

**Digital Property
Spring 2024
Final Exam Memo**

Your grades are available on Canvas. The bullet points in the following outline do not precisely correspond to my grading rubric, but they do reflect the overall weight I put on different parts of the analysis. I gave full credit for identifying an issue and analyzing it carefully even if you reached a different conclusion than I did. I gave partial credit for a wrong answer in the right ballpark; I gave extra credit for spotting an issue I missed, or for surprising me with an argument I had not thought of.

I will of course be happy to discuss your essays and your grades with you if you have any questions.

One Look

The following outline does not precisely track the questions posed in the problem. They were designed to make sure you didn't miss important issues. I gave full credit regardless of how you organized your answer.

Blue Steel

- Under the *Kremen* test, the NFT of Blue Steel is property. First, it is defined as ability to control the ownership field of a particular smart contract on the Ethereum blockchain, as controlled by an associated private key. Second, it is capable of exclusive control because whoever knows that private key and keeps it secret controls it. Third, a legitimate claim to exclusivity follows from voluntary transfers from an initial owner.
- The initial owner of the NFT was the Center, which created the NFT by establishing the smart contract.
- Ballstein became the owner of the NFT via voluntary transfer from the Center after winning the auction.
- Ballstein no longer has control over the NFT because the only copy of the private key has been destroyed. But he is still *entitled* to have control over it. He was the most recent owner, and he did not voluntarily give up ownership. It is still legally his property.
- The NFT still exists in an abstract sense, but its value has been reduced. Ballstein is no longer able to transfer it, or use any of the other functions built into the smart contract.
- McDonald committed to trespass to chattels by physically damaging the iMac's hard drive.
- Under *Thyoff*, McDonald converted Ballstein's data property in the private key by making the key no longer accessible.
- The only available remedy is monetary damages. A court order requiring McDonald to return the NFT is pointless, as he does not have the ability to do so.
- Under either the trespass to chattels or data property theory, the proper measure of damages includes the diminution in value of the

NFT resulting from Ballstein's inability to transfer or use it. It might be fair to presume that this diminution is \$200,000. If McDonald can prove that the NFT retains some value, he can offset that value against the damages he is required to pay to Ballstein.

Magnum

- Under the *Kremen* test, the NFT of Magnum is also property.
- Putting aside the mistakes about the NFT's identity, the NFT was initially owned by the Center, and was validly voluntarily transferred to Jeffries and then to Prewitt, making him the owner.
- One argument is that the transfers to Jeffries and Prewitt were based on fundamental and mutual mistakes about the identity of the property being transferred. The NFT linked to the wrong image, and so it did not correspond to the property (an NFT of Magnum) the parties believed they were transferring. On this theory, Prewitt is entitled to rescission from Jeffries: he transfers the NFT back to her and she transfers the \$500,000 back to him. If he does, Jeffries can seek rescission from the Center.
- Another argument is that the parties sufficiently described the property being sold—an NFT on the Ethereum blockchain—to make the transfer effective. The NFT does not come with any copyright license or ownership (see the terms of service) or other associated rights. The specific location the URL points to is irrelevant to the NFT's identity or characteristics as property. On this theory, Prewitt cannot obtain rescission.
- A third argument is that the Center committed some form of false advertising or negligent misrepresentation by falsely identifying two NFTs (the one Ballstein bought and the one Jeffries bought) as unique, even though they pointed to the same image. On this theory, Jeffries can probably obtain rescission from the Center, and Ballstein might also have a claim against the Center to recover some or all of the purchase price of Blue Steel (to the extent that his recovery from McDonald does not make him whole). Jeffries in turn committed a

negligent misrepresentation against Prewitt and could also be subject to rescission.

Le Tigre

- Under the *Kremen* test, the NFT of Le Tigre is also property.
- Assuming that the forfeiture order is valid and takes priority over other claims to the 10 Bitcoin, the question is what assets, if any, it now applies to.
- There are no other claims to the 4.75 Bitcoin stored in Mugatu's self-custody wallet. The U.S. government is entitled to it.
- A court can order Mugatu to transfer the 4.75 Bitcoin to the government. He may not cooperate, and if he does not, there is no effective way for the government to obtain them. The court can use its contempt power to try to compel his cooperation, but this may not be effective if he is already imprisoned for conspiracy to commit murder.
- The 5.25 Bitcoin are trickier. One argument would be that the government's forfeiture order traces forward with the Bitcoin. But this theory is probably contradicted by the facts, as the forfeiture order was entered *after* the purchase. The Center probably owns the 5.25 Bitcoin outright. Its claim is even stronger than a purchaser for value and without notice, as there wasn't even a forfeiture order when it auctioned off the NFT.
- If the government could recover the 5.25 Bitcoin, then it could obtain a court order directed to the Center, which would presumably comply. It could also obtain an order directed to Coinbase (since this is a custodial wallet) under the principle of *AA v. Persons Unknown*.
- A second argument is that the forfeiture order applies to the property the 5.25 Bitcoin were exchanged for, i.e., the NFT. This has a similar timing issue (the Bitcoin were already exchanged at the time the order was obtained), but there is no innocent third party; Mugatu himself holds the NFT.
- Remedially, getting the NFT from Mugatu is just as hard as getting the 4.75 Bitcoin, as he controls the wallet.

- A third argument is that the forfeiture order does not apply at all to the NFT, as the NFT was not used in the commission of the crime.

Iconic Looks

- An “iconic look” is not a copyrightable work of authorship. We have not studied any other body of law that would give Zoolander rights over these looks. (It’s possible that some aspects of right of publicity might apply, but that would only apply to some uses and only to the looks as performed by Zoolander himself.)
- “[R]ight[s] to call themselves the owners of my iconic looks” are not an identifiable form of property. This is also not a thing that Zoolander has a right to control.
- The photographs on the Center’s website are copyrightable works of authorship and the copyrights are apparently owned by Zoolander. But he has explicitly *not* given anyone else a copyright license to use them (except apparently the Center, as part of this fundraiser). There is some question over whether the terms on the Center’s website could constitute a binding contract. But if they do not, the bottom line is the same: Zoolander has not given anyone else a license.
- The most that we can say is that the buyers in the auction are the owners of NFTs of Zoolander’s iconic looks, but this is different than saying that they are owners of the iconic looks themselves. (See *Free Holdings* for a case illustrating that owning an NFT does not necessarily mean that you own anything beyond the NFT, or that the NFT actually is anything in particular.)
- Thus, Zoolander’s “gasoline fire” statement has no legal effects. He gave the buyers nothing, so he is taking nothing back.
- Maybe the fashion world follows the same artificial-authenticity norms as the fine-art work, so that when Zoolander takes back his approval, people will no longer be content calling themselves the owners. But that’s grounded in social norms, not in law, and there is probably nothing law can do about it, one way or another.

There is No Spoon

The account

- The account is property. *JLM Couture*.
- Reeves was the initial owner of the account. He created it for his own use, not as an employee or agent of anyone else.
- Reeves did not voluntarily transfer the account. Morpheus obtained the account via fraud (convincing Reeves to enter his password in response to a phishing attempt) and then forgery (impersonating Reeves when logging in). Morpheus had possession of the account, but Reeves remained the owner.
- Morpheus committed conversion of the account when he sold it to Pantoliano. I think that before that, he might have engaged in trespass to chattels but not conversion; the sale is the moment when he acted toward the account in a manner completely inconsistent with Reeves's ownership. I also think that it was Morpheus who committed the conversion, not Pantoliano when he changed the password. But I was satisfied with any of these answers as long as you explained why you chose the point in time you did.
- Morpheus's sale of the account to Pantoliano transferred only whatever limited possessory rights Morpheus had. As a thief, Morpheus had void title, and so even a good-faith purchaser for value could not obtain good title from him.
- Because the sale was in explicit violation of The Termination's terms of service, there is an argument that it was wholly ineffective and Pantoliano obtained nothing. But there are several possible replies. First, the terms could be interpreted to say that Bullet Time won't cooperate in transferring an account, and that trying to do so is a violation of the terms (for which Bullet Time could terminate an account), but not to reach the question of whether it controls which users have rights against each other. Second, perhaps this *can't* even be settled by contract; it's a property issue between users. All this said, there is

also an argument that the terms mean that Pantoliano was not even a good-faith purchaser, because he should have known he was purchasing an account in violation of the terms.

- The password reset restored the account to Reeves's control, consistent with his ownership.
- Now that the account is terminated, it does not even exist any more, so no one owns it. (If anyone did, it would be Reeves.)

The NeonOne name

- The handle is property. This follows from the domain-name cases and from *JLM Couture*.
- The same initial ownership and transfer analysis applies as for the account, up until the moment that Bullet Time terminated the account.
- According to Bullet Time's terms of service, it has the right to terminate the account at any time. When it did, the NeonOne name became freely available again.
- Smith created an account with the NeonOne name, and under Bullet Time's standard policies, that gave him ownership of it.
- The answer might be different if Smith had participated in the hack or tricked Reeves into giving up the handle. But where, as here, he is an innocent party who obtained the resource made available by the company, he is not liable.
- Morpheus is also liable to Reeves for the value of the handle, but the same analysis of its lack of a market price applies.

The guns

- The guns are property. They are transferrable intangibles like cryptocurrencies.
- Reeves is the initial owner; he owned them when they were created as part of the transactions he bought them in.
- Morpheus's successful phishing attempt gave him void title (as with the account and handle), so he could not give good title to Moss. One

difference is that the terms of service do not forbid transferring guns, so this would not be an obstacle in the same way that it would for the account.

- When Reeves recovered his account, he did not recover the guns, but he still was their owner.
- When Bullet Time terminated the account, it appears that Moss retained possession of the the guns, but Reeves is still their owner.

The skins

- The skins are property. They are either intangibles that are attached to the account, or they are enhancements to the utility and value of the account.
- Reeves was the initial owner, the subsequent transfers did not affect his title, the restoration of the account to Reeves put them in his possession again, and the deletion of the account destroyed the skins.

The tunes

- The tunes are property. They are limited nontransferable licenses to copyrighted works (the songs). These licenses are attached to the account.
- Reeves was the initial owner and the subsequent transfers did not affect his title for the same reasons as above. In addition, by the terms of service, the licenses may be *inherently* nontransferable. That is, Morpheus and then Pantoliano obtained the ability to play the music in-game, but they may never have obtained the copyright license that Bullet Time gave to Reeves.
- When the account was terminated, per the terms of service, the licenses terminated as well. This property does not exist any more.

Remedies among the parties

- Morpheus is liable to Reeves for the value of the account and its contents. (He cannot return any of this property; that is out of his control).

- The value of the account *as such* may be small. Because accounts cannot be bought and sold under the terms, it may have no market value. Accounts are easy to create. The best measure of damages might be the cost (in subscription fees and effort) Reeves incurred to level up his character.
- The value of the NeonOne handle is also hard to estimate, for similar reasons.
- A good estimate of the value of the guns, skins, and tunes is \$900, the amount Reeves paid for them. Morpheus might try to argue that he only made \$500 from the sale, but there are good reasons to think that Morpheus, as a thief trying to fence stolen property, lowballed the prices.
- Moss can be ordered to return the guns to Reeves (perhaps via another in-game meetup), or to pay their value (probably \$200).
- Pantoliano might also be liable to Reeves for the value of the account, handle, skins, and tunes, but the counterarguments are that (1) Pantoliano did not *intentionally* try to deprive Reeves of them, and (2) the intervening act of Bullet Time is what actually deprived Reeves of it.
- Morpheus may be liable to Pantoliano for \$500: he sold an account (and other property associated with it) that was not his to sell.

Bullet Time's obligations

- Bullet Time is probably not obliged to do anything, and it is probably allowed to do almost anything.
- Its terms of service give it complete discretion over whether to terminate accounts.
- Its terms of service also allow it to modify the game. This authority probably means that it could transfer ownership of any in-game assets, including accounts, handles, skins, guns, and tunes.
- It is possible that, as in *MacKinnon*, a court might invalidate some or all of the terms of service. If it did, Reeves is the only user who can make a strong property claim to the account, guns, skins, and tunes. Both Reeves and Smith might have a claim to the NeonOne handle,

and the details would depend on whether Bullet Time had the ability to terminate the account and on whether its normal policies on registering account names give Smith a reliance interest in using the NeonOne handle.

- The one type of property raising a harder question is the tunes. These are copyright licenses provided under licenses from the copyright owners. These licenses might prevent Bullet Time from giving the tunes to anyone. There is an argument, however, that if Bullet Time *wrongfully* terminated the account, then it is obliged to either give Reeves a new license (so it might have to pay royalties to the copyright owners again, as they would presumably be happy to sell more licenses) or to give him a refund of the purchase price of the tunes.

What Bullet Time should do

- Reeves is a complete innocent. Bullet Time should restore as much as it can to him: certainly the account, skins, and guns, and probably also the tunes and handle.
- Morpheus phished and stole from another user for profit, and breached multiple policies of the terms of service. Bullet Time should ban him from the game and consider suing him. This will probably be ineffective, as no one knows who he is, but if he could be identified, he would clearly be the one at fault.
- Moss does not appear to have breached any of Bullet Time's policies. Unless it has evidence that she knew the transaction was unauthorized, it should give her duplicate copies of the guns. They are non-rival from Bullet Time's perspective; it can create as many in-game copies as it wants.
- Pantoliano breached the terms of service against transferring accounts. Bullet Time should leave things as they stand, and Pantoliano's out-of-pocket costs can serve as a warning about the risks of buying accounts.
- Smith acted innocently, but he bought from a thief. Under property policies, he would be out of luck in terms of a claim to the handle. Bullet Time should offer him a new choice of a handle. Unless Bullet

Time has evidence that he knew about the termination and deliberately took advantage of it, it should probably offer him some compensation for the inconvenience: perhaps an account credit for his next month of service, or some free guns.