No. 09-15932

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MDY INDUSTRIES LLC AND MICHAEL DONNELLY,

Plaintiffs-Appellants,

v.

BLIZZARD ENTERTAINMENT, INC. AND VIVENDI GAMES, INC.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF ARIZONA
CASE NO. 06 CIV. 2555
JUDGE DAVID G. CAMPBELL

APPELLANTS' OPENING BRIEF

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II. Certificate of Interested Parties

Appellant's counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case: These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. MDY Industries, LLC
2. Michael Donnelly
3. Blizzard Entertainment, Inc.
4. Vivendi Games, Inc.
5. Counsel of Record
   Lance C. Venable
   Joseph R. Meaney
   Venable, Campillo, Logan & Meaney, P.C.
6. Sonnenschein Nath & Rosenthal LLP

s/Lance C. Venable/ /
Lance C. Venable
VENABLE, CAMPILLO, LOGAN & MEANEY, P.C.

III. Statement of Jurisdiction

The United States District Court for the District of Arizona had jurisdiction under 28 U.S.C. §§ 1331 and 1332. The district court issued a partial summary judgment on July 14, 2008, and after trial, a final judgment on April 1, 2009. MDY Industries, LLC ("MDY") and Michael Donnelly ("Donnelly") filed a timely notice of appeal on April 29. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1).

IV. Questions Presented for Review

1. **Basic Copyright Infringement.** Section 117 of the Copyright Act exempts from infringement end-users who make a copy of a computer program essential to its use. MDY created an autopilot program (Glider) to play the videogame Warcraft through the first 70 levels, using an end-user-made, fully authorized RAM copy essential to playing the game. Glider entails no unauthorized copying or change in source code. Are the end-users who choose to use Glider exempt from a claim of infringement?

2. **Corporate Contributory Infringement.** If the end-users are not infringers, can MDY be considered a contributory infringer?

3. **Personal Vicarious Liability for Infringement.** If neither the end-users nor MDY is liable for infringement, can Michael Donnelly, MDY's owner, be vicariously liable for infringement?

4. **DMCA § 1201(a)(2).** Federal law creates a claim against those who create circumventing devices if (1) the claimant has created a technological measure that "effectively controls access" to a protected work; (2) the circumventer infringes or facilitates infringement; and (3) circumvention of the technological measure is the main goal. Here, Blizzard created an ineffective control over those who have already gained access, no copyright infringement occurs, and Glider's circumventing measures are incidental to its autopilot purpose. Does Blizzard have a claim?

5. **DMCA § 1201(b)(1).** Federal law forbids devices that circumvent technologies designed to permit access to a computer or video program while preventing the copying of it. Blizzard's noncircumvention technology, Warden, does nothing to prevent copying. Does Blizzard have a claim under § 1201(b)(1)?

6. **Tortious Interference with Contractual Relations.** Under Arizona law, the "impropriety" element of a tortious-interference claims weighs the social importance of the defendant's interest against the plaintiff's interest. Here, MDY developed an autopilot program that, through keystrokes, will play Warcraft — a highly addictive, time-devouring but noncompetitive game — through the first 70 levels without decreasing the

game's popularity. Blizzard then changed its terms of use to forbid Glider and alleged tortious interference. Does Blizzard have a valid claim?

7. **Personal Vicarious Liability for Tortious Interference.** If MDY is not liable for tortious interference, can Michael Donnelly, MDY's owner, be vicariously liable for that tort?

V. Statement of the Case

This is an appeal from the district court's decisions of July 14, 2008, and January 28, 2009, in which the court held MDY and Michael Donnelly liable for alleged copyright violations and tortious interference with contractual relations. After the district court found copyright liability on summary judgment, MDY and Donnelly stipulated to a damage award of $6.5 million dollars in light of the statutory damages available under 17 U.S.C §504 (up to $150,000 dollars per infringement) and given Glider sales in excess of 100,000. MDY and Donnelly ask this Court to reverse the district court's judgment and dismiss all of Blizzard's claims with prejudice.

VI. Standard of Review

Issues Decided by Summary Judgment

The district court decided the copyright and tortious interference issues on summary judgment.[1] The standard of review for a district court's decision to grant or deny summary judgment is de novo.[2] On review, the appellate court must determine whether the district court correctly applied the relevant substantive law and, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact.[3] The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial.[4]

Issues Decided by Bench Trial

The district court decided MDY's liability for DMCA violations and Michael Donnelly's personal liability after a bench trial.[5] The standard of review for a district court's conclusions of law after a bench trial is de novo.[6]

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[1] ER at G12–16 (§117 analysis); ER at G8–10 (condition/covenant); and ER at G22-26 (tortious interference).
[2] *See, e.g., Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).
[3] *See Olsen v. Idaho State Bd. Of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004)
[4] *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).
[5] ER at E3-12 (DMCA); ER at E12-19 (personal liability).
[6] *See Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869, 879 (9th Cir. 2005).

Mixed questions of law and fact are also reviewed de novo.[7]

Issues Relating to District Court's Interpretation of State Law

Three of the issues on appeal relate to the district court's interpretation of state law: interpretations of Blizzard's contracts, MDY's tortious-interference liability, and Donnelly's personal liability.[8] The standard of review for a district court's interpretation of state law is de novo.[9] The court's role is to determine what meaning the state's highest court would give to state law. [10] In addition, the court of appeals has discretion to certify questions to state courts.[11]

Issues Relating to District Court's Interpretation of Contract Provisions

The district court's interpretation of Blizzard's EULA (end-user license agreement) and TOU (terms of use) is relevant to the issues of at least four issues: "ownership" of software copies purchased at retail, conditions of

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[7] *See Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000).
[8] ER at G6–11, 22-26(contract analysis); ER at G22-26 (tortious interference); ER at E12-19 (personal liability).
[9] *See Laws v. Sony Music Entertainment, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006); *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003).
[10] *See Goldman v. Standard Ins.Co.*, 341 F.3d 1023, 1027 (9th Cir. 2003); *Paulson v. City of San Diego*, 294 F.3d 1124,1128 (9th Cir. 2002) (en banc).
[11] *See Commonwealth Utils. Corp. v. Goltens Trading & Eng'g*, 313 F.3d 541, 548-49 (9th Cir. 2002); *Ashumus v.Woodford*, 202 F.3d 1160, 1164 n.6 (9th Cir. 2000).

Blizzard's contracts, MDY's tortious-interference liability, and Donnelly's personal liability. [12] The standard of review for a district court's interpretation and meaning of contract provisions is de novo.[13] The district court's interpretation of state contract law is also de novo.[14]

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[12] ER at G13–16 (§117 analysis); ER at G12 (misuse analysis); ER at G8–10 (condition/covenant); and E22–26 (tortious interference); ER at E12-19 (personal liability).

[13] *See Lamantia v. Voluntary Plan Administrators, Inc.*, 401 F.3d 1114, 1118 (9th Cir. 2005); *United States v. 1.377 Acres of Land*, 352 F.3d 1259, 1264 (9th Cir. 2003) (noting no deference accorded to decision of district court).

[14] *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 445 F.3d 1132, 1135 (9th Cir. 2006); *Jorgensen v. Cassiday*, 320 F.3d 906, 914 (9th Cir. 2003).

VII. Preliminary Statement

Imagine if you started this small business: you read Harry Potter books aloud to people who buy them. The publisher finds out about your business and decides to squelch you. It begins shrink-wrapping each copy of Harry Potter with a "license agreement" stating that by taking the book from its shrink-wrap cover, the buyer agrees not to have the book read aloud — but instead to read it *personally*. Everyone ignores this silly overreaching restriction and nannies continue reading aloud to children at bedtime. Meanwhile, you persist in your small business — but (again) you read copies aloud only to people who legitimately buy the book. The publisher sues you for tortiously interfering with its contractual relations — the "license agreements" it has with the book-buying public. The publisher even succeeds in getting an injunction against you — preventing you from reading aloud for a fee.

Preposterous? Perhaps. But something very akin to that has happened here.

This case presents the Ninth Circuit with a series of computer-related copyright issues that are among the most important and ground-breaking in our computer age. The district court's opinion has drawn the attention of many copyright commentators,[15] most of whom scorn it as retrograde because (1) it

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[15] *See, e.g.*, Carver, Brian, *The Top Copyright Ownership Cases*, (August 31, 2009) http://cyberlawcases.com/2009/08/31/the-copy-ownership-cases; Patry, William, *The Strange Copyright World of Warcraft*, (July 15, 2008)

broadens the Copyright Act in a way that stifles creative, entrepreneurial software development; (2) it eviscerates the first-sale doctrine, which in copyright law allows the purchaser of a physical copy of a copyrighted work to dispose of it without infringing the copyright owner's rights; and (3) it creates a new liability for those who dishonor overreaching end-user license agreements (EULAs), thereby encouraging the biggest developers to overreach.

Although the bulk of this brief will elucidate just how the district court misapplied both copyright and tort law as to MDY, Michael Donnelly's company, the crucial issue for Donnelly is that the Court held him *personally* liable for software development and sales conducted in *corporate* form (through MDY). Ignoring the protections of the corporate form not only is financially devastating to Donnelly personally (to the tune of $6.5 million of debt that might well be

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<http://williampatry.blogspot.com/2008/07/strange-copyright-world-of-warcraft.html>; Chintipalli, Satish, Recent Development, *MDY Industries v. Blizzard Entertainment: Preventing the Use of Software Robots in an Online Game With Copyright Law,* 10 NC JOLT Online Ed. 1 (2008) http://jolt.unc.edu/abstracts/volume-10/ncjoltonlineed/p1; Redman, Jordan Christopher, Note, *MDY Industries, LLC v. Blizzard Entertainment, Inc.:* "Contracts" That Expand Copyrights Have Gone Too Far, 49 Jurimetrics J. 317–42; McSherry, Corynne. *You Bought It, But You Don't Own It*, (July 15, 2008) <http://www.eff.org/deeplinks/2008/07/you-bought-it-you-dont-own-it>; Siy, Sherwin. *MDY v. Blizzard: Cheating at WoW May Be Bad, But It's Not Copyright Infringement*, (May, 5 2008) <http://www.publicknowledge.org/node/1546>; Lee, Timothy, *Judge's Ruling That WoW Bot Violates DMCA Is Troubling*, (January, 29 2009) <http://arstechnica.com/gaming/news/2009/01/judges-ruling-that-wow-bot-violates-dmca-is-troubling.ars>.

nondischargeable in bankruptcy), but also has the effect of severely discouraging innovative software add-ons (plug-ins, macros, and the like) that run alongside of and enhance much existing software. There are, and there will be, countless beneficial applications of add-on software that the lower court's ruling, if allowed to stand, would effectively annihilate. That's why this case might properly be characterized as a "copyright-misuse" lawsuit.[16]

The case presents questions of first impression in the Ninth Circuit on: (1) the applicability of copyright protection to software autopilots that involve no unauthorized copying; (2) the interpretation of the Digital Millennium Copyright Act (DMCA) when applied to protection measures that do not prevent access to, or prohibit piracy of, the protected work; (3) the attempted use of state-law tort claims to enforce fuzzy copyright claims; and (4) whether a copyright owner can use a license agreement to dictate what is and is not an infringement even though that authority is left to Congress.

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[16] *See* BLACK'S LAW DICTIONARY 387 (9th ed. 2009) (s.v. *copyright misuse*).

VIII. Statement of Facts

This case concerns the computer game World of Warcraft ("Warcraft") and an autopilot software program, Glider, which plays the game for its owners, up to a point, while they are away from their computer keyboards.[17] In the game, each player takes on a distinctive character, called an "avatar," within a virtual universe, exploring the landscape, fighting monsters, performing tasks, building skills, and interacting with other players and computer-generated characters — but in essentially noncompetitive ways.[18] There are no winners or losers, and the game has no end.[19]

Blizzard, Warcraft's creator, designed the game so that players can advance from level 1 to level 60 with the basic game, and later expanded the game to have 80 levels.[20]

In 2004 Michael Donnelly began playing Warcraft.[21] He is a brilliant young software developer who had extensive experience in developing add-on software that integrated with programs developed by others.[22] As an entrepreneur, he had previously had considerable success running two software companies that he

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[17] ER at N10, ¶¶ 41, 42.
[18] *See* ER at G1-2.
[19] *See* ER at M4-5.
[20] *See* ER at G1-2, *see also* ER at N3, ¶¶6-8.
[21] ER at N9, ¶34.
[22] ER at H7-9.

created.[23] Donnelly's first company developed and sold add-on software for commercial bulletin-board systems, and his second company developed web applications and database integration software.[24]

Donnelly found that he couldn't keep pace with his friends who played Warcraft because they reached higher levels more quickly than he could.[25] He identified repetitive, time-intensive parts of Warcraft and used his programming skills to develop a software program that automated those tasks.[26] This program became what is known as Glider.[27]

Glider is a "bot" (short for robot)[28], a program that plays Warcraft for its owner.[29] Glider does not copy or hack Blizzard's software code, and it doesn't short-circuit the need for the owner to acquire Blizzard's software or to pay Blizzard's monthly subscription fees.[30]

Donnelly initially wrote Glider for his own use so that he could catch up to the game levels that his friends had already reached.[31] Between March and May

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[23] *Id.*
[24] *Id.*
[25] ER at N9, ¶35; ER at H4-5.
[26] ER at N9, ¶¶34-37; ER at H4-5, 9.
[27] ER at N9-10.
[28] The Appellant has provided a glossary in pages 1-2 of the Appendix for many of the terms used in this brief.
[29] *See* ER at G2.
[30] ER at E12-13, ll. 23-24; ER at N9, ¶ 39.
[31] ER at N9, ¶¶ 34–37; ER at H3-5.

2005, Donnelly used Glider for himself.[32] After experiencing how Glider could help him advance to his friends' levels, Donnelly decided to explore whether he could market the program commercially.[33] Relying on his previous business experience with software, Donnelly recognized that a market for Glider might exist for Warcraft players who were experiencing his same frustrations with the time commitment needed to play Warcraft.[34]

As an avid Warcraft player who respected the game, Donnelly wanted to ensure that Blizzard would not object to his selling Glider commercially.[35] So he scrutinized Blizzard's then-existing contracts and other documentation and concluded that the agreements did not prohibit software with Glider's autopilot functionality.[36]

Having incorporated MDY Industries in 2004 to support his consulting business, Donnelly began selling Glider through the corporation.[37] In May 2005, MDY made Glider available for a fee by downloading it from MDY's website (www.mmoglider.com).[38] MDY marketed Glider to experienced players solely as an alternative method for reducing the time the player must spend to have a

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[32] *Id.*
[33] ER at N11, ¶ 48.
[34] ER at H4-5.
[35] ER at N12-13, ¶ 61.
[36] ER at H11-H12; *see also,* ER at N12-13; ER at E13; ER at H26-27.
[37] ER at O22, ¶¶ 120, 121.
[38] *Id.*

character reach level 70.[39] Once players reach level 70, they have access to advanced game content that is not otherwise available, such as raids, arenas, and flying mounts.[40] Many players have several avatars at once, and Glider allowed them to develop their additional characters to reach the highest level.[41]

From the time MDY began distributing Glider until the filing of this lawsuit 18 months later, Blizzard was aware of both MDY and Glider.[42] At one point, Blizzard sent MDY a cease-and-desist letter 13 months after MDY began selling Glider. In the letter, Blizzard complained of: (1) unauthorized screenshots of Warcraft that appeared on Glider's website, and (2) a file that is used to install Glider – but never complained about him selling or using Glider.[43] Donnelly complied with Blizzard's request to remove the screenshots.[44] Donnelly then replied to Blizzard, asking it to clarify why it objected to the file since the file had no connection to Warcraft.[45] Blizzard never responded.[46]

After Donnelly's response to Blizzard's letter, Blizzard sent a joke[47] to

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[39] ER at N11, ¶47.
[40] ER at N2, ¶¶4-8.
[41] ER at K18, ¶107; *see also, e.g.,* U14.
[42] ER at H15-27; ER at E13, ll. 11–17.
[43] ER at H20-22.
[44] *Id.* at H22, ll. 3-7.
[45] *Id.* at H21, ll. 9-14.
[46] *Id.*
[47] This joke was a link to a website that displays what is commonly known as a "Rickroll" where upon clicking the link, a video of popular 80's singer Rick Astley

MDY embedded in the Warcraft code, knowing that only Donnelly would find it.[48] The joke confirmed Donnelly's belief that Blizzard viewed him as a worthy adversary, not as a tortfeasor.[49]

Blizzard's Warden Software

Unbeknownst to Donnelly, and several months after MDY had begun establishing contractual relationships with Warcraft players, Blizzard implemented Warden,[50] a new component of its Warcraft software.[51] Donnelly would later learn that the purpose of Warden was to detect third-party software that Blizzard didn't want used with Warcraft.[52] When Warden detects the software program, it can notify Blizzard to deactivate the user's account.[53] But Warden cannot stop a user from accessing, copying, or pirating any of Blizzard's copyrighted works.[54] Nor can it prevent a user from making copies of Blizzard's copyrighted works.[55]

In September 2005, Blizzard suddenly used Warden to identify and ban the

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sings "Never Gonna Give You Up." *See* "Rickrolling." *Wikipedia, The Free Enclyclopedia*, <http://en.wikipedia.org/wiki/Rickrolling> (accessed 13 September 2009).

[48] ER at H23-24.

[49] *Id.*

[50] ER at T2-3.

[51] ER at N12, ¶¶ 57–59.

[52] ER at H13-15; ER at N12, ¶¶57-63; ER at T3; ER at G17, line 23 – E18, line 6.

[53] *Id.*

[54] ER at G19, ll. 15–23 (game client software can be freely copied); ER at E12, fn. 3 (game play can be freely copied (recorded)); ER at T3.

[55] *Id.*

majority of MDY's Glider customers.[56] To protect MDY's business and customer base, Donnelly responded by developing software countermeasures to avoid being detected.[57] In late September 2005, Glider began avoiding Warden so that MDY's customers could use Glider with the Warcraft game-client software without interference.[58]

Glider does not circumvent Warden to copy or pirate Blizzard's protected works, but only allows a gamer to play Warcraft in conjunction with Glider.[59] After Blizzard began searching for Warcraft gamers who used Glider, MDY modified its website to notify its customers that Blizzard was claiming that Glider violated Blizzard's End User License Agreement ("EULA") and Terms of Use ("TOU").[60]

From the time MDY first sold Glider until late October 2006, Blizzard made no attempt to notify Donnelly of its belief that Glider use either infringed its copyrights, or that by selling Glider, MDY was tortiously interfering with Blizzard's agreements.[61] On the morning of October 25, 2006, three representatives from Blizzard appeared unannounced at Donnelly's home,

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[56] ER at H13-15; ER at N12, ¶57.
[57] ER at N12, ¶¶ 57–59; *see also,* ER at G22, ll. 22–24.
[58] *Id.*
[59] ER at N9-12, ¶¶ 38-46, 60.
[60] ER at G22, ll. 22–24.
[61] ER at H28; *see also,* ER at H15-27; ER at E13, ll. 11–28; ER at N2, ¶16-18.

including in-house counsel Fritz Kryman, litigation counsel Shane McGee, and an unnamed private investigator.[62] Donnelly felt threatened and intimidated as Blizzard's representatives demanded that Donnelly immediately stop selling Glider and pay Blizzard all the profits that MDY had earned to date by 5:00 p.m. that day.[63] They said that if Donnelly didn't comply with their demands, that they would file a federal complaint that they presented to him.[64] After Blizzard's representatives left Donnelly's home, Donnelly retained his current counsel, who advised him to immediately file a declaratory judgment action against Blizzard in the U.S. District Court in Phoenix to protect his rights.[65]

Two months later, before answering MDY's complaint, Blizzard revised its TOU – for the first time – to expressly prohibit bot software programs.[66] By this time, nearly a year and a half after MDY first sold Glider, MDY had built its business into a company with revenues of over $1,000,000.00, with a customer base of 40,000, and an equal number of sales of copies of Glider.[67] MDY had built an extraordinarily successful business and believed that Blizzard had no right to

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[62] ER at N13, ¶64; ER at H25.
[63] ER at N13, ¶¶64-66; ER at H24-25.
[64] *Id.*
[65] ER at N13, ¶66, ER at H26-28.
[66] ER at E13, ll. 3–5; ER at K10-11, ¶¶ 66–69; Appendix at 4.
[67] ER at O39, ¶¶ 231–33.

destroy it simply by changing the terms of its TOU.[68] Having revised its TOU, Blizzard filed an answer to MDY's complaint in February 2007.[69]

At all times, MDY sold Glider by doing nothing more than making it available for purchase through its website.[70] MDY never directly solicited, coerced, deceived, or induced its customers into purchasing Glider.[71] In fact, while MDY was selling Glider, Blizzard's number of active Warcraft subscribers rose from 3.5 million to about 11.5 million players with sales of $1.5 billion annually.[72] Furthermore, Blizzard acknowledges that many Glider users will play Warcraft using multiple accounts.[73] Thus Blizzard receives more income from the additional subscription fees from Glider users who play with multiple accounts. In fact, MDY has received hundreds of emails from Glider users praising Glider's utility and stating that they would have quit playing Warcraft but for Glider.[74] Some of these emails also came from have also come from people saying that Glider literally saved their marriage.[75] Other emails came from physically challenged individuals that stated they could not even play Warcraft but for Glider

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[68] *Id.*
[69] ER at X1.
[70] ER at N11, ¶¶ 47–56.
[71] *Id.*
[72] ER at G2, ll. 16-19.
[73] ER at O39, ¶230.
[74] ER at L3, ll. 2-11; ER at U1-U14.
[75] ER at U9.

because they physically could not use a keyboard with their hands.[76]

Blizzard's Game-Client Software

To play Warcraft, one must first acquire Blizzard's game-client software, either at a retail store or by downloading it free from Blizzard's website.[77] Blizzard requires no further payment for the buyer to maintain possession of the copy of the client software.[78] Buyers have no obligation to return the game-client software at any time — even if a subsequent license is terminated.[79] And Blizzard does not restrict a Warcraft player from transferring or redistributing his copy to third parties.[80]

After obtaining the game-client software, a gamer must install the software onto a computer. During the installation, the gamer must agree to Blizzard's EULA.[81] Once installed, the software must be launched on the computer, during which process the gamer must agree to Blizzard's TOU and agree to pay a monthly subscription fee to play on Blizzard's servers.[82] This subscription transaction is entirely separate from the acquisition of the game-client software and is immaterial to whether a gamer owns the copy of the Warcraft client software it obtained from

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[76] ER at U1.
[77] ER at E3, ll 7-8.
[78] ER at G2, ll. 6-10.
[79] *Id.*
[80] *See, e.g.*, ER at P3 (§3(B)).
[81] *See, e.g.*, ER at P2.
[82] *See, e.g.*, ER at Q2.

Blizzard.[83]

[83] ER at G2, ll. 5-15.

IX. Argument

A. No copyright infringement has occurred: because gamers own their copies of Warcraft software and must make a RAM copy on their computers as an essential step to using it, neither the players nor Glider infringes Blizzard's copyrights.

To establish a successful claim of copyright infringement, a claimant must show that (1) it owns a valid copyright, and (2) the alleged infringer has copied protectable elements of the work without authorization.[84] Since the validity of Blizzard's copyright is not at issue, prong 2 is the crux of the analysis here. The fact is that MDY, through Glider, doesn't copy any of Blizzard's protectable elements. The end-users do, and with Blizzard's blessing.

Under 17 U.S.C. § 117(a), the end-users may make a copy of the software with impunity:

> **Making of additional copy or adaptation by owner of copy.**
>
> Notwithstanding the provisions of section 106, it is not an infringement for the *owner of a copy* of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner; and

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[84] *Feist Pubs., Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1296, 113 L.Ed.3d 358 (1991).

> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.[85]

Of course, under § 202, the ownership of a tangible copy of a copyrighted object is quite distinct from ownership of the intangible copyright itself.[86] Under this Court's decision in *Wall Data v. Los Angeles County Sheriff's Department*,[87] courts must inquire into whether the end-user exercises sufficient incidents of ownership to be considered owner of the copy of the software under §117. In determining the ownership of copies, courts look to six indicators:

(1) limits on possession (here there are none);

(2) time limits (here there are none);

(3) pricing and payment (here the game is sold at retail or available for free downloading);

(4) schemes that are unitary and not serial (here the sale or download is a one-time event);

(5) licenses under which later transfer is neither prohibited nor conditioned on the licensor's prior approval (end-users are allowed to transfer their copies freely as long as they don't retain a copy); and

(6) licenses having restrictions whose primary purpose is to protect copyrightable subject-matter (Blizzard's purpose isn't to keep tabs on the actual copies of its software but to protect its existing copyrights).[88]

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[85] 17 U.S.C. § 117(a) (emphasis added).
[86] 17 U.S.C. § 202.
[87] 447 F.3d 769, 784–85 (9th Cir. 2006).
[88] *Softman Prods. Co., LLC v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075, 1086 (C.D. Cal. 2001) (citing David A. Rice, *Licensing the Use of Computer Program*

In short, these factors establish that Warcraft end-users own their own copies of the software.

The question then becomes whether, under § 117's exemption, the end-user's copying of the software is an essential step in the process of using the software for its intended purpose. It is. Warcraft can be used only by copying the software into RAM.[89] Under this Court's holding in *Wall Data*, § 117's essential-step requirement for copying the software onto the computer's active memory (RAM) ensures that the end-user will not be liable for copyright infringement.[90]

Wall Data articulates the standard for determining whether a software purchaser owns that copy of the program. A purchaser is not an owner of the software if the copyright holder: "(1) makes clear that it is granting a license to the copy of the software, and (2) imposes significant restrictions on the redistribution or transfer of the copy."[91] *Wall Data* further supports the Ninth Circuit's previous decisions in *U.S. v. Wise* and *Microsoft Corp. v. Dak Industries, Inc.*, which stated that the issue of ownership in terms of whether the transaction is a sale under the

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Copies and the Copyright Act First Sale Doctrine, 30 Jurimetrics J. 157, 172 (1990)).

[89] ER at E5, ll. 2-7.

[90] *Wall Data*, 447 F. 3d at 784.

[91] *Id.*

First Sale Doctrine of 17 U.S.C. § 109.[92] Moreover, two district court rulings in the Ninth Circuit followed the *Wise* ruling – *Vernor v. Autodesk, Inc.* and *UMG Recordings, Inc. v. Augusto*. In particular, these decisions noted that the *Wise* court focused on the critical issue of perpetual possession of the product to determine ownership.[93]

MDY does not dispute that Blizzard purports to license its Warcraft client software to its customers. But Blizzard does not limit its customers from redistributing or transferring its licenses to third parties. Therefore, in addition to failing the second prong of the *Wall Data* test, Warcraft players have the perpetual right to possess, transfer, or redistribute the Warcraft software and own their copies of the software as discussed in the *Wise*, *Augusto*, and *Vernor* cases. Thus, when a Warcraft player loads the Warcraft software into its computer RAM, the RAM copy cannot infringe Blizzard's copyrights.

1. ***The district court misapplied Ninth Circuit law.***

In its summary judgment order, the district court misquoted and then misapplied the *Wall Data* test when it analyzed whether those who purchase or download the Warcraft client software own the copies under 17 U.S.C. § 117. Specifically, the court defined the test as:

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[92] *See generally*, *U.S. v. Wise*, 550 F.2d 1180 (9th Cir. 1977).
[93] *UMG Recordings, Inc. v. Augusto*, 558 F.Supp.2d 1055, 1060 (C.D. Cal. 2008); *See generally*, *Vernor v. Autodesk, Inc.*, 555 F.Supp.2d 1154 (W.D. Wash 2008).

> if the copyright holder: (1) makes clear that it is granting a license to the copy of the software, and (2) imposes significant restrictions on the *use* or transfer of the copy.[94]

The court misquoted the *Wall Data* test by substituting the word "use" for "redistribution." This critical error – a serious word-switch – misstated the *Wall Data* test and led to the court's erroneous finding that Warcraft users do *not* own their copies of the Warcraft software.

After mistakenly concluding that Blizzard restricts the transfer of its software in § 3(B) of the EULA, the court considered § 4 of the TOU:

> [T]he TOU places additional *restrictions on the use* of the software. These restrictions are at least as severe as the restrictions in *Wall Data*. The Court concludes, therefore, that users of [Warcraft], including those who use Glider, are licensees of the copies of the game client software and are not entitled to the section 117 defense.[95]

But the *Wall Data* test does *not* consider whether a licensor imposes restrictions on use of its software to determine ownership under § 117. The court misinterpreted § 3(B) of Blizzard's EULA as a restriction on the transfer of copies of Blizzard's software and relied solely upon Blizzard's restrictions on use in its license. That is reversible error. Under § 117, the alleged direct infringers (namely, the end-users) aren't infringers at all when they load Warcraft into RAM.

Copyright law is a contract that grants the creator or author of an original work the exclusive right to: (1) reproduce, (2) make derivative works of, (3) make

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[94] ER at G13(emphasis added).
[95] ER at G14 (emphasis added).

and distribute copies, (4) perform, and (5) display the work.[96] A copyright owner holds the exclusive right not only to do these things but also to prevent others from infringing the copyrights. Copyright owners commonly protect their rights through license agreements with third-party users. These license agreements often contain not just the restrictions of § 106 of the Copyright Act, but also other contractual terms by which the copyright-holder wishes to limit the use of its work.

Courts evaluate license agreements that contain both copyright law and contract terms according to what particular field of law the license-agreement provision addresses. In this case, Blizzard asserts that its entire EULA constitutes copyright law and that any violation of any provision of the EULA constitutes copyright infringement. This is patently untrue. The only sections of Blizzard's EULA that can rightfully constitute copyright law are those dealing with reproduction, derivative work, distribution, performance, and display of Blizzard's copyrighted material by a third party. Without one of these trespasses, no copyright infringement occurs, regardless whether the EULA may overreachingly state to the contrary.

No copyright-holder may rewrite or extend the limited protected rights that Congress gives through the Copyright Act. The district court somehow countenanced Blizzard's attempt to arrogate to itself Congress's power to declare

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[96] 17 U.S.C. §106.

what constitutes copyright law. This usurpation amounts to copyright misuse, plain and simple. And in fact, after the district court ruled in Blizzard's favor, Blizzard immediately brazenly changed its EULA to reflect its desire to create copyright infringements merely by breaching benign terms in the EULA that have no connection whatsoever to violating what Congress determined to be infringements in 17 U.S.C. § 106.[97]

True, Blizzard does not like the Glider program. And true, Blizzard has changed its EULA to discourage Glider's use in Warcraft. But Blizzard does not have the power to change what Congress has determined is and is not copyright infringement. Blizzard's EULA erroneously and overreachingly states that any EULA-section violations constitute copyright infringement. With Blizzard's copyright, Congress has granted only these rights: (1) reproduction; (2) creation of a derivative work; (3) distribution; (4) performance; (5) public display; (6) digital audio-transmission.[98] Congress has not given Blizzard the right to redefine copyright infringement according to its EULA. And Glider does not perform any function that impinges on any of the six rights granted to Blizzard under § 106 of the Copyright Act.

For Blizzard to succeed in its claim of copyright infringement, "the copying

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[97] *See* Appendix at 16 (highlighted section 2).
[98] 17 U.S.C. § 106.

must be beyond the scope of a license possessed by the defendant."[99] And the "source of the copyright owner's complaint must be grounded in a right protected by the Copyright Act, such as unlawful reproduction or distribution."[100] Hence the portions of the EULA dealing with copyright can be no broader than the rights created under 17 U.S.C. § 106.

In a leading case, the Federal Circuit has recognized this principle. And its holding in the *Storage Technology* case is closely on point. Storage Tech manufactured and maintained computer-information storage as data libraries.[101] Custom Hardware repaired these data storage libraries, which in part required reading error codes to determine what might be wrong with the data library.[102] In retrieving these error codes, Custom Hardware had to use Storage Tech.'s copyrighted maintenance code.[103] Storage Tech had licensed Custom Hardware to repair its libraries but sued for copyright infringement because the use of the copyrighted maintenance code exceeded the scope of the license agreement.[104] The court found that a party's alleged breach of a license provision does not mean that

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[99] *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307, 1316 (Fed. Cir. 2005).
[100] *Id.*
[101] *Id.* at 1309.
[102] *Id.*
[103] *Id.* at 1310.
[104] *Id.*

the party commits copyright infringement.[105] The copying of the maintenance code was permitted under the license agreement, but not the use of the code: "The use of the code may violate the license, but is not forbidden by copyright law and cannot give rise to an action for copyright infringement."[106] These are two distinct claims and should be treated as such. The court gave an illuminating example to differentiate copyright law from contract law:

> Consider a license in which the copyright owner grants a person the right to make one and only one copy of a book with the caveat that the licensee may not read the last ten pages. Obviously, a licensee who made a hundred copies of the book would be liable for copyright infringement because the copying would violate the Copyright Act's prohibition on reproduction and would exceed the scope of the license. Alternatively, if the licensee made a single copy of the book, but read the last ten pages, the only cause of action would be for breach of contract, because reading a work does not violate any right protected by copyright law.[107]

Although in *S.O.S., Inc. v. Payday, Inc.*, the Ninth Circuit has stated that a "licensee infringes the owner's copyright if its use exceeds the scope of its license,"[108] the case makes clear that the copyright owner only complained of the

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[105] *Id* at 1315-16.
[106] *Id.* at 1316*; See United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 695 (2d Cir.1991) ("[a] licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it").
[107] *Storage Technology,* 421 F.3d at 1316.
[108] *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

defendant's use of "copying and modification of the software."[109] Hence that precedent is inapposite here.

B. Because § 4(B) of Blizzard's TOU does not unambiguously state that the absence of bot programs is a *condition* of playing Warcraft, the district court erred by holding that a user must comply with Section 4(B) as a contractual condition.

Section 14(g) of Blizzard's EULA provides that Delaware law governs Blizzard's agreements with its customers. In general, Delaware presumes that the terms of a contract are covenants rather than conditions[110] and disfavors conditions in agreements where the drafter doesn't clearly separate any covenants and conditions in the agreement.[111] Because Blizzard did not unambiguously state that the TOU § 4 terms were conditions for playing Warcraft, Blizzard's contract provisions are promises or covenants.[112]

The court correctly acknowledged that "[t]he EULA and TOU contain no

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[109] *Id.* at 1085. *See John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 41 (1st Cir.2003) (holding that "[u]ses of the copyrighted work that stay within the scope of a nonexclusive license are immunized from infringement suits"); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1167 (1st Cir.1994) ("uses" that violate a license agreement constitute copyright infringement only when those uses would infringe in the absence of any license agreement at all).

[110] *Wilmington Trust Co. v. Clark*, 325 A.2d 383, 386 (Del. Ch. 1974). *See also Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 559 n.7 (9th Cir 1990).

[111] *AES Puerto Rico, L.P. v. Alstom Power, Inc.*, 429 F. Supp. 2d 713, 717 (D. Del. 2006).

[112] *Id.*

provision that explicitly lays out the scope of the Blizzard limited license,"[113] leaving it ambiguous. This should have been the end of the court's analysis. Yet despite the ambiguity, the court made the contrary decision that users must comply with § 4(B) of the TOU as a *condition* to playing Warcraft.[114]

The court noted that while TOU § 4 contains limitations on the scope of the license, § 5 does not.[115] But the EULA does not distinguish between sections. The court's finding was directly contrary to the plain language of Blizzard's EULA. The EULA is at best ambiguous on this issue.

C. Donnelly cannot be vicariously liable for a copyright infringement that has not occurred.

Under Ninth Circuit law, there can be no liability for contributory or vicarious infringement without a direct copyright infringement.[116] This follows the well-established tort principle that there can be no secondary liability without primary liability.[117]

Because under § 117 the gamers have not infringed Blizzard's copyrights, it necessarily follows that Donnelly cannot be held to have infringed the copyrights

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[113] ER at G8, ll. 21-22; *see also,* ER at I4-7(even Blizzard's counsel uncertain).
[114] ER at G9.
[115] *See id.*
[116] *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 729 (9th Cir. 2007).
[117] *Visa Int'l Serv. Ass'n*, 494 F.3d at 795.

in some secondary way — even if it were possible (as it should not be) to ignore the protections of the corporate form in which MDY exclusively conducted its business.[118] Donnelly acted only through MDY, his corporation, and there has been no adequate showing, as a matter of law, of why the corporate form should be ignored and Donnelly held to be personally liable.[119]

Much more could be said about this point, but we wish not to detain the Court on this elementary, though crucial, point when so much more has to be developed for an understanding of this case.

D. Although the district court found that Glider violated two DMCA provisions, neither one applies because Warden — Blizzard's technological measure to suppress Glider — was not designed or intended to protect against copying, but instead only to limit continuing access to players who were using Glider.

As the Federal Circuit noted in *Chamberlain Group, Inc. v. Skylink Techs., Inc.*,[120] Blizzard must prove the following six elements to establish a prima facie

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[118] *Dream Games of Ariz., Inc. v. P.C. Onsite*, 561 F.3d 983, 995 (9th Cir. 2009) (contributory infringement and vicarious infringement both require direct infringement).

[119] *Ong Hing v. Arizona Harness Raceway, Inc.*, 459 P.2d 107, 115 (Ariz. App. 1969); *Wechsler v. Macke Intern. Trade, Inc.*, 486 F.3d 1286, 1292 (Fed. Cir., 2007); *see also, Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 853 (N.D.Cal.1979), *aff'd sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir.1981), *cert. denied*, 455 U.S. 1018 (1982); *Hoover Group v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1411 (Fed. Cir. 1996).

[120] 381 F.3d 1178, 1203 (Fed. Cir. 2004).

case to establish liability under § 1201(a)(2) of the DMCA:[121]

1. ownership of a valid copyright on a work;
2. effective control of the work by a technological measure that has been circumvented;
3. access to the work by third parties;
4. the lack of authorization to use the circumventing technology;
5. infringement or facilitated infringement of a right protected by the Copyright Act;
6. design by the defendant of the circumventing technology (a) designed or produced primarily for circumvention, (b) made available despite only limited commercial significance other than circumvention; or (c) marketed for use in circumventing the controlling technological measure.[122]

Blizzard's claim under § 1201(a)(2) fails under #2, #5, and #6 of this six-point requirement.

Number 2 fails because Warden does not maintain effective control of the work. A measure that precludes access only under certain conditions is not an effective one. In the leading case of *Lexmark International v. Static Control Components*,[123] the Sixth Circuit likened the "preventing access" requirement to locking the doors of a house: if only the back door is locked and the front door has no lock, then access to the house is not prevented. The court concluded: "It does

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[121] The entire version of the DMCA is included in pages 5-14 of the Appendix.
[122] 17 U.S.C. § 1201(a)(2); *Chamberlain Group*, 381 F.3d at 1203.
[123] 387 F.3d 522 (6th Cir. 2004).

not make sense to say that this provision of the DMCA applies to otherwise readily accessible copyrighted works."[124]

Blizzard's attempted countermeasure, Warden, tries to block players who use Glider from continuing to play the game. But any player who does *not* use Glider can successfully log on to Warcraft, access any dynamic, nonliteral elements, and copy them by using, for example, a digital video recorder such as a TiVO, a handheld video recorder, or the screenshot button on the computer. So Warden does not effectively control access to Warcraft's copyrighted elements. Blizzard has locked Warcraft's proverbial back door but left its front door wide open.

Meanwhile, as demonstrated in Sections A-C of this brief, Glider does not infringe Blizzard's copyright. Hence the claim under #5 of the six-part requirement of § 1201(a)(2) fails.

And finally as to § 1201(a)(2), #6 of the six-part requirement fails because Glider is not marketed primarily for circumvention at all (but primarily as an autopilot), Glider has more than limited commercial success for purposes other than circumvention (namely, to advance the player's avatar to a more interesting playing level in the videogame), and it is not marketed for use in circumventing Warden (its commercial success preceded the development of Warden).

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[124] *Id.* at 547.

As for Blizzard's other DMCA claim, § 1201(b)(1) forbids devices that circumvent technologies "designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright."[125] Warden is not designed or intended to prevent copying of any kind in any way. And it cannot detect Warcraft players who access and copy the dynamic, nonliteral elements of the computer game. The district court acknowledged that this is so.[126] At any rate, Glider does not copy or record anything, nor does it aid any other system to do so. Hence it doesn't violate § 1201(b)(1).

All Glider does is automate the keystrokes necessary to progress to the 70th level of the game. It does not capture sounds or images or in any other way make a record or copy.

MDY and Donnelly didn't infringe any of Blizzard's copyrights in Warcraft, nor did they facilitate others' infringing acts. This case is not about piracy or mass distribution of a copyrighted product. Rather, this is a case about a disgruntled computer game owner who seeks a monopoly regarding anything related to its game.

What we've just written is all the Court needs to know. Yet the Court might want to delve into the intricacies of Warcraft, Warden, and Glider, and for that

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[125] *Universal City Studios v. Corley*, 273 F.3d 429, 440–41 (2d Cir. 2001).
[126] ER at E12, fn. 3.

purpose the rest of this section provides a more in-depth discussion that reveals the district court's errors in interpreting the DMCA. We emphasize that what follows is not for the technologically meek of heart.

The district court noted that the literal and nonliteral elements of the software are readily available to the gamer without any technological safeguards, allowing the gamer to copy the information easily and without obstruction.[127] The court also noted that the dynamic, nonliteral elements of the game are changeable according to the game software and come directly from Blizzard's server, and thus are not available on the gamer's actual hard drive or RAM when not connected to the server.[128]

The dynamic, nonliteral elements of Warcraft come from a data stream originating in Blizzard's server, which loosely directs the actions of the images on the computer screen in response to the gamer's chosen actions. So if the game-client software, stored on the gamer's RAM, shows an image of a dragon, the data stream from Blizzard's server loosely directs how, for example, wings will flap and what sounds will come from the image. This coupling is what the district court found to be dynamic, nonliteral elements of the game.

The parties agree that Warden is not a checkpoint to gain access to

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[127] ER at G19, ll. 15–23 (game client software can be freely copied); ER at E12, fn. 3 (game play can be freely copied (recorded)); *See also,* ER at T3.
[128] *Id.*

Blizzard's server for accessing the dynamic, nonliteral elements. The parties differ on what constitutes the protective "technological measure." Blizzard claims it is the complete Warden; MDY claims the log-in requirement as the access point—the technological measure that allows access to the copyrighted material.

Warden, the putative "technological measure" to prevent access, is a two-part program: (1) the "scan.dll" that scans the gamer's computer for unauthorized programs before allowing access to the gamer through the log-in process; (2) the "resident portion," which pops up periodically to check the gamer's RAM to ensure that it is free from unauthorized programs, but only while the gamer is connected to Blizzard's server.[129] Scan.dll acts as a gatekeeper, and the resident checks up from within the server.[130]

Lumping the two-pronged security measure under one name, as Blizzard does in calling it "Warden," oversimplifies the security issue and allows a misapplication of the DMCA § 1202(a)(2) as illustrated in this analogy: key cards (containing digital information about the possessor) are now the norm for security measures allowing access into secure building locations. To enter a secure building, one need only produce a valid keycard to enter. This is much like a log-in site where the scan.dll program checks to ensure that you're not using a counterfeit

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[129] ER at G17-G18.
[130] *See id.*

card. The resident program is more akin to a version of the wandering night watchman who verifies your credentials to be present within the building, but only when he encounters you. The wandering night watchman isn't sitting and checking your authorization at the front door. Both the keycard scanner and the night watchman are part of the security system for the building, but they are not the same measure or the same thing. Each has a specific purpose and a specific protocol.

Glider doesn't help circumvent Blizzard's log-in requirements: (1) having an up-to-date monthly subscription by paying a fee; (2) having an authorized account; and (3) entering valid log-in information. All three points must be met to access Blizzard's server. If a gamer turns on Glider before logging in, scan.dll can identify Glider and prevent the gamer from logging in to Blizzard's server. Glider must be in the "off" mode before a gamer can access Blizzard's server (which means that the gamer is not using Glider and Glider is not an issue). After a successful log-in, a gamer has access to the full realm of the data streams from Blizzard's server, creating the dynamic, nonliteral elements on which the district court dwelled. Properly understood, Glider has nothing to do with Blizzard's security measure protecting *access*, namely scan.dll.

But even if Warden's two-pronged security system were evaluated as a single entity, then again MDY did not violate the language of § 1202(a)(2) because although Glider does avoid detection by the resident program, the gamer has

already accessed the dynamic, nonliteral elements—and that access was not gained through circumvention. The DMCA's focus has, from the very beginning, been to strengthen antipiracy laws by prohibiting any means of circumventing the security measures that protect copyrighted material from being vulnerable and thus easily copied and distributed en masse as pirated material. For example, in *Universal City Studios, Inc. v. Corley*,[131] as a publisher of a hacker magazine and website, Corley posted decryption software (DeCSS) that allowed users to circumvent the CSS encryption on DVDs that prevented unauthorized copying of the DVD-copyrighted material.[132] The CSS program prevented the DVD files from being copied onto the computer's hard drive.[133] If copied onto the hard drive in such an unprotected manner (without CSS protection), the files can be reproduced, "burned" onto other discs, made downloadable over a website, sent by e-mail, and mass distributed in other ways, all against the copyright.

The DMCA's main directive was to prevent piracy of copyrighted material, namely unauthorized copying. The *Corley* court expressed what Congress's intent was in enacting the DMCA: "Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied

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[131] 273 F.3d 429 (2d Cir. 2001).
[132] *Id.* at 435–36.
[133] *Id.*

material, Congress sought to combat piracy in its earlier stages, before the work was even copied."[134] Congress targeted pirates who circumvented these protective-digital walls to carry out unauthorized copying.[135]

Glider has no copying capabilities. It does not work with any other program that would facilitate someone in copying dynamic, nonliteral elements. And Glider does not disable Warden measures so that a third-party program might "sneak" past or around Warden and then copy the dynamic, nonliteral elements. Glider has only one function: to aid gamers in advancing their videogame characters through the lower levels of the game. That simply doesn't constitute copyright infringement, nor does it facilitate infringing activities.

One last thing about § 1201(b)(1). As the Second Circuit has noted, the focus of the technological measure there is to *permit access* to a copyrighted work but to *prevent the copying* of the work.[136] In this case, Blizzard claims Warden as its technological measure that fulfills §1201(b)(1)'s requirements. Scan.dll is only positioned at the log-in portal of Blizzard's server. Any gamer can pass through this portal by merely entering valid user identification and having no unauthorized third-party software running. Scan.dll will scan the gamer's RAM, and if no unauthorized third-party software is detected, the gamer can access Blizzard's

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[134] *Id.* at 435.
[135] *Id.*
[136] *Id*, at 441; *see* S.Rep. No. 105-190, at 11–12 (1998).

server. At this point, the gamer has full access to all the dynamic, nonliteral elements that combine with the literal and nonliteral elements present in the gamer's RAM, producing a visual expression on the visual monitor. So for example, the literal elements produce an image of a dragon on the screen and the combination with the nonliteral and dynamic, nonliteral elements depict the dragon flapping its wings and breathing fire. A gamer who wishes to makes to copies of this image or any other from the videogame can use a digital recorder, video camera, or even a camera to capture the image. These actions of copying are in fact copyright infringement. Copying can be shown through circumstantial evidence proving access to the copyrighted work and a substantial similarity between the copyrighted work and the infringer's work.[137] Copyright infringement is actionable only if the copyright holder shows substantial similarity in both ideas and expression.[138] The infringing work should capture the "total concept and feel" of the original work.[139] Actual depictions and copies of the copyrighted work would constitute copyright infringement under these standards.

Section 1201(b)(1) requires that the technological measure effectively protect the dynamic, nonliteral elements from copyright infringement. But it is

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[137] *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1176 (9th Cir. 1989).
[138] *Frybarger v. Int'l Business Machines Corp.*, 812 F.2d 525, 529 (9th Cir. 1987).
[139] *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987); *Johnson Controls*, 886 F.2d at 1176.

evident that Warden does not prevent a DVR link, or a video camera from taping the visual expressions of Warcraft. So if Warden does not protect the copyrighted material, and no technological measure remains to be circumvented, Blizzard has no valid claim that Glider violates §1201(b)(1).

Without in some way abridging one of those six rights accorded to copyright owners, MDY and Donnelly cannot be liable under either § 1201(a)(2) or § 1201(b)(1). The district court erred in holding otherwise.

The DMCA illegalizes the creation of software and hardware that allow bypassing of copyright-security measures and facilitates the full-scale unauthorized copying and disseminating of copyrighted material.[140] In protecting copyrighted works, Congress also sought to balance the interests content-creators and information-users without squashing the creative spirit and the opportunity that Congress intended to flourish through copyright protections.[141]

1. ***The Court must look to the purpose of the circumvention when determining whether a person violates the DMCA.***

As other Circuits have noted, the legislative history of the DMCA indicates that it was designed to address a problem that had not previously existed — namely that computers and the Internet had enabled digital works to be copied and massively pirated to millions of potential recipients with no practical legal means

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[140] *Chamberlain Group*, 381 F.3d, at 1197.
[141] *Id.*

to enforce a copyright owner's rights.[142] While some owners might try to protect their works from being infringed by implementing technological security measures to prevent massive piracy, no laws existed to discourage the creation and use of devices to circumvent these protection schemes.[143] Congress designed the DMCA to assist owners in these self-help efforts. But when a protection scheme exists merely to protect access to the functionality of a work, such as a computer program that is not at risk of infringement, or a copyright owner's business model, Congress never intended the DMCA to apply.[144]

In both the *Chamberlain* and *Lexmark* cases, the courts affirmed that the DMCA does not apply to cases where a person circumvents a protection scheme that does not relate to infringement or piracy of the protected works. As the *Chamberlain* Court noted, Congress passed sections 1201(a)(2) and (b)(1) to help copyright owners protect their works *from piracy* behind a digital wall.[145] Congress intended that there be a connection between a person who merely circumvents a technological measure for the purpose of pirating a protected work, and one who circumvents a technological measure for purposes unrelated to infringement.[146]

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[142] *Lexmark*, 387 F.3d at 549.
[143] *Id.*
[144] *See Chamberlain Group*, 381 F.3d at 1197.
[145] *Id.* (citing *Universal City Studios v. Corley*, 273 F.3d, at 435. (emphasis in original)).
[146] *See id.*

In *Lexmark*, the concurring opinions went even further by cautioning against misusing the DMCA and addressing how a claim under the DMCA should be analyzed. Judge Merritt noted that "the key question is the 'purpose' of the circumvention technology" and that the "main point of the DMCA [is] to prohibit the pirating of copyright-protected works . . . ."[147] In particular, he warned that companies should not use the DMCA with copyright law to create monopolies of manufactured goods for themselves.[148] And in addressing Lexmark's claims, Judge Merritt noted:

> If we were to adopt Lexmark's reading of the statute, manufacturers could potentially create monopolies for replacement parts simply by using similar, but more creative, lock-out codes. Automobile manufacturers, for example, could control the entire market of replacement parts for their vehicles by including lock-out chips. Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures "for the purpose" of pirating works protected by the copyright statute. Unless a plaintiff can show that a defendant circumvented protective measures for such a purpose, its claim should not be allowed to go forward. If Lexmark wishes to utilize DMCA protections for (allegedly) copyrightable works, it should not use such works to prevent competing cartridges from working with its printer.[149]

Perhaps most importantly, Judge Merritt noted its concern over the control copyright holders would have over third parties, as well as the effects of restraining progress in science and art — things clearly contrary to Congress's purposes under

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[147] *Lexmark*, 387 F.3d at 552 (Merritt, J., concurring).
[148] *Id.* at 551.
[149] *Id.* at 552 (Merritt, J., concurring).

the Copyright Act. As Judge Merritt put it:

> Lexmark's reading of the extent of these rights, however, would clearly stifle rather than promote progress. It would allow authors exclusive control over not only their own expression, but also over whatever functional use they can make of that expression in manufactured goods.[150]

In his concurring opinion, Judge Feikins reaffirmed these same points and noted that reading the DMCA in Lexmark's way would clearly reject Congress's intent.[151] Because Blizzard used the DMCA against MDY as the plaintiffs did in *Lexmark* and *Chamberlain*, the court erred in applying the DMCA here.

E. Blizzard's simply changing the wording of its license agreement to prohibit "bots" like Glider — which had already been in commercial use for 18 months — does not transform Glider's ongoing sales into tortious interferences. And tortious interference is an inappropriate state-law claim in this copyright lawsuit.

If there were a valid claim for tortious interference in this case — there is not — MDY would have every bit as much reason to claim that Blizzard is tortiously interfering with MDY's existing and prospective contractual relations by amending its EULA with its then approximately 6.5 million users, long after MDY had built a highly satisfied customer base. But MDY forbore litigating that claim on grounds that it would be just as frivolous as Blizzard's tortious-interference claim.

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[150] *Id.* at 553.
[151] *Id.* at 564 (Feikins, J., concurring).

Under Arizona law, there are four elements to a claim for tortious interference with contractual relations: (1) the existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resultant damage to the party whose relationship has been disrupted.[152]

To be actionable, the alleged interference must be, in the words of the Arizona Supreme Court, "both intentional and improper . . . . If the interferer is to be held liable for committing a wrong, his liability must be based on more than the act of interference alone."[153] In *Wagenseller v. Scottsdale Memorial Hospital*, the Arizona Supreme Court adopted a six-factor test from The Restatement (Second) of Torts § 767 (1979) for determining whether conduct is improper for purposes of a tortious-interference claim.[154] The six factors are:

(1) the nature of the actor's conduct (here, creating an autopilot for a videogame);

(2) the actor's motive (here, to advance an experienced player to the more interesting parts of a videogame);

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[152] *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1025 (Cal. 2005).
[153] *Id.* at 102; *see Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1043 (1983).
[154] *Wagenseller*, 710 P.2d at 1042.

(3) the interests of the other with which the actor's conduct interferes (here, Blizzard's apparent desire to have players take months to plod through the first 69 steps of its game, even though advanced players prefer to avoid that monotony);

(4) the social interests in protecting the freedom of action of the actor and the contractual interests of the other (please remember, it's a videogame with steadily and strongly increased subscribership);

(5) the proximity or remoteness of the actor's conduct to the interference (there *was* no "interference," since Glider allowed the player to play the game on autopilot without affecting the source code or any elemental aspect of the game, and Blizzard proffered no evidence that Glider shortened anyone's subscription to Warcraft);

(6) the relations between the parties (there was no direct relationship until Blizzard's representatives, three in number, arrived on Donnelly's doorstep demanding money in October 2006).

According to the Arizona Supreme Court, although "the 'intentional' element of tortious interference focuses on the mental state of the actor, . . . the 'improper' element in contrast 'generally is determined by weighing the social importance of the interest the defendant seeks to advance against the interest invaded.'"[155]

Here, since Warcraft is played noncompetitively — there is no winner or loser, and there isn't even an "end" to the game because it can go on ad infinitum — it's hard to believe that a sense of fairness is being compromised in any way. It's not as if one tennis player is cheating another, or one golfer is cheating the field, since defeating other players and being declared winner are not objects of the

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[155] *Safeway*, 106 P.3d at 1026 (quoting *Snow v. W. Savs. & Loan Ass'n*, 730 P.2d 204, 212 (Ariz. 1986)).

game.

In any event, Blizzard first decided to contractually ban bots well after this litigation began, changing its end-user license agreements in an attempt to make Glider-users scofflaws and to create a claim that MDY's sale of Glider somehow amounted to tortious interference.[156] The district court never considered whether Glider-users violated any earlier versions of the TOU. The court only found that users violated Blizzard's current prohibition against use of "third-party software designed to modify the [Warcraft] experience" once its bar against "bots" was inserted.

If there is any ambiguity whether software "modif[ies] the [Warcraft] experience," it must be construed against Blizzard.[157] "Cheats" that do not pay for their access to the game; "mods" that change a game character's traits (e.g., enhanced strength); and "hacks" that change access to, or the code of, Warcraft's program, are unambiguous and clearly "modify the [Warcraft] experience." But Glider is only an automation device, or "bot." There is nothing improper about a "bot" per se, and it is not a defined term in Blizzard's end-user license agreements.

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[156] ER at N6, ¶¶16-18; *see also,* E13, ll. 3-4 (district court noting that the EULA and TOU did not expressly prohibit bots when MDY first introduced Glider); Appendix at 3-4 (showing how Blizzard changed its TOU after this case began to create liability for MDY).

[157] *See Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, No. 373, 2003, p. 6 (Del. 2003) ("[T]he *contra proferentem* rule of construction … requires that the ambiguity be resolved against the drafter.").

A "bot" can be a simple macro without any impact on the Warcraft experience. Using Glider doesn't change anything that a player would normally do while playing the game; it merely does the same things automatically.[158] Given this ambiguity concerning bots and their uncertain effect, if any, on the Warcraft experience, the district court's finding is unsupported.

There is also no direct evidence that Glider-users necessarily "modif[ied] the [Warcraft] experience" such that no reasonable jury could conclude otherwise. Any evidence to the contrary asserted by Blizzard must be viewed in "a light most favorable" to MDY, and MDY must be given "the benefit of all the evidence and all favorable inferences that may be reasonably drawn therefrom."[159] With this high proof standard — and Blizzard's reliance on its post-litigation changes to the end-user license agreements — Blizzard has attempted to misuse the cause of action of tortious interference and fallaciously persuaded the district court to adopt its position.

Essentially, Blizzard has alleged tortious interference as a way of bootstrapping a copyright claim into a state tort-law claim. If it is legal to sell Glider under the Copyright Act, then Blizzard shouldn't be able to urge that selling to any intended user is an act of tortious interference. If anything, the state tort

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[158] ER at N9-11, ¶¶38-46.
[159] *Geiler v. Arizona Bank*, 537 P.2d 994, 997 (Ariz. App., 1975).

claim should be preempted by the Copyright Act, just as the United States Supreme Court has held that the National Labor Relations Act preempts a state claim of tortious interference with an employment contract.[160]

MDY asks this Court to rule that Blizzard's tortious-interference claim is invalid because (1) there was no improper interference, (2) Blizzard has unclean hands in changing its EULA in such a way as to create a tortious interference, (3) a copyright claim cannot be bootstrapped into a state-law tort claim, and (4) the Copyright Act preempts the state-law claim.

The district court mainly relied on *American Airlines v. Platinum World Travel*[161] in holding that MDY had tortiously interfered with contracts. But the court in *American Airlines* rightly said that the circumstances in that case were "unusual."[162] Indeed, they were anomalous — and quite unlike the case at bar.

The facts of *American Airlines* require some explanation. American Airlines' customers could enroll in a frequent-flyer program to earn awards; under the program's terms, the awards could not be sold, but they could be issued in the name of a person other than the customer.[163] The defendants were brokers who directly induced the airline's customers to sell their awards to the brokers, then

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[160] *Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 682, 103 S.Ct. 1453, 1462 (1983).
[161] 769 F. Supp. 1203 (D. Utah 1990), *aff'd*, 967 F.2d 410 (10th Cir. 1992).
[162] *Id.* at 1206.
[163] *Id.* at 1204.

engaged them to participate further in the scheme by requesting a travel award in a name provided by the brokers, and delivering it to the brokers, who then resold the award to the person named.[164] The brokers also altered the airline's electronic tickets,[165] took or falsely manufactured the airline's property, specifically the awards of the program,[166] and manufactured phony identification cards.[167] Knowing of the anti-resale provision in the frequent-flyer program agreement,[168] the brokers took elaborate measures to ensure that the airline did not learn of the brokerage operation.[169] In so doing, the brokers caused the airline to perform and provide services to a noncustomer under conditions that violated the terms of the frequent-flyer program contract.[170]

The *American Airlines* court held that the defendants' actions were improper but decided that the factors in § 767 of the Restatement (Second) of Torts did not "address precisely the unusual circumstances" of the case, and so were not useful

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[164] *Id.*
[165] *American Airlines v. Christensen*, 967 F.2d 410, 412 (10th Cir. 1992) (Although the defendant's name is different, this case is the *American Airlines* decision that was affirmed on appeal by the Tenth Circuit. It is cited here because the factual record is more developed than in the district court decision).
[166] *Id.*
[167] *Id.*
[168] *Id.* at 413.
[169] *Platinum World Travel*, 769 F. Supp. at 1204.
[170] *Id.* at 1204.

to determine impropriety.[171] It declared that

> the defendants' business depends upon their ability to induce the plaintiff's customers to breach their contractual obligations while the plaintiff continues to perform. In order to accomplish this, the defendants have developed an elaborate system of deception enlisting the aid of the plaintiff's customers and the purchasers of the brokered tickets.[172]

But in reaching this decision, the court looked to § 766 of the Restatement, which provides: "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by *inducing or otherwise causing* the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."[173] The brokers had directly and deliberately induced the airline's customers to lie to the airline[174] and to violate their contracts by selling their awards to a third party,[175] and taken great pains to keep the brokerage scheme a secret.[176]

But MDY has done nothing of the sort. It does not actively induce or encourage Warcraft players to breach a contract. Through its website, it warns potential customers that using Glider with Warcraft may breach Blizzard's

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[171] *Id.* at 1206.
[172] *Id.*
[173] *Id.* (emphasis added).
[174] *Christensen*, 967 F.2d at 412.
[175] *Id.* at 413.
[176] *Id.* at 412; *Platinum World Travel*, 769 F. Supp. at 1204.

agreements.[177] MDY does not instruct customers to lie to Blizzard about using Glider.[178] MDY has never appropriated any property from Blizzard because Glider does not copy anything or otherwise take anything away from Blizzard.[179] And the players who use Glider are the same ones who directly contract with and continually pay subscription fees to Blizzard to play Warcraft.[180] Further, MDY never hid Glider. Blizzard was aware of MDY and Glider from its inception, and it knew that Warcraft players were using Glider, yet it did not object to the software or alter its terms of usage until nearly two years had passed.[181] Although Glider may now avoid detection by Blizzard's Warden software, it never alters any of Blizzard's code.[182] And MDY has never created or sold phony or fraudulent Warcraft usernames or passwords so that unauthorized users could gain access to Warcraft.

In addition, the trial court erred when it rejected MDY's argument that it could not be liable for tortious interference as a matter of law when it did nothing more than "honestly persuade" people to buy Glider.[183] The trial court asserted that

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[177] ER at G22. The Court should note that MDY did not post this warning until Blizzard began banning MDY's Glider customers. ER at H33-H34.
[178] ER at N11-12 ¶¶ 47-56.
[179] ER at E12-13.
[180] ER at N9 ¶ 39.
[181] ER at H22–27; ER at E13, ll. 11–28.
[182] ER at E12-13.
[183] ER at G24.

"honest persuasion," as those terms were used by the Arizona Supreme Court in *Wagenseller v. Scottsdale Memorial Hosp.*,[184] "refers to competitors in a marketplace."[185] Nothing in *Wagenseller* supports such a narrow view.

Specifically, *Wagenseller* stated: "It is difficult to see anything defensible, in a free society, in a rule that would impose liability on one who honestly persuades another to alter a contractual relationship."[186] *Wagenseller* was not a competition case. And neither of the law-review articles cited by the Arizona Supreme Court in support of its honest-persuasion doctrine focused on competition either.[187] The articles addressed the very thing that has happened here: a court expansively applying the tort of interference to wrongfully include those who do nothing more than honestly persuade.[188]

F. In the absence of any tortious interference with contractual relations by MDY, Donnelly cannot be vicariously liable in tort.

If firsthand liability doesn't attach here — and this Court should squarely

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[184] *Wagenseller,* 710 P.2d at 1041.
[185] ER at G24.
[186] *Wagenseller*, 710 P.2d at 1041.
[187] Dobbs, Dan B., *Tortious Interference with Contractual Relationships*, 34 Ark. L. Rev. 335 (1980-81); Perlman, Harvey S., *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61 (1982).
[188] *See generally, id.*

rule that it doesn't — then secondary liability shouldn't attach.[189] Michael Donnelly created and sold his autopilot, Glider, for a wildly popular videogame as a way of advancing the experienced player beyond the tedium of the initial steps. He achieved some success, never dreaming that he personally could be held liable to the tune of more than $6.5 million. For what? For creating an autopilot to a computer game.

The evidence is uncontroverted that Donnelly wrote his own software, did not copy anything, did not mislead anyone when selling Glider (he was candid with buyers), and did not ignore the legal terrain (he carefully reviewed the EULA, the TOU, and other relevant documents). At all times, Donnelly acted in a way that was socially acceptable and economically justifiable — that is, the way one could reasonably expect a person to act in his shoes.[190]

In its order, the trial court conceded that "Donnelly argues, with some persuasive force, that he should not be held personally liable when he could not reasonably be expected to know that the Ninth Circuit applied copyright law to the

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[189] *Dream Games of Ariz., Inc. v. P.C. Onsite*, 561 F.3d 983, 995 (9th Cir. 2009) (contributory infringement and vicarious infringement both require direct infringement).

[190] *Murphy Tugboat Co.*, 467 F.Supp. at 853; *accord, Hoover Group v. Custom Metalcraft, Inc.*, 84 F.3d at 1411-12; *Wechsler v. Macke Intern. Trade, Inc.*, 486 F.3d at 1292; *Ong Hing*, 459 P.2d at 115.

copying of software into RAM."[191] Of course, we not only urge this Court to reverse the judgment in full, but also to reverse (if such a thing is possible) the portions relating to personal liability with special gusto. In the presence of doubt — and many are watching this case in hopes that the Ninth Circuit will sensibly clarify the law — Donnelly should not suffer under the knell of a truly draconian judgment.

X. Conclusion

Just as people take their Harry Potter books seriously, people take their games seriously. To many, it was astonishing a few years ago to see the Rules of Golf federalized and ruled on by none other than the Supreme Court of the United States.[192] Now we're seeing an attempt to federalize the rules of a computer game that millions have found to be not just a diversion, but an obsession.

What is at stake, though, is weighty indeed. If Glider — to most people a harmless autopilot that does nothing to copy software, nothing to alter source code, and nothing to diminish the popularity of Warcraft — is disallowed by commingling the federal tort law (copyright) with state contract law, the most powerful software purveyors will be able to stifle all sorts of add-ons with

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[191] ER at E18, lines 2–4 (adding, at E12, lines 22–23: "Donnelly did not believe that the creation or distribution of Glider violated the copyright laws").
[192] *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 149 L.Ed.2d 904 (2001).

anticompetitive zeal. It may become impossible to market add-on software that individual entrepreneurs may develop for benign, productive purposes. Innovation will be thwarted — and bizarrely enough, under the aegis of a right intended "to promote the progress of science and useful arts."

MDY and Donnelly ask this Court to reverse the judgment of the trial court and to render judgment in their favor. In the alternative, if there is any fact that the Court believes needs to be considered by the fact-finder — and we don't believe there is — we ask for a reversal and remand for a further finding of facts, with directions from this Court on how to apply the law.

Respectfully Submitted

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XI. Certificate of Compliance

Under Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the Appellant's principal brief is proportionally spaced, has a typeface of 14 points or more and contains 12,338 words.

September 14, 2009

Lance C. Venable, Esq.
Attorney for Appellants

Date

XII. Appendix

INDEX TO APPENDIX

Software-Gaming Glossary

Account: a set of contractual information for a player, including a username and password. Creating an account for use with World of Warcraft can be done by redeeming a code that comes in the World of Warcraft box as purchased from a retail outlet for about $20. Account codes can also be purchased directly from Blizzard's website.
Add-on: a piece of software that interoperates with another piece of software for the purpose of adding or changing functionality. Some common examples: Adobe Flash player and Google search bar.
Avatar: a virtual person within World of Warcraft, attached to an account. Accounts typically possess several characters.
Bot: an add-on that is intended to automate the play of a videogame; similar to an autopilot. The term is short for "robot."
Character: see Avatar.
Class: the defining archetype to which a character might belong, such as warrior or priest. When a character is created, the player must choose the class of the character. The class can never be changed. To play a new class, the player must start a new character from scratch.
Cheat: a hack or playing method that alters the game to allow players to do things otherwise impossible, such as fly, move through walls, or become impervious to killing.
Crack: a hack whose purpose is to remove copy protection.
EULA: end-user license agreement—namely, the contract that appears after purchase but during installation of software. The EULA also appears when Blizzard updates the game, EULA, or TOU.
Hack: an add-on that alters the software with which it interoperates, physically changing the behavior of the software.
Level: one measure of the progression through a videogame such as World of Warcraft. As players continue playing, they gain levels, items, virtual currency, and other in-game rewards for continued play.
Mod: short for modification—a specialized type of add-on terminology defined by Blizzard to be a developer's add-on for World of Warcraft using Blizzard's interface with Blizzard's blessing. Blizzard's interface is limited and allows only certain functionalities to be created. (Glider is not a mod, as defined by Blizzard.)
Patch: a modification or set of modifications done to the game of World of Warcraft by Blizzard. A patch consists of a download, which is often very large, of new graphics, sounds, and game logic. A process runs on the player's PC to merge

these new elements with the existing ones that came from installing the game. Glider is not used during the patch process.

Rootkit: a software system that consists of a program or combination of several programs designed to hide or obscure the fact that a system has been compromised. Blizzard characterizes Glider's evasion of Warden as an "illegal rootkit" in its pleadings, apparently because it alters Windows itself. But it is not a rootkit, since it's only hiding Glider from Warden and not compromising the system.

TOU: terms of use—namely, a second contract governing the rules of the World of Warcraft service, as provided by Blizzard. It is similar to the EULA: players are asked to assent to its terms before they can begin playing or, on update, resume playing.

Trial account: a limited type of account that can be created free for 30 days. Trial accounts are subject to many restrictions, such as maximum levels and limitations on interacting with other players.

CONTRACT EXCERPTS

Blizzard's TOU in May 2005
(MDY first offered Glider for sale[1])

The record is silent regarding any TOUs prior to June 2005.[2]

Blizzard's TOU in June 2005[3]
(shortly after MDY began selling Glider)

C. You agree that you will not (i) modify or cause to be modified any files that are a part of a World of Warcraft installation; (ii) create or use cheats, "mods", and/or hacks, or any other third-party software designed to modify the World of War craft experience; (iii) use any third-party software that intercepts, "mines", or otherwise collects information from or through World of War craft; or (iv) allows players who are playing characters aligned with the "Alliance" faction to chat or otherwise communicate directly with players who are playing characters aligned with the "Horde" faction, or vice versa. Notwithstanding the foregoing, you may update World of War craft with authorized patches and updates distributed by Blizzard, and use authorized Third Party User Interfaces as set forth in Section 13(f), below.

Blizzard's TOU modified on December 11, 2006[4]
(two months after this lawsuit commenced[5])

C. You agree that you will not (i) modify or cause to be modified any files that are a part of the Program or the Service; (ii) create or use cheats, **bots**, "mods", and/or hacks, or any other third-party software designed to modify the World of War craft experience; or (iii) use any third-party software that intercepts, "mines", or otherwise collects information from or through the Program or the Service. Notwithstanding the foregoing, you may update the Program with authorized patches and updates distributed by Blizzard, and Blizzard may, at its sole and absolute discretion, allow the use of certain third party user interfaces.

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[1] ER at O22, ¶120 (Blizzard's Statement of Facts).
[2] *See,* ER at W.
[3] ER at R4, §2C.
[4] ER at V3-4, §4C(emphasis supplied).
[5] ER at V1.

17 U.S.C. §1201 (DMCA)

U.S. Code collection

TITLE 17 > CHAPTER 12 > § 1201

§ 1201. Circumvention of copyright protection systems

(a) Violations Regarding Circumvention of Technological Measures.—

(1)

(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a

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copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) Additional Violations.—

(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection—

(A) to "circumvent protection afforded by a technological measure" means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

(B) a technological measure "effectively protects a right of a copyright owner

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under this title" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) Other Rights, Etc., Not Affected.—(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) Exemption for Nonprofit Libraries, Archives, and Educational Institutions.—

(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph—

(A) may not be retained longer than necessary to make such good faith determination; and

(B) may not be used for any other purpose.

(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1)—

(A) shall, for the first offense, be subject to the civil remedies under section 1203; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be—

(A) open to the public; or

(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a

specialized field.

(e) Law Enforcement, Intelligence, and Other Government Activities.— This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(f) Reverse Engineering.—

(1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

(4) For purposes of this subsection, the term "interoperability" means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

(g) Encryption Research.—

(1) Definitions.— For purposes of this subsection—

(A) the term "encryption research" means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and

(B) the term "encryption technology" means the scrambling and descrambling of information using mathematical formulas or algorithms.

(2) Permissible acts of encryption research.— Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if—

(A) the person lawfully obtained the encrypted copy, phonorecord, performance,

or display of the published work;

(B) such act is necessary to conduct such encryption research;

(C) the person made a good faith effort to obtain authorization before the circumvention; and

(D) such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) Factors in determining exemption.— In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security;

(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

(C) whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

(4) Use of technological means for research activities.— Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to—

(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

(5) Report to congress.— Not later than 1 year after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly report to the Congress on the effect this subsection has had on—

(A) encryption research and the development of encryption technology;

(B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and

(C) protection of copyright owners against the unauthorized access to their encrypted copyrighted works.

The report shall include legislative recommendations, if any.

(h) Exceptions Regarding Minors.— In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a

technology, product, service, or device, which—

(1) does not itself violate the provisions of this title; and

(2) has the sole purpose to prevent the access of minors to material on the Internet.

(i) Protection of Personally Identifying Information.—

(1) Circumvention permitted.— Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if—

(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

(2) Inapplicability to certain technological measures.— This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

(j) Security Testing.—

(1) Definition.— For purposes of this subsection, the term "security testing" means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

(2) Permissible acts of security testing.— Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) Factors in determining exemption.— In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

(A) whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network; and

(B) whether the information derived from the security testing was used or

maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.

(4) Use of technological means for security testing.— Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2),[1] provided such technological means does not otherwise violate section [2] (a)(2).

(k) Certain Analog Devices and Certain Technological Measures.—

(1) Certain analog devices.—

(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in any—

(i) VHS format analog video cassette recorder unless such recorder conforms to the automatic gain control copy control technology;

(ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;

(iii) Beta format analog video cassette recorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;

(iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or

(v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless such device conforms to the automatic gain control copy control technology.

(B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in—

(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology.

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of

this chapter, and thereafter to continue conforming to the four-line colorstripe copy control technology. For purposes of this subparagraph, an analog video cassette recorder "conforms to" the four-line colorstripe copy control technology if it records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits, on a reference display device, a display containing distracting visible lines through portions of the viewable picture.

(2) Certain encoding restrictions.— No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying—

(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

(C) from a physical medium containing one or more prerecorded audiovisual works; or

(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C).

In the event that a transmission meets both the conditions set forth in subparagraph (A) and those set forth in subparagraph (B), the transmission shall be treated as a transmission described in subparagraph (A).

(3) Inapplicability.— This subsection shall not—

(A) require any analog video cassette camcorder to conform to the automatic gain control copy control technology with respect to any video signal received through a camera lens;

(B) apply to the manufacture, importation, offer for sale, provision of, or other trafficking in, any professional analog video cassette recorder; or

(C) apply to the offer for sale or provision of, or other trafficking in, any previously owned analog video cassette recorder, if such recorder was legally manufactured and sold when new and not subsequently modified in violation of paragraph (1)(B).

(4) Definitions.— For purposes of this subsection:

(A) An "analog video cassette recorder" means a device that records, or a device that includes a function that records, on electromagnetic tape in an analog format the electronic impulses produced by the video and audio portions of a television program, motion picture, or other form of audiovisual work.

(B) An "analog video cassette camcorder" means an analog video cassette recorder that contains a recording function that operates through a camera lens and through a video input that may be connected with a television or other video playback device.

(C) An analog video cassette recorder "conforms" to the automatic gain control

copy control technology if it—

(i) detects one or more of the elements of such technology and does not record the motion picture or transmission protected by such technology; or

(ii) records a signal that, when played back, exhibits a meaningfully distorted or degraded display.

(D) The term "professional analog video cassette recorder" means an analog video cassette recorder that is designed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

(E) The terms "VHS format", "8mm format", "Beta format", "automatic gain control copy control technology", "colorstripe copy control technology", "four-line version of the colorstripe copy control technology", and "NTSC" have the meanings that are commonly understood in the consumer electronics and motion picture industries as of the date of the enactment of this chapter.

(5) Violations.— Any violation of paragraph (1) of this subsection shall be treated as a violation of subsection (b)(1) of this section. Any violation of paragraph (2) of this subsection shall be deemed an "act of circumvention" for the purposes of section 1203 (c)(3)(A) of this chapter.

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[1] So in original. Probably should be subsection "(a)(2),".

[2] So in original. Probably should be "subsection".

Appendix 14

BLIZZARD'S CURRENT EULA

END USER LICENSE AGREEMENT

IMPO SE READ CAREFULLY.

THIS SOFTWARE IS LICENSED, NOT SOLD. BY INSTALLING, COPYING OR OTHERWISE USING THE GAME (DEFINED BELOW), YOU AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, YOU ARE NOT PERMITTED TO INSTALL, COPY OR USE THE GAME. IF YOU REJECT THE TERMS OF THIS AGREEMENT WITHIN THIRTY (30) DAYS AFTER YOUR PURCHASE, YOU MAY CALL (800)757-7707 TO REQUEST A FULL REFUND OF THE PURCHASE PRICE.

This software program, and any files that are delivered to you by Blizzard Entertainment, Inc. (via on-line transmission or otherwise) to "patch," update, or otherwise modify the software program, as well as any printed materials and any on-line or electronic documentation (the "Manual"), and any and all copies and derivative works of such software program and Manual (collectively, with the "Game Client" defined below, the "Game") is the copyrighted work of Blizzard Entertainment, Inc. or its licensors (collectively referred to herein as "Blizzard"). Any and all uses of the Game are governed by the terms of this End User License Agreement (the "License Agreement" or "Agreement"). The Game may only be played by obtaining from Blizzard access to the World of Warcraft massively multi-player on-line role-playing game service (the "Service"), which is subject to a separate Terms of Use agreement (the "Terms of Use") incorporated into this Agreement by this reference. The Game is distributed solely for use by authorized end users according to the terms of this License Agreement. Any use, reproduction, modification or distribution of the Game not expressly authorized by the terms of the License Agreement is expressly prohibited.

Game Guide
Game Guide

1. **Grant of a Limited Use License.**
   If you agree to this License Agreement, you may install the computer software (hereafter referred to as the "Game Client") onto your computer for purposes of playing the Game by registering for and accessing an account with the Service (the "Account"). Subject to your agreement to and continuing compliance with this License Agreement, Blizzard hereby grants, and you hereby accept, a limited, non-exclusive license to (a) install the Game Client on one or more computers owned by you or under your legitimate control, and (b) use the Game Client in conjunction with the Service for your non-commercial entertainment purposes only. All use of the Game Client is subject to this License Agreement and to the Terms of Use agreement, both of which you must accept before you can use your Account to play the Game.

Game Guide

2. **Additional License Limitations.**
   The license granted to you in Section 1 is subject to the limitations set forth in Sections 1 and 2 (collectively, the "License Limitations"). Any use of the Game in violation of the License Limitations will be regarded as an infringement of Blizzard's copyrights in and to the Game. You agree that you will not, under any circumstances:

A. in whole or in part, copy, photocopy, reproduce, translate, reverse engineer, derive source code from, modify, disassemble, decompile, or create derivative works based on the Game; provided, however, that you may make one (1) copy of the Game Client and the Manuals for archival purposes only;

B. use cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience;

C. exploit the Game or any of its parts, including without limitation the Game Client, for any commercial purpose, including without limitation (a) use at a cyber cafe, computer gaming center or any other location-based site without the express written consent of Blizzard; (b) for gathering in-game currency, items or resources for sale outside the Game; or (c) performing in-game services in exchange for payment outside the Game, e.g., power-leveling;

D. use any unauthorized third-party software that intercepts, "mines", or otherwise collects information from or through the Game or the Service, including without limitation any software that reads areas of RAM used by the Game to store information about a character or the game environment; provided, however, that Blizzard may, at its sole and absolute discretion, allow the use of certain third party user interfaces;

E. modify or cause to be modified any files that are a part of the Game Client in any way not expressly authorized by Blizzard;

F. host, provide or develop matchmaking services for the Game or intercept, emulate or redirect the communication protocols used by Blizzard in any way, for any purpose, including without limitation unauthorized play over the internet, network play, or as part of content aggregation networks;

G. facilitate, create or maintain any unauthorized connection to the Game or the Service, including

G. facilitate, create or maintain any unauthorized connection to the Game or the Service, including without limitation (a) any connection to any unauthorized server that emulates, or attempts to emulate, the Service; and (b) any connection using programs or tools not expressly approved by Blizzard; or

H. sell, grant a security interest in or transfer reproductions of the Game to other parties in any way not expressly authorized herein, or rent, lease or license the Game to others.

3. **Service and Terms of Use.**
You must accept the Terms of Use in order to access the Service and play the Game. The Terms of Use agreement governs all aspects of game play. You may view the Terms of Use by visiting the following website: http://www.worldofwarcraft.com/legal/termsofuse.shtml. If you do not agree with the Terms of Use, then (a) you may not register for an Account to play the Game, and (b) you may call (800)757-7707 within thirty (30) days after the original purchase to arrange to return the Game and to request a full refund of the purchase price. Once you accept the License Agreement and the Terms of Use, you will no longer be eligible for a refund.

4. **Ownership.**

A. All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard. The Game is protected by the copyright laws of the United States, international treaties and conventions, and other laws. The Game may contain materials licensed by third parties, and the licensors of those materials may enforce their rights in the event of any violation of this License Agreement.

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The media on which the Game Client is distributed may contain additional software and/or content for which you do not have a license (the "Locked Software"), and you agree that Blizzard may install the Locked Software onto your hard drive during the Game Client installation process. You also agree that you will not access, use, distribute, copy, display, reverse engineer, derive source code from, modify, disassemble, decompile any Locked Software, or create any derivative works based on the Locked Software, until and unless you receive from Blizzard (a) a license to use that software; and (b) a valid alphanumeric key with which to unlock it. If you receive a license and a key from Blizzard, you may only unlock those portions of a single copy of the Locked Software for which you received a license. The terms of the End User License Agreement displayed after the Locked Software is unlocked will replace and supersede this Agreement, but only with regard to the Locked Software for which you receive a license. Notwithstanding anything to the contrary herein, you may make one (1) copy of the Locked Software for archival purposes only.

6. **Consent to Monitor.**
WHEN RUNNING, THE GAME MAY MONITOR YOUR COMPUTER'S RANDOM ACCESS MEMORY (RAM) FOR UNAUTHORIZED THIRD PARTY PROGRAMS RUNNING CONCURRENTLY WITH THE GAME. AN "UNAUTHORIZED THIRD PARTY PROGRAM" AS USED HEREIN SHALL BE DEFINED AS ANY THIRD PARTY SOFTWARE PROHIBITED BY SECTION 2. IN THE EVENT THAT THE GAME DETECTS AN UNAUTHORIZED THIRD PARTY PROGRAM, THE GAME MAY (a) COMMUNICATE INFORMATION BACK TO BLIZZARD, INCLUDING WITHOUT LIMITATION YOUR ACCOUNT NAME, DETAILS ABOUT THE UNAUTHORIZED THIRD PARTY PROGRAM DETECTED, AND THE TIME AND DATE; AND/OR (b) EXERCISE ANY OR ALL OF ITS RIGHTS UNDER THIS AGREEMENT, WITH OR WITHOUT PRIOR NOTICE TO THE USER.

7. **Termination.**
This License Agreement is effective until terminated. You may terminate the License Agreement at any time by (i) permanently destroying all copies of the Game in your possession or control; (ii) removing the Game Client from your hard drive; and (iii) notifying Blizzard of your intention to terminate this License Agreement. Blizzard may terminate this Agreement at any time for any reason or no reason. Upon termination for any reason, all licenses

terminate this Agreement at any time for any reason or no reason. Upon termination for any reason, all licenses granted herein shall immediately terminate and you must immediately and permanently destroy all copies of the Game in your possession and control and remove the Game Client from your hard drive.

8. **Export Controls.**
The Game may not be re-exported, downloaded or otherwise exported into (or to a national or resident of) any country to which the U.S. has embargoed goods, or to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders. You represent and warrant that you are not located in, under the control of, or a national or resident of any such country or on any such list.

9. **Patches and Updates.**
Blizzard may deploy or provide patches, updates and modifications to the Game that must be installed for the user to continue to play the Game. Blizzard may update the Game remotely including without limitation the Game Client residing on the user's machine, without the knowledge of the user, and you hereby grant to Blizzard your consent to deploy and apply such patches, updates and modifications.

10. **Duration of the "On-line" Component of the Game.**
This Game is an 'on-line' game that must be played over the Internet through the Service as provided by Blizzard. You understand and agree that the Service is provided by Blizzard at its discretion and may be terminated or otherwise discontinued by Blizzard pursuant to the Terms of Use.

11. **Limited Warranty.**
THE GAME (INLUDING WITHOUT LIMITATION THE GAME CLIENT AND MANUAL(S)) IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF CONDITION, UNINTERRUPTED USE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NONINFRINGEMENT. The entire risk arising out of use or performance of the Game (including without limitation the Game Client and Manual(s)) remains with the user. Notwithstanding the foregoing, Blizzard warrants up to and including 90 days from the date of your purchase of the Game that the media containing the Game Client shall be free from defects in material and workmanship. In the event that such media proves to be defective during that time period, and upon presentation to Blizzard of proof of purchase of the defective media, Blizzard will at its option (a) correct any defect, (b) provide you with a similar product of similar value, or (c) refund your money. THE FOREGOING IS YOUR SOLE AND EXCLUSIVE REMEDY FOR THE EXPRESS WARRANTY SET FORTH IN THIS SECTION. Some states do not allow the exclusion or limitation of implied warranties, so the above limitations may not apply to you.

12. **Limitation of Liability, Indemnity.**
NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE OF ANY KIND ARISING OUT OF THE GAME OR ANY USE OF THE GAME, INCLUDING WITHOUT LIMITATION LOSS OF DATA, LOSS OF GOODWILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, OR ANY AND ALL OTHER DAMAGES OR LOSSES. FURTHER, NEITHER BLIZZARD NOR ITS PARENT, SUBSIDIARIES OR AFFILIATES SHALL BE LIABLE IN ANY WAY FOR ANY LOSS OR DAMAGE TO PLAYER CHARACTERS, VIRTUAL GOODS (E.G., ARMOR, POTIONS, WEAPONS, ETC.) OR CURRENCY, ACCOUNTS, STATISTICS, OR USER STANDINGS, RANKS, OR PROFILE INFORMATION STORED BY THE GAME AND/OR THE SERVICE. BLIZZARD SHALL NOT BE RESPONSIBLE FOR ANY INTERRUPTIONS OF SERVICE, INCLUDING WITHOUT LIMITATION ISP DISRUPTIONS, SOFTWARE OR HARDWARE FAILURES, OR ANY OTHER EVENT WHICH MAY RESULT IN A LOSS OF DATA OR DISRUPTION OF SERVICE. IN NO EVENT WILL BLIZZARD BE LIABLE TO YOU FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES. In no event shall Blizzard's liability, whether arising in contract, tort, strict liability or otherwise, exceed (in the aggregate) the total fees paid by you to Blizzard during the six (6) months immediately prior to the time such claim arose. You hereby agree to defend, indemnify and hold Blizzard harmless from and against any claim, liability, loss, injury, damage, cost or expense (including reasonable attorneys' fees) incurred by Blizzard arising out of or from your use of the Game. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitations may not apply to you.

13. **Equitable Remedies.**
You hereby agree that Blizzard would be irreparably damaged if the terms of this License Agreement were not specifically enforced, and therefore you agree that Blizzard shall be entitled, without bond, other security, or proof of damages, to appropriate equitable remedies with respect to breaches of this License Agreement, in addition to such other remedies as Blizzard may otherwise have available to it under applicable laws. In the event any litigation is brought by either party in connection with this License Agreement, the prevailing party in such litigation shall be entitled to recover from the other party all the costs, attorneys' fees and other expenses incurred by such prevailing party in the litigation.

14. **Changes to the Agreement.**
Blizzard reserves the right, at its sole discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this License Agreement when Blizzard upgrades the Game Client, effective upon prior notice as follows: Blizzard will post the revised version of this License Agreement on the World of Warcraft website, and may provide such other notice as Blizzard may elect in its sole discretion. If any future changes to this License Agreement are unacceptable to you or cause you to no longer be in compliance with this License Agreement, you may terminate this License Agreement in accordance with Section 7 herein. Your installation and use of any of Blizzard's updates or modifications to the Game or your continued use of the Game following notice of changes to this Agreement will demonstrate your acceptance of any and all such changes. Blizzard may change, modify, suspend, or discontinue any aspect of the Game at any time. Blizzard may also impose limits on certain features or restrict your access to parts or all of the Game without notice or liability. You have no interest, monetary or otherwise, in any feature or content contained in the Game.

15. **Dispute Resolution and Governing Law.**

A. Informal Negotiations. To expedite resolution and control the cost of any dispute, controversy or claim related to this License Agreement ("Dispute"), you and Blizzard agree to first attempt to negotiate any Dispute (except those Disputes expressly provided below) informally for at least 30 days before initiating any arbitration or court proceeding. Such informal negotiations commence upon written notice from one person to the other. Blizzard will send its notice to your billing address and email you a copy to the email address you have provided to us. You will send your notice to Blizzard Entertainment, Inc., P.O. Box 18979, Irvine CA 92623, attn: Legal Department.

B. Binding Arbitration. If you and Blizzard are unable to resolve a Dispute through informal negotiations, either you or Blizzard may elect to have the Dispute (except those Disputes expressly excluded below) finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. The arbitration shall be commenced and conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and, where appropriate, the AAAs Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are available at the AAA website www.adr.org. The determination of whether a Dispute is subject to arbitration shall be governed by the Federal Arbitration Act and determined by a court rather than an arbitrator. Your arbitration fees and your share of arbitrator compensation shall be governed by the AAA Rules and, where appropriate, limited by the AAA Consumer Rules. If such costs are determined by the arbitrator to be excessive, Blizzard will pay all arbitration fees and expenses. The arbitration may be conducted in person, through the submission of documents, by phone or online. The arbitrator will make a decision in writing, but need not provide a statement of reasons unless requested by a party. The arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Except as otherwise provided in this License Agreement, you and Blizzard may litigate in court to compel arbitration, stay proceeding pending arbitration, or to confirm, modify, vacate or enter judgment on the award entered by the arbitrator.

C. Restrictions. You and Blizzard agree that any arbitration shall be limited to the Dispute between Blizzard and you individually. To the full extent permitted by law, (1) no arbitration shall be joined with any other; (2) there is no right or authority for any Dispute to be arbitrated on a class-action basis or to utilize class action procedures; and (3) there is no right or authority for any Dispute to be brought in a purported representative capacity on behalf of the general public or any other persons.

D. Exceptions to Informal Negotiations and Arbitration. You and Blizzard agree that the following Disputes are not subject to the above provisions concerning informal negotiations and binding arbitration: (1) any Disputes seeking to enforce or protect, or concerning the validity of, any of your or Blizzard's intellectual property rights; (2) any Dispute related to, or arising from, allegations of theft, piracy, invasion of privacy or unauthorized use; and (3) any claim for injunctive relief.

E. Location. If you are a resident of the United States, any arbitration will take place at any reasonable location convenient for you. For residents outside the United States, any arbitration shall be initiated in the County of Los Angeles, State of California, United States of America. Any Dispute not subject to arbitration (other than claims proceeding in any small claims court), or where no election to arbitrate has been made, shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

F. Governing Law. Except as otherwise set forth herein, this License Agreement shall be governed by, and will be construed under, the Laws of the United States of America and the law of the State of Delaware, without regard to choice of law principles. The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded. For our customers who purchased a license to the Game in, and are a resident of, Canada, Australia, Singapore, or New Zealand, other laws may apply if you choose not to agree to arbitrate as set forth above; provided, however, that such laws shall affect this Agreement only to the extent required by such jurisdiction. In such a case, this Agreement shall be interpreted to give maximum effect to the terms and conditions hereof. If you purchased your license to the Game in New Zealand, and are a resident of New Zealand, The New Zealand Consumer Guarantees Act of 1993 ("Act") may apply to the Game and/or the Service as supplied by Blizzard to you. If the Act applies, then notwithstanding any other provision in this License Agreement, you may have rights or remedies as set out in the Act which may apply in addition to, or, to the extent that they are inconsistent, instead of, the rights or remedies set out in this License Agreement. Those who choose to access the Service from locations outside of the United States, Canada, Australia, Singapore, or New Zealand do so on their own initiative and are responsible for compliance with local laws if and to the extent local laws are applicable.

G. Severability. You and Blizzard agree that if any portion Section 15 is found illegal or unenforceable (except any portion of 15(D)) that portion shall be severed and the remainder of the Section shall be given full force and effect. If Section 15(D) is found to be illegal or unenforceable then neither you nor Blizzard will elect to arbitrate any Dispute falling within that portion of Section 15(D) found to be illegal or unenforceable and such Dispute shall be decided by a court of competent jurisdiction within the County of Los Angeles, State of California, United States of America, and you and Blizzard agree to submit to the personal jurisdiction of that court.

16. **Miscellaneous.**
This License Agreement constitutes and contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior oral or written agreements, provided, however, that this Agreement shall coexist with, and shall not supersede, the Terms of Use. To the extent that the provisions of this Agreement conflict with the provisions of the Terms of Use, the conflicting provisions in the Terms of Use shall govern. The provisions of Sections 4(A), 6, 11-13, 15 and 16 shall survive the termination of this Agreement for any reason. If any provision of this Agreement is found to be unenforceable, that provision shall be severed and the remainder of the Agreement shall be given full force and effect.

I hereby acknowledge that I have read and understand the foregoing License Agreement and agree that by clicking "Accept" or installing the Game Client I am acknowledging my agreement to be bound by the terms and conditions of this License Agreement.

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