

INIURIA IN CYBERSPACE*

1 Introduction

In April 2007 Belgian newspapers reported that the Brussels public prosecutor had asked of the Federal Computer Crime unit to go onto Second Life, one of many virtual worlds that exist in cyberspace, to investigate the “virtual rape” of a Belgian user of Second Life (see amongst others *De Morgen* 13 August 2007). The perpetrator manipulated the program to force the “woman” into virtual sexual intercourse, which would normally not be possible without her consent. If this should happen in real life, it would obviously be rape, but what effect, if any, would this and other heinous acts committed in virtual worlds, have in the real world?

Since 2003 a new kind of public space, commonly known as virtual worlds, have developed in cyberspace. A virtual world is defined as a computer-based simulated environment intended for its users to inhabit and interact *via avatars* (the virtual representatives of members of the virtual worlds). This habitation is usually represented in the form of two- or three-dimensional graphical representations of humanoids or other graphical or text-based *avatars* (definition from <http://lindenlab.com/pressroom/general/factsheets/sloverview> (accessed January 2010)). Most, but not all, virtual worlds allow for multiple users. The total membership of virtual worlds was estimated at 569 million in the second quarter of 2009 (according to Keegan “Virtual Worlds are Getting a Second Life” 20 July 2009 *The Guardian*).

In one such world, Second Life, avatars can interact with each other almost the way humans do in the real world (<http://Secondlife.com> (accessed 2009-11-20)). The “world” of Second Life consists of a digital component populated with “people”, where there is abundant entertainment and where experiences are similar to and also often more extreme than those encountered in real life. It is possible for Internet users to create avatars that become citizens of this world. These avatars are able, amongst others, to interact with each other, purchase land, erect mansions and start businesses. Users’ avatars interact socially and professionally with other users’ avatars, and these residents of Second Life retain rights to their digital creations. They can buy, sell and trade with other residents. The “monetary unit” of Second Life is called Linden Dollars (L\$), and it can be exchanged for American dollars. In fact, special exchange offices have sprung up in many parts of the US and the L\$ has an exchange rate which fluctuates in the same way as any other currency, but which is basically stable at L\$250=US\$1 (<http://secondlife.com/statistics/economy-market.php> (accessed 2009-11-20)).

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In the scenario sketched above, a myriad of legal questions, relating to many different sections of the law, may arise (see in general Duranske *Law: Navigating the Legal Landscape of Virtual Worlds* (2008)). One of the creators of virtual worlds, Linden Lab, acknowledges this by making provision for a mandatory arbitration process within Second Life, by stating in Second Life Terms of Service that "Linden Lab's resolution of such disputes will be final with respect to the virtual world of the service but will have no bearing on any real-world legal disputes in which users of the service may become involved ..." (secondlife.com/corporate/tos.php (assessed 2009-01-18)).

Unfortunately for Linden Lab, the arbitration clause, as well as a choice of law clause and a choice of jurisdiction clause, was found to be unenforceable in 2007 (*Bragg v Linden Research, Inc.* 487 F. Supp. 2d 539 (E.D. Penn.2007)). The effect is that almost any dispute that arises in Second Life can potentially be the subject of legal action in many places all over the world (for an exposition of the shortcomings of contracts as a tool to regulate virtual worlds, see Fairfield "Anti-social Contracts: The Contractual Governance of Virtual Worlds" 2008 53 *McGill Law Journal* 427; and Christ and Peele "Virtual Worlds: Personal Jurisdiction and Click-Wrap Licenses" 2008 1 *Intellectual Property & Technology Law Journal* 1 *et seq.*)

Although much has been written internationally about some aspects of virtual worlds, such as the legal effect of infringement of intellectual property rights (Kennedy "Law in Virtual Worlds" April 2009 *Journal of Internet Law* 6) and even rights of "ownership of land", (see *inter alia* Kennedy "Virtual rights? Property in Online Game Objects and Characters" 2008 17 *Information and Communication Technology Law* 95; Bartle "Pitfalls of Virtual Property" <http://www.mud.co.uk/richard/povp.pdf> (accessed 2009-11-20) the consequences of "wrongful conduct" in delict is still uncertain.

The purpose of this note is to investigate some real-world disputes that may arise as a result of unlawful conduct in virtual worlds. The note will firstly expand the background of virtual worlds and then sketch some scenarios, which could potentially lead to liability in law. The main focus will be on actionability in criminal law and delict in South African law. Special attention will be given to the question whether personality rights of members of virtual worlds can be infringed by, for instance, the rape of their avatars. The question whether liability for economic loss caused unlawfully to members of virtual worlds by other members of such worlds will also be addressed.

2 Background

Phillip Rosendale established Linden Lab in 2003 and created the virtual world of Second Life. According to Rosendale, his goal was to demonstrate a viable model for a virtual economy or virtual society. He reiterated that he did not build a game but a new country where inhabitants could live and interact socially and economically. Since then, many different virtual worlds such as World of Warcraft, Entropia Universe, Habbo Hotel and Club

Penguin were created in cyberspace (Keegan “Virtual Worlds are Getting a Second Life” 29 July 2009 *Guardian.co.uk*). According to Keegan “Facebook and Twitter are lauded to the skies, but neither has found a way to make money where-as virtual worlds ... are profitable because their business models are based on the digital elixir of subscriptions and micropayments (*sic*) ... Twitter makes the noise, Second Life makes the money.” (Keegan 29 July 2009 *Guardian.co.uk*). The monetary value of virtual worlds could not be ignored by Facebook and in May 2008 Facebook launched the hugely successful virtual world, Yoville, which is accessible only through Facebook (see <http://gigaom.com/2009/03/31/how-virtual-world-yoville-got-5m-facebook-users/> (accessed 2009-11-11)).

Second Life is chosen as a model of a virtual world for purposes of this investigation, firstly because it mirrors reality (avatars do in Second Life what people do in real life) and secondly, because conduct in Second Life did give rise to litigation in the past (see *inter alia Bragg v Linden Research, Inc.* 487 F. Supp. 2d 539 (E.D. Penn.2007); and *Eros LCC et al v Simon* New York Eastern District Federal Court (unreported case no 1:2007cv04447)).

The inhabitants of Second Life do what people do. For example, they create, buy and sell objects such as clothes, jewellery and books; they buy and sell “real estate”; they buy building material and build mansions; they pay for services of professionals, for example, lawyers; they can become members of clubs, such as jazz clubs; they advertise, they can visit cinemas, music performances, open air debating societies and they can become involved in relationships.

Examples of a multiplicity of legal problems that may arise are, to mention but a few:

- Intellectual property – apart from the normal copyright issues which are covered in the “Second Life Terms of Service”, numerous issues relating to intellectual property rights may arise. The following are but a few examples:

Mr X designs a specific type of vehicle, the x-mobile, which operates in the virtual world. It is highly successful and he reproduces and sells thousands of the x-mobile to other users in the virtual world. Can X patent the x-mobile or, if it is regarded as a computer program, does he have copyright in it?

Ms Y designs a virtual dress, which is highly successful, and she sells the “design rights” to a clothing manufacturer in the virtual world or she engages a shop to manufacture clothes under licence. Does she have any rights in the “design” that can be protected in the real world?

- Value Added Tax (VAT) – residents who live in the European Union are charged VAT for purchases (services) (even in L\$) made from Linden Lab. This includes purchases from the land store, land-use fees and land auctions. Transactions in L\$ between “residents” of Second Life that do not involve Linden Lab directly are not subject to VAT

(<https://support.secondlife.com/ics/support/KBAnswer.asp?questionID=4592>. See also <http://europa.eu/scadplus/leg/en/lvb/l31044.htm>)).

- “Real estate” and other “property” – it is common cause that virtual real estate and other property that are acquired in virtual worlds simply do not fulfil the requirements to be recognised as property in reality. The fact, however, is that millions of dollars of “property” (movable and immovable) are bought, sometimes further developed and sold in Second Life. Although we do not deal with property, we certainly deal with monetary value. The difference between the “property” in Second Life and “property” in the game of monopoly is that in the case of Second Life, we have to do with something with monetary value and although it is dealt with in Linden \$, it can be exchanged for real money (see on property in virtual worlds: Hunt “This Land is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights” 2007 9 *Texas Review of Entertainment & Sports Law* 141; and Kennedy 2008 17 *Information and Communications Technology Law* 95).

3 Liability for unlawful conduct

The main focus of this note is to investigate the effect of intentional unlawful actions committed in virtual worlds.

The question arises whether, if, for instance, one “citizen” of Second Life commits an illegal or unlawful act (be it “criminal” or “delictual”) against another, such act could have legal consequences in the “real world”. To put it differently, can an *iniuria* committed in cyberspace result in the creation of rights and obligations for the creators or “owners” of the avatars, or can monetary loss caused unlawfully result in a claim against the owner of the perpetrator?

Three “real life examples” will illustrate the problem:

As mentioned in the introduction, in April 2007 an avatar of a Belgian user of Second Life was raped. In this case, the perpetrator manipulated the program to force the “woman” into virtual sexual intercourse, which would normally not be possible without her consent. If this would happen in real life, it would obviously be rape.

In another incident in 2008, a 43-year-old Japanese woman’s sudden divorce in a virtual game called Maple Story made her so angry that she killed her online husband’s digital *persona*. This too, would not have been possible without some interference with the normal programming of the game. The woman was arrested by the Japanese police on suspicion of hacking (<http://edition.cnn.com/2008/TECH/ptech/10/23/avatar.murder.japan.ap/index.html>).

In March 2008, Dutch police arrested a teenager on suspicion of stealing £2,800 worth of furniture on the site. A spokeswoman for Second Life’s creators Linden Lab said: “We have in place sophisticated antifraud and anti-money laundering tools. We will work closely with any law enforcement

agency.” (<http://www.mirror.co.uk/news/top-stories/2008/03/25/fantasy-biz-quiz-by-cops-89520-20362088/> (accessed 2008-12-08)).

From the outset, it should be clear that acts of whatever nature, committed with the consent of other players, or acts or conduct allowed by the rules of a virtual world, even if it would cause personality harm or economic loss, would not lead to any liability in the real world. This is so, simply because, by submitting to the end-user agreement of the virtual world, one agrees to submit to the rules (laws) of the specific world.

The examples mentioned above deal with two types of “infringement”.

Firstly, acts which seemingly do not have any direct consequences in real life (for example the “rape” of one avatar by another against the will of the owner of the “victim” or the “murder” of the avatar by the aggrieved angry divorcee).

The second type of infringement, namely the “stealing” of virtual goods with monetary value clearly has detrimental implications for the owner of the “victim” avatar. Although it can be questioned whether one has to do with theft in the normal sense of the word, there is clear financial detriment to the “owner” of the goods and, therefore, should result in a monetary claim for the victim.

The scenarios sketched above may potentially result in criminal or delictual liability as will be indicated below.

3.1 *Criminal liability*

All the situations mentioned above will be criminal offences in terms of section 86 of the Electronic Communications and Transactions Act 25 of 2002. This section provides:

“86(1) Subject to the Interception and Monitoring Prohibition act, 1992 (Act No 127 of 1992), a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence.

86(2) A person who intentionally and without authority to do so, interferes with data in a way which causes such data to be modified, destroyed or otherwise rendered ineffective, is guilty of an offence.

86(3) A person who unlawfully produces for use ... a device ... which is designed primarily to overcome security measures for the protection of data ... or performs any of those acts with regard to a password, access code or other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

86(4) A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.”

The “rape” incident will clearly be in contravention of sec 86(1) because there was unauthorised interference with data by the owner of the rapist avatar. The “murder” would fall foul of sections 86(1) and (2) because there was not only unauthorised interference but also “destruction” of data. In both cases, the perpetrator would also contravene sections 86(3) and (4) because he unlawfully “produced” and “used” a device to overcome security

measures for the protection of players (and their avatars). All the above sections, except subsection (4), carry a penalty of a fine or imprisonment for a period not exceeding 12 months (s 89(1)). Subsection (4) carries a penalty of a fine or imprisonment for a period not exceeding five years (s 89(2)).

The question whether the “rape” of one avatar by another can, apart from possible liability under section 86, also constitute a crime such as rape or indecent assault, presents interesting problems. The actions of the “rapist” clearly do not fulfil the requirement for rape. The reason for this is simple: Rape is defined as sexual intercourse with a person without his/her consent. Clearly, in the scenario above, there was no “sexual intercourse *with a person*”. One had to do with simulated acts depicting sex between avatars perpetrated by the owner of one avatar against an unwilling “victim” avatar. (The *adagium, qui facit per alium facit per se* comes to mind but it could only be relevant if the victim was a person and penetration in one or other form took place!) Can indecent assault be excluded as easily?

The question whether the stealing of virtual goods with monetary value can, apart from the liability incurred in terms of section 86, be a crime, also presents interesting problems. It is submitted that such an act can at most be regarded as fraud.

3.2 *Liability in delict*

Two possible claims may arise in delict. On the one hand, the infringement of personality rights may give rise to the *actio iniuriarum*. On the other hand, it may be possible that economic or financial loss is suffered as a result of the “rape”. It has been pointed out by Lynn that the effect of rape on a successful businesswoman (avatar) may have such a detrimental or traumatic influence on the avatar that her business may suffer a result (See “Virtual rape is traumatic, but is it a crime?” http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/05/sexdrive_0504 (accessed 2009-11-24)). The case of the murdered avatar would illustrate this point clearly. If it is not possible to re-establish the same identity, the goodwill that her business had accumulated will be lost with the avatar even if the owner/creator would establish a new business with a new avatar. Another example of economic loss is theft of virtual goods.

3.2.1 *The actio iniuriarum*

At common law the position was that an *iniuria* could not only affect a person directly, but also indirectly through others (Neethling, Potgieter and Visser *Law of Delict* 2005 297). So, for instance, where a girl or wife was raped, the *iniuria* was also committed against the father or husband as *pater familias* or head of the family. In similar fashion, if an *iniuria* was committed against the mortal remains of a testator it was regarded as an *iniuria* against the heir (Neethling, Potgieter and Visser *Neethling’s Law of Personality* 2005 62). Although our courts did not embrace the idea of *iniuria per consequentias* or

indirect *iniuria* such as the above, it seems that it is accepted (albeit reluctantly) that an action (whether verbal or otherwise) against a person or even the remains of a person can, under certain circumstances, also cause harm (financially or even in the form of an *iniuria*) to persons near to the “injured person”. In *Splendiff v East London Daily Dispatch Ltd*, Van der Riet J said (1929 EDL 113, 129):

“I consider that I should adopt as the correct principle in our law that the wife and sons of a deceased party who has been slanderously aspersed, have a right of action only if the nature of the aspersion be such that they are directly affected in status or patrimonial interest, and that I should not hold that the mere hurt to their feelings of regard to the deceased man should entitle them to such an action.”

It is clear from our case law – and it is accepted by most authors on the subject – that even damage to property or interference with another right, for example, intentional disturbance of possession, can sometimes constitute an infringement of dignity. It is, however, stressed that *iniuria* is only committed if all the elements of *iniuria vis-à-vis* the victim are proven (see Neethling, Potgieter and Visser *Law of Personality* 64). The success of such action will therefore not depend on the question whether the avatar suffered “rape” or “indecent assault”, but whether the actions of the perpetrator amount to the wrongful infringement of the person of the creator of the victim avatar. In the light of the above, one would have to investigate whether the elements of *iniuria* in the narrow sense (insult) or of infringement of the right to privacy can be proved in any of the scenarios sketched above.

3 2 1 1 Virtual rape

The victim

From the outset one must distinguish between the victim avatar and her owner or creator. It should be clear that no crime or delict can be committed against the victim avatar, simply because it lacks legal subjectivity. It cannot be raped or indecently assaulted in the legal sense of the word, and likewise it cannot be insulted or defamed. The avatar can, therefore, not be the victim.

The conclusion can only be that, if rights are infringed, the aggrieved party (victim) must be the creator/owner of the raped avatar. It must be noted that even the term “owner” creates problems because we do not have to do with a corporeal thing.

The wrongdoer

As no *iniuria* can be committed against the avatar, there can consequently be no *iniuria per consequentias* in the true sense of the word. The simple question is whether an *iniuria* was committed against the aggrieved party by the actions of the wrongdoer. The wrongdoer will not be the “perpetrator”

avatar, but the controller/creator. In order to answer this question, one will have to prove the elements of the delict.

The delict

The delict in this case will be the intentional, wrongful manoeuvring by the controller of the perpetrator avatar in such a way that, through its attack on the avatar of the victim, personality rights of the owner/creator of the “victim” avatar are infringed. This is analogous to the *Splendiff* scenario sketched above. The only personality right that can come into play would be the right to dignity. The right to dignity is not only protected by the common law, but also by the constitution. One can analyse the different elements of infringement of the right to dignity (*iniuria* or insult) at common law as follows:

Conduct

The conduct requirement will be the manoeuvring or interference with the “victim” avatar by executing actions on a computer. It should be noted that the act is not committed by the avatar, but by its owner/creator, and the act is not rape but may be infringement of personality rights of the owner of the victim avatar.

Wrongfulness

If the act mentioned above was only in conflict with the “rules of the game”, it may be debatable whether such act was wrongful. If, however, it was necessary to “hack” into the virtual world and to change the way in which the computer program was written in order to commit the “rape”, it may be argued that such action was wrongful. A more difficult question may be whether the wrongfulness pertains to the injury.

Animus iniuriandi

The action had to be done with the intention to infringe the personality rights of the prejudiced person. It is submitted that this will be a factual question but, given the nature of the “virtual world” and its inhabitants, one will at least be able to prove *dolus eventualis*. *Animus iniuriandi* in this form can certainly be imputed to a person who, intentionally, knowing that it may be insulting the controller of the victim avatar, committed the rape. This element will therefore also not present insurmountable problems. If the “rape” was committed with the intention to degrade the owner/creator of the victim avatar, *animus iniuriandi* in the form of direct intention would be present.

Causality

There is clearly a causal connection between the act of the owner/creator of the perpetrator avatar and the personality infringement or insult to the owner/creator of the victim.

Harm

A person's dignity embraces his subjective feelings of self-respect. The onus to prove that his/her feelings of self-respect have been infringed will be on the aggrieved party, which is the owner/creator of the victim. It should not be problematic to prove this element.

It is concluded that that rape of an avatar can, at most, and provided that the elements of *iniuria* are proved, constitute insult in the narrow sense against the owner of the "victim" avatar.

3 2 1 2 Virtual "murder"

What has been said above regarding the "rape" of an avatar, is equally true for the "crime" of murder. Since avatars are not legal subjects, crimes and unlawful acts in delict cannot be committed against them. Therefore the murder of the avatar can, at most, and provided the elements of *iniuria* can be proved by the creator of the "deceased" avatar, be *iniuria* committed against the person of the creator of the murdered avatar.

It is therefore submitted that as far as the *actio iniuriarum* is concerned, the only remedy available to creators/controllers of "aggrieved avatars" can be a claim based on insult. The situation may be considerably different if one investigates the possibility of a claim based on possible financial loss or *damnum iniuria datum*.

3 2 2 Financial loss

The question whether economic loss, which may result from the "rape" or "murder" of the avatar, will now be addressed.

Neethling defines pure economic loss as "... patrimonial loss that does not result from damage of property or impairment of personality" (Neethling, Potgieter and Visser *Law of Delict* 2005 268). Although there was uncertainty regarding the question whether economic loss can be recovered by the *actio iniuriarum* or whether it must be recovered by the *actio legis aulica*, it is trite that economic damage resulting from personality infringement can be recovered (Neethling, Potgieter and Visser *Neethling's Law of Personality* 2005 63).

In the scenario sketched above, goodwill may be lost, for instance in the case of the murder of an avatar, or as was pointed out in the introduction to this paragraph, even by the rape of the avatar. Even if it is possible to create a new avatar, to "follow up" the "deceased", or to replace the "damaged"

raped avatar, goodwill has to be built up anew. This matter is not trivial. In the case of a very famous or highly successful avatar, such as Anshe Chung (created by Ailin Greef), who became the first dollar millionaire in Second Life in 2006, and who made her fortune by buying and selling virtual property (see *Business Week* 1 May 2006), the goodwill may be substantial. It must again be pointed out that it is not the goodwill of the avatar that is lost or diminished, but the goodwill which the creator/owner of the avatar has built up in the virtual world.

It is submitted that, once it is clear that the loss results in economic loss in the real world, normal principles of the law of delict should be applied and such loss should, accordingly, be recoverable.

In the case of the stolen goods mentioned above, there is clearly financial loss. Again, the loss is not loss of property but economic loss. The “theft” was made possible through manipulation of the computer program. It would not be possible in the world of Second Life. Such loss should be recoverable from the owner of the perpetrator if the requirements of the *actio legis aquilia* are fulfilled.

4 Conclusion

Conduct in virtual worlds is not irrelevant and cannot simply be regarded as game playing. Huge amounts of money change hands in these worlds and where money is involved the law will play its part. Where virtual “murder” and “rape” occur or money is made or lost in terms of the rules of the game, it does not affect the real world. However, where these actions occur as a result of tampering with the rules of the game by manipulation of the underlying computer program, legal consequences should follow.

In such cases, the “rape” or “murder” of an avatar can result in liability for *iniuria* in terms of the *actio iniuriarum*, provided all the elements of *iniuria* can be proved. Economic loss flowing from “rape” or “murder”, for instance loss of goodwill, can be claimable under the *actio legis aquilia*. Economic loss resultant from “theft” or damage to property should likewise lead to aquilian liability.

Virtual villains, beware of what you do in cyberspace; it can have serious legal consequences.

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