



WESTMINSTER

INTERNATIONAL UNIVERSITY IN TASHKENT

An Accredited Institution of the University of Westminster (UK)

Virtual items: Legal theory v. Contractual Obligations (WIP)

- Research Background
- Applicable Jurisdiction
- Virtual items as Property
- Virtual items as Services (Contractual clauses)
- References

- **Statistics of the primary market:**
 - Interactive entertainment generated \$91 billions in revenues in 2016;
 - Consumers spent \$14 billions more in 2017 than in 2016;
 - One in three people on the planet (2.5 billion) play free-to-play games across PC and mobile platforms;

- **Terminology:**
- **Virtual items** - are items, currency, and characters that are features of virtual spaces such as social games like **Entropia**, MMORPG like **World of Warcraft**, Star Wars: The Old Republic, and MOBA like **Playerunknown's Battlegrounds**.

Research Background

- Some insights from the secondary market:
- Counter-Strike GO – StatTrak™ M9 Bayonet
- Sold for: **10.000 USD**



Research Background

- Age of Wulin - Sword

- Sold for: **16.000 USD**



Research Background

- **Second Life - Amsterdam**

- Sold for: **50.000 USD**



- **Eve Online – Bloodbath of B-R5RB**
 - Occurred on 27th January 2014;
 - Lasted 21 hours;
- Estimated **losses: 330.000 USD**



Research Background

- Entropia Universe – Club “Neverdie”

- Sold for: **635.000 USD**



Research Background

- **Entropia Universe – Planet “Calypso”**
- Sold for: **6.000.000 USD**



- **Issues arising:**
 1. Ownership rights over the virtual items;
 2. Liability for the harm caused to users;
 3. Potential taxation / public policy / national security issues;
- Similar issues were reported on Virtual Network's White Paper on Virtual Property
- *All three issues are closely related to the question of jurisdiction.*

- **Jurisdiction** – The power and authority of a State to exercise legislative, judicial and executive powers.
- There are four principles, which regulate the jurisdiction under the International Law:
 - **Territorial Principle**
 - **Nationality Principle (Active and Passive)**
 - *Two other principles:*
 - **Protective Principle**
 - **Universality Principle**

- According to Ryngaert (2015):
- “The exercise of jurisdiction over Internet-based offenses remains largely based on the principle of **territoriality**.”
- Cybercrime Convention (2001), sets forth territoriality as the main jurisdictional principle, and several EU legal instruments addressing Internet-based criminality cite the constituent elements approach.
- States require a *substantial* territorial connection in order to establish jurisdiction.

- Such a connection may consist of
 - (a) the production of effects within the territory, e.g. as a result of the alleged perpetrator purposely addressing content to territorially based users, or, in the case of serious offenses, mere accessibility of a website (a variation on the objective territoriality principle, which comes, however, close to **universal jurisdiction**),
 - (b) the location of the offender's computer within the territory via an identified IP address (a variation on the **subjective territoriality principle**);
or
 - (c) the storage of content on a local server.”

- **Personal Jurisdiction:**
- In the United States:
- The "**effects**" **test** was described from the American Law Institute's Restatement (Second) of Conflict of Laws (1971), and later applied in *Calder v. Jones* (1984):
- "A state has power to exercise judicial jurisdiction over an individual who causes **effects** in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction **unreasonable.**"

- **The Zippo-test** (Zippo Manufacturing Co. v. Zippo Dot Com, Inc):
- Test assessed whether minimum contacts have been created by the creation and maintenance of a website;
- Under this test, websites are divided into three categories:
 - 1. passive websites;
 - 2. interactive websites;
 - 3. commercial websites;

- **In Germany (*LG Berlin 970193/96*):**

- German court found it could exercise jurisdiction over a defendant based in Kansas City based on the fact that the Web site operated at the defendant's domain name was accessible at the plaintiff's location in Germany.

In France (*Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme 2001*):

- Yahoo! unsuccessfully argued that France did not have personal jurisdiction over the U.S. company because it was operating on the Internet from the United States and that French law did not apply to the images because they were stored on a server in the United States

- **Contractual Jurisdiction:**
- A "**choice of law**" or "**governing law**" provision in a contract allows the parties to agree that a particular state's **laws** will be used to interpret the agreement, even if they live in (or the agreement is signed in) a different state.
- **Entropia Universe:**
 - *“This Agreement is to be governed by, construed and enforced according to the laws of Sweden. You agree that any future dispute that might arise between You and MindArk is to be governed by the laws of Sweden, **without regards** to any **principles of conflicts of laws** and the United Nations convention on contracts for the International Sale of Goods.”*

- *“You agree that all disputes under this Agreement shall be settled by a Swedish court in the city of Gothenburg. Notwithstanding the exclusive jurisdiction of a Swedish court as stipulated above, You acknowledge MindArk’s right to apply for injunctive and/or other equitable relief in any court of competent jurisdiction.”*
- **Blizzard:**
 - *“This Agreement shall be governed by and construed in accordance with the **laws of France**. If you are resident in a member state of the European Union, you also enjoy the protection of the mandatory provisions of the consumer protection laws in your member state.”*

- **EVE Online:**
 - *“The sole and exclusive forum for resolving any controversy, dispute or claim arising out of or relating to the EULA, or otherwise relating to any rights in, access to or use of the Software, System, Game, Game Content, User Content and/or the rights and obligations of the parties hereto, **shall be the District Court of Reykjavík, Iceland, (Héraðsdómur Reykjavíkur).** You hereby **expressly waive and agree not to raise any and all objections based on personal jurisdiction, venue and/or inconvenience of such forum and agree to the jurisdiction of the District Court of Reykjavík, Iceland.**”*

- **League of Legends:**

- ***North America Server:***

- *“The Federal Arbitration Act and federal arbitration law apply to the enforcement of this arbitration agreement. California law, exclusive of conflict or choice of law rules, applies for deciding all other claims and issues, including the interpretation of this Agreement.”*

- ***European West Server:***

- *Except as otherwise provided in this Agreement, this Agreement shall be governed by, and will be construed under, the **laws of Ireland, without regard to conflict of law principles.** **The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded.** If you access the Game from, and are a resident of, the European Economic Area and you are a consumer, you may have other or additional mandatory rights or remedies by law as set out in this Agreement.*

- **What is property? (Real property - Chattel)**
- *English Law:*
- Property law defines objects of property for the purpose of the law, whether tangible or conceptual, and confers **exclusive rights in these objects** or “**things**” that are enforceable against the whole world. These rights, property rights, are socially recognised and legally protected or created exclusive powers over these objects, asserted against the world at large.
- English legal term “property” has at least three meanings: property objects or things, property rights, and assets or wherewithal

- *German Law:*
- A thing (Sache) is defined in § 90 BGB as comprising physical objects only.
- Anything that has no corporeal existence as such can be a thing if it can be embodied in some kind of physical object, such as a computer program on a magnetic disk.
- However, all kinds of rights (obligations, debts) are not things, because they are not corporeal
- At the same time **Austrian law** (§ 285 ABGB) that “everything that is distinguished from the person, and serves the use of men, is called a thing in the sense of the law.”

- **Right to title and Possession**

- *Virtual items from the perspective of legal scholars and practitioners:*

- **Allen Chein (2012) states:** “Despite the fact that virtual world residents think of virtual goods in the same way as tangible ... reasons abound why a court would not treat virtual items as property... as virtual goods, with few exceptions, have absolutely no utility in the real world”
- **Leah Shen (2010) argues:** “Without the guidance of any property regime for virtual items, some courts have simply chosen to treat virtual property as any other personal property owned by the players. However, treating virtual property as real-life personal property does not help decide who owns the virtual property”.
- **According to Simpson (2006)** “... even if rights are created, the player is not the first owner of the rights. ”

- *Approach is taken by the majority of gaming services.*
- **Virtual Policy Network (2012):**
- “is common is that virtual items tend to be defined in the Terms of Service or End User Licence Agreement. They are defined as being part of the game software to which the user has a limited licence to use. In some instances the licence for the digital item is differentiated in some way.”
- **RIOT Games EULA:**
 - “ We grant you a limited, **non-exclusive, non-transferable, revocable license to use** and enjoy the Riot Services for your individual, non-commercial, entertainment purposes only and expressly conditioned upon your compliance with the terms of this Agreement. Unless otherwise expressly authorized by us in a signed writing, **you may not sell, copy, exchange, loan, reverse engineer, decompile, derive source code from, translate, lease, grant a security interest in, transfer, publish, assign or otherwise distribute any of the Riot Services** or any of **Riot Games’** intellectual property, including any computer code associated therewith”

- **Entropia Universe:**
 - **“Limited and Non-Exclusive License**
 - The Participant acknowledges that he or she shall have only a limited, non-exclusive, non-assignable license to make personal use of the Entropia Universe System and only in conjunction with the use of the Entropia Universe Services.
 - You **expressly acknowledge** that You **do not obtain any ownership right or interest** in the Virtual Item You “create” but all such terms refer to **the licensed right to use a certain** feature of the Entropia Universe System or the Entropia Universe in accordance with the terms and conditions of this EULA.”

Recognition of property?

- **RuneScape Case (Gerechtshof Leeuwarden, 10 November 2009, LJN: BK2773, BK2764)**
- In 2007 a 13 year-old player of the online game RuneScape (Jagex Games Studio, UK) was kicked and threatened with a knife by two 14 year-olds until he transferred virtual items to one of their accounts.
- In 2008 a Dutch court found the both defendants guilty of robbery under Article 312 of the Dutch Criminal Code, noting that the virtual items qualified as goods under Dutch law.
- In February 2012, Dutch Supreme Court upheld the decision.
- ***EULA of RuneScape:***
 - “A person who is not a party to this agreement shall have no rights to enforce any term of this agreement. These terms and conditions are governed by English law and any dispute connected with them or Jagex Products will be decided only by the courts of England.”

Preliminary Conclusions

- **Huge gap in the sense of classification of virtual property.**
 - **Concepts of property and property rights vary from jurisdiction and jurisdiction.**
 - **Entertainment providers try to limit the ability of users to bring claims to the court by contractual clauses in EULA.**

 - **The EULAs are not unbreakable. If they contradict to existing Law – the Law prevails.**
- BUT:**
- **The question of jurisdiction still remains.**

- **Primary legislation:**

- Bürgerliches Gesetzbuch (BGB)
- Das Allgemeine bürgerliche Gesetzbuch (ABGB)

- **Case Law:**

- *Calder v. Jones*, 465 U.S. 783 (1984)
- Gerechtshof Leeuwarden, 10 November 2009, LJN: BK2773, BK2764
- *LG Berlin*, 97O193/96 (Nov. 20, 1996), *aff'd*, KG, 5U659/97 (March 25, 1997)

- Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)
- Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 399 F.3d 1010 (9th Cir. 2005).
- Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D.Pa. 1997)

- **Secondary sources:**
- American Law Institute's Restatement (Second) of Conflict of Laws (1971)
- Chein, Allen (2012) "A Practical Look at Virtual Property," St. John's Law Review: Vol. 80: Iss. 3, Article 6. Available at: <http://scholarship.law.stjohns.edu/lawreview/vol80/iss3/6>
- Lodder, Arno R., Dutch Supreme Court 2012: Virtual Theft Ruling a One-Off or First in a Series? (September 17, 2013). Journal of Virtual Worlds Research, September, 2013, Vol. 6, No. 3. Available at SSRN: <https://ssrn.com/abstract=2327008>
- Strikwerda, L. Ethics Inf Technol (2012) 14: 89. <https://doi.org/10.1007/s10676-011-9285-3>

- Virtual Policy Network, 'Virtual Items, Virtual Currency and Public Policy' (2017). [online] Available at: http://www.virtualpolicy.net/_Downloads/Documents/tVPN_WhitePaper-Virtual_Items_&_Public_Policy.pdf [Accessed 21 Jan. 2018]
- Year in Review, December 2017. (2018). [online] SuperData Research, p.5. Available at: <https://www.superdataresearch.com/data/> [Accessed 15 Feb. 2018].
- Yi Xiang and Liang Guo, 'Virtual Property Trade in Online Games' (2013). [online] Available at: <https://pdfs.semanticscholar.org/28f5/0a21ff304985d2ade4dddaceb34498f2ee78.pdf> [Accessed 16 Mar. 2018]