Running head: BRAGG V LINDEN, ET AL.

Bragg v. Linden, et al.: A Virtual Property Dispute

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Introduction

I click the link entitled “Sell Lindens”. My browser spins for a minute. I’m presented with a page similar to an on line brokerage page, offering options to enter Market or Limit orders. I choose a Sell Limit order, 10,000 Linden Dollars, at 271L/US Dollar. Ten minutes later, my account shows a credit of $36.90, US.

Second Life is unique. It may appear on its surface to be similar to the massively multiplayer on line games that are currently popular, but there’s a difference. It’s not a game. There are no goals, no levels, no quests. Instead, all that is offered is a set of tools to build and program 3D objects, and “land”, acres and acres of virtual land. The motto of Second Life is “Your World, Your Imagination” (Linden Lab).

Linden Lab, the company behind Second Life, has positioned it as a unique 3D platform, where the residents of their virtual world retain all intellectual property rights in the work they create. There are very few restrictions on resident intellectual property rights; one of the few caveats is that residents must grant a non-revocable patent license if they hold any patents on objects they make available in the virtual world. This patent license only extends to the use of their items within Second Life.

Linden Lab makes money primarily by “selling” virtual land to the users. Land can be used as space to build, host parties, create a home, club, virtual store, or even a battlefield for war games. The only limits are the imagination of the owner, and the technical limitations of the platform. All land within Second Life incurs a monthly fee, a full region currently costs about $1600 US at auction, plus 195 US Dollars per month.

Within Second Life, a microcurrency called “Lindens” or “Linden Dollars” are used. Current exchange rates put the Linden around 270/1 US Dollar. Linden Lab does not redeem

Linden Dollars for cash, they are only traded on open markets with other residents. Linden Lab does introduce new Linden Dollars into circulation, to prevent runaway deflation caused by population growth. In this way they are similar to the Federal Reserve, controlling the supply of money. This is also a source of income for Linden Lab. In addition to the money they sell to introduce new Lindens, they also run their own open market for Lindens, called the LindeX. Lindens sold there create a US Dollar balance on one's Second Life account. This US Dollar balance can be cashed out, or applied toward land fees.

The Terms of Service

In addition to the aforementioned clause that grants residents the full retention of all intellectual property rights, the Terms of Service (TOS), authored by Linden Lab general counsel Ginsu Yoon, contains several other clauses. Many of them exist to protect Linden Lab in the case something goes wrong. For example, notwithstanding the IP rights the residents have, Linden Lab has the unlimited right to delete content from the service. In particular:

> When using the Service, you may accumulate Content, Currency, objects, items, scripts, equipment, or other value or status indicators that reside as data on Linden Lab's servers. THESE DATA, AND ANY OTHER DATA, ACCOUNT HISTORY AND ACCOUNT NAMES RESIDING ON LINDEN LAB'S SERVERS, MAY BE DELETED, ALTERED, MOVED OR TRANSFERRED AT ANY TIME FOR ANY REASON IN LINDEN LAB'S SOLE DISCRETION.

Linden Lab does not currently provide a way to "backup" content created within the service to a location not on Linden Lab servers. Linden Lab also asserts that the Linden Dollars have no redemption value, and reserves the right to suspend or eliminate all Linden Dollars in circulation (Yoon, 2006). Linden Lab also reserves the right to ban users and cancel accounts, for "any reason or no reason":

> 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.

The TOS also provides for jurisdiction, stating that all disputes must be resolved by arbitration in San Francisco, California. The TOS states International Chamber of Commerce (ICC) is named as the arbitration service that must be used. The ICC claims to be "the voice of world business" (ICC, 2006).

Linden Lab has a separate document detailing billing policies. This is incorporated by reference into the official TOS. This billing policy states that Linden Lab will auction off virtual land from canceled accounts, and return the money to the account holder, less any obligations or $100, whichever is highest. This virtual land sale policy has a caveat, however:

> Notwithstanding the foregoing, no money will be returned to you in the event that your Account is terminated due to suspicions of fraud, violations of other laws or regulations, or deliberate disruptions to or interference with the Service (Yoon, 2006).

Bragg's Actions

According to his filings, Marc S. Bragg, Esq. joined Second Life in early 2006. Shortly thereafter, he began investing in virtual property as a money making endeavor. Regions are auctioned by Linden Lab on an internal auction system. The starting price for a region is $1000 US. Bragg purchased at least two full regions and several smaller parcels through this auction system, paying the normal price of $1500-$1600 US Dollars per region.

Bragg later discovered that he could induce the auction system to start an auction with a $1 US minimum bid, by copying the auction ID from a land parcel in world not yet listed on the public auction page, and pasting it onto the request URL for the auction page. In his filings, Bragg claims that it was his understanding that this was an acceptable way to initiate an auction. He argues that anyone who was aware of the auction could bid on it, and apparently some others aware of this

method did bid against him, though the final prices on the regions were well below the normal market value, due to the fact that such auctions were not listed on the public auction listings.

Upon discovering the use of this method to create "semi-private" auctions to acquire land below market value, Linden Lab froze the accounts of those involved in the activity. Linden Lab apparently considered the auctions fraudulent, and the methods used to activate them a sort of hacking, using an "exploit" in the system. Linden Lab froze all of Bragg's assets, including those regions he rightfully acquired at full market price, his Linden Dollar balance of 1 million Lindens (approx $3333 US at then market rates), and the US Dollar credit on his account, approximately $2000 US.

The Suit

Bragg's Claims

Bragg claims that statements made by Philip Rosedale, founder and CEO of Linden Lab, amount to fraudulent representations. In addition to page titles on the Second Life web site such as "Own Land", he cites interviews with Philip Rosedale where Rosedale is quoted as saying "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 (Bragg, 2006)." He cites many similar quotes from Rosedale to the same effect.

Bragg also claims ignorance of the TOS, even though Bragg himself is a lawyer. He states that he relied on the marketing information, including the statements by Philip Rosedale, when he initiated his purchases. The TOS is a "click-wrap" agreement, it must be clicked through multiple times before anyone is allowed into Second Life; once on the web site, and once in the client program on first login.

Bragg also claims the TOS is an unconscionable contract of adhesion. He specifically challenges the language found in many sections of the TOS that includes the words "for any reason" as unconscionable.

Bragg makes many more claims, some I believe to be irrelevant to the case at hand, but the core claim is that Linden Lab sold him assets that he had a valid title of ownership of, then fraudulently and unjustly took them away, along with his sizable cash balance held in trust.

Linden's Response

Linden Lab has asked the court to move the case to federal jurisdiction and enforce the arbitration clause in the TOS. Because of Bragg's claim that he did not read the TOS, he claims that the case should remain in state court, and not be bound to arbitration. He also cites the fact that arbitration with the ICC will cost at least $10,000 US Dollars in arbitration fees, claiming that Linden is trying to be overly litigious and draw out the case to the point where it is not worth pursuing.

Rulings

On May 30, 2007, Judge Eduardo Robreno of Pennsylvania ruled that the TOS is indeed a "contract of adhesion", and ruled that the arbitration clause does not apply in this case, allowing the case to proceed in Pennsylvania court. A contract of adhesion is one that is presented on a "take it or leave it" basis, one party does not get much or any input into the terms of the contract. This is known as a procedural unconscionability. Most TOS are in this category, so it is an interesting, albiet limited, precedent for any TOS that includes an arbitration clause.

This is the first part of the general test of unconscionability. To be found unconscionable a contract must satisfy two tests; it must have procedural unconscionability and substantive unconscionability. The judge found the TOS to be procedurally unconscionable, because it is a one-sided contract of adhesion, and because there aren't market alternatives to Second Life. The question of substantive unconscionability depends on how risks and costs are allocated. Because Linden Lab takes little contractual risk, and yet exposes the user to the risk of loss of all assets "for any reason or no reason", I believe Bragg has a particularly good chance of getting a ruling that the TOS is generally unconscionable.

Analysis

This case is not clear cut. There are several issues at hand:

- Does appending a simple and predictable identifier on a URL constitute hacking?
- Is an offer of sale that is triggered by a "tweaked" URL valid?
- Does the TOS represent the totality of the rights afforded to users, or can some marketing claims be valid legal representations regarding a service, regardless of what the TOS claims?
- Is a TOS that grants absolute power to take away US Dollar funds and fungible assets on a whim unconscionable?
- Is a "click wrap" TOS enforceable, even if the user claims to have not read it?
- Is an arbitration provision that requires high up front costs, and arbitration by a panel from an organization that claims to be "the voice of world business" unconscionable?
- Do Bragg's actions give him "unclean hands" in the matter?

I will analyze each of these issues in turn.

Does URL diddling constitute illegal hacking?

Seton Hill professor of new media journalism D. G. Jerz states on his site "There's nothing illegal or even very technical about hacking a URL". I concur in general. It is not a complex matter to make simple manipulations to a URL to navigate to a page that will predictably exist. I, however, believe that when such URL manipulation has the end result of gaining a financial advantage over the general populace, that changes the situation. In this case it is the ends rather than the means that matter.

In this case the end result of the URL manipulation lead to the initiation of an auction without listing it on the public page, and with no minimum bid. This bug in the code was irresponsible, and trivially exploitable. I don't think that justifies utilizing the exploit for financial gain. A reasonable and moral person would report the error and happily allow Linden Lab to cancel the obviously erroneous auction.

Is the offer of sale generated by a "non-public" URL valid?

I do not believe so, not if it induces the computer program to make an offer that wasn't intended by the party that owns the site. A contract requires a "meeting of the minds" in the virtual world as much as it does in the real world. The computer program including statements like "Bid now" or generating emails with verbiage like "Thank you for your purchase" in an automated fashion does not demonstrate to me a meeting of the minds.

Can marketing claims be binding when they are in conflict with the TOS?

The Linden TOS includes the following text: "This Agreement sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof." If this is indeed valid and binding, then all marketing materials would not be binding.

Such matters are covered by US law under the Lanham Act. It states that false or misleading advertisement must contain false statements of fact, not mere puffery. Puffery is vague statements such as "The best" or "America's Favorite" (Hoffman). It appears that Philip Rosedale's statements were intended as fact, and not mere puffery. Rosedale should have avoided such absolute statements and representations in his marketing interviews.

I don't think such actions absolve the user's responsibility to review the TOS. Most TOS do represent themselves as the totality of the terms of use, claiming any other materials are not binding. This is a common clause in such agreements, and most people are aware of such terms. Bragg, being an attorney himself, claming special experience with "cyber law" on his web site, surely was aware that such language was likely to be included.

Is a TOS that grants omnipotence unconscionable?

I believe so in this case. Linden Lab disclaims all liability, but they trade in many fungible assets, including large US Dollar balances on their user's accounts. In addition to the clear situation of a positive US Dollar balance, users also entrust Linden Lab with often the only copy of

intellectual property, large sums of fungible Linden dollars, and virtual land assets that have sizable fair market values. This completely unequal assignment of risk that places all the risk of loss on the user, left to the whims of any Linden Lab employee, with no liability to Linden Lab, I believe is "shocking to the conscious" and unconscionable.

A real world analogy might be a storage unit rental company. All disclaim liability for the contents stored in their units. They do not, however, have the right to demolish the storage units on a whim, or resell the contents unless the account in question is in arrears. In this case, Linden seized and resold all assets held by Bragg, including those that they knew he had aquired completely legally. I believe that these terms in the TOS granting Linden Lab this ultimate power are indeed unconscionable, and should be revised.

Is a "click wrap" TOS binding?

Yes. Groff v AOL and many other cases have stated that users are indeed bound by "click wrap" agreements, whether they claim to have read them or not.

Do Bragg's actions give him "unclean hands" in the matter?

I believe so, to a limited extent. Bragg likely has "unclean hands" in the matter of the assets that were aquired through the use of unintended URLs. Unclean hands requires a serious misconduct or fraud. Bragg must show that his use of these URLs was not serious misconduct or fraud. I believe this will be a difficult task. His other assets were not aquired under this method, and I believe are they are clean.

Conclusion

Things are looking up for Marc Bragg, however, a full recovery may be difficult. I believe that he was wronged when Linden siezed all his assets that they held in trust, not just the ones that were contested. I believe that he was also in the wrong when he exploited an obvious flaw in the Linden Lab web site for his own financial gain.

This is not a clean case, there was wrongdoing on both sides. Linden Lab should review their TOS and remove some of the unconscionable clauses regarding the ability to delete assets on a whim, or seize them for mere “suspicion of fraud” on an account. Philip Rosedale should exercise more caution when he makes public statements regarding the ownership of assets in Second Life. This is a case that potentially intersects nearly every aspect of current “cyber law”, yet it is unlikely to set any major new precedent. I await the outcome of this case.

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