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News and Blog

Second Life, (<http://www.secondlife.com>) an online virtual worlds system, has become the center of a recent copyright controversy involving, yes, virtual sex toys. Apparently, there are not enough legitimate or inexpensive sex toys for all the denizens of Second Life, so some residents have elected to make knock-offs. Just like the real-world controversies surrounding real-world goods made by companies like Tiffany and Louis Vuitton, Eros LLC has filed suit against the alleged infringers and Linden Labs, for housing and supporting the alleged knock-offs. (See [Wired Article](#))

Vicarious and contributory liability for copyright infringement are recognized by the courts as a cause of action under federal copyright law. This kind of liability has been raised in recent years against the various music file sharing services that came and went, such as Napster (originally a file sharing service without any copyright licensing from the music companies that owned the music being shared), Gnutella, and Limewire. Each of these services were held to be liable for the file sharing of their users, in part based on the notion of vicarious liability. Cases prior to *Napster et al.* that addressed this kind of liability have developed along two lines: landlord-tenants where the landlord exercised no control over the leased premises, and dance-hall cases where the operator of the hall controlled the premises and obtained a direct financial benefit from the infringing performances. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). Under common law, landlords have not been held to have copyright liability where dance-hall operators have infringed the copyrights of others.

In *Fonovisa*, the defendant Cherry Auction operated a swap meet where it rented stalls to individuals who were selling unlicensed copies of bootlegged music owned by the plaintiff.

For the swap meet operator to be liable, the plaintiff had to prove that the operator controlled the marketplace and obtained a direct financial benefit from the sales of infringing works. The Court sided with the plaintiff in *Fonovisa*, even though the defendant Cherry Auction did not receive a commission from the sales of the infringing materials.

Unlike the auction house in *Fonovisa*, Second Life does allow users access to their information system without making a payment. Anyone can download a copy of the Second Life client, establish a username, and log in to the system. Users start to rack up fees when they purchase virtual real estate within the system. In addition, Linden Labs provides a virtual currency of Linden Dollars that allow for the exchange of virtual goods within the system. Linden Dollars can be exchanged for U.S. dollars using the credit card or paypal account associated with your Second Life account. As a result of this connection with the physical world, there are a number of users that make an actual living in Second Life producing virtual goods for their fellow Second Life denizens. The last time I visited, about 17 million worth of linden dollars were exchanged into real dollars on the Linden Labs exchange system in a day. Linden Labs is generating a significant amount of commerce in spite of the national recession.

According to Eros Products LLC, his SexGen products line has sold about \$1 million (that's U.S. dollars) of product within Second Life over the past five years. (A copy of the [Complaint is here](#)). Competition being fierce in the digital world, others have been making sex toys that look a lot like Eros', with some likely being copied straight from the source and resold. This is possible in Second Life because Second Life provides "builder" tools to its users. Included in

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the toolkit are functions to allow for the upload of image files. In addition, there are apparently tools available from other software makers that allow a Second Life user to copy images within the system.

Assuming that Eros Products LLC (and other plaintiffs that may join the suit should the court certify this as a class action) can prove that they are the valid owner of the copyrighted works, the question for the court is whether Linden Labs can meet the standard for contributory liability. Linden Labs is a virtual landlord in the sense that users of Second Life pay an annual subscription in order to own virtual real estate within the virtual world. The right to own this virtual property is limited by payment of the subscription. You will note, however, that there are plenty of users that do not acquire any virtual real estate in Second Life - and for them, there is no fee to participate.

However, Linden Labs also charges fees for the conversion of Linden Dollars into U.S. Dollars through the Linden Exchange. For infringers seeking to sell pirated works in the virtual world, the real benefit to them is the ability to take the proceeds of those sales and convert them back into hard currency for use in the real world. Approximately 250 Linden Dollars are worth a U.S. Dollar (the trading in this currency fluctuates). In order to convert Linden Dollars back to U.S. Dollars, Linden Labs charges a fee of 3.5% of the value of the transaction. So, indirectly, Linden Labs benefits from the sale of infringing goods every time that the infringer converts his Linden Dollar proceeds to hard currency.

There is a question, however, of whether Linden Labs is merely a landlord who relinquished control to his infringing tenant. Eros Products LLC claims that Linden Labs did exercise control over the activities of its users because all of the virtual worlds within Second Life are ultimately housed on servers controlled by Linden Labs. Pl.'s Complaint at ¶ 127-128. And furthermore, Linden Labs has ultimate control over its software that operates Second Life, and I suppose that Linden Labs could alter its software to prevent copyright infringement if it wished to do so (how, exactly, is another story). Factually, however, I think this is going to be tough to prove. Unlike [Grokster](#), who marketed itself as the successor to Napster for those looking to willfully infringe on the copyrights of others, Linden Labs has not marketed itself as a safe haven for willful copyright infringers. On the contrary, Linden Labs gave some thought to copyright in its license agreement, granting its users rights in the works they create in-world. (See [Terms of Service here](#) at section 3.2)