

# COPYRIGHT IN SECOND LIFE

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## I. INTRODUCTION

Second Life is a virtual world,<sup>3</sup> similar in design and nature to a sophisticated computer game. Users from all over the world move about in a simulated world,<sup>4</sup> a realm of parallel existence in which they are represented by figures called “avatars.”<sup>5</sup> Participants engage in such activities as shopping, dating, chatting, studying, and even marriage.<sup>6</sup> As in the real world, controversies arise over issues such as fraud, violence, and child pornography.<sup>7</sup>

The company behind Second Life, Linden Lab, was founded in 1999 by Phillip Rosedale, the former financial officer of Real Networks.<sup>8</sup> Investors include Mitch Kapor, the founder of Lotus Development; Benchmark Capital; Catamount Ventures; and Omidyar Network, owned by eBay co-founder Pierre Omidyar.<sup>9</sup> Linden Lab enables users to create their own original creations within Second Life. Users can design and build their own 3D objects using an internal building system, and can define their behavior and their interaction with the Second Life world using Linden Scripting Language (LSL).<sup>10</sup> Second Life designing is not limited to objects. Avatars’ shapes may also be edited by the use of the internal building system, clothes may be added and removed, objects may be attached, and with the use of external software, such as Poser, animations may be assigned, enabling

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<sup>3</sup> Working in Second Life FAQs, <http://work.secondlife.com/en-US/products/workingfaq/> (last visited Apr. 10, 2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Second Life Work, About Us, <http://work.secondlife.com/en-US/about/> (last visited Apr. 10, 2010); Grace Wong, *Educators Explore ‘Second Life’ Online*, CNN.COM, Nov. 14, 2006, <http://www.cnn.com/2006/TECH/11/13/second.life.university/> (last visited Apr. 10, 2010); SL Index-Wedding, <http://www.slindex.com/wedding/Wedding.htm> (last visited Apr. 10, 2010).

<sup>7</sup> Some Second Life controversies are described in PETER LUDLOW & MARK WALLACE, *THE SECOND LIFE HERALD: THE VIRTUAL TABLOID THAT WITNESSED THE DAWN OF THE METAVERSE*, 89, 128, 129 (2007); see also Daniel Teridman, *Phony Kids, Virtual Sex*, CNET NEWS, Apr. 12, 2006, [http://news.cnet.com/Phony-kids,-virtual-sex/2100-1043\\_3-6060132.htmlsex/2100-1043\\_3-6060132.html](http://news.cnet.com/Phony-kids,-virtual-sex/2100-1043_3-6060132.htmlsex/2100-1043_3-6060132.html).

<sup>8</sup> Linden Lab, Management, <http://lindenlab.com/about/management> (last visited Mar. 24, 2010).

<sup>9</sup> Linden Lab, The Company, <http://www.lindenlab.com/about> (last visited Apr. 10, 2010); Omidyar Network, Pierre Omidyar, <http://www.omidyar.com/team/pierre-omidyar> (last visited Apr. 10, 2010); Mitchell Kapor, Biography, <http://www.kapor.com/bio/index.html> (last visited Mar. 24, 2010).

<sup>10</sup> Mary Lou Maher, Mike Rosenman & Kathryn Merrick, *Agents for Multi-Disciplinary Design in Virtual Worlds*, 21 *ARTIFICIAL INTELLIGENCE FOR ENGINEERING DESIGN, ANALYSIS AND MANUFACTURING* 267, § 267–71, 277 (2007).

an Avatar to accomplish special sequences of motions, such as clapping or dancing.<sup>11</sup>

In 2006, Second Life collided with real life through a program called CopyBot, which could clone any design in the virtual world by analyzing the stream of data being received by the User's client (for this reason only designs and textures may be copied using CopyBot and not animations or scripts which are not communicated to the client).<sup>12</sup> The program caused a wholesale violation of copyrights and an enormous furor.<sup>13</sup>

Understanding why copyright matters to the users of Second Life, and not merely to the company that owns it, requires a bit of background. As in the real world, life in the virtual world costs money—"Linden dollars."<sup>14</sup> One must pay to acquire goods or visit places of entertainment.<sup>15</sup> Players who join a premium version of the game (for a fee) receive a weekly allowance.<sup>16</sup> Users of the free version can convert real U.S. dollars into Linden dollars.<sup>17</sup> The conversion takes place on the foreign currency exchange of Second Life or through outside exchanges.<sup>18</sup> According to Linden Lab, the Second Life marketplace now accounts for millions of U.S. dollar transactions each month.<sup>19</sup>

Linden Lab offers incentives for project developers: anyone who

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<sup>11</sup> Luis Perez, *Second Life Basics*, FLORIDA CENTER FOR INSTRUCTIONAL TECHNOLOGY, 2009, available at [http://etc.usf.edu/te\\_mac/movies/pdf/secondlifefcib.pdf](http://etc.usf.edu/te_mac/movies/pdf/secondlifefcib.pdf); Second Life Wiki, How to Create Animations, [http://wiki.secondlife.com/wiki/How\\_to\\_create\\_animations](http://wiki.secondlife.com/wiki/How_to_create_animations) (last visited Apr. 10, 2010); Second Life, Building, <http://secondlife.com/whatis/building.php> (last visited Apr. 10, 2010).

<sup>12</sup> Adam Reuters, *Outcry as 'Copybot' Threatens Copyright Protection*, REUTERS, Nov. 14, 2006, <http://secondlife.reuters.com/stories/2006/11/14/outcry-as-copybot-threatens-copyright-protection/> (last visited Apr. 10, 2010); Second Life Wiki, Bot, <http://wiki.secondlife.com/wiki/Help:CopyBot#CopyBot> (last visited Apr. 10, 2010).

<sup>13</sup> Reuters, *supra* note 12.

<sup>14</sup> Second Life FAQ, <http://secondlife.com/whatis/faq.php> (last visited Apr. 10, 2010).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Second Life Wiki, Linden Lab Official: How Do I Get Linden Dollars?, [http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:How\\_do\\_I\\_get\\_Linden\\_Dollars](http://wiki.secondlife.com/wiki/Linden_Lab_Official:How_do_I_get_Linden_Dollars) (last visited Apr. 10, 2010).

<sup>18</sup> Second Life Wiki, Linden Lab Official: Xstreet Currency Exchange, [http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Xstreet\\_Currency\\_Exchange](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Xstreet_Currency_Exchange) (last visited Apr. 10, 2010).

<sup>19</sup> Posting of T. Linden, 2009 End of Year Second Life Economy Wrap Up, <https://blogs.secondlife.com/community/features/blog/2010/01/19/2009-end-of-year-second-life-economy-wrap-up-including-q4-economy-in-detail> (last visited Apr. 10, 2010).

manages to create a popular area is entitled to compensation.<sup>20</sup> And anyone who creates an original and new figure, region, character, or product can sell it for Linden dollars.<sup>21</sup> Second Life is a virtual economy. According to Linden Lab,

- The Second Life world has a “fully integrated economy” designed to reward risk, innovation, and craftsmanship.<sup>22</sup>
- Residents create their own virtual goods and services. Because residents retain the IP rights of their creations, they are able to sell them at various in-world venues.<sup>23</sup>
- “Businesses succeed by the ingenuity, artistic ability, entrepreneurial acumen, and good reputation of their owners.”<sup>24</sup> “Second Life real estate market provides opportunities for Residents to establish their own communities and business locations.”<sup>25</sup>

The SL economy extends beyond businesses created “in world.” A growing number of real-world businesses now use the virtual world to their own advantage.<sup>26</sup> These companies include manufacturers such as Adidas and Toyota, and technology companies such as IBM, Intel, and Sun.<sup>27</sup> Academic institutions, universities, colleges, museums, and libraries maintain conspicuous presences on Second Life as well.<sup>28</sup>

Many media outlets have migrated to Second Life. Reuters opened offices on a Second Life island.<sup>29</sup> The news service

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<sup>20</sup> Second Life, Create Anything, <http://secondlife.com/whatis/create.php> (last visited Apr. 10, 2010).

<sup>21</sup> See Second Life Wiki, Make Money, [http://wiki.secondlife.com/wiki/Make\\_money](http://wiki.secondlife.com/wiki/Make_money) (last visited Apr. 10, 2010); Second Life, Shop: Learn, <http://secondlife.com/shop/learn/index.php?lang=en-US> (last visited Apr. 10, 2010).

<sup>22</sup> Nobody Fugazi, *The Second Life Economy as a Product*, <http://your2ndplace.com/node/715> (last visited Apr. 10, 2010).

<sup>23</sup> Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Apr. 10, 2010) [hereinafter *Terms of Service*]; Second Life, Arts and Culture, [http://wiki.secondlife.com/wiki/Arts\\_and\\_Culture](http://wiki.secondlife.com/wiki/Arts_and_Culture) (last visited Apr. 10, 2010).

<sup>24</sup> Pritam Dey, Impact of *Second Life* (a Virtual World) on Business (2007), 6, <http://www.slideshare.net/pritamde/impactofsecondlifeonbusiness>.

<sup>25</sup> Home Job List, Second Life, <http://www.homejoblist.com/paid-to-play/second-life> (Jun. 19, 2009, 20:29).

<sup>26</sup> See, e.g., LindenLab, Factsheet: What is Second Life?, <http://lindenlab.com/pressroom/general/factsheets/sloverview> (last visited Apr. 10, 2010).

<sup>27</sup> *Id.*; Second Life Wiki, Businesses in Second Life, [http://wiki.secondlife.com/wiki/Businesses\\_in\\_Second\\_Life](http://wiki.secondlife.com/wiki/Businesses_in_Second_Life) (last visited Apr. 10, 2010).

<sup>28</sup> Second Life Wiki, SLED, <http://wiki.secondlife.com/wiki/SLED> (last visited Apr. 10, 2010).

<sup>29</sup> See Adam Reuters, *The Reuters Second Life Bureau is Now Closed*, SECOND

formerly employed a full-time reporter in the virtual world, with an avatar who circulated, interviewed residents, reported on important events, and in general functioned as a real journalist.<sup>30</sup> The technology magazine *Wired* and the technology news source CNET also opened offices in Second Life.<sup>31</sup> The BBC leases a virtual island on which it holds festivals, concerts, and parties.<sup>32</sup>

Copies, imitations, and forgeries irritate the users of Second Life as much as they do the “users” of real life.<sup>33</sup> Theft there is akin to theft here.<sup>34</sup> Illicit copies affect the economy, too. The CopyBot controversy caused the value of many goods to drop, which in turn caused the value of the Linden dollar to drop.<sup>35</sup> Many merchants closed their stores and sold large quantities of Linden dollars, concerned that the capability of cloning merchandise would harm their businesses and the economy as a whole.<sup>36</sup> Many protested and demanded that Linden Lab ban CopyBot from the site.<sup>37</sup>

Linden Lab believes that creativity is the growth engine of Second Life and must be protected. The company “has attempted to make the protection of intellectual property a cornerstone of Second Life, giving residents ownership rights for the content

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LIFE NEWS CENTER, <http://secondlife.reuters.com/index.html> (last visited Apr. 10, 2010). Although the virtual office is now closed, it did exist for over two years. *Id.*

<sup>30</sup> See, e.g., Daniel Terdiman, *Reuters’ ‘Second Life’ Reporter Talks Shop*, CNET NEWS, Oct. 26, 2006, [http://news.cnet.com/Reuters-Second-Life-reporter-talks-shop/2008-1043\\_3-6129335.html](http://news.cnet.com/Reuters-Second-Life-reporter-talks-shop/2008-1043_3-6129335.html).

<sup>31</sup> *Wired in Second Life*, *Wired*, Oct. 2006, available at <http://www.wired.com/wired/archive/14.10/slwire.html>; Daniel Terdiman, *CNET Launches ‘Second Life’ Presence*, CNET.COM, NewsBlog, [http://news.cnet.com/8301-10784\\_3-6120349-7.html?tag=mncol](http://news.cnet.com/8301-10784_3-6120349-7.html?tag=mncol) (Sept. 27, 2006, 13:26 PDT).

<sup>32</sup> Jonathan Fildes, *BBC Starts to Rock Online World*, BBC.COM, May 12, 2006, <http://news.bbc.co.uk/2/hi/technology/4766755.stm>.

<sup>33</sup> Terms of Service, *supra* note 23, at § 4.1.

<sup>34</sup> See generally *id.* (stating members must abide by real world laws and Second Life rules).

<sup>35</sup> Catherine Holahan, *The Dark Side of Second Life*, BUS. WK., Nov. 21, 2006, available at [http://www.businessweek.com/print/technology/content/nov2006/tc20061121\\_727243.htm](http://www.businessweek.com/print/technology/content/nov2006/tc20061121_727243.htm).

<sup>36</sup> Adam Reuters, *Linden Bans CopyBot Following Resident Protests*, SECOND LIFE NEWS CENTER, Nov. 15, 2006, <http://secondlife.reuters.com/stories/2006/11/15/linden-bans-copybot-following-resident-protests/> [hereinafter *Linden Bans*]; Adam Reuters, *CopyBot Furor Roils Second Life Currency*, SECOND LIFE NEWS CENTER, Nov. 16, 2006, <http://secondlife.reuters.com/stories/2006/11/16/copybot-furor-roils-second-life-currency/> [hereinafter *CopyBot*].

<sup>37</sup> CopyBot, *supra* note 36; *Second Life: CopyBot Causes Widespread Protests Among Residents*, Theory.isthereason, <http://theory.isthereason.com/?p=1388> (Nov. 15, 2006).

they create in-world . . . ”<sup>38</sup> Linden Lab assumed that it would not need to act as an enforcer or adjudicator of copyright disputes.<sup>39</sup> Consequently, it was unprepared for the CopyBot crisis, which was too big and fast-moving for the real-world courts to handle. Notwithstanding the importance that Linden Lab places on copyright protection, it was reluctant to take any preemptive measures; it acted only under pressure from users.<sup>40</sup> Linden Lab’s Terms of Service now prohibit running CopyBot to copy other users’ creations without permission;<sup>41</sup> Second Life allows use of CopyBot for other purposes.<sup>42</sup>

In short, commerce is the reason that copyright issues on Second Life make such a difference to members. Users create goods in order to sell them. Copyright infringement represents a loss of income, just as it does in the real world. Because of these shared features, Second Life offers a valuable opportunity to rethink copyright law, starting from its basic principles.

## II. THE QUESTIONS

This article examines the rights of the makers and users of creative works in Second Life. Copyright laws in the real world aim to maintain a balance between, on the one hand, the desire to encourage innovation, discoveries, and creativity, and, on the other hand, the desire to provide the public with culture, information, and art.<sup>43</sup> Current law presumes that creators will stop producing works unless they can exert strict control over them.<sup>44</sup>

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<sup>38</sup> Reuters, *supra* note 12.

<sup>39</sup> Linden Bans, *supra* note 36.

<sup>40</sup> *See id.*

<sup>41</sup> Second Life Wiki, Bot, <http://wiki.secondlife.com/wiki/CopyBot> (last visited Mar. 15, 2010).

<sup>42</sup> *See id.* (stating CopyBot can still perform its functions such as copying avatars, objects, and textures, however, it cannot perform such tasks if it copies other user’s creations without their permission).

<sup>43</sup> *See* Lydia Pallas Loren, *The Purpose of Copyright*, OPEN SPACES Q. MAG., <http://www.open-spaces.com/article-v2n1-loren.php> (last visited Mar. 15, 2010) (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>44</sup> *See id.* (explaining current copyright laws in the United States); *see* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 449–50 (2007) (arguing that creators of property expect full control over it and copyright law has done little to discourage this expectation). *See generally* Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–18 (2009) (stating that the principle of copyright law is to incentivize creation by allowing the creator to control the market value of the work).

From a broad perspective, several questions arise. Is it possible to encourage creativity while protecting original content in a virtual world, and if so, how? Should real-life copyright laws, such as those of the United States, govern the goings-on of the virtual world? Is it possible to adopt a new set of rules? Who determines what rules apply? What can users do to protect against infringement? How can rules be enforced in a world that lacks any governing body, police, or court system?

Copyright laws come into play in many contexts and can be viewed from many perspectives. Here is a simple, three-part taxonomy for the purposes of this article:

1. The import of reality into the virtual realm. For example, a user copies a real-world logo and puts it on a Second Life t-shirt. Is this permissible, or does it violate copyright laws in the real world?

2. The export of works created in Second Life to the real world. For example, a user copies a logo that exists only in Second Life and puts it on a real-world t-shirt. What law governs? How can the content of this virtual world be protected?

3. The duplication of works within Second Life. For example, a user copies a logo that exists only in Second Life and puts it on a Second Life t-shirt. Should internal laws of the virtual world apply? Should real-world laws apply, with the choice of law determined by the location of the participants?

This article will present our preliminary thoughts on the third question—namely, intellectual property solely within the virtual world. We address the laws that ought to protect works created within Second Life and the extent to which those laws ought to be based on real-world laws. We do not address such related issues as who will enact the laws, who will enforce them, and the processes for enactment and enforcement.

### III. SECOND LIFE'S OPPORTUNITIES FOR LEGAL SCHOLARS

Since it became popular, Second Life has witnessed an influx of scholars, especially those from the social sciences, researching such topics as whether the height of an avatar affects the user's online and offline aggressiveness.<sup>45</sup> Fewer legal scholars,

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<sup>45</sup> See, e.g., Nick Yee & Jeremy N. Bailenson, *The Proteus Effect: Implications of Transformed Digital Self-Representation on Online and Offline Behavior*, 36 COMM. RES. 285 (2009), <http://vhil.stanford.edu/pubs/2008/yee-proteus-implications.pdf> (finding taller avatars were more aggressive than their shorter counterparts); Llewellyn Joseph Gibbons, *Law and the Emotive Avatar*, 11

however, have embraced Second Life's valuable research opportunities.

Second Life raises important and complicated issues. If it can be considered a separate jurisdiction, at least for in-world conflicts, then we have the possibility of developing a copyright law that seems optimal, based on real-world laws' successes and failures, studying its results, and fine-tuning it as necessary—the sort of process that is all but impossible in the real world. Moreover, unlike most community and networking websites such as Facebook, Second Life features commercial exchanges. Creators want to profit, which spawns an incentive structure much like that in the real world. Linden dollars can be converted into real money. Though the world may be simulated, the economy, in a crucial sense, is authentic.

We might develop a Second Life copyright law that, compared to American law,<sup>46</sup> has a broader fair-use defense. We might revive the “sweat of the brow” doctrine that the United States Supreme Court has discarded—the rule that one's effort in compiling material can make it eligible for copyright<sup>47</sup>—or provide for the “moral right” to control uses of one's work, which many jurisdictions other than the United States recognize.<sup>48</sup>

We might reconsider the duration of copyright. Does it make sense to provide copyright protection for a much longer period than patent protection? Does it make sense to determine copyright duration partly on the longevity of the creator?<sup>49</sup> Would it be possible, within limits, for the creator to determine the duration of copyright—perhaps through a system that charges a certain amount of money in Linden dollars per month of protection? Thomas Babington Macaulay in the 1840s acknowledged that copyright is a necessary incentive for writers, but observed that it also represents a “tax on readers.”<sup>50</sup>

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VAND. J. ENT. & TECH. L. 899, 910 (2009) (discussing further research on the Proteus Effect).

<sup>46</sup> See generally 17 U.S.C. § 107 (2010) (listing the elements of the fair use test under United States law).

<sup>47</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340 (1991) (discussing the “sweat of the brow” doctrine).

<sup>48</sup> See Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND L. REV. 1, 2–3 (1985).

<sup>49</sup> See 17 U.S.C. § 302(a)–(b) (1998) (stating that copyright lasts the lifetime of the author plus seventy years).

<sup>50</sup> PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 174–75 (1994) (quoting THOMAS BABINGTON MACAULAY, *PROSE AND POETRY* 737 (G.M. Young ed., 1970)).

Consequently, “the evil ought not to last a day longer than is necessary for the purpose of securing the good.”<sup>51</sup>

As another potential element of Second Life copyright law, we might borrow a provision of the American Digital Millennium Copyright Act. The provision allows a lawsuit for damages against anyone who alleges that someone’s action violates copyright law if the person making the allegation knows it to be false.<sup>52</sup> We might change the scienter—state of mind—requirement to “reasonably should know.” In the real world today, many companies try to prohibit activities, some of which plainly constitute fair use. In a revealing example, the Associated Press’s website says that AP is “the bastion of the people’s right to know around the world,”<sup>53</sup> and that “[n]o political candidate, political party, political action committee, polemical organization, or any group formed for partisan purpose may use AP copy in any publication.”<sup>54</sup>

The virtual world of Second Life serves as a quasi-laboratory for the study of copyright law and offers an opportunity to reexamine the necessity for copyright laws in order to promote original works and encourage productivity, novelty, and originality. The citizens of Second Life, in theory, could develop better rules than the citizens of “first life” have succeeded in doing. A partial model is the California-based service The Well, which enforces some member-created rules.<sup>55</sup> One founding principle is YOYOW, “You own your own words”—users must accept responsibility for what they say.<sup>56</sup> In keeping with that principle, the system prohibits anonymous or pseudonymous accounts.<sup>57</sup>

Even if they remain in the realm of thought experiments, these

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<sup>51</sup> *Id.* at 175 (quoting MACAULAY, *supra* note 50, at 735).

<sup>52</sup> 17 U.S.C. § 512(f) (1999).

<sup>53</sup> Associated Press, AP and Freedom of Information, <http://www.ap.org/FOI/index.html> (last visited Apr. 10, 2010).

<sup>54</sup> Associated Press, Permissions, [http://www.ap.org/pages/contact/contact\\_perm.html](http://www.ap.org/pages/contact/contact_perm.html) (last visited Apr. 10, 2010).

<sup>55</sup> The WELL, YOYOW—You Own Your Own Words, <http://www.well.com/yoyow.html> (last visited Apr. 10, 2010) [hereinafter YOYOW]; see Gail Ann Williams, *Hosting: Online Moderator Guidelines and Community-Building Tips*, The WELL, <http://www.well.com/confteam/hosting.html> (last visited Apr. 16, 2010) (stating that members can create their own rules in different situations).

<sup>56</sup> YOYOW, *supra* note 55.

<sup>57</sup> *Id.*; The WELL, The WELL Member Agreement, [http://www.well.com/member\\_agreement.html](http://www.well.com/member_agreement.html) [hereinafter *Member Agreement*] (last visited Apr. 16, 2010).

possibilities make Second Life a valuable tool for rethinking intellectual property law.

#### IV. THE INTERNET AND COPYRIGHT

Stepping back, we should remember that the Internet itself has provided myriad opportunities for such rethinking. Indeed, it has made rethinking essential. The old balance of interests in copyright law, Jessica Litman writes, “is gone. Whatever approach we choose, we will need to find a different balance.”<sup>58</sup>

From the outset, the Internet has fostered a thriving subculture of information sharing. In the oft-repeated phrase of Well co-founder Stewart Brand, an Internet pioneer, “Information wants to be free.”<sup>59</sup> In an influential *Wired* article published in March 1994, John Perry Barlow, a lyricist for the Grateful Dead, advanced the argument that the band promoted itself by giving away its music—that is, allowing bootleg tapes without limitation—and charging for tickets.<sup>60</sup> Fans wanted the value-added of a live performance.<sup>61</sup> So too, Barlow argued, with online material.<sup>62</sup>

This raises an important point: even most rigorous copyright law can be made more lenient in practice by the behavior of copyright owners. Owners who do not sue over infringements make the copyright regime de facto less stringent. Second Life itself provides an apt example. When Vancouver-based marketer Darren Barefoot launched a parody website in 2007, Linden Lab sent a letter reading in part as follows:

We do not believe that reasonable people would argue as to whether the website located at <http://www.getafirstlife.com/> constitutes parody—it clearly is. Linden Lab is well known among its customers and in the general business community as a company with enlightened and well-informed views regarding intellectual property rights, including the fair use doctrine, open source licensing, and other principles that support creativity and self-expression. We know parody when we see it.<sup>63</sup>

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<sup>58</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 115 (2001).

<sup>59</sup> STEWART BRAND, *THE MEDIA LAB: INVENTING THE FUTURE AT MIT* 202 (1987); Member Agreement, *supra* note 57.

<sup>60</sup> John Perry Barlow, *The Economy of Ideas*, *WIRED*, Mar. 1994, available at <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> DarrenBarefoot.com, *I Got a Proceed and Permitted Letter from Linden Labs*, <http://www.darrenbarefoot.com/archives/2007/01/i-got-a-proceed-and-per>

Similar to the Grateful Dead example, many magazines now give away some or all of their content online and hope that people who value the material will subscribe for the ease of paper. To be sure, this model has not worked for most newspapers and magazines, which have seen circulation and profits drop (the migration of classified advertising to non-news websites is a major factor for newspapers).<sup>64</sup> But *The Economist* is a powerful counterexample. Each issue is posted online in full,<sup>65</sup> yet the magazine's American circulation rose by over ten percent in 2007.<sup>66</sup> People will often pay for convenience, in Second Life as in the real world.

Yet we must also keep in mind the nature of digital representations. Barlow observes that digital information is non-corporeal, wine without bottles,<sup>67</sup> but that is not the only difference. The history of duplication has entailed improvements in quality and reductions in effort. "In the early 1900s, many libraries offered manual copying services, or they referred patrons to copyists who transcribed materials by hand for a living."<sup>68</sup> Though technology has existed for photocopying a book for roughly half a century, doing so takes time and produces an inferior duplicate.<sup>69</sup> With digital representations, by contrast, one can make precise copies, easily, almost instantly, and

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mitted-letter-from-linden-labs.html; DarrenBarefoot.com, About Me, <http://www.darrenbarefoot.com/about>.

<sup>64</sup> See Project for Excellence in Journalism, Overview: Audience, [http://www.stateofthemediamedia.org/2008/narrative\\_overview\\_audience.php?cat=3&media=1](http://www.stateofthemediamedia.org/2008/narrative_overview_audience.php?cat=3&media=1) (last visited Apr. 10, 2010); see also Jon Fine, *Net to Newspapers: Drop Dead*, BUS. WK., July 4, 2005, available at [http://www.businessweek.com/magazine/content/05\\_27/b3941024.htm](http://www.businessweek.com/magazine/content/05_27/b3941024.htm); James Warren, *When No News is Bad News*, THE ATLANTIC, Jan. 2009, available at <http://www.theatlantic.com/magazine/print/2009/01/when-no-news-is-bad-news/7267/>.

<sup>65</sup> See THE ECONOMIST, [www.economist.com](http://www.economist.com) (last visited Apr. 10, 2010).

<sup>66</sup> See Project for Excellence in Journalism, *supra* note 64.

<sup>67</sup> Barlow, *supra* note 60.

<sup>68</sup> KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION 31 (1993).

<sup>69</sup> C. James Schmidt, University Librarian, Professor and Acting Chief Information Officer San Jose State University, Address at the China-U.S. Conference on Global Information Access: Challenges & Opportunities-Intellectual Property Rights in Cyberspace: A Difference in Degree or In Kind (Aug. 21-23, 1996), available at <http://darkwing.uoregon.edu/~felsing/ala/schmidt.html>; see Prabhat Kumar, *Benefits of Digital Copiers*, BUZZLE.COM, June 12, 2008, <http://www.buzzle.com/articles/benefits-of-digital-copiers.html> (last visited Apr. 10, 2010); Anthony Bianco & Pamela L. Moore, *Xerox: The Downfall*, BUS. WK., Mar. 5, 2001, available at [http://www.businessweek.com/2001/01\\_10/b3722001.htm](http://www.businessweek.com/2001/01_10/b3722001.htm).

disseminate them widely.<sup>70</sup> “[T]he Net allows copyright violations, within seconds, on a scale that thousands of printing presses or photocopiers could never approach,” Tom Forester and Perry Morrison write.<sup>71</sup> CopyBot is an excellent example.

This consideration may argue for a stricter copyright law, perhaps one more concerned with preventing infringements before they occur, as with the copy protection on DVDs, rather than punishing them afterward. Or the law might simply permit private parties to do more to protect themselves—“Private fences, not public law,” urges one of the leading theorists of law on the Internet, Lawrence Lessig.<sup>72</sup>

One form of private fencing, licensing, is an increasingly important factor with software, the Internet, and other technologies. Licensing can expand the uses of a work by its admirers, by reducing transaction costs—licenser and licensee no longer need to contact each other and negotiate the terms.<sup>73</sup> One example is the “Copyleft” license promulgated by the developers of the GNU operating system.<sup>74</sup> Under the license, software is available for free, and the user can modify it in any respect.<sup>75</sup> The only rule is that the user then must make the modified version available for free; he or she cannot sell it.<sup>76</sup> Siva Vaidhyanathan writes that Copyleft “uses the power of the copyright system to turn copyright inside out.”<sup>77</sup>

Creative Commons licenses are similar. Creative Commons is a nonprofit organization that has created different licenses with varying degrees of stringency.<sup>78</sup> The creator of a work can choose

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<sup>70</sup> See Schmidt, *supra* note 69; Kumar, *supra* note 69.

<sup>71</sup> TOM FORESTER & PERRY MORRISON, *COMPUTER ETHICS: CAUTIONARY TALES AND ETHICAL DILEMMAS IN COMPUTING* 257 (2d ed. 1994).

<sup>72</sup> LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* 126 (1999); Steven Levy, *Lawrence Lessig's Supreme Showdown*, WIRED, [http://www.wired.com/wired/archive/10.10/lessig\\_pr.html](http://www.wired.com/wired/archive/10.10/lessig_pr.html) (last visited Apr. 10, 2010); see also Paul Marett, *Legal Issues in Electronic Publishing*, in 4 OXFORD SURV'S. IN INFO. TECH. 1, 23 (1987).

<sup>73</sup> See, e.g., *IP Licensing: Reaping the Benefits*, WIPO MAGAZINE, May/June 2003, at 10–13.

<sup>74</sup> GNU Project, *What Is Copyleft?*, <http://www.gnu.org/copyleft/> (last visited Apr. 20, 2010).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THWARTS CREATIVITY* 156 (2001).

<sup>78</sup> Creative Commons, *About: Licenses*, <http://creativecommons.org/licenses/> (last visited Apr. 10, 2010) [hereinafter *Licenses*]; Creative Commons, *About: What is CC?*, <http://creativecommons.org/about/what-is-cc> (last visited

one of the licenses, fill out a short form, and embed a Creative Commons button on the web page.<sup>79</sup> People interested in using the material can click on the button to see what is permitted.<sup>80</sup> Licenses may extend to nonprofit uses or to all uses, for example, and may let people only reproduce the entire work or let them create derivative works.<sup>81</sup>

Copyleft and Creative Commons, however, are not the dominant forms of licensing of digital materials. Licenses are more frequently used to limit rights.<sup>82</sup> At an extreme, licensing can create a privatized realm of law, defined by licensors rather than by legislators, that is stricter than real-world statutes.<sup>83</sup> The End User License Agreements on computer software and the click-here-to-proceed buttons on web pages are examples.<sup>84</sup> They are “contracts of adhesion,” which the user cannot negotiate. Certain software agreements say that the buyer is purchasing nothing more than a license to use the program, which may be revoked under particular circumstances.<sup>85</sup> Some (but not all) American courts have voided such provisions.<sup>86</sup> Amazon’s wireless reading device, Kindle, presents similar issues. Although Amazon speaks of “buying” an electronic book, the consumer actually licenses the book for certain uses but not others.<sup>87</sup> The consumer cannot sell, lend, or give away the book

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Apr. 10, 2010) [hereinafter *What is CC?*].

<sup>79</sup> Creative Commons, License Your Work, <http://creativecommons.org/choose/> (last visited Apr. 10, 2010).

<sup>80</sup> See Licenses, *supra* note 78.

<sup>81</sup> See *What is CC?*, *supra* note 78.

<sup>82</sup> GNUProject, General Public License, <http://www.gnu.org/copyleft/gpl.html> (last visited Apr. 10, 2010).

<sup>83</sup> Annalee Newitz, *Dangerous Terms: A User’s Guide to EULAs*, ELECTRONIC FRONTIER FOUND., <http://www.eff.org/wp/dangerous-terms-users-guide-eulas> (last visited Apr. 10, 2010).

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Object Planet, Opinion Student Installation License Agreement, [http://objectplanet.com/opinio/student\\_university\\_license.html](http://objectplanet.com/opinio/student_university_license.html) (last visited Apr. 10, 2010).

<sup>86</sup> See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 108 (3d Cir. 1991) (“We will reverse the holding of the district court that the parties intended to adopt the box-top license as the complete and final expression of the terms of their agreement.”); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (“[T]he provision in Vault’s license agreement, which prohibits the decompilation or disassembly of its program, is unenforceable.”); *but see ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (“[A] simple two-party contract is not ‘equivalent to any of the exclusive rights within the general scope of copyright’ and therefore may be enforced.”).

<sup>87</sup> Michael Seringhaus, *E-Book Transactions: Amazon “Kindles” the Copy Ownership Debate*, 12 YALE J.L. & TECH 147, 147, 149–50 (2009); see also

without also giving away the reader.<sup>88</sup> It is as if a DVD could never be removed from a DVD player.

Licensing might apply to Second Life as a condition of entry into the new intellectual-property jurisdiction: users agree to be bound by the rules in place in Second Life as they sign up, and if they violate the rules, they can be kicked off—as is the case with many ISPs and websites now, including Second Life.<sup>89</sup> The license acts as doorman and bouncer. Note, though, that this may be even more draconian than the Kindle rule: if you violate Second Life’s copyright rules, you might be expelled, exiled, and lose all of your belongings.<sup>90</sup>

#### V. REAL-WORLD COPYRIGHT LAWS AND SECOND LIFE

Features of Second Life include the look of a physical environment, construction of houses, creation of avatars, and the design of clothing, hairstyles, furniture, and artistic works. Every piece of the virtual reality is actually an original creation made by a program, manipulated by the creator. Theoretically, all of these works are protected by copyright laws, like computer games or other audiovisual products. However, not all creations are entitled to identical protection, and many give rise to complex questions.

Consider fictional characters and their design in the virtual environment. Can I give my avatar on Second Life the name Harry Potter and make him identical to J. K. Rowling’s character? Or, an example from 2008, can I make a film called *Hari Puttar: A Comedy of Terrors*? Warner Bros. says no.<sup>91</sup>

Additional questions arise over the protection accorded virtual “products” such as furniture, toys and games, clothing, costumes, jewelry, and other fashion products, as well as virtual works such as architecture and environmental design and landscapes. The question is this: Are we talking about a copy of a program, bearing in mind that the entire virtual world is but a software

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Amazon.com, Amazon Kindle: License Agreement and Terms of Use, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200144530> (last visited Apr. 10, 2010).

<sup>88</sup> Steven Levy, *The Future of Reading*, NEWSWEEK, Nov. 26, 2007, available at <http://www.newsweek.com/id/70983>; see also Amazon.com, *supra* note 87.

<sup>89</sup> See Terms of Service, *supra* note 23.

<sup>90</sup> *Id.*

<sup>91</sup> See Rhys Blakely, *Hari Puttar? It’s a Wizard Idea, but Hollywood Claims It’s a Rip Off*, THE TIMES, Aug. 25, 2008, available at [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/film/bollywood/article4608340.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/film/bollywood/article4608340.ece).

program; or are we talking about a copy of a de facto product such as furniture, clothing, or jewelry? Specifically, should we think of CopyBot as a device to duplicate computer code or a device to duplicate objects? This is not an idle question; the answer determines the applicable copyright rule.

## VI. COMPUTER PROGRAMS

Some copying of computer code is unavoidable. Digital duplication is part of every operation of a computerized system.<sup>92</sup> For users to access the characters and products on Second Life, they must first download the content onto their computer, where it is copied.<sup>93</sup> This is permissible duplication. However, when a program copies digital material for some other use, such as duplicating a figure or product within Second Life, the outcome may be different.

Copyright laws protect computer programs.<sup>94</sup> Protection applies to all types of programs, including operational programs, practical programs, and computer and video games.<sup>95</sup> The artistic aspects of these programs, such as the characters and the designs, are protected as separate artistic creations, and changing and moving screens are protected as audiovisual works.<sup>96</sup>

Protection of a computer program also covers the artistic elements of form and structure. These components are sometimes referred to as the “look and feel.”<sup>97</sup> They consist of the

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<sup>92</sup> COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD & NATIONAL RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 140 (2d ed. 2000).

<sup>93</sup> Terms of Service, *supra* note 23; Second Life Wiki, Getting Started with Second Life, [http://wiki.secondlife.com/wiki/Getting\\_started\\_with\\_Second\\_Life](http://wiki.secondlife.com/wiki/Getting_started_with_Second_Life) (last visited Apr. 10, 2010).

<sup>94</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 61: COPYRIGHT REGISTRATION FOR COMPUTER PROGRAMS (2009), *available at* <http://www.copyright.gov/circs/circ61.pdf>; *see also* 17 U.S.C. § 101 (2010) (defining “computer program” as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.”); 17 U.S.C. § 117 (2010) (listing permissible duplications of copyrighted software).

<sup>95</sup> *See* Jeanne Hamburg, *Copyrights and Trademarks: (Almost) Everything You Need to Know*, CASUAL CONNECT MAG., at 42, *available at* <http://www.nmm-law.com/pdf/CandT.pdf>.

<sup>96</sup> *See* 17 U.S.C. § 101 (2006) (defining “audiovisual works,” “computer programs,” and “pictorial, graphic, and sculptural works.”); *see* 17 U.S.C. §§ 102(a)(5)–(6) (2006) (establishing copyright protection for “audiovisual works” and “pictorial, graphic, and sculptural works”).

<sup>97</sup> Hamburg, *supra* note 95.

screens and sounds, the interfaces, and the graphic elements of the programs.<sup>98</sup> But these elements are bound by the rule that denies protection to expression or design which is rudimentary and generic, or which is dictated by functionality.<sup>99</sup> In one case, a federal appeals court in the United States ruled that a company did not infringe on the Pac-man copyright by marketing a maze game for computers, which featured dot-gobbling characters and scoring like those on Pac-man, but that the program did infringe by featuring “ghost monsters” similar to Pac-man’s.<sup>100</sup> Mazes, dot-gobbling characters, and scoring are generic, the court reasoned; ghost monsters are not.<sup>101</sup>

From the perspective of software copyright, in sum, CopyBot would be held to violate copyright in most respects except in duplicating rudimentary and functional elements. But many lesser duplications would also infringe copyright, as the “ghost monsters” case illustrates. This protection is broad, possibly too broad. Copyright law seeks a balance: to encourage creativity through original works as well as derivative works. Perhaps if we look at Second Life as a world unto itself and treat its figures and products as authentic for legal purposes, we can develop better copyright laws.

#### VII. COPYRIGHT LAW WHEN WE TREAT SECOND LIFE AS REALITY

Assume that a copy of a figure, article of clothing, building, or other item within Second Life is not a duplication of computer code but rather an actual copy of an actual product. These items might have come into existence via a computer program, but within Second Life they are perceived as real products, and for the moment we shall treat them as such. Under this approach, developing copyright laws for the virtual world requires us to bear in mind the values of the items to be protected. A good starting point is the protection given to the parallel works in the

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<sup>98</sup> Law-Counsel.com, Legal Info@Law-Counsel.com, [http://www.law-counsel.com/Legal\\_information/intellectual\\_property\\_law/copyright/software/legal\\_answers\\_3.htm](http://www.law-counsel.com/Legal_information/intellectual_property_law/copyright/software/legal_answers_3.htm) (last visited Apr. 10, 2010).

<sup>99</sup> David Nimmer et al., *A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases*, 20 ARIZ. ST. L.J. 625, 640, 643 (1988); Law-Counsel.com, *supra* note 98.

<sup>100</sup> Atari, Inc. v. N. Am. Phillips Consumer Elec’s. Corp., 672 F.2d 607, 610–11, 617–21 (7th Cir. 1982), *superseded by statute* Fed. R. Civ. P. 52(a), *as recognized in* Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429 (7th Cir. 1985).

<sup>101</sup> *Id.* at 617–20.

real world. This is only a starting point and not necessarily conclusive, but it helps us understand the considerations involved. We will briefly discuss the copyright laws in the real world for some of the basic creations that appear on Second Life: fictional characters, buildings, clothing, and furniture.

**Avatars:** Should avatars be considered to be more than a mere costume or items of clothing but as fictional characters? The United States authorizes the copyright of well-developed fictional characters separate from the works in which they first appear.<sup>102</sup> Thus, the Disney Company's right to Mickey Mouse and Goofy is well recognized.<sup>103</sup> Fictional characters such as those in Second Life are composed of mixed characteristics: visual features and names, combined with the users' behaviors. Does infringement occur if only one element of a figure is copied—for instance, the visual element? In an analogous case, an American court held that a company could be held liable for infringing a copyright by marketing a costume visually similar to TV's Barney the dinosaur, even though only the visual aspect and no other characteristics of the character had been lifted.<sup>104</sup> These rules apply to literary and artistic characters that acquire reputations and audiences.<sup>105</sup> Is the same law suitable for figures in Second Life, which are not fictional figures in the customary literary sense but simply the counterparts of users in the virtual world? Some of the figures, such as those of new users who have not yet acquired custom skins, haircuts, and clothing, are generic and commonplace within Second Life itself. The "moral right" doctrine of copyright, recognized by many nations but not by the United States,<sup>106</sup> might well protect the creator of a Second Life character. The moral right includes what is termed the right to paternity, which protects a creator's right to be known as the creator of his or her work.<sup>107</sup>

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<sup>102</sup> Universal City Studios, Inc. v. Kamar Indus., Inc., No. H-82-2377, 1982 WL 1278, at \*4 (S.D. Tex. Sept. 20, 1982).

<sup>103</sup> See, e.g., Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 755, 757–58 (9th Cir. 1978).

<sup>104</sup> Lyons P'ship v. Morris Costumes, 243 F.3d 789, 794–96, 802–06 (4th Cir. 2001).

<sup>105</sup> See, e.g., *id.* at 794–95 (stating that the owner of "Barney and Friends," a program which was once top-rated among shows directed at children, does not license Barney costumes due to an inability to prevent those who would appear in the costume from behaving in an "un-Barney-like manner," thereby "tarnishing his wholesome reputation.").

<sup>106</sup> Kwall, *supra* note 48, at 3 (1985).

<sup>107</sup> *Id.* at 5–7.

One might argue, however, that broad copyright protection is inappropriate in Second Life, because duplication is not likely to cause participants to stop creating characters. The valid concern to be addressed is the confusion and deception that may be wrought by cloned characters. While preventing deception and confusion are important goals, they are not necessarily among the chief goals of copyright law. One can in fact argue that copying characters, or at least creating derivative works from them, promotes creativity. Prohibiting users from copying images thus may not be the best way to preserve creativity in the virtual world.<sup>108</sup>

**Buildings:** Architectural works can be copyrighted,<sup>109</sup> but not “individual standard features” of a building.<sup>110</sup>

**Clothing:** The subject of copyrighting clothing is complicated. An article of clothing is a “useful article” under the law, and, therefore, it does not usually enjoy copyright protection.<sup>111</sup> The design of the clothing, such as the cut and pattern, are generally functional and therefore unprotected.<sup>112</sup> Attempts by designers to obtain protection have generally met with refusal so that other fashion designers and creators would not be unreasonably restricted in their creations.<sup>113</sup> On the other hand, when designs are printed or painted on the material, an artistic work has been created, which benefits from protection like any other artistic

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<sup>108</sup> For an argument for respecting the collaborative nature of many creative works, see Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 294, 313–14, 316–18 (1992) (seeking to demonstrate that “American copyright law makes it difficult for any new legal synthesis, which would focus on the reality of collective creativity, to emerge”).

<sup>109</sup> 17 U.S.C. § 102(a)(8) (2010).

<sup>110</sup> *Id.* § 101 (2010).

<sup>111</sup> *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (noting “useful article[s]” have an “intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”).

<sup>112</sup> “[T]he pictorial, graphic, and sculptural aspects of useful articles may be copyrightable if they are separable from the article, physically or conceptually . . . .” *Whimsicality Inc. v. Rubie’s Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989) (citing 17 U.S.C. § 101 (1982)). However, “clothes are particularly unlikely to meet [this] test” because the decorative elements are generally “intrinsic to the decorative function of the clothing.” *Id.* at 455.

<sup>113</sup> See Kal Raustiala & Christopher Sprigman, *Where IP Isn’t*, VA. L. REV. IN BRIEF 3 (2007) (stating that “U.S. Courts have rebuffed plaintiffs’ claims of copyright infringement arising from fashion knock-offs,” yet “copying does not deter innovation and may actually promote it.”), available at <http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/raustialasprigman>.

creation.<sup>114</sup> “[F]abric designs . . . are considered ‘writings’ for purposes of copyright law and are accordingly protectable.”<sup>115</sup> Similarly, a small sculpture would qualify for copyright protection; the fact that it appears on a belt buckle does not remove it from the realm of copyright.<sup>116</sup> Second Life clothing, on the other hand, has no function – Second Life avatars do not require clothes in order to keep warm or for the sake of modesty, therefore Second Life clothes may well be considered an artistic work.

**Furniture:** The law provides that “pictorial, graphic, and sculptural works” can be copyrighted.<sup>117</sup> It defines the category to include “a useful article . . . only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>118</sup> Accordingly, design of furniture is ordinarily functional and cannot be copyrighted.<sup>119</sup> However, if the design incorporates artistic and nonfunctional aspects, then it can be considered a work of art suitable for copyright protection.<sup>120</sup>

The main reason that clothing and furniture are accorded less copyright protection is that they are principally “useful articles” under the copyright law.<sup>121</sup> Only a portion of them may be

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<sup>114</sup> See, e.g., *Knitwaves, Inc.*, 71 F.3d at 1002, 1004 (stating that fabric designs, such as the artwork on the plaintiff’s sweaters in this case, are protectable under copyright law).

<sup>115</sup> *Id.* at 1002 (citations omitted).

<sup>116</sup> *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990, 992-94 (2d Cir. 1980).

<sup>117</sup> 17 U.S.C. § 102(a)(5).

<sup>118</sup> *Id.* § 101.

<sup>119</sup> See *Universal Furniture Int’l, Inc. v. Collezione Europa USA, Inc.*, 196 F. App’x. 166, 167, 170–71 (2006) (noting that under the Copyright Act “useful articles as a whole, such as furniture, are not eligible for copyright protection, but individual design elements may be eligible only if, and only to the extent that they can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”) (internal quotations omitted); see also *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 493 (4th Cir. 1996) (noting “the industrial design of a unique, aesthetically pleasing chair cannot be separated from the chair’s utilitarian function and, therefore, is not subject to copyright protection”).

<sup>120</sup> See, e.g., *Mazer v. Stein*, 347 U.S. 201, 202–05, 217 (1954) (upholding the validity of copyrights obtained for statuettes of male and female dancing figures made of china even though the statuettes were used as based for table lamps), *superseded by statute*, 37 C.F.R. § 202.10(a) (2010) (“The registrability of [a pictorial, graphic, or sculptural] work is not affected by the intention of the author as to the use of the work . . .”).

<sup>121</sup> See *Universal Furniture Int’l Inc.*, 196 F. App’x. at 170 (stating that

protected as designs.<sup>122</sup> The relevant question for this study is whether these products in Second Life can be said to possess a functional attribute even though they do not exist in the physical world and are simply part of the aesthetic experience of participating in Second Life. As an avatar has no need to sit on a chair and does not need to sleep in a bed, even if these bare actions are possible within Second Life, furniture, in Second Life, may well not possess any functional attribute.

**Motions:** A sequence of motions may be viewed as a “pantomimes and choreographic works” which constitute works of authorship and can be copyrighted.<sup>123</sup>

**Second Life Scripts:** Second Life creations may be granted special attributes with the use of LSL scripting.<sup>124</sup> From automatic doors to Second Life dartboard games, the use of scripting in Second Life is extensive,<sup>125</sup> and raises the question how these inventions should be treated. Inventions, as “useful articles,” do not enjoy copyright protection;<sup>126</sup> however, the law provides that “any new and useful process, machine,

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“useful articles,” such as furniture, are not eligible for copyright protection unless they pass the “separability test”); Raustiala & Sprigman, *supra* note 113 (stating that “copyright protection has been withheld in the U.S. from virtually all fashion *designs* due to the ‘useful articles’ rule in U.S. copyright law”).

<sup>122</sup> See *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) (explaining that clothing is eligible for copyright protection only if it contains “protectible elements.”); *Universal Furniture Int’l Inc.*, 196 F. App’x. at 171–72 (explaining that furniture is eligible for copyright protection only if the aesthetic design features are separable from the utilitarian function).

<sup>123</sup> 17 U.S.C. § 102(a)(4).

<sup>124</sup> See Second Life, Scripting, <http://secondlife.com/whatis/scripting.php> (last visited Apr. 10, 2010) (explaining that Linden Script language or LSL is “[a]n internal, event-driven, C/Java-style language which allows you to control object and avatar behavior, up to and including mini-games and other complex programs”); Second Life, Avatar, <http://secondlife.com/whatis/avatar/?lang=en-US> (last visited Apr. 10, 2010) (explaining that “[o]nce you enter Second Life, there are thousands of unique clothing, hair and fashion accessories that can be found in Resident-owned shops.”); Second Life Wiki, Search API, [http://wiki.secondlife.com/wiki/Search\\_API](http://wiki.secondlife.com/wiki/Search_API) (last visited Mar. 21, 2010) (noting that Search API enables users to search Second Life for people using a web browser, and that “tags allow content to be flagged with special attributes”).

<sup>125</sup> See Bob Sutor, <http://www.sutor.com/newsite/blog-open/?p=1551> (Apr. 26, 2007, 12:03 EST) (noting that the sliding doors which “automatically open and close themselves” eerily replicate science fiction in the virtual world); Second Life, Renouf Labs Main Store - Quality Scripted Items, <http://world.secondlife.com/place/0271fdf1-9c0e-3a65-4de1-18a0b5bf38d4> (last visited Apr. 10, 2010).

<sup>126</sup> See *Schnadig Corp. v. Gaines Mfg. Co.*, 620 F.2d 1166, 1167–68 n.1 (6th Cir. 1980) (“[C]opyright is available to protect only the form of an object, as separated from its function, and if such a separation is not possible, copyright protection is unavailable.”).

manufacture, or composition of matter” may be patentable.<sup>127</sup>

#### VIII. UNIQUE CHARACTERISTICS OF THE WORKS AND CREATIVE PROCESS IN SECOND LIFE

In order to establish new rules for protecting intellectual property and promoting creativity in Second Life, we must understand the creative process and the balance of interests between creator and user. These are among the principal characteristics of creativity in Second Life:

1. Many participants in Second Life are creators.<sup>128</sup> The relationship between creators and the general population is completely different from that in the real world. There is a much stronger component of mutuality.

2. Many participants support the same values of innovation and creativity, and wish to enjoy creative freedom and open access to works, but want some form of protection against duplication.<sup>129</sup>

3. Inventiveness and creativity in Second Life arise mainly with derivative creations. Participants want to be able to copy designs and be inspired by examples of dress, hair, physical landscape, jewelry, and lifestyle.<sup>130</sup>

4. Second Life users import images from the real world into the virtual world, sometimes in an innovative way and other times by direct copying.<sup>131</sup>

5. All landscapes, figures, buildings, items, clothes, jewelry, and property are basically computer code.<sup>132</sup>

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<sup>127</sup> 35 U.S.C. § 101 (2010).

<sup>128</sup> See Nicolas Suzor, Bragg v. Linden Lab, <http://nic.suzor.com/2009/04/02/bragg-v-linden-lab/> (last visited Apr. 10, 2010) (stating the Second Life “[p]articipants have the relative freedom to own land, customize their avatars’ appearance, build objects and create clothing, socialise and express themselves as they wish (within limits)”).

<sup>129</sup> See LindenLab.com, Linden Lab Ushers in a New Era of Second Life with Initiative to Customize the Experience for Each User, Apr. 22, 2009, [http://lindenlab.com/pressroom/releases/21\\_04\\_09](http://lindenlab.com/pressroom/releases/21_04_09); see also, Daniel Terdiman, ‘Second Life’ Faces Threat to Its Virtual Economy, CNET NEWS, (Nov. 15, 2006) [http://news.cnet.com/2100-1043\\_3-6135699](http://news.cnet.com/2100-1043_3-6135699).

<sup>130</sup> See, e.g., SecondLife.com, Create, <http://secondlife.com/whatis/create/?lang=en-US> (last visited Apr. 10, 2010) (giving participants an opportunity to design a dress, build objects, and bring ideas to life).

<sup>131</sup> See, e.g., SecondLife.com, Create: Designers, <http://secondlife.com/whatis/create/designers/> (last visited Apr. 10, 2010) (providing participants an opportunity to import graphics and create textiles).

<sup>132</sup> See Second Life Develop, What Will You Create?, <http://develop.secondlife.com/develop-in-lsl/> (last visited Apr. 10, 2010).

6. As such, duplicates of these items can be identical to the originals. These are not the online equivalent of knock-off Prada bags; they are, in every respect, Prada bags.<sup>133</sup>

7. To a large extent, Second Life is a collective work made by all of its participants. There are no owners of this intellectual-property work as a whole.<sup>134</sup>

8. Most of the works and properties cannot be removed from Second Life.<sup>135</sup>

#### IX. AN EXAMPLE FROM ANOTHER WORLD: FRENCH COOKING

The idea that the virtual arena of Second Life should be allowed to develop without the intrusion of strict western copyright laws is not farfetched. Emmanuelle Fauchart and Eric von Hippel recently studied the manner in which French chefs protect recipes that they devise and prepare.<sup>136</sup> A recipe that appears in a book can be partially protected from duplication but not from performance.<sup>137</sup> Otherwise, copyright and patent rights are almost nonexistent in this area.<sup>138</sup>

Fauchart and von Hippel discover that despite the weakness of legal protection, leading chefs have developed strong rules to protect original creations.<sup>139</sup> These rules are strictly adhered to and enforced by the community through condemnation and even a sort of excommunication.<sup>140</sup> The rules are as follows:

1. A chef may not make an exact copy of a novel and original

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<sup>133</sup> See Nicholas Carr, *Knockoffs Roil Second Life*, ROUGH TYPE, [http://www.roughtype.com/archives/2006/11/knockoffs\\_roil.php](http://www.roughtype.com/archives/2006/11/knockoffs_roil.php) (Nov. 15, 2006).

<sup>134</sup> See Terms of Service, *supra* note 23.

<sup>135</sup> See, e.g., *id.* (noting that Linden Lab has the right to retain or delete your content).

<sup>136</sup> Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of the French Chefs*, 2 MIT Sloan School of Mgmt. Research Paper No. 4576-06 (Jan. 2006). The laws of the Sybarites protected recipes:

[i]f . . . any confectioner or cook invented any peculiar and excellent dish, no other artist was allowed to make it for a year. But he alone who invented it was entitled to all the profit to be derived from the manufacture of it for that time, in order that others might be induced to labor at excelling in such pursuits.

HELLENIC CIVILIZATION 207 (G.W. Botsford & E.G. Sihler eds., Columbia Univ. Press 1915).

<sup>137</sup> See Fauchart & von Hippel, *supra* note 136, at 17, 19.

<sup>138</sup> See *id.* at 15-16.

<sup>139</sup> See *id.* at 3-5.

<sup>140</sup> See *id.* at 4.

dish conceived by another chef.<sup>141</sup>

2. If a chef discloses to another chef an exact recipe, it may not be given to others except with his express permission.<sup>142</sup>

3. Members of the community must credit the original creator of the recipe.<sup>143</sup>

#### X. DISCUSSION AND CONCLUSIONS

In order to determine what laws should govern copyright issues within Second Life, we must understand the special characteristics of this virtual world as well as how the participants in the world perceive the values of creativity and innovation, free access to works, and protection of works. It may well be that Second Life members have their own ideas and would like to create intellectual property rules on their own terms, or that, like the French chefs, many of them are doing so de facto by way of informal agreements or merely shared values. From this perspective, Second Life can be a laboratory for considering alternative policies in the real world. The virtual world creates options beyond the rules that constitute the basis of western intellectual property jurisprudence. Second Life provides the opportunity for, and perhaps the necessity of, experimentation in hopes of producing a more flexible approach than the stringent copyright laws that exist in real life.

A possible solution can be seen in the approach of copyright laws toward real-world clothing and furniture. Like those objects, most creations in Second Life are not pure artistry, but combine artistry and functionality. Many creations, moreover, are derivative works, neither wholly original nor clones of existing creations. These derivative works are an integral part of Second Life, and users see them as such. Most participants are innovative and creative, and they take inspiration from and borrow elements of other people's patterns and designs for their own works.

Our opinion is that the virtual arena of Second Life must be allowed to develop without the intrusion of strict western copyright laws, in particular those of the United States. Within this novel laboratory, the opinions of the participants should be taken into consideration (a study that we intend to do in the

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<sup>141</sup> *Id.* at 3–4, 16.

<sup>142</sup> *Id.* at 3–4.

<sup>143</sup> *Id.*

future), as should the special characteristics of this unique world. These characteristics might lead to a different set of rules to protect intellectual property — just like the French chefs.