computer Data

From the moment computers entered society, in particular personal computers, discussion has been going on about how to categorize computer data. In the Netherlands a heated debate took place between those who considered data a good (in the sense of physical object), and those who did not. Obviously, the latter party formed the vast majority. Hence, computer data differ from physical objects in particular on the point that they can be copied multiple times within a short period, without losing the possession of the original owner. In the context of theft, it is generally accepted that data cannot be stolen. Taking away of data is only partly possible: you can take data just as you can take a physical object, but in the case of computer data, the original owner still holds possession too. So if someone ‘steals’ the document I am currently working on, in the old days of typewriters, I would really miss what I had typed. With computer files, I can still keep on working on this paper at the same time the ‘thief’ enjoys reading what I wrote so far. Due to this characteristic, classic crimes did not fit criminal behavior concerning computer data. This is one of the reasons special computer crimes have been introduced.

5.2 Article 138ab Criminal Code on Hacking

Article 138ab(1) Dutch Criminal Code defines what constitutes hacking, namely getting access by, e.g., breaching security or using a false identity. This can be applied to the taking away of virtual objects in the Habbo case as well as in the Runescape case. In Article 138ab(2) the penalty of one year from the first section is raised to a maximum of 4 years when data are “copied, taped, or recorded.” Although in the Netherlands offenders rarely get maximum penalties, it should be noted that although the maximum penalty of ordinary theft is also four years, in the Runescape case the maximum penalty for theft using violence with more than one person is 12 years. So, although the actual sentence of 144 hours community service could have been easily based on Article 138ab as well, for society as well as victims it makes a difference what criminal offense is chosen: if the possible penalty is higher, the seriousness of the crime is better acknowledged.

The argument by Rozemond boils down to this: it is strange to broaden the old crime of theft to include virtual theft and, at the same time, not also consider the taking away of data as theft as well. At first this seems a good point. Virtual objects are computer data after all. One of the reasons crimes concerning computer data were introduced is that crimes concerning physical objects could not be applied to computer data. The statement that legislatures could not foresee that computer data would include virtual objects is beside the point.

Even if legislatures could have foreseen virtual objects, they would not have cared to regulate them. These are special singular data, a type of computer data that, once taken away, is no longer in the possession of the original owner. This was actually how the discussion on virtual theft started. Since virtual objects are singular just as physical objects, what one gets the other loses, so ordinary theft could be applied analogously. Boonk & Lodder (2007) have put forward a similar argument regarding the first sale doctrine in Copyright Law. This doctrine does not apply to electronic copies, but one could argue that the copyright on a created virtual object is exhausted once sold. It would not make much sense to try

¹⁴ In December 2012 Bert-Jaap Koops had written an article to appear in the Dutch journal *Computerrecht* 2013, and Klaas Rozemond wrote a lengthy annotation to appear in the Dutch journal *Ars Aequi* 2013.

to fit this special type of electronic information (hence: singular) into the exception for electronic copies of the first sale doctrine.

It is interesting to note that in the Habbo Hotel case the victims were found guilty of both hacking (as reported by the producer) and theft (as reported by the Habbo participants). The attorney argued that this combination is not possible, because hacking should be considered a *lex specialis* of theft. The Amsterdam Court did not agree, and stated the virtual furniture was stolen:

“virtual furniture and virtual items are not intercepted or recorded. These goods were not streaming media at the moment of taking away either.”

In addition the Court argued that taking over is not the same as taking away.

Koops in particular has problems with the uncertainty following from the fact that in the Runescape case the Supreme Court indicated that sometimes computer data offenses, as well as classic physical objects offenses, can be applied to data, and that it depends on the circumstances of the case which regime to choose. He also raises the interesting question of the utility of special cybercrime offenses, once the distinction between data and physical objects becomes blurred.

These observations are important to keep in mind in the future, since more of our possession is taking the form of virtual computer data. I do not believe that the present case justifies serious concerns, although the way the Supreme Court discusses this is somewhat unlucky. What should have been pointed out more clearly is that we need special offenses for computer data because, with regard to many forms of data, a criminal law based on physical objects simply does not work. The present case is a clear exception. The virtual Runescape objects share the main characteristic that distinguishes computer data from physical objects: singularity.

6. Conclusion

A decision as the one of the Dutch Supreme Court on 31 January 2012 has been long awaited in the law and virtual world field. This decision confirms what has been argued by several authors during the last decade, e.g. Lastowka & Hunter (2004):

“(...) it is predictable that someday a victim of a serious virtual crime will make the case that the words “property,” “owner,” and “stolen” in the Model Penal Code encompass “chattels” like Bone Crusher maces.”

This paper analyzed the Runescape case from various perspectives. Stated simply, two conclusions are drawn. First, the Dutch Supreme Court was right in deciding that the taking away of virtual objects qualifies as theft. Virtual objects in someone's exclusive possession were taken away with the intent of obtaining exclusive possession. Hacking and taking over data is not applicable, since this involves copying. Singular virtual objects are not copied; they are moved from one account to another account.

Second, the case has no consequences for the position of producers of virtual worlds. The criminal law criterion is exclusive power, and someone who is not a civil law owner can have exclusive power (cf. a hired car).

The future will tell whether this ruling is a one-off or whether more cases on virtual theft will follow. The signs are there that in the Netherlands, as well as elsewhere, similar cases are going to be prosecuted. On the same day as the Runescape decision, the Supreme Court decided that you can steal

prepaid credit, and later that year in April 2012 ruled on malversation and receiving of prepaid credit.¹⁵ We are living in an age where more and more of what was physical becomes digitalized, professional as well as social life is increasingly taking place online, and criminals are turning into cybercriminals. This same development is likely to occur concerning the taking away of objects. Probably within 5 or 10 years from now, rulings on the stealing of (amongst other things) iTunes and eBooks could be expected. The Netherlands might remain the only country where these electronic crimes are qualified as theft, but it would not surprise me if other countries follow as well.

¹⁵ Dutch Supreme Court 31 January 2012 (Judgment LJN no. BQ6575) and 17 April 2012 (Judgment LJN no. BV9064).

References

- Boonk, M. and A.R. Lodder (2007), Virtual Worlds: Yet Another Challenge to Intellectual Property Law. *Global IP Summit Magazine*, available at <http://ssrn.com/abstract=1079970>
- Brenner, S.W. (2008), Fantasy Crime, *Vanderbilt Journal of Entertainment and Technology Law*, Vol. 11, p. 1-97.
- Castranova, E. (2006), *Synthetic Worlds: The Business and Culture of Online Games*, University Of Chicago Press
- Duranske, B.T. (2008), Virtual Law: Navigating the Legal Landscape of Virtual Worlds, American Bar Association.
- Fairfield, J. (2009), The Magic Circle, *Vanderbilt Journal of Entertainment and Technology Law* Vol. 11, p. 823-840.
- Kerr, O.S. (2008), Criminal Law in Virtual Worlds, 2008 *U. Chi. Legal Forum* 415.
- Kokswijk, J. van & A.R. Lodder (2008), *Recht in online reality. De juridische werkelijkheid in fantasiewerelden*, Paris Uitgevers.
- Lastowka, F.G. & D. Hunter (2004), Virtual Crimes, *New York Law School Law Review* Vol. 49, p. 293-316.
- Lastowka, G. (2010), *Virtual Justice. The new laws of online worlds*, Yale University Press.
- Lodder, A.R. (2011), Conflict Resolution in Virtual Worlds: General Characteristics and the 2009 Dutch Convictions on Virtual Theft, in: K. Cornelius & D. Hermann (eds.), *Virtual Worlds and Criminality*, Springer, p. 79-94, available at <http://ssrn.com/abstract=159014>.
- Viersma, M. & B.J.V. Keupink (2006), 'Virtuele criminaliteit: all in the game', in: A.R. Lodder (ed.), *Recht in een virtuele wereld. Juridische aspecten van Massive Multiplayer Online Role Playing Games (MMORPG)*, Den Haag: Elsevier Juridisch, p. 41-60.
- Zittrain, J. (2008), *The Future of the Internet – And How to Stop it*. Yale University Press.