

VIRTUAL WORLD, VIRTUAL LAND BUT REAL PROPERTY

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Virtual worlds such as Second Life have become increasingly significant in terms of both time and money for their users. As such, it is important to analyse how the law may apply to and resolve disputes that originate in these virtual worlds. This article will focus on the virtual world Second Life, and in particular, the legal concept of land in Second Life which has come into the international legal limelight because of the *Bragg* litigation against Linden in the United States. Although the dispute was settled, the *Bragg* litigation raised the issue of the legal status of items in virtual worlds and whether these virtual items can indeed be recognised as property under the Western legal tradition. This is an issue separate from and independent of the question of intellectual property protection. This article will argue that land ownership in Second Life is very much like owning a modified form of leasehold property. Just like in the real world where more than one type of property right can subsist in a given item, this should also be the case in Second Life.

I. INTRODUCTION

Video gaming has undoubtedly been revolutionised by the Internet. Single player games no longer seem to be as attractive as dynamic, networked games, such as virtual worlds. A number of non-level-based, social interaction three-dimensional virtual worlds have become hugely popular in recent years. Two of the better known in the Western world are Second Life, operated by Linden Research (“Linden”), and There.com, operated by Makena Technologies. Of the Asian social interaction virtual worlds, HiPiHi operating out of China offers a truly collaborative and open-ended experience to users to create, inhabit and govern a new world.

This article will focus on the virtual world Second Life, and in particular, the legal concept of land in Second Life, which has come into the international legal limelight because of the *Bragg* litigation against Linden in the United States.¹ The *Bragg* litigation raised squarely, for the first time in a Western court of law, the issue of the

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¹ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Penn. 2007) [*Bragg*].

legal status of items in virtual worlds and whether these virtual items can indeed be recognised as property under the Western legal tradition. This is an issue separate from and independent of the question of intellectual property protection, which has already been discussed elsewhere.² There has been much dispute concerning whether virtual items can be considered property. If they are not considered property, then players have very little control over their creations *vis-à-vis* the virtual world provider and against other players; in effect, they have a mere contractual licence. If virtual items are property, then the legal landscape changes dramatically as will be discussed in Part VII.

It can be said that at the heart of the issue is the End User Licence Agreement (“EULA”). Before a player commences using the virtual world, the player must agree to the terms of the EULA, which dictates the conditions for playing the game.³ A game provider “can discipline players who violate the EULA, take away their privileges and powers, or even kick them out of the game space and eliminate their avatars.”⁴

Whilst EULAs may provide consumers with nearly everything they need to know by providing the terms of the relationship between the player and the game provider,⁵ certain terms of these standard contracts, found among the billing arrangements and software requirements, often rob players of a number of rights—most often, the intellectual property rights in any characters or items they create while playing the game.

The legal problems essentially begin here. Online gamers feel an almost passionate sense of ‘entitlement’ to ownership of the unique characters and items they create while playing the game.⁶ Most virtual world providers feel the opposite: almost always, the EULA states that the intellectual property rights of gamers vest with the game providers, depriving the player of any rights over the potential use of a character or item.⁷

A more crucial layer on top of the intellectual property issue is the status of the virtual items, that is, whether they can be classified as property, an issue which has been further fuelled by a lucrative online market for the sale of game characters and items. The value of this market was estimated in 2005 at approximately US\$880 million.⁸ Whether sold on eBay or sold by private transactions, game items can fetch a fortune. In December 2004, University of Sydney graduate David Storey purchased an online island, complete with beaches and an abandoned castle, for

² Yee Fen Lim, “Is it really just a game? Copyright and online role-playing games” (2006) 1 *Journal of Intellectual Property Law & Practice* 481.

³ Mia Garlick, “Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers” (2004-2005) 7 *Yale Journal of Law and Technology* 422, online: *Yale Journal of Law & Technology* <<http://www.yjolt.org/7/spring/garlick-422>>.

⁴ Jack M. Balkin, “Institute for Information Law and Policy Symposium State of Play: I. Essay & Reflection: Law and Liberty in Virtual Worlds” (2004/2005) 49 *N.Y.L. Sch. L. Rev.* 63 at 65.

⁵ Daniel C. Miller, “Note: Determining Ownership in Virtual Worlds: Copyright and Licence Agreements” (2003) 22 *Rev. Litig.* 435 at 461.

⁶ *Supra* note 3.

⁷ Andrew Jankowich, “EULaw: The Complex Web of Corporate Rule-Making in Virtual Worlds” (2006) 8 *Tulane Journal of Technology & Intellectual Property* 1.

⁸ Edward Castronova, “Secondary markets: \$880 million” *Terra Nova* (30 October 2004), online: *Terra Nova* <http://terranova.blogs.com/terra_nova/2004/10/secondary_marke.html>.

AUD\$35,000.⁹ In March 2005, a Chinese gamer sold a “dragon sabre” sword in the game Legends of Mir 3 for AUD\$1,129. Other items have sold for as much as US\$3,000.¹⁰ On eBay, a purchaser can buy a magic sword from the game Dark Age of Camelot for \$100.¹¹ After sending one hundred real world dollars to the seller, the purchaser will then meet the seller inside the game so the seller can hand over the magic sword.¹² Inside the game, the purchaser can now defeat a dragon; outside the game, the seller is \$100 richer. This is essentially the sale of something independent from the intellectual property. The closest analogy would be the purchase of a book; when one buys a book, one buys the physical thing and not any intellectual property rights. Similarly, when one buys a virtual castle, one buys the castle in its virtual form and not necessarily any intellectual property rights.

Game companies have been quick to ban the sale of virtual items. While most EULAs state that players do not have the right to resell any items they create in the game, in most instances, game companies have purported to rely on intellectual property law, in particular copyright, to stop such sales. As will be discussed, several companies have threatened online auction sites including Yahoo! and eBay with legal action, claiming that this practice infringes the intellectual property rights of the game provider. Players have complained, however, that it is not intellectual property being sold, but the fruits of the time players have invested in these games and in essence, the ‘property’ in their creations.

It will have become apparent to the reader that there are numerous legal issues arising in this area. This article will focus on the property issues. The best analogy is that of a book. As already mentioned, in a physical book, multiple layers and forms of ownership of different types of property can co-exist—the physical property in the book and the intangible copyright or copyrights in the book.¹³ The same can be argued for virtual items in that there is property in the virtual item separate from the intellectual property of the virtual item.

From a legal point of view, it is unfortunate that the dispute between Bragg and Linden was settled in early October 2007. The hearing was originally set for December 2007, and the decision was destined to produce important and interesting precedents in the area of virtual property. Part II of this article elaborates on the nature of virtual worlds and Part III examines Second Life and its thriving synthetic economy. Part IV examines the policy on property in Second Life and its interaction with property law and intellectual property law. Part V expounds the meaning of land ownership in Second Life under the current conception of property law and concludes that proprietary interests do subsist in land ownership in Second Life. Part VI argues that the bundle of property rights that arises from owning land in Second Life is very much like the property rights associated with holding a modified form of leasehold property. The analysis will draw upon the leasehold in public housing in Singapore

⁹ Amalie Finlayson and Reuters, “Online gamer killed for selling virtual weapon” *The Sydney Morning Herald* (30 March 2005), online: The Sydney Morning Herald <<http://www.smh.com.au/news/World/Online-gamer-killed-for-selling-virtual-weapon/2005/03/30/1111862440188.html>>.

¹⁰ Molly Stephens, “Note: Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators” (2002) 80 *Tex. L. Rev.* 1513 at 1515.

¹¹ Listings of internet gaming characters, items and other paraphernalia may be viewed on eBay.

¹² *Supra* note 3.

¹³ There can be multiple copyrights in a book such as the copyright in the text and the copyright in the layout of the published editions of books; see *e.g.*, the *Copyright Act 1968* (Cth.), s. 92 (Australia).

as well as grazing licences in Australia. Property is a legal construct and in the real world, the law has recognised property in many guises from the tangible to the intangible such as shares and leases. Land ownership in Second Life can and should be regarded as another form of property that gives rise to proprietary rights. Finally, Part VII will discuss the practical significance of this analysis.

II. VIRTUAL WORLDS

Massively multiplayer online role-playing games (“MMORPGs”) or, simply, online games, are a craze that has swept the globe. These online games provide virtual worlds that are as rich as the imagination allows. Being powered on the internet and with players from countries around the world, the games never stop. A player can go to bed at night and find an online kingdom’s ruler has changed by morning. In 2005, it was found that on average, online gamers spent approximately 22 hours per week online playing their favourite games.¹⁴ There have been reports of players spending up to 55 hours at a time playing¹⁵ and some Asian countries, where these games are enormously popular, have introduced laws designed to limit the number of hours players spend playing them on the internet.¹⁶

Online games allow users to create items and visual characters while playing the game. A player who subscribes to a game must first create an ‘avatar’—a character that can have whatever features one chooses. Characters and other in-game items can take two forms: either text-based, literary characters or visual, animated, two or three-dimensional figures.¹⁷ The character does not even need to resemble a human being. While playing the game, users can battle dragons, escape dungeons and rescue princesses (or handsome princes), acquiring abilities, swords, shields and coins (which can also be created).

While some online games emphasise problem-solving and adventuring akin to the fantasy tabletop role-playing game, Dungeons and Dragons (first published in 1974), others are less task-oriented and focus more on interpersonal relationships and goals less competitive than slaying beasts and gaining power. These types of online social worlds are not competitive by design in that players do not need to ‘level up’, that is, there is no need to defeat obstacles to increase the avatar’s power from a weak level 1 avatar to become a more powerful level 2 avatar and so on. Instead, the online game allows for social interaction, letting users communicate or otherwise interact with each other. There are of course also hybrids like EVE Online, where players aim to acquire power and treasure, but player interaction is paramount, through combinations of trade, resource collection or theft and fraud. The heightened interactivity between the player and the game has no doubt been one of the major attractions of this phenomenon—and has arguably created the legal controversies surrounding online games.

¹⁴ Tom Loftus, “Virtual worlds wind up in real world’s courts” *MSNBC.com* (7 February 2005), online: MSNBC.com <<http://www.msnbc.msn.com/id/6870901>>.

¹⁵ “S Korean dies after games session” *BBC News* (10 August 2005), online: BBC News <<http://news.bbc.co.uk/2/hi/technology/4137782.stm>>.

¹⁶ “Time Limits For Online Games Meant to Protect Children From Addiction” *Shanghai Daily* (21 October 2005), online: Shanghai Daily <<http://www.shanghaidaily.com/>>.

¹⁷ *Supra* note 5 at 449.

In order to play an online game, a user must first either purchase a CD or download the game software from the website of the game provider for free or a flat fee.¹⁸ A monthly subscription fee is usually payable to access the game. The downloaded software allows the player to connect to the game server and play the game.

III. SECOND LIFE AND ITS ECONOMY

Second Life is a non-competitive, social, three-dimensional virtual world where Linden has deliberately recreated real world experiences such as wind, oceans, mountains, islands, grass and buildings so that players would feel as if they were actually living in some sort of virtual reality. But unlike the real world, players may also encounter vampires, talking animals, flying humans and anything else the players and Linden fancy.

To participate in Second Life, the user would first register at no cost on Second Life's homepage and create an avatar. After downloading and installing the software, one is ready to begin living in Second Life. A player can simply live in Second Life and interact with other players in the online community without touching the Second Life economy. However, Second Life was designed to be more than an interactive chat facility for conversations, and indeed, Linden explicitly rejects calling Second Life a 'game'.¹⁹ According to the Second Life website, Second Life has a "fully integrated economy architected to reward risk, innovation and craftsmanship".²⁰ On the same website, it boasts to the world, "Make real money in a virtual world. That's right, **real money**."²¹ It also advises that businesses succeed in Second Life by the "ingenuity, artistic ability, entrepreneurial acumen, and good reputation of their owners".²²

The virtual currency in Second Life Linden is "Linden Dollars" (or L\$), which can be purchased with real world US dollars. The exchange rate in May 2010 was around US\$1 for L\$260 and this rate has been relatively stable since 2007. One can also earn Linden Dollars by making and selling goods and services, holding events and so on in Second Life. If one upgrades to a Premium account which costs the player US\$9.95 upwards per month, then Linden provides a small weekly stipend.²³ It should also be noted that only Premium account players can own land in Second Life.

Many items in Second Life such as clothes, cars and castles have been created by its players using scripting tools and other design programs. Linden allows players to create, buy, sell and otherwise trade any product or service within Second Life and in the real world. Some residents of Second Life have made significant profits from the sale and exploitation of virtual items and virtual land.²⁴ These residents often spend

¹⁸ Mathias Klang, "Avatars: From Deity to Corporate Property—A Philosophical Inquiry into Digital Property in Online Games" (2004) 7(3) *Information, Communication & Society* 389 at 390.

¹⁹ Kenneth James, "Real Benefits in Virtual Worlds" *Business Times* (11 December 2006).

²⁰ "The Marketplace", online: Second Life <<https://secure-web6.secondlife.com/whatis/marketplace.php>> (website available until early 2008). Thereafter, the webpage was changed. See also Bragg, *supra* note 1.

²¹ *Ibid.* (emphasis in the original).

²² *Ibid.*

²³ See generally Second Life's FAQ website, online: Second Life <<http://secondlife.com/whatis/?lang=en-US>>.

²⁴ See Mark Wallace, "The Game Is Virtual. The Profit Is Real." *The New York Times* (29 May 2005) at 37.

as much time online in Second Life as they would working a full-time job, to the point that many view their investment in Second Life as their livelihood.²⁵ A case in point is Anshe Chung (the creator of which is Ailin Graef) who in late 2006 became the first online avatar to achieve a net worth exceeding one million US dollars from profits entirely earned inside a virtual world.²⁶ Indeed, it was through virtual real estate that Anshe Chung made her fortune.

Within Second Life, Linden sells parcels of land through online auctions where registered users bid against other users for parcels of land. Once the parcels of land have been purchased, they can be subdivided and resold.²⁷ Over a period of around two and a half years, Anshe Chung bought and developed virtual real estate from an initial investment of US\$9.95 for a Second Life account. She began with small-scale purchases of virtual real estate, which she then subdivided and developed with landscaping and themed architectural builds for rental and resale. Since then, her profits have also come from the development and sale of properties for large-scale real world corporations. Anshe Chung's holdings in Second Life have been reported to include virtual real estate that is equivalent to 36 square kilometres of land, several virtual shopping malls, virtual store chains, several virtual brands in Second Life as well as 'cash' holdings of several million Linden Dollars. She also has significant virtual stock market investments in Second Life companies.²⁸ Importantly, all this grew from her real estate investments in Second Life, which indicates that real estate in Second Life is a significant commodity in the virtual world.

Given the successes of individuals, it is not surprising that traditional real world businesses have also set up shop in Second Life, with international brands selling products such as clothing, virtual and real.²⁹

IV. SECOND LIFE AND VIRTUAL ITEMS

The ability of players such as Anshe Chung to profit from their time spent in Second Life stems from the policy on ownership of virtual items in Second Life. On 14 November 2003, Linden released a statement announcing that it had revised the Terms of Service ("TOS") for Second Life and now allowed subscribers to retain full intellectual property protection for the digital content they create while playing the game, including characters, clothing, scripts, textures, objects and designs.³⁰ This was largely seen as a bold move on the part of the company. Specifically, clause 3.2

²⁵ See F. Gregory Lastowka & Dan Hunter, "The Laws of the Virtual Worlds" (2004) 92 Cal. L. Rev. 1 at 8-9.

²⁶ Rob Hof, "Second Life's First Millionaire" *Business Week* (26 November 2006), online: Bloomberg Businessweek <http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html>.

²⁷ See Julian Dibbell, "The Unreal Estate Boom" *Wired* (January 2003), online: Wired <http://www.wired.com/wired/archive/11.01/gaming.html?pg=1&topic=&topic_set=>>.

²⁸ Press Release, "Anshe Chung Becomes First Virtual World Millionaire" *Anshechung.com* (26 November 2006), online: Anshechung.com <http://www.anshechung.com/include/press/press_release251106.html>; Sean F. Kane, "Virtual Wealth Management: Asset Creation, Seclusion, and Money Laundering in the Online World" (2006) 185 N.J.L.J. 988.

²⁹ Wagner James Au, "Adidas, Toyota, come to Second Life" *GigaOM* (20 August 2006), online: GigaOM <<http://gigaom.com/2006/08/20/adidas-toyota-come-to-second-life>>.

³⁰ Press Release, "Second Life Residents to Own Digital Creations" *Linden Lab* (14 November 2003), online: Linden Lab <http://lindenlab.com/press/releases/03_11_14>.

of the Second Life TOS now states:³¹

Linden acknowledges and agrees that, subject to the terms and conditions of this Agreement, you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service.

The rationale given for the change in policy was presented by Linden in the Press Release as follows:³²

Until now, any content created by users for persistent state worlds, such as EverQuest or Star Wars Galaxies, has essentially become the property of the company developing and housing the world... We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.

It would appear from this Press Release alone that Linden is truly adhering to the position that it is relinquishing all property rights in the virtual world items created by players. It states that "the preservation of users' property rights" is essential and that players should "own the content they create" as well as "share in the value that is created". In addition, it would also appear that Linden recognises that general property rights, which are inclusive of intellectual property rights, exist in Second Life.

However, the actual wording of the clause in the TOS refers only to intellectual property rights and not general property rights and therefore questions arise as to what exactly was the intention of Linden. As referred to in the Linden Press Release, many if not all virtual world providers state in their EULAs or TOS that the virtual world provider owns all property rights, not just the intellectual property rights in all players' creations. It could be argued that because at the time of the Linden Press Release, the well-publicised disputes have been only in the intellectual property area, and that this is the reason for the change in the TOS only referring to intellectual property rights, whereas it was the intention of Linden that all property rights of the players would be respected. Indeed, as will be discussed below, the representations of Linden over the course of the years from the Press Release until the *Bragg* litigation in 2006 tend to support the contention that Linden intended to refer to all property rights, not just intellectual property rights.

A. *The Tension*

The EULAs of other virtual worlds and the ensuing intellectual property disputes that were well-publicised before the Linden Press Release resulted in the unhappy position that if one were to exercise one's imagination and create a highly original online character complete with weaponry, pursuant to most EULAs or TOS, one would not be able to use the same character if one were to, for example, write a comic book or sell t-shirts with pictures of the character.³³ As Miller has noted,

³¹ "Terms of Service", online: Second Life <<http://secondlife.com/corporate/tos.php>>.

³² Press Release, "Second Life Residents to Own Digital Creations" *Linden Lab* (14 November 2003), online: Linden Lab <http://lindenlab.com/press/releases/03_11_14>.

³³ At least in an American context, an EverQuest subscriber "is denied from creating any derivative fiction based on his character, his character's adventures, or items he creates in space." See *supra* note 5 at 466.

“A subscriber creates. He is encouraged to create. However, he owns nothing but a good time.”³⁴ Another analogy useful here would be the software and platforms for word processing. Whilst software developers provide and own the facilities for creating documents, they do not own the documents and artworks that are created with the software.

Most complaints in this area arise from the virtual world provider asserting ownership over the intellectual property created by gamers, with the use of EULAs or TOS being blamed for this injustice. For example, para. 8 of the EverQuest EULA reads, “We and our suppliers shall retain ownership of all intellectual property rights relating to or residing in the CD-ROM, the Software and the Game.”³⁵

These clauses are fairly sweeping and are extremely one-sided.³⁶ They do not allow any leeway for the player to retain any rights—whether general property or intellectual property rights—over their creations. One of the earliest reasons put forward for the denial of players’ copyrights was that if players/creators were permitted to retain any intellectual property or other property rights, the law would be allowed into the game and it would no longer be a game.³⁷ This argument is unconvincing, as it has not stopped game companies from purporting to claim copyright infringements when they experience a problem, whether legal, commercial or economic.

It is submitted that the use of such broad intellectual property law claims was largely to curb the out-of-game sale of virtual world items discussed above, which would in turn help increase the revenue of the virtual world providers. After all, if players can purchase characters and virtual world items for real world dollars, this would decrease the amount of time players, especially inexperienced ones, would need to spend in the virtual world, which would in turn decrease the revenue for virtual world operators as they would be collecting less monthly subscription fees. The situation was exacerbated by the many ‘gold farming’ companies that have been operating in developing countries. These ‘gold farmers’ are basically sweatshops that hire users to play these games solely to acquire or create valuable virtual world items and then sell the items outside of the virtual world.³⁸ An illustrious example is Black Snow Interactive, which was based in Tijuana, Mexico. It hired players to play the Mythic Entertainment-owned game, *Dark Age of Camelot*.³⁹ Like many virtual world providers, Mythic Entertainment claimed this ‘farming’ infringed the company’s copyrights and asked the online auctions sites such as eBay to shut down any auctions of these items. However, the reliance on copyright law as a means of curbing this practice is somewhat artificial and indeed, ineffective, if virtual items

³⁴ *Supra* note 5 at 466.

³⁵ See “End User Licence Agreement”, *supra* note 5.

³⁶ See clause 7 of “Terms of Use for Star Wars Galaxies: An Empire Divided”, online: Star Wars Galaxies <[³⁷ *Supra* note 4 at 73.](http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=15629&p_created=1114485003&p_sid=KJByKL*j&p_accessibility=0&p_redirect=1&p_srch=1&p_lva=16206&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9Mj15LDIyOSZwX3Byb2RzPTAmcF9jYXRzPTAmcF9wdj0mcF9jdj0mcF9zZWZwY2hfdHlwZT1hbnN3ZXJzLnNlYXJjaF9ubCZwX3BhZ2U9MSZwX3NlYXJjaF90ZXh0PWludGVsbGVjdHVhbCBwcm9wZXJ0eQ!!&p_li=&p_topview=1>.</p>
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³⁸ Mark Ward, “Fantasy fuels games with finances” *BBC News* (30 December 2005), online: BBC News <<http://news.bbc.co.uk/2/hi/technology/4543212.stm>>. See also *supra* note 3.

³⁹ *Supra* note 14.

are characterised as property. In fact, it could be argued that copyright has been used as a legal tool by some virtual world providers to indirectly maintain their economic positions.

B. *The Policy Decision made by Second Life*

In light of the foregoing, when Linden entered the virtual world market in 2003, it understood the tensions that already existed between existing virtual world operators and their players. Being a new entrant in the market, in order to succeed, Linden also needed to distinguish itself from the other established virtual worlds. Hence, it made a business decision to depart from the industry standard of denying that players had any rights to virtual items. As already discussed, this decision could be justified from the view of the players and indeed was probably intended to draw players to Second Life. From the point of view of a virtual world provider, especially the provider of a non-level-based virtual world, there were no convincing reasons as to why virtual world providers needed to assert intellectual property ownership over player creations. So it appeared to be a win-win business decision for Linden.

Following the announcement on 14 November 2003 where Linden expressly recognised players' property rights in their online creations, Linden continued to make statements and representations that preservation of players' property rights is a fundamental part of Second Life.⁴⁰ Much of the language used by Linden seems to indicate that Linden was referring to property rights in general and not just intellectual property rights.

In December 2003, Linden began allowing players to 'own' land in Second Life. Players were able to buy land at land auctions and the payment would be made to Linden in US dollars for parcels of land. In June 2004, Rosedale, the Chief Executive Officer of Linden, was quoted: "The idea of land ownership and the ease with which you can own land and do something with it... is intoxicating... land ownership feels important and tangible. It's a real piece of the future."⁴¹

One year later, in June 2005, Rosedale was again quoted in an interview published by *Guardian Unlimited: Gamesblog*. During the course of the interview, Rosedale said:⁴²

We like to think of Second Life as ostensibly as real as a developing nation... The fundamental basis of a successful developing nation is property ownership... We started selling land free and clear, and **we sold the title, and we made it extremely clear that we were not the owner of the virtual property.**

In July 2006, in an interview with After TV, Rosedale was asked, "So your economic model is selling virtual land; do you have an advertising model?" Rosedale's reply stated, "[E]veryone owns their own stuff, **their own property**—there's no way we

⁴⁰ See Complaint, *Bragg v. Linden Res., Inc.*, No. 06-08711 (Pa. Ct. Com. Pl. 2006) [*Bragg* (2006)] and *Bragg*, *supra* note 1.

⁴¹ Michael Learmonth, "Virtual Real Estate Boom Draws Real Dollars" *USA Today* (3 June 2004).

⁴² "Second Life and the Virtual Property Boom" *Guardian Unlimited: Gamesblog* (14 June 2005), online: Guardian News and Media Limited <http://blogs.guardian.co.uk/games/archives/2005/06/14/second_life_and_the_virtual_property_boom.html> (emphasis added).

could just advertise on that property without asking because it isn't ours you know. **It belongs to the land owners.**"⁴³

These statements and representations are just a selection made by Linden over the years. They clearly indicate that as far as Linden was concerned, owners of land in Second Life do indeed own the land, including the title. It would also be fair to conclude that Second Life's month over month record growth in subscriber acquisition during those years⁴⁴ is attributable to the economic and investment opportunities offered by Second Life, which entice players to spend and make substantial amounts of money.⁴⁵ In the following section, the concept of land ownership in Second Life under property law will be examined.

V. LAND OWNERSHIP IN SECOND LIFE

The legal meaning of land ownership in Second Life has come into the legal limelight because of the dispute between Marc Bragg and Linden. The case resulted in a decision at the United States District Court level concerning one aspect of contract law.⁴⁶ The remaining issues, including the property issue, were originally set for hearing in December 2007,⁴⁷ but the parties settled in early October 2007. Whilst many legal questions remain unanswered, it is heartening to note that Linden has amended some of its procedures and websites to overcome some of the weaknesses highlighted by the case. This section will first examine the *Bragg* dispute, and then analyse the features of land ownership in Second Life within the context of existing legal scholarship on property law.

A. *The Bragg Dispute—Overview*

Marc Woebegone was the online avatar of Mark Bragg, a lawyer based in Pennsylvania. Woebegone had accumulated a substantial portfolio of real estate and currency in Second Life and also ran nightclubs and other businesses.⁴⁸ Bragg was keen to increase his profits from his land investments in Second Life and began investigating means of taking advantage of the online auction interface. Bragg contacted another player through the Second Life online chat facility where he learnt of a way of accessing unlinked URLs or web addresses in order to prematurely start land auctions that would not be visible to players who did not know how to access them.⁴⁹ This meant

⁴³ See interview of Philip Rosedale (20 July 2006), online: Andrew Keen <<http://andrewkeen.typepad.com/aftertv/2006/07/index.html>> (emphasis added).

⁴⁴ Linden and Rosedale's Answer & Counterclaim against Bragg in *Bragg*, *supra* note 1 at para. 51.

⁴⁵ See Robert D. Hof, "My Virtual Life" *Business Week* (1 May 2006), online: Bloomberg Businessweek <http://www.businessweek.com/magazine/content/06_18/b3982001.htm>, where it is stated that in January 2006, "inside Second Life alone, people spent nearly \$5 million in some 4.2 million transactions buying or selling clothes, buildings, and the like"; "Virtual Online Worlds" *The Economist* (28 September 2006) at 62, online: The Economist <http://www.economist.com/business/displaystory.cfm?story_id=7963538>.

⁴⁶ *Bragg*, *supra* note 1.

⁴⁷ The case was originally placed in the trial pool for 17 December 2007.

⁴⁸ Kathleen Craig, "Second Life Land Deal Goes Sour" *Wired* (18 May 2006), online: Wired <<http://www.wired.com/news/culture/0,70909-0.html>>.

⁴⁹ *Supra* note 44.

that the minimum bid of US\$1,000 set by Linden for its parcels of land at its land auctions would not be applicable and there would be very few, if any, competing bidders. According to court records, another player self-initiated a land auction. Bragg was one of the bidders and became the owner of a parcel of land named "Taessot" for which he paid Linden US\$300.01.

It is unclear from Second Life's TOS and EULA if the practice was prohibited. Certainly, it is arguable that Bragg knew that Linden sets a minimum bid for the land parcels it auctions as he had previously purchased land from Linden in the normal way. However, there was nothing in the TOS or EULA which stated that all land sold by Linden had a minimum price of US\$1,000, nor was there anything that stated that land could only be purchased through the online auction in a certain way. Indeed, the 'exploit' in the system which Bragg and others took advantage of was a result of a loophole left open by Linden's computer programmers. While the actions of Bragg may be morally reprehensible, Linden also had a responsibility, if not a duty, to its players to ensure that certain important transactions and key features of the virtual world are properly secured and functioning properly. The auction and sale of land by Linden, which usually involves transactions totalling US\$1,000 and upwards, would certainly come under such a special category.

If it could be said that perhaps Linden was acting negligently for not ensuring that its computing systems were functioning properly, then perhaps Linden should have relied on a legal, and not technological, solution. As Moore has said of EULAs, "It is a legal device designed to limit the gamers' capacity for legitimate ownership when playing the game, but because installation of the game on the player's computer requires acknowledgement of the contract's terms, players are powerless to object."⁵⁰

This being so, it would have been open to Linden to dictate in the TOS or EULA that land auctions could only occur validly in a certain way and that all other methods of acquisitions would be null and void. This would have incorporated these conditions so they form part of the contract of subscription to the virtual world or the contract for sale of virtual land. Alternatively, the statements could have appeared on Second Life's website at prominent and relevant places. This would have alerted the players and could arguably have been an implied term of the subscription contract or the contract for the sale of land in Second Life.

Linden, however, did not do any of these things. Furthermore, Linden accepted Bragg's money and Bragg was given the parcel of land known as Taessot, thereby concluding the contract for the sale of land.

Soon after the land was transferred to Bragg, Linden discovered the anomaly and froze Bragg's account on Second Life. Linden subsequently resold all of Bragg's real estate in Second Life (not just Taessot), deleted his avatar and denied him access to all of his virtual property. Bragg did not receive any compensation or reimbursement. Linden had initially told Bragg that it intended to rescind the sale of Taessot and refund the price paid, being US\$300.01, but this never occurred even though it would have been the equitable course of action.

Bragg retained counsel and sued Linden, seeking financial damages and specific performance and requesting the return of the land and access to it, in part for a

⁵⁰ Christopher Moore, "Commonising the Enclosure: Online Games and Reforming Intellectual Property Regimes" (2005) 3(2) Australian Journal of Emerging Technologies and Society 100.

breach of a virtual land auction contract, fraud and violations of the Pennsylvania *Unfair Trade Practices and Consumer Protection Law*⁵¹ and *California Unfair and Deceptive Practices Act*,⁵² among other claims.⁵³ Bragg alleged that at the time his avatar was deleted from Second Life, he had provided to Linden US\$13,900 for items such as Land Use Fees and land purchases and that his ongoing rentals, fire-work shows and projects under construction were generating approximately US\$50 per month. He also alleged that his purchase and sale of land in Second Life was generating approximately US\$1,200 per month. Bragg alleged that he relied upon statements made by Linden, which indicated that property rights in Second Life were inviolable and that he was thereby induced to invest in Second Life.⁵⁴

B. *The Bragg Dispute—TOS*

The first round of the dispute⁵⁵ was fought over the TOS when Linden filed motions to dismiss the suit and compel Bragg to arbitrate his claim out of court, consistent with Linden's TOS. Judge Eduardo Robreno held that Linden's TOS constituted a "contract of adhesion", and which was also a substantively unconscionable contract and that the arbitration clause was invalid. The court therefore refused to enforce the compulsory arbitration clause contained in the TOS and ordered the legal suit to proceed.⁵⁶ The purpose of this article, however, is not to focus on the contract law issues, but rather to focus on the property law issues.

C. *The Bragg Dispute—The Concept of Land in Second Life*

The concept of land in Second Life became an issue in the dispute when Linden denied the existence of any 'property' in the land it sold in Second Life. In the court documents, Linden and Rosedale, the defendants, stated as follows:⁵⁷

Defendants admit that Second Life contains an integrated economy that enables users to purchase and sell rights in Objects or other user-created content for various forms of consideration. Defendants further admit that, subject to the Second Life Terms of Service and other applicable rules and policies, Second Life users may also purchase and sell representations of parcels of "land" in Second Life, hereinafter referred to as "virtual land." Defendants deny that Second Life allows for the actual "conveyance of title" in "virtual land," as "virtual land" is not property to which one may take "title," but instead a license of access to Linden's proprietary servers, storage space, bandwidth, memory allocation and computational resources of the server, which enables the experience of "land" and the things that one can do with "land" on the Second Life platform. Defendants further

⁵¹ *Unfair Trade Practices and Consumer Protection Law*, 73 P.S. (1968).

⁵² *Unfair and Deceptive Practices Act*, Cal. Bus. & Prof. Code § 17200.

⁵³ Bragg (2006), *supra* note 40.

⁵⁴ *Ibid.*

⁵⁵ The court also had to consider jurisdiction arguments over Rosedale, the CEO of Linden.

⁵⁶ Bragg, *supra* note 1.

⁵⁷ *Supra* note 44 at para. 8.

admit that the access rights represented by “virtual land” in Second Life can be purchased using Linden Dollars or U.S. Dollars...

It would appear that what the defendants are arguing is that they are simply leasing out (very expensive) computer processors when they ‘sell land’ in Second Life. Indeed, what the defendants have described is probably an accurate scientific explanation of what users are engaged in when they interact with land in Second Life. The law, however, has not always accepted the scientific view as the legal view.⁵⁸ Secondly, the defendants’ explanation completely ignores the booming and energetic economy that has developed around land in Second Life—players do not pay thousands of US dollars just to give themselves “the experience of ‘land’ and the things that one can do with ‘land’ on the Second Life platform” as Linden claims. Lastly, the defendants, in denying the existence of any property, are also closing their eyes to the expectations of the players, expectations which have been formed as a result of the representations made by Linden and its officers, as already discussed above.

D. *The Legal Concept of Property and Land Ownership in Second Life*

In order to properly examine the legal status of land and land ownership in Second Life, the first question that needs to be asked is simply, “What is property?”⁵⁹ It should be remembered that property is a legal construct. The High Court of Australia has said, “The concept of property may be elusive... and it may be... that ‘the ultimate fact about property is that it does not really exist: it is mere illusion’.”⁶⁰ The High Court then went on to cite Professor Kevin Gray: “[M]uch of our false thinking about property stems from the residual perception that ‘property’ is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.”⁶¹ In *Western Australia v. Ward*, another decision by the High Court of Australia, the majority held that “the common law’s concern [is] to identify property relationships between people and places or things as rights of control over access to, and exploitation of, the place or thing”.⁶² These notions of property reflect the thinking in a number of Commonwealth jurisdictions such as Australia, Singapore and the United Kingdom on the concept of property. In essence, property is not a thing but a socially approved power relationship in respect of socially valued assets.⁶³ The two key features of property then are a presumptive right to exclude others (or control over access) and discretion in the manner of exploitation.⁶⁴

We will now turn to these two features of land ownership in Second Life to examine whether land ownership does take on the features of ‘property’ and to examine what

⁵⁸ See e.g., *Gutnick v. Dow Jones Co Inc* [2001] Vic. S.C. 305.

⁵⁹ For an excellent discussion of virtual property in general from the perspective of the American legal tradition, see Joshua A.T. Fairfield, “Virtual Property” (2005) 85 B.U.L. Rev. 1047.

⁶⁰ *Yanner v. Eaton* [1999] 201 C.L.R. 351 (H.C.A.) [*Yanner*] at para. 17, citing Kevin Gray, “Property in Thin Air” (1991) 50 Cambridge L.J. 252 at 252.

⁶¹ *Yanner*, *ibid.* at para. 18.

⁶² *Western Australia v. Ward* [2002] 213 C.L.R. 1 (H.C.A.) [*Ward*] at para. 88, *per* Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne.

⁶³ Kevin Gray, “Equitable Property” (1994) 47(2) *Curr. Legal Probs.* 157 at 160.

⁶⁴ There is also of course the need that the so-called property is definable or identifiable, but this is not an issue here as each parcel of land in Second Life has not only its unique name and location in Second Life, but also a unique location on the computer processor.

similarities exist between ownership of land in the real space and the ownership of land in Second Life.

As previously mentioned, once one has successfully bid for a parcel of land in Second Life, one can subdivide the land and resell the land. In addition to this, the Second Life website provides details of what else one can do with the land one owns: "Owning land allows you to control land. You can prevent others from visiting or building there, change the shape of the land, subdivide and sell it, and much more..."⁶⁵

The statement is clear. When one owns land, one can control the land. If the control amounts to control over access to, and exploitation of, the land, as was held in *Ward*, then clearly, property rights would arise over the land in Second Life.

On the same webpage⁶⁶ as the abovementioned statement, much detail is given as to the types of control one has. These will now be considered to demonstrate the breadth and depth of control a user has over the virtual land. As it will become apparent, many of these types of controls are also those which landowners and tenants have over physical land.⁶⁷

First, the owner can allow others to, or restrict others from, creating, editing or placing objects on the land. Note that this only refers to others as the landowner always has the ability to build or place things on his or her own land. In the real world, an example of this would be whether one allows others to build a house or plant trees on one's land or to graffiti one's walls and so on. Second, the owner can dictate whether the land is 'safe', that is, no damage can be done to those visiting the land, or not safe. For example, in the real world, one could (with notice, of course) keep dogs within one's land to attack any person or thing that comes onto the land. This would render the land not safe in the Second Life sense. Third, the owner of the land can determine whether or not sound can enter or leave the parcel of land. The equivalent of this in the real world would of course be the use of soundproofing to keep sound in or to keep sound out.

The fourth feature of land ownership in Second Life is the ability, at a cost, to have the land publicly listed so that other avatars can easily locate the land. One would need to specify the category under which the land is to be listed, for example, homestead or store. The analogy in the real world of this would be something along the lines of a telephone book or a street directory, except that the listing would be of the property and not of the person or business as in the telephone book, or the street name as in the street directory. Fifth, in Second Life, the owner can dictate whether other avatars can fly on the land. It is possible for others to fly over one's land at a prescribed height, similar to real life where one cannot generally prevent airplanes

⁶⁵ "Land: How To" online: Second Life <<http://secondlife.com/community/land-howto.php>> (website available until early 2008; thereafter, the information has been separated into many webpages in the webpages on Land, online: <<http://secondlife.com/land/?lang=en-US>>).

⁶⁶ *Ibid.* The information on Second Life in the remainder of this section is taken from the same webpage unless stated otherwise.

⁶⁷ See also Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), which discusses the power of code to regulate in the virtual world, powers that are markedly different from the power of architecture in real space.

from flying above one's land, but landowners in Second Life who do allow others access to their land also have the option to prevent others from starting to fly while they are on the land. Given that in real life, human beings cannot fly, it can however be argued that in some respects, this capability to control goes beyond what a real world landowner possesses. A real world landowner generally cannot, for example, prevent birds from starting to fly from within their land (without the construction of horizontal nets or similar devices).

Sixth, landowners in Second Life can allow others to, or prevent others from, running scripted objects on their land. What this means is essentially that landowners can prevent others from doing things like firing scripted weapons on one's land. Avatars may be allowed to visit but while there, they are prevented from doing things, good or bad, that are not in the default. Examples of harmless activities may include animations or chimeras for customised dancing or the launch of particle effects to liven up the atmosphere. Because a large variety of effects, some harmless and some harmful, can be achieved with scripted objects, a lot of places such as nightclubs in Second Life do not permit scripted objects to be run on their land. This type of control in some sense goes beyond the control a real world landowner possesses. In practice, it is not possible to out and out prevent people (short of imposing security checks) from bringing things such as mini firecrackers and fireworks into clubs and shopping malls and setting them off. In the real world, however, the deterrent for this kind of behaviour is simply civil and sometimes criminal sanctions.

Seventh, not only may avatars purchase land and make improvements to the land, they can also exclude other avatars from entering onto the land. Access may be denied to the general public or limited to a certain group and/or up to 50 particular avatars. A landowner in Second Life may also sell passes to access the land and select the price and time limit for the pass. As noted above, those who are banned from accessing a parcel of land in Second Life may still fly over the land, but the flight must be above a certain height. This is clearly analogous to the real world where prying helicopters and planes can fly over private properties at a certain height. The ability in Second Life to restrict access to the land is clearly a feature found in the real world ownership of land. Similarly, Second Life landowners can freeze and eject people from their land. Ejection of persons is an action available to landowners in the real space, but the freezing of avatars certainly goes beyond what is physically possible in the real world.

Eighth, landowners in Second Life can work the land by 'terraforming', which means flattening, raising, lowering, smoothing or roughening the land. One can terraform the whole parcel of land or parts of the parcel. All this is clearly possible with real property in the real world. Ninth, as already mentioned, landowners can subdivide the land and conversely, they can also join together two or more parcels of land if they own the parcels. Tenth, if an avatar is feeling generous or simply does not have the time to sell the parcel of land, it can give away the parcel of land, just like in real life. Finally, Linden charges landowners in Second Life a monthly "Land Use Fee" if the avatar owns more than 512 square metres of land.⁶⁸ The first 512 square metres are free but thereafter, the fee increases according to the size of the land holding. The most obvious equivalent of the Land Use Fee in the real world is land tax.

⁶⁸ See "Mainland Pricing and Fees", online: Second Life <<http://secondlife.com/whatis/landpricing.php>>.

In conclusion, most if not all of these controls are also controls that real property holders such as occupiers and landowners in the real world possess. Granted, occupiers cannot subdivide land, but they can sub-lease part of the land.

From the foregoing, it is clear that ownership of land in Second Life gives the owner a presumptive right to exclude others. Further, the second element of discretion in the manner of exploitation is also satisfied, as there is a wide discretion available to the landowner in the manner of exploitation of the land. Hence, under the principles of property law as it is known in many Commonwealth jurisdictions, it would appear that land ownership in Second Life gives rise to some kind of property rights. It could also be said that there is 'property' in the land in Second Life. But the question is, what form of property rights? The foregoing analysis has shown that a substantial number of similarities exist between ownership of land in the real space and ownership of land in Second Life. The law has recognised all sorts of property rights in relation to land, for example, mortgages and leases. Could it be that the property rights that subsist in land ownership in Second Life are akin to some forms of property rights related to land as we know it in the real world? It is submitted that owning land in Second Life resembles holding some modified form of leasehold property in the real world. In particular, the next section will argue that parallels can be drawn with the modified form of leasehold in public housing in Singapore.

VI. THE LEASEHOLD IN PUBLIC HOUSING IN SINGAPORE, GRAZING LICENCES AND LAND OWNERSHIP IN SECOND LIFE

We saw in the previous section that excludability and the discretion in the manner of exploitation form the foundation of the concept of property. It may be suggested that while the landowner in Second Life has the requisite control over the land, ultimately, he or she may not have meaningful real control because that control can be lost easily if, for example, the user fails to pay the monthly subscription fee or the monthly Land Use Fee. In most cases, the non-payment of such fees will result in one losing ownership of the land. The second objection that may be raised as to the control a landowner in Second Life has is in respect to one particular clause in the TOS that overshadows this control. Clause 2.6 reads:⁶⁹

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 all 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.

Leaving aside the issues of whether the above clause is unconscionable or unfair and whether it is enforceable, it would certainly seem that the control a landowner has in Second Life is at the absolute discretion of Linden. After all, Linden can, for no reason, suspend or terminate an account and give no refund. We will now turn to these two issues.

⁶⁹ *Supra* note 31. Note that this was originally clause 7.1 when Bragg launched the legal proceedings but was subsequently renumbered. The text remains unchanged.

In the next section, the argument will be made that just because land ownership in Second Life can come to a premature and abrupt end should not deprive land ownership in Second Life of the character of property. The foundation of the argument will be the leasehold in public housing in Singapore to which property rights do attach, coupled with analysis of legal and equitable interests in land.

A. *Leasehold in Public Housing in Singapore—Premature
End to Ownership*

The leasehold is the most prevalent method of land holding in Singapore. Importantly, the public housing system administered by the Housing and Development Board (“HDB”) provides the key to understanding land ownership in Second Life. Under the *Housing and Development Act*,⁷⁰ the HDB has broad powers to manage all lands, houses and buildings or other property vested in or belonging to the HDB, including preparing and executing proposals, plans and projects for the erection, conversion, improvement and extension of any building for sale, lease, rental or other purposes.⁷¹

Part IV of the *Housing and Development Act* deals with the HDB’s power to sell flats, houses and other buildings. As noted by Ricquier,⁷² the HDB in fact rarely sells property, but rather, leases it. The definition of “owner” in s. 2 of the *Housing and Development Act* is interesting as it includes a person who has purchased a leasehold interest in the property and also includes a purchaser under an agreement for a lease. Indeed, most people who buy from the HDB generally regard their transactions as sales.⁷³ The scheme is in effect a modified form of the leasehold as it is known at common law.

The public housing scheme meets and exceeds social policy and desires by ensuring sufficient, fair and equitable housing. Apartment prices for flats sold by HDB are pegged in relation to specific income levels to ensure the flats are affordable. However, the HDB encourages an active resale market after the “minimum occupation period”⁷⁴ and because of this, the resale value of flats in sought-after locations can be several times higher than a new flat sold by the HDB.

The public housing scheme is an equitable one and for it to be so, there must be strict rules in place ensuring fair play, social justice and equal access to public housing. To this end, ss. 55 and 56 of the *Housing and Development Act* list circumstances that will trigger a premature end to the leasehold ownership. The most common duration for a leasehold flat that the HDB sells is 99 years, but if the owner has (or in some cases, other authorised occupiers have) breached any of the provisions in s. 55 or s. 56, then the HDB may re-enter the premises and determine the lease absolutely under s. 55 or compulsorily acquire the premises under s. 56. For example, under s. 55(1)(a), the non-payment of rent for three months after the HDB has sent a letter of demand will trigger a right of re-entry by the HDB. Similarly, under s. 56(1)(b),

⁷⁰ *Housing and Development Act* (Cap. 129, 2004 Rev. Ed. Sing.) [*Housing and Development Act*].

⁷¹ *Ibid.*, s. 13.

⁷² William J.M. Ricquier, *Land Law*, 3rd ed. (Singapore: LexisNexis, 2007) 22.

⁷³ See also Tan Sook Yee, *Private Ownership of Public Housing in Singapore* (Singapore: Times Academic Press, 1998) 129-138, where Professor Tan concludes that owners of HDB flats can be said to own their flats and have property rights over them.

⁷⁴ *Supra* note 70, s. 49A.

the HDB can compulsorily acquire any flat if the owner, the owner's spouse or any authorised occupier has acquired any title to an estate or interest in any other flat, house or building or land with the exception of some forms of commercial property.⁷⁵ Significantly, unlike forfeiture, the owner of a HDB flat has recourse to an appeals structure as well as compensation as set out under s. 56. In short, under the scheme, there is a framework to instill confidence in home ownership.

The relevance of these two sections to land ownership in Second Life is that parallels can be drawn in terms of the rights of control of the property owner coming to a premature end as a result of some triggering event. In Second Life, the non-payment of the subscription fee or Land Use Fee would be a triggering event. Under the public housing scheme in Singapore, one example of an event triggering a premature end to ownership would be non-payment of rent for three months. The only difference between buying land in Second Life and buying an apartment from the HDB is that the HDB cannot and does not arbitrarily, at its absolute discretion, terminate the ownership and to do so without compensation. This difference, however, should not impact upon whether or not land or land ownership in Second Life has proprietary rights attached. Rather, it reflects the lack of justice as well as substantive and procedural unfairness in the Second Life regime. Land ownership in Second Life and ownership in public housing in Singapore can both come to a premature and abrupt end: this is the crucial element. The point being made here is that the fact that the methods by which the ownership can be determined are different should not be relevant to questions of whether property rights subsist. Owning land in Second Life is in fact very much like owning a modified form of leasehold property. To put it another way, the holding of freehold real property can also be uncertain and defeasible as the land can always be compulsorily acquired, sometimes for seemingly arbitrary reasons.⁷⁶

B. Discretion to Terminate

Having made the argument above that the focus should be on the fact that property interests can come to a premature and abrupt end, Second Life's ability to terminate at will needs further examination under traditional real property (land) law. In particular, there may be lingering doubts as to whether this discretion may render the property right to be only a personal right. The discussion will now turn to grazing licences in Australia and the law on *profit-à-prendre*.

The leading authority on Australian grazing licences is the High Court of Australia decision of *R v. Toohey; Ex parte Meneling Station Pty Ltd.*⁷⁷ The case concerned grazing licences granted pursuant to statute. A number of legal points were at issue. We will only deal with the property issue, on which the five justices of the High Court all concurred. The grazing licences were not assignable and they were terminable on three months' notice by the relevant Minister. The question was whether the holder of a grazing licence has an "estate or interest" in the land, the

⁷⁵ See *supra* note 70, s. 56(2).

⁷⁶ See *e.g.*, the facts of *Sole v. Secretary of State for Trade and Industry* [2007] EWHC 1527 (Admin).

⁷⁷ (1982) 158 C.L.R. 327 (H.C.A.) [*Toohey*].

subject of the licence, within the meaning of another piece of legislation. The applicants' contention was that this is a question to be answered by determining whether the grazing licence created under statute is a *profit-à-prendre*, and if so, that this would mean the grazing licence constitutes an interest in land, as a *profit-à-prendre* is a proprietary interest in land.

Under the legislation, a grazing licence is one granted by the relevant Minister to the holder to graze stock or any particular kind of stock, on specified lands for such period not exceeding one year.⁷⁸ The relevant Regulations set out the amount payable for a grazing licence based on the area of the land. A grazing licence must include a condition prescribing the maximum number and type of stock that may be depastured on the land and may include any other conditions that the Minister may think necessary or desirable in a particular case.⁷⁹ Applicants for a grazing licence who have not commenced grazing stock on the land may withdraw the application if they are not satisfied with the conditions imposed by the Minister.⁸⁰ Under the regulation, a grazing licence ceases to be in force on 30 June each year but may be renewed, at the Minister's discretion, for a further period not exceeding twelve months.⁸¹

A licence can come to a premature end if there is a failure to comply with a condition of it.⁸² Further, a licence may be cancelled if the Minister gives three months' notice in writing of the intention to cancel it.⁸³ There is also provision for the surrender of a grazing licence.⁸⁴

Justice Mason (as he then was), with whom Chief Justice Gibbs and Justice Brennan (as he then was) agreed, took as a starting point Lord Wilberforce's statement in *National Provincial Bank Ltd. v. Ainsworth*:⁸⁵

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.⁸⁶

In Justice Mason's view, the rights of the holder of a grazing licence created under the statute fall short in two respects of the concept of property or proprietary rights expressed by Lord Wilberforce. First, the existence of reg. 71A, which enables the Minister to cancel a licence with three months' notice in writing of his intention to do so without any necessary default on the part of the licensee, suggests that the licensee has no interest in the land at all because a right terminable in such a manner lacks the requisite degree of permanence envisaged in Lord Wilberforce's passage.⁸⁷

Second, Justice Mason said that nothing in the statute indicated that the grazing licence is assignable. In fact, he said, all indications are to the contrary. Further, His

⁷⁸ *Ibid.* at 341.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ [1965] A.C. 1175 (H.L.) [*Ainsworth*] at 1247-1248.

⁸⁶ *Supra* note 77 at 342.

⁸⁷ *Ibid.*

Honour also placed much emphasis on the personal nature of the right conferred by the grant of a grazing licence. For example, he pointed to the fact that under the statute, a licensee must apply for permission if he wishes to make or erect improvements on the land. This, according to Justice Mason, is a very strong indication that property in the land remains in the Crown and does not pass to the licensee.

Justice Wilson, with whom Chief Justice Gibbs and Justice Murphy agreed, found the “resolution of the issue more than ordinarily difficult”.⁸⁸ Justice Wilson was of the view that the statutory grazing licence is “more than a mere licence”,⁸⁹ but the answer to the problem, according to His Honour, is to be:⁹⁰

...found in the view taken of the totality of the legal rights conferred by the statute set against the question, not whether a grazing licence confers a right corresponding to the common law category of a profit a prendre, but whether it is ‘an estate or interest in land’ within the meaning of that term in the Act.

The decision of His Honour turned on a close examination of the statute, which he found to have made a clear distinction between estates in fee simple, leases and easements, all of which are estates or interests in land, and licences. First, Justice Wilson found that the discretion in the relevant Minister to terminate the licence unilaterally and more or less summarily, without compensation (except to improvements erected with the permission of the Minister), tends strongly to deny to the grazing licence the character of an interest in land.⁹¹

Second, the statute does not contemplate any assignment of the licence, and this can be contrasted with leases under the statute that are transferrable with the permission of the Minister. According to Justice Wilson, it would be extraordinary if the legislation placed such a control on the assignment of leases while allowing grazing licences to be freely transferrable without the permission of or even notice to the Minister. Hence, Justice Wilson concluded that the grazing licence remains personal to the grantee of the licence.⁹²

The judgments of both Justices hung on three main factors: The discretion resting with the relevant Minister to terminate the licence unilaterally, the inability of the licensee to assign and the inability to make or erect improvements on the land without the permission of the relevant Minister. The only one of these factors present in the situation in *Second Life* is the discretion to terminate the grazing licence unilaterally. However, it is important that the judgments are interpreted within the context of the particular statutory regime. Indeed, as with Justice Wilson, whose views are already noted above, Justice Mason was also careful to point out that:⁹³

[t]he grazing licence is the creature of statute forming part of a special statutory regime governing Crown land. It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land.

⁸⁸ *Supra* note 77 at 353.

⁸⁹ *Supra* note 77 at 352.

⁹⁰ *Ibid.*

⁹¹ *Supra* note 77 at 353.

⁹² *Ibid.*

⁹³ *Supra* note 77 at 344.

In the more recent case of *Commissioner of Taxation v. Orica Ltd*,⁹⁴ Justice Gummow indicated that one should not attach too much significance to the approval by Justice Mason in *Toohey* of the statement by Lord Wilberforce in *Ainsworth*. Justice Gummow said, “Mason J was concerned to analyse particular statutory rights, and Lord Wilberforce was dealing with the novel development of the ‘deserted wife’s equity’. Neither was dealing with rights created under the general law of contract.”⁹⁵

The insight of Justice Gummow is particularly relevant to the situation of Second Life where we are dealing with rights created under the general law of contract. Whilst it is true that the *Ainsworth* formulation requires some permanence or stability, in both *Ainsworth* and *Toohey*, the courts were concerned with very particular sets of facts and circumstances which may not be universally relevant.

Furthermore, as Professor Gray has already pointed out, the requirement of ‘permanence’ or ‘stability’ is circular. He states:⁹⁶

Quite often—as for instance in *National Provincial Bank Ltd v Ainsworth*—the reason for asking whether a particular right is *proprietary* is precisely in order to determine whether the right is capable of binding third parties and thereby attaining just such a quality of ‘permanence’ and ‘stability’. It is radical and obscurantist nonsense to formulate a test of proprietary character in this way.

Returning to the case of *Toohey*, it was the applicants’ contention that the question of whether the holder of a grazing licence has an “estate or interest” in the land should be answered by determining whether the grazing licence created under statute is a *profit-à-prendre*. As we have just seen, the court refused to follow such an approach. If we examine a *profit-à-prendre* under common law, we will find that the Minister’s discretion to terminate the grazing licence unilaterally would not deprive the grazing licence of the character of property.

The relevant case on *profit-à-prendre* is the Australian case of *Unimin Pty Ltd v. The Commonwealth*.⁹⁷ In this case, the previous landowner had conferred on the plaintiff the right to remove sand from its land with royalties payable on the sand removed. Clause 12 of the agreement stated that the arrangement was terminable by either party upon one month’s notice to the other. No default of any kind was required. The court held that the plaintiff was entitled to an interest in land in the nature of an equitable *profit-à-prendre* and in doing so, it confirmed that a valid *profit-à-prendre* could come to an end by the giving of an agreed notice. Justice Connor said:⁹⁸

I do not think that an interest which would amount to a *profit a’ prendre* if it were granted in perpetuity or for a term of years, loses its essential character because it is determinable on a month’s notice, any more than a tenancy does so.

The principle to be drawn from *Unimin* is that a contract clause that gives either party the discretion to terminate the agreement at will does not affect the proprietary nature of the right. Thus, proprietary rights in land ownership in Second Life will survive the clause in the TOS that gives Linden the discretion to terminate the user’s account at will.

⁹⁴ [1998] 194 C.L.R. 500 (H.C.A.).

⁹⁵ *Ibid.* at para. 110.

⁹⁶ Kevin Gray, “Property in Thin Air” (1991) 50 Cambridge L.J. 252.

⁹⁷ (1974) 22 F.L.R. 299 [*Unimin*].

⁹⁸ *Ibid.* at 78.

VII. RAMIFICATIONS

Having reached the conclusion that some form of proprietary rights should be recognised in virtual land in Second Life, this section will examine the significance or practical importance of this. The most obvious impact of a right over property is that on the relationships between a landowner in Second Life and the virtual world provider, Linden, as well as between virtual landowners and other users.

Taking the facts of the *Bragg* dispute as a starting point, what would this mean? Would the only possible result be that even though Bragg had a proprietary right over the virtual land, that right would come to a premature end as a result of his account and avatar being validly terminated by Linden? And would Linden be required to pay some sort of compensation for the loss in property ownership? Although this may seem to be a simple solution, it may not be the fairest or only solution. What follows will be a discussion of some other possible outcomes.

Assuming that the clause giving Linden the discretion to terminate Bragg's account is not struck down as unconscionable, one possibility would be that the land ownership could be detached from the access to the virtual world, meaning that whilst Bragg may own the land, he would have no access to Second Life as Linden would have validly terminated his access. In this scenario, Bragg ought to be allowed to dispose of his land to anyone he so wishes and Linden would have to honour access to the new landowner. Linden certainly should not be able to sell off all of Bragg's land like it did without accounting to Bragg.

Alternatively, could the proprietorial interest be read to impose a limit on the provider's contractual discretion to terminate Bragg's account? This may be slightly more difficult, though not impossible, to argue. From first principles of property ownership, one ought to be able to exclude others from one's property, which means that one ought to be able to control and access the virtual land. Would it be technologically possible for a landowner like Bragg to be able to access his virtual land but not the rest of the virtual community? The answer is dependent on the software code of Second Life. If it were possible to do this, then perhaps this would be the simplest solution, as Bragg's right to his property in the virtual land is preserved, while at the same time, Linden would be able to terminate Bragg's access to and interaction with the rest of Second Life. The land would still be attached to the rest of Second Life, and while others would be able to come to visit Bragg and his 'secluded' land, Bragg would not be able to access beyond the boundaries of his own land, similar to a prisoner who cannot leave the prison but who can be visited by outsiders. In this way, if, for example, Bragg wished to continue running his nightclub on the land to generate revenue, others could come to his nightclub. Bragg might however need to find alternative ways of advertising his products and services, as he would not be able to access the other areas of Second Life to advertise. It would also be questionable how much value a 'secluded' piece of land would have in Second Life, and it may be even more difficult for Bragg to dispose of such a piece of property.

However, if the software is written in such a way that it is not technologically possible to separate access to the virtual land from access to Second Life as a whole, then the question would fall back to whether there are any compelling reasons why technologically and contractually denying Bragg access to Second Life should not be permitted even though he may own land in Second Life.

Given that the property that Bragg owns sits within the larger framework of the virtual world of Second Life, it is only fair to take the framework into consideration when balancing the rights and interests of landowners like Bragg and virtual world providers like Linden. As a virtual world provider, Linden has overall responsibility for the reputation and integrity of the virtual community as a whole; it would be fettering Linden's ability to effectively discharge this responsibility if Linden is repeatedly prevented from terminating avatars and users who may be in flagrant breach of the rules. This would also negatively impact upon the Second Life experience and likely devalue the product of Second Life. Hence, the answer would appear to be in the negative, but to be fair to Bragg, he should be allowed to dispose of his land within a reasonable period of time and Linden should recognise the new landowner as the legitimate successor in title.

It is difficult to find a perfect solution to the problem, but another analogy from the physical world may assist in clarifying matters. A commercial tenant may own a leasehold on a small island accessible only by a bridge. There is no access by boat as the island is surrounded by swampy marshland infested with crocodiles. It is also not accessible by air as there is no place to land a helicopter, let alone a plane. If the bridge is blown up, then of course the tenant still owns the leasehold, but is unable to access or control it in any meaningful physical way, although he is free to dispose of the leasehold if the contract does not prevent this. If the bridge being blown up was the fault of an identifiable party, it seems arguable that the tenant can claim some compensation under tort law from the bridge blower. And if the bridge blower was the landlord, the tenant may be able to claim under either tort law or the contract. If, however, the bridge being blown up was the result of the actions of the tenant himself, then he would surely have no recourse against any party (except perhaps claiming on his own insurance policy).

Similarly, if a user like Bragg breaches the rules or fails to pay the subscription fees, resulting in Linden terminating his access to Second Life, he should not be compensated by anyone for the denial of access. And perhaps Linden should be regarded as temporarily holding the virtual land on trust for a set period of time for the landowner until it is acquired by a new landowner. If the virtual land is not sold within a reasonable period of time, it could perhaps revert back to Linden.

The issue becomes tricky, however, if there is no breach or no clear identifiable breach by the player, and Linden, at its whim, terminates a user. Although it is unlikely that Linden would embark on this course of action as it is earning good money from its user, in the event that it does happen, should the player obtain any extra compensation from Linden in addition to whatever amount he would receive from selling the virtual land? This is a difficult question, as there is no tortious act (like there is in the blowing up of a bridge), and importantly, the user has already agreed in the TOS to be subjected to a discretionary power to be terminated by Linden at any time. Further, no doubt the basis for termination would be hotly contested, that is, Linden would be arguing that there was a breach or default whilst the deprived landowner would be arguing the opposite. Perhaps in such a scenario, the user's best course of action would be to argue the unconscionability of the original contractual clause that gives Linden the full discretion to terminate the user.

These outcomes are, however, not without their problems. While they may settle, to some extent, the problem thrown up by the *Bragg* dispute, treating virtual land as property, may have difficult consequences in other settings. For example, what

would happen if a virtual world provider like Linden goes into liquidation? The server would be shut down and the virtual property in the virtual land would be 'switched off' until the server is switched back on again. What happens to the virtual land if it is never 'switched on' again? Perhaps this is a risk that any user of Second Life has to accept.

Characterising virtual land as property may be helpful for tax collectors in jurisdictions where gains derived from dealings in property are taxable. It would provide clarity for both the taxpayer and the tax authorities.

VIII. CONCLUSION

Virtual worlds such as Second Life have become increasingly significant in terms of both time and money for their users. As such, it is important to analyse how the law may apply to and resolve disputes that originate in these virtual worlds. Linden and the users of Second Life have already imported real world concepts, such as currency and economy, into Second Life and significant player expectations have already arisen. These have also in part been the result of Linden's public representations regarding player ownership. This article has argued that land ownership in Second Life is very much like owning a modified form of leasehold property. Just like in the real world where more than one type of property right can subsist in a given item, this should also be the case in Second Life. So, for example, a paperback book will have property rights attached to the physical thing of the book, but there will also be intellectual property rights over the content. Similarly, an owner of land in Second Life may, for example, have intellectual property rights over the contents of the land as an artistic work, but in addition, the owner of the land will have proprietary rights and interests over the land and use of the land itself. Some Asian countries such as China and Taiwan have already recognised property rights in virtual items such as virtual swords,⁹⁹ and it would appear to be the next logical step to recognise virtual land as having proprietary rights attached. Under the system of law in Singapore, the United Kingdom and Australia, there is no reason why this should not be the case.

⁹⁹ For China, see the cases of *Li Hong Chen v. Beijing Arctic Ice Technology Development* (2004) 二中民终字第 02877 号, online: ChinaCourt.org <<http://www.chinacourt.org/public/detail.php?id=143455>> and a case in the Chaoyang District of Beijing in December 2003 report in "Video Game: Real Murder" *China Economic Review* (26 October 2006). For Taiwan, see Art. 323 of the *Taiwan Criminal Code* (1997) and Taiwan Ministry of Justice Official Notation No. 039030 (90).