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## *Jagex Ltd. v. Impulse Softwar.* An Almost Big Win for Online-Gaming Software Developers

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# Jagex Ltd. v. Impulse Software: An Almost Big Win for Online-Gaming Software Developers

*Holly Guest\**

## I. INTRODUCTION

This case arises from the use of a bot, a program used to cheat the game *Runescape*, which was created by Jagex.<sup>1</sup> The issue is whether the defendants can be held liable for the marketing and sale of their bot to *Runescape*'s customers.<sup>2</sup> Jagex brought this action against Impulse Software and the creators of the bot, alleging the bot constituted copyright and trademark infringement and violated the Digital Millennium Copyright Act (DMCA)<sup>3</sup> and the Computer Fraud and Abuse Act (CFAA).<sup>4</sup> The District Court for the District of Massachusetts found that Jagex failed to demonstrate the factors necessary in order to obtain preliminary injunctive relief against the defendants.<sup>5</sup> This case represents a victory for bot developers and highlights the importance of requiring a software developer to register its copyright in order to be protected.

### A. Factual Background

In 2001 under the laws of the United Kingdom, Jagex created *Runescape*, a massive multiplayer online game (MMOG).<sup>6</sup> Seven years later, *Runescape* boasted over 130 million accounts—making it the most popular free role-playing game on the Internet, according to the Guinness Book of World Records.<sup>7</sup> *Runescape* players create characters that they lead through a virtual fantasy world in which they complete goals and objectives.<sup>8</sup> Players can also work together through chatting, trading, or competing in mini-games and challenges.<sup>9</sup> One can play *Runescape* for free and get basic access to the game, or the user can pay for a subscription and receive access to additional

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1. Jagex Ltd. v. Impulse Software, 750 F. Supp. 2d 228, 231 (D. Mass. 2010).
2. *Id.* at 237.
3. 17 U.S.C. § 1201(2)(a) (1999); *id.* at 231.
4. 18 U.S.C. § 1030(a)(4) (2008); *Jagex*, 750 F. Supp. 2d at 231.
5. *Jagex*, 750 F. Supp. 2d at 239.
6. *Id.* at 231.
7. *Id.*
8. *Id.*
9. *Id.*

levels and skills.<sup>10</sup> To advance in the game, players gain *experience points* and virtual *gold coins*, which allow them to obtain resources more quickly and fulfill missions more efficiently.<sup>11</sup> Becoming a skilled player requires a substantial time commitment. For example, in October 2009, the three highest-ranked players had each logged an average of 20,000 hours, which is equivalent to about 50 hours a week, over the course of almost eight years.<sup>12</sup>

Defendants Eric and Mark Snellman, doing business as Impulse Software, run websites that enable players to cheat at *Runescape* and other similar MMOGs through the use of bots that play the MMOGs for the player even when the player is not actively using the computer.<sup>13</sup> The bot software enables *Runescape* players to “cheat” their way through the levels of the game because the bots operate on their own.<sup>14</sup> The bot software functions by downloading onto its website a copy of *Runescape*’s game client—the software that connects to the game’s server—and then, through a process called *reflection*, the software examines *Runescape*’s internal procedures, which users are normally not able to see.<sup>15</sup> The software then uses this advantageous information to recognize objects and complete game tasks accordingly.<sup>16</sup> The bot automatically advances players through the levels of the game at a faster pace than a player who manually controls the game, and thus gives bot users a sizeable, unfair advantage compared with those who play *Runescape* without the aid of bots.<sup>17</sup>

## B. Description of Plaintiff’s Claim

Jagex filed this complaint against Impulse Software and the Snellman brothers in the United States District Court for the District of Massachusetts on February 9, 2010, asserting multiple causes of action.<sup>18</sup> First, Jagex alleged that the Snellman brothers directly and contributorily infringed several of its valid copyrights by selling bots that copy the game client in violation of *Runescape*’s Terms and Conditions, and by encouraging others to buy and use the bots.<sup>19</sup> Second, Jagex alleged the defendants violated the DMCA by selling bots that, through reflection, evaded *Runescape*’s “technological mea-

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10. *Jagex*, 750 F. Supp. 2d at 231.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Jagex*, 750 F. Supp. 2d at 231.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 235.

sure” that safeguards its copyrighted work.<sup>20</sup> Jagex claimed that the bots’ “only significant commercial purpose” was to get around *Runescape*’s protective measures.<sup>21</sup> Third, Jagex alleged that the defendants—through the sale and marketing of the bots—infringed on *Runescape*’s trademark under the Lanham Act in a way that was likely to cause consumer confusion.<sup>22</sup> Jagex based its reasoning on the fact that the defendants: “1) promote the Bots on websites such as ‘*Runescape* cheating asylum’ (www.runescape.su), 2) use the *Runescape* mark throughout such websites, and 3) use an email address ending in @runescape.su, causing consumers to believe they are associated with or endorsed by Jagex.”<sup>23</sup> Fourth, Jagex alleged that—because the defendants offer their bots for sale—they violate the CFAA by surpassing and causing others to surpass the access authorized by *Runescape*’s game software Terms and Conditions, which are viewable on the *Runescape* website.<sup>24</sup>

### C. Procedural and Substantive History

On top of Jagex’s four-count complaint, the company also requested a preliminary injunction to stop the defendants from profiting from the sale and promotion of their “infringing software.”<sup>25</sup> Defendants answered Jagex’s complaint with a motion to dismiss for lack of personal jurisdiction and improper venue. And, in the alternative, they asked for a transfer to the United States District Court for the Middle District of Florida.<sup>26</sup> On July 27, 2010, the court held a motion hearing to post tentative rulings and present the parties with questions.<sup>27</sup> The court published its decision in a Memorandum and Order on August 16, 2010.<sup>28</sup>

The United States District Court for the District of Massachusetts held that Jagex failed to demonstrate a likelihood of success on the merits of its copyright claim,<sup>29</sup> its DMCA claim,<sup>30</sup> its trademark-infringement claim under the Lanham Act,<sup>31</sup> and its CFAA claim.<sup>32</sup> Consequently, the court denied

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20. *Jagex*, 750 F. Supp. 2d at 237.

21. *Id.* at 237.

22. *Id.* at 237-38.

23. *Id.* at 237.

24. *Id.* at 238.

25. *Jagex*, 750 F. Supp. 2d at 232.

26. *Id.* at 231-32.

27. *Id.* at 232.

28. *Id.* at 228.

29. *Id.* at 236.

30. *Jagex*, 750 F. Supp. 2d at 237.

31. *Id.* at 238.

Jagex's motion for a preliminary injunction.<sup>33</sup> In this case, the main stumbling block for Jagex was that it failed to obtain copyrights for its software program or game client.<sup>34</sup> Furthermore, Jagex failed to demonstrate that *Runescape*'s Terms and Conditions transformed its server into a "protected computer" under the CFAA.<sup>35</sup> Despite its decision, the court hinted that in the future the case might have a different outcome.<sup>36</sup>

#### D. Court's Rationale

The court relied on the preliminary injunction standard set in *Nieves-Marquez v. Puerto Rico*, which states that the plaintiff must demonstrate: "(1) a substantial likelihood of success on the merits, (2) a significant risk of irreparable harm if the injunction is withheld, (3) a favorable balance of hardships, and (4) a fit (or lack of friction) between the injunction and the public interest."<sup>37</sup> The court emphasized that in copyright- and trademark-infringement cases, the first factor weighs the most heavily in its decision.<sup>38</sup>

First, the court addressed Jagex's copyright-infringement claim by laying out a two-part test requiring that Jagex had the burden of proof to demonstrate: (1) Jagex owned a valid copyright and (2) the defendants copied original elements of Jagex's copyrighted work.<sup>39</sup> Also, the court noted that the defendants could have contributorily infringed a copyright by "intentionally inducing or encouraging direct infringement of the copyright."<sup>40</sup> Jagex argued that the defendants' bots operated under the game client licensed to users under *Runescape*'s Terms and Conditions.<sup>41</sup> Jagex averred that the defendants violated those terms and conditions because Jagex's license stated that licensees "must not use software to gain an unfair advantage [by using] automation tools, macros [or] bots [and] must not use any game specific, third-party software that encourages breaking of our rules."<sup>42</sup>

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32. *Id.*

33. *Id.* at 239.

34. *Id.* at 234-35.

35. *Jagex*, 750 F. Supp. 2d at 238.

36. *Id.* ("Thus, at least at this stage of the proceedings, plaintiff's allegations do not convince the Court that it is likely to succeed on its CFAA claim.").

37. *Id.* at 234-35 (quoting *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003)).

38. *Id.* at 235.

39. *Id.*

40. *Jagex*, 750 F. Supp. 2d at 235.

41. *Id.*

42. *Id.*

Jagex supported its argument by relying on two recent cases, which also involved claims of copyright infringement of online products and services.<sup>43</sup> The first case, *MDY Industries LLC v. Blizzard Entertainment, Inc.*, involved a suit for copyright infringement against the creator of a bot designed to cheat *World of Warcraft*, another MMOG.<sup>44</sup> In the second case cited by Jagex, *Ticketmaster LLC v. RMG Technologies, Inc.*, the plaintiffs succeeded on a copyright claim against the creator of a bot that automatically steered itself through a copyrighted website.<sup>45</sup> Although both cases contained strong analogies to Jagex's claims, Jagex's copyright-infringement claim fell short because, unlike the plaintiffs in these cases, Jagex did not own registered copyrights on its website or software.<sup>46</sup> Jagex argued that the Copyright Act did not require that Jagex register its game client software before filing suit, since *Runescape* is not a "United States work" as defined by the Act.<sup>47</sup> Nevertheless, the court noted that even if a registered copyright is not a prerequisite to obtaining injunctive relief, it is difficult for a plaintiff to succeed without it.<sup>48</sup>

Alternatively, Jagex argued that since the defendants previously used and then removed from their website images for which Jagex owned Visual Arts copyrights, the defendants had violated *Runescape*'s Terms and Conditions.<sup>49</sup> The court rejected this alternative argument as well, because Jagex failed to clearly show how a bot user violates his limited license by infringing on the visual arts copyrights, especially where the importance of the images with the game was not clarified.<sup>50</sup> Therefore, Jagex failed to meet its burden of proof to show a registered copyright on the *Runescape* software, as opposed to the copyrighted Visual Arts images.<sup>51</sup> Further underscoring the importance of meeting the first requirement in obtaining a preliminary injunction, the court found that Jagex failed to demonstrate a "substantial likelihood of success on the merits of its copyright claim."<sup>52</sup>

Next, the court moved on to Jagex's DMCA claim against the defendants, noting that well-established case law required Jagex to show that: "(1) defendant[s] trafficked in a technology; and (2) the technology was primarily

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43. *Id.* at 235-36.

44. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-2555, 2008 WL 2757357, at \*10 (D. Ariz. July 14, 2008).

45. *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1104-11 (C.D. Cal. 2007).

46. *Jagex*, 750 F. Supp. 2d at 236.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Jagex*, 750 F. Supp. 2d at 236.

52. *Id.*

designed or produced to circumvent conditional access controls to protected works, or has limited commercially significant use other than such circumvention.”<sup>53</sup> Like its copyright claim, Jagex’s DMCA claim fell short because Jagex did not own a valid copyright for its software program or game client.<sup>54</sup> Further, Jagex failed to show that it used any “technological measure” that the defendants’ bots had to circumvent.<sup>55</sup> Instead, the *Runescape* website is open to the public and does not employ any method of protecting its copyrighted material.<sup>56</sup> Based on those two shortcomings, the court found that Jagex likely would not be able to prevail on a DMCA claim.<sup>57</sup>

Then, the court addressed Jagex’s trademark-infringement claim against the defendants.<sup>58</sup> To succeed on a trademark-infringement claim, Jagex had to prove to the court: “1) that the symbols in which the property right is asserted are valid, legally protectable trademarks; 2) that they are owned by plaintiff; and 3) that defendant’s subsequent use of similar marks is likely to create confusion as to origin of the goods.”<sup>59</sup> No one disputed that Jagex owned a registered trademark for the mark *Runescape*.<sup>60</sup> Jagex based its claim against the defendants on the fact that the defendants’ promotion of the bots on *Runescape*-cheating websites was likely to cause consumer confusion.<sup>61</sup> Jagex contended that consumers would be misled by the defendants’ uses of Jagex’s trademark on the defendants’ websites and the defendants’ use of an email address containing the word “Runescape.”<sup>62</sup>

Ultimately, Jagex’s trademark-infringement claim failed because after Jagex filed suit, the defendants took down the website [www.runescape.su](http://www.runescape.su), labeled their new website as “RS Cheating Asylum,” and started editing on-line discussions on its website by systematically replacing the word “Runescape” with “RS” when it appeared.<sup>63</sup> Jagex urged that the abbreviation

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53. *Id.* (quoting *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 110 (1st Cir. 2008)).

54. *Jagex*, 750 F. Supp. 2d at 237.

55. *See MDY Indus., LLC v. Blizzard Entm’t, Inc.*, No. CV-06-2555, 2008 WL 2757357, at \*11 (D. Ariz. July 14, 2008) (where plaintiff had a “warden” that detected unauthorized programs); *see also Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1111-12 (C.D. Cal. 2007) (where website employed a computer-security program that blocked automatic access to its copyrighted pages by detecting non-human users).

56. *Jagex*, 750 F. Supp. 2d at 237.

57. *Id.*

58. *Id.* at 237-39.

59. *Id.* at 237 (quoting *Three Blind Mice Designs Co., Inc. v. Cyrk, Inc.*, 892 F. Supp. 303, 309 (D. Mass. 1995)).

60. *Jagex*, 750 F. Supp. 2d at 237.

61. *Id.*

62. *Id.*

63. *Id.*

“RS”—for which Jagex owned a trademark in the European Union—was widely known as *Runescape*, and thus the association would lead to consumer confusion.<sup>64</sup> The court reasoned that it was highly unlikely that the creator of a computer game would run a website that promoted cheating in that game, and therefore, the probability of consumer confusion that the two sites were associated was slight.<sup>65</sup> Because Jagex failed to show that the defendants used similar trademarks that would lead to consumer confusion, the court held that Jagex would not be able to win against the defendants on claims based upon the Lanham Act.<sup>66</sup>

Last, the court addressed Jagex’s CFAA claims against the defendants, setting forth that the CFAA makes it illegal to “knowingly and with intent to defraud . . . exceed[ ] authorized access[of a protected computer], and by means of such conduct further[ ] the intended fraud and obtain[ ] anything of value.”<sup>67</sup> *Runescape*’s Terms and Conditions specifically prohibited “automation tools, macros, bots, or autotypers [and] game-specific, third-party software that encourages breaking of [*Runescape*’s] rules.”<sup>68</sup> Here, Jagex’s claim failed because they were unable to prove that the defendants actually surpassed their authorized use of the *Runescape* server.<sup>69</sup> While the defendants’ consumers may have accepted *Runescape*’s Terms and Conditions after a free, 10-hour trial period, the defendants claimed to have never accepted the Terms and Conditions.<sup>70</sup> Also, the court rejected Jagex’s claim of contributory liability under the CFAA because Jagex did not cite any authority to support the claim.<sup>71</sup>

The court concluded its analysis by rejecting Jagex’s claim that they would suffer irreparable harm if the court did not grant the injunction.<sup>72</sup> Jagex insisted that the defendants’ actions drove consumers to abandon *Runescape* in favor of games with no cheating bots, and that Jagex spent considerable time and money dealing with the backlash.<sup>73</sup> The court specifically noted Jagex’s two-year delay in filing its complaint after becoming aware of defendants’ website, and the additional five-month delay before Jagex moved for a preliminary injunction.<sup>74</sup> Because Jagex did not show a

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64. *Id.* at 237–38.

65. *Jagex*, 750 F. Supp. 2d at 238.

66. *Id.*

67. 18 U.S.C. § 1030(a)(4) (2008); *id.*

68. *Jagex*, 750 F. Supp. 2d at 238.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 239.

73. *Jagex*, 750 F. Supp. 2d at 239.

74. *Id.*

strong likelihood of success on the merits of its claims, the court did not hold in its favor.<sup>75</sup> Lastly, the court found that Jagex did not sufficiently prove that the public interest would be furthered by an injunction, regardless of whether the defendants' actions promote a "culture of cheating."<sup>76</sup>

## II. CRITIQUE OF COURT'S APPROACH

The court's ruling was limited to the fact situation presented in Jagex's case.<sup>77</sup> It is very probable that if Jagex had registered its *Runescape* software and game client properly, the outcome of this case would have been different.<sup>78</sup> Nevertheless, the court's ruling in this case was a fair application of the law to the facts.

Had Jagex registered its *Runescape* software and game client, the court would have had to address whether copying its software in violation of *Runescape*'s Terms and Conditions constituted copyright infringement. A case in another district—which Jagex cited for support of its claim—addressed that issue. In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, the court granted summary judgment for Blizzard for the contributory and vicarious copyright infringement of MDY.<sup>79</sup> In that case, Blizzard, the creator of the largest MMOG in the world, *World of Warcraft*, sued MDY Industries, the creator of a bot called *WowGlider* (or *Glider*), which operates similarly to the bot at issue in the *Runescape* dispute.<sup>80</sup> Unlike Jagex, however, Blizzard owned a valid copyright of its game-client software, and it granted a limited license for its players to use the software.<sup>81</sup> Blizzard prevailed on its copyright-infringement claims against MDY because the use of its software with *Glider* violated the scope of the license according to the game's Terms of Use.<sup>82</sup> MDY also violated section 106 of the Copyright Act by copying information to a computer's random access memory.<sup>83</sup> The *MDY* case is factually very similar to Jagex's case. But because Jagex failed to register its copyright, the *Jagex* court was able to sidestep the issue surrounding the defendants' glaring violation of *Runescape*'s Terms and Conditions.<sup>84</sup>

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75. *Id.*

76. *Id.*

77. *Id.* at 234–39.

78. *See Jagex*, 750 F. Supp. 2d at 236.

79. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-2555, 2008 WL 2757357, at \*17 (D. Ariz. July 14, 2008).

80. *Id.* at \*10.

81. *Id.*

82. *Id.*

83. *Id.* (citing 17 U.S.C. § 106 (2006)).

84. *See Jagex Ltd. v. Impulse Software*, 750 F. Supp. 2d 228, 236 (D. Mass. 2010).

Additionally, Blizzard succeeded on its tortious-interference-with-contract claim against MDY.<sup>85</sup> It is unclear why Jagex did not try to assert this claim against the defendants. If they had, the court might have ruled in Jagex's favor. The court in *MDY* held that MDY encouraged gamers to violate the valid contracts, an end-user license agreement, and a terms-of-use agreement between Blizzard and its consumers with the use of the *Gliders*.<sup>86</sup> There was no doubt whether MDY knew its promotion and sale of *Glider* would result in the breach of Blizzard's contract with its customers and that the interference was intentional.<sup>87</sup> If Jagex decides to try its suit against the defendants again, it might do well to take a play out of Blizzard's handbook and bring a claim of tortious interference of contract against the Snellman brothers.

Although the *Jagex* court correctly denied Jagex's DMCA claim, the court hinted that if Jagex had employed a specific type of "technological measure"—like the computer protection software used by MDY<sup>88</sup> or Ticketmaster<sup>89</sup>—the court might have found that the defendants had violated the DMCA.<sup>90</sup> The court could have used this case as a chance to articulate for future cases exactly what constitutes a protection measure under the DMCA. Perhaps if Jagex obtains the proper copyrights and appeals, the court may have a chance to set a clear precedent in this area of the law.

Although the defendants in *Jagex* took down any misleading references to *Runescape* from their websites by the time of the trial, it seems unfair that they were able to get away with infringing on the trademark for a period of time with no consequences.<sup>91</sup> What is the point of *Runescape*'s registering its mark if others are able to use it for their own commercial use? It seems clear that the defendants' use of the trademark is likely to cause consumer confusion as to the origin of the goods, which would satisfy the test laid out by the court, especially for new consumers of the game.<sup>92</sup>

The biggest hole in the court's analysis of Jagex's claims is found in its discussion of Jagex's contributory-liability theory under CFAA. According to the court, Jagex's theory did not hold up because it did not provide any authority to support its argument.<sup>93</sup> The court then cites to the case *Doe v.*

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85. *MDY*, 2008 WL 2757357, at \*17.

86. *Id.* at \*14.

87. *Id.*

88. *Id.* at \*11.

89. Ticketmaster LLC v. RMG Techs., Inc., 507 F. Supp. 2d 1096, 1111-12 (C.D. Cal. 2007).

90. *See Jagex Ltd. v. Impulse Software*, 750 F. Supp. 2d 230, 236 (D. Mass. 2010).

91. *See id.* at 237-38.

92. *See id.* at 237 (citing *Three Blind Mice Designs Co., Inc. v. Cyrk, Inc.*, 892 F. Supp. 303, 309 (D. Mass. 1995)).

93. *Id.* at 238.

*Dartmouth-Hitchcock Medical Center*, in which the District Court of New Hampshire rejected the plaintiff's claim of vicarious liability under the CFAA because Congress only provides a private cause of action against the person who violates the statute with the necessary criminal intent.<sup>94</sup>

But at least one court has upheld the theory of vicarious liability under the CFAA.<sup>95</sup> In *Charles Schwab & Co. v. Carter*, the United States District Court of the Northern District of Illinois began its analysis with an examination of the language of the statute to resolve the issue of whether a plaintiff can successfully bring a claim against a defendant who did not directly violate the statute's provisions.<sup>96</sup> The deciding factor was whether the application of vicarious liability would contradict the clear intent of Congress.<sup>97</sup> The *Charles Schwab* court concluded that the statute functions similarly to a tort action, and that permitting vicarious liability under the CFAA would not violate Congress's intent to "deter and punish those who intentionally access computer files and systems without authority and cause harm."<sup>98</sup> The court distinguished *Dartmouth-Hitchcock* by finding that allowing a vicarious-liability action in that situation would result in holding an employer responsible for its employee's harmful and illegal actions against the employer.<sup>99</sup> The facts in *Charles Schwab*, however, show that the defendants intentionally advised another to access a computer system beyond the scope of his authority for the defendants' benefit, a scenario the CFAA directly seeks to prevent.<sup>100</sup> Not allowing a claim of vicarious liability in such a situation would permit a principal to get away with illegally directing its agent to access a computer in violation of the statute.<sup>101</sup>

While both *Dartmouth-Hitchcock* and *Charles Schwab* deal with vicarious liability under the CFAA as applied to the employer-employee context, they are both still analogous and relevant to the case at hand. Indeed, few cases expressly address whether vicarious liability is available under the CFAA.<sup>102</sup> In *Jagex*, the court could have cited *Charles Schwab* over *Dartmouth-Hitchcock*, which might have yielded a more favorable result to *Jagex*. It is clear that the theory of vicarious liability under the CFAA has

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94. *Id.* (citing *Doe v. Dartmouth-Hitchcock Med. Ctr.*, No. CIV. 00-100, 2001 WL 873063, at \*5 (D.N.H. July 19, 2001)).

95. *Charles Schwab & Co. v. Carter*, No. 04C7071, 2005 WL 2369815, at \*7 (N.D. Ill. Sept. 27, 2005).

96. *Id.* at \*5.

97. *Id.*

98. *Id.* at \*7.

99. *Id.* at \*6-7.

100. *Charles Schwab*, 2005 WL 2369815, at \*7.

101. *Id.*

102. *Id.* at \*6.

been upheld in at least one court.<sup>103</sup> If Jagex gets a chance to amend its case and try again, its chances of succeeding under the theory may increase.

### A. Overview of the Critique

The world of massive multiplayer online games is expanding and holds the potential for software developers to earn millions of dollars in the online gaming market. In 2009, Jagex reported profits of £18.3 million, marking an increase of 24 percent from the year before.<sup>104</sup> Competitors will always try to get a piece of such a big market through legal, and illegal, means. In the case of MMOGs, it is clear that software creators will go to the edges of the law to create cheating programs that allow players to traverse through levels and games more quickly. What is not clear, however, is the extent to which the law will allow them to do so.

Though the court in this case did not specifically address certain copyright- and trademark-infringement issues due to Jagex's large misstep in not obtaining the appropriate copyrights, it is very likely that the issues will be faced in the near future. The factors leading to the dismissal of Jagex's claims can be corrected.<sup>105</sup> As the court pointed out, if Jagex registers its software, they have a much better chance of succeeding on copyright-infringement claims against anyone in the future.<sup>106</sup> Another option is for Jagex to rewrite its terms and conditions in a way that the defendants, not just the defendants' consumers, could be held liable under the CFAA for their unauthorized use.<sup>107</sup> In rewriting its terms, Jagex could also make the reflection process employed by the defendants a violation.<sup>108</sup>

Even so, there are those who feel that copyright law in this area has gone too far. The Copyright Act describes a user's right of fair use, allows for a person to make copies for himself, and creates the premise of the first-sale doctrine—which stands for the proposition that the sale of a lawfully

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103. See also *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 472 (S.D.N.Y. 2004) (finding that plaintiffs did not have standing to claim vicarious liability under the CFAA but noting that defendant's citation of *Doe v. Dartmouth-Hitchcock Medical Center* was inapposite because contrary to *Dartmouth-Hitchcock*, the third-parties in *Nexans* actually acted at the direction of defendants).

104. Peter Day, *RuneScape Conjures up £ 1.8m Profit for Jagex*, MAIL ON SUNDAY (UK), Jan. 31, 2010, 2010 WLNR 2052622.

105. Lee Gesmer, *Runescape Copyright and CFAA Case Fails at Preliminary Injunction Stage, But Runescape is Not Down for the Count: Jagex v. Impulse Software*, MASS L. BLOG (Sept. 25, 2010), <http://masslawblog.com/cfaa/runescape-copyright-and-cfaa-case-fails-at-preliminary-injunction-stage-but-runescape-is-not-down-for-the-count-jagex-v-impulse-software>.

106. *Id.*

107. *Id.*

108. *Id.*

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made copy ends a copyright holder's power to restrict later sales or distribution of that copy.<sup>109</sup>

There is room for debate within these provisions as to whether these rights allow for such stringent enforcement by software-copyright owners.<sup>110</sup> The inclusion of user rights in the Copyright Act could be evidence that Congress desired the Act to benefit both owners and users.<sup>111</sup> Because software must always be copied in order for it to be used as intended, software is unique from all other types of copyrightable material.<sup>112</sup> If this case progresses through the courts, it will prove interesting to see whether courts will follow the lead set in *MDY*—which held the creators of bots liable for copyright infringement—or if courts will take another approach in which users are given more latitude to copy software for which they have paid, making them more owners than licensees.<sup>113</sup>

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109. 17 U.S.C. §§ 107, 109, 117 (2006).

110. Jordan Christopher Redman, *MDY Industries, L.L.C. v. Blizzard Entertainment, Inc.: Software "Contracts" that Expand Copyrights Have Gone too Far*, 49 JURIMETRICS J. 317, 331 (2009).

111. *Id.*

112. *Id.*

113. *Id.* at 317–18.