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18 THE UNITED STATES DISTRICT COURT
 19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 AMARETTO RANCH BREEDABLES, LLC, a
 21 California Limited liability corporation,
 22 Plaintiff,
 23 v.
 24 OZIMALS, INC., an Alabama corporation.
 25 Defendant.

CASE No.: CV 10-5696 CRB

**NOTICE OF MOTION AND
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION**

[DECLARATIONS OF MICHAEL D.
 LISI, JAMES W. STIBBARDS,
 JOANNE MCCHESENEY, AND
 [PROPOSED] PRELIMINARY
 INJUNCTION FILED HEREWITH]

Date: January 11, 2011
 Time: 1:00 P.M.
 Judge: Hon. Charles R. Breyer
 Courtroom: 8, 19th Floor
 Complaint Filed: December 15, 2010

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE
3 NOTICE THAT on January 11, 2011 at 1:00 p.m. in Department 8 of the above Court, Plaintiff
4 Amaretto Ranch Breedables, LLC will and does hereby move this Court for a preliminary
5 injunction against Defendant Ozimals, Inc. and Linden Research, Inc.

6 By its Motion, Plaintiff seeks to enjoin Defendant from enforcing current and serving
7 additional “take down” notices pursuant to the Digital Millennium Copyright Act alleging that
8 Plaintiff is infringing Defendant’s purported copyrights on the features of its virtual animals,
9 and Linden Research from acting upon any such notices.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION**

12 Although Defendant Ozimals, Inc. (“Ozimals” or “Defendant”) wishes the Court and the
13 residents of Second Life to believe that Plaintiff Amaretto Ranch Breedables, LLC (“Amaretto”
14 or “Plaintiff”) is the wrongdoer here, the truth is actually far different. To the contrary, and as
15 Ozimals well knows, Amaretto’s virtual horses do not infringe any alleged copyright on
16 Ozimals’ virtual bunnies, and thus, it is actually Ozimals who is in the wrong. Indeed,
17 Ozimals’s conduct has not been driven by its proclaimed desire to protect its intellectual
18 property, but rather by its desire to force its competitor, Amaretto, out of the market for virtual
19 breedable animals in Second Life. Indeed, rather than spur its programmers on toward
20 developing competing products, Defendant instead chose to turn its lawyers loose, sending
21 cease and desist letters to other developers of breedable animals and, ultimately, filing not one
22 but two DMCA take-down notices with Linden Research, Inc. (“Linden” or “Linden Labs”)
23 alleging infringement upon its supposed copyright in the features inherent in virtual, breedable
24 animals. Fortunately, the Digital Millennium Copyright Act (“DMCA”) provides a remedy for
25 such anti-competitive conduct.

26 In this instance, Amaretto should be granted a preliminary injunction preserving the
27 status quo and preventing Defendant from seeking the removal of, and Linden Research from in
28 fact removing, Plaintiff’s products from Second Life, until Plaintiff’s claims are resolved. As

1 this Court has recognized, “software protection does not apply to functionality.” Order (e-
2 docket 29), at 4, citing 17 U.S.C. § 102(b). Despite that, Defendant has repeatedly and
3 aggressively asserted its fictional copyrights to the functional traits common among virtual,
4 breedable animals. The obviously meritless nature of Defendant’s allegations betrays its
5 strategy: to create the impression that Plaintiff’s product is infringing and thus in danger of
6 being removed from not just the Second Life market, but Second Life entirely. In other words,
7 Defendant seeks to make Plaintiff’s product a “risky” investment while, simultaneously,
8 invoking the imprimatur of a “copyright” for its own product, thus making it the “safe” one.
9 Such irreparable harm, coupled with the meritless legal claim on which Ozimals has attacked
10 Amaretto, warrant a preliminary injunction. Plaintiff’s Motion should be granted.

11 II. STATEMENT OF ISSUES TO BE DECIDED

12 Whether this Court should issue a preliminary injunction barring Defendant from
13 enforcing “take down” notices pursuant to the Digital Millennium Copyright Act alleging that
14 Plaintiff is infringing Defendant’s purported copyrights on the features of its virtual animals
15 and Linden from acting upon them.

16 III. STATEMENT OF FACTS

17 A. The Online World of Second Life

18 Second Life is a persistent 3D virtual world created by the company Linden Research,
19 Inc. Declaration of James W. Stibbard (“Stibbard Decl.”), ¶ 6. That means that, from a users
20 perspective, Second Life is an environment existing on the Internet that the user can “enter” by
21 downloading the client program, known as the Viewer. *Id.* at ¶ 7. A person may participate in
22 Second Life’s virtual community by becoming a “Resident,” and is then represented in Second
23 Life by an Avatar. Through the Avatar, a person can do such things as socialize with other
24 Residents, travel throughout the virtual world, and buy and sell virtual goods and services using
25 Second Life currency, the Linden dollar, which can be exchanged for U.S. dollars. *Id.* at ¶¶8, 9.

26 B. Programming in Second Life

27 From a software developer’s perspective, Second Life is a programming platform
28 running on multiple servers, creating the Second Life Grid. *Id.* at ¶ 6. A developer can create

1 3D objects, made up of primitives or “prims,” which can be introduced to Second Life using a
2 3D rendering tool integral to the Second Life platform. *Id.* at ¶ 10. Prims are based on
3 geometric shapes that are then decorated by textures, which are also created by the developer.
4 *Id.* The end-result is displayed, or rendered, in the virtual world by the 3D renderer that is also
5 integral to the Second Life platform. *Id.*

6 A developer adds functionality¹ (i.e., behaviors) to the objects he or she has created
7 using Linden Scripting Language (“LSL”), which is a programming language copyrighted by
8 Linden and universal to objects in Second Life. *Id.* at ¶ 11. Script languages like LSL are
9 distinct from general-purpose coding languages (such as C# and C++) in that they are specific
10 to a given application, in this case Second Life. By using LSL, Linden seeks to limit errors at
11 the expense of the flexibility and variability of the script. *Id.* at 12.

12 C. Virtual Animals in Second Life

13 Just as Second Life contains virtual people – the Avatars – it also contains virtual
14 animals. Virtual animals may be “breedable,” meaning that they are scripted to loosely mimic
15 the lifecycle of a real animal: i.e., they eat to thrive and grow, sleep to recover energy, and
16 reproduce. *See* Declaration of Jason Jazdzewski (“Jazdzewski 1 Decl.”) at ¶ 11, attached as Ex.
17 A to the Declaration of Michael D. Lisi filed herewith (“Lisi Decl.”), at ¶ 2. As part of that
18 reproduction scheme, each member of a pair of breedable animals is scripted to have and pass-
19 on certain “genetic traits” to its offspring, thereby creating genetic variation among that virtual
20 species.

21 The concept of “breedables” was well known in Second Life long before either
22 Ozimals’s or Amaretto’s products were in existence. As explained in more detail in Amaretto’s
23 TRO Application, these included PlantPets, Sion Chickens, HunnyBunny, Petables’ Turtles,
24 and PinkyPigs. Jazdzewski 1 Decl., ¶ 13. Each variation on the breedable template required
25 some sort of “sustenance,” had a range of physical attributes (such as fur color), demonstrated

26
27 ¹ Functionality describes an objects internal behavior. How an object interacts with the external
28 Second Life environment is governed, at least in part, by a physics simulation program that is
part of the Second Life platform and thus common to all objects in Second Life.

1 an ability to “grow,” and “reproduced” in a given manner on a given interval. *Id.*; see
2 Declaration of Joanne McChesney (“McChesney Decl.”), filed herewith, ¶¶ 9-15.

3 **D. Of Chickens and Bunnies**

4 The forerunners in creating virtual, breedable animals in Second Life was Sion Labs,
5 whose “Sion Chicken” was released on January 16, 2008. McChesney Decl., ¶ 7. The Sion
6 Chicken is a sculpted primitive possessing a unique identifier, and has features such as tail
7 color, wing color, gender, race, and egg color, all of which are “genetic” traits. *Id.* at ¶ 9. It
8 passes on its traits based on a combination of each parent’s two alleles – one known to the
9 owner, one hidden from them. *Id.* at ¶ 10. The Sion Chicken displays “stats” that allow the
10 owner to monitor hunger, life span, fatigue, and reproductive status measured on a percentage
11 basis from 0% to 100%; it sleeps when its fatigue reaches 100% and dies when its hunger
12 reaches 100%. *Id.* at ¶¶ 10, 14, 15. It reproduces once mature and then produces an egg to
13 breed, which occasionally produces genetic defects. *Id.* at ¶¶ 14, 15. It can also interact with
14 Residents, can be “boxed” and added to its owner’s inventory, and be commanded to return to
15 its “home” with the use of a “home” button. *Id.* at ¶¶ 16, 17.

16 Two years after Sion introduced its chicken, Ozimals introduced its bunnies to Second
17 Life. Like the Sion Chicken, the Ozimals bunny is a sculpted primitive possessing a unique
18 identifier which has features such as fur color, eye color, and ear type, all of which are
19 “genetic” traits. Declaration of Candace Sargent Filed in Opposition to Plaintiff’s Application
20 for a TRO (“Sargent Decl.”),² ¶ 15-16. It passes on its traits based on a combination of each
21 parent’s two alleles – one known to the owner, one hidden from them. *Id.* at ¶ 17. The Ozimals
22 bunny displays “stats” that allow the owner to monitor hunger, life span, fatigue, and
23 reproductive status measured on a percentage basis from 0% to 100%; it sleeps when its fatigue
24 reaches 100% and dies when its hunger reaches 100%. *See e.g., id.* at ¶¶ 16, 19, 25, 31, 32, 36.
25 The Ozimals bunny reproduces once mature and then produces a nest to breed, which
26 occasionally produces genetic defects. *See e.g., id.* at ¶¶ 18, 20, 21. It can also interact with

27 _____
28 ² A copy of that declaration is attached as Ex. B to the Lisi Decl.

1 Residents, can be “boxed” and added to its owner’s inventory and be commanded to return to
2 its “home” with the use of a “home” button. *See e.g., id.* at ¶¶ 35, 40. Yet, Ozimals now claims
3 to have copyrighted these features and others its shares with its predecessor, the Sion Chicken.

4 **E. Amaretto’s Horses**

5 On or about October 26, 2009 – prior to the release of the Ozimals bunny and without
6 knowledge of Ozimals’s project – Amaretto wrote a “a food script” in the Second Life
7 environment, allowing “a newly born” virtual animated animal to eat “virtual food,” grow into
8 different stages of its life if it continued to eat the “virtual food,” and die if it was not fed the
9 “virtual food.” This was the beginning of Amaretto’s development of the Amaretto Horse
10 Product Line which includes, among other things, an Amaretto breedable horse and the virtual
11 food (sold in various quantities) from which it sells copies and transfers the rights to the
12 product to other users in Second Life. Jazdzewski 1 Decl., ¶ 12, and Ex. A thereto.

13 **F. Defendant’s Wrongful Filing of the DMCA Notifications**

14 On or about November 2, 2010 Ozimals sent Plaintiff a cease and desist letter alleging
15 that Ozimals had a “copyright” for its virtual bunny; that the Amaretto’s virtual horse was a
16 “virtual clone” of Ozimals’ virtual bunny; and that Amaretto’s products infringed Ozimals’
17 alleged copyrighted products. *See* Complaint (e-docket 1), Ex. 3. Amaretto immediately
18 responded to Ozimals, pointing out the unoriginal and functional nature of Ozimals’s claimed
19 copyrighted work. Plaintiff also clarified that it began scripting the food for its horses well
20 before the release of Ozimals’s bunnies. *Id.* at Ex. 4. Ozimals responded by sending a DMCA
21 take down notice to Linden largely repeating the allegations in its letter. *Id.* at Ex. 5

22 Pursuant to the DMCA, Amaretto submitted a counter-notice to Linden, then filed the
23 instant Complaint and sought a TRO. Despite its knowledge that its claimed copyright was
24 improper and the pendency of the TRO proceedings, Ozimals nonetheless submitted a second
25 DMCA notice to Linden on December 20, which was nearly identical to the first. *See* “Notice”
26 submitted by Defendant to this Court on December 20, 2010 and e-docket 22. Simultaneously,
27 Ozimals filed an action against Amaretto for alleged copyright infringement in the Northern
28 District of Alabama. *See* Lisi Decl., Ex. C. (“Alabama Complaint”).

IV. LEGAL STANDARD

1 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed
2 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
3 that the balance of equities tips in his favor, and that an injunction is in the public interest.”
4 *Winter v. Natural Res. Defense Council, Inc.*, --- U.S. ----, 129 S. Ct. 365, 374 (2008). As the
5 Ninth Circuit has found, the four *Winter* factors may be measured on a sliding scale, such that
6 “serious questions going to the merits” and a hardship balance that tips sharply towards the
7 plaintiff can support issuance of an injunction, so long as the plaintiff also shows a likelihood
8 of irreparable injury and that the injunction is in the public interest.” *Alliance for Wild Rockies*
9 *v. Cottrell*, 622 F.3d 1045, 1053 (9th Cir. 2010). Plaintiff has more than satisfied this standard.
10

V. ARGUMENT

A. Amaretto Is Likely to Succeed on Its 512(f) Misrepresentation Claim

11
12 In the Second Cause of Action of its Complaint, Amaretto alleges that Defendant
13 wrongfully filed its DMCA Notification, and therefore, Defendant is liable under 17 U.S.C. §
14 512(f)³ for materially misrepresenting that Amaretto is infringing Ozimals’s alleged copyright.
15 The Ninth Circuit has held that, to show material misrepresentation and prevail on a 512(f)
16 claim, a plaintiff must demonstrate that it has not infringed, and that the defendant had “actual
17 knowledge of misrepresentation on the part of the copyright owner.” *Rossi v. MPAA*, 391 F.3d
18 1000, 1005 (9th Cir. 2004) (internal citation omitted).
19

20 Even at this nascent stage of the litigation, there is ample evidence that Defendant made
21 material misrepresentations in its DMCA Notice and that a preliminary injunction is
22 appropriate. First, Plaintiff is likely to prevail on its claim for several reasons: Defendant does
23 not hold a valid copyright and thus cannot claim infringement; the material for which
24 Defendant claims to have a copyright is either functional or unoriginal and thus not
25 copyrightable; and Defendant knowingly and intentionally misrepresented that Ameretto was
26

27 ³ Although the Second Cause of Action specifically references the original DMCA notice, the
28 amended DMCA Notice suffers from the same defects and is also a basis for liability. Plaintiff
will, if needed, seek leave to amend its Complaint to reflect this.

1 infringing its copyright when it filed the DMCA Notifications.

2 **1. Defendant Does Not Have a Valid Copyright Claim**

3 “To establish a successful copyright infringement claim, a plaintiff must show that he or
4 she owns the copyright and that defendant copied protected elements of the work.” *Cavalier v.*
5 *Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (“*Cavalier*”). Here, that inquiry stops
6 with the first element because Defendant does not hold a valid copyright. Even if a valid
7 copyright were found – at best, in the actual code comprising the Ozimals bunny – Defendant
8 has not alleged infringement of any “protected element” of Defendant’s. Thus, any effort by
9 Defendant to prove infringement necessarily fails.

10 **a) Defendant Does Not Possess a Valid Copyright**

11 First, and perhaps most damning to Ozimals’ infringement claim, Ozimals has failed to
12 identify a valid copyright. In her declaration in opposition to Amaretto’s TRO Application, Ms.
13 Sargent stated that she was “informed on December 16, 2010 that the U.S. Copyright Office has
14 approved Ozimals’ application for copyright protection of the scripts, or software code, for the
15 Ozimals bunny and that the Copyright Office has assigned copyright registration number
16 TX0007151661 to Ozimals work.” Sargent Decl., ¶ 4. However, a search of the Copyright
17 Office’s public records shows that Copyright Registration TX0007151661 actually belongs to a
18 2008 book by Tosca A. Lenci entitled “A Child’s Book of Light.” *See* Lisi Decl., ¶ 6 & Ex. D.
19 In fact, a search of the public records turned up no copyrights for Ozimals bunnies, or
20 copyrights issued to Ozimals or Ms. Sargent. *See* Lisi Decl., ¶¶ 7-8 & Ex. E.

21 Similarly, in the Alabama Complaint, Ozimals alleges that “Ozimals applied for
22 registration of the scripts for its virtual animal software, and, effective November 29, 2010, the
23 Copyright Office approved its application and granted Certificate of Registration No.
24 TX0007251661 to Ozimals, for its work entitled Ozimals Animals Scripts.” *See* Lisi Decl., Ex.
25 C at ¶ 17. Yet a search of the Copyright Office’s public records for that registration number –
26 which is different than the one offered to this Court – turns up no records whatsoever with that
27
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1 registration number or for Ozimals Animals Scripts. *See* Lisi Declaration, ¶ 7, Ex. E.⁴ Simply
 2 put, according to the Copyright Office public records, Ozimals does not have a registered
 3 copyright for its breedable bunny software, notwithstanding its representations to the contrary.⁵
 4 It thus cannot satisfy the first element of copyright infringement.

5 **b) Defendant Does not Allege Infringement of any “Protected
 6 Elements” of any Alleged Copyright**

7 Even if Ozimals did have the copyright it claims, it still cannot prevail. In analyzing
 8 infringement, the Court compares the alleged infringing work with the protected elements of the
 9 copyrighted work in or to determine whether the two are “substantially similar.”⁶ To discern
 10 what is “protected” for the purpose of this comparison, the Court “filters out” unprotectable
 11 elements of the alleged copyright. *See Cavalier*, 297 F.3d at 822.

12 As applied to computer software, it is only the writing and not the function that is
 13 protectable by copyright. United States Copyright Office, Circular 61. Specifically, “those
 14 elements of a computer program that are necessarily incidental to its function
 15 are...unprotectable.” *Computer Assoc. Int’l v. Altai, Inc.*, 982 F.2d 693, 705 (2d Cir. 1992)
 16 (“*Altai*”) (applying a similar filtration analysis). In addition, copyright law does not protect
 17 expression that is standard or commonplace in the computer industry, or expressions that are
 18 based on technical requirements or hardware constraints. *See, e.g., Apple*, 35 F.3d at 1444,
 19 1445; *Altai*, 982 F.2d at 710. It follows that copyright protection is highly limited “when an
 20 idea and a particular expression of that idea are so inseparable that protecting the expression
 21 would necessarily confer a monopoly on the idea because only a limited number of ways exist
 22 to express the idea.” *Interactive Network, Inc. v. NTN Communications, Inc.*, 875 F. Supp.

23 ⁴ Ozimals did not attach the alleged copyright to its papers here or to the Alabama Complaint.

24 ⁵ Plaintiff is aware that properly filed copyright application may serve as a basis for an
 25 infringement claim. *See Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 621 (9th
 26 Cir. 2010). Defendant, however, has not alleged an application – Defendant has repeatedly
 claimed to have a registered copyright that Plaintiff has infringed. *See e.g., Sargent Decl.*, ¶ 4;
 Alabama Complaint, ¶ 17.

27 ⁶ In fact, if the allegedly copyrighted material is entitled to only “thin” protection, the Court will
 28 apply a more rigorous standard and look to whether or not the two works are “virtually
 identical.” *Apple Computer v. Microsoft Corp.*, 35 F.3d 1435, 1439, 1447 (9th Cir. 1994)
 (“*Apple*”). Defendant cannot meet either standard.

1 1398, 1403 (N.D. Cal. 1995).

2 Little if anything remains of Defendant’s alleged copyright after the unprotected
3 elements are filtered out. Even before addressing the particularities of software copyrights,
4 Defendant’s alleged copyright fails the threshold test of originality. *See* 17 U.S.C. § 102(a). As
5 shown by the McChesney Declaration, an examination of the Sion Chicken, just one of the
6 virtual, breedable animals that preceded Defendant’s in Second Life (let alone elsewhere),
7 reveals that many, if not all, of the characteristics displayed by the Ozimals bunny pre-date it.
8 *See e.g.* McChesney Decl., ¶¶ 7-17, compare Sargent Decl., at ¶¶ 15-40; *see Aurora World, Inc.*
9 *v. Ty Inc.*, 719 F.Supp.2d 1115, 1137 (C.D. Cal. 2009) (“*Aurora*”) (“to the extent aspects of
10 Aurora’s animals were not original, but found in prior stuffed animals, they cannot be
11 considered protectable elements.”)

12 Moreover, Defendant’s own description of its copyright dooms any claim of
13 infringement. Indeed, Defendant has attempted to extend protection to the “concept of
14 breedables” and admits as much in its blog posted on December 16, 2010 when it claims that
15 “the Amaretto horse product was a near complete clone of the Ozimals concept of a
16 breedable...[which] are protected by copyright.” (Emphasis added). *See* 12/16/10 Ozimals
17 blog, attached as Ex. F to Lisi Decl., ¶ 9. Protecting a “concept” is beyond the bounds of
18 copyright law. *See* 17 U.S.C. § 102(b). Even when attempting to be more specific in its
19 description of its copyright, Defendant’s cease and desist letter merely collected a laundry list
20 of features and functions inherent in the concept of virtual animals. *See e.g.*, Complaint (e-
21 docket 1), Ex. 3.

22 “[S]imilarities derived from the use of common ideas cannot be protected; otherwise,
23 the first to come up with an idea will corner the market.” *Apple*, 35 F.3d at 1443. There can be
24 no serious dispute that Defendant does not have a copyright on the idea of virtual, breedable
25 animals. *See Aurora*, 719 F.Supp.2d at 1136 (“no copyright protection can be afforded the idea
26 of producing plush toys that resemble particular animals”). By the same token, in attempting to
27 mimic the appearance and behavior of a real animal there are necessarily certain features that
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1 will be inherent in any expression of that idea.⁷ For example, animals will likely have fur,
2 which may have color; thus those physical characteristics are unprotected. *See Satava v. Lowry*,
3 323 F.3d 805, 810 (9th Cir. 2003) (plaintiff could “not prevent others from copying aspects of
4 his [jellyfish] sculptures resulting from ... jellyfish physiology”); *see also Aliotti v. R. Dakin &*
5 *Co.*, 831 F.2d 898, 901 (9th Cir.1987) (“No copyright protection may be afforded to the idea of
6 producing stuffed dinosaur toys or to elements of expression that necessarily follow from the
7 idea of such dolls.”).

8 The same logic applies to the characteristics of eating and sleeping – these are necessary
9 elements of an animal’s life and thus the portrayal of such activity is not protected. *See Satava*,
10 323 F.3d at 813 (“Nature gives us ideas of animals in their natural surroundings...[t]hese ideas,
11 first expressed by nature, are the common heritage of humankind, and no artist may use
12 copyright law to prevent others from depicting them.”) Extending this concept to breedable
13 virtual animals, it must be expected that such animals will possess traits that can be inherited by
14 their progeny and thus basic concepts inherent in genetics are not protected. *See id* at 810
15 (“expressions that are standard, stock, or common to a particular subject matter ... are not
16 protectable under copyright law”); *see also Berkla v. Corel Corp.*, 66 F. Supp. 2d 1129, 1141-
17 42 (E.D. Cal. 1999) (denying copyright protection to plant image databases because creator’s
18 exercise of judgment was based “not on expressive decision but rather on the essentials”
19 necessary to create realistic images of plants).

22 ⁷ Similar to the bar against obtaining a copyright on functional elements of an idea is the
23 doctrine of *scènes à faire*. The doctrine of *scènes à faire* prohibits one from obtaining a
24 copyright on expressions of an idea that are so integral to the idea itself that they are
25 unprotectable. “[W]hen similar features in a videogame are “as a practical matter
26 indispensable, or at least standard, in the treatment of a given [idea],” they are treated like
27 ideas and are therefore not protected by copyright. *Apple*, 35 F.3d at 1444 -1445 [citations
28 omitted] “[T]he mere indispensable expression of these ideas, based on the technical
requirements of the videogame medium, may be protected only against virtually identical
copying.” *Frybarger v. International Business Machines Corp.*, 812 F.2d 525, 530 (9th
Cir.1987). Defendants reliance on elements of the Ozimals bunny that are at least
commonplace if not indispensable to the idea of virtual, breedable animals causes is alleged
copyright to run afoul of this doctrine, as well.

1 In the end, Defendant is left with no protected elements of its allegedly copyrighted
2 work other than, at best, the specific code that is the literal expression of the Ozimals bunny.

3 **c) Plaintiff Did Not Copy Defendant's LSL Script**

4 Even if there were a valid and enforceable copyright, Ozimals cannot show that it has
5 been infringed. To establish infringement, Ozimals must either show irrefutable evidence of
6 direct copying, or that Amaretto (1) had access to Ozimals' work and (2) produced a work that
7 is substantially similar to Ozimals' work. *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421,
8 445 (4th Cir. 1986); 3 *Nimmer on Copyright* § 13.01[B]. Because Defendant cannot show any
9 of those things, it cannot demonstrate infringement, and Plaintiff is likely to succeed on the
10 first element of its section 512(f) claim.

11 "Access is established if 'plaintiff shows that the defendant had an opportunity to view
12 or to copy the plaintiff's work.'" *Aurora*, 719 F.Supp.2d at 1133-1134. "Circumstantial
13 evidence of reasonable access is proven in one of two ways: (1) a particular chain of events is
14 established between the plaintiff's work and the defendant's access to that work (such as
15 through dealings with a publisher or record company), or (2) the plaintiff's work has been
16 widely disseminated." *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000).
17 Defendant has no such proof. Plaintiff did not license Defendant's code from it at some point,
18 and there is no evidence that Plaintiff reverse-engineered the Ozimals bunny. Absent some
19 colorable claim that Plaintiff has somehow obtained Defendant's code, Defendant cannot show
20 infringement. *See* Declarations of Josette L. Smith at ¶¶ 2-8 and Jason Jazdzewski at ¶ 96
21 ("Jazdzewski 2 Decl.") (previously filed at e-dockets 15 and 12, respectively), attached for the
22 Court's convenience as Exs G and H to Lisi Decl., ¶¶ 10-11.

23 **d) There Is No Evidence of Substantial Similarity between the**
24 **Works**

25 In a typical infringement analysis, the Court would next look to whether or not there is a
26 substantial similarity or virtual identity between the alleged infringing work and the protectable
27 elements of the copyrighted work. *See Aurora*, 719 F.Supp.2d at 1134. In the case of software,
28 this analysis typically involves a comparison of the literal expression of the two works, i.e., the

1 code.⁸ Here, comparison of the parties' code has not been possible.

2 According to the guidelines of the Copyright Office (Circular 61) and 17 U.S.C. §
3 408(a), *et seq.*, for entirely new computer programs (including source or object code), the
4 applicant must submit representative portions of code in a form that is "visually perceptible
5 without the aid of a machine or device." 37 C.F.R. § 202.20(c)(2)(vii)(A)(1). As described
6 above, Defendant's copyright – and thus the code associated with it – has been elusive, thereby
7 frustrating any effort to compare the parties' code bases.

8 Rather than provide the code itself, Defendant has simply implied that there must be
9 similarities in the code due to supposedly "identical software bugs" suffered by both products.
10 *See Sargent Decl.*, ¶¶ 45-55. However, Defendant's description of the "bugs" is too vague to
11 allow any meaningful comparison between the underlying code. *See Stibbards Decl.*, ¶ 19.
12 Indeed, many if not all of Defendant's allegedly common bugs are either not shared by the two
13 products, are a by-product of using Linden Scripting Language, or can be attributed to common
14 issues with the Second Life grid, such as messaging errors and lag. *Id.* at ¶¶ 17-19; Jazdzewski
15 2 Decl. ¶¶ 74-95. Consequently, there is no evidence that the parties' code is substantially
16 similar, let alone virtually identical. *See Jazdzewski 2 Decl.* ¶ 96.

17 **2. Defendant Intentionally Made Misrepresentations in its DMCA** 18 **Notification**

19 The second element of Plaintiff's section 512(f) claim is easily met. There can be no
20 dispute that, in its November 22, 2010 letter, Plaintiff informed Defendant that a copyright does
21 not protect ideas or functional aspects of a product and that all of its identified expressions were
22 in the public domain. Similarly, Defendant must have known whether it had a copyright to

23 ⁸ If this Court were to consider extending protection beyond Defendant's code, it would
24 necessarily be "thin" given that any creative expression remaining in the Ozimals bunny after
25 all functional and unoriginal features are removed is *de minimus*. *See Apple Computer, Inc. v.*
26 *Microsoft Corp.*, 35 F.3d at 1439. Consequently, such creative expression should be limited to the
27 specific visual manifestation of that code in Second Life, i.e. a virtual breedable "bunny," and
28 judged under the virtual identity standard. *See Aurora World, Inc. v. Ty Inc.*, 719 F.Supp.2d at
1137. In this case, simply noting that Defendant's product is a "bunny" and Plaintiff's is a
horse suffices to refute any similarities beyond the code. *See Id.* at 1138, n. 51 (finding neither
virtual identity nor substantial similarity between two stuffed pandas and two stuffed penguins
based on different color schemes).

1 enforce. Therefore, Defendant had actual knowledge of its misrepresentation when it sent its
2 December 1, 2010 DMCA Notification, and again when it sent the amended notice on
3 December 20th. The assertions by Defendant are not an “unknowing mistake,” but rather a
4 deliberate, intentional and willful act to destroy Plaintiff’s business and reputation.

5 Coupled with the evidence outlined above that there has been no copyright
6 infringement, it is clear that Amaretto is likely to succeed on the merits of its § 512(f) claim.

7 **B. Amaretto Is Likely to Suffer Irreparable Harm without Injunctive Relief**

8 While mere monetary harm “will not usually support injunctive relief” (*American*
9 *Trucking Ass’ns v. City of L.A.*, 559 F.3d 1046, 1057 (9th Cir. 2009)), intangible injuries that
10 are incapable of measurement, like reputation, advertising efforts, or goodwill, may constitute
11 irreparable harm. *Rent-A-Center, Inc. v. Canyon Telev. & Appl. Rental, Inc.*, 944 F.2d 597, 603
12 (9th Cir. 1991). Likewise, the threatened loss of customers also constitutes irreparable harm.
13 *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001).

14 Had this Court not issued a Temporary Restraining Order, it is undisputed that Linden
15 Labs would have taken down the Amaretto product from Second Life by the close of business
16 that same day pursuant to Defendant’s amended “take-down” notice. *See* Declaration of
17 Michael D. Lisi filed on December 20, 2010, Ex. I to Lisi Decl.

18 A properly filed DMCA notice requires a service provider to takedown the claimed
19 offending products as soon as the notice has been filed. 17 U.S.C. § 512(g). If a counter-
20 notification is filed then the material may only be down for 14 days unless the original DMCA
21 notice filer brings a suit. 17 U.S.C. § 512(g)(2)(C). Defendant filed a copyright infringement
22 suit in Alabama on December 20, 2010. (Lisi Decl., Ex. C). Accordingly, if this Court does
23 not issue a preliminary injunction upon the expiration of the Temporary Restraining Order, then
24 Linden will certainly take down Amaretto’s product. In the virtual computer world of Second
25 Life, computer script code is written quickly and the created virtual images are popular for a
26 short period of time, causing the consuming users to move quickly to become part of the fad
27 before the fad fades. (Jazdzewski 1 Decl., ¶ 11). Without the ability to sell products during the
28 pendency of this litigation, including food for the horses that customers have already purchased,

1 Plaintiff's business and reputation will be ruined as its customers look elsewhere.

2 In fact, just the *threat* of not being able to sell product has already impacted Plaintiff
3 and its customers. For example, Jennifer Smith, the owner of a Second Life business who earns
4 a "real" living reselling Amaretto horses, has seen the price of Amaretto horses fall significantly
5 since Ozimals published news of the lawsuit, and has lost customers. She has also lost
6 customers because people are not willing to resell horses due to the fear that that the horses will
7 not longer exist. *See* Declaration of Jennifer Smith, attached as Ex. J to Lisi Decl.; *see also*
8 Declaration of Sarena Woods, attached as Ex. K to Lisi Decl. (stating she has seen the price of
9 her horses drop significantly and is at risk of losing the "real world" income from selling
10 Amaretto's products); Declaration of Lindsey Hastey, attached as Ex. L to Lisi Decl. Or, for
11 example, Cheryl Genira, a Resident in Second Life, has stated in her previously filed
12 declaration that buying horses on Second Life has given her hope after losing her son in an
13 accident, and almost losing her husband to kidney failure. She will be strongly adversely
14 affected if the horses are taken away. *See* Declaration of Cheryl Genira, attached as Ex. M to
15 Lisi Decl.

16 In short, if the Amaretto Horse Product Line is taken down, Amaretto will suffer
17 significant damage to its reputation and goodwill, and will cease to be a viable business.
18 Moreover, thousands of customers will be damaged monetarily as well as emotionally.

19 **C. The Balance of Hardships Tip decidedly in favor of Plaintiff**

20 "In each case, a court must balance the competing claims of injury and must consider
21 the effect on each party of the granting or withholding of the requested relief." *Amoco Prod.*
22 *Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). Plaintiff competes with
23 Defendant in the same market place, selling similar products and has done so since the end of
24 2009. It is clear that Defendant timed its DMCA Notices to prevent Plaintiff from selling its
25 products during the all-important holiday shopping season, and to attempt to ultimately shut it
26 down. If Plaintiff is not allowed to sell its products during the pendency of this litigation,
27 Plaintiff will lose not only significant amounts of money, but will lose goodwill and business
28 reputation. Current and future customers most likely will not return to Plaintiff's business to

1 buy its products. By contrast, the only harm to Defendant, in the unlikely event its prevails on
 2 its infringement claim, would be compensable monetary damage. A balancing of the hardships
 3 here weighs heavily in favor of granting Plaintiff's Motion.

4 **D. Public Interest**

5 "The public interest analysis for the issuance of a preliminary injunction requires [the
 6 court] to consider 'whether there exists some critical public interest that would be injured by the
 7 grant of preliminary relief.'" *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d
 8 644, 659 (9th Cir. 2009). Here, the public would actually benefit from injunctive relief.
 9 Indeed, the danger from abuse of the DMCA take down notices is manifest. "[T]he
 10 unnecessary removal of non-infringing material causes significant injury to the public where
 11 time-sensitive or controversial subjects are involved and the counter-notification remedy does
 12 not sufficiently address these harms." *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150,
 13 1156 (N.D. Cal. 2008). As the is clear from the statements of Second Life Residents noted
 14 above, the injuries flowing from Ozimals's fraudulent use of the DMCA are in no way
 15 "virtual," but are as real as the injury suffered where a real world investment is wrongfully
 16 devalued. *See e.g.* Lisi Decl., Exs J, K, L, M.. This factor also favors granting Plaintiff's
 17 Motion.

18 **VI. CONCLUSION**

19 In view of the foregoing, Amaretto respectfully requests this Court grant the requested
 20 preliminary injunction.

21
 22 Dated: December 28, 2010

KRIEG, KELLER, SLOAN, REILLEY & ROMAN LLP

23
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