Virtual Worlds: Personal Jurisdiction and Click-Wrap Licenses

By Roxanne E. Christ and Curtis A. Peele

A federal district court recently came out with an unprecedented decision involving an interactive virtual world called Second Life.[1] Marc Bragg, an attorney, acquired a parcel of virtual land in Second Life, which Linden Research, Inc., the operator of this virtual world, later confiscated. Judge Robreno ruled that the district court had personal jurisdiction over Linden based on representations made by its representatives in national advertisements and Bragg's "attendance" at virtual town meetings hosted by Second Life. Moreover, the court refused to compel arbitration to resolve the dispute, holding that the arbitration clause in Second Life's Terms of Service (also commonly referred to as a click-wrap license) is unconscionable and therefore unenforceable.

There have been very few decisions concerning virtual worlds prior to this case, but the popularity, size, and growth of virtual worlds such as Second Life indicate that these cases are certain to become more common. The Bragg decision provides an indicator of how courts may deal with the complex issue of jurisdiction and disputes over virtual activities but also leaves many areas open and uncertain, specifically the enforceability of a click-wrap license in a virtual world environment. Nevertheless, the decision does provide some guidance for virtual world operators to use as a means of avoiding similar issues as those faced by Linden.

Background

Second Life is a multiplayer role-playing game set in a virtual world.[2] In this world, participants represent themselves through avatars, which can engage in unlimited social interactions and also purchase virtual property. In November 2003, Linden announced that it would recognize full intellectual property rights in the virtual property that participants create or own in Second Life. This ability to own virtual property differentiates Second Life from other virtual worlds and was heavily publicized through press releases, magazine interviews, and virtual town halls.

In 2005, Bragg joined Second Life. As a participant, Bragg purchased numerous parcels of land, created and sold virtual fireworks, and acquired other virtual items. Bragg claims that he was induced to buy virtual land through a virtual town hall and other publicity generated by Linden and Philip Rosedale, a representative of Linden. On April 30, 2006, Bragg paid $300 to purchase a parcel of virtual land called Taessot. Soon thereafter, Linden confiscated Taessot from Bragg, claiming that Bragg improperly purchased the virtual property through "exploit," a software trick used to buy virtual property on the cheap.[3] Linden then froze Bragg's account, effectively confiscating all of Bragg's other virtual property and currency, prompting Bragg to bring suit on October 3, 2006.

Personal Jurisdiction

At issue was whether the court had personal jurisdiction over Rosedale. Linden is a Delaware corporation headquartered in California, and Rosedale is a California resident. Bragg brought suit in a federal district court in Pennsylvania. Despite this geographic disparity, the court held that sufficient minimum contacts existed to satisfy specific personal jurisdiction. According to the court, a national advertising campaign can provide the basis for specific jurisdiction if the advertisement is not merely passive but induces an individual to interact and establish direct contact with a company.[4] In reaching its holding, the court rejected Rosedale's argument that his statements do not subject him to specific personal jurisdiction because they were not directed specifically at Pennsylvania, but rather to the nation as a whole. Instead, the court found that Rosedale had orchestrated the national campaign with the purpose of inducing individuals to purchase virtual property through Second Life, emphasizing that Rosedale's statements and representations were at "the heart" of the alleged fraudulent and deceptive conduct.[5]

Interactivity was a significant factor in the court's holding that sufficient minimum contacts existed between Rosendale and Bragg. The court found that

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Rosedale's role was to "bait the hook," that is to encourage additional participation, interaction, and traffic within Second Life.[6] Once inside Second Life, participants could view virtual property, read additional materials about purchasing virtual property, and ultimately purchase the virtual property themselves.[7] The court emphasized the fact that Rosedale's avatar actively interacted with Bragg's avatar during the virtual town hall. The court differentiated this interactive conduct from passive conduct, such as the distribution of a national advertising publication, which alone does not give rise to a finding of specific personal jurisdiction.

Second Life's Terms of Service

When an individual joins Second Life, he or she must first accept the Terms of Service (TOS) by clicking a button that indicates such acceptance. Bragg conceded that he clicked this button when he joined Second Life. However, buried in the 14th line of the 13th paragraph under a heading titled "GENERAL PROVISIONS," there was an arbitration clause in the TOS that requires that claims and disputes brought by Second Life users be arbitrated. The court held that the arbitration clause was both procedurally and substantively unconscionable and therefore invalid.

Procedural Unconscionability

Procedural unconscionability is found when an agreement is a contract of adhesion, which is a contract where the bargaining power of one party is far superior to that of the other party, who has only two options: either adhere to the contract or reject it.[8] The critical factor in examining this issue is the manner in which a contract is presented or negotiated. Here, the court found that Second Life's TOS was on a take-it-or-leave-it basis, concluding that an individual was required to accept the contract in order to join Second Life or refuse the contract and be denied access altogether.[9] Despite Bragg's being an experienced attorney, the court concluded that Linden clearly had superior bargaining power because Bragg was never given an opportunity to negotiate different terms. In further support of its holding, the court concluded that no reasonable alternatives to Second Life existed because no other virtual world grants property rights to its users.

It is important to distinguish the *Bragg* court's holding from *Davidson & Assoc., Inc. v. Internet Gateway, Inc.,*[10] which found similar take-it-or-leave-it agreements not to be unconscionable. *Davidson* involved Blizzard, a computer game that required its users to click buttons confirming that they agreed to Blizzard's End User Licensing Agreement (EULA) and the Terms of Use (TOU) before they could install the software. While the court in *Bragg* held that no reasonable alternative to Second Life existed, the court in *Davidson* held that purchasers could simply choose to either (1) select a different video game, (2) agree to the terms and use the software, or (3) simply disagree with the terms and return the software for a full return of their money.[11]

Additionally, the *Davidson* court emphasized that the defendants, who were computer programmers and administrators, were familiar with the language in these clauses and had notice that they were subject to these terms.[12] However, Bragg's familiarity with Second Life's TOS and notice of its terms was apparently insufficient to avoid unconscionability, even though Bragg is an experienced attorney who believed that he was expert enough to comment on numerous industry standards and the rights of participants in virtual worlds.[13]

An additional consideration in determining procedural unconscionability is whether the disputed terms are "hidden" or "inconspicuous" within the contract.[14] Here, the court found that the arbitration clause was hidden and inconspicuous because it was buried in the General Provisions heading in the TOS and therefore did not draw attention to itself through such markings as a clear heading or a bolded font and had failed altogether to present the costs and rules of arbitration.

Substantive Unconscionability

More significant to operators of virtual worlds was the *Bragg* court's reliance on other provisions of the TOS to support its holding of substantive unconscionability, which focuses on the one-sidedness of a contract. In support of its finding, the court highlighted the following rights granted to Linden by the TOS:

- The right to terminate accounts at any time and for any reason;
- The right to determine in its sole discretion whether the TOS is breached;
- The right to withhold money based on mere suspicion of unlawful activity; and
- The right to amend the TOS at any time.[15]

The court found that such factors weighed heavily in support of substantive unconscionability because Linden had a variety of these remedies at its disposal, while its users could only rely on an unfavorable arbitration provision.

In addition, the court specifically focused on the arbitration clause but relied on these other provisions

of the TOS to determine that the arbitration clause unfairly favored Linden:

- The fee-sharing provision supported a finding of unconscionability because it would impose a greater cost than filing an action in court;
- The venue clause supported a finding of unconscionability because it is not reasonable to expect clients from all over the United States to come to San Francisco for cases that potentially involve minimal sums of money; and
- The confidentiality clause supported a finding of unconscionability because it would hide information from future arbitrators and is surrounded by other biased elements of the TOS.

Taken together, the court concluded that the arbitration clause was not designed to provide an effective means for resolving disputes with Linden and noted that Linden had failed to offer any legitimate business reasons to justify these unilaterally imposed conditions.

Implications and Uncertainties

Personal Jurisdiction for Virtual Activities

The *Bragg* case raised the significant question of what activities in a virtual world environment are sufficient to support a finding of specific personal jurisdiction. The court determined that interactive contact (*i.e.,* attending a virtual town meeting for more information after viewing an advertisement) is more significant for minimal contacts purposes than passive contact (*i.e.,* the national advertisement itself).[16] However, the line between the two is not easily drawn, particularly when distinguishing activities in a virtual world from those on the Internet in general, which itself can be interpreted as a virtual world.

Unenforceability of Second Life's Terms of Service

The *Bragg* decision leaves open a significant question about the breadth of its holding. In determining that the arbitration clause was unconscionable, the court held that the entire TOS was a contract of adhesion. In terms of substantive unconscionability, the provisions that the court listed as being unfairly advantageous to Linden when viewed in the whole (*e.g.,* fee sharing, venue, confidentiality) represent a variety of powers scattered throughout the TOS. Consequently, it remains uncertain as to which specific provisions in the TOS remain enforceable, not only those contained in Second Life's TOS but also similar provisions contained in the click-wrap license of other virtual world operators.

Moreover, it is uncertain what reasonable alternatives exist to a virtual world platform sufficient to avoid a finding of procedural unconscionability. The *Bragg* court took issue with such an agreement because Second Life is the only virtual world operator that grants property rights to its users, while the *Davidson* court emphasized that users could simply select a different video game. Perhaps this difference was informed by the fact that there are more reasonable substitutes for Blizzard, unlike Second Life, but it remains uncertain as to what unique and exclusive characteristics of virtual world environments lend themselves to a finding of procedural unconscionability.

Virtual Property Rights in General

In addition to the issues upon which the *Bragg* court ruled in its opinion, the court also raised a number of undecided issues that seem likely to appear in future litigation. Specifically, what rights are available for virtual property and how are these rights obtained?

In terms of how such rights are obtained, the Second Life TOS states that a user may have property rights in content that the user creates or otherwise owns. Under this language, it appears that the property rights attach when a virtual object is created and that these rights are freely transferable in the same manner as other types of property.

However, this raises the question of what rights are available for virtual property. The TOS states that a user may have "copyright or other intellectual property rights." Linden has emphasized that "this ownership [does] not extend to full property rights—creators have intellectual property rights to the software patterns used in making virtual objects but no rights to the objects themselves."[17] Cory Ondrejka, Chief Technical Officer of Linden, elaborated by stating that "[e]verything in the virtual world is intellectual property, as much as it looks like property or as much as property is a useful metaphor. Copying it is not theft. It's infringement, but it's not theft."[18]

It is significant to note that, even if Linden grants these rights to Second Life participants, the applicable virtual object still needs to qualify for intellectual property protection. That is, Linden cannot grant a copyright for a virtual dress, for example, unless that virtual dress would otherwise qualify for copyright protection under applicable law.

This raises a question as to what happens when a user creates something on Second Life that does not independently qualify for intellectual property protection.

For example, if someone makes a Mickey Mouse T-shirt for avatars, that individual does not own the copyright to that T-shirt. As a result, there would be no applicable intellectual property right and consequently no property right to transfer in Second Life. The user could likely still sell the virtual shirt, however, because most Second Life participants are operating under the assumption that avatars own anything that they create in Second Life. This seems problematic because it would require Second Life participants to have a relatively extensive knowledge of intellectual property laws in order to determine what virtual property can legitimately be owned and transferred.

Enforcement of Arbitration Agreements in the Context of Virtual Worlds

Aside from the fact that this case ruled on relatively new and potentially significant issues, it is also unique in that the court decided not to enforce Second Life's arbitration provision. Generally, courts tend to go out of their way to enforce arbitration provisions in order to save the time and expense required by litigation.[19] It is unclear whether the *Bragg* court's deviation from this norm was a general jab at Second Life's TOS in order to require greater protection for virtual world participants with little other recourse or whether there was some other impetuous behind the court's decision.

Perhaps a more appropriate means of arbitration could properly address the unique issues raised by the dispute. A system of arbitration established to deal specifically with issues of virtual rights has already been suggested to deal with conflicts among avatars.[20] Such a system could be extended to address conflicts between avatars and virtual world operators, thereby creating a body of rules and precedent that may better resolve disputes in this complex and unique environment.

Guidance Notes

Although enforcement of click-wrap licenses may seem a bit uncertain after Bragg, there are certain steps that virtual world operators can take that will make courts more likely to enforce a click-wrap license.

- ***Be aware of take-it-or-leave-it agreements.*** Be weary of relying on click-wrap licenses alone when virtual property interests and significant amounts of money are at stake. Clearly, it would be difficult (if not impossible) to negotiate terms with each individual user, but the Bragg court found that absence of any negotiation ability was a symbol of unequal bargaining power.

- ***Emphasize and delineate an arbitration clause.*** Make sure that an arbitration clause is clear and conspicuous. Specifically, separate sections using headings and use bold or underlined text for particularly important language. Also, provide any applicable rules (*e.g.*, the Federal Arbitration Act) and information about associated costs either directly in the text or through a hyperlink.

- ***Ensure that the terms are not inexplicably biased.*** Avoid click-wrap licenses that may appear unfairly one-sided by:

  —***Providing similar treatment for similar issues.*** Ensure that favorable terms for a virtual world operator do not yield unequal rights for its users on similar issues. For example, requiring that the user be able to resort only to arbitration to seek a remedy while the operator maintains numerous avenues for dispute resolution (*e.g.* account termination, withholding money, sole discretion to determine a breach) may be viewed as an unequal allocation of rights.

  —***Avoid pervasive one-sided provisions.*** Provisions like fee sharing, venue, and confidentiality, which alone may not seem one-sided but viewed in the collective may appear unfairly one-sided, should be limited. As a general matter, a Web site operator should be prepared to support one-sided provisions with legitimate business justifications.

Notes

1. Bragg v. Linden Research, Inc., No. 06-4925, 2007 U.S. Dist. WL 1549013 (E.D. Pa. May 30, 2007).
2. *See* Second Life, *www.secondlife.com* (last visited June 12, 2007).
3. Roger Parloff, "Virtual Worlds, Real Litigation," *CNNMoney*.com, June 1, 2007.
4. Bragg, No. 06-4925, 2007 U.S. Dist. WL 1549013, at *13-14.
5. *Id.* at *5.
6. *Id.*
7. *Id.* at *14.
8. *Id.* at *10.
9. *Id.*
10. Davidson & Assoc., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164 (E.D. Mo. 2004).
11. *Id.* at 1179.
12. *Id.* at 1179-1180.
13. Bragg, No. 06-4925, 2007 U.S. Dist. WL 1549013, at *14.
14. *Id.* at *10.
15. *Id.* at *12.
16. *Id.* at *5.

17. Alan Simpress, "Where Real Money Meets Virtual Reality, The Jury Is Still Out," *Wash. Post*, Dec. 26, 2006.
18. *Id.*
21. *See*, *e.g.*, Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding that a claim of fraudulent inducement to contract should go to an arbitrator rather than a court under its arbitration clause unless there is evidence that the contracting parties intended to withhold that issue from arbitration).
22. Farnaz Alemi, An Aavatar's Day in Court: A System for Obtaining Relief and Resoling Disputes in Virtual World Games.