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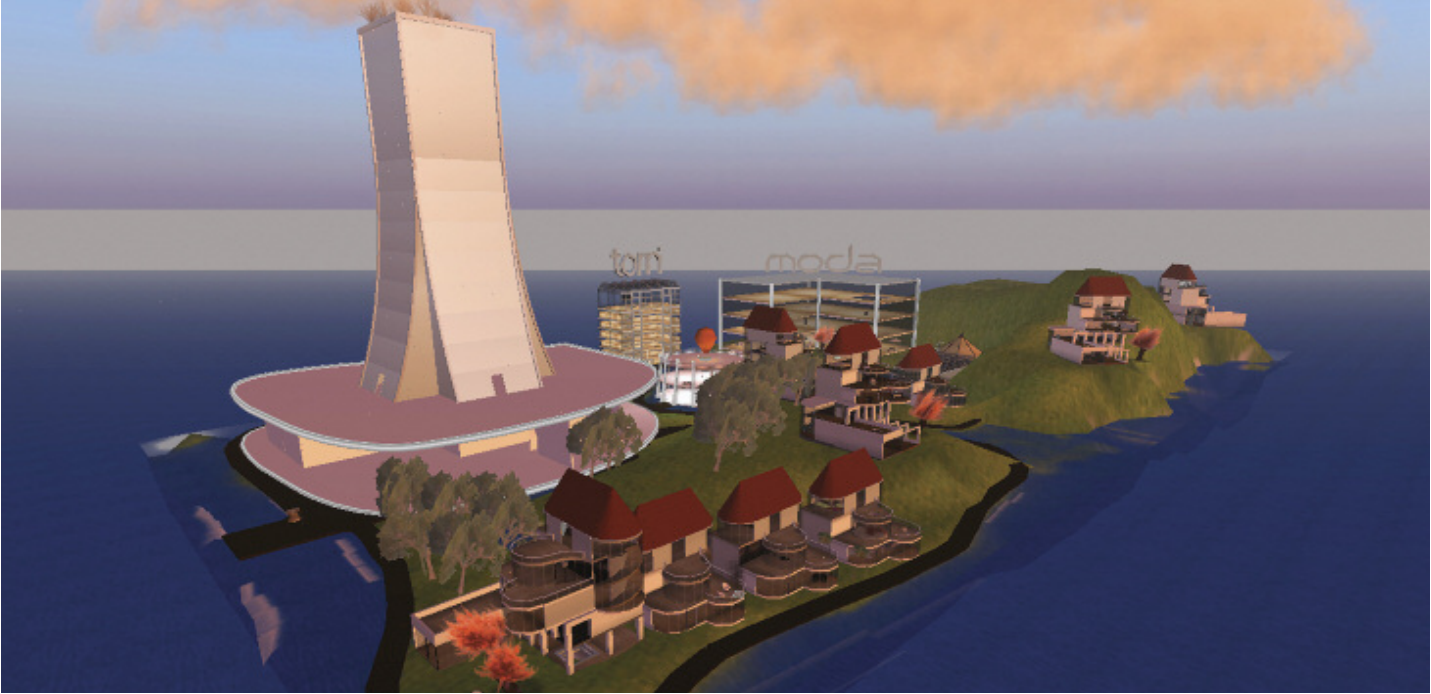
Metaverse

Law and the virtual world

Left to right: Richard Stockton, of Banner & Witcoff; Monday Beam, from Second Life; and Janet Garetto, of Nixon Peabody



**Pondering the reality
of a virtual world**



In the online three-dimensional virtual world of *Second Life*, users can visit and create their own communities on “islands” — like this one owned and developed by the Chicago lawyer behind avatar Monday Beam.

By Maria Kantzavelos

In a world far removed from his criminal defense practice on LaSalle Street, the lawyer known as Monday Beam has not only put out his shingle on the spacious top floor of a skyscraper that also houses a Cineplex and an art gallery, but he is also the owner of that upscale high-rise, the island on which it sits, and several more islands touted as “premier, organic” destinations featuring a mix of “modern residential living” and “state-of-the-art” retail offerings.

While juggling more than a dozen inquiries a day from clients who sometimes take the form of a winged fox; or a dancing fairy in funky, pink attire; a robot; or an elf, the sleek and always courteous Beam — who can fly like Superman if he doesn’t feel like walking around his base of operations — runs a series of furniture stores, clothing boutiques, and car dealerships stocked with products emblazoned with his own brand name.

The legal matters he handles tend to focus on issues related to land disputes or intellectual property. But he has, on occasion, stepped in to assist clients in playing out divorces or child custody battles.

Many of Beam’s clients are known as “furries,” who carry themselves with both animal-like features and a humanoid framework.

“They’ll come and talk fully legitimate busi-

ness with you, as if wearing ears and a tail is completely normal, and I make nothing of it. I’m so accustomed to it at this point that nothing here fazes me,” the lawyer said.

That’s because all of this, and far more, takes place in *Second Life*, the three-dimensional online digital world where users — like the real-world sole practitioner behind the computer-generated figure, or avatar, known as Monday Beam — can create their own content, using 3D modeling and scripting tools provided by *Second Life* developer Linden Lab, and pretend to be whomever, or whatever, they want to be.

In *Second Life*, whose San Francisco-based developer boasts that about 15 million accounts have been set up since opening the software to the public in 2003, people from around the world can interact with each other in real time using voice or text chat, assuming the form of an avatar that can be customized to suit all sorts of imaginations.

“My avatar is basically me. Of course, he’s probably much more handsome and better dressed,” said the 37-year-old lawyer who operates as Monday Beam “in-world,” the word fellow “residents” of that “metaverse” use to distinguish that simulated setting from the real, physical world.

The lawyer behind the avatar moniker Mon-

day Beam asked *Chicago Lawyer* to withhold his real-life identity for purposes of maintaining the role-playing nature of *Second Life*, where he considers his interactions with other avatar “clients” to be fictional in nature.

(Stretching the imagination

But the virtual world of *Second Life* is more than a mere game for many of its residents, including Beam, who said he just might accumulate enough Linden dollars — the fictional currency used for in-world transactions that can be exchanged for actual U.S. dollars — to reach the equivalent of his real-life income as a criminal defense attorney in a few years.

While the technology is similar to so-called massively multiplayer online role-playing games (MMORPs), like the popular *World of Warcraft*, “there aren’t any points or levels” in *Second Life*, said Benjamin Duranske, an associate in the Palo Alto office of Pillsbury Winthrop Shaw Pittman, where his IP practice focuses on the emerging area of virtual law.

“It’s a social and an economic environment with open content creation tools where any user can create just about anything they can imagine,” said Duranske, who is the author of “Virtual Law: Navigating the Legal Landscape of Virtual Worlds,” published in 2008 by the

Virtual > feature



Lawyers, in the form of avatars, attend a continuing legal education seminar offered by the SL Bar Association, a lawyers' group in Second Life.

American Bar Association. "Second Life provides this big sandbox and all the toys for users to build whatever they like. But if you see a house, a horse, it was very likely created by a user."

That said, the places to visit, or things to do in Second Life can seem endless. Within minutes, an avatar can "teleport" from such re-created places as the Great Wall of China, to the Louvre in Paris, and on to an inner tube floating along the Dead Sea, or a hike in the Andes Mountains.

Avatars can hold down jobs as dancers or bartenders in one of the many nightclubs created by fellow users. They can meet for a chat at a virtual café, take in a movie or concert with avatars from around the real world, plan or attend extravagant weddings, or even visit virtual brothels.

Reuters is among the news agencies with a bureau in Second Life, covering the activity there. And, while social scientists have tapped into virtual worlds as a resource for study, and numerous universities maintain a presence on Second Life as a potential medium for distance education, panel discussions, or alumni networking, some real-world companies and businesses — like IBM, Adidas, and Nissan — are using virtual worlds as a new form of advertising.

Duranske, who has an avatar named Benjamin Noble in Second Life, formed the SL Bar Association, which counts as members about 150 real-world lawyers, law students, or

people interested in becoming lawyers.

Some law schools maintain a presence there, like Harvard's Berkman Center for Internet & Society, which has held multiple classes in Second Life. And Silicon Valley's Santa Clara University Law School recently claimed to be the first law school to use Second Life as a recruiting tool when it held a workshop in January for prospective students on "Santa Clara Island."

While some real-world law firms have created outposts in Second Life, the virtual world has also seen Judge Richard A. Posner of the 7th U.S. Circuit Court of Appeals, in the form of an avatar resembling the jurist. Posner made a visit to "Kula Island" in 2006, to discuss his book, "Not a Suicide Pact: The Constitution in a Time of National Emergency."

"I find it interesting just for the merger of the real world and the electronic world," Posner said in a recent interview. "As these massive multiplayer online video games become more realistic, the line between the electronic world and the so-called real world becomes blurred."

A vast legal landscape

Along with providing users with the infrastructure and freedom to create just about anything they can imagine, Linden Lab grants users intellectual property rights in their creations.

Add a fairly vibrant economy to the mix (at press time, the Linden dollar exchange rate

was about 263 Lindens per one U.S. dollar) and lawyers have the fixings for an intriguing discussion point from which to explore the legal issues that can arise from the expansion of virtual worlds.

One of the many open legal questions that Posner finds interesting relates to taxation on income derived through virtual transactions.

"If you actually get real American dollars, and make a profit, that's taxable," Posner conceded. "But suppose you're just accumulating these Linden dollars and you haven't converted them to U.S. dollars. Is that taxable?"

"If I were selling something in France and getting paid in francs, I'd have to pay tax on them. Could Linden dollars be treated the same? ... The question would be: Is a profit in Linden dollars, itself, taxable the way it would be a foreign currency?"

Or, Posner said, "Suppose you have an avatar and you have a store, or something like that, and some other avatar comes along and destroys it. Can you sue that person?"

"When I gave my talk, there were a bunch of explosions. Some kind of cube would come across the audience and obliterate part of the audience," Posner said. "I don't think it actually injured any avatar, but there was certainly some disruption. I think Linden regulates that, but the question would be: What if someone else's avatar somehow destroys your property? It's a question. Do you have rights outside your contract with Linden?"

Besides attracting some users who are reportedly making a portion of their real-life living in Second Life — many of them doing so by creating and selling virtual services and items for fellow avatars, like parcels of land, and digital homes, clothes, gadgets, furniture, jewelry, and even hair, skin and sets of detachable genitals — this free-form social virtual world for adults has captured the attention of legal scholars and law practitioners looking in from the real world — especially those who focus on intellectual property.

“We like to see what’s new and hot in our field, and this is what’s new,” said Janet M. Garetto, a partner in the Chicago office of Nixon Peabody, where her practice focuses on IP counseling and litigation. “A lot of clients as of yet aren’t really thinking about it, but I’m sure more will become more aware of it, and find they can market and brand themselves in another place, where you have a different end-user.

“We’re interested as lawyers in this field, because we know our clients are going to have questions about it,” Garetto said. “Plus, it’s a fun and dynamic thing that’s going on.”

For many IP lawyers, like Richard S. Stockton, a partner in the Chicago office of Banner & Witcoff, thinking and talking with colleagues about these wide-ranging legal questions and how traditional legal principles could be applied to this immersive, interactive 3D setting serves as a helpful exercise for keeping their skills primed for a new wave of online worlds to come.

“It’s an academic exercise, in some ways, but we know it’s coming in the real world as well. People are analyzing these issues more and more,” Stockton said. “This has gone from this off-the-wall sort of thing for people to do in their homes after midnight, to something where there are real legal issues that are gradually emerging. ... We’ve created this virtual microcosm of the real world. Are the laws of the real world going to apply to the microcosm? When you actually see it come to practice, it’s really kind of neat.”

Many lawyers and scholars who follow the legal issues posed by the existence of Second Life or other virtual worlds — like *There*, and *Project Entropia*, or the many others that cater to a youth audience, like *Club Penguin*, or a newer teen version of *Second Life* — are seeing these game-like platforms as a harbinger

of the 3D Internet.

“Many people believe it is all but inevitable that we will see 3D content as part of the mainstream Internet presence for mainstream businesses in the relative future,” said Duranske, who serves as co-chair of the ABA’s Virtual Worlds and Multiuser Online Games Committee.

Formed in 2007, the ABA committee addresses issues arising from the popularity and expansion of virtual worlds, including issues related to virtual property rights, virtual securities trading, crimes committed in virtual worlds, taxation of transactions of virtual property, and the legal rights of participants.

“Attorneys are interested in this space because of what this space represents, and the likelihood that there will be a huge influx of users into this space in the next few years,” Duranske said. “Interfaces look more and more like reality to whatever degree they can, based on the technological limitations. ... As 3D content becomes something that’s technically feasible, we’re going to be interacting with our computers that way.”

To the extent that is true, wrestling with the peculiarities of such 3D online spaces is important to lawyers like J. Michael Monahan, a partner at Pattishall McAuliffe, where his practice focuses on trademarks, copyrights, and trade secrets involving software and information services, including video games.

“It may not require a whole new body of law, but you will need to sort through good old-fashioned IP law, contract law, and everything else, because it will be the setting,” Monahan said.

Stockton and many other lawyers interviewed for this story likened the scenario to the one that played out in the early 1990s, when the Internet was opened to commercial traffic and people questioned whether the laws of the real world would apply.

“It’s sort of a new frontier and a new dimension of online worlds, and it takes the Internet to the next level,” Stockton said. “*Second Life* started out as a gamer’s distraction and now, here we are a few years later, and I really do think it poses practical mainstream legal questions that are truly untested, just in the same way that the *World Wide Web* and domain name laws, were untested back in the early 1990s.”

Evan D. Brown, a Chicago associate at Hin-

shaw & Culbertson and the author and publisher of *InternetCases.com*, a blog that tracks developments in Internet and technology law, agreed that virtual worlds like *Second Life* provide a unique context from which to explore the issues.

“At a fundamental level, it’s still just communication over the Internet with others. But the way that communication is embodied more closely resembles the real world,” Brown said. “It’s so much more interesting to think about the types of things that can arise when you’re dealing with anthropomorphic features in a game, rather than lines of text on a screen. I think that’s why it is, perhaps, more intriguing than other Internet issues that have arisen before.”

Questions abound

Using *Second Life* as the context, lawyers said, the activity among users gives rise to a host of legal questions, like one big one: What is “virtual property”?

“It’s the most interesting puzzle,” Duranske said. “In property law, which is so old, it’s pretty rare to find something that’s a completely new area.”

Indeed, said the lawyer who holds himself out as Monday Beam in *Second Life*, these virtual items and services amount to bits and bytes on a computer.

“People are buying virtual property, which is fictional. It’s not a tangible, physical thing,” the lawyer said. “But it still has value. People have found value in virtual objects. That translates to real-world, tangible value in U.S. dollars, or euros or yens, or whatever else you’re using.”

As such, Duranske said, if an avatar purchases a virtual hat with real money, “it hasn’t been decided, but you certainly have an argument that you might in fact own a new kind of property that property law hasn’t really addressed yet.

“We have the same intuitive sense that if somebody pays \$10 for a virtual car, that they have something — they own something. And, really, the law hasn’t said what that is yet,” Duranske continued. “I expect that will be tested at some point.”

Now take the example of a knockoff of a Gucci purse for avatars.

“It’s a little bit abstract when you think about, ‘Okay, I’m going to buy a Gucci purse

Virtual > feature

in Second Life,” said Caroline L. Stevens, a partner at Leydig, Voit & Mayer, whose IP practice focuses on trademarks and copyrights. “People will buy it, because some people are brand-conscious, and they want that. But, it’s not a real Gucci purse that you can use, except in a virtual world.”

That moves into the hot topic of trademark and copyright infringement emerging in the virtual setting.

“Can you take a trademark and start selling counterfeit virtual goods?” Nixon Peabody’s Garetto said. “In the real world, you might have to deal with counterfeit Gucci purses on eBay. Likewise, in Second Life, you can make money off what’s going on there. You can be profiting off the use in an unauthorized way.”

Virtual consumers can have a field day shopping for clothes and accessories to spruce up their avatars in Second Life, where unauthorized use of brand names, logos and designs runs rampant, Duranske said.

“I am certain that you can buy Harry Potter outfits for your avatar that match the Warner Brothers movie look, from anywhere from five to 10 stores, and none of which are owned by Warner,” Duranske said. “That’s true for Nike, Gap, Gucci, Ray-Ban ... and you’ll find many hits for all these brands.”

That raises another question, Garetto said, “How on Earth do you police this new world?”

For now, Leydig Voit’s Stevens said: “Trademark owners have yet to fully adjudicate cases involving trademark use in virtual worlds, perhaps because the issues are so murky and damages are uncertain. Are you going to spend a million dollars on a lawsuit that you might lose, to stop damages amounting to \$100 a day in Second life?”

However, Stevens added: “As virtual worlds become more popular, the day may come when trademark owners decide to try to address their concerns over trademark misuse in a court of law.”

Garetto, whose curiosity led her to just one visit to Second Life, offered this prediction shared by many other lawyers interviewed for this story.

“In many ways, what will probably come down in a lot of these issues may be similar to other Internet-related ideas,” she said. “When people first started improperly using trademarks in search engines, domain names, any

sort of Internet content, a new body of law had to be developed based on fundamental trademark or copyright principals. This is one more extension to that: How are those regulations and cases, and bodies of law that have developed, now going to develop?”

More recently, virtual services have become the subject of actual federal trademark registration applications. And, unlike trademarks used on websites to market real-world services, the sought-after marks on services that only exist in the virtual world, but could be enforced in the real world, is a unique development that lawyers like Banner & Witcoff’s Stockton find fascinating to watch.

“All trademark rights depend on use. If you don’t have use, you don’t have trademark rights,” Stockton said. “Is ‘use’ in the virtual world sufficient to establish trademark rights?”

Apparently so, in the eyes of the U.S. Patent & Trademark Office.

Alyssa LaRoche of Rutherford, N.J., is believed to be the first to obtain federal trademark registration of her Second Life avatar, Aimee Weber, as a part of her virtual design business known as Aimee Weber Studio.

That real-world registration, Stockton pointed out, grants a presumptive nationwide right of exclusivity to use the mark, which gives rise to all sorts of new issues when that right is put into the context of the virtual world.

“Say you have someone in China who sets up shop in Second Life and is using the same trademark name,” Stockton said. “Are you going to be able to stop them with your registration? Is Second Life encompassed within ‘nationwide?’”

Another novel question arises if she were to file the trademark registration with U.S. Customs & Border Protection, in an effort to prevent the importation of counterfeit goods.

“Let’s say somebody in China starts making that kind of clothing, or something that is a confusing knockoff to it, and selling it in Second Life. Should there be customs enforcement in Second Life?” Stockton said. “You have the issue that you can file a U.S. trademark registration with customs, and at the border posts they will monitor and look for counterfeit goods. ... What are they going to do? Are they going to have Second Life avatars dressed as customs officials?”

It’s those sorts of questions that keep the wheels turning for IP lawyers like Garetto.

Along with jurisdictional issues in a virtual world where the people behind the avatars are interacting and conducting business from places around the globe, could issues involving rights of publicity be raised?

“In the real-world setting, you as a famous person have rights in your name and, perhaps, things that are associated with you because you’re famous,” Garetto said. “Could a person’s avatar become so famous that you could do something to violate or defame their right of publicity?”

Virtual world vs. real world

In settings where virtual creations can collide with reality, the legal issues can stretch beyond those related to intellectual property.

Note, for example, the divorce of a British couple who reportedly married in a lavish virtual wedding ceremony held within Second Life — and in a real-life wedding in 2005 — after the bride claimed she caught her husband’s avatar having sex with a virtual prostitute.

Some lawsuits over activities stemming from the virtual world of Second Life have made their way to real-world courts.

In one of the first lawsuits involving virtual property, a Pennsylvania lawyer in 2006 sued Linden Lab in the Chester County, Pa., Court of Common Pleas, *Bragg v. Linden Research Inc.*, claiming that the service provider froze about \$8,000 worth of his virtual assets and refused to reimburse him. Linden Lab claimed the action was an appropriate response to a terms of service violation, saying Bragg acquired his Second Life property in an unsanctioned manner by taking advantage of a loophole in their code. The case was settled, and Bragg was allowed back in with his account restored.

In a 2007 dispute, the creator of “SexGen Platinum,” a software program that enables avatars to engage in sexual acts, filed a copyright infringement lawsuit in the U.S. District Court in Tampa, Fla. The suit, *Eros, LLC v. John Doe*, which was filed against a Second Life user for allegedly copying and selling the code to the software program, was ultimately settled out of court.

Stephen S. Wu, a partner in the Los Altos, Calif., office of Cooke Kobrick & Wu whose avatar, Legal Writer, serves as president-elect of the virtual bar association in Second Life,

sees a profound future for virtual worlds.

“We will be using virtual worlds as an extension of our physical space — to conduct business, to conduct social networking and to practice law,” Wu said. “I can foresee people having business meetings, or contract negotiations in virtual spaces. I can foresee people having court proceedings that use virtual spaces. I don’t know that Second Life is the place where that will occur, necessarily, but

other 3D applications will arise.”

If online social virtual worlds and games are the precursor to the mainstream 3D Internet, Hinshaw’s Brown said he could only imagine the possibilities for the distant future, when lawyers could find themselves puzzling through worlds where hologram technology, tactile suits, and even interfacing with a machine merely by thinking — via a microchip implanted in the skull — could be

the setting.

“These virtual worlds have been able to gain popularity, in part, because of things like more people having broadband connections, more powerful computers, and more memory, more storage,” Brown said. “I wouldn’t be surprised if these types of things really start getting into the realm of what we would think of today as science fiction.” ■