

Virtual Worlds With Real-World Losses

The names “Second Life,” “World of Warcraft,” and “OpenSim” may sound vaguely familiar to you, and you may even know they refer to online virtual worlds. But what exactly are virtual worlds and why should any attorney care? Well, when investment bank Piper Jaffray reports that sales of U.S. virtual goods will total \$621 million in 2009—an astounding increase of 134 percent from 2008 figures—most people take note¹. Even more astounding is the prediction that total sales will rise to nearly \$2.5 billion by 2013.



Virtual worlds, which first came into existence around 2000, initially allowed users to create online personas, known as avatars, as well as entire environments for those avatars to live in. Since its rudimentary beginnings, in which users could change an avatar’s color, environments have evolved to full-fledged marketplaces where virtual real estate is bought and sold and users shop for virtual goods and services. In fact, the market has evolved to such a point that, according to data released by Linden Labs, the company that operates “Second Life,” 68,000 user accounts on the service made money in the month of August 2009, and of those accounts, almost 500 made more than \$2,000 that month. Although virtual worlds may not yet be commonplace, their explosive growth is expected to soon infiltrate the culture like the World Wide Web did in the 1990s.



With the increased commerce in virtual worlds comes growing concern over the ownership of intellectual property and exactly how real-world concepts of copyright and trademark protection can be applied in these worlds. Until now, licensing of content in virtual worlds can best be compared to the settling of America’s Wild West, with content creators trying to stake a claim for protection under a system of laws that never contemplated this type of environment. To exacerbate the issue, many online users accustomed to free downloads feel that content in virtual worlds should be free and is fair game to copy. It is also easy to duplicate and reuse content in virtual worlds with free

software programs, like CopyBot, which simplify the process. Considerable confusion surrounds all aspects of property in virtual worlds, and steps will need to be taken to settle the Wild West now found in cyberspace.

The rise in the ability to generate real-world income from activities in the virtual world has been accompanied by a corresponding increase in cases of trademark and copyright infringement. In “Second Life,” famous real-world trademarks are used throughout the service, but the owners of those marks have no presence themselves in the virtual world. For example, in 2007, at least 16 shops in “Second Life” advertised Ferrari automobiles, at least 40 stores advertised virtual Rolex and Chanel watches, and more than 50 stores sold sunglasses by Gucci, Prada, Rayban, and Oakley, and none of these items were sold by the owners of those trademarks. The real-world value of these knockoff goods in the virtual world was an estimated \$2 million in 2007, and that amount has probably doubled since then.² With this much money, good will, and reputation behind the trademarks at stake, companies need to start paying attention to what is happening in online worlds.

One way companies can police their intellectual property—and specifically copyrighted content—online is through the use of takedown notices under the Digital Millennium Copyright Act (DMCA). However, the problem with this method is that virtual worlds do not provide an easy way for companies to identify and reference the infringing work the way they would for content on the rest of the Internet. A user or item displaying an infringing copyright may move around freely in a virtual world, and it is a moving target with no particular address as we would normally think of an Internet address. Therefore, when companies attempt to issue a takedown notice under the DMCA, they are left trying to describe the location of an infringing work and hoping that the work has not changed location by the time they are able to serve their request.

Another way to protect intellectual property rights in virtual worlds might involve looking at the terms of service that may exist. According to its terms of service, “Second Life” allows users to own any digital content they create.³ In fact, some users have even been successful in registering trademarks for their “Second Life” avatars with the U.S. Patent and Trademark Office, implicating the use of real-world trade-

mark law. Alyssa LaRoche was the first user to successfully register a design mark for her “Second Life” avatar, Aimee Weber, based solely on her use of the image in commerce within the virtual world—and this instance may only be the beginning. With this step out of the virtual worlds for trademark registrations, the next logical step is into real-world courts in an attempt to protect the intellectual property in these worlds.

Finally, even though operators of virtual worlds, like “Second Life’s” Linden Labs, are considered immune to prosecution because they are simple service providers, some believe that these operators are the only ones able to really control and prevent the infringement occurring in their worlds and have filed suit against these operators. The latest suit was filed by Eros LLC, a Florida corporation that makes and sells a “SexGen” bed found in “Second Life” that is allegedly counterfeited with great frequency on the site. The plaintiffs in the case allege that Linden Labs has done little, if anything, to control the counterfeiting of the product and has little incentive to prevent the counterfeit sales because of its financial gain from every sale—whether the sale is of a genuine product or one that is counterfeit. Although a court is not likely to take the necessary steps to impose liability on Linden Labs and place the operator outside the realm of a service provider, it will be interesting to see how the court deals with this issue.

Be assured that as the use of these services grows, so will litigation arising from their use. It remains to be seen how real-world law for protecting intellectual property may have to be modified or adapted to protect the virtual world models, just as we are still adapting to protect intellectual property on the Internet. **TFL**

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Endnotes

¹eMarketer, *Virtual Goods Mean Real Dollars* (Aug. 13, 2009) available at www.emarketer.com/Article.aspx?R=1007226#.

²Benjamin Duranske, *Rampant Trademark Infringement in Second Life Costs Millions, Undermines Future Enforcement*, VIRTUALLY BLIND, at virtuallyblind.com/2007/05/04/trademark-infringement-vws/.

³“Second Life” Terms of Service § 3.2 available at secondlife.com/corporate/tos.php.

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tended to cause fear—and to terrorize a population.” See transcript of oral argument at www.oyez.org/cases/2000-2009/2002/2002_01_1107/argument. The Court ruled that the state could ban cross burning but that the statute as written was overbroad in that it declared the act of cross burning prima facie evidence of intent to create fear. Justice Thomas dissented.

⁹Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY May 5, 2009 at www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

¹⁰Torres-Spelliscy, Chase, and Greenman, *supra*, note 4.

¹¹Racial, ethnic, and gender terms are those used on the Federal Judicial Center’s Web site, www.fjc.gov/history/home.nsf.

¹²The total number of federal judicial appointments as of Oct. 5, 2009, stands at 3,193 judges serving on U.S. courts: 2,916 males and 277 females. The Federal Judicial Center also reports that, of those appointments, 155 were African-American, 91 were Hispanic, 17 were Asian-American, and two were Native American.

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