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December 06, 2006

Bragg vs. Linden Lab: Interview with Bragg Attorney Jason Archinaco

It is rare event when Uri steps aside and let's Peter Ludlow report a story, but this case is very important and it is very important to me that all of you read this and consider it thoughtfully. This interview involves the [Bragg vs. Linden Lab](#) lawsuit in which Mr. Bragg alleges that Linden Lab seized around \$4,000-\$5,000 US of his virtual property in retaliation for an unrelated action (characterized by some as utilizing an exploit to acquire land on the cheap) -- in effect his claim is that assets not related to the offense were seized under the 'any reason or no reason' clause of the [Terms of Service](#) (more on this below).

I understand that [many Second Lifers think](#) Bragg got what he deserved, but deserved or not, this is an issue that cuts to the very heart of whether the property we hold in SL is real, or whether it is just an illusion concocted for PR purposes by Linden Lab. Are we investing our time and

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money wisely or are the assets we acquire something that could all disappear in a single poof with Linden Lab as the judge, jury, and executioner. Bragg may not be the poster boy you wanted for a case like this, but here it is. Today we are getting Bragg's side of the story. Hopefully soon we can get the Linden response. If Linden Lab's lawyer is willing to talk to me I will be happy to interview him as well. Until then, I give you this interview with Jason Archinaco of White and Williams LLP in Pittsburgh.

Ludlow: In a paragraph or two, tell us what happened to Mr. Bragg.

Archinaco: Mr. Bragg was induced into providing his money to Linden with the representation and promise by Linden and Mr. Rosedale that if he purchased virtual land in Second Life, he owned that land. That promise was and remains unique in the MMORPG industry which is the very reason the representation is being made. Mr. Bragg bought numerous parcels of land from Linden in a series of land auction contracts. When a dispute arose with Mr. Bragg several months after his first contract with Linden, in a transaction where the company in essence called him an "exploiter", the company first stated they were going to reverse the transaction and refund Mr. Bragg's money on that single contract. When Mr. Bragg complained, Defendant Linden confiscated everything he owned, froze his account, resold his land at auction and kept the money for itself.

So, at the heart of this lawsuit is whether or not Linden and Rosedale's representations about virtual land ownership are true, or whether they

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are simply lying to induce people into handing over their money.

Ludlow: Precisely what virtual property was seized and what was its fair market value?

Archinaco: All of Mr. Bragg's virtual land was taken (as detailed in the exhibit to the Complaint) - as was \$2000 in U.S. currency, which was frozen. In all, we estimate that Mr. Bragg is out of pocket somewhere between \$4000-\$5000 US.

Ludlow: Some questions have been raised in the forums and other blogs, so I think I should ask you about them since they will come up. What do you say about [this post](#) on [Clickable Culture](#) by Prokofy Neva:

This fellow used a deliberate exploit, he took auction ID numbers for land inworld that wasn't put up yet, taking advantage of the huge backlog of abandoned parcels that the Lindens manually process, and then plugged that number into his browser to artificially force up an auction bid out of the normal sequence that opened at a dollar instead of the normal \$1000 or equivalent value depending on meters. It was essentially an HTML exploit, and just because you can find an exploit and use it doesn't mean you have been harmed if the property is seized back from you-- you've done the harming by essentially stealing property, hijacking it, and reselling it.

It's like finding an electronics item in the store that was mistakenly priced at \$1.00 instead of \$1000, going and paying for it at the cash-register because the bar code seems to match, but then being stopped at the door by the guard who looks at the item, and the sales receipt, and says "hey, this doesn't add up". That's exactly what it's like. You wouldn't be able to then sue Radio Shack if they caught you doing this and say "I wuz robbed" if you gained a sale immediately from your theft and your assets were seized or something in the lawsuit.

Archinaco: The logic falls apart for a simple reason. Even assuming arguendo that everything the "Prok" said was true (which it isn't), would it be appropriate for the RadioShack employees who allegedly "undo" the transaction at the cash register then (even if they correctly "caught" such a customer), to also take the customer's wallet before kicking him out of the store? How about then appearing at the customer's house with a swat team and confiscate everything the customer purchased at RadioShack for the last year? How about topping that off with the swat team taking all the property owned by the customer back to RadioShack where they re-list it on the shelves, sell it to new customers and keep the proceeds for themselves. Does that all sound legal to you? Does it sound like that kind of behavior is actionable?

Should we be less offended by this conduct because the "confiscation" occurred

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electronically rather than with an actual SWAT team physically appearing at Mr. Bragg's door? And, what absurd claim can be made that such conduct is permissible and not a violation of the law? The reality is that the only real difference between an electronic confiscation and the SWAT team confiscation is that the electronic version is easier to accomplish with less fanfare, which likely makes it all the more offensive.

Use the "Wal-Mart Smell Test" on this: If Wal-Mart was doing this, how would consumers and Congress react?

Ludlow: If Prok's description of what happened is incorrect, can you provide a characterization of what Bragg did to secure the disputed property, and why you think that it was within the letter of the law/contract (assuming you think that).

Archinaco: I think it is best right now for purposes of this debate for everyone to assume that everything bad thing that could be said about Mr. Bragg is true: that a Linden sympathizer's version of the "facts" are true; he exposed the steamier side of a "family friendly game"; he secretly runs a Chinese gold farm sweatshop; and that he does so from his prison cell on death row.

Assuming it is all true -- and Mr. Bragg is a horrible, terrible person -- does that mean that it would somehow be OK if Mr. Rosedale and Linden are not being honest when they tell people you own land you buy in Second Life? No. Would it mean that Linden could confiscate Mr. Bragg's property, resell it to the highest bidder and keep the money for themselves? No. Not even the United States Government gets away

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with that.

As much as Linden would like to -- and will try to -- make this case about Mr. Bragg. It isn't. It is about Linden and Mr. Rosedale -- and what they are telling people to drive their business model.

Ludlow: Clause 7.1 of Second Life's Terms of Service gives Linden Lab the right to kick people out "for any reason" and, in case that doesn't cover all the bases, "no reason". Further down, the ToS says this in all caps:

*YOU UNDERSTAND AND AGREE THAT
LINDEN HAS THE RIGHT, BUT NOT
THE OBLIGATION, TO REMOVE ANY
CONTENT (INCLUDING YOURS) IN
WHOLE OR IN PART AT ANY TIME
FOR ANY REASON OR NO REASON,
WITH OR WITHOUT NOTICE AND
WITH NO LIABILITY OF ANY KIND.*

People might think that this gives them the right to delete or seize any of Mr. Bragg's property for any or no reason.

Archinaco: I certainly can't wait to cross-examine Mr. Rosedale about his belief about the ToS and ask him whether the statements he has repeatedly been making to the public about land ownership are true or not. I think a lot of people would like to know Linden's position, under oath, as opposed to statements in the media.

Ludlow: Some people have argued that the Linden Lab ToS is a contract of adhesion. Do you think so? Why or why not?

Archinaco: Of course it is. I don't think there is a real debate about that. What will be interesting

to see is the position Linden and Mr. Rosedale take with regard to the ToS and, whether, they are going to claim that the ToS is inconsistent with what they are telling the public about land ownership in Second Life.

Ludlow: *When I was kicked out of The Sims Online by Electronic Arts, Jack Balkin among other legal scholars were sympathetic to the idea that had I gone to court, the case of Marsh vs. Alabama would have been relevant. Here is what Balkin said:*

Virtual worlds are like company towns in that the game owner forms the community, controls all of the space inside the community and thus, controls all avenues of communication within the community. The free flow of ideas and the formation of community cannot occur within a virtual world unless the designer permits it. Alphaville was a virtual city controlled by The Sims Online through its design of code and its Terms of Service agreement. Although Electronic Arts does not take over "the full spectrum of municipal functions" in real space, it does exercise all of those functions in the virtual world. If any private entity could be regarded as a company town, it would be a virtual world. That is especially so because the whole point of the virtual world is to create community (or communities) and action in the virtual world occurs through the

exchange of ideas.

Now your case isn't a free speech case, but does a similar line of reasoning apply? Has Linden lab taken on the role of governmental authority to such a degree that it must be bound by basic constitutional principles of terrestrial governments?

Archinaco: I like the thought behind this reasoning and, as MMORPG and virtual worlds grow in importance, the issue of whether corporations providing such worlds should be considered state actors for purposes of constitutional analysis (and free speech) will likely be directly litigated. I do not think we will reach this issue directly in the Bragg case -- other than in the context of the possible unconscionability of the ToS "agreement". Although "constitutionality" is not directly an issue in our case, attempts to waive constitutional protections or other oppressive terms can be used with regard to a substantive unconscionability analysis. If you want a good example of how far some companies are trying to go with oppressive terms, read paragraph 11.B. of the Eve Online End User License. The agreement claims that "You have no interest in the value of your time spent playing the Game" What does that ultimately mean? Is a player made a "slave" because he clicks the "accept" button (at least so long as he is playing the game)? The easiest argument is that such clauses are evidence of unconscionability and should not be enforced.

Ludlow: *As you may now, many people in Second Life have much more in virtual assets - perhaps as much as a million dollars US equivalent of virtual real estate and assets in*

one case. What does this case mean to those people?

Archinaco: I would hope that the case is important to anyone who has invested their time or money in a virtual world, whether it be one cent or a million dollars. Given that our society is moving more and more towards digital transactions, what is the real difference between money you have deposited with Charles Schwab that is evidenced by an "ownership" certificate in a stock -- as opposed to depositing money in Second Life in return for an "ownership" certificate in virtual land? Isn't the Second Life world really a bank? So, I would hope that many people realize the importance of this case in the broader perspective of, at the very least, what could be next? I used a Walmart analogy before because I like to ask the "Walmart smell test", i.e., if Walmart was doing "this", what would the reaction from the public or Congress be?

Ludlow: *This is a philosophical question. Some people think that our lives are more and more moving online - both our work lives and our virtual lives, and more and more of our social and virtual assets will be found in online worlds. Do you think that this case is an important case for the protection of our rights and property in the future?*

Archinaco: I think I addressed this briefly in response to your last question but, if I haven't, the answer is yes. A variety of science fiction writers have written about the rise of corporations in the future - and it seems to be a common premise that when corporations "rule the future" (like in the movie Alien), that is not necessarily a good thing. In response to your

philosophical question, ask yourself this question: what if Microsoft made you click "I agree" every time you turned on your computer before it would boot Windows, i.e., make the computer function? Now, presume for just one minute that Microsoft slipped in the Eve Online term "You have no interest in the value of your time spent using this computer"

Ludlow: This is a crystal ball question. If the precedent set here determines whether our futures are those of free peoples with property rights or those of serfs to platform owners, which do you think we will see? Will we be free and propertied, or serfs to the platform owners.

Archinaco: I would certainly not like to think that we are serfs to a platform owner. While I am cautiously optimistic about this case from a legal standpoint, win or lose, I think this case is bringing to light issues like those you have raised in this interview. And, that is necessarily a good thing. We all have to look ahead at the future. Ultimately, it may be as simple as voting with our dollars and rejecting "virtual worlds" with terms the public does not like -- but I raised the Microsoft OS example because, what about situations where there is no meaningful choice? What does that mean to a country that is founded on the concept that we are all free?

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