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Defamation of Second Life Avatars: How the Laws of First Life People Could Be Invoked

I. Introduction

"The Gods are just. No doubt. But their code of law is dictated, in the last resort, by the people who organize society; providence takes its cue from men."¹

There is a "Brave New World"² out there, but it is not the one Aldous Huxley warned us about. In fact the new world we are dealing with now is one that was probably beyond Huxley's wildest dreams. The new world I'm speaking of is the virtual world, and it is expanding further and further as each year passes.³ As virtual worlds become easier to navigate and accessible to more and more people, there seems to be a never ending supply of possible legal issues that could be raised in these seemingly benign environments.⁴

Participants in these virtual worlds can play, interact with each other, and build social connections with other participants just as they can in the real world.⁵ They can explore new sights, fly to new places, submerge themselves in the depths of oceans, and even attend concerts and other events with other participants.⁶ In other words, they can create a whole new life for themselves in a world where the laws of physics do not apply and the possibilities are seemingly endless.

¹ Aldous Huxley, *Brave New World*, Ch. 17 (1932) [hereinafter Huxley]

² Id.

³ T. Linden, *2009 End of Year Second Life Economy Wrap up (including Q4 Economy in Detail)*, January 19 2010, <https://blogs.secondlife.com/community/features/blog/2010/01/19/2009-end-of-year-second-life-economy-wrap-up-including-q4-economy-in-detail> [hereinafter Linden]

⁴ Stephen M. Porter, *Let's Not Rush to Regulate*, *Computer Graphics World*, July 1995, at 4

⁵ Robert D. Hof, *My Virtual Life*, *Business Week*, May 1, 2006, available at http://www.businessweek.com/magazine/content/06_18/b3982001.html [hereinafter Hof]

⁶ Id.

These virtual worlds exist inside Massively Multiplayer Online Role-Playing Games (MMORPGs) where large numbers of players interact with each other within computer generated worlds.⁷ A participant will log in through their computer and then play with other participants in this virtual world via the internet. MMORPGs distinguish themselves from other computer games by not only the large number of players that can be playing at any one time, but also by the fact that the game's world is persistent, continuing to exist and evolve despite any particular player being away from the game.⁸ This world is constantly available to all players and is maintained by the platform owner on computer servers.⁹

Participants will sign up to join the virtual world a specific game provides, and in doing so will sign an agreement with the platform owner that allows them to participate in that world, usually referred to as the Terms of Service (TOS.)¹⁰ This agreement can govern the rules of the game, what behaviors are appropriate in the game, what rights the players have, what liabilities the platform owner will be subjected to, and how violations of these terms will be dealt with.¹¹ In other words, it is a contract with the player stating that they can join this game and play within it, provided they adhere to the rules of the platform provider.¹²

Once a participant has joined the virtual world, they then must create an avatar, which is an in-game representation of them self.¹³ The possibilities for how the player can make their avatar look are governed only by the imagination of the player and the confines of the game's software. The player can make their avatar look like their real world counterpart, or like someone

⁷ Wikipedia, http://en.wikipedia.org/wiki/Massively_multiplayer_online_role-playing_game

⁸ Id.

⁹ Id.

¹⁰ Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 64 (2004) [hereinafter Balkin]

¹¹ Id. At 65

¹² Id.

¹³ Hof, supra note 5

or something completely different.¹⁴ Whatever incarnation the player chooses for their avatar, it will be the player's representative in the virtual world. The avatar will be what other players see and communicate with when they are in the virtual world at the same time, and their avatars will be what the player sees and communicates with. These avatars will be able to interact with each other, talk with each other through their real world counterparts, and thus make social connections with each other.¹⁵ In other words, although a player is really interacting and talking with another player in the virtual world, it is only the name and image of that player's avatar that they recognize as being that other player.¹⁶

One of the biggest MMORPGs, and one that has distinguished itself from many of the others, is Second Life (SL).¹⁷ One way SL has distinguished itself is that it is not really a game at all, but rather a platform.¹⁸ There are no challenges to overcome or victories to win in SL, just a virtual world to exist in.¹⁹ SL has no defined goal for the player to strive towards, but instead just a world the player can wonder through and explore while interacting with other players. It is a computer graphics generated world with land, skies, and oceans. Players can build buildings for other players to explore, chat with other players in the proximity of their avatar's location, or go out to other locations to see what is there.²⁰ It is in essence a parallel universe where players can

¹⁴ John Suler, *The Psychology of Avatars and Graphical Space in Multimedia Chat Communities*, January, 2007, <http://www-usr.rider.edu/~suler/psyber/psyav.html> [hereinafter Suler]

¹⁵ Hof, supra note 5

¹⁶ Balkin, supra note 10, at 74

¹⁷ David Kirkpatrick, *Second Life: It's not a game*, CNNMoney.com, January 23, 2007, http://money.cnn.com/2007/01/22/magazines/fortune/whatsnext_secondlife.fortune/index.htm [hereinafter Kirkpatrick]

¹⁸ Id. (quoting Jed Smith, an early investor who sits on Linden's board [which is the company that created Second Life])

¹⁹ See supra note 7

²⁰ Mark Glaser, *Reuters Agog over Second Life*, CNET, Oct. 23, 2006, http://www.pbs.org/mediashift/2006/10/virtual_journalismwired_cnet_r.html

do anything they can in real life, including shop, work, host and attend parties, chat and dance with each other at night clubs, sing karaoke, skydive, go to museums, rallies, concerts, etc, etc. etc.²¹ Except in this world, a person can transform them self into whatever they wish through the design of their avatar, and they can create whatever new persona they desire to have. So basically the player can become reborn in their “Second Life.”²² However, unlike other MMORPGs the player’s value is not determined by their accomplishments in the game but rather by their reputation amongst other players in this virtual world.

The other area in which SL distinguishes itself from most other MMORPGs is that SL’s TOS agreement specifically gives players the right to enforce any copyright and intellectual property rights which may apply (save for certain licenses of those rights to SL which are required), in any content they create in SL.²³ This goes against the norm of MMORPG TOS agreements where the platform owner will specifically retain all potential rights to any content created in the game, even if the player is the one who creates that content.²⁴ So players are encouraged to help create the virtual world of SL with the knowledge that any possible rights to anything they create will be vested in themselves.²⁵

This simple gesture of offering players the ability to retain the rights of their creations has helped to establish an entire in-world economy. Players in SL can create and sell anything their minds (and technical skills with a computer) can imagine.²⁶ Players can create, sell, and buy;

²¹ Hof, supra note 5

²² Id.

²³ Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> [hereinafter SL TOS]

²⁴ Kirkpatrick, supra note 17

²⁵ Id.

²⁶ Michelle Caruso-Cabrera, *Buying into the Virtual World*, MSNBC, Aug. 7, 2006, <http://msnbc.msn.com/id/14228225>.

clothing, cars, jewelry, works of art, pets, homes, stores, land, etc., etc., etc. Pretty much anything a person can buy and sell in real life can also be done in SL. And just like real life, players can make a lot of real life money trading in these in-world commodities.²⁷

Hence, in reality SL has become a world that functions very similarly to the real world. A world where a player can make money based on their ingenuity and their reputation amongst the community.²⁸ A world where there are no points to be scored and no victories to be won, just relationships to be forged and trusts to be earned. A world where any player can reinvent them self and get a brand new start from their real world counterpart.²⁹ However, it is also a world that has come to mimic the real one so closely through the use of its own economy, business transactions, and interpersonal relationships, that its users may need help from real world laws in order to protect their interests in it.

Specifically, this essay will deal with how real life (or first life) defamation laws could be used to protect the rights of SL avatars. Defamation laws are designed to protect a person from having their reputation tarnished in their community by another person making false claims about them.³⁰ It occurs when a communication is made about a person that harms their reputation in the eyes of at least a substantial minority in the community, or deters others from associating with that person.³¹

But what happens if an avatar makes defaming communications about a second avatar that lowers the second avatar's reputation in SL so much that other avatars will no longer

²⁷ Hof, *supra* note 5

²⁸ Balkin, *supra* note 10, at 74

²⁹ Hof, *supra* note 5

³⁰ RESTATEMENT (SECOND) OF TORTS § 559 (1977) [hereinafter Torts]

³¹ *Id.*

associate with them? What steps can the real person behind the defamed avatar take in order to rectify this situation? This essay will try to help expound on these questions. Part II will look at how SL operates, Part III will look at how defamation laws operate in the real world, and Part IV will look at how a player may be able to protect their rights against having their avatar defamed. In conclusion I will argue that real world laws can be invoked to protect the rights of avatars, and in fact should be invoked in order to protect the rights of the real life people behind them.

II. Second Life

Second Life (SL) is a virtual world that is free to join, and very similar to the real world in many ways except that it exists over the internet.³² Participants create a three-dimensional model called an avatar to represent themselves,³³ and then can use that avatar to explore a vast three-dimensional world which contains any type of landscape one could find in real life. Along their travels residents of this virtual world can meet at coffee shops, attend business meetings, shop at stores, or stop by their friends house to visit; just to name a few.³⁴ It is truly an alternate reality where one's avatar can live a completely different life than their creator does in real life.³⁵

Much like in real life, the residents of SL help to shape its existence. Residents can create almost any virtual item their mind can imagine from the resources allowed to them by SL.³⁶ The SL TOS gives its resident the ability to retain any possible intellectual property rights in the items they create, and sell any of their creations to other avatars for profit. Residents can regulate the avatar purchasing an item from altering or reselling the item. Residents can also purchase

³² Hof, supra note 5

³³ Second Life, Create an Avatar, <http://secondlife.com/whatis/avatar.php>

³⁴ Hof, supra note 5

³⁵ Id.

³⁶ Wikipedia, http://en.wikipedia.org/wiki/Second_Life

land in SL from the company who created the platform it runs on, a California based company named Linden Lab.³⁷ Land purchasers can then alter that land, subdivide it, and then rent it to other players to use for homes, stores, private escapes, etc.³⁸ Owners of land can also block any other avatar they wish from entering onto that land. Residents can rent or buy land, build a structure on that land to store their purchased items, or from which to sell their created ones; and retain some control over how these things are done. In other words, SL is not a game but a virtual world where the residents create the environment, and the economy of it.³⁹

In order to facilitate all of this buying and selling SL invented the Linden Dollar.⁴⁰ The Linden Dollar is the currency used in SL, but unlike other games this dollar has a very real exchange rate where players can convert real world money into Linden Dollars, and convert Linden Dollars back in to real world money.⁴¹ This currency exchange has led to some SL participants growing very rich off of this platform,⁴² and led to some real life Court cases to protect the players' pecuniary interests in this virtual world.⁴³ In fact, financial transactions occurring between avatars in SL totaled \$567 million in 2009.⁴⁴

Besides its' economy, the SL world is growing as well. The number of registered SL participants is above 18,000,000, with an average of 38,000 of them logged in at any one time.⁴⁵ Residents of SL spent 481,000,000 hours logged in to this "platform" in 2009, an increase of

³⁷ Kirkpatrick, *supra* note 17

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *supra* note 36

⁴¹ Linden, *supra* note 3

⁴² Hof, *supra* note 5

⁴³ Bragg v. Linden Research, Inc., 487 F. Supp.2d 593,611 (E.D.Pa. 1972) [hereinafter Bragg]

⁴⁴ Linden, *supra* note 3

⁴⁵ See *supra* note 36

21% over 2008.⁴⁶ With all of the time residents devote to SL, and all of the real world money that can be made in it, it becomes easier to understand how important an avatar's reputation can become in this virtual world. Much like the real world where a person's reputation can dictate who someone may be willing to sell goods to or buy them from, an avatar's reputation can have a great impact on how their real life creator is treated in the virtual world of SL.⁴⁷

In SL, there are several ways for avatars to communicate with each other, and for other avatars to read or hear those communications.⁴⁸ The first way is when one resident wants their avatar to speak they can type in the words. Any other avatar near the same geographical position as that person's avatar will be able to read those words, including anyone in the audience if an avatar is at an event. The next way a resident can have their avatar speak is through instant messaging, in which only other avatars that a resident chooses can read the speech they type.⁴⁹ These two ways of communicating can also now be accomplished through voice to voice communications using a headset or microphone.⁵⁰ Another way of communicating is the SL blog.⁵¹ Here any resident can post their thoughts about SL, or any of the avatars in it, for any other residents to read.⁵² These blogs are archived by Linden Lab and can be accessed for years after their original posting date.

Now in order for a person to become an avatar, and thus a resident, in SL, Linden Lab requires that they agree to their TOS. Under this contract between the player and Linden,

⁴⁶ Linden, *supra* note 3

⁴⁷ Balkin, *supra* note 10, at 74

⁴⁸ Basic Communication in Second Life, http://slisweb.sjsu.edu/sl/index.php/Basic_Communication_in_Second_Life

⁴⁹ Id.

⁵⁰ http://wiki.secondlife.com/wiki/Voice_FAQ

⁵¹ People could post blogs about avatars in third party blogs outside of Second Life, but since anyone who read them and is not involved in Second Life would not be part of the Second Life community for purposes of possible defamation actions, this essay will not discuss these possibilities

⁵² <https://blogs.secondlife.com>

participants are forbidden to “post, display, or transmit content that is harmful, threatening or harassing, defamatory, libelous, false, inaccurate, misleading, or invades another person's privacy.”⁵³ The TOS also provide that any violation of these terms by a resident “ may result in immediate suspension or termination of [their] accounts without any refund or other compensation”⁵⁴ The TOS also state that “ Linden Lab does not control and is not responsible or liable for the quality, safety, legality, truthfulness or accuracy of any such user conduct.”⁵⁵ Lastly, The TOS specify that any claim against Linden Lab will be subject to California Law.⁵⁶

This contract does specifically outlaw any player from defaming another, but what happens if a player breaks these terms? Is their expulsion from the game enough? How does that repair the reputation (and in some cases, the earning potential) of the defamed avatar? In order to understand these questions we must first look at how defamation laws operate in regards to real world people.

III. Defamation

Defamation laws vary from state to state, but the basic elements that need to be proved in any state usually follow the Restatement of Torts.⁵⁷ So in order for someone to show they have been defamed they must show that someone else has made a defamatory communication about them, that lowers their reputation in the community, and leads to members of the community looking down on them or no longer being willing to interact with them.⁵⁸ This means that first of

⁵³ SL TOS, supra note 23

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Torts, supra note 30

⁵⁸ Id.

all, the allegedly defaming statement must be communicated to a third party.⁵⁹ A person cannot be found liable of defamation if the defamatory statement was made to the person it is about.

Then it must be determined whether that communication was in written or spoken form. The difference being that a written defamatory statement is referred to as libel, whereas a spoken defamatory statement is referred to as slander.⁶⁰ However, this distinction between verbal and written defamation has been viewed with less importance by Courts over the years, with some scholars even calling for an end to the distinction entirely.⁶¹

Next the person alleging defamation must show that the defamatory communication is a false statement of fact.⁶² In order for a communication to be capable of a defamatory meaning, the person alleging defamation must be able to verify the communication is about something that is provably false.⁶³ Any person can voice their opinion, and that will be protected by the First Amendment, only people voicing a false statement of fact can be found liable of defamation. However, if a person communicates a provably false fact about someone else they will not avoid liability simply by labeling it as an opinion.⁶⁴ In other words, while a person cannot be held liable of defamation simply for stating an incorrect opinion, just because that person labels their communication “in my opinion” will not automatically excuse them either. The Court will look

⁵⁹ Id.

⁶⁰ 51 A.L.R.3d 1300

⁶¹ Julie C. Sipe, “*OLD STINKING, OLD NASTY, OLD ITCHY OLD TOAD*” *DEFAMATION LAW, WARTS AND ALL (A CALL FOR REFORM)*, 41 INLR 137, 149 (2008) [hereinafter Sipe]

⁶² *Ollman v. Evans*, 750 F.2d 970 (D.C.Cir.1984)

⁶³ *Moldea v. New York Times Co.*, 22 F.3d 310, 317 (C.A.D.C., 1994)

⁶⁴ *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C.Cir.1990) [hereinafter *White*]

at whether the intended audience of the communication would have reasonably interpreted it to be a statement of fact, which is provable or disprovable, as opposed to a statement of opinion.⁶⁵

The next thing a person alleging defamation must prove is that the allegedly defaming communication caused them actual harm.⁶⁶ Thus the recipient of the communication has to understand that communication to be defaming the person it is about.⁶⁷ The person alleging defamation must show that their reputation in the community was hurt by the communication or that third parties are more reluctant to deal with them as a result of the communication.⁶⁸ So for example, if a person's reputation was already regarded in low esteem (i.e. - a murderer, drug dealer, pedophile, etc.), they would have a very difficult time proving defamation of their character.

Now for most people, showing the aforementioned elements of defamation will be enough. However, since the Supreme Court constitutionalized this tort in the 1964 case of New York Times Co. v. Sullivan, there has been one more additional element that may have to be proved.⁶⁹ This case separated defamation claims involving public figures from those involving private, or non-public, figures.⁷⁰ After this ruling, any person who purposefully puts themselves out in the public eye has a higher burden of proof that they must show in order to prevail in a defamation lawsuit. Anyone the Court considers to be a public person must show that not only was the allegedly defamatory communication false, but also that the communicator of it either knew it was false or recklessly disregarded their ability to check on its accuracy, and thus had

⁶⁵ Id.

⁶⁶ Torts, supra note 30

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) [hereinafter NY Times]

⁷⁰ Id.

actual malice to harm that public person.⁷¹ In other words, if someone communicates a defamatory statement about a private person they can be found liable if the communication is false (and not one of opinion) whether or not they knew or should have known it was false. However, if the defamatory communication is about a public person the communicator can only be found liable if they knew the statement was false or should have known it was had it not been for their reckless disregard of trying to learn the truth before they made the communication.⁷²

The theory behind this ruling is that the First Amendment right of freedom of speech, and of the press, should insulate those who make communications which may cause harm to a public person's reputation in the interests of robust political debate and the press' right to report on matters of public interest.⁷³ Public people include politicians, celebrities, and anyone else who is pervasively in the public eye. However private people can be viewed as limited purpose public figures if they thrust themselves into the public eye in certain situations. Examples could be activists, non-celebrities who appear on television programs, people accused of high profile crimes, etc.⁷⁴ Courts will make individual assessments of whether a person is a limited purpose public figure in any claim of defamation. If a person is found to be a limited purpose public figure in a particular case, they too will have to show the alleged defamation of them was done with actual malice in order to prove the claim. Subsequent cases have distinguished this alternate treatment as applying only to those who put themselves into public view via public office, interviews with the media, or otherwise opening themselves up to public scrutiny, etc., as

⁷¹ Id.

⁷² Id.

⁷³ Aaron Larson, *Defamation, Libel and Slander Law*, Expertlaw.com, August 2003, http://www.expertlaw.com/library/personal_injury/defamation.html#3

⁷⁴ Id.

opposed to people who are in the public view merely by way of their attempts to sell items to the public.⁷⁵

If a person is deemed a limited purpose public figure they will only have to show actual malice if the alleged defamation concerned a public matter. To put it another way, if the alleged defamer made the communication about a limited purpose public figure in order to further debate on a public issue, then the person alleging defamation will have to show the defamation was done with actual malice. However, if the allegedly defamed person can show the person who made the defaming statement did so purely for personal reasons (i.e. – they made the defamatory statement solely to destroy the other person because that would increase their business' profits), then only negligence to ascertain the truth by the alleged defamer would have to be shown.⁷⁶

Another thing to note about defamation laws is their ability to hold third parties accountable. If a third party republishes or distributes a defamatory communication then they too can be held liable.⁷⁷ Now the key difference hinges on whether the third party republishes the defamatory content, as a book might, or merely distributes it, as a person operating a bookstore might.⁷⁸ If the third party republishes defamatory content then it is liable whether or not it knew of the defamatory nature of the communication it published.⁷⁹ However, if the third party only distributed defamatory content, then it can only be guilty of defamation if it knew or should have known that the material it was distributing contained defamatory content.⁸⁰

⁷⁵ Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) [hereinafter Gertz]

⁷⁶ Senna v. Florimont, 196 N.J. 469, 492 (2008) [hereinafter Senna]

⁷⁷ Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991) [hereinafter Cubby]

⁷⁸ Id.

⁷⁹ Stratton Oakmont, Inc. v. Prodigy Services Co., N.Y.S.2d, 1995 WL 323710, at 3 (May 24, 1995) [hereinafter Stratton]

⁸⁰ Id.

One last thing to note about defamation laws is the somewhat recent trend to try to adjudicate them through the use of “libel tourism.” Libel tourism is the term used for when plaintiffs alleging defamation file suit in jurisdictions neither they nor the alleged defamer have any meaningful connections with, because that jurisdiction has more plaintiff friendly libel laws.⁸¹ Basically the plaintiff will choose to file in this alternate jurisdiction because they have a better chance of winning there, and base it on the premise that their reputation was also injured in that jurisdiction. This trend has become particularly popular in Britain, where unlike the United States the alleged defamer must prove the truth of their communication rather than the plaintiff having to prove the falsity of it.⁸² Plaintiffs living outside of Britain, have on numerous occasions successfully sued defendants living outside of Britain for libel, based on the fact that the libelous publication was available in Britain, even if only through the worldwide web.⁸³

Suing under British Libel laws can lead to an outcome that fails to recognize the First Amendment freedoms American Courts are bound to protect. U.S. Courts must decide if they have the jurisdiction to prevent enforcement of these foreign decisions on U.S. citizens. With no Federal law dealing with this issue, it is left up to the States to decide jurisdiction based on whether the foreign plaintiff purposefully availed them self of the laws and protections of that state, under the state’s personal jurisdiction statute.⁸⁴ There is a divide amongst the states as to whether they can exercise this jurisdiction or not. The California Court ruled that it can exercise personal jurisdiction over a foreign plaintiff in a defamation suit because they purposefully availed them self of California law when they adjudicated a suit that they knew would cause

⁸¹ Ehrenfeld v. Bin Mahfouz, 9 N.Y.3d 501, 506 (N.Y. 2007) [hereinafter Ehrenfeld]

⁸² Doreen Carvajal, *Britain, A Destination for “Libel Tourism”*, N.Y. Times, January 20, 2008, available at <http://www.nytimes.com/2008/01/20/technology/20iht-libel21.1.9346664.html>

⁸³ *Id.*

⁸⁴ *Calder v. Jones*, 465 U.S. 783, 789 (1984)

harm to be suffered by a California citizen.⁸⁵ The New York Court ruled however, that it could not exercise personal jurisdiction over a foreign plaintiff unless the plaintiff availed them self of New York law through the transaction of business in the state.⁸⁶ Merely serving lawsuit notice papers on an N.Y. citizen is not enough for N.Y. jurisdiction to apply.⁸⁷

In response to this divide over whether states have jurisdiction to protect the First Amendment rights of their citizens against foreign libel suits, several states have enacted laws under which these judgments are unenforceable if they did not take into account American freedom of speech protections.⁸⁸ These states are New York (whose legislature was angered over the Court decision), California, Illinois, and Florida (with a similar bill pending in New Jersey.)⁸⁹ The U.S. House of Representatives has already passed its own version of this, but it is still pending in the Senate.⁹⁰ Although libel tourism may eventually be unrecognizable under U.S. law, at the moment it's still a very real issue in defamation cases.

Can these real world defamation laws be used to protect the reputation of an avatar as opposed to a real person? What type of redress does a resident of SL have if they feel their avatar has been defamed by another avatar? How can they prove their case? Would they be able to advance such a case in foreign jurisdiction like Britain? We must now look at how some of these questions may be answered in the years to come.

⁸⁵ Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199 [(9th Cir.2006, en banc)]

⁸⁶ Ehrenfeld, supra note 83, at 508

⁸⁷ Id., at 509

⁸⁸ Media Law Resource Center,

http://www.medialaw.org/Content/NavigationMenu/Hot_Topics/Libel_Tourism/Libel_Tourism.htm

⁸⁹ Id.

⁹⁰ Id.

IV. Analysis

If someone feels another avatar in Second Life (SL) has defamed their own avatar the first thing they should do is inform Linden Lab of this activity. The SL TOS is the contract a player makes with Linden Lab and it spells out the rights they have in the virtual world of SL.⁹¹ If the resident informs Linden of the allegedly defamatory remarks of another, they can then investigate the claim and provide the first form of redress. First of all, they can remove any libelous statements made about an avatar in SL. Linden Lab can also expel any resident found to be defaming another's avatar from SL as violating the TOS agreement.⁹² Although even this may be harder than it seems because that real life person can just register a new SL account, create a new avatar, and then continue defaming with the new avatar if they were so inclined. Then the process of reporting this new avatar's defaming communications to Linden Lab would start all over again, and this cycle could keep being repeated.

The main problem with relying on Linden Lab to police this type of situation is that they cannot take back the defamatory statement. They can remove it, or the resident who made it, but they can't erase that statement from the minds of the other people whose avatar's read it. So for example; let's say an avatar told a group of other avatars, or posted a sign in SL, or a blog, etc., that your avatar was a cheater. They said your avatar steals other avatar's creations, illegally copies them, and then sells them in competition. You reported this to Linden Lab and they removed the libelous statements and terminated the account of the offending resident, but all of the other avatars who were told this or read it still remember what was said. Now they no longer

⁹¹ Jess M. Collen, Oren Gelber, Matthew C. Wagner, *Intellectual Property in Virtual Worlds*, Law.com, August 2009, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202432993006>

⁹² SL TOS, supra note 23

want to sell items to your avatar or buy items from it. They no longer want to communicate with your avatar and may even block your avatar from entering their land.

What options are you left with as an innocent person whose avatar has been defamed in SL by another? An easy answer would be to just quit playing the game or start over as a different avatar with a new name. However if you have spent many hours, weeks, years, etc. building up your avatar's wardrobe, getting it a nice house, making friends with other avatars, and generally building the reputation of your avatar; this may not seem like an equitable solution.⁹³ Not to mention that if you've built up a reputation as selling desired items, just exiting or restarting the game could have real world monetary consequences.⁹⁴ In other words, although it is only the reputation of the avatar that has been defamed (since the other avatars who read the defaming communication do not know that avatar's real world identity), nonetheless it is the real world person who is losing their enjoyment of playing, the fruits of their time spent playing, and possibly even real world money they could have been earning while playing. The laws of SL (the TOS) can't correct this injustice so the real world owner must turn to real world laws to protect their virtual world interests.

Now the first thing someone in this situation, who wants to try to sue for defamation, must do is figure out who they are going to sue. Again they do not know the identity of the real person behind the allegedly defaming avatar, only that avatar's name. So the person trying to sue would have to again turn to Linden Lab and ask them to reveal that avatar's identity. Linden may be willing to do this voluntarily since their Privacy Policy clearly states that "that Linden Lab may disclose your personal or other account-related information... in order to protect and defend

⁹³ Balkin, *supra* note 10

⁹⁴ Hof, *supra* note 5

the rights or interests of Linden Lab, Second Life or the users of Second Life”⁹⁵ Even if Linden refused this request, the person could seek a Court order for Linden to release this information. If the plaintiff can prove their case can withstand a motion to dismiss by the alleged defamer, the Court will look at whether or not the right of the plaintiff to protect their reputation outweighs the free speech right of the anonymous defendant to speak anonymously; and if it does the Court will compel the provider to release that information.⁹⁶

After the person figures out whom they are suing, they need to decide whether they are suing for libel or slander. Now it is obviously a case of slander if the communication is made through vocal communication. However it can make for an interesting interpretation of the law where another avatar “speaks” their defamation through type, because usually libel applies to any printed defamation while slander applies to anything that is spoken.⁹⁷ Even though an avatar may “speak” to other avatars, they are usually just typing words that only other nearby, or personally selected, avatars can see. In this case most Courts would probably see avatars “speaking” to each other through type as slander and only find written communications such as blogs, in-world signs, posters, books, etc., as libel. However as I mentioned, this distinction may become less and less relevant as Courts continue to blur the line between the two.⁹⁸

Next the person seeking legal redress would have to show that the allegedly defamatory statements towards their avatars were not opinions but provably false facts. Once again the freedom of speech protects against claims of defamation where the allegedly defaming statement

⁹⁵ Second Life, Privacy Policy, <http://secondlife.com/corporate/privacy.php?lang=en-US>

⁹⁶ Dendrite Intern., Inc. v. Doe No. 3, 342 N.J.Super. 134, 142 (N.J.SuperA.D., 2001)

⁹⁷ See supra note 58

⁹⁸ Sipe, supra note 62

is just someone expressing their personal opinion.⁹⁹ However in the example I have given, it should be relatively easy to show that the statements made were not ones of opinion, but clearly expressed statements that are provably false. The person whose avatar was defamed could show that they have never illegally copied and sold anyone else's goods. The avatar making those statements did not make them as though that was just what they thought; they said them as though they were facts. Although it depends on the context, I think most Courts would find that avatars (and thus their real life creators), who heard or read these statements would view them as facts being communicated to them.

The next thing a person alleging their avatar was defamed would have to show is that the defamatory communication made lowered the reputation of their avatar in the community so that other avatars no longer want to interact with them. However, when dealing with the SL community it can be difficult to ascertain just who makes up "the community." Of the millions of registered avatars in SL only a handful of them are logged in, or present in the community, at any one time.¹⁰⁰ Also, avatars can travel anywhere they want in SL for as long as they want at the touch of a button.¹⁰¹ So how can a person who is alleging defamation of their avatar know if other avatars are avoiding theirs' as a result of the defamatory communication, or just because they have logged off or decided to explore some place else for a while?

The easiest way to show damage has been done to an avatar's reputation would probably be in cases where the avatar sells goods in SL. In these cases the real world person behind the avatar could show statistics of how much their avatar averaged selling before the alleged

⁹⁹ See White, supra note 63

¹⁰⁰ Linden, supra note 3

¹⁰¹ Hof, supra note 5

defamatory communication, and then contrast that to lower average sales after the communication. This could be used to persuade the Court that the loss of sales were not due to people simply not being logged in to SL, but as a direct result of the defamatory communication.

However, damage to an avatar's reputation can cause harm to the real person behind it in other ways besides just monetary loss. Some people are using numerous hours of their time and energy logged in to SL building social connections with other real people through their avatars.¹⁰² They are spending a lot of money in SL to buy stylish clothes for their avatar to wear, desired land for their avatar to build a home on,¹⁰³ and attending events they want their avatar associated with. Many people have begun to view their avatar as an extension of their real self.¹⁰⁴ These people are spending time and money to build up their avatar's reputation in SL, because that reputation has taken on great importance to the real people behind those avatars.

Linden Lab recognizes this fact and has recently purchased a company which will allow people to link their avatars with their real life profiles in other forms of social media such as Twitter and Facebook.¹⁰⁵ On-line reputations have become important enough to some people that there are even companies advertising and selling their ability to repair that reputation if it is damaged.¹⁰⁶ The defamation of this on-line reputation can lead to the loss of the real person's ability to enjoy the connections and stature they have worked so hard to attain in SL, not to mention the countless hours they may have spent building that reputation.

¹⁰² Balkin, *supra* note 10

¹⁰³ Dean Takahashi, *Real world laws intrude on virtual world behavior*, May 16, 2009, <http://venturebeat.com/2009/05/16/sofa-king-rude-real-world-laws-intrude-on-virtual-world-behavior>

¹⁰⁴ Suler, *supra* note 14

¹⁰⁵ <http://www.virtualworldsnews.com/2010/02/linden-acquires-enemy-unknown-connecting-second-life-outwards.html>

¹⁰⁶ <http://www.reputationadvocate.com>

Once again though, the person alleging their avatar has been defamed, must be able to show that the defamation has damaged their avatar's reputation in the SL community in order to prevail. One way a person might be able to show this is by presenting evidence that their avatar has been discriminated against as a result of the alleged defamation. They could do this by showing they have been blocked from entering privately owned areas of land in SL where they used to be welcome. For example, the person's avatar is no longer admitted to certain in-world parties, rallies, events, etc., that they used to be welcome to attend. Or the person could try to show that many land owners who used to do business with their avatar will no longer deal with them, or have evicted them from property they previously leased to them.

Another way to prove damage to the reputation of a SL avatar might be if the person alleging defamation can provide evidence that other avatars are avoiding their avatar when it is in a public setting within the SL world. The person could try to show that when their avatar enters a public area of land, most of the other avatars already there immediately vacate it. There are certainly many other arguments that could be made to show how the damaged reputation of an avatar could have an effect on how it's treated in the SL community. I highlight these options as examples to show that even as elusive as this community can be to determine at times, there are ways to show how damages can be done by it.

The person alleging defamation of their avatar will also have to consider whether a Court will determine them to be a public figure, a limited purpose public figure, or a private figure.¹⁰⁷ This determination will be the difference between having to prove whether the alleged defamer stated a false fact that they knew was false, and thus acted with actual malice, or merely stated a

¹⁰⁷ See NY Times, supra note 70

fact they heard might be true but turned out to be false. If the laws of defamation are purely extrapolated out into the world of SL, then how a Court may make this determination becomes easier to see. In this case the Courts would base their determination on whether the avatar itself was a public avatar, limited purpose public avatar, or private avatar in the community SL community. SL does have its share of celebrity avatars including a real estate tycoon whose avatar has become known inside and outside of SL, real world celebrities appearing in SL through their avatars, and even a U.S. Appeals Court Justice appearing through his avatar to give a speech at a SL symposium.¹⁰⁸ These avatars are obviously in the public eye of the SL community, much as the people behind them are in the real world community, and thus they would be considered public figures. As such, they would have to prove the alleged defamer acted with actual malice.

Limited purpose public avatars would be determined on a case by case basis by determining if that avatar has thrust them self into the public eye of the SL community. So for instance, if an avatar makes public speeches at rallies, or posts blogs about well known public issues in SL in an attempt to influence the views of other avatars, then they would probably be viewed as a limited purpose public figure. The key in trying to make this determination is whether the avatar has thrust them self into the public eye, or has a matter of public concern thrust them into the public eye. If the Court determines either of these things has happened it will probably view the avatar as a limited purpose public avatar, and they would have to prove actual malice in most cases.

¹⁰⁸ Hof, supra note 5

Assuming the Courts apply defamation laws to the SL world in the same ways they do to the real world, then any other avatars would be considered private avatars. Any avatar who just explores the game, talks with friends, attends meetings (rather than being a speaker in them), etc., would be considered a private avatar. Avatars who merely operate a business and try to sell goods to the SL community would probably also be considered private avatars.¹⁰⁹ Of course, if an avatar's business dealings caused them to become a kind of pseudo-celebrity, or thrust them into an issue of public concern in the SL community, then they would probably be considered either a public or limited purpose public avatar. Absent this though, if the avatar was just one of the millions of other avatars involved in SL who is not in the public eye of the SL community, they would be considered a private avatar. Thus the person alleging defamation of their private avatar would only have to show that the defamatory communication was provably false, regardless of whether the avatar making the communication should have known it was false or not.

However, if the Courts view SL as a public life unto itself; that could lead to the actual malice standard being applied in all SL defamation cases. The actual malice standard is designed to protect society's right to free speech against a person's right to maintain the integrity of their reputation.¹¹⁰ Since any possible SL defamation claim would be a case of first impression for a Court, it may decide to err on the side of the First Amendment and hold that any alleged defamation in virtual worlds has to satisfy the stricter test of actual malice. Courts are very

¹⁰⁹ See Gertz, supra note 76

¹¹⁰ See NY Times, supra note 70

hesitant to carve exceptions out of the freedom of speech, and they may be even more hesitant to do so in the case of virtual worlds they may not quite yet understand.¹¹¹

In this case the Courts would base their determination on whether the real world person behind the avatar is a public figure, limited purpose public figure, or private figure. Courts would still view a real life public figure interacting in SL through an avatar, and whose avatar is known in SL as representing that real person, as a public avatar and thus needing to prove actual malice in order to show defamation. I suspect though that if Courts look at the real person behind the avatar in making their determination, they will view all avatars which are not public as limited purpose public avatars. This is because the person behind the avatar has thrust them self into this world, and into the public eye of the SL community. People are not forced to join SL, nor are their avatars thrust into the SL community as a result of public interest; they do so out of their own free will. People who join SL put themselves in this very public internet community that anyone else can join. If Courts choose to look at defamation claims in SL from this perspective, than anyone alleging their avatar has been defamed will have to show actual malice.

However, whatever reasoning a Court uses to make these determinations, a limited purpose public figure can get around the actual malice standard if the alleged defamer made their communication for purely private reasons.¹¹² Going back to my previous example; suppose someone else's avatar made a defamatory communication about your avatar, which said that your avatar copied another avatar's goods and then sold the copies in competition. If the other avatar was just a SL resident trying to tell other avatars what they heard about your limited purpose public avatar, you would have to show the communication was false and that they knew

¹¹¹ 8 St. Thomas L. Rev. 423, 424-425

¹¹²See Senna, supra note 77

it was false. Suppose though that you could show that avatar was a competitor of yours, and that they made the communication not because of any matter of public interest, but because they could personally benefit by increasing their sales as a result of defaming your avatar. In that case you would only have to show that they made a false statement about your avatar, regardless of whether or not they knew it was false.¹¹³

If the person alleging defamation of their avatar can show all of these factors, and thus that defamation has occurred, they should then decide whether Linden Lab itself could be liable as a third party re-publisher or distributor of those defamatory communications. Linden Lab owns and operates the computer servers SL is run on, and any communications running through those servers are being transmitted to others through Linden Lab. However, Linden Lab faces a different level of liability for the communications it transmits depending on whether the Court sees them as a re-publisher or distributor.¹¹⁴ Ordinarily, anyone who republishes defamatory statements is subject to the liability as though they had originally published it.¹¹⁵ However, “vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.”¹¹⁶ The main difference between a re-publisher and a distributor is the amount of control they exercise over what is being communicated.¹¹⁷ A re-publisher has the ability and the duty to monitor and control what it is publishing, while a distributor has no control over what is being published.

¹¹³ Id.

¹¹⁴ See Cubby, supra note 78

¹¹⁵ Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (2d Cir. 1980)

¹¹⁶ Lerman v. Chuckleberry Publishing, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981)

¹¹⁷ See Stratton, supra note 80

Linden Lab would certainly be viewed as a distributor and not a re-publisher by the Courts. It would be infeasible for Linden Lab to monitor each one of the millions, if not billions, of communications being made every day in the world of SL. So Linden could only be found liable as a distributor of defamatory material, and thus only if they knew of the defamatory material and distributed it anyway. The SL TOS state that Linden Lab does not control and cannot be held liable for any untruthful statements made by SL players.¹¹⁸ This would seem to prevent any player from recovering from Linden for distributing defamatory information. However, a recent case in Pennsylvania rejected the SL TOS as being an unfair and extremely one-sided contract.¹¹⁹ This ruling leaves open the possibility of suing Linden for liability despite the TOS a player signs in order to join the game. Following this reasoning, a person who has proven their avatar was defamed in Second Life could show Linden is also liable if they made Linden aware of the defamatory material, but Linden refused to remove it and instead allowed it to continue to be distributed through its servers.

Finally, the issue of libel tourism must be considered if Courts were to allow defamation suits over SL avatars. In the case of SL, I don't think U.S. Courts would allow foreign defamation judgments against the real world people behind SL avatars. To start with, the trend in the U.S. seems to be going towards not recognizing these foreign judgments as enforceable against U.S. citizens.¹²⁰ But even as the law stands today, I think most people alleging defamation in a foreign jurisdiction would have a difficult time getting U.S. Courts to recognize it.

¹¹⁸ SL TOS, supra note 23

¹¹⁹ Bragg, supra note 44

¹²⁰ See supra note 90

First of all, a plaintiff wanting to sue the person behind a defaming avatar would have to get Linden Lab to release that person's name in order to sue them. Even if a foreign Court issued that order, a U.S. Court would probably not enforce it against a U.S. internet service provider unless the case could withstand a dismissal motion under U.S. law, with the First Amendment taken into account when weighing that decision. This would effectively end any benefit to filing in a foreign jurisdiction such as Britain, because their plaintiff friendly libel laws would be nullified under U.S. law in trying to ascertain the identity of an anonymous user. This is especially true when considering that even if the foreign Court chose to dismiss the SL TOS as unfair, which require any action against Linden be decided under California law; it would still be up to California Courts to determine if Linden has to abide by the foreign Court's order of releasing user's information since Linden is located there.

However, even if Linden voluntarily surrendered that info, I still think the foreign judgment would be unenforceable in any state, whether they follow the New York or California jurisprudence (prior to those states amending their laws.) Any state following the California standard should find jurisdiction to void any such foreign judgment as unenforceable if it believes the plaintiff intended the judgment to cause harm to one of its citizens. Yet even if the state follows New York case law, it will probably find that it has jurisdiction over the foreign plaintiff and that the judgment is unenforceable based on the fact that the plaintiff had transacted business in the state.

Any plaintiff involved in a SL defamation suit signed the SL TOS, which means they agreed to a contract with an American company. I think most State Courts, even those that would throw out the TOS as unfair, would still find this satisfies the requirement that the foreign

plaintiff transacted business in the state and purposefully availed themselves of that State's laws. After all, the foreign plaintiff would have no case if they were not interacting with that state's citizens, presumably in their homes (albeit through their computer.) This is vastly different from only being involved with the state in order to serve papers on an alleged defamer.

Now that we have seen how real world laws could be invoked to deal with defamation of SL avatars, there remains one more important question. Should they be invoked? Should Courts allow the law to protect the interests of an avatar, and thus the person who created it, in playing a game? Or should the law only apply to actual people and allow the platform owners to police their own games? I feel that in order for the law to serve its purpose of protecting the interests of real world people, it must be extended to protect the interests of their virtual world avatars.

IV. Conclusion

“There is nothing so finely perceived and so finely felt as injustice”¹²¹

The law in America has a long history of trying to prevent injustices from being perpetrated on the people in the society they govern. The advent of computer generated virtual worlds, like SL, have now challenged the views of how far these laws will have to extend. Courts must now determine whether to apply real world laws to virtual worlds in order to protect the rights of the real world people involved in them.

There are those that argue real world laws cannot keep up with the ever expanding technology of virtual worlds, and thus they should not be applied. The argument is that the laws currently in place do not easily adapt themselves to these computer environments, so only

¹²¹ Charles Dickens, *Great Expectations*, Chapter 8 (1880)

specific laws geared towards these technologies will be able to settle disputes amongst the users of them.¹²² I cannot argue against the idea that new laws may be needed to protect the rights of real world people in virtual worlds. Until those new laws are enacted however, and as long as virtual worlds continue to involve real world rights, I think Courts have a duty to invoke current laws in order to protect the rights of real world people.

Of course any virtual world is still voluntarily joined by users and can be voluntarily exited. So maybe we should keep the Courts out of them and leave it up to the platform owners to police them. The problem with this is, as virtual worlds like SL begin to mimic the social connections and monetary possibilities of real life more and more, the rights of real life people interacting in these worlds grow more affected. As we have seen, the TOS' which govern these worlds can serve as a way of stopping other users from abusing another's rights after the fact, but they do not provide justice for the person whose rights have already been abused. Until this gap in the protection of real peoples' rights in these virtual worlds is closed, people will have to turn to real life laws.

Defamation of SL avatars can lead to damage to the interests and rights of real world people. The law has a duty to protect the rights of these people. While Courts may be hesitant to involve themselves in SL defamation disputes, there is precedent for them to do so. Courts have already gotten involved in a case disputing the property rights of real world people in SL.¹²³ Courts have also gotten involved in defamation cases relating to the liability of internet sites.¹²⁴

¹²² David R. Johnson & David E. Post, *Law and Borders--The Rise of Law in Cyberspace*, 48 *Stanford Law Review* 1367, 1367 (1996)

¹²³ See Bragg, supra note 44

¹²⁴ See Stratton, supra note 80

Courts have heard cases of alleged defamation involving one corporation suing another corporation.¹²⁵ They have allowed for the owner of a corporation to sue the owner of a second corporation over defamatory statements made by the second's corporation towards the first.¹²⁶ This situation lends itself particularly well to the case of a person suing a second person over defamatory statements made by the second person's avatar towards the avatar of the first. In both of these cases a real person is suing another real person over defamatory statements made by one's non-real representative towards the other's non-real representative.

It is a brave new world we find ourselves in. Technology has advanced further than almost anyone could have imagined. The law is often slow to catch up with the advances of technology, but until it does so Courts will need to apply existing laws to new technologies in order to protect the rights of the people who use them. Second Life is an immersive and vast new world that could soon begin to invoke many of the laws we apply to first world life. Real world property laws and intellectual property laws like copyrights have already begun to invade this virtual world. Will defamation laws be next? I guess we'll just have to wait and see.

¹²⁵ National Refining Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 766 (8th Cir. 1927)

¹²⁶ See Senna, supra note 77, at 498