SLART® ENTERPRISES

September 29, 2008

Hon. David R. Homer
James T. Foley U. S. Courthouse
445 Broadway, Room 441
Albany, NY 12207

Re: Richard Minsky v. Linden Research, Inc. et al
Civil Case No.: 08-CV-819 LEK/DRH
In the matter of the TEMPORARY RESTRAINING ORDER BY CONSENT [TRO]

Dear Judge Homer,

I am Richard Minsky, Plaintiff in the above captioned case.

On Friday, September 19, 2008, I sent the defendant Linden Research Inc. [hereinafter "Linden"} a Report of Infringement of the trademark SLART® within the Second Life® virtual world [SL], (Exhibit A), pursuant to the TRO of Judge Kahn dated September 12, 2008. On September 24 I received an e-mail from Linden, stating:

> We are writing in response to your September 19, 2008 notice of alleged infringement regarding a "SLart Show Viewer" associated with the user identity "Tate Watanabe." Linden Lab did not locate this use either in the Second Life region "Cannery Rezzable" at or around the coordinates 212, 108, 26, or after searching for the use under the "All" search tab of Second Life search. Therefore, and under the terms of paragraph 3 of the Temporary Restraining Order By Consent issued by the Court in the pending action, Minsky v. Linden Research, Inc., we are declining to forward your notice to the Second Life user you identified as the source of the alleged infringing use.
>
> (Exhibit B)

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I was surprised at this response, because there is nothing in the TRO about Linden locating the use as a condition of their forwarding my Notice to the infringer. Linden seems to have added a condition to the TRO without my consent or that of the Court.

If I discover an infringing use of my mark in SL and document it, whatever happens to that item afterwards is not an issue, as far as Linden's obligation to send that user my Notice. Whether the infringing use is taken into someone's inventory and is not currently rezzed (not visible in-world), or is displayed elsewhere in SL than where I saw it, or if it was renamed or even deleted does not mean it ceased to exist, or that it never had existed. Even items marked "deleted" are kept in inventory until they are purged, just like in the Trash bin on a computer. They can be restored from the trash and placed back in SL. It's like putting a counterfeit Rolex watch into a storage bin.

An infringement took place. Even if purged, it had been created and offered for sale in this place. I don't know how many people saw it before I did, thinking it had my approval because it misused my Mark or one similar enough to be confusing to a consumer. How many people purchased copies of it, thinking I had something to do with its production, before I found it? I found the infringing item in a search for my mark and the search pinpointed the location of the object [Exhibit C]. The object was at the place the search said it would be [Exhibit A].

If there is an infringing use and the infringer is identified, the infringer must be sent a Cease and Desist Order, per the terms of the TRO. If an infringer is not notified they may infringe again, with the same use or a different use. They are likely to keep doing that until notified. After they are notified, if they are again caught infringing, actions may be taken to prosecute that are enabled by having served the notice following the previous infringement. For Linden to decline serving the notice because the infringing use has moved or been sold or vanished harbors the infringer from prosecution, and makes Linden an accessory to the infringement and to further infringement. If this is the way Linden protects Intellectual Property, per their public claims, I should be awarded a summary judgment against them on my complaint of Fraud, and also on my complaint of trademark infringement and contributory infringement.

Linden's service, or their handling of it, appears to have features that enable evasion of prosecution for trademark infringement.

Is Linden singling me out for this kind of treatment because they are upset that I have the SLART trademark and they fear it interferes with their claim to anything with the letters SL in it? Or do they do this to every trademark owner?

According to the TRO, my providing the screen shot and the information that I provided in Exhibit A, with the Notice to User, is sufficient for Linden to send the Notice

to User within two days of my reporting the alleged infringement. Linden's failure to find the infringing use was irrelevant. Linden, in its own interest, made that a condition. It is not mentioned in the TRO. The user should have been sent the notice within the two days as provided for in the TRO, and a notice of service should have been sent to me per the Order.

There are many reasons why an object may not remain in the same location in SL, just as objects do not remain in the same location in any other place. In my original motion for the TRO I cited the Matter of Vuitton et Fils S.A., 606 F.2d 1,5 (2nd. Cir. 1979), where a significant factor in granting a writ of mandamus for an ex parte order was that the evidence would be removed by the defendants. That same example continues to apply.

I am not alleging that Linden removed this infringing use. To the contrary, I received an e-mail from their attorney, Janet Cullum, clearly stating they did not remove it [Exhibit D]. This was in response to an e-mail I sent her [Exhibit E] the day I received the Linden e-mail declining to forward my Notice. I specifically asked for Linden to provide evidence of the object I saw and imaged at 7:27 a.m. PDT on Sept. 18, 2008. Ms. Cullum stated:

> In your email you suggest that evidence is not being preserved unless Linden can provide to you a record of the appearance of the particular location in Second Life at the time you captured the screen shot you included with your notice. As you are aware, Second Life is a constantly changing environment with modifications made on an ongoing basis by millions of individual users as they conduct their activities and consequently modify the appearance of the world in real time. The Second Life world thus consists of a massive amount of data which is constantly changing. For purposes of your claims, Linden will abide by the terms of the TRO including, upon receipt of a notice of alleged infringement from you, will capture and preserve screen shots showing the results of its investigation of any alleged infringing use you identify at the location you identify in the Second Life world and using Second Life search under the "All" tab and any other search tab you identify in your notice.

Just as an infringing handbag or knockoff watch may be seen in a store in Albany one minute and then taken to be sold in the street, or may be bought in the store, or may be thrown in the incinerator, objects in SL can be taken by their owners, returned to their owners, be given to or purchased by someone else, or they can just disappear in a technical glitch or simulator crash. I have lost items in SL for no apparent reason,

including unique valuable artwork, and know others who have lost inventory and objects in SL. That is common knowledge among Residents of SL.

The problem is that Linden's position violates the principle of the TRO. The function of this Order is to protect a trademark from infringement, not to aid and abet the act of infringement. Linden claims that preserving evidence that the infringing use has disappeared from that location is the same as preserving evidence of the infringing use.

Beyond violating the principle, it violates the language of the TRO. The statement that Linden "will capture and preserve screen shots showing the results of its investigation" does **not** "abide by the terms of the TRO." There is no mention in the TRO of an "investigation" by Linden, much less to preserving evidence of their "investigation." The TRO paragraph 4(b) requires Linden to preserve:

> **(b) all materials reflecting any use with respect to which Plaintiff has claimed infringement, including, to the extent possible, evidence of date and time stamps associated with the use**

A screenshot of nothing after the fact does not constitute all materials reflecting an infringing use. When I consented to the TRO, that consent was based on the language of the TRO, not language fabricated afterwards by the Defendant to evade the Order.

Linden creates backup and/or archive copies of the Second Life world. I do not know the details yet of how they do this, but it is well known that they can replicate entire regions when they crash, or can revert a region to a previous state on the request of the user who owns the region. On information and belief, they can recreate the objects that were there a week before, a month before, and longer. I informed Linden of the place and time I saw the infringing use. Therefore they should be able to find a point in time on their backup or archive, at or prior to the time I made the screen shot, where the infringing use was present at that location.

It is possible that an infringing use can disappear from a particular place in SL for any of the reasons stated earlier, or not be there for some other reason, right after I leave. It could even disappear while I am there. I have been at art exhibitions in SL where people bought originals or limited edition works, and they vanished right then as the buyer took them into their inventory. It is a common occurrence.

The backup or archive files of the region in which the infringement occurred are included in "all materials." I would expect that backup and archive copies have time and date stamps. Preserving a backup tape, disc, or whatever media Linden uses for archive purposes is analogous to preserving a videotape of the security camera following a bank

robbery, or, for that matter, a videotape of somebody selling counterfeit Vuitton merchandise.

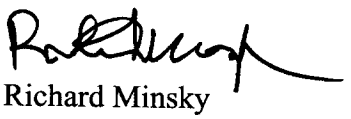
The unsigned (by any heretofore identifiable person) September 24 e-mail from Linden [Exhibit B] also includes a reference to paragraph 3, as though that paragraph related to the requirement of Linden locating the alleged infringing use as a condition of their forwarding my Notice, which it does not. Paragraph 3 only provides a procedure for Linden to decline to forward the Notice to User in the event that the use is not "the use of SLART as one word with all letters depicted in a uniform size, font and color." Since the use in this instance met the criteria, and is as one word with all the letters in a uniform size, font and color, paragraph 3 did not apply. The use of "SLart" in the reported use is entirely in upper and lower case letters of the same font. The letters are all the same size, and they are all the same color. *Case* is not specified in the parameters of the TRO. *Style* is not specified in the parameters of the TRO.

This is my expert opinion. I bought my first printing press in 1960, have been composing type for 48 years, am the Founder of the Center for Book Arts, and have organized many exhibitions that involved typography, as well as lectures and classes by prominent typographers.

Defendant Linden failed to comply with the terms of the TRO. There are no grounds within the language of the Order to permit their failure to serve the Notice to User within the specified two days after my Report.

Perhaps the unknown individual who is responsible for responding at "removals @lindenlab.com" is not trained in typography. To address that possibility and save the Court's time and that of the Parties in the future, I respectfully request a declaratory judgment that Exhibit F be declared to provide examples of "the use of SLART as one word with all letters depicted in a uniform size, font and color" for the purposes of the TRO. Each example was created in a common word processing program using standard typographic usage employing one font, one color and one size for each specimen. The only variations are in case and style. There are many more combinations possible than those provided, with the only style changes used being italic, bold, bold italic, and small caps, and not every possible combination of those being presented. I believe, however, that even a typographically untrained administrator would understand the principle from this simple sheet, which presents the same set of variations in six popular typefaces out of the thousands available.

Respectfully Yours,



Richard Minsky