

SLART® ENTERPRISES

October 9, 2008

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

Re: Richard Minsky v. Linden Research, Inc. et al., 08-CV-819 LEK/DRH

Dear Judge Homer,

Defendants falsely claim they did not have to forward the Notice because the infringing use no longer existed in SL. The infringing use continues to exist in SL, whether in that copy or others sold from it. Even if it had ceased, Linden would still have to send the Notice. Defendants know quite well how transactions take place in SL. The infringing use creates copies of itself on demand for anyone who wants to buy one [Exhibit A].

If an object is sold to a user, Linden knows it, and knows who has received it, but I do not. Linden keeps records of transactions between users [Exhibit B]. Defendants are preserving evidence, including the transaction data of all copies of the infringing use sold or given, at any location, from the date of its creation. The “SLart Show Viewer” appears to have been created in October, 2007, and likely has been selling copies for a year. Because I do not yet have access to Defendants’ data to search for transactions of “slart” myself, I am restricted in my ability to police my mark.

Defendant falsely states there is no danger of goods being transferred to an unknown person. In SL, an object’s owner controls whether an object will be included in a Search result [Exhibit A]. Objects are easily hidden. The owner simply does not check “Show in search.” There may be copies of the infringing use all over SL.

Defendants repeat false claims as “facts” from their failed motion to vacate the TRO. My Response to that [Dkt. 20], and the accompanying exhibits, are incorporated herein by reference.

Defendants state “As a matter of compromise, Linden agreed to follow a take-down procedure for one form of the mark, namely SLART where all the letters appear in a uniform size, font and color such that the SL portion is not differentiated from the balance of the mark” [Dkt. 34 p.2]. Nowhere in the TRO does it state “such that the SL portion is not differentiated from the balance of the mark.”

What I got in Judge Kahn’s Order that was not in Defendants’ proposal [Dkt. 34 Exhibit D] was

my Notice, preservation of Data, and expedited Court procedures. To get these I compromised to have the court decide what typographic uses of “SLART” constitute infringing uses in cases where the font, size and color are different, not where they are the same. It’s not just my self-proclaimed expertise in typography that I rely on. I submitted the examples [Dkt. 30, Ex. F] to the pre-eminent expert typographer Robert Bringhurst, author of *The Elements of Typographic Style*, to verify my opinion [Exhibit C].

I disagreed with ¶3 of the proposed TRO in order to save the Court’s and my time from frivolous rejections of the mark by the Defendants. Defendants admit that the SLART registration with the USPTO included a specimen with “SL” a different color than “ART” [Dkt. 15 Ex. J]. But they want the Court to spend time verifying that an unauthorized use exactly the same would be infringing. Registration as a Standard Character Mark includes the characters “SLART” in any font, size, color, or style [Dkt. 6 Ex. B]. Defendants admit that users of SL know that SLart, SLArt and SLART refer to my uses. They fabricate imaginary reasons for my initial objection to ¶3. Please read the real reasons in my Response to Def. Proposed TRO [Dkt. 34 Exhibit C, ¶3].

Defendants falsely state “Plaintiff has admitted that where SLART is in a form which would likely be pronounced “ess ell art,” there is no infringement” [Dkt. 34, p. 5]. SLart as one word may be pronounced “slart” no matter what combination of fonts, styles, colors, sizes, or case is used. Any such use infringes my trademark, *especially* when SLart may also be read as “essellart,” creating a double entendre [see Dkt. 20 p. 11-12]. They refer to my USPTO Response [Dkt. 15 Ex. L]. I state, after viewing all the specimens found by the USPTO Examining Attorney, that all were “instances of “SL Art” and “sl-art.” That is not the same thing as SLART.” With a space or hyphen, “sl art” or sl-art” will *not* be pronounced “slart.” There is no double entendre then. Those two specific forms are non-infringing uses.

Because of my widespread use of SLART in the SL world (and outside it), the term “SLART” as one word has gained additional distinction and is seen to represent my activities, as Defendants admitted in Court on September 10. Judge Kahn asked if they notified a user that it was an

infringement of SLART, when they took down an infringing use. Defendants claimed that they did not notify their user because it is widely known in SL that I am enforcing my trademark. Even if it is widely known, infringers must be served a proper Notice.

The Order requires Linden to forward the Notice to User and to tell me exactly when that was done. If Defendants fail to execute this obligation under the TRO, then the next time I discover the same user infringing I will be unable to prosecute.

Upper and lower case letters in the same size font are the same size: AbCdEfGhIjklM. Defendants' attempt to redefine the meaning of "size" to include "case" with respect to type is absurd. What would they say about ... **SLart** ...?

A search in SL for "SLART" gives results with any combination of Upper and lower case [Dkt. 30, Ex. C]. That result brings a use such as "SLart" to a person searching for my SLART activities. The degree of similarity of SLart to SLART is effectively identical. The infringing use is a product close in proximity to mine. This creates confusion among a wide range of sophisticated and unsophisticated consumers [cf. Dkt. 10 ¶19, EX A & B]. The SLART brand has a stellar reputation [Dkt 6 ¶¶14-22]. Since Defendants failed to forward my Notice, and have not yet provided transaction data, we don't yet know about actual confusion or the junior user's good faith. Linden's obstruction of my attempts at policing makes it impossible to complete the Polaroid factors, and contributes to the infringement.

I am not asking Linden to police my mark; but to stop obstructing the policing of my mark. That is what the TRO is about. They now claim I can send the Notice as an Instant Message [IM] or Notecard to the user in SL. This was tried and failed [Dkt. 6, ¶25]. These are not reliable systems of service. IMs are often not delivered. There is no proof of delivery for an IM. Notecards can be declined, or disappear in a glitch. Even if I could contact the user directly, Linden consented to serve my Notice per the TRO. There are no valid grounds in this instance for their non-compliance.

Respectfully,

Richard Minsky

EXHIBIT A

Detail of screenshot in Second Life® virtual world, September 18, 2008



The check boxes indicate parameters set by the user who created this object. Here “Show in search” is enabled, “For Sale” is enabled and the Price is set at L\$ 1250 (Linden dollars [L\$ are the currency in SL]). The round selection buttons below the price indicate whether you are buying this Original object (you then own it and can take it, or leave it where it is), a Copy of the object (it replicates itself and transfers the copy to you) or the Contents of the object (whatever is in the Contents, such as other objects, images, notecards, scripts of code). This one is set to dispense a Copy of itself. The bottom line of check boxes tells you what you can do with the object after you buy it. This one is set that you cannot Modify it, you cannot make a Copy of it, but you can Resell it or Give it away (transfer it).

EXHIBIT B

Examples of Transaction Data from the Second Life[®] Virtual World, January, 2007

ID	Type	Description	Debit	Credit	Time	Resident/Group
1	1.63E+08	Classified Charge	SLART GALLERY :: FINE ART	160	2007-01-25 14:06:13	SYSTEM
2	1.62E+08	Payment	Condo Rental Box Tamarck	500	2007-01-25 06:36:17	cinda Hoodoo
3	1.6E+08	Currency Exchange	Currency Exchange - order #1360747	6000	2007-01-22 14:45:51	Currency Linden
4	1.52E+08	Object Sale	Industrial Strength Mandala #13	150	2007-01-15 00:40:50	Xander Ruttan

1. Classified Advertisement within Second Life for the SLART GALLERY (paid to Linden Research, Inc. "SYSEM")
2. Rental Payment for one of the SLART Galleries (paid to cinda Hoodoo, Owner of Skye Condos).
3. Purchase of Linden Dollars, the currency in Second Life (paid to Linden Research, Inc., "Currency Linden")
4. Purchase of Artwork titled Industrial Strength Mandala #13 (paid to the artist, Xander Ruttan)

EXHIBIT C

Opinion of pre-eminent expert in typography Robert Bringhurst on the description of size, font, and color in the examples in Dkt. 30, Ex. F. Mr. Bringhurst is the author of the classic work in the field of Typography, *The Elements of Typographic Style*.

From: "Robert Bringhurst"
To: "Richard Minsky"
Subject: RE: Typographic Description
Date: Mon, 29 Sep 2008 13:22:15 -0700

Dear Richard,

All your examples are, indeed, instances of a single word in a uniform size, font, and color.

Best,
Robert