

## **Grand theft – GTA cheat software falls foul of contract and copyright rules**

The Patents Court has granted the developers and publishers of Grand Theft Auto V summary judgment for breach of contract, inducing breach of contract and copyright infringement, against two individuals who were involved in the development and sale of cheat software for use with the GTA video game.<sup>1</sup> The decision will be welcome to rights-holders in their efforts to protect against unauthorised add-ons, and the rulings contain some instructive analysis of the admittedly “technical” factors that can arise in cases of this sort.

### **Background**

There were originally five defendants. Claims against the first three were settled. Take-Two Interactive and Rockstar Games sought summary judgment against the fourth and fifth defendants, who were both involved in developing software known as Epsilon, which is a cheat software of a kind known as a “mod menu”. As the judge Mrs Justice Falk explained, mod menus are software programs that alter the operation of a game while it is being played, enabling players to gain advantages in gameplay, such as “spawning” copies of weapons, vehicles or ammunition, generating “spoofed” virtual currency for use in the game, and interfering with other players’ gameplay experience.

According to the claimants, cheat software like Epsilon seriously harms the gameplay experience for other players – particularly online, where GTA can be played by up to 30 players at a time. The claimants also claimed that Epsilon allowed cheating players to generate virtual goods and currency, which they would otherwise have had to buy using real money or to earn during legitimate gameplay.

The claimants sought summary judgment on the basis that the defendants had breached various terms of the end-user licence agreement (**EULA**) for GTA, as well as the terms of service and online code of conduct, which all players must agree in order to install and play the game. They also claimed that the defendants knowingly induced breaches of contract by the defendants’ own customers, i.e. the users of the Epsilon mod menu.

The claimants also claimed that the defendants infringed copyright by, among other things, authorising infringements of copyright in the form of copying and adaptations committed by Epsilon users, contrary to section 16(2) of the Copyright, Designs and Patents Act 1988 (**CDPA**).

### **Decision**

#### Breach of contract

On the basis that the facts were sufficiently established and not in dispute, the judge was prepared to grant summary judgment against the fourth defendant. There was a clear breach of contract, most obviously as the EULA contained a specific prohibition both on cheating in any form and on providing guidance or instructions to any other individual or entity on how to cheat. The defendants, acting in person, denied liability, but neither denied having a contract with Rockstar Games, and on their own evidence what Epsilon did and was intended to do was to enable cheating.

Yet, although it ultimately accounted for nothing, the judge was not prepared to grant summary judgment against the fifth defendant on this ground, because he was under 18 at the date when he first used GTA, and so the judge was not prepared to rule out a real prospect of his successfully defending the claim for breach of contract on the basis that he was not bound by the contractual terms and could not be sued.

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<sup>1</sup> *Take-Two Interactive Software Inc v Nathan James* [2020] EWHC 179.

The judge briefly reviewed the rules governing whether contracts are binding on a minor. The general principle is that, except for contracts for so-called “necessaries”, contracts with a minor are voidable at the minor’s option. Those voidable contracts divide into two further classes: (a) contracts granting an interest in property, which are binding on the minor unless the minor repudiates them during the minor’s minority or within a reasonable period after attaining majority; and (b) contracts that are not binding on the minor unless ratified after attaining majority.

The claimants’ first argument was that the contract in this case fell into the first category of voidable contract in that it granted an interest in property, being the licence to use the game, and so was binding unless repudiated. Unpersuaded, the judge noted that Chitty at 9–036 referred to contracts involving the acquisition of an interest in property “of a permanent nature” and, without hearing full argument, it was not clear what that meant. Moreover, there might also be some argument in the current case as to whether a licence was in fact of a permanent nature, since it was irrevocable on its terms.

As to whether the contract was a contract for a so-called “necessary” and so binding on the fifth defendant anyhow, the judge said that, while in one sense computer games might be regarded as “necessary” for a certain age group, that did not mean that they were “necessary” as a matter of law.

So the judge was not prepared to grant summary judgment against the fifth defendant for breach of contract. By contrast, the rules governing whether contracts are binding on a minor did not apply to the claim in tort of inducing breach of contract or to the copyright infringement claim.

#### Inducing breach of contract

Applying the test for inducing breach of contract as set out in *OBG Ltd v Allan*,<sup>2</sup> the judge was satisfied that the necessary ingredients of the tort were made out.

- (a) There was a breach of contract by anyone who bought the Epsilon mod menu and used it on GTA, having agreed to be bound by the EULA.
- (b) There was persuasion, procurement or inducement by the defendants, causing the contracting party to breach its contract. The judge was satisfied that this requirement was met, as Epsilon was marketed and supplied for the express purpose of allowing or encouraging individuals who acquired it to cheat, and so to breach their contracts.
- (c) There was the requisite knowledge on the part of the defendants that what they were doing was inducing a breach of contract. In this respect the judge noted that turning a blind eye was enough. In this case, the fourth and fifth defendants had admitted knowledge of the existence of the contract. It was also clear that they were aware that players to whom they provided Epsilon were regularly getting “bans” from playing the game.
- (d) There was the required intention to procure a breach of contract. Again, for this purpose, it was sufficient to have knowledge of the existence of the contract and to turn a blind eye. The judge was satisfied that the defendants must have been aware not only of the existence of the contract, but that what was being done was unauthorised and amounted to a breach.
- (e) The judge was satisfied, on the evidence, that damage had been suffered by the claimants.

#### Copyright infringement

The judge was also prepared to grant summary judgment on the basis of copyright infringement, since she was satisfied that, by providing the Epsilon cheat software to consumers, the defendants had

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<sup>2</sup> [2008] 1 AC 1.

authorised the copying of the GTA program or substantial parts of it, without a licence, contrary to section 16 of the CDPA. On the basis that section 17(6) of the CDPA expressly provides that copying includes the making of copies that are “transient”, the judge rejected the defendants’ defence that using Epsilon did not involve copying of a lasting nature. The way that the cheat worked, in the judge’s view, involved a breach of copyright in the form of making transient copies, such as by allowing a player to access weapons or other objects that would not be available without cheating. It did this by taking information from the GTA libraries in relation to the relevant object, such as a weapon, and reproducing the image and functions of the object “instantiated in the game”, so allowing a cheater to use it in gameplay.

The judge also rejected a number of further defences. A purported disclaimer of liability to Epsilon users in relation to its use in gameplay online was dismissed as “mere window-dressing” of the kind disregarded by Arnold J in *EMI Records Ltd v British Sky Broadcasting Ltd*.<sup>3</sup>

A decompilation defence under section 15(B) of the CDPA was also rejected. As the judge observed, that provision was intended to allow a computer program to be copied for limited purposes in the course of creating an independent program that may be operated either with the program decompiled or with another program. The judge was not satisfied that the requirements of section 50(b)(1) were met, however: that provision described compilation as the process of converting a computer program expressed in low-level language into a version expressed in higher-level language. In the judge’s view, that did not fit with the description given by the fourth defendant himself of how the Epsilon product was produced.

Furthermore, the judge noted that what section 15B permitted was incidental copying in the course of decompilation. Accordingly, even if the defence were available to the defendants, it would relate only that process of decompilation. It would not provide a defence to what the judge had found to be a copyright infringement, namely authorising copying by persons to whom Epsilon was supplied.

## **Comment**

Although this was a summary judgment application and the defendants represented themselves, the case usefully illustrates the causes of action and related issues that may arise from the unauthorised supply of software that alters the operation of a video game.

The defendants admitted that they had entered into a contract with Rockstar Games, but even if they had not themselves done so, the court would apparently have been prepared to find that they had the requisite knowledge and intention, at least to the extent of turning a blind eye, to be liable for inducing a breach of contract by users of the game who were subject to the conditions of the EULA. As such, the case gives some encouragement to rights-holders seeking swift justice.

Indeed, the judge acknowledged the challenge for the court to be sure at an interim stage that it sufficiently understands the facts, which in this sort of case can be, in the judge’s words, “quite complex, or at least technical”. Despite some initial reservations, the judge was ultimately satisfied that the facts were sufficiently undisputed and established for her to make a decision. She did so despite the fact that one of the claimants’ two witnesses, who was put forward as an expert, was employed by the claimants to monitor and address cheating activity and so could not be said to be independent. The judge could fortunately make her decision without reference to that witness’s evidence.

Some of the issues in the case will, however, remain unresolved. Along with the fifth defendant’s status as a minor, there were also copyright arguments raised which the judge was not prepared to rule on definitively. One was a claim under section 296 of the CDPA on the basis that Epsilon incorporated a

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<sup>3</sup> [2013] EWHC 379.

circumvention of the technological protection measures built into GTA to prevent unauthorised tampering. While it was not necessary for her to decide the point for the copyright infringement claim to succeed, the judge did note that there was some substance to the defendants' evidence in this respect to support their case that nothing they had done, or that Epsilon did, was designed to get round anti-cheating software included in the GTA program.

Finally, although the copyright claim succeeded on the basis of authorising infringement, the judge did not consider the claimants' primary copyright infringement claim, i.e. that the defendants themselves copied parts of the GTA program, namely the executable file and libraries that formed part of GTA, which contained, respectively, instructions to run the game and graphics, sound and other artistic materials used in the game. According to the claimants, those must have been copied during the development of Epsilon, contrary to section 16(1)(a) of the CDPA. They also claimed that the defendants had made adaptations contrary to sections 16(1)(e) and 21 of the CDPA. Those will now be matters for another case and another day.

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