

HELP! MY INTELLECTUAL PROPERTY IS TRAPPED: SECOND LIFE, CONFLICTING OWNERSHIP CLAIMS AND THE PROBLEM OF ACCESS

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Cite as: Megan B. Caramore, *Help! My Intellectual Property Is Trapped: Second Life, Conflicting Ownership Claims and the Problem of Access*, XV RICH. J.L. & TECH. 3 (2008), <http://law.richmond.edu/jolt/v15i1/article3.pdf>.

I. INTRODUCTION

[1] The controversy over ownership of virtual “real” property and intellectual property rights within online games has existed for nearly as long as the technology to create such games.¹ Previously, the owners of virtual worlds possessed sole control over everything within the world as a result of rather strict terms contained in their user licensing agreements.² Lately, this controversy has acquired a new dimension in a rapidly expanding game called Second Life.³ Second Life is different from most online games because it expressly guarantees its users the rights to content

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¹ See generally David P. Sheldon, Comment, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 ULCA L. REV. 751, 754-58 (2007) (describing the virtual world landscape and the rise of the property rights conflict).

² See *id.* at 765.

³ See Second Life Home Page, <http://www.secondlife.com> (describing Second Life as “an online, 3D virtual world imagined and created by its Residents.”) (last visited Sept. 28, 2008).

they create within the game.⁴ To the extent that Second Life protects users' intellectual property rights, it should be applauded. This is a notable step forward in the realm of virtual worlds.⁵

[2] Second Life, however, substantially undermines its own policy in its terms of service. The terms of service agreement gives Second Life the right to deny users access to the very forum where their rights may have substantial value.⁶ While Second Life's users have a strong interest in retaining control of, and access to, their intellectual property, the virtual world's creators have a strong interest in retaining some degree of control over their platform and their business by controlling access. These conflicting interests may significantly decrease a user's willingness to create, especially when the content created only has value within the Second Life community. The incentive would be diminished because of the risk that the user might be denied access to the forum's market, and thus cheated out of the value of the property. In this situation, a solution which balances the interests of users and platform owners is necessary in order to promote the best interests of both parties.

[3] To solve the problem, either assured access or adequate compensation is necessary to promote creation and participation in commercially based online platforms such as Second Life. Assured access is not a practical

⁴ See Second Life, IP Rights, http://secondlife.com/whatis/ip_rights.php (last visited Oct. 23, 2008). Virtual property within Second Life falls into two categories. First, there is virtual "real" property such as land, purchased goods, etc. Second Life, Own Virtual Land, <http://secondlife.com/whatis/land.php> (last visited Oct. 23, 2008). Second, there is a user's intellectual property. This intellectual property is no different in principle than intellectual property held outside Second Life. Second Life, IP Rights, http://secondlife.com/whatis/ip_rights.php (last visited Oct. 23, 2008). Although much of the controversy over users' rights to their content centers on virtual "real" property, this article focuses on issues surrounding intellectual property rights and the ability of platform owners to undermine those rights by restricting user access.

⁵ See Press Release, Linden Lab, Second Life Residents to Own Digital Creations (Nov. 14, 2003), available at http://lindenlab.com/pressroom/releases/03_11_14 ("Linden Lab has taken an important step toward recognizing the rights of content generators in Second Life.").

⁶ Second Life, Terms of Service §§ 2.6, 3.3, <http://secondlife.com/corporate/tos.php> (last visited Oct. 23, 2008) (warning that "Linden Lab has the right at any time for any reason or for no reason to suspend or terminate your Account" and "[y]our intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.").

solution because it does not allow Second Life's creator, Linden Lab, to exert adequate control over its platform. This article proposes that users who are denied access to the forum should be given the option of cashing out the value of their intellectual property rights. The argument proceeds as follows: Part II provides background information on the property rights dispute including intellectual property in virtual worlds; Part III explains the problems inherent to Second Life's current policy; Part IV compares and contrasts Second Life's intellectual property policy with that of open source licensing regimes; Part V analyzes Second Life's intellectual property policy using various intellectual property theories; Part VI discusses legal precedent and joint authorship; Part VII proposes a solution to the conflict between platform control and user rights; and Part VIII wraps up the discussion and provides clarity and additional thoughts.

II. OVERVIEW OF PROPERTY RIGHTS IN VIRTUAL WORLDS

[4] Second Life is an online game platform that enables transactions and communication between users. It is similar to the Internet, but three-dimensional.⁷ Companies and individuals can buy land, usually islands, on which they construct virtual stores and advertisements, much in the same way that they would buy web space on the Internet.⁸ Second Life's code is open source, which means that users who know enough about computer code can create their own buildings, clothing, and other items within the world.⁹ Unlike many other Massively Multiplayer Online Role-Playing Games (MMORPGs),¹⁰ Linden Lab designed Second Life primarily as a platform for social interaction and commercial activities.¹¹ In this way, the virtual platform mimics the real world in nearly every aspect. Other MMORPGs, such as Electronic Arts and NC Soft games, have strictly held that all in-game creations belonged exclusively to the

⁷ See Complaint at 2, *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (No. 06-04925) ("Rosedale has acknowledged that 'Second Life is like the internet but it's in 3D.'").

⁸ Second Life, *Own Virtual Land*, *supra* note 4.

⁹ Second Life, *Open Source FAQs*, <http://www.secondlifegrid.net/technology-programs/virtual-world-open-source/faq#basics> (last visited Sept. 28, 2008).

¹⁰ MMORPG is a commonly used acronym for types of games known as Massively Multiplayer Online Role-Playing Games. Complaint, *supra* note 7, at 2.

¹¹ See Bobby Glushko, Note, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 *BERKELEY TECH L.J.* 507, 524 (2007).

creating company.¹² These companies, through their End User Licensing Agreements (EULAs), cemented their grip on the rights to all in-game property.¹³ As a result, black markets for in-game goods often sprang up on online trading sites.¹⁴ Although, as Lastowka and Hunter point out, “[t]he current crop of virtual worlds is the brainchild of large, property-owning corporations, typically based in the United States. . . . [T]hese commercial products must attract large numbers of paying customers to be profitable. This means mirroring the features of real-world systems that make sense to twenty-first century participants.”¹⁵

[5] Second Life is fundamentally different from previous MMORPGs in many respects. One of the most important differences is that Second Life has a “if you create it, you can sell it, trade it, and even give it away for free” policy.¹⁶ For example, Second Life’s website provides the following statement of user rights:

Under Linden Lab's Terms of Service, Residents retain intellectual property rights in the original content they create in the Second Life world, including avatar characters, clothing, scripts, textures, objects and designs. The result is a vibrant marketplace of Second Life content. If you create it, you can sell it, trade it, and even give it away for free, subject of course to our Terms of Service.¹⁷

This policy has specific benefits to Second Life. The ability to own and retain intellectual property rights within Second Life’s platform has encouraged capital investment within the virtual world.¹⁸

¹² Amy Kolz, *Virtual IP Rights Rock Online Gaming World*, AM. LAW., Dec. 6, 2004, <http://law.com/jsp/article.jsp?id=1101738506769>.

¹³ See generally Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 286-308 (2007) (discussing the enforceability of user agreements).

¹⁴ Alex Pham, *EBay Bans Auctions of Virtual Treasures*, L.A. TIMES, Feb. 3, 2007, at C-1.

¹⁵ F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 33 (2004).

¹⁶ See Second Life, IP Rights, *supra* note 4.

¹⁷ *Id.*

¹⁸ According to Second Life’s website, the platform “supports millions of US dollars in monthly transactions. This commerce is handled with the inworld unit of trade, the

[6] In the end, Second Life may not be all that different from other virtual worlds after all. According to Second Life's Terms of Service, its express guarantee of intellectual property rights may not provide what it purports.¹⁹ Section 2.6 of the Terms of Service states,

Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and avll current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.²⁰

Additionally, section 3.3 of the Terms of Service reads,

You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.²¹

Linden dollar™, which can be converted to US dollars at several thriving online Linden dollar exchanges.” Second Life, What is Second Life, <http://secondlife.com/whatis/> (last visited Oct. 23, 2008). Scholars have commented that Linden Lab's intellectual property policy will encourage investment. Law professor Lawrence Lessig stated that “Linden Lab has taken an important step toward recognizing the rights of content generators in Second Life . . . As history has continually proven, when people share in the value they create, greater value is derived for all. Linden Lab is poised for significant growth as a result of this decision.” Press Release, Linden Lab, *supra* note 5.

¹⁹ See Steven J. Horowitz, Note, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 448 (2007).

²⁰ Second Life, Terms of Service, *supra* note 6, at § 2.6.

²¹ *Id.* at § 3.3.

[7] In effect, this means that despite a users' "ownership" of his intellectual property rights, Linden Lab may deny the user access to the market for his content without reason. When taken together, these two term statements create a middle ground of intellectual property protection that lies somewhere between full copyright protection and the complete lack of protection provided by many other MMORPGs. In this in-between area, Linden Lab acknowledges real world intellectual property rights within Second Life but at the same time wishes to protect itself to the extent to which such property rights would lessen its control over the game's platform.²² The user retains his intellectual property rights and can enforce them against infringers, assuming that infringement would be discovered without forum access. Assuming that the intellectual property rights in question were only valuable within the Second Life platform, a denial of access would mean that while the rights would be protected, they would provide no value to the user, because he could no longer sell or otherwise derive value from the rights.

III. SO WHAT IS THE BIG DEAL?

[8] The ability to deny user access does not just harm Second Life's users. It also hurts Second Life's business. The Internet provides a compelling example of the commercial confidence that access inspires. The overwhelming success of the Internet shows that unlimited access can lead to widespread use and investment. Companies spend large amounts of money on marketing. This includes the cost of web design expenses and the expense of developing new and inventive business methods that increase profits by harnessing the communicative power of the web.²³ Intellectual property rights are an essential part of this digital network. Some Internet entrepreneurs have patented new ideas and business methods, while others use the Internet to create and distribute their creative works.²⁴ Still others create new trademarks in order to brand their

²² See Horowitz, *supra* note 19, at 449-50.

²³ See, e.g., Amazon.com, <http://www.amazon.com/>; Recent Website and DotCom News, http://www.send2press.com/news_dotcom.shtml; Richard Fay, WebConsuls.com, How Much Does a Website Cost?, <http://www.webconsuls.com/articles/cost.htm>.

²⁴ See generally Julia Alpert Gladstone, *Why Patenting Information Technology and Business Methods Is Not Sound Policy: Lessons From History and Prophecies for the Future*, 25 *HAMLIN L. REV.* 217 (2002) (describing the development of patents for Internet business models encourage innovation); Matthew G. Wells, *Internet Business*

Internet businesses. The value of these forms of property to their owners is not in danger because Internet access does not rest in the hands of a controlling entity. Unlike the Second Life platform, no one “owns” the Internet.²⁵

[9] One Second Life user, Marc Bragg, who filed a complaint against Linden Lab when it denied him access to his virtual “real” property and intellectual property, compared the Second Life platform to Microsoft Internet Explorer.²⁶ The complaint noted that

Second Life itself is much like Microsoft’s Internet Explorer in that it simply gives a participant access to a “world” (like the internet), where the “participant” can enter into a variety of transactions and visit various places. In many respects, Second Life is simply a three-dimensional version of Microsoft’s Internet Explorer – and the places one can visit using that graphical three-dimensional web browser are simply three-dimensional graphical web sites. [Second Life’s creator] Rosedale has acknowledged that “Second Life is like the internet but it’s 3-D”²⁷

While there may be similarities between Microsoft’s browser and Second Life’s platform, there are significant differences as well. A browser is only a tool for use in navigating the Internet.²⁸ Denying a user access to

Method Patent Policy, 87 VA. L. REV. 729 (2001) (describing the controversy over the development of Internet business methods patents).

²⁵ See John Naughton, *The World Doesn’t Get It - No One ‘Owns’ the Internet*, OBSERVER, Nov. 20, 2005, available at <http://www.guardian.co.uk/business/2005/nov/20/theobserver.observerbusiness6>. But see Lawrence Lessig, *The Internet Under Siege*, FOREIGN POL’Y, Nov.-Dec. 2001, at 62-65, available at <http://lessig.org/blog/ForeignPolicy.pdf> (discussing the Internet’s decline as corporations have attempted to fence off the Internet commons through ownership claims).

²⁶ Complaint, *supra* note 7, at 4.

²⁷ *Id.* at 4-5.

²⁸ Browsers are software programs that enable you to view WWW documents. They “translate” HTML-encoded files into the text, images, sounds, and other features you see. Microsoft Internet Explorer (called simply IE), Mozilla,

Internet Explorer would not prevent him from accessing the Internet. Other similar programs provide the same tools. Where Second Life is concerned, however, the content to be explored does not exist independent of the access tools. Second Life owns and controls the entire platform and therefore access to the platform as well. Unlike the Internet browser, there are no alternative tools for accessing Second Life content.

[10] Bragg's complaint also draws an analogy between Second Life and Disney World.²⁹ The purpose of the analogy is to show that being exiled from Second Life and having one's account frozen is akin to being ejected from Disney World with all of one's purchases and wallet confiscated.³⁰ Of course, this comparison focuses on a deprivation of virtual "real" property. The analogy, however, could be extended to shed light on the intellectual property concerns as well. Some of the attractions within Disney World are the product of the creative efforts of those within the park.³¹ For example, the amusement park might have within its borders persons invited in and allowed to paint caricatures of park patrons and their children. Consider an artist ejected from the Disney park who had created such a work of art, just prior to his ejection. The artist would have intellectual property rights to the work; however, he could not access the market for the work, namely the family he painted, who were within the park. The value of his property without access to the market would be little, if anything. The same problem occurs within Second Life when users are denied access to their intellectual property rights.

[11] The ability to deny a user access to intellectual property markets will damage those users, like Bragg, who are unfortunate enough to feel the sting of such a policy. It will also harm Second Life in the long run

Firefox, Safari, and Opera are examples of "graphical" browsers that enable you to view text and images and many other WWW features.

UC Berkeley Library, Glossary of Internet & Web Jargon,
<http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/Glossary.html> (last visited Oct. 23, 2008).

²⁹ See Complaint, *supra* note 7, at 4, 23.

³⁰ See *id.* at 23.

³¹ See Walt Disney World, Theme Parks Overview,
<http://disneyworld.disney.go.com/wdw/parks/parkOverview?id=ThemeParkOverviewPage> (last visited Oct. 23, 2008).

because the uncertainty over continued access to markets for intangible rights will create a chilling effect on in-game investment of both time and capital. Second Life needs to address this issue if it hopes to continue to draw in users and patrons willing to invest resources and creative energy in its platform.

IV. OPEN SOURCE LICENSING COMPARISONS

[12] In some respects, Linden Lab's intellectual property policy resembles the open source licensing regimes which are gaining in popularity among software communities. Open source licensing systems allow users free access to a program's software code.³² Users can then use the code to make modifications to the program or to create new features. So far, this seems a lot like the relationship between Second Life and its users. But this is where the similarity ends. In open source licensing, users may not restrict others from accessing their new code if they intend to distribute it.³³ Rather they must license their modifications under the same open source license that the original code carried.³⁴ Linden Lab's policy is quite different. Second Life users can choose from different options to allow users to share or not share their content as they choose.³⁵

[13] Linden Lab claims that users do own their property within Second Life and have valid and enforceable property rights.³⁶ At the same time, it also claims to have complete ownership and absolute control over the platform as a whole through its ability to control user access.³⁷ While Linden Lab's Terms of Service do require that users grant back certain rights in their creations, such as the ability to show the creations in Second Life's advertisements or other media, the total effect upon the rights of the user is quite different from an open source license.³⁸

³² LAWRENCE ROSEN, OPEN SOURCE LICENSING: SOFTWARE FREEDOM AND INTELLECTUAL PROPERTY LAW 52 (2005).

³³ The Open Source Initiative, The Open Source Definition, <http://opensource.org/docs/osd> (last visited Sept. 28, 2008).

³⁴ *Id.*

³⁵ Second Life, Terms of Service, *supra* note 6, § 3.2.

³⁶ *See* Second Life, IP Rights, *supra* note 4.

³⁷ Second Life, Terms of Service, *supra* note 6, §§ 2.6, 3.3.

³⁸ *Id.* § 3.2.

[14] Also unlike open source software licensing systems, Second Life does not appear to be willing to enforce intellectual property rights against other users or against outside parties.³⁹ It is often the case in open source software licensing, that only the original licensor has the standing to sue someone for infringement.⁴⁰ Where Second Life is concerned, it appears that Linden Lab does not intend on being involved in internal or external disputes that may arise over a user's intellectual property rights.⁴¹ Linden Lab does, however, encourage users to enforce those rights themselves.⁴² Linden Lab's Terms of Service state that users "are solely responsible for understanding all copyright, patent, trademark, trade secret and other intellectual property or other laws that may apply to [their] Content hereunder."⁴³ Users are "solely responsible for, and Linden Lab will have no liability in connection with, the legal consequences of any actions or failures to act on [their] part while using the Service, including without limitation any legal consequences relating to [their] intellectual property rights"⁴⁴ Linden Lab's acknowledgement of intellectual property rights in user

"[c]ontent does not constitute a legal opinion or legal advice, but is intended solely as an expression of Linden Lab's intention not to require users of the Service to forego certain intellectual property rights with respect to Content they create using the Service, subject to the terms of this Agreement."⁴⁵

This indicates that Linden Lab's opinion is that it is the users themselves, not Linden Lab, who are responsible for policing and enforcing their property rights.

[15] This dissimilarity between open source licensing and Second Life rights suggests that the level of rights for user ownership under Second Life's property regime is much higher than those of open source

³⁹ *Id.* § 5.1.

⁴⁰ *See* ROSEN, *supra* note 31, at 139.

⁴¹ Second Life, Terms of Service, *supra* note 6, § 5.1.

⁴² *Id.* § 3.2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

contributors. So much so, that unlike open source contributors, Second Life users have enough standing to bring their own claims. Yet, it seems Second Life users' rights are still not strong enough to trump the platform owner's right to exclude them from access to their virtual intellectual property. In effect, even though a user may have a greater claim to his property against all other users within the Second Life platform, Linden Lab's creation of the original platform provides it with an even greater claim to control the user's ability to access his rights.

V. ANALYZING SECOND LIFE'S INTELLECTUAL PROPERTY POLICY USING VARIOUS INTELLECTUAL PROPERTY RATIONALES

A. INCENTIVE/UTILITARIAN THEORY

[16] There are many rationales behind intellectual property theory. The most popular and widely referenced is the idea that intellectual property rights are necessary to provide an incentive for creation.⁴⁶ Certainly, this is one of the reasons that Second Life creators purported to grant in-game intellectual property rights at all. Second Life users are also its creators.⁴⁷ They generate much of the digital content within the virtual world. This digital content generates value for its creators, as shown by the large Second Life market.⁴⁸ In this market, millions of real U.S. dollars change hands when users exchange it for Second Life's currency, the Linden.⁴⁹ In order for Second Life to attract users who were willing to invest time, money, and resources into the virtual world they needed an incentive to create. Intellectual property rights in the user's in-game creation provide that incentive.

[17] While the necessary incentive may appear to exist on the surface, because of Linden Lab's pro-intellectual property approach, it may in fact exist only conditionally. Linden Lab's ability to deny user access to the platform may lessen, or even nullify, the incentive to create, depending on whether or not the intellectual property in question is useable outside of

⁴⁶ This is sometimes referred to as the utilitarian theory of intellectual property. *See* Lastowka & Hunter, *supra* note 15, at 44.

⁴⁷ *See* Second Life Home Page, *supra* note 3 (describing Second Life as a "virtual world imagined and created by its Residents.").

⁴⁸ Lastowka & Hunter, *supra* note 15, at 44.

⁴⁹ *See* Complaint, *supra* note 7, at 6, 10, 13.

the Second Life platform. A work or creation that has value outside of Second Life would likely retain that value even if Linden Lab denied a user access to the game.⁵⁰ One example of such a creation is Tringo, a popular game originally created within Second Life.⁵¹ Tringo is a “simple, multiplayer board game with elements of Bingo and a fast-action jigsaw arcade game.”⁵² User Nathan Keir created it within Second Life.⁵³ Due to its overwhelming popularity, PC software companies licensed Tringo, and Nintendo released it as a game for Game Boy Advance, as well as in other forms, outside of Second Life.⁵⁴ Even if Linden Lab prevented a user such as Keir from accessing the game, the value of his intellectual property, Tringo, would retain its value in the world outside the game.⁵⁵

[18] Other creations may be useable only within the unique Second Life virtual world. For example, a piece of code that created virtual fireworks within the Second Life platform might have no use outside of that platform. Such a creation would have little or no value to the owner outside of its use within the game’s platform.⁵⁶ Since Linden Lab possesses the power to deny the users access to the only forum wherein the intellectual property right possesses any value, Linden Lab also possesses the power to strip the existing intellectual property right of its value to the user.⁵⁷ With no guarantee of useable rights to their creations, those who would otherwise have created new and useful items within the game may choose not to, due to the lessened incentive. Large corporations may hesitate to put great amounts of resources into a system where the rights to intellectual property assets within the game remain insecure.

⁵⁰ See *Tringo Fever--Catch It!*, SECOND OPINION, Mar. 3, 2005, http://secondlife.com/newsletter/2005_03_03_archive.php.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Associated Press, *Virtual Game Jumps to Real World*, CNN.COM, Apr. 28, 2006, <http://www.cnn.com/2006/TECH/internet/04/28/gamein.game/index.html>.

⁵⁴ *Id.*

⁵⁵ See *Tringo Fever—Catch It!*, *supra* note 49.

⁵⁶ See Complaint, *supra* note 7, at 20.

⁵⁷ *Id.* at 22.

B. LOCKEAN RIGHTS THEORY

[19] Second Life users create within a platform provided by Linden Lab. In order to make money, Linden Lab needed to attract users. Users, in turn, play a central role in creating the Second Life virtual world. In fact, much of the visible content within Second Life is the work of users, not Linden Lab.⁵⁸ According to Locke, “Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.”⁵⁹ Of course, Locke was writing before the digital age, so it is debatable whether these ideas are even applicable. Commentator Steven Horowitz points out that “Second Life users might argue that their world is full of uncultivated resources, made valuable only when users come to play. To the extent that the world lies [sic] barren until the users created value, there seems to be a natural common of resources.”⁶⁰

[20] Users making such an argument, however, may encounter some problematic counterarguments.⁶¹ One such argument, as Horowitz points out, is that just because “something is uncultivated does not imply that it is commonly owned.”⁶² So, where Second Life’s barren platform may seem like a virtual commons, the space is not really a commons at all.⁶³ It has an owner, namely, Linden Lab. Here, the user and operator claims clash. While the user may feel entitled to absolute property rights in the thing his labor creates, the original owner of the “commons” is not willing to give up all rights to his stake either. Linden Lab attempts to avoid this clash by adopting a limited intellectual property rights theory, whereby it retains the ability to control access to its property while still allowing users to possess rights in their creations.⁶⁴ And Linden Lab is able to do so to the extent that there is no controversy over access. But it is exactly such

⁵⁸ See Second Life, What is Second Life, *supra* note 18.

⁵⁹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁶⁰ Horowitz, *supra* note 19, at 455.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 449.

access situations where problems are likely to arise and which this article attempts to address.

C. THE HEGELIAN PERSONALITY THEORY

[21] A third theory that might be useful in examining Second Life users' rights to their in-game creations is the Hegelian personality theory. This theory characterizes property as an extension of one's personality.⁶⁵ Under the Hegelian view, property is divided into two types: personal property and fungible property.⁶⁶ Fungible property is somewhat less important because its value is primarily monetary and not strongly tied to the individual's sense of self.⁶⁷ Whether a work created in Second Life falls into the personal or fungible category is a difficult question, especially when one considers that many users spend a great deal of time within the Second Life world and their virtual world personality is very much an extension of their real world selves.⁶⁸ Certainly, the more creative a work is, the more personal and less fungible it may be to the user. On the flip side, if a user creates extremely unique works within the game platform simply to profit from those creations, the works might then be more fungible than personal. There is no clear valuation line that would work in every situation and some intellectual property may fall somewhere between the two categories.

D. HOW IT ALL FITS TOGETHER

[22] Taken together, the utilitarian, labor and personality theories provide a great deal of support for user rights.⁶⁹ According to these theories, allowing users to hold property rights provides incentive for creation. The effort of creating a work generates rights, and those rights become a fundamental part of a user's sense of self. Enabling users to hold such rights, then benefits society as a whole. But many, if not all, of these theories could also support the rights of the platform holder. Any

⁶⁵ Lastowka & Hunter, *supra* note 15, at 48.

⁶⁶ See Reuveni, *supra* note 13, at 278.

⁶⁷ *Id.*

⁶⁸ *Id.* at 278-79.

⁶⁹ See *supra* Part V.A-C.

proposed solution would need to take these competing interests into account.

[23] A recent case, *Bragg v. Linden Research*, serves to illustrate such a conflict between the original creator and subsequent creators within the platform.⁷⁰ Marc Bragg was a Second Life user who, in reliance upon the representations of ownership made by Second Life, decided to invest in property within the game.⁷¹ He acquired land as well as intellectual property.⁷² Following accusations of misconduct, Linden Lab decided to exclude Bragg from the game.⁷³ Bragg's account was closed and his property confiscated.⁷⁴ Bragg filed suit.⁷⁵ After a preliminary finding by the court that some of the Terms of Service, including a mandatory arbitration provision, were unenforceable, Linden Lab settled with Bragg and restored his access to Second Life.⁷⁶ While it is difficult to speculate as to how the case might have come out, perhaps litigation might have been avoided altogether if Bragg had not felt unfairly cheated out of the value of his property and labor within Second Life's virtual world.⁷⁷

⁷⁰ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

⁷¹ Complaint, *supra* note 7, at 16-17.

⁷² *Id.* at 17. According to the Bragg complaint, Bragg designed a code that would create fireworks within Second Life. He thus acquired intellectual property rights over his creative work. Bragg claimed to have offered his fireworks for sale and sold them to other Second Life participants during the time before he was ejected from Second Life. The fireworks, however, were only useful within the game platform and had no value independent of Second Life's virtual world. *Id.* at 20.

⁷³ *Id.* at 21.

⁷⁴ *Id.* at 23.

⁷⁵ Benjamin Duranske, *Bragg v. Linden Lab - Confidential Settlement Reached: 'Marc Woebegone' Back in Second Life*, VIRTUALLY BLIND, Oct. 4, 2007, <http://virtuallyblind.com/2007/10/04/bragg-linden-lab-settlement/>.

⁷⁶ *Id.*

⁷⁷ Bragg, apparently, is not the only person who felt that he was entitled to the value of his property. In 2007, Harvard Law School conducted a mock trial of the Bragg case as part of a three week "Evidence 2007" course, part of which was conducted in Second Life. Nine members of the mock jury found in favor of Bragg with respect to his claims for both real and intellectual property rights. See Benjamin Duranske, *Mock Trail of 'Bragg v. Linden'*, VIRTUALLY BLIND, Jan. 25, 2007, <http://virtuallyblind.com/2007/01/25/harvards-evidence-2007-in-second-life/>.

VI. PRECEDENT – COPYRIGHT LAW AND JOINT AUTHORSHIP

[24] Intellectual property rights for Second Life users do not exist simply because Linden Lab announces in a press release or on its website that its users shall have them from that day forward. The intellectual property rights of users, which in this case will typically be copyright, come from federal law.⁷⁸ Federal copyright law, like many other forms of intellectual property law around the world today, exists for the purpose of promoting creation for the greater benefit of society as a whole.⁷⁹ In light of these goals, it is useful to examine the competing rights claims independently and jointly to determine exactly what copyright law has to say about the issue.

[25] In order to be copyrightable, a work needs to fall into one of the prerequisite categories, be fixed in a tangible medium of expression, and be original.⁸⁰ The originality threshold, however, is relatively low. It requires only a “modicum of creativity” and usually just about any amount of “creative spark” is sufficient to pass this hurdle.⁸¹ Given how low the originality standard is and considering that an electronic game “may be copyrightable as an audiovisual work, since such a game consists of visual and aural features of an audiovisual display containing original variations sufficient to render the display copyrightable as an audiovisual work,”⁸² it seems highly probable that Linden Lab has a valid copyright where the Second Life Platform is concerned. It also seems likely that any user-created contributions to Second Life would also fall into this category.

[26] The Second Life world is the product of collaborative efforts of all involved, platform owners and users alike. All of the separate works of authorship come together to create the virtual world that exists on the screen at any given moment. There may in fact be an argument to be “made that participant interaction in video games may constitute

⁷⁸ U.S. CONST. art. I, § 8, cl. 8; Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2000).

⁷⁹ See U.S. CONST. art. I, § 8, cl. 8.

⁸⁰ 17 U.S.C. § 102 (2000).

⁸¹ Reuveni, *supra* note 13, at 271.

⁸² 18 AM. JUR. 2D *Copyright and Literary Property* § 52 (2008).

coauthorship of the virtual world that is ultimately represented.”⁸³ This argument, however, cannot focus solely on contemporaneous input by several parties because several additional requirements must be met before joint authorship will exist.⁸⁴ First, the contribution must represent an original expression which is independently copyrightable.⁸⁵ Second, the parties must intend to merge their independent contributions into a unified whole in order to create the joint work at the time when the work was created.⁸⁶

[27] Where MMORPGs are concerned, it seems unlikely that each user’s creation qualifies him as a joint author of the entire Second Life game. Each contribution may be independently copyrightable, and Linden Lab certainly allows users to contribute their creations to the Second Life platform. At the point in time when each user creates, however, it seems unlikely to say that Linden Lab would intend for that user to be a joint author alongside itself. If this were the case, Linden Lab would be a joint author alongside thousands of Second Life users. This would become a practical nightmare since all joint authors must account to other joint authors for profits received.⁸⁷ This situation would defeat Linden Lab’s commercial aim to profit from its platform, as well as require users profiting from their own creations to share the proceeds with Linden Lab. It seems unlikely that this outcome could reasonably be the intention of either party. As a result, the argument for joint authorship rights would likely fail. Thus, the problem of competing interests and access remains.

VII. A PROPOSED SOLUTION TO THE CONFLICT

[28] As outlined in the previous sections, a conflict exists within Second Life, between the rights that Linden Lab guarantees its users and the power Linden Lab has to control access to its platform. This article does not argue that Linden Lab should be forced to give up its ability to control access to its platform. It is important to acknowledge that Second Life is

⁸³ Lastowka & Hunter, *supra* note 15, at 61 (citing *William Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (“Defendant also apparently contends that . . . the player becomes a co-author of what appears on the screen.”)).

⁸⁴ *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994).

⁸⁵ *Id.* at 1071.

⁸⁶ *See* 17 U.S.C. § 101; *Erickson*, 13 F.3d at 1071.

⁸⁷ *Erickson*, 13 F.3d at 1071.

fundamentally different from the Internet and certainly the world at large. It is a platform that is owned and operated by a company for profit. In this context,

[I]f analogies to real-world and intangible property are taken to their logical extreme, Second Life players could argue that Linden would never have the right to shutdown their MMORPG and deny virtual property owners of their “right” to access, use, sell and other wise [sic] deal with their virtual property when, as will inevitably be the case one day, Second Life ceases to be a profitable game for Linden.⁸⁸

While it seems unlikely that Linden Lab would, or even should, relinquish its control over the Second Life platform, there may be alternative solutions that allow users at least some measure of security in the value of their intellectual property rights.

[29] In the complaint filed against Linden Lab, Marc Bragg points out the need to preserve a user’s right to the value available in his intellectual property rights.⁸⁹ The complaint explains that, “[d]efendants also interfered and prevented Plaintiff from exploiting his rights to sell and/or otherwise trade his ‘fireworks’ and other content created by him and, in which, he retained all intellectual property rights.”⁹⁰ Bragg’s complaint also avers that his intellectual property “had real value and could have been sold to multiple ready, willing and able buyers. Bragg was never offered the opportunity to do so.”⁹¹ The complaint hints that Bragg might have found a cash-out option to be an acceptable solution to the market access problem that Second Life faces.

[30] The question remains of just how, exactly, such a cash-out option would function. If Linden Lab decided to deny access to a user, for whatever reason, upon notification, that user would then possess the

⁸⁸ Dale Dietrich, *Mark Bragg Files Virtual Property Complaint Against Linden Labs*, <http://www.daledietrich.com/gaming/mark-bragg-files-virtual-property-complaint-against-linden-labs/> (Nov. 16, 2006, 17:51).

⁸⁹ Complaint, *supra* note 7, at 6.

⁹⁰ *Id.* at 22.

⁹¹ *Id.*

option of cashing out any intellectual property rights held within the game. A user who possessed intellectual property rights which were valuable outside of the virtual world, like Tringo, would likely wish to retain the rights, since the work possesses value or at least potential value outside of the game. A user, like Bragg, with the rights over software code which creates in-game fireworks might wish to cash out his right since the virtual fireworks would have little or no value outside of the Second Life platform.

[31] A user opting for the cash-out option could then sell the intellectual property within the community where it has the most, or perhaps the only, real market value. This could be accomplished through either privately negotiated sales or through an auction system. The auction mechanism is best suited to the situation because it would assist sellers in accessing and obtaining a price that is consistent with the actual Second Life market value of the right. Second Life could advertise and conduct these auctions set up an independent site for advertising and auctioning off intellectual property rights that exiled users could still access. This solution would allow Linden Lab and other similar platform owners to retain control of the virtual world while allowing users to access the value of their intellectual property in addition to protecting it from infringement.

VIII. CONCLUSION

[32] The purpose of copyright and other intellectual property protection law is to ensure that incentive to create exists in society. In order to do this, people are given exclusive rights to their creations for a limited period of time in order to allow a recovery of investment and to profit from the work. When creation occurs inside a platform which is owned and controlled by some entity, in the way that Linden Lab exerts control over Second Life's platform, the availability of the incentive created by intellectual property protection may be significantly undermined. This occurs because the platform owner, in order to maintain control of his creative work, retains the ability to deny access to users. When the value of the user's intellectual property relies on continued access to the platform, the fact that no one else can use the protected property is little consolation if the owner himself is utterly unable to access its value. The solution to such a problem must take into account the competing

intellectual property interests of both parties while simultaneously keeping the goals of intellectual property protections in mind.