

Nos. 09-15932, 09-16044
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MDY INDUSTRIES, LLC,

*Plaintiff-Counterclaim-Defendant-
Appellant,*

v.

BLIZZARD ENTERTAINMENT, INC. and VIVENDI GAMES, INC.,

*Defendants-Third-Party Plaintiffs-
Appellees-Cross-Appellants*

v.

MICHAEL DONNELLY,

Third-Party Defendant-Appellant

On Appeal from the United States District Court
for the District of Arizona (Phoenix) –
No. 06-CV-02555 – Hon. David G. Campbell

RESPONSE BRIEF OF APPELLEES AND
OPENING BRIEF OF CROSS-APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MDY INDUSTRIES, LLC,)	No. 09-15932
)	
Plaintiff-Counterclaim Defendant,)	
Appellant)	
)	APPELLEES' CORPORATE
v.)	DISCLOSURE STATEMENT
)	
BLIZZARD ENTERTAINMENT, INC.)	
and VIVENDI GAMES, INC.,)	
)	
Defendants-Third-Party Plaintiffs,)	
Appellees)	
)	
v.)	
)	
MICHAEL DONNELLY,)	
)	
Third-Party Defendant,)	
Appellant)	

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees Blizzard Entertainment, Inc. and Vivendi Games, Inc. submit the following corporate disclosure statement:

The parent corporation of Appellee Blizzard Entertainment, Inc. is Activision Entertainment Holdings, Inc. (f/k/a Vivendi Games, Inc.). The parent corporations of Activision Entertainment Holdings, Inc. are: Activision Blizzard,

Inc.; VGAC LLC (majority shareholder); Vivendi Games Acquisition Company;
Vivendi Holding I Corp.; and Vivendi SA.

Respectfully submitted,

Dated: October 28, 2009

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellees/Cross-Appellants Blizzard Entertainment, Inc. and Vivendi Games, Inc. request oral argument. This appeal raises important issues in this Court concerning the proper interpretation of the Copyright Act and the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201 *et seq.* and thus is ripe for oral argument.

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STATEMENT OF JURISDICTION

Appellees agree with Appellants' statement of jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court correctly held that Appellants vicariously and contributorily infringed Blizzard's copyright in its computer game software by creating, distributing and supporting an unauthorized program that enables users to copy Blizzard's work into RAM in excess of their limited license with Blizzard.
2. Whether the District Court correctly held that Appellants' development and sale of a software program that was primarily designed for, lacks a commercially significant purpose independent of, and is marketed for use in circumventing Blizzard's technological measures designed to prevent players running unauthorized third-party programs from accessing the non-literal expressive elements of its online computer game violates 17 U.S.C. § 1201(a)(2).
3. Whether the District Court correctly held that Appellants' development, marketing, and sale of a software program that was primarily designed for, lacks a commercially significant purpose independent of, and is marketed for use in circumventing Blizzard's technological measures that prevent users running unauthorized third-party programs from copying Blizzard's protected work into RAM and copying the non-literal

elements displayed while playing Blizzard's online computer game violates 17 U.S.C. § 1201(b)(1).

4. Whether the District Court erred in finding that Blizzard, a copyright owner who allows access to and copying of its game software's literal computer program code in a non-useful context, but imposes technological measures to prohibit access to and copying of that code in a manner that exploits and infringes its protected work, cannot establish a violation of 17 U.S.C. §§ 1201(a)(2) or (b)(1) for the circumvention of the technological measures that selectively prohibit access to and copying of that literal code.
5. Whether the District Court correctly held that Appellants' development, marketing and support of software designed to enable users to breach their contracts with Blizzard, conceal the breaches and force Blizzard to continue to perform, while increasing Blizzard's cost of discovering the breaches to the point where Blizzard can no longer afford to enforce its contract rights, renders Appellants liable under Arizona law for tortious interference with contractual relations.
6. Whether the District Court correctly determined that Michael Donnelly, a corporate officer and sole partner of a LLC, is personally liable for

copyright infringement, DMCA violations, and tortious interference with contract where he personally directed and knew of every wrongful act giving rise to those claims, and benefited personally from the wrongful acts.

STATEMENT OF THE CASE

I. Nature of the Case.

This case arises out of a declaratory judgment action filed on October 25, 2006 by MDY Industries, LLC (“MDY”) and Michael Donnelly (“Donnelly”) against Blizzard Entertainment, Inc. and Vivendi Games, Inc. (collectively “Blizzard”) seeking declaratory relief regarding whether MDY’s “Glider” software program (formerly known as “WoWGlider”) infringes a number of Blizzard’s rights. (Dkt. 1.) Blizzard answered on February 16, 2007, asserting counterclaims and third-party claims against both MDY and Donnelly for tortious interference with contract, contributory and vicarious copyright infringement, violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a)(2) & (b)(1), trademark infringement, unfair competition, and unjust enrichment. (Dkt. 10.)

II. Cross Motions for Summary Judgment.

Following discovery, the parties filed cross motions for summary judgment, and the district court granted both parties’ motions in part and denied both in part. (ER G1-G27.)

The District Court found that MDY was vicariously and contributorily liable for Glider users’ infringement of Blizzard’s copyright when those users copied portions of Blizzard’s World of Warcraft (“WoW”) software into RAM in excess

of their limited license. (ER G6-G12.) It granted summary judgment in Appellants' favor as to Blizzard's claim under 17 U.S.C. § 1201(a)(2) regarding access to the literal WoW client code. It denied both parties' motions regarding Blizzard's claims under § 1201(b)(1) as to the literal WoW code and both §§ 1201(a)(2) and (b)(1) with regard to WoW's non-literal elements.

The District Court granted summary judgment in Blizzard's favor on its tortious interference with contract ("TIWC") claim. It held that there was no factual dispute that a valid contract existed between Blizzard and its users, that MDY knew of the contract, and that MDY intentionally and improperly interfered in the relationship and caused a breach or termination of the relationship, and that Blizzard had been damaged because of that breach. (ER G22.)

III. Bench Trial.

The parties entered into a stipulated judgment on September 26, 2008, finding MDY liable for \$6,000,000 in damages as to the copyright and TIWC claims independently, and finding that Mr. Donnelly would be personally liable for the same amount if found personally liable at trial. (SER 8.) The District Court then held a bench trial on January 8th and 9th, 2009, following which the court issued an Order holding MDY liable under §§ 1201(a)(2) and (b)(1) of the DMCA with respect to WoW's non-literal elements but not liable as to its literal code, that

Mr. Donnelly was personally liable for MDY's tortious interference, copyright infringement, and DMCA violations, and that Blizzard was entitled to a permanent injunction. (ER E1-E22.)

IV. Post-Trial and the Instant Appeal.

Following trial, the parties entered a revised damages stipulation, increasing the amount of damages owed by \$500,000 to reflect Appellants' continued infringing activity following the summary judgment ruling and to apply the judgment to Blizzard's DMCA claims. (SER 3-4.) The District Court rejected Appellants' motion for a stay of the injunction, directed Appellants to post a bond, and denied their motion for reconsideration. (ER D9; Dkts. 118, 120.) Appellants then filed an appeal of the denial of a stay to this Court and sought an emergency stay of the injunction pending appeal. (Dkt. 121.) This Court rejected that request on April 24, 2009. (Case No. 09-15649, Dkt. 11.) Appellants subsequently dismissed that appeal on May 8, 2009. (Case No. 09-15649, Dkt. 17, 18.)

Appellants then filed this appeal on May 1, 2009, seeking reversal of the District Court's underlying rulings on Blizzard's copyright, DMCA, and tortious interference claims. (ER B1-B4.) Blizzard cross-appealed, seeking reversal of the district court's grant of summary judgment in MDY's favor for its DMCA claims based on protecting the WoW game client's literal code. (ER A1-A4.)

STATEMENT OF FACTS

I. The Parties.

Appellee/Cross-Appellant Blizzard Entertainment, Inc. is the creator and operator of WoW, the world's most popular massively multiplayer online role-playing game in which over 10 million players join together online to create characters, socialize and explore a rich virtual universe. (ER O3, O5; SER 79-81.) To play the game, users purchase a limited license to use the copyrighted WoW software client—the software that resides on the user's computer—and pay monthly subscription fees to access the WoW game servers. (ER O4; SER 80.) Once they have installed the software and created an account with Blizzard, players play online and interact with other players, complete quests, and battle monsters to gain experience and gold, all of which make additional game content available and offer progressively more complex challenges for players. (SER 80-81.)

Blizzard has invested significant resources to create and maintain a massive online world with rules and rewards carefully calibrated to ensure the optimum playing experience for all players. (ER O3, O5-O6; SER 94, 98.) Part of that calibration is to ensure that players' advancement through the game is such that

they are able to acquire certain items or skills at particular points during their progress thus keeping players engaged and interested. (SER 36-38.)

Donnelly is the founder and sole member of MDY. (ER N8-N9 G2.)

Donnelly developed and sold a software “bot,” Glider, that allows players to automate WoW game play such that a user’s in-game character can advance in the game and accumulate in-game items without human participation. (ER G2.) The use of such a program violates Blizzard’s licenses with users. (ER G2.)

II. Blizzard Protects Its Intellectual Property Through Its EULA, TOU and Technological Measures.

Blizzard has implemented a two-prong approach to enforce its intellectual property rights in the WoW online game experience. First, before playing WoW Blizzard requires all users to agree to its End User License Agreement (“EULA”) and Terms of Use (“TOU”), which provide users with a limited license to WoW. (ER P1-P9, Q1-Q15, R1-R15, S1-S6, V1-V12.) Second, Blizzard uses a technological measure known as Warden to detect copying of the WoW game client into RAM in violation of the EULA or TOU. (SER 91.)

Players view and agree to the EULA and TOU on numerous occasions: when installing WoW, connecting to the service for the first time or whenever Blizzard updates or changes the WoW software or any terms of the license. (ER

O15-O16; SER 156-57.) The EULA (ER P2-P3) provides users with a limited license to WoW and conditions users' ability to copy WoW as follows:

- Section 4.B(ii) of the EULA prohibits “exploit[ing] the Game or any of its parts, including without limitation the game client, for any commercial purpose” (ER O19-O20, ER P3.)
- Section 4.B (ii) of the TOU provides that users agree not to “create or use cheats, bots, ‘mods,’ and/or hacks, or any other third-party software designed to modify the World of Warcraft experience.” (ER Q3.)
- Section 4.B (iii) of the TOU requires users to refrain from any “use [of] any third-party software that intercepts, ‘mines,’ or otherwise collects information from or through the Program or the Service;” (ER Q3-V4.)

Blizzard also employs technology called Warden to detect users that exceed the scope of their limited license. (SER 47.) Warden is designed to prohibit WoW users running “cheats,” “bots,” and other unauthorized programs from connecting to the WoW servers and accessing or copying Blizzard’s copyrighted WoW content. (*Id.*) Warden is composed of two different components. (ER O20-O22; SER 91.) (ER O10; SER 49-50, 92-93, 106-07.) One component of Warden – called “scan.dll” – scans RAM for unauthorized programs before a user connects to the WoW servers and if it detects an unauthorized program, denies that user access to the game content by preventing the user from connecting to the WoW

servers.¹ (ER O20-O21.) The second, “resident component” of Warden runs periodically while a user plays WoW, asking the users’ computer to report portions of information stored in the WoW code running in RAM. (ER O21-O22; SER at 51-52.) The resident component looks for signatures associated with known cheats that differ from a correct “clean RAM” response, and upon detection, revokes access to the game and its dynamic content and prohibits additional copyrighted portions from being copied into RAM. (*Id.*) With the notable exception of Glider, which Warden has only detected periodically, Warden has been extremely successful in blocking access to users running unauthorized programs in conjunction with WoW. (ER O21-O22; SER 104.)

Warden’s ability to block connections and copying of code into RAM when connected to the WoW servers is critical. (SER 46.) The WoW game client contains an executable client as well as cinematics, animations, character models, character textures, sounds, and musical scores. (SER 42, 46.) Without a connection to the server, a WoW user cannot experience the dynamic display of expressive elements that make up WoW game play. (*Id.*) When a user connects to

¹ To play WoW, users must copy portions of the WoW game client from their hard drive into their computers’ random access memory (“RAM”).

the WoW server, the server then combines those elements and connects with other players to create a full-featured, expressive online world by continually loading those individual elements as players progress through the game. (SER 42-44.) In addition to orchestrating the elements present on the WoW game client, the server provides the “several novels” worth of story text users read throughout the game, none of which is present on the game client. (SER 45-46.) In sum, “the server provides the experience. It’s what makes [the game] come to life. It’s directing [the individual non-literal elements]. Without that they’re a bunch of models and voids. . . . [WoW] is the experience that we’ve designed and the orchestration of all those events together.” (SER 46.)

III. Glider Circumvents Warden and Enables Copying in Violation of the EULA and TOU.

Glider is a bot that exploits WoW by allowing users to gain an unfair advantage over other users. (SER 33.) Glider plays WoW for players while they are away from their computers, which allows Glider users to accumulate more wealth, progress through the game faster, and quickly garner huge amounts of in-game assets. (SER 34.) Doing so negatively affects the game for other players by removing the “social” and interactive aspects of the game experience and distorting the in-game economy—by flooding the game with gold and items, thus making items less valuable. (SER 33, 37-39.)

MDY began selling Glider in June 2005. (SER 72.) MDY and Donnelly knew from at least September 2005 that Glider use violated the WoW EULA and TOU and openly admitted that fact in emails to users and on its website. (ER G22-23 (citing SER 85, 86, 184, 190).) Prior to the District Court's entry of a permanent injunction, Glider was far and away the most popular bot, and consumed more Blizzard resources than any other bot because of its sophisticated features designed to prevent detection. (ER G23; ER O23-O24.)

Glider's viability depends on its ability to circumvent Warden and avoid detection. (ER O23.) Donnelly conceded that the ability to avoid detection is as "essential" to Glider use as seatbelts are to a car, and that Glider's anti-detection features distinguish it from similar bot programs Blizzard has successfully banned. (ER O26; SER 87-88.) MDY constantly updates Glider to ensure its continued success in circumventing Warden's evolving protection measures. (ER O26.)

Appellants actively market Glider's distinctive ability to circumvent Warden. (ER O41-O42.) MDY website's FAQ boasted that "Glider provides a number of features to help lower the risk of detection[,]” and that “[t]he current version of Glider . . . is not known to be detected by these methods.” (ER O33; SER 183.) The site also offers a forum for users, including Donnelly, to share information on avoiding detection by Blizzard. (ER O23.) Glider has little to no

use outside of circumventing Warden and botting in WoW—it has no functionality with programs other than WoW, and cannot be used in connection with WoW in any authorized manner. (SER 15.) Indeed, to protect its ability to circumvent and remain viable, MDY’s stated goal was to drive up Blizzard’s cost of combating Glider to the point it ultimately abandons efforts to block it, an option that Blizzard’s rule-abiding customers, who have filed over 465,000 formal complaints about bots and voiced their continued displeasure with Glider on Blizzard’s forums, have made clear is unacceptable for Blizzard. (ER O15, O28-O31, O40-O41; SER 81.)

Glider circumvents Warden by ““examin[ing] your configuration and then giv[ing] you recommendations on what you can do to minimize your risk of detection.”” (SER 11.) It also performs a number of technical actions designed to avoid reporting an “unclean” portion of memory to Warden, as well as to hide itself from detection by removing any reference to Glider from a number of files that Warden examines when searching for unauthorized programs. (*Id.*) After the scan.dll component began successfully blocking Glider, Appellants added functionality to allow Glider to circumvent scan.dll by loading Glider after scan.dll runs its check. (SER 48.)

IV. Appellants Profited from Their Exploitation of WoW and Caused Significant Damage to Blizzard.

“Through September 10, 2008, [Appellants] ha[d] sold approximately 120,000 licenses for Glider” generating over \$3.5 million in gross revenue. (SER 6.)

Blizzard spent over \$900,000 “per year responding to customer complaints [about] bots . . . and implementing a bot enforcement program to decrease” their presence in the game. (*Id.*) Glider represents the vast majority of bots used in connection with WoW, and thus is responsible for the large majority of these costs. (ER-G23 (citing ER O38, ER K17).) Between December 22, 2004 and March 18, 2008, Blizzard received more than 465,000 in-game petitions from users complaining about bots. (*Id.*) Several thousand of these mention Glider by name reflecting its notoriety even among non-cheaters. (*Id.*) Blizzard has continued to receive complaints about bots generally, and Glider specifically, after March 18, 2008. (SER 6.) Not surprisingly, in addition to direct costs to Blizzard, “Glider [use] has caused Blizzard to lose subscription fees from WoW players.” (*Id.* (citing ER O43, ER K20).)

SUMMARY OF ARGUMENT

The District Court properly found that Appellants' conduct constituted contributory and vicarious copyright infringement, violated 17 U.S.C. §§ 1201(a)(2) and (b)(1) with respect to the non-literal elements of Blizzard's software, tortiously interfered with Blizzard's contracts, and that Mr. Donnelly was personally liable for all of these claims.

First, the District Court correctly found Appellant liable for secondary copyright infringement. Appellants concede nearly all elements of Blizzard's copyright claim: that Blizzard owns valid copyrights in its WoW software; that Glider users copy WoW client code into RAM while playing WoW with Glider; that playing WoW with Glider breaches the EULA and TOU; and that if Glider users commit copyright infringement, Appellants are vicariously and contributorily liable. The District Court recognized that under binding precedent, Glider users infringed Blizzard's copyrights when they copied WoW into RAM with Glider in excess of the clear limitations on the WoW license. *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006); *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007). The court properly based its determination on the finding that the WoW EULA was a limited license, and that the provisions violated by Glider users were conditions limiting

licensees' right to copy. *Sun Microsystems, Inc. v. Microsoft Corp.*, 81 F. Supp. 2d 1026, 1032 (N.D. Cal. 2000) (“*Sun IP*”); *Netbula, LLC v. Storage Technology Corp.*, No. C06-07391 MJJ, 2008 WL 228036 (N.D. Cal Jan. 18, 2008).

The District Court likewise properly rejected Appellants' affirmative defense under 17 U.S.C. § 117(a), which allows “owners” of software to make copies essential to use of the program. Under this Court's decision in *MAI Sys. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), licensees are not owners for purposes of § 117. The court examined the relevant § 117 factors and determined that WoW purchasers are licensees because they do not obtain rights through a single payment, can only sell their license by transferring all of the original media to a purchaser subject to the license agreement, may be required to destroy the software at Blizzard's discretion, and because Blizzard reserves the rights to modify the software, remove features, discontinue the program, or restrict access to the program at any time. The express license to which users agree, and the extensive restrictions contained therein, clearly do not confer “ownership” under § 117.

The District Court also correctly ruled that Appellants' sale of Glider violates Sections 1201(a)(2) and (b)(1) of the DMCA. On § 1201(a)(2), the District Court properly found that Warden, a technological measure that requires

the WoW game client to report information to the WoW server evidencing a bot-free copy of WoW, effectively prevents access to the protected expression of WoW's non-literal elements because all WoW users must pass through Warden before accessing that copyrighted work. The District Court also correctly found in Blizzard's favor under §1201(b)(1), which concerns measures that protect a right of a copyright owner, because all WoW users must pass Warden, before they may make any copies of the non-literal elements—either into their computer's RAM or by subsequently recording game play. As to both claims, the District Court did not commit clear error in making findings of fact that Glider was primarily designed to circumvent these measures, had no significant commercial purposes aside from circumvention, and was marketed for circumvention.

The District Court also correctly found that Appellants tortiously interfered with Blizzard's contracts as a matter of law. The District Court applied Arizona's seven factor test for impropriety and found, based on the undisputed facts, that every factor weighed in Blizzard's favor. The court properly rejected Appellant's contention that they were "honest persuaders" where their improper conduct was directed at Blizzard, whose property they sought to exploit by enabling third parties to breach their contracts with Blizzard with impunity, hide those breaches from Blizzard, and prevent Blizzard from enforcing its rights. *Am. Airlines v.*

Platinum World Travel, 769 F. Supp. 1203, 1206 (D. Utah 1990), *aff'd*, 967 F.2d 410 (1992).

The District Court properly held Mr. Donnelly personally liable on all three of Blizzard's claims because the undisputed facts demonstrate that he personally authorized, directed, and participated in the wrongful acts and benefited personally from those acts. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985).

Finally, the District Court erred as to one aspect of Blizzard's DMCA claims. Specifically, the court erred by finding that Blizzard's technological measures did not effectively protect access to the literal WoW software code for purposes of 17 U.S.C. §§ 1201(a)(2) and (b)(1) because they did not block *all* access and copying, only that which exploited or infringed the protected code. Blizzard requests that this aspect of the District Court's Orders be reversed and the District Court ordered to enter judgment in favor of Blizzard as a matter of law on both DMCA claims with regard to the literal code.

REVIEWABILITY AND STANDARD OF REVIEW

Appellees agree with Appellants' standards of review, except to add that a District Court's determinations of issues of fact in a bench trial are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004); *Twentieth Century Fox Film Corp. v. Entmt. Distrib.*, 429 F.3d 869, 879 (9th Cir. 2005). The District Court's findings of fact must be accepted unless the reviewing court is left with a definitive and firm conviction that a mistake has been made. *Twentieth Century Fox*, 429 F.3d at 879. This standard also applies to the District Court's application of law to facts where it requires an "essentially factual" review. *Husain*, 316 F.3d at 835 (internal quotation marks omitted).

ARGUMENT

I. Introduction.

This appeal emanates from the District Court's entry of summary judgment against Appellant MDY for copyright infringement and tortious interference, and the entry of judgment following a bench trial against both Appellants for DMCA violations and against Mr. Donnelly personally on all three claims. Appellants' brief, however, conveniently ignores the extensive record below. Rather than addressing the District Court's conclusions or identifying facts of record it failed to consider, Appellants introduce new legal arguments, ignore their prior concession of certain facts and legal arguments, and repeatedly make declarations that contradict the record. Appellants thus fail to meet their burden on appeal, offering no viable arguments that the District Court erred based on the record before it. In fact, as shown herein, both of the District Court's well-reasoned orders properly applied controlling law to the facts in the record and should be affirmed.

In the absence of a compelling legal basis for reversal, Appellants repeatedly resort to grandiose proclamations about the unfairness of the judgment and characterize the Glider program as a benign add-on "akin to reading a book aloud." (App. Br. at 11.) This generous depiction defies the undisputed record, which makes clear that Appellants have, in fact, based their entire business on

perpetrating a fraud against Blizzard and other rule-abiding WoW users. (ER O26-27.) Appellants actively encouraged WoW players to breach their licenses by developing, promoting and supporting Glider, a “bot” program designed specifically to exploit WoW by “playing” users’ characters, increasing the characters’ “level” in the game to access more advanced game content, and acquiring valuable in-game currency, all without actual human participation. (ER O3, O10-11, O21, O31-32.) Glider’s main selling point is Appellants’ promise to continue developing ever-more-sophisticated means to conceal Glider users from Blizzard, and increase Blizzard’s costs to block it. (ER O26-27; SER 87-89.) The undisputed record below makes clear the improper and infringing nature of Appellants’ conduct:

- MDY’s stated goal is causing Blizzard’s cost of combating Glider to rise to the point it ultimately abandons efforts to block it. (ER O15, O28-31, O41.)
- Appellants knew from at least September 2005 that Glider use violated the WoW EULA and TOU and openly admitted that fact in emails to users and on its website. (ER G22-23 (citing SER 85, 86, 184, 190).)
- “Glider consumes more Blizzard resources than any other bot because of its sophisticated anti-detection features, [] Blizzard must divert resources from game development to combat Glider, and [] Blizzard has received numerous complaints from WoW players regarding other players’ use of Glider,” (ER G23 (citing ER K17)) “Glider [use] has caused Blizzard to lose subscription fees from WoW players.” (*Id.* (citing ER K20.)
- “MDY assists players in avoiding detection by Blizzard, and does so in a way designed to place Blizzard at risk.” (ER G23.)

- “MDY’s business strategy is not to accept and honor the pre-existing contract between Blizzard and its customers, but to take advantage of that relationship for MDY’s financial gain.” (ER G24.)
- “[T]he success of MDY’s endeavor depends on inducing Blizzard customers to breach their contracts. Glider affects the operation of WoW, empowering its users to play WoW in a way not contemplated or approved by the game’s creator and copyright holder.” (ER G24.)
- MDY “is not a competitor of Blizzard. . . . Rather, MDY persuades Blizzard customers to violate their contract with Blizzard for MDY’s financial advantage. . . . MDY ultimately is an exploiter, not a competitor . . .” (ER G25.)
- “In MDY’s own words, ‘[s]taying one step ahead of Blizzard is just about impossible,’ so MDY seeks to make it ‘bad business’ for Blizzard to spend time and money trying to detect Glider.” (ER G23-24 (quoting SER 190 at 3).)
- Blizzard spent over \$900,000 per year combating these unlawful activities and Appellant stipulated to a \$6,500,000 judgment on Blizzard’s claims. (SER 3, 4, 6.)
- Blizzard’s rule-abiding customers have filed over 465,000 formal complaints about bots and voiced their continued displeasure with Glider on Blizzard’s website discussion forums. (ER O15, O20-O31, O41.)
- The dismay among legitimate WoW gamers over the effects of economic exploitation of WoW on the game experience even spawned an unprecedented player class action lawsuit against a prominent internet virtual property exchange, a site where professional “botters” sell, for real money, the virtual goods that Glider enables them to collect in their sleep. (SER 110-153.)

If this Court reverses the District Court’s decision, Appellants and the opportunistic cheaters they enable will again be free to devalue the gaming

experience of Blizzard’s rule-abiding customers and undermine the integrity of the online gaming industry’s premier franchise. As detailed below, no such reversal is warranted. The District Court’s careful application of controlling precedent of this Circuit to the facts of the record—facts Appellants now spin, but did not dispute below—compels entry of judgment in Blizzard’s favor on all three of its claims. The Judgment should be affirmed.

II. The District Court Correctly Held that Appellants Were Secondarily Liable for Copyright Infringement Committed by Glider Users.

In order to establish that Glider users engage in copyright infringement such that Appellants are contributory or vicariously liable, Blizzard must prove: (1) ownership of a copyright; and (2) a “ ‘copying’ of protectable expression”; that is (3) “beyond the scope of [a] license.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989) (internal citation omitted); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001). Appellants are vicariously liable for the infringement of another if they have a right and ability to control the infringing activity and derive a direct financial benefit from that activity. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931 n.9 (2005). Appellants are liable for contributory infringement “if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” *Grokster*, 545 U.S. at 942 (2005).

A. MDY Concedes Most Elements of Blizzard’s Secondary Copyright Infringement Claims.

Appellants do not dispute the majority of the District Court’s conclusions supporting its copyright ruling, including that:

- Blizzard owned valid copyrights in both the WoW server and WoW client software. (ER O9-O10.)
- “[T]he loading of software into the RAM creates a copy under the Copyright Act.” *MAI Sys. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993), *cert denied*, 510 U.S. 1033 (1994); *Triad Sys. Corp v. Se. Express Co.*, 64 F.3d 1330, 1334 (9th Cir. 1995).
- Glider users load WoW code into RAM when using Glider to play WoW, and thus copy protectable expression under the Copyright Act (ER G6.)
- “When a licensee exceeds the scope of the license granted by the copyright holder, the licensee is liable for infringement.” *S.O.S., Inc.*, 886 F.2d at 1085.
- The governing agreements—the WoW EULA and TOU—only allow users to load WoW into RAM in compliance with their terms.
- Glider users violate the express terms of the EULA and TOU when they use the program to play WoW; and²
- Appellants materially contributed to, controlled, and benefited from the infringing activity, such that they are liable for contributory and vicarious copyright infringement if Glider users’ conduct is infringing.

² Appellants appear to dispute this point only with regard to Mr. Donnelly’s personal liability. (SER 55-56.)

Appellants challenge the District Court’s order on only two grounds. First, Appellants argue that the provisions in the license that Glider users admittedly violate are not “limitations” or “conditions” on the scope of the license but mere “covenants” enforceable only under contract law. (App. Br. 23.) Second, despite the plain language of the EULA and TOU, Appellants argue that purchasers of WoW are not “licensees” of software, but “owners” under 17 U.S.C. § 117(a), which provides an affirmative defense to copyright liability for owners of software that make copies into RAM as an “essential step” in use of the program. (App. Br. 14.) Neither argument supports reversal.

B. The Applicable License Provisions Are Conditions or Limitations Supporting a Copyright Action.

As the District Court recognized, courts have repeatedly held that when users copy software in excess of a license, they are liable for copyright infringement. *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006); *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007). Where, as here, users make copies that clearly violate a provision in the software license, those copies are infringing if: (1) the license is limited; and (2) the provision at issue is a limitation or condition on the license. *Id.*

First, the District Court properly concluded, and Appellants do not challenge, that the WoW EULA and TOU together form a limited license. Like the copyright owner in *MAI*, 991 F.2d at 519, Blizzard requires that all purchasers of its WoW client software affirmatively agree to the EULA, and upon joining Blizzard's on-line service, the TOU.³ These documents make clear, in explicit language, that users' rights to copy the software are subject to limitations on the license. For example, the EULA, which by its terms incorporates the TOU (ER P2-P3, P9), states:

- “All title, ownership rights and intellectual property rights ... are owned or licensed by Blizzard.” (ER P2-P3.)
- “Subject to [a user's] agreement to and continuing compliance with this License Agreement,” including acceptance of the Terms of Use, a user may “install the game client” and “use the game client in conjunction with the [WoW massively multi-player on-line role-playing game] service.” (ER P2-P3.)
- “Subject to the license granted hereunder, you may not, 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, or remove any proprietary notices or labels on the Game.” (ER P3-4.)

³ Blizzard also takes the extraordinary step of requiring its users to scroll through the entire text of both the EULA and TOU before the game client will permit them to click on the “I ACCEPT” button. (SER 156-57.)

- “Failure to comply with the [terms of the EULA] shall result in the immediate, automatic termination of the license granted hereunder and may subject you to civil and/or criminal liability.” (ER P3-P4.)

Accordingly, the EULA and TOU make clear that Blizzard only intends to confer a limited license to use the WoW software pursuant to the user’s ongoing compliance with certain specified terms.

The District Court next found that the specific license provisions Glider users violated were limitations or conditions, not covenants, and thus exceeding those limitations in connection with copying violates the Copyright Act. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (“*Sun I*”). Specifically, it concluded that Section 4 of the TOU contains limitations on the scope of the license. Section 4 is titled, “**Limitations on Your Use of the Service**,” which in this case is synonymous with use of the game client, and thus unambiguously “reflects an intent to create limitations on use.” (ER G8-G9; ER Q3) (emphasis added).) Notably, Glider users violate the following two provisions in Section 4:

- Users may not “create or use cheats, bots, ‘mods,’ and/or hacks, or any other third-party software designed to modify the World of Warcraft experience;” (ER Q3.)
- Users must refrain from the “use [of] any third-party software that intercepts, ‘mines,’ or otherwise collects information from or through the Program or the Service;” (ER Q3.)

The operative EULA is similarly clear: “Subject to the license granted hereunder, you may not in whole or in part, copy ... the Game ... failure to comply with the restrictions and limitations contained in this Section 4 shall result in immediate, automatic termination of the license granted hereunder.” (ER P3-P4.)

Section 4 provides that users may not:

- “Exploit the Game or any of its parts” or
- “Facilitate, create or maintain any unauthorized connection to the Game or the Service ...”

(ER P3-P4.)

In *Sun Microsystems, Inc. v. Microsoft Corp.*, 81 F. Supp. 2d 1026, 1032 (N.D. Cal. 2000) (“*Sun II*”) the district court determined that a license term was merely a separate contractual covenant because the provision said “nothing about the license grants being *subject to, conditional on, or limited by compliance* with the compatibility obligations,” and did not give the licensor an unqualified right to terminate the license for failure to comply with the provision. *Id.* at 1032-33. By contrast, the WoW EULA and TOU contain the exact provisions lacking in *Sun II*, and evidence that Blizzard’s prohibitions on bots limit the scope of the license. The WoW EULA clearly provides a “Grant of a Limited Use License,” which conditions licensees’ rights to use and copy the program on continued compliance

with the license,⁴ and permits Blizzard to terminate the license in the event of non-compliance.⁵

Likewise, in *Netbula, LLC v. Storage Technology Corp.*, No. C06-07391 MJJ, 2008 WL 228036 (N.D. Cal Jan. 18, 2008), the court assessed whether two distinct license provisions involving the same software—one defining the number of users permitted to use the software, the other restricting the operating systems that could be used with the software—constituted limitations on the scope of the licenses. The court found that under Ninth Circuit law, the limit on the number of users was a covenant, because “[t]his provision does not limit *how* the software may be *used*, but instead defines what the purchase of one license gives the buyer.” *Id.* at *5 (emphasis in original). By contrast, the court found that the limitation on operating systems that could be used with the software “[l]ike the license in *LGS* and *S.O.S.*” was a restriction on “the way in which the licensed material may be *used* and [thus] part and parcel of the license grant itself.” *Id.* Because the second

⁴ (e.g., “Subject to your agreement to and continuing compliance with this License Agreement, Blizzard hereby grants, and you hereby accept, a limited, non-exclusive license”; “Subject to the license granted hereunder, you may not, in whole or in part, copy . . . the game”)(ER P3-P4.)

⁵ “Failure to comply with the restrictions and limitations contained in this Section 4 shall result in immediate, automatic termination of the license granted hereunder” (ER P3-P4.)

license restriction “limit[ed] the breadth of the license,” the court held the breach of that provision formed the grounds for an infringement claim. *Id.*; *see also Ticketmaster, L.L.C. v. RMG Techs., Inc.* 507 F. Supp. 2d 1096, 1102-03, 1109-10 (C.D. Cal. 2007) (violation of terms of use provision prohibiting the *use* of bots constituted infringement because bot users downloaded copyrighted web pages into RAM in order to purchase tickets in excess of limited license.)

As in *Netbula* and *Ticketmaster*, the WoW license restrictions in Sections 4 of the TOU and EULA condition “*how* the [WoW] software may be *used*” (and specifically under what conditions users are authorized to load the software into RAM) and therefore “*limi[t] the breadth* of the license.” (ER P3-P4 emphasis added.) Thus, as the District Court properly concluded, the breach of those provisions is grounds for infringement. ER G12; *Sun II*, 81 F. Supp. 2d at 1032-33; *Ticketmaster*, 507 F. Supp. 2d at 1102-03, 1109-10.

Appellants’ citations to Delaware contract law do not change the analysis or the outcome.⁶ In *Wilmington Trust Co. v. Clark*, 325 A.2d 383 (Del. Ch. 1974) the

⁶ Nor could it. Under Ninth Circuit law, “[t]he license must be construed in accordance with the purposes underlying federal copyright law.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989). Accordingly, the

(Continued)

Chancery Court first looked to whether the provision at issue was ambiguous and thus was susceptible to being interpreted as a covenant. The Court found the provision was not ambiguous, because “the contract contains no language which can be construed as expressing an intent that [the provision at issue] was to be deemed a mere covenant. Such provision must therefore be construed as a limitation to the title granted the buyer. . . .” *Id.* at 386. Thus, absent some express indication that the provision is a mere covenant, Delaware courts will construe license provisions termed as limitations as such. *Id.*; *see also AES Puerto Rico, L.P. v. Alston Power, Inc.*, 429 F. Supp. 2d 713, 717 (D. Del. 2006) (if language of contract is plain and unambiguous it should be construed according to its terms).

The District Court undertook a similar analysis below, determining that Section 4 of the TOU does not contain any language that can be construed as expressing an intent that its provisions should be deemed a mere covenant. In fact, it found the contrary to be true. As the District Court noted, Section 4 is titled, “Limitations on Your Use of the Service” and thus unambiguously “reflects an intent to create limitations on use.” (ER G11.) Furthermore, Section 4 of the TOU

aforementioned *LGS* and *Sun I* cases provide the relevant framework for analyzing license terms.

“make[s] clear that although users are licensed to play WoW and to use the game client software while playing, they are not licensed to exercise other rights belonging exclusively to Blizzard as the copyright holder” (ER G9.) The District Court also found that Blizzard clearly separated the conditions in Section 4 of the TOU from the covenants in Section 5, breaches of which were not enforceable as copyright infringement. As the District Court recognized:

“Section 5 is different. The subsections of section 5 are titled ‘Rules Related to Usernames and Guild Designations’ (§5(A)), ‘Rules Related to ‘Chat’ and Interaction With Other Users’ (§5(B)), and ‘Rules Related to Game Play’ (§5(C)). Section 5 thus sets the rules for the game, where as Section 4 establishes limits more clearly designed to preserve Blizzard’s copyright interests.”

(ER G11.)

Finally, Appellants argue that even if the applicable provisions are “limitations,” the act that violates the license must be the same act that constitutes infringement of a copyright and cite *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc*, 421 F.3d 1307 (Fed. Cir. 2005) as support. (App. Br. at 21-22.) As the District Court noted, *Storage Tech* only stands for the unremarkable point that a defendant must both breach a limitation

and engage in infringing behavior.⁷ (SER 61.) Indeed, Appellants *conceded* below that copying after a breach of a license for non-payment, where the non-payment is not itself infringing, would be a copyright violation:

If A grants a software license to B on the express condition that the license will remain in effect only so long as B makes monthly payments to A, and B then stops making payments to A, any subsequent copying of the software to RAM by B would constitute copyright infringement – **a conclusion with which MDY’s counsel agreed during oral argument.** This would be true even though the act that took B outside the scope of the license – nonpayment – is different from the act that constitutes infringement – subsequent copying of the software.

(ER G11 (emphasis added); *see also* SER 59-61.)⁸ *Storage Tech* thus would at best bar Blizzard’s claims if players used Glider *without* making copies of WoW.

⁷ In *Storage Tech*, the license at issue placed *no restriction* on the defendant’s right to *copy* the maintenance code at issue, and thus the license authorized the copying in question. *Id.* at 1315-16.

⁸ As Counsel for Appellants stated at oral argument:

THE COURT: You don't pay me anymore and you don't do anything with the software until next March. Next March you load it on the computer and copy it to RAM. Copyright violation?

MR. VENABLE: Yes, it is, Your Honor.

(SER 60.)

They do not. Finally, even if Appellants' proposition were correct, the act that breaches the license in this case is the same act that infringes—*unauthorized copying* of WoW into RAM with Glider.

C. WoW Users Are Licensees, Not Owners, Under 17 U.S.C. § 117(a).

The Copyright Act, 17 U.S.C. § 117(a), provides that “the owner of a copy of a computer program” may make a copy as “an essential step in the utilization of the computer program in conjunction with a machine and [provided] that it is used in no other manner.” When a software developer sells its software to a user, however, it may do so subject to a license agreement. In *MAI*, this Court interpreted § 117 to mean that if a developer “license[s] its software, the [purchasers] do not qualify as ‘owners’ of the software and are not eligible for protection under § 117.” *Id.* The District Court correctly applied this precedent to the undisputed facts of record in determining that WoW users are mere licensees, and thus not entitled to § 117’s protection. Contrary to the claims of Appellants and *Amicus* Public Knowledge, the court’s finding is not only consistent with the law of this Circuit but the well-established and understood apportionment of rights between software publishers and consumers. In fact, the outcome dictated by their proposed test would radically alter established industry practices.

1. The District Court Examined the Relevant Factors and Properly Found that the Undisputed Facts Demonstrated that WoW Users Are Licensees and Not “Owners.”

In applying *MAI*, district courts, including the court below, have considered a number of factors to determine whether the user is a licensee:

1. Whether the user has obtained rights through a single payment;⁹
2. Whether the license places restrictions on transfer or the user has unlimited rights to possession;¹⁰ and
3. Whether the license reserves rights of the copyright owner inconsistent with a transfer of ownership.¹¹

Appellants acknowledge these factors, but limit their discussion of them to brief, unsupported parentheticals. (App. Br. at 15-16.) As demonstrated below, however, an examination of the record reveals that each factor weighs in Blizzard’s favor.

First, WoW users do not obtain rights through a single payment.

Appellant’s cursory recitation that “the sale or download is a one-time event”

(App. Br. at 15) ignores that purchase of the WoW client alone will not permit the graphical display of WoW’s interactive, immersive multimedia experience—part

⁹ *Softman Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1086 (C.D. Cal. 2001).

¹⁰ *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000).

¹¹ *DSC Commc’ns Corp. v. Pulse Commc’ns, Inc.*, 170 F.3d 1354 (Fed. Cir. 1999)

of the expression copyright law protects—without a connection to Blizzard’s game servers. (ER O4-O5.) Users must pay a monthly fee to access Blizzard’s servers and play WoW.¹² Accordingly, users obtain the rights to access and copy WoW’s copyrighted material through a series of ongoing payments. (ER P2, Q2-Q3.) In light of the restrictions in the EULA and TOU, if the payments cease, the game client becomes useless. (*Id.*; SER 42-46 (WoW requires a connection to Blizzard’s server to play).) These recurring payments support a finding that Blizzard has licensed the WoW game client.

Second, the record demonstrates that the EULA places significant restrictions on transfer. In *Adobe Systems Inc. v. One Stop Micro, Inc.*, the court found that restrictive language in a EULA allowing resale only within the country of reseller’s principal place of business, subject to the EULA, through the reseller’s direct sales force, and “solely in the form obtained from Adobe” constituted a license, not a sale. *Id.* at 1091; *see also Adobe Sys. Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1056 (N.D. Cal. 2002) (same).

¹² The EULA expressly precludes a user from using other software to attempt to replicate the online experience. (ER P3-4.)

Like the EULAs in *One Stop* and *Stargate*, the WoW EULA contains several restrictions inconsistent with ownership. A user may only transfer the program “by physically transferring the original media (e.g. the CD-ROM or DVD you purchased), all original packaging, and all Manuals or other documentation distributed with the Game[.]” (ER P3.) As in *One Stop*, licensees may only resell the game “solely in the form” the game was “obtained from” Blizzard (or a reseller). 84 F. Supp. 2d at 1093. The EULA also restricts the form of the transfer—requiring transferees to be subject to the EULA and precluding a user from “rent[ing], leas[ing] or licens[ing] the Game to others.” (ER P2-P3.)

Third, users do not have an unlimited right to possession. Appellants and *Amicus* argue extensively that “perpetual possession” is the “primary indicator” or “critical issue” in determining ownership. (Am. Br. at 9-15; App. Br. at 16-17.) Although Blizzard does not physically repossess the physical CD-ROM¹³ or packaging material—in part because it is so inexpensive it is barely worth the cost of postage to return—the EULA grants Blizzard the right to “repossess” the

¹³ Both Appellants and *Amicus* refer to purchasing WoW off the shelf in a store, but the record makes clear that the WoW may be purchased as download. (SER 57-58.) In that case, there is no “physical media” for a user to own, and “destruction” is the only way to “return” software to Blizzard.

software upon termination of the license agreement by requiring users to destroy their copies. The EULA states:

Blizzard may terminate this Agreement at any time for any reason or no reason. In such event, 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. Upon termination of this Agreement for any reason, all licenses granted herein shall immediately terminate.

(ER P5.) Thus, Blizzard *does* repossess the licensed material on termination and the right to require destruction of the copyrighted material at any time, for any reason, is contrary to ownership.

Fourth, the EULA grants Blizzard rights inconsistent with ownership by the end user. Contrary to the assertions of Appellants and *Amicus*, courts have held that a possessor is not an owner “if the possessor’s right to use the software is heavily encumbered by other restrictions that are inconsistent with the status of owner.” *DSC Commc’ns Corp.*, 170 F.3d at 1362; *see also Krause v. Titleserv, Inc.*, 402 F.3d 119, 125 (2d Cir. 2005) (to be an owner, the possessor must be able to “use a copy without material restriction.”)

The WoW EULA’s use restrictions make abundantly clear that WoW users are not owners. The EULA provides Blizzard the right to modify the game client “remotely, including without limitation, the game client residing on the user’s

machine, without the knowledge or consent of the user, and ... grant[s] to Blizzard ... consent to deploy and apply such patches, updates and modifications.” (ER

P8.) Similarly, in the TOU,

“Blizzard reserves the right” to alter “the availability of any feature of the Program, hours of availability, content, data, software, or equipment needed to access the Program, effective with or without prior notice Blizzard may change, modify, suspend or discontinue any aspect of the Program at any time. Blizzard may also impose limits on certain features or restrict your access to parts of all of the Program without notice or liability.”

(ER Q5.) While restrictions in the TOU generally concern the online component of the game, the game client will not function without a connection to Blizzard’s server, and consequently these terms restrict a user’s access to and use of the copyrighted content. Blizzard’s reservation of rights to restrict use and alter the game post-purchase plainly conflict with “owners’” rights to do as they please with their copies, and further confirm that users receive only a license.

2. Appellants and Amicus Seek Reversal on § 117 Grounds by Selectively Applying a Limited Test Based on *Dicta* and Inapplicable First Sale Doctrine Cases.

Perhaps in recognition that the factors above support Blizzard, Appellants ask this Court to make the licensee/owner determination based solely on the extent of Blizzard’s restrictions on transfer. Appellants rely on *dicta* in *Wall Data v. Los*

Angeles County Sherriff's Department, 447 F.3d 769 (9th Cir. 2006) and this Court's decision in *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), a case involving a different statutory provision—17 U.S.C. § 109—as support for this restricted test. These authorities do not support reversal here. First, *Wall Data* turned on the fact that the copying in question was not an “essential step in the use of the program” under § 117, and thus its statements on ownership are *dicta*. 447 F.3d at 786 n.9. Whether or not the District Court quoted *dicta* with absolute precision is not grounds for reversal, particularly where the District Court thoroughly analyzed all relevant factors in accord with prior case law. 447 F.3d at 775 n. 5; ER G15.

Second, applying *Wise* ignores the distinction between the rights protected by § 109 and § 117 of the Copyright Act. Section 109 grants “owners” of software the right to resell their copy of the software. In § 109 cases like *Wise*, on which *Amicus* relies, the issue is whether a possessor is an “owner” for purposes of *reselling* a physical copy of a copyrighted work. Logically then, *Wise* focused its analysis on restrictions on *transfer*. Section 117(a), by contrast, protects owners' rights to *use* a copyrighted work. Thus, in § 117(a) cases, the relevant inquiry is whether the possessor of a copy has an unfettered right to *use* the software—or if a valid license restricts that use such that the possessor cannot be said to own the

copy. Cases like *Wise* would presumably reach a different result even under that court's reasoning if the license violation at issue were not tied to the *transfer* of physical property. In fact, despite having three opportunities to do so—*MAI*, 991 F.2d 511, *Triad*, 64 F.3d 1330, and *Wall Data*, 447 F.3d 769—this Court has never even cited *Wise* in a § 117(a) case. Thus, neither the *dicta* in *Wall Data* nor this Court's decades old ruling in *Wise* overrule *MAI*'s holding that licensees are not owners or call into question consideration of the factors the District Court analyzed in determining whether WoW licensees are “owners” under § 117.¹⁴

Finally, even applying Appellant's and *Amicus*' interpretation of § 117(a) does not change the outcome here. Blizzard's EULA and TOU include restrictions on transfer—allowing Blizzard to alter or delete portions of the software or requiring users to destroy their copies, without any prior notice or cause—more

¹⁴ Nor does *UMG v. Augusto*, 558 F. Supp. 2d 1055, 1060 (C.D. Cal. 2008), support a different result. The *UMG* court *specifically* distinguished sales of software licenses from its analysis. *Id.* at 1062. In addition, unlike the music companies in *UMG*, Blizzard does not grant users perpetual possession—requiring destruction of the copy in certain instances, including at the termination of the license, which may be effected in Blizzard's discretion. Further, unlike in *UMG*, Blizzard receives recurring benefits in the form of subscription fees. *Id.* at 1061.

extensive than those found insufficient in *Wise*.¹⁵ Moreover, as the District Court noted, *Wise* recognized that a transaction is a license where the “copyright owner retains title to the copy,” as Blizzard unquestionably does here. (ER G16 n.7, ER O1-O45, P3.) Accordingly, under each of the tests employed in prior § 117 and §109 cases WoW users are licensees, not owners, and thus Glider users committed copyright infringement by copying WoW into RAM with Glider.

3. The District Court’s § 117 Analysis Reflects the Well-Established Balancing of Rights Between Software Publishers and Consumers.

Appellants and *Amicus* warn that upholding the District Court’s decision will radically alter copyright law by transforming all breaches of contract into copyright violations. Their fears are unfounded. As the District Court correctly observed, “a person must not only act outside the scope of the license, *but also must engage in an act that infringes upon the exclusive rights granted the*

¹⁵ The instant case is also distinguishable from *Vernor v. Autodesk, Inc.*, No. C07-1189RAJ, 2009 WL 3187613, at *7 (W.D. Wash. Sept. 30, 2009). In *Vernor*, the plaintiff could only require destruction of software as consideration in the later purchase of an upgrade. *Id.* at 12-13. The *Vernor* court found that “[t]he decision to upgrade and thus the decision to accept Autodesk’s destruction requirement -- is entirely in control of the licensee.” *Id.* That is not the case here, where the EULA and TOU provide that Blizzard may require destruction of the software at the termination of its license agreement, which Blizzard may terminate at its discretion. (ER P5-6.)

copyright holder by section 106 of the Act,” in order for a licensor to have a claim for copyright infringement. (ER G10.) Here, the infringing act—copying WoW into RAM with Glider—is the same one that violates the license conditions, and thus implicates Blizzard’s core rights under 17 U.S.C. § 106(1).

Blizzard has not “rewritten” copyright law by enforcing the limitations on the license granted to WoW users. Contrary to Appellants’ suggestion, Blizzard did not contend that every provision in its TOU is grounds for infringement. Indeed, the District Court alleviated any such concern by distinguishing between provisions it found to be license conditions (those in Section 4, protecting Blizzard’s exclusive rights under Section 106) and those that were mere contractual covenants (Section 5’s “Rules of Conduct” governing “minor matters such as the use of celebrity names.”). (ER G9.)

In fact, it is Appellants and *Amicus* who seek a radical transformation of law by converting § 117 into an unalienable right. Section 117(a) was a necessary addition to copyright law, because in its absence the owner of computer software would, *by definition*, not be able to use it without committing copyright infringement. *See MAI*, 991 F.2d at 517-20. Software licenses, however, recognize this fact and typically (as Blizzard does here) authorize copying of a computer program in such a way to make it useful. (ER P2-3.) This Circuit has

refused to hold that copyright law requires the copyright owner to license *all* copying of software into RAM for any purpose under § 117(a). *See MAI*, 991 F.2d at 517-20. Indeed, under controlling precedent, licensees are not owners and may not take advantage of § 117(a). *Id.* Courts have applied this doctrine with equal force to consumers that purchase “off the shelf” consumer software pursuant to a click-wrap or shrink wrap agreement. *See Wall Data Inc.*, 447 F. 3d at 775.¹⁶

The implication of *Amicus*’ arguments, by contrast, is nothing less than the eradication of *all* software licensing. In *Amicus*’ view the “critical factor” in determining whether software is licensed or sold is whether there are subsequent restrictions on transfer. But in the same breath *Amicus* argues that the Supreme Court’s decision in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) prohibits restrictions on transfer. In this respect, *Amicus* seeks a sea change in the way software is distributed—and in doing so takes a giant leap that no court has yet made, or even approached. It effectively reads the word “owner” out of § 117, by making it nearly impossible for purchasers of software to be anything *but* owners.

¹⁶ Contrary to Appellants’ representations, *Wall Data* did not involve a specially negotiated license. While the defendant in *Wall Data* bought several thousand licenses of software, it did so pursuant to a standard form contract, and agreed to standard shrink-wrap and click-wrap agreements. 447 F.3d at 775 & nn. 4 & 5.

The District Court's order, by contrast, recognizes the existing distinction between licensees and owners, carefully evaluates the WoW EULA under the proper factors, and reaches a conclusion consistent with binding precedent and the expectations of software publishers and consumers. The Order should be affirmed.

III. The District Court Correctly Held that Appellants' Distribution of Glider Violates Sections 1201(a)(2) and (b)(1) of the DMCA.

The DMCA prohibits trafficking in technology that circumvents: 1) *access controls* to copyrighted works; or 2) *technological measures that protect the rights* of a copyright owner, 17 U.S.C. §§ 1201(a)(2), (b)(1), where the technology is:

(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.

17 U.S.C. § 1201(a)(2)-(a)(2)(c)(emphasis added).

The District Court ruled after a bench trial that Appellants' sale of Glider violated § 1201(a)(2) with respect to WoW's non-literal expressive elements because Warden effectively controls access to that copyrighted content, Glider enables unauthorized third parties to access it, and once players obtain access, they

may copy those elements as they are displayed. (ER E11.) The District Court likewise held that Appellants' sale of Glider violated § 1201(b)(1), because Warden also prevents Glider users from copying the dynamic non-literal elements of WoW as it is being played. (*Id.*)

Appellants do not dispute that Blizzard holds a copyright in a protected work—here the non-literal expressive elements of WoW, *i.e.* the sounds, graphics, game play, story text and interactivity, as orchestrated and provided by the WoW server software,¹⁷ that Glider users circumvent Warden to access the work, and that Glider users lack the authority to use Glider to play WoW. Appellants instead challenge the District Court's order on three grounds: (1) Warden does not effectively control access to, or protect Blizzard's rights in, WoW's non-literal

¹⁷ “[C]opyright protection extends not only to the literal elements of a computer program—source code and object code—but also to the program’s non-literal elements, which are the products that are generated by the code’s interaction with the computer hardware and operating program(s).” *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 81 (D.D.C. 2007) (quoting *MiTek Holdings, Inc. v. Arce Eng’g Co.*, 89 F.3d 1548, 1555 n.15 (11th Cir. 1996) (footnote omitted)). *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 549 (6th Cir. 2004) (Noting that in video or computer games the non-literal elements include the visual and audio manifestation rendered by the software’s program commands); U.S. Copyright Office, Circular 61, *Copyright Registration for Computer Programs* (2006) (Copyright protection extends to all the copyrightable expression embodied in the computer program).

elements; (2) that Glider was not designed primarily as a circumvention device; and (3) Glider users do not commit copyright infringement. Appellants' third argument relies exclusively on the arguments presented in the copyright section of their brief. The DMCA does not require such a showing,¹⁸ but even if it does, Blizzard addresses those arguments in section II above.¹⁹ The other two objections are addressed below.

A. Warden Effectively Controls Access to the Non-Literal Elements of the Copyrighted WoW Work for Purposes of § 1201(a)(2).

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.” 17 U.S.C. § 1201(a)(3)(B). The District Court found

¹⁸ The “facilitation of infringement” element, which Appellants borrow from the Federal Circuit, is not the law of the Ninth Circuit. The text of the DMCA does not require a secondary infringement under 1201(a)(2), and the Ninth Circuit has not required a showing of infringement in addition to access.

¹⁹ To the extent this extra element applies, the parties agree that if Glider use infringes Blizzard's copyrights, this element is met and Appellant's arguments regarding videotaping are irrelevant. However, as the District Court held, Warden also prevents users from accessing the WoW server and then copying the game's non-literal elements by taking screenshots or video recording game play. (*See* page 50, *infra*; App. Br. 34). Appellants admit that such copying would infringe, and thus Appellee's § 1201 (a)(2) claim succeeds even if Glider use alone is not infringing. (App. Br. 34.)

that Warden met this definition by requiring the game client software to check portions of the user's RAM and report back the necessary information (a bot-free segment of RAM) to Warden to gain continuing access to the WoW servers and subsequent non-literal elements as players progress in-game. (ER E10.)

Appellants argue that Warden does not control access to WoW's dynamic non-literal elements because *non-Glider users* may access them after passing Warden. Before the District Court, however, Appellants argued only that these non-literal elements are not protected expression under the Copyright Act and *conceded* that Warden controls access to the dynamic "symphony" of non-literal elements orchestrated by the server:²⁰

THE COURT: ... But, again, it seems to me this raises the question of whether the symphony is a work protected. Because if the symphony is protected, clearly Warden controls access to the symphony.

MR. VENABLE: Agreed, Your Honor.

(SER 20.) Thus, with regard to the non-literal elements as orchestrated by the server, Appellants did not argue below that Warden does not control access, expressly conceded the point, and as such it is waived. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1052 (9th Cir. 2003) (issues abandoned before district court

²⁰ Appellants concede on appeal that the non-literal elements are protected.

will not be considered on appeal); *Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978) (appellate court will not review issues conceded below).

Even if not waived, the record below supports the District Court’s conclusion that the ability of *non-Glider users*, who have successfully and legitimately passed Warden, to access the dynamic non-literal elements has no bearing on the § 1201(a)(2) analysis. (App. Br. at 27.) Warden is a technological measure applied to *all* WoW users—its purpose is to block access to users running unauthorized programs, but permit access to users who demonstrate they are running clean copies of WoW. (ER O21-O22, SER 51-52). It is undisputed that neither Glider users nor non-Glider users may *access* the online orchestration of WoW’s non-literal elements without first passing Warden. (SFR 20.) Nor can players make infringing copies into RAM or record game play without first passing Warden. (SFR 20, 51-52 ER O21-O22.) Accordingly, Blizzard did not, as Appellants suggest, leave WoW’s “front door wide open;” it instead required that users open it with the correct key—a clean copy of WoW.

Likewise, Appellants’ contention that only the scan.dll portion of Warden—and not the resident component—is an access restriction for purposes of § 1201(a)(2) is without merit. Appellants provide no authority suggesting that an access control measure cannot attempt to block both initial access and continue to

scan and revoke access if the secondary check determines access was unauthorized. Nor could they, as such a limitation would preclude enforcement under the DMCA of more effective two-tiered systems that continue to scan for unauthorized access even when the first layer has been compromised. Appellants' argument also fails to acknowledge the undisputed facts below that new WoW content is continually accessed as users progress in the game, including new story text provided by the server as well as additional loading of client code into RAM to generate new non-literal elements—and that the resident component of Warden serves as the gatekeeper to this additional protected expression. (ER O21-22; SER 51-52.)²¹

B. Warden Effectively Protects a Right of Blizzard's Under the Copyright Act for Purposes of § 1201(b)(1).

Section 1201(b)(1) bans trafficking in products designed to circumvent technological measures that *effectively protect a right of a copyright owner under this title in a work or a portion thereof*. A technological measure effectively

²¹ Regardless, the scan.dll component is itself an effective access control and Glider circumvents it. By their own admission, Appellants modified the Glider code to conceal itself and circumvent the scan.dll process. (ER M41.) The fact that Appellants' enabled Glider to circumvent scan.dll does not render the control ineffective. *Reimerdes*, 111 F. Supp. 2d at 317-18 (rejecting argument that “weak cipher” that was “trivial” to circumvent was not an effective access control).

protects the rights of a copyright owner under this section “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.” 17 U.S.C. § 1201(b)(2)(B) (emphasis added). The District Court ruled that Warden protects Blizzard’s rights because it was designed to prevent Glider users from accessing, and then copying, WoW’s dynamic non-literal elements that are only available when connected to Blizzard’s servers. (ER G12.)

Appellants argue on appeal that “Warden does not prevent copying of any kind in any way.” (App. Br. at 28.)²² This sweeping claim ignores critical findings of fact below and fundamentally misconstrues the purpose of 1201(b)(1). Warden is designed to prevent Glider users from *any* access to, and thus any ability to copy, the non-literal expressive elements of WoW generated by the game code

²² Appellants’ also argue in passing that they do not violate § 1201(b)(1) because Glider itself does not copy. As the District Court recognized, however, the plain text of the DMCA places no such requirement on prohibited programs. The programs must merely circumvent the protection technology for purposes of both §§ 1201(a)(2) and (b)(1). Indeed, programs that break encryption on protected works may well use the computer’s operating system to perform the actual copying—by working only to make the content of the work “available” for copying. See Nikita Aldrich, *An Exploration of Rights Management Technologies Used in the Music Industry*, 2007 B.C. Intellectual Property & Tech Forum 0510001 (2007).

when connected to the WoW servers. (SER 51-52.) As the District Court recognized, Glider users are only able to copy those elements using recording software after they circumvent Warden, and such copies infringe. (ER E11-E12.) The record further makes clear that Warden also protects Blizzard’s right to restrict the unauthorized copying of WoW code into RAM—the code that generates the non-literal elements—while connected to the server. *See* Section II, *supra*.

In defense of the (b)(1) claim, Appellants repeat their objection that Warden does not prevent *all* forms of copying by *any* user, because *non-Glider users* are able to record screen shots of the non-literal elements during game play. As the District Court noted, however, § 1201(b)(1) places no such burden on Warden. Rather, § 1201(b)(1) requires only that the technological measure “restrict[] or otherwise limit[]” *unauthorized* copying. 17 U.S.C. § 1201(b)(1)(A). As the copyright owner, Blizzard may thus impose measures to restrict only unauthorized users from copying into RAM or recording game play. Again, the fact that Warden does not prevent authorized non-Glider users from doing so is not an “open back door” because those users had to unlock the door with their key—clean copy of WoW. *See Lexmark*, 387 F.3d at 551. Indeed, if Appellants’ argument is correct, *no* DVD or online audio streaming protection mechanisms would be effective under 1201(b)(1) because none prevents someone *with sufficient rights* to

view the DVD or listen to a digital audio stream from pointing a video recorder at the screen or computer to record the copyrighted work. *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *1-2 (W.D. Wash. Jan. 18, 2000)). (Measure designed to permit streaming audio but prevent downloading copy protected under 1201 (b)(1)). The court should not apply a higher standard to computer software.²³ *Lexmark*, 387 F.3d at 549 (6th Cir. 2005) (“A precondition for DMCA liability is not the creation of an impervious shield to the copyrighted work Otherwise, the DMCA would apply only when it is not needed.”) (internal citations omitted)).

²³ An analogous case reached the same result. In *Ticketmaster, LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1106 (C.D. Cal. 2007), the court recognized that a computer program (CAPTCHA), which required users to input a series of randomly generated characters to prevent using bots to access Ticketmaster’s otherwise publicly available website (and copy the content into their computers’ RAM in a manner that violated its Terms of Use), “control[led] access to a protected work [under § 1201(a)(2)] because a user cannot proceed to copyright protected webpages without solving CAPTCHA, and protect[ed] rights of a copyright owner [under § 1201(b)(1)] because, by preventing automated access to the ticket purchase webpage, CAPTCHA prevents users from copying those pages.” *Ticketmaster*, 507 F. Supp. 2d at 1112. Notably, as is the case here, the protection mechanisms at issue in *Ticketmaster* did not preclude any other form of copying and allowed users to record the website using screenshot programs or handheld video recorders.

Finally, Appellants’ reliance on the concurrence in *Lexmark* to graft a general “for the purpose of piracy” requirement onto the DMCA does not compel a different conclusion. 387 F.3d at 547. The *Lexmark* concurrence was intended only to “make clear that in the future companies like Lexmark cannot use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves just by tweaking the facts of this case” *Id.* at 551. Those concerns do not apply here, where Blizzard’s measures are focused *solely* on blocking access to the non-literal, expressive attributes of its game software—the heart of what Copyright law protects. *Lexmark*, 387 F.3d at 548 (code at issue was not “conduit to protectable expression” because code did not generate a protectable work); *see also Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (holding that use of a transmitter to emulate a copyrighted computer code in a garage door opener did not violate § 1201(a)(2) because executing the code merely performed the function of opening the garage door rather than led to protectable expression).

C. Glider was Primarily Designed for, Had Limited Commercial Purpose Absent, and Was Marketed By Appellants for Use in Circumventing Warden.

The District Court correctly found that Glider derived its functionality from circumventing Warden, had little commercial purpose aside from that

circumvention, and was marketed by Appellants for the purposes of circumvention. The District Court made factual findings, subject only to review for clear error, that “MDY and Donnelly have designed Glider to avoid detection by Warden,” and that “Glider’s anti-detection features are essential to Glider’s commercial success.” (ER E8.) The District Court also found that each time Blizzard was able to detect Glider users, Appellants “modified Glider to again avoid detection by Warden.” (*Id.*) In response, Appellants only offer unsupported parentheticals, devoid of citations to the record or argument. These do not present the issue sufficiently on appeal or demonstrate clear error. *See Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) (failure to comply with Fed. R. App. P. 28(a)(9), results in waiver); *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (“To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.” (citation and internal quotation marks omitted).)

The following facts, which were *undisputed* below, amply demonstrate that that the District Court did not commit clear error in finding that Appellants provided and trafficked in Glider, a product primarily designed for, marketed as being capable of, and with only limited commercially significant purpose other

than, circumventing Blizzard’s warden protections. 17 U.S.C. § 1201(a)(2)(A)-(C) and (b)(1)(A)-(C); *Husain*, 316 F.3d at 835 (“essentially factual” findings reviewed for clear error).

- Appellants constantly updated Glider to ensure its continued success in cracking Warden’s evolving detection and access control technologies. (ER O26);
- Appellants marketed Glider’s circumvention technology to users via MDY’s website, which boasted that “Glider provides a number of features to help lower the risk of detection[,]” and that “[t]he current version of Glider . . . is not known to be detected by these methods.” (SER 183.)
- Appellants marketed Glider’s circumvention capabilities by hosting a forum for users to share information on avoiding detection and to receive assistance in doing so from MDY employees, including Donnelly. (SER 158-81, 192-93.)
- Appellants “acknowledged the value of the anti-detection features in refraining from charging extra fees for advanced anti-detection functionality, noting that Glider’s anti-detection ability is as essential to Glider’s success as seatbelts are to a car, and that Glider’s value would be limited if it could not evade Blizzard’s technological measures.” (SER 12.)
- When asked what other commercial applications Glider had, Mr. Donnelly answered only that MDY had experimented with using Glider to play solitaire, but had not sold it for that purpose. (SER 15-18, 53.)

In short, Appellants cannot show that the District Court committed clear error in finding that Appellants’ sale of Glider violated 17 U.S.C. §§ 1201(a)(2) and (b)(1).

IV. The District Court Erred in Finding that Appellants Did Not Violate §§ 1201(a)(2) or (b)(1) of the DMCA With Regard to WoW’s Literal Client Code.

The District Court erred in finding that Glider did not violate Sections 1201(a)(2) or (b)(1) of the DMCA with regard to the “literal code” in the WoW client based on the fact that Warden does not prevent users from accessing or copying the executable software code—the literal program code resident on the client—when they are not connected to WoW servers. (ER G20-G22.) The DMCA does not require that the protective measure block *all* forms of access or copying of the protected work—in this instance the literal code—to state a claim for circumvention of the protective measures that are implemented. *Lexmark* 367 F.3d at 557; *RealNetworks*, 2000 WL 127311, at *1-2. Permitting a copyright owner the discretion to “*restrict or limit*” certain of its rights even in a “*portion*” of its work (including the right to make authorized copies) is particularly afforded under § 1201(b)(1), which specifically grants this right. *Id.* Here, Blizzard does not protect access or copying of the client code outside of a server connection because those acts do not exploit the value of Blizzard’s copyright in the code. Only by connecting to the Blizzard server can a user copy the literal code in RAM to produce WoW game play. (ER O21-O22; SER 51-52.) In order to access the Blizzard server for this purpose and perform useful copying of the code, a user

must pass the Warden checks. *See e.g., Skylink Techs.*, 381 F.3d at 1204 (only code that leads to protectable expression may be protected under § 1201). Warden thus limits users' ability to copy the literal code into RAM, and protects its right to block *infringing* copying, *i.e.* copying into RAM with Glider.

Copyright owners routinely employ measures designed to prevent access and copying only in ways that jeopardize the value of copyrighted works. For example, music labels protect audio files through digital rights management (“DRM”) technology to prevent an unauthorized user from playing the file on their computer. Nikita Aldrich, *An Exploration of Rights Management Technologies Used in the Music Industry*, 2007 B.C. Intellectual Property & Tech Forum 0510001 (2007). That DRM, however, does nothing to prevent the copying of the music file's literal code into notepad, just as a user can freely copy the WoW code outside of a server connection. *Id.* Copyright holders applying DRM to audio files, like Blizzard, may opt to protect only this *useful* access and copying, that which allows a user to hear the music or play the game, without forfeiting DMCA claims when these selective provisions are circumvented. Accordingly, Blizzard requests that this Court clarify that Glider's circumvention of WoW also violates §§ 1201(a)(2) and (b)(1) of the DMCA as to WoW's literal code.

V. The District Court Correctly Held that Appellants Tortiously Interfered with Blizzard's Contracts.

A. There is No Dispute that Appellants Intentionally Interfered with Blizzard's Contracts.

To state a claim for TIWC under Arizona law, a plaintiff must prove: (i) a valid contractual relationship, (ii) knowledge of the relationship by the interfering party, (iii) intentional interference with the relationship, (iv) improper motive or means with regard to the interference, and (v) harm resulting from the breach. *Id. Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1041 (Ariz. 1985); Restatement (Second) Torts § 766 (2007).

Appellants admit that the EULA and TOU were valid contracts, and that using Glider breached those agreements. (SER 55-56.) Appellants also admit that MDY marketed and sold Glider to users with knowledge that its use resulted in a breach of the EULA and TOU, and that Blizzard was taking affirmative, costly steps to curb its use. (ER G22-23 (citing SER 85, 86, 184, 190).) Appellants only dispute whether the District Court correctly found on the undisputed facts that Appellants acted improperly.²⁴

²⁴ Appellants never argued that copyright law preempts TIWC liability below. As such, those arguments are waived on appeal. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1052 (9th Cir. 2003).

B. The District Court Properly Applied the Restatement’s Seven Factor Test for Impropriety.

Arizona law employs the Restatement test, which requires courts to apply a seven factor test to determine whether conduct is improper.²⁵ “(a) the nature of [Appellants’] conduct; (b) [Appellants’] motive; (c) the interests of [Blizzard and users of WoW] with which [Appellants’] conduct interferes; (d) the interests sought to be advanced by [Appellants]; (e) the social interests in protecting the freedom of [Appellants] and the contractual interests of [Blizzard and its users]; (f) the proximity or remoteness of [Appellants’] conduct to the interference; and (g) the relations between the parties.” *Wagenseller*, 710 P.2d at 1042; Restatement (Second) of Torts § 767 (2007). Arizona courts “give the greatest weight to the first two factors, the nature of the defendant’s conduct and the defendant’s motive.” *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1027 (Ariz. 2005). Appellants give short shrift to these factors, reciting them but limiting their

²⁵ Notably, if the Court determines that Appellants’ distribution of Glider violates the Copyright Act or the DMCA, that finding alone is sufficient to establish that his conduct was improper. “Conduct specifically in violation of statutory provisions or contrary to public policy may for that reason make an interference improper.” *Wells Fargo Ban v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund* 38 P.3d 12, 32-33 (Ariz. 2002).

argument to unsupported parenthetical statements following that recitation.²⁶ The District Court, by contrast, carefully examined all seven factors, and found, based on the undisputed facts, that *none* weighed in Appellants' favor. (ER G23-26.)

The nature of Appellants' conduct. Appellants were *exploiters* that acted for their private advantage in selling a product for their own financial gain—earning over 3.5 million dollars at Blizzard's expense. (SER 14.) They colluded with Glider users to breach their contracts and conceal those breaches from Blizzard using Glider's anti-detection technology. (SER 183.) In doing so, users defrauded Blizzard and prevented it from enforcing valid provisions of its contracts. As the District Court recognized, the undisputed evidence revealed that Appellants' acted maliciously by: “assist[ing] players in avoiding detection by Blizzard, and do[ing] so in a way designed to place Blizzard at risk.” (ER G24.) Perhaps most importantly, Appellants placed at the center of their business plan a goal to make it prohibitively expensive for Blizzard to enforce its valid contracts and prohibit cheaters from negatively affecting the WoW experience. (ER G24-25.) As Appellants themselves admitted below, MDY's business plan “seeks to

²⁶ This cursory presentation of these issues results in waiver. *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) (issues raised in an appellate brief but not supported by citations to the record are deemed abandoned).

make it a ‘bad idea’ for Blizzard to try to detect Glider because counter-measures Blizzard must create to detect Glider present the ‘risk [of] banning or crashing innocent customers.’” (*Id.* (quoting SER 190).)²⁷

Motive. The District Court found that Appellants’ motive was solely for “profit.” Appellants do not, and cannot, reasonably dispute this point on appeal. While Mr. Donnelly stated that he initially developed Glider for his and his friends’ own personal use, he quickly exploited the relationship between Blizzard and its customers for his own seven-figure financial gain. (SER 6.) Once apprised in September 2005 that Blizzard sought to enforce its contract rights to ban Glider users, Appellants “business strategy [was] not to accept and honor the preexisting contract between Blizzard and its customers, but to take advantage of that relationship for MDY’s financial gain.” (ER G24.)

The interests with which Appellants’ conduct interferes. It was undisputed below that Blizzard “entered into valid and financially profitable contracts with its customers, and [did] so through the innovative development and marketing of WoW.” (ER G24.) Appellants derisively characterize Blizzard’s

²⁷ The District Court’s statement that *Wagenseller* referred to honest persuasion among “competitors” rather than exploiters merely underscored the difference between MDY’s illegitimate efforts and those of a legitimate competitor.

interest as an “apparent desire to have players take months to plod through the first 69 steps of its game” (App. Br. at 40.) Appellants, however, provide no explanation for why Blizzard’s enormous investment in creating a rich, balanced immersive online experience is not deserving of protection. As Blizzard’s chief witness testified at trial:

Blizzard invests a large amount of time in developing a very specific game experience for our players to have online. You know, our—we’re notorious for having what would be—most companies would consider a complete product that could be released years before we actually release the game. And the extra years of work, which is significant cost to us, goes into fine-tuning that experience. Every little detail is fine-tuned.

(SER 32.) Appellants may believe that WoW would be more popular or “better” if players could “skip to the end,” but Blizzard is entitled to design its game in a way to prevent such advancement. The hundreds of thousands of WoW players who have complained to Blizzard about the presence of Glider users in the game affirm Blizzard’s choice. (SER 81.)

The interests Appellants advance. The District Court properly concluded that this factor weighs in Blizzard’s favor because Glider “empower[s] its users to play WoW in a way not contemplated by the game’s creator and copyright holder,” and because “MDY seeks to exploit WoW’s success for its own financial benefit.” (ER G24.) Appellants’ attempts to equate their cheat program to “benign add-ons”

notwithstanding, this is not a case where the technology at issue has a wide range of applications that are important to society and select individuals are abusing it for an unintended illegal purpose contrary to the developer's intent. On the contrary, Appellants developed Glider for one specific market—WoW players seeking to cheat the game and avoid getting caught.

Social interests in protecting Appellants' freedom of action. Appellants' sole argument on this point is a plea that this court "remember, it's a videogame with steadily and strongly increased subscribership." (App. Br. at 40.) Blizzard submits that the record below demonstrates this is true in large part because of the choices Blizzard has made in designing its game—one such choice being to prevent users from running bots and taking steps to eliminate that use. (SER 32, 94-103.) As the District Court recognized, no social interests are advanced by protecting Appellants' concerted effort to exploit WoW's success.

The proximity of Appellants' conduct to the contract breaches. Appellants again offer only a glib, unsupported statement that they did not "interfere" at all because Glider does not change the source code or any elemental aspect of the WoW software. This statement ignores the undisputed facts, on which the District Court relied, that the proximity of Appellants' conduct to the breaches at issue—violations of the TOU's restriction on bots—could not be

closer. (ER G25.) There is no dispute Appellants are solely responsible for developing and distributing Glider, and that Glider is the but-for cause of the breaches.

The relationship between the parties. Appellants claim there was no relationship between the parties until Blizzard's representatives confronted Mr. Donnelly in November of 2006. (App. Br. at 40.) This is a non-sequitur. As the District Court recognized, the parties here are not competitors, and enjoining Appellant's interference presents no danger of stifling competition in the marketplace for multiplayer online games. Appellants are exploiters that use the pre-existing relationship between Blizzard and its users for their own commercial gain, to Blizzard's great detriment. (ER G25.)

Because all seven impropriety factors weigh heavily in Blizzard's favor, and the remaining TIWC elements are conceded, the District Court's Order entering summary judgment for Appellants' tortious interference with Blizzard's contracts should be affirmed.

C. The District Court Properly Focused on the Relationship Between Appellants and Blizzard in Determining Impropriety.

Rather than address the seven factors, Appellants argue that they were "honest persuaders" and thus immune to liability for TIWC. The District Court acknowledged the concept of "honest persuasion" as a relevant consideration under

the fifth impropriety factor, but properly rejected its application to Appellants. (ER G24.) The “honest persuasion” test is relevant to TIWC claims where the improper conduct concerns the defendant acting improperly *toward the breaching party* in convincing it to breach its contract. The focus, however, is different where, as here, the interfering party seeks to prevent the plaintiff from enforcing its contract or make its performance more costly. As the Restatement (Second) of Torts states:

One who intentionally and improperly interferes with the performance of a contract ... between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Restatement (Second) of Torts § 766A (1979) (emphasis added). The District Court thus properly rejected Appellants’ argument that they were honest persuaders by focusing on the relationship between Appellants and Blizzard, rather than between Appellants and Glider users. Furthermore, the *Wagenseller* court specifically stated that “acting *purely for private advantage, acting maliciously, and making false and defamatory statements*” were “facets of the element of impropriety that the plaintiff may show in a particular case.” 710 P.2d at 1043 (emphasis added). The undisputed facts below show that Appellants engaged in precisely those behaviors.

Likewise, Appellants fail to distinguish *American Airlines v. Platinum World Travel*, 769 F. Supp. 1203, 1206 (D. Utah 1990), *aff'd*, 967 F.2d 410 (1992), which also applied the Restatement test to a third party's efforts to assist breaching parties in concealing their breaches from the plaintiff. (ER G25.) The defendants in *American Airlines* advertised in travel magazines that they would purchase travel rewards from airline customers that participated in frequent flyer programs, and then sell those awards to other customers. *Id.* at 1204. Because such sales violated the terms of the frequent flyer program the plaintiff sponsored, the defendants "developed a rather elaborate system of deception to prevent the plaintiff from learning that the award was brokered." *Id.*

The *American Airlines* court held that the defendant's system of deceiving the plaintiff into performing was "improper" under the Restatement test because "defendants' business depends upon their ability to induce the plaintiffs' customers to breach their contractual obligations while the plaintiff continues to perform." *Id.* at 1206. The defendants argued in response that they honestly persuaded their customers to breach their contracts and "in order to make interference improper, deception and misrepresentation must be directed toward the customer such as when a defendant defames the character of the plaintiff." *Id.* at 1206-07. In keeping with the Restatement test's focus on the relationship between the plaintiff

and the defendant, the court summarily rejected this argument, holding that “[C]ommon sense dictates that the conclusion that the system of deception practiced in this case is equally or more improper than efforts to deceive the customer.” *Id.*²⁸ at 1207. The *American Airlines* court then held that defendants were liable for TIWC as a matter of law, stating:

In summary, it is difficult to see how the defendants’ interference in this case can be characterized as anything but improper. * * * If the defendants are allowed to persist, the plaintiff must either cease efforts to enforce an otherwise valid contractual provision or else constantly question the veracity of the customers it attempts to service. There is no reason the plaintiff should be forced in to this position.

Id.

This case is on all fours with *American Airlines*. The undisputed facts below demonstrate that Appellants’ business model, like that in *American Airlines*, unquestionably depends on deceiving Blizzard into performing and being unable to

²⁸ The Tenth Circuit put it succinctly: “The tortious conduct of the corporate Defendants pervaded their business. That is, the businesses were set up to interfere with known contracts between the airlines and their frequent flyers and to misappropriate the airlines’ services through deceptive means. ... such conduct satisfies the elements of the tort of interference with an existing or prospective contract.” *Am. Airlines v. Christensen*, 967 F.2d 410, 417 & n.14 (10th Cir. 1992). Here too, Blizzard does not want to perform its services under the contract with Glider users, but thanks to Appellants actions, those users are able to misappropriate the WoW service.

enforce a valid contractual provision against WoW players using bots. (SER 190.) Appellants' argument that they do not encourage users to breach flies in the face of the record below. Appellants aggressively marketed Glider for only one use—botting in WoW in violation of the TOU. (ER O41.) They touted the program by assuring purchasers they would continue to diligently assist them in concealing their breaches from Blizzard by keeping Glider undetectable. (ER O33; SER 183.) This is not a case where purchasers, of their own accord, used a product designed for a lawful purpose for an unintended secondary purpose after Appellants cautioned them against it. The *only* viable use of Glider was in connection with WoW and Appellants' entire business model rested on attracting users to use their product in connection with WoW and in violation of the EULA and TOU. (SER 15-18, 53.)

D. The District Court Considered the Applicable Version of the EULA and TOU.

The EULA and TOU in force at the time MDY began selling Glider prohibited “cheats and hacks” and “unauthorized third-party programs.” (ER

E13.)²⁹ As Appellants note, the term “bot” was added specifically to an updated version of the TOU in 2006. Appellants *conceded* at summary judgment that only the operative versions of the EULA and TOU in place at that time were relevant to their liability for TIWC. (SER 55-56.) As such, the District Court did not err by limiting its analysis to those versions, and Appellants have waived any argument to the contrary. *Harik*, 326 F.3d at 1052.³⁰ Waiver aside, the record below evidences that Appellants understood that Glider was a “cheat” and an “unauthorized third-party program” as prohibited in the prior TOU. Appellant bid equally on the Google keywords “World of Warcraft bot” and “World of Warcraft cheat”—meaning that users searching Google for those results would receive a link to MDY’s website as a result. (ER O41.) Appellants also acknowledged in the FAQ on their own website that Glider use violated the 2005 version of the TOU, and had been actively combating Blizzard’s efforts to block Glider since September 2005. (SER 183.)

²⁹ Even if the EULA and TOU did not prohibit Glider use until they explicitly referenced “bots”, this argument is irrelevant to the vast majority of Glider users who entered contracts *after* Blizzard explicitly added “bots” to the EULA and TOU.

³⁰ This concession, and Appellants’ lack of development of the argument here and failure to present it below, similarly forecloses their passing assertion that the 2006 TOU revision renders Blizzard’s hands unclean.

VI. The District Court Correctly Held Michael Donnelly Personally Liable.

Both Ninth Circuit and Arizona law recognize that an officer or director of a corporation, like Donnelly here, is “personally liable for all torts that he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.” *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985); *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823-24 (9th Cir. 1996) (officers found personally liable for company's trademark infringement); *Coogan v. Avnet, Inc.*, No. CV040621PHXSRB, 2005 WL 2789311, at *7-8 (D. Ariz. Oct. 24, 2005) (corporate officer can be held individually liable for copyright infringement where he has right and ability to supervise infringing activity and direct financial interest in the activity). Moreover, directors may also be held liable under Arizona law if they participate in the corporate affairs causing or contributing to injury. *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821, 826 (Ariz. App. 2001) (corporate officer status “does not shield [officers] from personal liability to those harmed as a result of intentionally harmful or fraudulent conduct”).

Here, the record leaves no doubt that Donnelly personally performed nearly every significant act from which liability arose, including the development, support and marketing of Glider. The District Court correctly focused on whether

Donnelly was aware of the *facts* that made his conduct improper—regardless whether or not he understood the details of the applicable law. (ER E16.) The District Court found that Donnelly, from at least November 2005, knew that Blizzard had established valid and financially profitable contracts with its customers and must have known MDY was engaging in tortious interference. (ER E15.) Donnelly knew of the TOU and EULA and that Glider aided WoW players in breaching those contracts and concealing those breaches. (*Id.*) Likewise, the District Court correctly found that Donnelly was personally liable for the copyright infringement and DMCA violations. “Donnelly clearly supervised the infringing and circumventing activities of MDY and profited personally from their successes.” (ER E19.) In short, the law dictates that if the company he created and ran is liable for copyright, DMCA and tort violations, then Donnelly—the driver behind every act giving rise to these claims—is likewise personally liable for his participation.

CERTIFICATE OF COMPLIANCE WITH RULES 28.1(e)(2)(B)(i) & 32(a)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 28.1(e)(2)(B)(i) & 32(a)(7)(C) because it contains 15,962 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a 14-point proportionally spaced font that includes serifs using Microsoft Word.

Date: October 28, 2009

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 28, 2009 .

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