

Case Nos. 09-15932 & 09-16044

In the
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**MDY INDUSTRIES LLC AND MICHAEL DONNELLY, *et al.*,
Plaintiffs-Appellants,**

v.

**BLIZZARD ENTERTAINMENT, INC. AND VIVENDI GAMES, INC.,
*Defendants-Appellees.***

On Appeal From a Judgment of the United States District Court for the
District of Arizona
Case No. 06 Civ. 2555
The Honorable David G. Campbell

**BRIEF OF AMICUS CURIAE THE MOTION PICTURE ASSOCIATION
OF AMERICA, INC. IN SUPPORT OF APPELLEE'S POSITION SEEKING
AFFIRMANCE ON APPEAL [AND REVERSAL ON APPEAL]**

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I hereby certify that pursuant to Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) & (C) and Ninth Circuit Rule 32-1, the enclosed brief is proportionately spaced, has a typeface of 14-point Times New Roman including footnotes, and contains approximately 6,755 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 6, 2009

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INTEREST OF AMICUS

All parties consented to Amicus filing this brief.

The Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s members produce or distribute the vast majority of the filmed entertainment in the domestic theatrical, television, and home entertainment markets, and they are among the leading distributors of motion pictures internationally. Increasingly, Amicus’ members distribute those works in electronic form, protected by technological measures, thus making more works available to consumers and businesses than ever before, including on DVDs and Blu-Ray discs, and through digital cable, satellite television, downloads, and streaming. Amicus’ members depend on the strong legal protections of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §1201, to support digital distribution of their copyrighted works, to the benefit of not only the members’ businesses, but also consumers. Amicus therefore has a strong interest in this appeal, which involves the scope and application of section 1201, as well as enforcement of valid licensing agreements involving copyrighted works.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant MDY Industries, LLC (“MDY”) makes and distributes “Glider” software, a so-called “bot” that enables its users to gain a competitive advantage over opponents in the computer game World of Warcraft (“WoW”), created by appellee Blizzard Entertainment (“Blizzard”). *MDY Industries, LLC v. Blizzard Entm’t, Inc.*, 616 F. Supp. 2d 958, 962-63 (D. Ar. 2009); *MDY Industries, LLC v. Blizzard Entm’t, Inc.*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *4 (D. Ar. July 14, 2008). The district court held that, by trafficking in Glider, MDY violated the anti-trafficking provisions of the DMCA, 17 U.S.C. §§1201(a)(2) and 1201(b)(1). Specifically, the district court concluded that Glider enables players to circumvent “Warden,” a technological measure that prevents persons who use unauthorized bots from accessing WoW and from copying elements of WoW during game play.

Section 1201 prohibits three types of conduct. First, section 1201(a)(1) prohibits circumventing a technological measure that controls access to a copyrighted work.¹ Second, section 1201(a)(2) prohibits trafficking in technology that is primarily designed, primarily used, or marketed to circumvent such an access control. Third, section 1201(b)(1) prohibits trafficking in technology that is

¹ Amicus refers to technological measures that control access as “access controls.”

primarily designed, primarily used, or marketed to circumvent a technological measure that protects an exclusive right of a copyright owner.² None of these prohibitions includes facilitation of copyright infringement as an element of a violation.

In its Opening Brief (AOB at 25-6), MDY relies on the Federal Circuit’s flawed opinion in *The Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1138, 1203 (Fed. Cir. 2004), which states that a section 1201 violation occurs only where circumvention or trafficking can possibly lead to infringement or, in other words, “facilitates infringement.”³ Proceeding from the false premise that *Chamberlain* governs, MDY argues that a violation of section 1201 cannot exist absent proof of *actual* copyright infringement. *Id.* at 35.

MDY misconstrues section 1201. It is true that among Congress’s goals was combating copyright infringement online, but it had a broader purpose as well: to encourage copyright owners to make their works available for distribution, viewing and/or listening online and in new digital formats. S. Rep. No. 105-190, at 2

² Amicus refers to technological measures that protect rights as “copy controls.”

³ Although *Chamberlain* involved only a section 1201(a)(2) claim, the Federal Circuit interpreted section 1201 in its entirety, concluding that access control- and copy control-related violations require facilitation of infringement. However, *Chamberlain* also stated that any technology that enables circumvention of a copy control “necessarily” facilitates infringement. *Chamberlain*, 381 F.3d at 1195.

(1998). Thus, even where circumvention (or trafficking) does not strictly facilitate infringement, section 1201 prohibits such conduct, which discourages the copyright owner from making works available online and deprives the copyright owner of a fair return for exploiting its works online.

For example, Amicus' members make motion pictures available for online viewing, in exchange for direct or indirect payment. Someone who circumvents access controls to watch those movies for free violates section 1201(a)(1) – even if circumvention does not facilitate copying because, for example, copy controls remain in place. The inability to infringe by copying or distributing makes no difference to such a circumventor, whose goal is simply to watch the movie for free. Yet, the harm to the copyright owner that this type of conduct causes is manifest. Congress enacted section 1201(a) to prevent this type of circumvention, and in that way to facilitate digital commerce. S. Rep. No. 105-190, at 8.

Therefore, anyone who, like MDY, traffics in a circumvention technology or service may be liable under section 1201(a) and/or 1201(b) without proof of infringement or facilitation of infringement. This interpretation is supported by the plain language of section 1201, by its legislative history, and by the case law. *See United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1124 (N.D. Cal. 2002) (rejecting argument that 1201(b) requires facilitation of infringement); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001) (“[T]he DMCA ...

does not concern itself with the *use* of [] materials after circumvention has occurred.”).

MDY seeks to make the *Chamberlain* test binding in the Ninth Circuit. But other than the Federal Circuit, no circuit court has adopted this test, which undermines the plain language and the purpose behind Congress’ enactment of section 1201. Amicus urges this Court to reject MDY’s attempt.

ARGUMENT

I. A SECTION 1201 VIOLATION DOES NOT REQUIRE PROOF OF INFRINGEMENT OR FACILITATION OF INFRINGEMENT

MDY relies heavily on *Chamberlain*, in which the Federal Circuit stated that a person cannot violate section 1201 where the act of circumvention, or of trafficking in circumvention tools, does not facilitate infringement. MDY’s position, and *Chamberlain*, conflict with the plain language of section 1201, with the statute’s legislative history, and with the better-reasoned case law.

Notwithstanding MDY’s attempt to treat *Chamberlain* as settled law, only the Federal Circuit has followed it. This Court should reject MDY’s attempt to portray it as binding here.

A. *Section 1201 On Its Face Does Not Require Facilitation of Copyright Infringement*

Section 1201(a)(1)(A) provides that “[n]o person shall circumvent a technological measure that *effectively controls access to a work* protected under this title.” 17 U.S.C. §1201(a)(1)(A) (emphasis added.) Similarly, section 1201(a)(2) states:

- (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that —
- (A) is primarily designed or produced for the purpose of circumventing a technological measure that *effectively controls access to a work* protected under this title;
 - (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that *effectively controls access to a work* protected under this title; or
 - (C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that *effectively controls access to a work* protected under this title.

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

Section 1201(a) therefore focuses exclusively on unauthorized access to copyrighted works. It makes no mention of infringement or of copyright owners’ exclusive rights. In using the language “a work protected under this title,” section 1201(a) simply limits the realm of potential violations to circumstances involving access to copyrighted works, as opposed to public domain or otherwise uncopyrightable works; it does not require any connection between circumvention of an access control and actual or potential infringement.

This reading becomes especially clear when section 1201(a) is compared with section 1201(b)(1). Whereas section 1201(a) focuses on technological measures that control *access* to copyrighted *works*, section 1201(b)(1) focuses on technological measures that protect copyright owners against unauthorized *exercise* of exclusive *rights*.

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

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

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

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

17 U.S.C. §1201(b) (emphasis added.) By referring to the *rights of a copyright owner*, section 1201(b), unlike section 1201(a), refers to technological measures that are used to limit infringement.

Indeed, the two explicit examples of unlawful circumvention of an access control contained in section 1201(a) involve “descrambl[ing] a scrambled work [and] decrypt[ing] an encrypted work” (17 U.S.C. §1201(a)(3)(A)) – conduct not directly tied to infringement. Nothing about descrambling or decrypting a work in

and of itself necessarily facilitates infringement; descrambling or decrypting might only enable someone to watch or listen to the work without authorization, with no impact on the exercise of exclusive rights afforded under the Copyright Act. *See Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 Colum. J. L. & Arts 385, 450 (2004) (“Besek”) (“Access controls are measures that prevent someone from viewing, reading, hearing and/or otherwise perceiving the work without authorization from the rightholder.”).

Despite section 1201(b)’s more direct relationship with technological measures used to limit infringement, that section also lacks any reference to infringement, and certainly does not include facilitation of infringement as an element of a violation. In fact, district courts within the Ninth Circuit have read the plain language of section 1201(b) to cover trafficking in circumvention technologies regardless of whether they are designed to or do facilitate infringement. In *Elcom*, the defendant trafficked in a technology that stripped use-restrictions utilized by the Adobe eBook Reader. 203 F. Supp. 2d at 1120. The defendant argued that section 1201(b) “bans only those tools that circumvent use restrictions for the purpose of facilitating infringement.” *Elcom* rejected this argument, holding that “the DMCA bans trafficking in all circumvention tools, regardless of whether they are designed to enable fair use or to facilitate

infringement ...” *Id.* at 1123. The court also concluded that “[t]he statute does not distinguish between devices based on the uses to which the devices will be put. Instead, all tools that enable circumvention of use restrictions are banned, not merely those use restrictions that prohibit infringement.” *Id.* at 1125. Courts have reached similar conclusions in cases involving violations of both section 1201(a) and 1201(b). *See, e.g., 321 Studios v. MGM Studios*, 307 F. Supp. 2d 1085, 1097-98 (N.D. Cal. 2004) (“It is the technology itself at issue, not the uses to which the copyrighted material may be put.”); *Corley*, 273 F.3d at 443 (section 1201 cannot be read to require courts to look to how copyrighted material will be used after circumvention occurs).

In short, acts of circumvention or of trafficking violate section 1201 on its face, irrespective of proof that these acts facilitate copyright infringement.

B. *The Legislative History Confirms that Section 1201 Does Not Require Facilitation of Copyright Infringement*

The Court need go no further than the statutory language to conclude that a section 1201 violation does not turn on whether the prohibited acts facilitate infringement. *See United States v. Tobeler*, 311 F.3d 1201, 1203 (9th Cir. 2002) (“We have long held that ‘there is a strong presumption that the plain language of [a] statute expresses congressional intent, rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.’”) (internal

citation omitted). In any event, the legislative history of section 1201 supports the statute's plain meaning. *Elcom*, 203 F. Supp. 2d at 1124 (“Because the statutory language is clear, it is unnecessary to consider the legislative history to determine congressional intent or the scope of the statute. Nevertheless, statements within the legislative history support the interpretation [that facilitation of infringement is not required].”).

It is true, as MDY contends, that a main purpose of section 1201 is to “prevent piracy of copyrighted material.” *Corley*, 273 F.3d at 435. But Congress also had a broader reason for enacting the DMCA – to encourage copyright owners to make copyrighted works available in digital formats. *See* H.R. Rep. No. 105-551 (pt. 2), at 23 (1998) (“A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property – whether in the form of software, music, movies, literature, or other works – drives the demand for a more flexible and efficient electronic marketplace.”).

One format that Congress intended to encourage was so-called “on-demand” or “pay-per-view” access, whereby consumers can view or listen to works without necessarily obtaining permanent copies of the works. *See id.* (discussing “new

technologies for distributing real-time audio and video through the Internet”). As

June Besek explains:

Providing copyright owners with the ability to preclude unlimited access was a goal of the DMCA, not just an unforeseen and unfortunate consequence. Pay-per-use models often are access-enhancing, since they afford users the opportunity to read, view or experience the materials they seek without imposing the costs of an unlimited access option.

Besek at 474.

In a real-time streaming scenario, the consumer obtains the value of accessing the copyrighted work by watching or listening to it. Depending on the nature of the technology, watching or listening to a work does not necessarily involve any exercise of an exclusive right of the copyright owner – that is, neither of these activities necessarily “facilitates infringement.” Nevertheless, Congress intended to prohibit circumvention of technologies that copyright owners use to prevent consumers from accessing copyrighted works without authorization. *See* H.R. Rep. No. 105-551 (pt. 2), at 38 (section 1201(a)(2) “is aimed fundamentally at outlawing so-called ‘black boxes’ that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work”); Paul Goldstein, II *Goldstein On Copyright* §7.17.1 (2009) (“Access to a work in the sense evidently contemplated by section 1201(a) occurs any time a user derives value from a work without necessarily infringing one of the exclusive rights secured by copyright.”).

Years before Congress enacted section 1201, it amended the Communications Act to provide similar legal protection against unauthorized receipt of cable and satellite television programming.⁴ Section 1201 extended that type of protection to other means of delivering copyrighted works. *See* S. Rep. No. 105-190, at 28 (analogizing 17 U.S.C. §1201(a)(2) to 47 U.S.C. §553(a)(2), prohibiting the manufacture or distribution of equipment intended for the unauthorized reception of cable television service, and 47 U.S.C. §605(e)(4), banning the manufacture, assembly, import, and sale of equipment used in the unauthorized decryption of satellite cable programming).

Similarly, in distinguishing between restricting access (section 1201(a)) and protecting rights (section 1201(b)), the Senate Report on the DMCA confirms that a section 1201 violation need not entail facilitation of infringement:

⁴ These earlier enactments establish that references to “piracy” in the legislative history of the DMCA do not necessarily denote copyright infringement. In the Communications Act context, illegal interception of cable and satellite programming signals is often referred to as “piracy” without any relationship to copyright infringement *per se*. *See, e.g.*, H. R. Rep. No. 100-887 (pt. 2), at 14 (1988) (“In general, ‘piracy’ refers to the decoding or decryption of scrambled programming without the authorization of the programmer nor payment for the programming.”); *see also DirecTV, Inc. v. Huynh*, 503 F.3d 847, 850 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 40 (2008) (“Individuals who seek to watch DirecTV programming without payment (‘pirates’) have developed methods of decrypting DirecTV’s signals without subscription. By reprogramming or replacing legitimate access cards with illicit decoder technology, pirates have managed to gain unauthorized access to all of DirecTV’s programming.”).

[1201(a)(2) and 1201(b)(1)] are not interchangeable, and many devices will be subject to challenge only under one of the subsections. For example, if an effective technological protection measure does nothing to prevent access to the plain text of the work, but is designed to prevent that work from being copied, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(b), but not under subsection 1201(a)(2). Conversely, if an effective technological protection measure limits access to the plain text of a work only to those with authorized access, but provides no additional protection against copying, displaying, performing or distributing the work, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(a)(2), but not under subsection 1201(b).

S. Rep. No. 105-190, at 12. *See also id.* at 29 (distinguishing technological measures that “protect ... copyright rights” from those that control access to works). This language contemplates that separate technological measures may be used to restrict access, on the one hand, and copying, on the other. It also contemplates separate claims under section 1201 against persons who traffic in technologies that circumvent each type of measure.

Thus, if a motion picture studio makes a movie available online for on-demand viewing, it may use two separate technological measures to secure the process.⁵ *See, e.g., RealNetworks, Inc. v. Streambox, Inc.*, No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at * 6-12, 18-21 (W.D. Wash. Jan. 18, 2000) (describing

⁵ Of course, a technological measure can be both an access control and a copy control. *See 321 Studios*, 307 F. Supp. 2d at 1096-97 (holding that the Content-Scramble-System (“CSS”) is both an access control and copy control).

streaming technology that used separate access control and copy control). First, it may use an access control to prevent consumers from watching the movie without paying. Second, it may use a separate technological measure so that consumers who have paid to watch the movie cannot make a copy while viewing it. Under section 1201, a person who traffics in technology that circumvents the access control violates section 1201(a)(2) even if the technology cannot circumvent the copy control. S. Rep. No. 105-190, at 12.

Finally, copyright owners can control access to their works online with passwords. In section 1201, Congress clearly sought to prohibit bypassing password protection. *See id.* at 12 (“if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so”). Yet, bypassing password protection, like accessing an on-demand movie without authorization, does not necessarily facilitate infringement.

The legislative history therefore confirms that Congress intended the prohibitions of section 1201 to apply without regard to proof that the prohibited acts facilitate infringement. Congress banned circumventing *access* controls (section 1201(a)(1)), and reinforced that ban with an additional prohibition (section 1201(a)(2)) on trafficking in tools and services used, designed or marketed to defeat such controls. *Id.* at 28. Congress intentionally distinguished those

provisions from section 1201(b), which prohibits trafficking in tools and services designed to defeat copy controls, and omitted any prohibition on circumventing copy controls because ordinarily such acts “will occur in the course of conduct which itself implicates the copyright owners [sic] rights under title 17[.]” and thus lead to already-actionable copyright infringement claims. *Id.* A contrary interpretation of the statute would thwart a key purpose of section 1201, namely to encourage copyright holders to make their expressive works available online.

C. *The Overwhelming Weight of the Case Law Holds That Section 1201 Does Not Require Facilitation of Infringement*

Consistent with the plain language and legislative history of section 1201, most cases interpreting section 1201 recognize that the statute prohibits circumvention of technological measures even absent proof of facilitation of infringement. Many of the cases finding violations of section 1201(a) involve unlawful receipt of television programming, in which the defendant circumvents or traffics in circumvention technology for the purpose of *viewing* paid programming for free. *See, e.g., CoxCom, Inc. v. Chaffee*, 536 F.3d 101 (1st Cir. 2008); *Echostar Satellite, LLC v. Viewtech, Inc.*, 543 F. Supp. 2d 1201 (S.D. Cal. 2008); *DirecTV, Inc. v. Carillo*, No. 05-55931, 2007 U.S. App. LEXIS 8024 (9th Cir. Apr. 3, 2007); *DirecTV, Inc. v. Ferguson*, 328 F. Supp. 2d 904 (N.D. In. 2004). None of these opinions require facilitation of infringement. Moreover, except for the

Federal Circuit, none of the U.S. courts of appeals that have interpreted and applied section 1201, *including this Court*, require facilitation of infringement as an element of a violation. *See Chafee*, 536 F.3d at 110 (“To establish liability under the DMCA, a plaintiff must establish two elements: ‘(1) defendant trafficked in a technology; and (2) the technology was primarily designed or produced to circumvent conditional access controls to protected works, or has limited commercially significant use other than such circumvention.’) (internal citations omitted); *Carillo*, 2007 U.S. App. LEXIS 8024, at * 4-5 (“To prevail on its claim under the Digital Millennium Copyright Act, Directv was required to prove (1) that Carrillo intentionally provided illegal satellite signal theft devices [sic], and (2) that these devices were primarily designed to intercept encrypted signals or had limited legitimate commercial purposes.”); *Davidson & Assoc v. Jung*, 422 F.3d 630, 640 (8th Cir. 2005) (emphasis in original) (“[A]lthough both sections prohibit trafficking in a circumvention technology, the focus of §1201(a)(2) is circumvention of technologies designed to *prevent access* to a work, and the focus of §1201(b)(1) is circumvention of technologies designed to *permit access* to a work but *prevent copying* of the work or some other act that infringes a copyright.”); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546-49 (6th Cir. 2004) (distinguishing access controls that prevent playing videogames, watching movies and reading code (*i.e.*, “conduits to protectable

expression”), from technologies that merely control functional aspects of consumer goods);⁶ *Corley*, 273 F.3d at 443 (emphasis in original) (“[T]he DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred.”). Thus, nearly all circuit courts have interpreted the unambiguous language of section 1201 and its legislative history in a manner that refutes MDY’s contention that a section 1201 violation requires proof that an act of circumvention or of trafficking results in or facilitates copyright infringement.

D. *This Court Should Not Adopt Chamberlain*

Relying on *Chamberlain*, MDY argues (AOB at 35) that Blizzard cannot prevail under section 1201 unless it proves that the circumvention of Warden by those who use Glider actually caused infringement. Blizzard’s brief on appeal (RB at 48-57) discusses in detail why the district court’s opinion should be affirmed even if MDY’s view of the law were correct. Amicus focuses on why this Court should reject the invitation to follow *Chamberlain* and instead decide whether

⁶ *Lexmark* does cite *Chamberlain* (387 F.3d at 547), but adopts neither *Chamberlain*’s six-part test nor specifically the fifth element regarding facilitation of infringement.

MDY has trafficked in illegal technology without regard to whether Glider users' circumvention of Warden results in or facilitates infringement.

The plaintiff in *Chamberlain* made garage-door opener systems. Chamberlain used "rolling code" technology to prevent burglars from breaking into garages by capturing the signals necessary to open the doors. *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 292 F. Supp. 2d 1040, 1042 (N.D. Ill. 2003). Defendant Skylink made universal transmitters. To market transmitters that could replace Chamberlain's, Skylink reverse engineered Chamberlain's rolling code software, and produced a device that would avoid or by-pass it. *Chamberlain*, 381 F.3d at 1184-85.

Chamberlain sued Skylink under section 1201(a)(2) for selling the transmitters, alleging that the rolling code technology operated not only to prevent unauthorized access to garages, but also to prevent unauthorized access to Chamberlain's software. *Id.* at 1186. Skylink countered primarily by relying on the definition of "circumvention" in section 1201(a)(3), which requires that the bypassing of access controls be accomplished "without the authority of the copyright owner." *Chamberlain*, 292 F. Supp. 2d at 1043-45. Skylink argued that, because Chamberlain had authorized its customers to use universal transmitters to access the software, no violation of 1201(a)(2) had occurred. *Id.* The district court granted summary judgment for Skylink, holding that Chamberlain had impliedly

authorized its customers to circumvent the rolling code. *Id.* at 1046. Importantly, the district court never considered the separate question of whether circumvention “facilitated infringement.”

The Federal Circuit affirmed, agreeing that Chamberlain had implicitly authorized its customers to bypass the access control at issue and that, therefore, no section 1201 violation had occurred. 381 F.3d at 1194. The court stated: “The statute’s plain language requires plaintiffs to prove that those circumventing their technological measures controlling access did so ‘without the authority of the copyright owner.’ Our inquiry ends with that clear language.” *Id.*⁷

Despite this well-marked path for holding in favor of Skylink, the Federal Circuit embarked on an unnecessary foray into “the statute’s structure, legislative history, and context within the Copyright Act.” *Id.* Given the court’s dispositive holding on the authorization issue, its subsequent analysis was dicta. The motivation for this detour into the penumbral aspects of the statute bespoke the court’s concern that Chamberlain had invoked section 1201, not to preserve an ability to exploit its rolling code software, but instead to prevent consumers from using a competitor’s transmitter. In the court’s words, Chamberlain had

⁷ Amicus disagrees with the *Chamberlain* court’s decision (381 F.3d at 1194) to place the burden of proof regarding the copyright owner’s authorization on the plaintiff. However, a discussion of that issue is outside the scope of this brief.

inappropriately “attempt[ed] to leverage its sales into after-market monopolies ...”

Id. at 1201.

Preventing such anti-competitive conduct is a laudable goal. However, in purporting to further this objective, the Federal Circuit articulated a six-part test that badly misreads section 1201(a)(2):

A plaintiff alleging a violation of §1201(a)(2) must prove: (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that (5) *infringes or facilitates infringing a right protected by the Copyright Act*, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure. A plaintiff incapable of establishing any one of elements (1) through (5) will have failed to prove a prima facie case.

Id. at 1203 (emphasis added). The fifth element of this test arose out of the court’s misconception that Congress meant to incorporate by reference the exclusive rights of copyright owners and the limitations thereon each time the word “protected” appears in section 1201.⁸ *Id.* at 1197.

⁸ Amicus’ brief focuses on the flaw in the fifth prong of *Chamberlain’s* test. However, the test has other significant defects. For example, the first prong requires a plaintiff to prove “ownership of a valid copyright on a work.” The statute does not impose such a requirement. *See* 17 U.S.C. §1203 (granting standing to “[a]ny person injured by a violation of section 1201”); *Viewtech*, 543 F. Supp. 2d at 1205 (“Nothing in the DMCA limits standing to the copyright owner.”). The fourth prong appears to require proof that circumvention leads to access to a work without authorization, whereas the statute refers to avoiding,

(...continued)

In reaching this conclusion, *Chamberlain* ignored the statutory language and misread the legislative history (discussed in Sections I.A. & B. above), thus essentially rewriting the DMCA by adding a new element to a section 1201 violation. See Paul Goldstein, II Goldstein On Copyright, at §7.17.1 (describing the “codifying zeal” displayed in the *Chamberlain* opinion). *Chamberlain* disregarded the critical difference between the language of section 1201(a) – which prohibits circumvention of a technological measure that controls *access to a work* protected by Title 17 – and 1201(b)(1), which prohibits circumvention of a technological measure that protects a *right of a copyright owner*. *Chamberlain* therefore transforms section 1201(a) into a section protecting copy controls, not access controls. But copy controls are already covered in section 1201(b).⁹

In sum, *Chamberlain*’s test for finding liability under section 1201(a)(2) conflicts with the very purpose of section 1201(a) – to enable copyright owners to effectively control access to their creative works, separate from their ability to

(...continued)

bypassing, removing, deactivating, or impairing *a technological measure without authorization*. 17 U.S.C. §1201(a)(2)(C).

⁹ Moreover, even though section 1201(b) covers technological measures that can limit infringement, it nowhere requires proof that the circumvention technology also facilitates infringement in order to establish a violation. See *321 Studios*, 307 F. Supp. 2d at 1097-98 (“This Court finds, as did both the *Corley* and *Elcom* courts, that legal downstream use of the copyrighted material by customers is not a defense to the software manufacturer’s violation of the provisions of 1201(b)(1).”).

invoke other provisions of the Copyright Act to curb infringement. As a result, the overwhelming majority of the courts applying section 1201 have not adopted *Chamberlain*'s test. This Court should reject MDY's appeal that it do so.¹⁰ Amicus urges this Court to follow the overwhelming weight of authority and reject *Chamberlain*.

E. *Declining to Apply Chamberlain Will Not Result in Anti-Competitive Consequences*

As noted above, the *Chamberlain* court feared that plaintiffs would obtain market monopolies on products having nothing to do with expressive works available in digital formats. It was unnecessary to misconstrue section 1201 to prevent this outcome. Amicus posits the following alternative theories not because it wants to relitigate *Chamberlain*, but only to demonstrate that more plausible legal theories existed to support the end result in that case.

¹⁰ Significantly, no circuit court with plenary jurisdiction to hear appeals from decisions on claims under section 1201 – or from decisions on claims for copyright infringement, for that matter – has adopted the Federal Circuit's *Chamberlain* analysis. These courts have a steady diet of cases arising under Title 17, while Congress withheld jurisdiction from the Federal Circuit in such matters, except in the fortuitous circumstance in which such claims appear in a case that involves an appealable patent law issue. *See* 28 U.S.C. §1295(a)(1) (granting the Federal Circuit jurisdiction in limited circumstances).

First, both the trial and appellate courts in *Chamberlain* concluded that users of the defendant's product acted with Chamberlain's implied authority and therefore had not circumvented within the meaning of section 1201(a)(3). 292 F. Supp. 2d at 1046; 381 F.3d at 1194. This holding by itself obviated the risk of a monopoly on universal transmitters or similar uncopyrightable products. The Federal Circuit did not need to go further to reach its result, and certainly did not need to graft a "facilitation of infringement" requirement onto section 1201.

Second, Skylink's conduct might have been immunized by the statutory exemption that defines circumstances in which trafficking in circumvention tools is allowable to enable the creation of interoperable computer programs, 17 U.S.C. §1201(f). *Chamberlain*, 381 F.3d at 1186. Neither the district court nor the Federal Circuit addressed this possibility. Although the MPAA takes no position on the applicability of this section to Skylink's conduct, section 1201(f)'s potential application shows that Congress already addressed issues related to anti-competitive conduct in the software sphere by including in the statute a specific exemption related to the very type of conduct in which Skylink engaged.

Third, Skylink argued that section 1201 applied only if circumvention of a technological measure that controlled access to a separate and independent copyrighted work occurred, and that Chamberlain's claim failed because Chamberlain's rolling code software was a technological measure that controlled

only access to itself. *See* Oral Arguments, *The Chamberlain Group, Inc. v. Skylink Technologies Inc.*, No. 02 C 6376, at 27 (N.D. Ill. June 12, 2003) (statement of D. Nimmer) (“*Chamberlain* Oral Arguments”). Again, Amicus takes no position on that theory. But, it provides another potential ground for supporting the result in *Chamberlain* without doing violence to section 1201.

Finally, a manifest purpose of section 1201(a) is to provide a level of security against unauthorized access and in that way to encourage copyright owners to make expressive works like motion pictures and video games available in digital form. H.R. rep. No. 105-551 (pt. 2), at 23. In *Chamberlain*, the plaintiff’s rolling code software did not support such availability, but instead prevented burglars from accessing garages. Thus, Skylink’s transmitter did not enable consumers to access a work protected by copyright, but rather enabled a competing product to function. That fact alone might have foreclosed Chamberlain’s claim. *See Lexmark*, 387 F.3d at 546-49 (section 1201(a) applies where an access control “restrict[s] consumers from making use of the copyrightable expression in the work”).¹¹ Whatever the reach of section 1201(a) as

¹¹ *Lexmark* also involved a perceived problem related to competition, but was easily resolved for the defendant without resorting to *Chamberlain*’s strained interpretation of section 1201. MDY relies on a concurring opinion in *Lexmark*. AOB at 36-37. Like *Chamberlain*, that concurring opinion (387 F.3d at 551 (Merritt, J. concurring)), if adopted, would improperly rewrite the statute and unnecessarily undermine Congress’ goals, as expressed in the legislative history.

applied to utilitarian products like garage-door openers, Congress and the courts have made clear that, where purely expressive works are at issue, the acts of circumventing an access control or trafficking in related technologies or services are prohibited without regard to whether these acts are proved to facilitate infringement. *Elcom*, 203 F. Supp. 2d at 1123. Because MDY traffics in Glider, which the district court found is primarily designed and used to circumvent Warden and therefore gain access to and copy Blizzard’s copyrighted videogame, MDY violated sections 1201(a)(2) and 1201(b)(1). The Court need not inquire further into whether such circumvention facilitates infringement.

II. MDY MISREADS BOTH THE *CHAMBERLAIN* OPINION AND SECTION 1201

Although unnecessary under the better reasoned authority, the district court found that MDY’s Glider circumvention technology *does* facilitate infringement.¹² *MDY*, 616 F. Supp. 2d at 967-68. In the face of this holding, MDY asks this Court to misread *Chamberlain* and to require a copyright owner to prove *actual*

¹² Although the district court cited *Chamberlain* in its January order, it first concluded that MDY violated section 1201(a)(2) without reference to *Chamberlain*. *MDY*, 616 F. Supp. 2d at 967. Rather, the district court relied on the statutory language and opinions such as *321 Studios*, 307 F. Supp. 2d at 1095. The court merely noted in passing that “some courts” apply a six-part test for violation of section 1201(a)(2), before concluding that Blizzard has satisfied even that more strenuous *Chamberlain* test.

infringement as a predicate to prevailing under section 1201. *See, e.g.*, AOB at 35 (“Without in some way abridging one of those six rights accorded to copyright owners, MDY and Donnelly cannot be liable under either §1201(a)(2) or §1201(b)(1).”).

However, *Chamberlain* did not require proof of actual infringement, but instead merely concluded that circumvention must make infringement *possible*. *See* 381 F.3d at 1198 (drawing a line between “defendants whose accused products enable copying and those ... whose accused products enable *only* legitimate uses of copyrighted [works]”); *id.* at 1194 (emphasis added) (“§1201 applies only to circumventions *reasonably related* to protected rights”); *id.* at page 1202 (emphasis added) (1201 does not “prohibit exclusively fair uses even in the absence of *any* feared foul use”); *id.* at 1203 (emphasis added) (finding no 1201(a)(2) liability where the plaintiff could “point to *no* protected property right that [the defendant’s technology] *imperils*”).¹³ MDY’s assertion that *Chamberlain* requires proof of actual infringement is incorrect.

¹³ Even the Federal Circuit does not read *Chamberlain* as broadly as MDY does. *See Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1319 (Fed. Cir. 2005) (circumvention facilitates infringement unless “there is no nexus between *any possible infringement* and the use of the circumvention devices”) (emphasis added).

III. THE DISTRICT COURT APPLIED THE PROPER STANDARD IN DETERMINING THAT BLIZZARD’S USERS ARE LICENSEES, NOT OWNERS FOR THE PURPOSES OF 17 U.S.C. §117

The district court concluded that Glider users infringed Blizzard’s copyright in WoW by exceeding the scope of their licenses to reproduce WoW. *MDY*, 2008 U.S. Dist. LEXIS at *14-21, citing *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999). *MDY* nevertheless argues that the statutory exception in 17 U.S.C. § 117, which relates to essential use of computer programs, immunizes the conduct of Glider users.

Blizzard’s brief discusses the inapplicability of section 117 in detail. RB at 35-46. Here, Amicus stresses that section 117 applies only to “owners” of copies of software. *Wall Data Inc. v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 785 (9th Cir. 2006). In holding that Blizzard retained ownership of the software at issue and that Blizzard users were licensees, the district court (*MDY*, 2008 U.S. Dist. LEXIS 53988, at *25) applied a clear Ninth Circuit test: “If the copyright owner makes it clear that she or he is granting only a license to the copy of software and imposes significant restrictions on the purchaser’s ability to redistribute or transfer that copy, the purchaser is considered a licensee, not an owner, of the software.” *Wall Data*, 447 F.3d at 785. See also *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333 (9th Cir. 1995); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993).

Faced with this controlling law, MDY and amicus Public Knowledge take different approaches. Whereas MDY argues that this Court's decision in *Wall Data* compels reversing the district court (AOB at 15-17), Public Knowledge criticizes that decision and argues that a recent district court opinion from the Western District of Washington, *Vernor v. Autodesk, Inc.*, 555 F. Supp. 2d 1164 (W.D. Wash. 2008), should apply. PK Brief at 14-15. Both MDY and Public Knowledge misread the salient cases.

In *Vernor*, the court incorrectly concluded that it could not reconcile *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), with later Ninth Circuit precedents, including *Wall Data*. *Vernor*, 555 F. Supp. 2d at 1173. However, *Wise* and *Wall Data* do not conflict. *Wise*, a 1977 criminal case involving film prints, was decided, not under section 117, but rather under the first sale doctrine of 17 U.S.C. §109. *Id.* at 1173-74. Moreover, although *Vernor* holds that *Wise* focused almost exclusively on “whether the transferee kept the copy acquired from the copyright holder” (*id.* at 1170), all of the relevant Ninth Circuit opinions, including *Wise*, focused much more broadly on the nature of the transactions involved and the overall contractual relationships between the parties. The court below properly concluded that “it is not at all clear that the result in this case would be different even if the [c]ourt were to follow *Wise*.” *MDY*, 2008 U.S. Dist. LEXIS 53988, at *30, n. 7.

Despite the protestations of MDY and Public Knowledge (*see* AOB at 19; PK Brief at 1), straightforward application of the *Wall Data* test does not undermine the purpose of copyright law, which is to provide creative incentives, resulting in the dissemination of expressive works for the public benefit. In fact, to further that objective, it is essential that the terms and conditions of copyright licensing agreements be upheld and enforced. Doing so benefits copyright owners and the public by facilitating a marketplace for creative works.

Moreover, this case is especially important because it involves contractual conditions related to the reproduction right in the context of digital downloads of copies of copyrighted works. *See MDY*, 2008 U.S. Dist. LEXIS 53988, at *2 (explaining that some Glider users download their WoW software rather than purchasing discs). Where the acquisition of the initial copy itself involves a license to reproduce the work by digital download, the copyright owner must be able to retain title to the downloaded copy and to control the scope of the license associated with that copy. Creating uncertainty with respect to the enforceability of such licenses would render online business models less attractive and undermine Congress' goal of increasing Internet commerce. *See* S. Rep. No. 105-190, at 2 (expressing Congress' desire to "provide[] protection and create[] the legal platform for launching the global digital online marketplace for copyrighted works

... [while] also mak[ing] available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius”).

CONCLUSION

For the foregoing reasons, Amicus urges the Court to rule in favor of Blizzard and to reject MDY’s invitation to follow *Chamberlain*.

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CERTIFICATE OF SERVICE VIA CM/ECF

I hereby certify under penalty of perjury that on November 6, 2009, I electronically filed the foregoing document entitled **BRIEF OF AMICUS CURIAE THE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF APPELLEE'S POSITION SEEKING AFFIRMANCE ON APPEAL [AND REVERSAL ON CROSS APPEAL]** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system.

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