

Appeals No. 09-15932 and 09-16044

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MDY INDUSTRIES LLC AND MICHAEL DONNELLY,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

**APPELLANTS' REPLY BRIEF
IN SUPPORT OF ITS OPENING BRIEF**

AND

APPELLANTS' RESPONSE BRIEF TO APPELLEES' CROSS APPEAL

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I. Introduction

Despite its 74 pages of square-peg-into-round-hole briefing, what Blizzard cannot escape are these inevitable facts:

- It cannot point to any copying by Glider—and therefore cannot point to any copyright infringement under 17 U.S.C. § 117.
- The buyers of copies of the Warcraft software could take it home, load it, delete it, and destroy it, if they liked—all with impunity. They owned their individual copies, not the copyright in the software, and Blizzard has tried to confuse the issues by conflating ownership of a “copy” of the discs containing the Warcraft software with ownership of the “copyright.”
- Because Blizzard initially provides its customers with complete and unfettered access to Warcraft, Blizzard’s Warden program cannot “effectively” control access under the DMCA.
- The DMCA combats software piracy—something very far indeed from what this case is about. Because Glider does not circumvent Warden to infringe Blizzard’s copyrighted materials, MDY does not meet the nexus requirement under the DMCA.
- MDY had a thriving business with tens of thousands of customers when Blizzard changed its contract with those same customers to try to make MDY into a tortious interferer—and did that after this litigation began. It’s fairer to say that Blizzard tortiously interfered with MDY customers than vice versa.

For all of Blizzard’s exaggerated claims, as late as 2006, Blizzard’s programmers embedded jokes in their code for Michael Donnelly’s amusement—that’s how seriously Blizzard took the “threat” that MDY posed.

Blizzard's response does little more than attempt to demonize MDY as a cheater to garner sympathy for its situation. But this case does not turn on Blizzard's disdain for MDY. This case turns on how copyright, DMCA, and tortious interference law apply to independently-created, third-party add-on software.

A decision for Blizzard in this case would stretch copyright law well beyond its established boundaries. Blizzard should not be allowed, by contract, to torpedo add-on software developers that Blizzard decides to outlaw—and to create tort liability with eleventh-hour strokes of the pen. An affirmance of the district court's ruling would be a blueprint for unprecedented copyright misuse.

II. Blizzard cannot refute MDY's arguments that Blizzard's customers own their purchased or downloaded copies of the Warcraft software under 17 U.S.C. § 117.

In its opening brief, MDY highlights the district court's error in misapplying *Wall Data v. Los Angeles County Sheriff's Dept.*¹ to determine whether, under 17 U.S.C. § 117, Blizzard's customers owned the copies of Warcraft software that the customers either downloaded or purchased. Blizzard tried to refute MDY's position, but none of Blizzard's cases are supported by Ninth Circuit precedent, logic, or common sense.

¹ 447 F.3d 769 (9th Cir. 2006)

A. *Wall Data's* correctly stated that the Ninth Circuit test of ownership under § 117 considers whether significant restrictions are placed on the transfer of the copy of the software in question.

Wall Data stated that a purchaser will be considered a licensee, not an owner, under 17 U.S.C. § 117 “if the copyright owner makes it clear that she or he is granting only a license to the copy of the software and imposes significant restrictions on the purchaser’s ability to redistribute or transfer that copy.”²

Blizzard responded that: (1) because *Wall Data's* copy ownership test was dictum, this Court should ignore it; and (2) MDY incorrectly cited this Court’s ruling in *United States v. Wise* to support the argument that the tests to determine copy ownership under 17 U.S.C. § 117 and § 109 are identical.³ Both arguments fail.

First, regarding *Wall Data's* copy-ownership test: yes, the Court’s discussion of copy ownership under § 117 was ancillary to its primary holding. But the Court nevertheless explicitly articulated that test. And *Wall Data* is the most recent Ninth Circuit decision discussing the issue of copy ownership. Notably, Blizzard never argued against the *merits* of the *Wall Data* test. Rather, Blizzard merely argued that because the *Wall Data* court discussed the test in dictum, this Court should ignore it. Worse, Blizzard has relied on the district

² *Id.* at 785.

³ Blizzard’s Response at 41.

court’s erroneous legal analysis to support its position. In deciding that Blizzard’s customers did not own their copies under § 117, the district court analyzed a misquoted version of the *Wall Data* test and then relied entirely on the misquoted test to reach its conclusion.

<i>Wall Data</i> Test ⁴	<i>MDY Indus.</i> Campbell Court Test ⁵
[I]f 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 <i>redistribute or transfer</i> that copy[.] (emphasis added).	[I]f the copyright holder: (1) makes clear that it is granting a license to the copy of the software, and (2) imposes significant restrictions on the <i>use or transfer</i> of the copy... (emphasis and ellipsis added).

Blizzard asserts that “[W]hether 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.”⁶ Once again, Blizzard is incorrect. The district court offered only two bases for its ruling that Blizzard’s customers do not own their copies of the Warcraft software: (1) its incorrect analysis under *Wall Data*; and (2) its assertion that the *Wall Data* test for determining copy ownership under § 117 is different from the test for determining copy ownership under § 109 in the *Wise*

⁴ *Id.*

⁵ ER at G13, lines 18–19.

⁶ Blizzard’s Response at 41.

case.⁷ Simply stated, the district court’s analysis of the *Wall Data* test was incorrect, and the tests to determine copy ownership under §§ 109 and 117 depend on the same issue – the nature of the transaction.⁸ In this case, Blizzard imposes no significant restrictions on transferring the media containing its Warcraft client software, and the nature of the transaction makes a direct sale or download of a copy Blizzard’s Warcraft client software a sale.

Congress gave copyright owners a distribution right under 17 U.S.C. § 106(3) that is limited by § 109. But § 109 has no meaning if a copyright owner can engage in transactions that to every appearance are sales, but transform transactions into nonsales that strip customers of copy ownership and of § 109 rights by adding a few magic words like “You may not transfer your copy without our express permission.” The proper analysis is to decide whether the transaction was a sale or a lease. If it was a sale, EULA language about transfers is irrelevant because § 109 controls. If it was a lease, then the EULA language is relevant, because the copyright owner genuinely owns the copy and has the continuing right to control its disposition. The same applies to the rights Congress granted under § 117 to owners of copies. The brief that Amicus Public Knowledge submitted provides a detailed analysis and additional support to why Blizzard’s customers own the copies of their software under § 117.

⁷ ER at G15–16.

⁸ *United States v. Wise*, 550 F.2d 1180, 1090–92 (9th Cir. 1977)

Second, Blizzard offers nothing to support its odd theory that the term “owner” has distinct meanings under §§ 109 and 117. Blizzard essentially suggests that someone who purchases or downloads a copy of Warcraft software could be an owner for the purpose of reselling it under § 109, but not an owner for the purpose of making a RAM copy of it under § 117.⁹ This theory of variable definitions for “owner” has no support in the statutory language, the caselaw, or the legislative history of either statute. Blizzard’s interpretation leads to the nonsensical conclusion that a person could be free to sell a copy of software despite having no legal right to use it.¹⁰ In fact, this Court has held that the proper test for copy ownership under § 109 examines the nature of the transaction.¹¹ The *Wall Data* Court applied the same reasoning when it held that copy ownership under § 117 focuses on whether the copyright owner *places significant restrictions on the transfer of the copy* of the work.¹²

Although the Ninth Circuit has never directly decided whether the term “owner” has different meanings under §§ 109 and 117, a recent decision in the

⁹ Blizzard’s Response Brief at 41.

¹⁰ Although there is no support in the statute, as a policy matter one can imagine a basis for a broader interpretation of “owner” under section 117 than under section 109 – people are allowed to use copies of software in their computers even where they are restricted from transferring it – but not a narrower interpretation.

¹¹ See, e.g., *United States v. Wise*, 550 F.2d at 1190-92; *United States v. Atherton*, 561 F.2d 747, 750 (9th Cir. 1977). *Accord Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2nd Cir. 2005); 2 Nimmer § 8.12[B][1][d][i].

¹² See *Wall Data* at 785. (emphasis added).

Western District of Washington did.¹³ In *Vernor v. Autodesk*, the district court analyzed this issue in a thoughtful and well-reasoned opinion and found no legal basis to make such a distinction.¹⁴

1. Blizzard confuses the right to license its “copyright” in its Warcraft software with the concept of leasing a “copy” of the software.

Blizzard argued that because its EULA allows Blizzard to retain title to the copy of any purchased or downloaded copy of its Warcraft software, Blizzard’s customers are still not copy owners under either § 117 or § 109.¹⁵ Blizzard is incorrect.

The court must look to the nature of the transaction to determine whether the transaction is a license or a sale.¹⁶ Here, Blizzard never controls the physical media that contains the Warcraft software. Blizzard’s customers either buy it at retail or download it to their hard drives.¹⁷ Blizzard’s customers are always free to destroy the physical media – CD’s, hard drive, or otherwise – at any time without Blizzard’s permission and do not have to pay Blizzard for destroying or losing the Warcraft discs they purchase or download. Ownership of the copy *on*

¹³ *Vernor v. Autodesk, Inc.*, No. C07-1189RAJ, 2009 WL 3187613 (W.D. Wash. Sept. 30, 2009). On October 30, 2009, Autodesk, Inc. filed an appeal with this Court.

¹⁴ *Id.* at *20–25.

¹⁵ Blizzard’s Response at 43.

¹⁶ *Wise*, 550 F.2d at 1190–92.

¹⁷ MDY’s Opening Brief at 12.

the user's hard drive is at issue here, and that copy is what Blizzard is claiming an ownership interest in. This becomes particularly bizarre when one imagines multiple software vendors each purporting to claim an ownership interest in the tangible copies themselves of various copies of software spread across a user's single hard drive. Selling one's old computer with the hard drive included would become a nightmare of potentially conflicting transfer obligations. A proper interpretation of the copy ownership issue gives users first-sale rights that prevent such an absurd result.

Anyone who has ever rented a video game from Blockbuster® understands the distinction between leasing the copy versus owning the copyright. The customer understands that he or she doesn't own the video game DVD, that Blockbuster owns and retains title to the rental *copy*, leases that *copy* to its customer, who must pay Blockbuster for the copy's loss or destruction. Blockbuster's customer is not an owner under § 117 (or § 109). Because the customer must return the copy to Blockbuster, the customer has no right to transfer the copy to a third party. Thus, under the second prong of the *Wall Data* test, or under *Wise*, the customer would not own the copy under § 117.

In contrast, when a customer buys that same DVD from Blockbuster, the customer understands that he or she then has title to the DVD and doesn't have to return the *copy*. So under § 117, the customer is an "owner" of the *copy* of

the video game even though the copyright owner still retains title to the copyright. It follows that the customer also owns the copy that is made, with Blizzard's authorization, onto a computer's hard drive. And because it is an essential step to use the copy, the customer is allowed to load the copy the video game from the hard drive into RAM as an owner under § 117. The customer's ownership of the copy does not in any way depend on whether or not Blockbuster or some third party owns the underlying copyright, as long as Blockbuster has the right to sell copies. Even under § 109, the customer is an owner and may freely resell the game because Blockbuster does not retain title to the game's physical medium.

If ownership under § 117 turns on whether Blizzard can require a person to destroy the software (as Blizzard suggests it does), then any company that sells a mass-marketed video game could obliterate rights Congress wanted owners to have under §117 — the right to use the software — just by saying so in a shrink-wrap agreement. In Blizzard's view, if a company added a line to its EULA, it could lawfully make § 117 meaningless. Presumably, if Blizzard could take the right to own the copy away under § 117, it could do so under § 109 as well. Surely Congress did not intend that rights it granted under §§ 117 and 109 could be eradicated at will by a copyright owner in an adhesion contract. Again, it is the nature of the transaction that determines ownership –

not the whim of the copyright owner. And courts have rejected Blizzard's view.¹⁸

2. Blizzard's "restrictions" on transferring copies of its Warcraft software simply restate existing copyright law.

Blizzard argues that because it contractually forbids owners of a Warcraft copy from transferring the copy to another person without destroying any remaining copies, its customers cannot own the copies of the software under § 117. Blizzard is incorrect.

MDY discussed this issue in its opening brief but emphasizes it here: Blizzard's "restrictions" are only restatements of the restrictions that the Copyright Act imposes on *any* purchaser of copyrighted software.¹⁹ For example, if A buys a copy of Microsoft Office, loads a copy onto a computer, then gives the original disks to B but never deletes the copy on A's computer, A's copy would be an infringing copy.²⁰ The Copyright Act imposes those restrictions whether or not Microsoft restates them in its EULA.²¹

¹⁸ See *Wise*, 550 F.2d at 1090.

¹⁹ See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (noting that the "archival exception" under 17 U.S.C. §117(2) does not allow one to keep an archival copy after selling the original copy to another). Section 117 was renumbered in 1998 such that 117(2) is now 117(b). See Public Law No. 105-304 (1998).

²⁰ See 17 U.S.C. § 117(b).

²¹ See *id.*

So because the district court misapplied the *Wall Data* test, and because Blizzard's customers are owners of copies of the Warcraft software they buy or download, this Court should reverse the district court's ruling that Blizzard's customers are not copy owners under § 117.

B. Blizzard's argument that the purchaser of the Warcraft client must pay a monthly subscription fee to access the gaming experience has no bearing on whether the purchaser owns the purchased copy of the Warcraft client.

Blizzard's customers do not obtain rights to access the server through a single payment for its client software; they must pay a monthly subscription fee to access Blizzard's servers and play the game.²² But Blizzard cites no support for its theory that its customers are not owners of the copies on their computers simply because they have to pay for access to the server.

There are two elements here: (1) the copy of the Warcraft client downloaded to the user's computer, and (2) the Blizzard remote server that the user logs into. Only by paying the monthly subscription fee can a user access the server. But the game client is freely accessible by either purchase in a retail store or download from Blizzard's website. The copy of the game client and the remote-server access are not the same thing. Nor are they inseparable. A person may possess and own a copy of the game client and never access Blizzard's server. Common sense tells us that the buyer owns the copy.

²² Blizzard's Response at 36–37.

But under Blizzard's theory, any person who purchases discs that include embedded software, doesn't own the discs and the copy of the embedded software if the software includes a EULA that is later terminated. Consider how far this rationale could go: Does General Motors own the copy of the software in one of its cars? Could GM reserve ownership of the software copy by purporting to license the software to GM's customers — under threat of disabling the car?

If Blizzard's theory is correct, then § 117 is enforceable entirely at the copyright holder's option — something Congress never intended. Blizzard's argument has no merit.

C. Blizzard's claim that overturning the district court's ruling based on MDY's interpretation of § 117 would eradicate all software licensing is meritless.

Under § 117, copyright owners remain free to use contract law to enforce any restrictions against users, and can still use copyright law against any activity that is not covered by § 117. Blizzard's argument loses sight of the purpose of § 117 — to ensure that retail consumers who purchase copies of software can use their copies by loading them into RAM free from the threat of copyright infringement and copyright-owner control.²³ Blizzard is the one

²³ See *Wall Data*, 447 F.3d at 784. And Blizzard's citation to *Sun Microsystems v. Microsoft Corp* is inapposite. The Ninth Circuit limited *Sun's* holding to

trying to use federal copyright law in a way Congress never intended — to police noncopyright-related contract terms in a computer game simply because it prefers not to enforce its contracts. Blizzard not only chooses not to enforce its contracts, it admits that it allows any customer dropped for using Glider to open a new Warcraft account using the same name and credit-card information.²⁴

By affirming the district court’s decision, this Court would hand copyright owners the power to misuse copyrights like never before. Under the district court’s holding, Microsoft could add a term to its Microsoft Office EULA forbidding the use of third-party software that integrates into Microsoft Word. Thomson-Reuters makes bibliographic software called Endnote that interoperates with and integrates itself into the menu structures of Microsoft Word.²⁵ Under the district court’s rationale, Thomson’s entire Endnote business exists at Microsoft’s whim because with a simple alteration of Microsoft’s EULA, Thomson would become liable for secondary copyright infringement. Under Blizzard’s theory, if Thomson continued doing business after Blizzard changed its EULA, Microsoft would also have the option of adding an Endnote detector to Outlook, making Thomson liable under the DMCA and for tortious

negotiated copyright licenses between sophisticated parties. 188 F.3d 1115, 1122 (9th Cir. 1999).

²⁴ ER at N7, ¶ 24; MDY’s Supplemental Excerpts of Record (“SER”) at 8–9.

²⁵ <http://www.endnote.com>.

interference. Microsoft, for example, could even change its EULA out of spite, to extract fees from Thomson, or to favor its own stand-alone bibliographic software. Even with noble motives (like eliminating stability problems Endnote might cause with Word, for example), this result would be wrong because the copyright owner would be misusing its copyright to control interoperable, third-party software. That is precisely what Blizzard is doing here and why their EULA terms cannot be construed to prevent third-party businesses from functioning.

D. Blizzard’s ability to provide updates to its Warcraft client software has no relevance to copy ownership under § 117.

Blizzard argues that because it reserves the right to modify the game client after its sale or download, customers can’t be owners of their copies under § 117.²⁶ That’s wrong.

If that argument were true, no one who ever bought software that gets periodic updates could ever be an owner under § 117. Nearly every software manufacturer makes updates and patches available to its customers the same way Blizzard does — via the Internet. When the update is made, the updated version resides on the user’s hard drive. The user owns the hard drive and, after installation, the copy of the software embodied on it, whether installed directly

²⁶ Blizzard’s Response at 39–40.

by the user or added automatically. Blizzard cites no legal authority to support its argument, and it should be dismissed.

In short, Blizzard provides no legal or factual basis to refute MDY’s argument that Blizzard’s customers who purchase or download its Warcraft client software for installation on their hard drives own those copies under § 117. So this Court should reverse the district court’s holding to the contrary.

E. The amicus briefs supporting Blizzard offered no substantive rebuttal to MDY’s arguments regarding § 117.

The amici supporting Blizzard — the MPAA, the BSA, and the SIIA (“Blizzard Amici”) —urge the Court to disregard its *Wise* precedent without directly refuting the persuasive analyses of *Wise* by the *Vernor* and *UMG Recordings, Inc. v. Augusto*²⁷ courts; they only assert that those cases are negligible because they are recent district court opinions.²⁸ But since Blizzard Amici provide no direct response to these thoughtful opinions, the Court has no reason to reject *Wise* as the controlling precedent. The Blizzard Amici attempt to avoid this deficiency by multiplying distinctions between *Wise* and later cases. But these are distinctions that fail to make a difference, such as when they assert that used film prints differ from CDs.²⁹ Regardless of whether § 109 or §117 is under consideration, and regardless of the specific medium of the

²⁷ 558 F.Supp.2d 1055 (C.D. Cal. 2008).

²⁸ MPAA Br. at 28; BSA Br. at 19–20; SIIA Br. at 28–29.

²⁹ BSA Br. at 15–18; SIIA Br. at 28–29.

copy, the identical question arises: What features of a transaction indicate a transfer of ownership of a copy of a copyrighted work? The Blizzard Amici provide no persuasive reason that the *Wise* precedent fails to apply to that issue.

Second, the Blizzard Amici hyperbolically insist that if this Court holds that buying Warcraft at retail is a “sale,” the ruling will dramatically disrupt the software industry.³⁰ Such Chicken Little cries can only frighten (1) if one believes that owners having the first-sale and essential-step-copyrights as Congress intended will wreak havoc, and (2) if one ignores available alternatives to software sales such as leasing, and (3) if one ignores available technological measures that allow software distributors to achieve all that they assert will be lost if sales are actually called sales. This Court must consider that Blizzard and the Blizzard Amici are asserting something peculiar: namely that someone who purchases a DVD-ROM with copyrighted software on it does not own that tangible medium. No typical software consumer would believe such a thing. Blizzard’s position is contrary to well-settled consumer expectations and common sense. What is more shocking is that they seek to use this fiction to impose secondary copyright liability on a third-party developer of interoperable software. The limited copyright monopoly simply cannot be stretched so far.

³⁰ BSA Br. at 20; SIIA Br. at 2–3.

III. Blizzard has not supported its assertions that the EULA was unambiguous regarding its covenants and conditions.

Assuming that Blizzard's customers own the copies of their Warcraft software under § 117 and § 109, Blizzard would have no authority to eradicate the customers' rights — granted by Congress — to make RAM copies as an essential step in using the software. That makes this issue moot. But even assuming that Blizzard could control ownership by the stroke of a pen, Blizzard's arguments still fail.

In its opening brief, MDY presents evidence that even by the district court's own admission,³¹ Blizzard's EULA did not explicitly define the scope of the license. The court incorrectly reasoned that § 4 contained *conditions* for playing Warcraft, while § 5 contained only *covenants* even though the first paragraph of Blizzard's EULA expressly stated that Blizzard conditioned playing Warcraft on complying with *all* sections of both its EULA and TOU.³² So the EULA by its very nature was ambiguous as to its covenants and conditions, and the district court erred when it held § 4 included express conditions for playing Warcraft.³³

³¹ MDY's Opening Brief at 23–24; ER at G8, lines 21–22; *see also*, ER at I4–7 (even Blizzard's counsel uncertain).

³² MDY's Opening Brief at 23–24.

³³ *Id.*

Blizzard did not refute that the EULA is ambiguous.³⁴ It didn't explain how the district court could distinguish between §§ 4 and 5 of its EULA, when Blizzard purports to make *all* of its contract terms conditions of playing Warcraft, while admitting at trial that at least some of the terms were covenants. Blizzard could have written its EULA to be unambiguous, but it chose not to. Furthermore, Blizzard never explains why, if § 4 was not ambiguous as a condition, Blizzard changed its current EULA to include the following language:

2. Additional License Limitations.

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

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

B. use cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience;³⁵

³⁴ Blizzard's Response Brief at 26–35.

³⁵ Compare Blizzard's February 2007 TOU (ER Q4, § 4) with Blizzard's current EULA (MDY's Opening Brief, Appendix 16, § 2).

Blizzard added the italicized language after the court issued its summary-judgment ruling.³⁶ Even Blizzard understood that the language the district court analyzed was, at best, ambiguous. Therefore, the Court should reverse the lower court's ruling that § 4 was a condition for playing Warcraft.

IV. The way Warden works is not an effective access-control measure under the DMCA.

Blizzard failed to show that Warden is an effective protection measure under the DMCA. Warden does nothing more than detect third-party software. And a mere bot detector is not an effective access or copy control under 17 U.S.C. § 1201 as analyzed in the *Lexmark*³⁷ and *Chamberlain*³⁸ courts' decisions.

³⁶ Apparently Blizzard does not even try to hide its true intention, which is to create copyright infringements for mere violations of its contract. Blizzard apparently believes that in addition to the five limited rights Congress granted to copyright holders under 17 U.S.C. § 106, Blizzard can also add to that list anything it wants to put in its EULA.

³⁷ *Lexmark Int'l v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004).

³⁸ *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178 (Fed. Cir. 2004).

A. Blizzard’s argument that Warden is “effective access control” fails under *Lexmark* and *Chamberlain*.

The *Lexmark* court found that § 1201 of the DMCA does *not* apply when the protection controls one form of access but leaves others open.³⁹ And the Federal Circuit in *Chamberlain* held that the *purpose* of circumventing an effective access-control measure must be to use the protected work in a way that violates copyright laws,⁴⁰ adding that construing DMCA more broadly would be “irrational.”

The facts of this case are identical to those in *Lexmark* regarding what constitutes an effective access-control measure. The *Lexmark* court specifically rejected the argument that access-control measures that function like Warden are “effective.” Consider the following quotations from the court’s language and how they apply to the facts here:

<i>Lexmark</i> Quoted Language⁴¹	<i>Lexmark</i>’s language with the facts here substituted in brackets
It is not Lexmark’s authentication sequence that “controls access” to the Printer Engine Program. It is the purchase of a Lexmark printer that allows “access” to the program.	It is not [Blizzard’s detection of unauthorized third party software] that “controls access” to the [Warcraft gaming experience, Blizzard’s server, or its literal game code]. It is the

³⁹ See *Lexmark*, 387 F.3d 522, at 547.

⁴⁰ See *Chamberlain*, 381 F.3d at 1200–01.

⁴¹ *Lexmark*, 387 F.3d at 546–47. All the quoted language in this table is taken directly from this citation.

	purchase of a [password to enter Blizzard’s game] that allows “access” to the [copyrighted works].
Anyone who buys a Lexmark printer may read the literal code of the Printer Engine Program directly from the printer memory, with or without the benefit of the authentication sequence, and the data from the program may be translated into readable source code after which copies may be freely distributed.	Anyone who buys a [subscription to Blizzard’s game and receives a password] may [play Warcraft and experience the Warcraft game and all of the literal and nonliteral elements of its copyrighted works], with or without the benefit of the [Warden working in the background], and the [game experience or the literal code] may be freely copied and distributed.
No security device, in other words, protects access to the Printer Engine Program Code and no security device accordingly must be circumvented to obtain access to that code.	No security device, in other words, protects access to the [Warcraft gaming experience or its literal program code] and no security device must be circumvented to obtain access to that code [because all one must do is type in a valid password].
The authentication sequence, it is true, may well block one form of “access” — the ‘the ability to obtain a copy of the work or to “make use of” the literal elements of the program (its code).	The [Warden program], it is true, may well block one form of “access” — the “ability to [play Warcraft while using Glider].”

As the court found, “the statute refers to ‘controlling access to a work protected under this title,’ [and] it does not...apply when the ‘work protected

under this title' is otherwise accessible.”⁴² Blizzard’s Warcraft program game experience is blocked when Warden detects Glider, but the game experience is otherwise accessible when it is not used and therefore is not being “protected.”

The facts here are on all fours with *Lexmark*. Blizzard’s brief never provides any legal or factual basis to support its argument that Warden is an “effective access control” under *Lexmark*. Warden is just a bot-spoiler. It doesn’t stop access or copying, and those are the only controls that the DMCA addresses.

B. Blizzard’s attempt to factually distinguish *Lexmark* further underscores Warcraft’s similarity to *Lexmark*’s printer.

In its opening brief, MDY argued that the DMCA does not apply when circumvention doesn’t relate to copyright infringement or piracy.⁴³ In response, Blizzard does not dispute that 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 [*Lexmark*]. . . .”⁴⁴ Instead, Blizzard tries to distinguish the facts of this case, arguing that it’s not like *Lexmark* because the code Lexmark was protecting was “not protectable expression.”⁴⁵ Here, Blizzard argues, Warden protects Warcraft’s nonliteral elements, which is

⁴² *Id.* at 547.

⁴³ MDY’s Opening Brief at 35–38.

⁴⁴ Blizzard’s Response at 55 (quoting *Lexmark*, 387 F.3d at 551).

⁴⁵ Blizzard’s Response at 55.

“the heart of what Copyright law protects.”⁴⁶ But Blizzard offers no legal support for its assertion because Warcraft’s nonliteral elements are *not* protected by copyright law. Even if they were, that was not the basis of the *Lexmark* decision.

As MDY argued below, the nonliteral elements of the dynamic game are not at the heart of copyright protection. The dynamic game experienced by users is neither fixed nor contains the creativity necessary to be authorship under copyright law.⁴⁷ Even if there were authorship in the dynamic game, it is produced by the players who input signals into Blizzard’s server — Blizzard provides no additional creative expression.⁴⁸ The server is statically programmed — it doesn’t change in response to user input signals but merely sends out the pre-programmed response.⁴⁹ Blizzard adds no more creativity to dynamic play than Microsoft adds to the creations of a Word user. So if the dynamic game is a derivative work, authorship is in the players, not Blizzard. Finally, even if Blizzard somehow is found to have a copyright interest in the dynamic game, Warden is not a copy-control measure under § 1201(b)(1) but a way to detect unapproved third-party software such as bots.

⁴⁶ *Id.*

⁴⁷ *Baltimore Orioles, Inc. et al v. Major League Baseball Players Ass’n*, 805 F.2d 663, 668–69 (7th Cir. 1986).

⁴⁸ MDY’s SER at 2–5.

⁴⁹ *Id.*

- C. Blizzard has failed to explain cogently how Warden controls access to its game, given that it is Blizzard who provides unlimited access to the game by giving a password to play Warcraft to anyone who is willing to pay its monthly subscription fee.**

When Blizzard provides passwords to its customers, its customers get unlimited and unfettered access to the literal and nonliteral elements of Warcraft. Anyone with a password can play Warcraft and can see, experience, and copy all the elements that Blizzard claims rights to. Warden cannot “effectively control” access after access has already been given – that is as effective as closing the barn door after the horse has left. Warden does not *control* access at all – it just *revokes* access that Blizzard previously provided.

Consider an analogy: At Blizzard’s home are thousands of computers logged into Warcraft. The house stays locked, but Blizzard gives keys to all its customers. Anyone with a key can unlock the front door, come inside, and play Warcraft. But some customers wear red hats. Blizzard hires a security guard whose sole mission is to patrol room by room ejecting anyone with a red hat. Note that the guard (Warden) doesn’t effectively control *access*. Anyone with a key (customers with passwords) can enter anytime. All the guard does is revoke access for those in red hats (Glider users). Under this analogy, Warden cannot be considered an effective access-control measure.

Also consider the DMCA and how it's used to deter piracy. The movie industry protects DVDs by encrypting the literal code so it can't be accessed or copied unless its decrypted. An unauthorized decrypter violates §1201(a)(2) and (b)(1) by gaining access to the literal code.

Suppose that the movie industry gave away the decryption key to every DVD purchaser. But the key won't work for anybody in a red hat. By Blizzard's argument, that, like its security guard above, would be "effective access control" under the DMCA — even though the decrypter *already has* access to the literal code and could copy, distribute, and pirate the DVD except under one condition entirely unrelated to copyright — that the person not wear a red hat.

Chamberlain also supported the *Lexmark* reasoning that the circumvention must have a nexus to some form of infringement under the Copyright Act.⁵⁰ And *Chamberlain's* rationale has been reiterated recently in both the Federal Circuit and in the Northern District of Illinois.⁵¹

⁵⁰ See *Chamberlain Group*, 381 F.3d at 1200-01.

⁵¹ See *Storage Tech v. Custom Hardware Engineering & Consulting, Inc.*, 421, F.3d 1307, 1318-19 (Fed. Cir. 2005) (holding that an activity that does not constitute or facilitate copyright infringement cannot violate the DMCA); see also *Nordstrom Consulting, Inc. v. M&S Techs., Inc.*, 2008 WL 623660 (N.D. Ill. Mar. 04, 2008) (following *Chamberlain* and *Storage Tech's* holdings that there must be a nexus between circumvention and copyright infringement).

Under § 1201, and in view of *Lexmark* and *Chamberlain*, the red-hat detector — which technologically functions just like Warden — is not an effective access-control measure because Blizzard has already provided that access.⁵² To hold otherwise is to expand the DMCA into a general enforcer of any terms a copyright owner works into its license, even if a term has nothing to do with copyright.

D. For the same reasons, the resident portion of Warden fails under the DMCA, the Scan.dll portion of Warden also fails.

Blizzard argued that its Scan.dll portion of the Warden program is an effective protection measure under the DMCA. Blizzard is wrong again.

Applying the “protected home” analogy to the Scan.dll portion of Warden, Scan.dll would now be the security guard *outside* the house checking to see if anyone with a key is wearing a red hat. But again, Blizzard has already provided access by providing the key to the home. By simply not wearing the red hat, the person does not circumvent the inspection. The security guard doesn’t even care if you carry the red hat in your hand in plain view — all that matters is whether you are wearing it. Under §1201, neither that guard nor Scan.dll is an effective access-control scheme.

⁵² The only “effective” access control measure is Blizzard’s password scheme, which Glider does not circumvent.

E. Blizzard's reliance on *RealNetworks v. Streambox, Inc.* is misplaced.

Blizzard cites *RealNetworks v. Streambox*⁵³ to argue that if MDY's argument is correct, then no DVD or online-streaming protection would be effective under 1201(b)(1). Blizzard's theory is that neither prevents anyone from using a video or audio recorder to record the copyrighted work.⁵⁴ But the DVD protection and streaming protection in *RealNetworks* does effectively inhibit *digital* copying of the stream.

To see this key difference, note that the DMCA would not apply to the DVD or streaming example if the copyright owner provided a password to get complete access to the encrypted DVD code or the source of the stream but subsequently precluded copying the code or stream only while wearing the proverbial red hat. So Warden isn't analogous to the measure at issue in *Real Networks*, whose protection measure prevented *all* forms of *digital* copying. Again, Warden is an anti-bot measure, not an anti-copy measure. The measure in *RealNetworks* controlled both streaming and copying, whereas Warden does neither. So there can be no liability under § 1201(b)(1), either.

⁵³ *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99 CV 02070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000).

⁵⁴ Blizzard's Response at 58–59.

F. Blizzard argues that Glider users make unauthorized copies of text from the many “novels” that are told through quests in the game by accessing Blizzard’s server. This is factually inaccurate.

Glider does not function or assist Warcraft players at the start or conclusion of quests in Warcraft.⁵⁵ It only works when Blizzard’s server copies text to local client computers.⁵⁶ So Blizzard’s argument that when a player uses Glider it violates the DMCA is meritless.

G. MDY never conceded that Warden controls access to the dynamic nonliteral elements of Blizzard’s Warcraft game.

Blizzard argues unfairly that during closing argument, MDY conceded that Warden controls access to the dynamic “symphony” of nonliteral elements orchestrated by the server. But that can’t be reconciled with the district court’s trial order, in which the court expressly noted that MDY and Donnelly contend that Warden is not a “technological measure” that “effectively controls access to a work.”⁵⁷ Nor can it be reconciled with MDY’s proposed conclusions of law, which plainly state MDY’s position.⁵⁸ And finally, MDY’s position at trial

⁵⁵ MDY’s SER at 6–7.

⁵⁶ *Id.*

⁵⁷ E9, lines 23–28.

⁵⁸ MDY’s SER at 12–13 (proposed conclusions of law 1 & 3).

is consistent with the position it took at summary judgment.⁵⁹ Blizzard is trying to undermine MDY's repeated position by citing an ambiguous closing-argument exchange.

Blizzard's contention is also taken out of context. MDY has never disputed that Warden revokes access when Warden detects Glider. But MDY has always disputed that Warden is an "effective access control" for DMCA purposes. And MDY has never conceded that the nonliteral elements of the dynamic game are protected by copyright.

In short, Warden is not an effective access control measure under § 1201 of the DMCA, and if Warden is not an effective access control, it is irrelevant whether Glider allows a player of Warcraft to circumvent Warden. This Court should reverse the district court's ruling that MDY is liable under § 1201 of the DMCA.

H. Amicus Motion Picture Association of America ("MPAA") incorrectly interprets the DMCA.

In its amicus brief, MPAA provides only a meritless argument why this Court should reject the Federal Circuit's ruling in *Chamberlain*. MPAA (like Blizzard) ignores MDY's fundamental argument — the DMCA cannot apply when Blizzard provides passwords that give unfettered access to its Warcraft

⁵⁹ G18 ("MDY likewise argues that the user has full access to the nonliteral aspects of the Warcraft software through the game client software, and that these nonliteral aspects can be viewed on the user's computer.")

game. The DMCA does not apply to Blizzard's customers who avoid Warden *after* Blizzard has already provided access.

MPAA's principal argument is that Congress wanted not only to combat copyright infringement online but also to encourage copyright owners to make their works available for distribution, viewing, and listening online and in new digital formats.⁶⁰ MDY concurs. But MPAA never explains how Blizzard's use of the DMCA to police its customers who wish to play Warcraft with Glider furthers Congress's goals.

Congress's goal was simple. It created the DMCA to encourage copyright owners to make their digital works available by giving them a tool to thwart the piracy that uniquely threatens the new digital formats. Congress did not create the DMCA as a tool for policing licensing terms that have nothing to do with infringement. Under the MPAA's interpretation, a copyright holder who provides unlimited access to its software could use the DMCA to enforce any provision of its EULA. And Blizzard could sue its customers under DMCA for avoiding detection by Warden, even if it detected only a benign violation of the EULA such as naming a character after a famous person.⁶¹ Congress

⁶⁰ MPAA Brief at 3 (citing S. Rep. No. 105-190, at 2).

⁶¹ Other examples would include using offensive language in an online chat during the game or communicating with players during the game who are aligned with the wrong faction. These are all actual violations of Blizzard's EULA and Terms of Use.

intended the DMCA to be used as a surgical tool to prevent access where copyright infringement may occur, not a broad club to enforce contract terms.

The Federal Circuit properly keeps the DMCA from being used as a general policing tool by holding that the access-control measure must have some nexus to protecting the copyrighted work from infringement.⁶² MPAA does not explain how Warden furthers Congress's goals, because Warden doesn't. Warden doesn't protect Blizzard's copyrighted works, it enforces Blizzard's contract.

MPAA offers no substantive argument why *Chamberlain's* holding is not tailored to fit Congress's goals in implementing the DMCA. The DMCA was not designed to help copyright holders enforce license agreements — that's what state contract law does. This Court should not adopt MPAA's overreaching argument.

V. Regarding Blizzard's cross-appeal, the district court correctly ruled that MDY does not violate §1201(a)(2) with respect to the literal elements of the client software

In its cross-appeal, Blizzard argues that the district court erred when it ruled for MDY by finding that because Warden does not effectively control access to the Warcraft software's literal code, MDY could not violate the

⁶² See *Chamberlain*, 381 F.3d at 1200–01.

DMCA under § 1201(a)(2).⁶³ The district court correctly cited *Lexmark* to show that Blizzard's use of the DMCA was not applicable where the literal code was left unprotected and freely available for use and copying.⁶⁴

Blizzard argues that a plaintiff does not have to protect all types of access or copying of its literal code to state a claim under the DMCA,⁶⁵ and that *RealNetworks v. Streambox, Inc.* controls this case regardless of what Warden does or doesn't do. Blizzard analogized its situation with how one might circumvent Digital Rights Management (DRM) technology (which prevents unapproved users from playing a music file on a computer) and violating the DMCA even though the DRM does not prevent copying of the audio file itself.⁶⁶ That is incorrect.

As the court stated in *RealNetworks*, that circumvention device enabled end-users to access and download copies of RealMedia files that RealNetworks streamed over the Internet to its customers.⁶⁷ Although the device also let users copy RealMedia files that were made freely available for downloading from ordinary Web servers, the only function relevant to this case is the portions of

⁶³ Blizzard's Response at 58–59.

⁶⁴ ER at G19.

⁶⁵ Blizzard's Response at 58–59.

⁶⁶ *Id.*

⁶⁷ *RealNetworks*, 2000 WL 127311 at *10.

the [device] that let users access and copy RealMedia files located on RealServers.⁶⁸

To gain access to RealMedia content on a RealServer, the device at issue there mimicked a RealPlayer and circumvented the authentication procedure (Secret Handshake) that a RealServer requires before it will stream content.⁶⁹ In other words, the device tricks the RealServer into thinking that the device is a RealPlayer.

If Glider circumvented Blizzard's password-protection scheme, *RealNetworks* might be applicable. But RealNetworks did not supply users of the defendant's software with DRM decryption passwords so that they could access and copy the digital stream of the audio files without having to circumvent the DRM.⁷⁰

In *RealNetworks*, the very *purpose* of the defendant's software was to circumvent the DRM by interacting with a RealServer, and the sole purpose of the DRM technology was to prevent piracy. By circumventing the DRM technology, the end-user provided a nexus between the circumvention and the

⁶⁸ *Id.*

⁶⁹ *Id.* at *11.

⁷⁰ See MDY's Opening Brief at 8 (demonstrating that any attempt to circumvent Warden can only occur after Blizzard's customer has obtained access to Warcraft by using a legitimate password).

creation of an unlawful copy under the Copyright Act, a connection that the *Chamberlain* court requires to establish DMCA liability.⁷¹

In contrast, Warden’s only purpose is to protect Blizzard’s business model, not to stop copying. A Glider user doesn’t have to circumvent Warden to gain access to Blizzard’s servers because the user already has access with a password. And Glider doesn’t circumvent Warden to make illegal copies of the Warcraft software; it doesn’t make copies at all.⁷² Glider hides from Warden merely so it can be used while playing Warcraft.⁷³ So there is no nexus between MDY’s avoidance of Warden, and the creation of an unlawful copy under the Copyright Act. Therefore, this Court should affirm the district court’s ruling.

VI. Blizzard cannot justify its attempt to use the law of tortious inference with contracts to unilaterally strip MDY of its customers when MDY originally sold Glider lawfully.

In the opening brief, MDY argues that Blizzard’s modification of its license agreement to prohibit “bots” like Glider — which had already been in commercial use for 18 months — did not transform Glider’s ongoing sales into tortious interferences.⁷⁴ Blizzard argues that MDY waived this argument.⁷⁵ But that contention is not supported by the record. Otherwise, Blizzard’s response

⁷¹ See *Chamberlain*, 381 F.3d at 1200–01.

⁷² MDY’s Opening Brief at 9.

⁷³ *Id.*

⁷⁴ *Id.*, Section E, at 38–47.

⁷⁵ Blizzard’s Response Brief at 71.

relies exclusively on facts that occurred long after MDY began selling Glider lawfully.⁷⁶ Those facts are not relevant to MDY's intent at the time it began selling Glider. And Blizzard again fails to offer any explanation — legal, factual, or otherwise — to justify how it has the right to transform a nontortious sale of Glider in June 2005 into a tortious one by the stroke of its contractual pen in October 2006.

A. MDY did not waive this argument at trial: MDY affirmatively argued in summary-judgment briefing that it had a privilege to continue to sell Glider, and Judge Campbell affirmatively acknowledged that he understood MDY's position at oral argument on summary judgment.

Judge Campbell plainly understood MDY's defense without having to be informed at oral argument because MDY had already briefed him during summary judgment.⁷⁷

Judge Campbell knew that part of MDY's defense to Blizzard's tortious-interference claim was that Blizzard could never satisfy the intent element of tortious interference given that Blizzard's contracts did not prohibit bots when MDY began selling Glider. He said, "I understand for the tortious interference claim you're saying it wasn't intentional or improper when [Donnelly] started because it wasn't prohibited."⁷⁸ MDY also consistently argued in its summary-

⁷⁶ See *id.* at 60–71.

⁷⁷ See MDY's SER at 24, 25-26, 30, 34-37, 43.

⁷⁸ ER at I2–3.

judgment briefing that because Glider did not interfere with Blizzard's contracts when sales began, Blizzard could not then later interfere with MDY's business merely by changing its EULA.⁷⁹

Likewise, although MDY did not use the word "preemption," MDY argued in its summary-judgment briefing that if its acts complied with copyright and DMCA laws, Blizzard could not stretch the more general Arizona state law of tortious interference with contract to create new liability.⁸⁰

Therefore, Blizzard's assertion that MDY has waived its defense to tortious interference because Blizzard did not originally prohibit "bots" is unsupported by the record.

B. Blizzard does not even attempt to explain how it has the right to transform a nontortious sale of Glider in May of 2005 into a tortious one by the stroke of its contractual pen in October 2006.

Blizzard's EULA did not prohibit bots until Blizzard added the term "bot" some 18 months after MDY began selling Glider.⁸¹ Nor has Blizzard cited any case to support its contention that by later changing its EULA, Blizzard could unilaterally destroy a business that MDY had lawfully started. Blizzard simply ignores MDY's argument and rests its entire response on facts that occurred months after MDY began lawfully selling Glider. Ignoring the fact

⁷⁹ MDY's SER at 37; *see also*, MDY's SER at 24, 25-26, 30, 34-37, 43.

⁸⁰ MDY's SER at 30, 34, 41, 43.

⁸¹ Blizzard's Response Brief at 71.

that MDY began selling Glider before Blizzard banned bots, and before Donnelly knew or should have known that Blizzard objected to Glider, is the same error the district court made on summary judgment. And it is an error that this Court should reverse.

To recap, MDY began selling Glider in May 2005⁸² only after Donnelly reviewed Blizzard’s EULA and TOU and determined that neither precluded bots like Glider.⁸³ MDY had no knowledge that Blizzard objected until September 2005 when Blizzard banned an initial wave of Glider customers.⁸⁴ Even then, Blizzard never formally objected to MDY’s Glider sales.⁸⁵ And for many reasons, including the jokes that Blizzard was putting in its Warden computer code knowing that only Donnelly would find them, Donnelly never believed that selling Glider was a tortious act.⁸⁶

All of Blizzard’s allegations of impropriety occurred in September 2005 or later —months after MDY began selling Glider. Blizzard contends that “Glider’s viability depends on its ability to circumvent Warden and avoid detection,”⁸⁷ but Warden, didn’t even exist when MDY first sold Glider.⁸⁸ Only

⁸² ER at O22, ¶¶ 120-21.

⁸³ ER at H11–H12; *see also*, ER at N12–13, ¶¶ 57–63; ER at E13, line 4; ER at H26–27.

⁸⁴ *See* MDY’s Opening Brief at 8–12.

⁸⁵ *Id.* at 9–10.

⁸⁶ *Id.* at 7–8.

⁸⁷ Blizzard’s Response Brief at 13.

after Blizzard's first ban wave in September 2005 did MDY modify Glider to avoid detection.⁸⁹

Blizzard claims that MDY's bulletin-board statements prove improper conduct. But those statements were all made *after* the first ban wave in 2005.⁹⁰ Blizzard cannot produce any evidence before September 2005 that Donnelly knew about any contract violation,⁹¹ and the district court found no facts before September 2005 that could support any such finding.⁹²

Finally, Blizzard argues that *American Airlines v. Platinum World Travel* is on "all fours" with this case.⁹³ But *American Airlines* does not apply factually because American Airlines never changed its contract to make the defendant's business unlawful *after* the defendant had already built it.⁹⁴

So the question this Court must answer is whether Blizzard can use a state-law tortious-inference claim to unilaterally strip MDY of a business it lawfully grew. The answer must be no.

Blizzard has never offered a case to support its position that tortious interference can be used as a sword to eviscerate an existing lawful business

⁸⁸ MDY's Opening Brief at 8–12.

⁸⁹ *Id.*

⁹⁰ ER at L5, ¶ 17-18.

⁹¹ Blizzard's Response Brief at 13 ("MDY and Donnelly knew from at least September 2005 that Glider use violated the Warcraft EULA and TOU ...").

⁹² *See* G22–23.

⁹³ Blizzard's Response at 69.

⁹⁴ 769 F.Supp. 1203 (D. Utah 1990), *aff'd*, 967 F.2d 410 (10th Cir. 1992).

because no supporting caselaw exists. Rather, because MDY was acting properly when it began selling Glider, Blizzard can only rely upon facts that occurred after MDY had been selling for months.

This Court should reverse the district court's decision and hold that neither MDY nor Donnelly tortiously interfered with Blizzard's contracts as a matter of law, or at a minimum, rule that the issue should have been decided by a jury.

VII. Blizzard failed to respond to the legal error made by the district court with respect to Donnelly's personal liability

In the opening brief, Donnelly asserts that “there has been no adequate showing, as a matter of law, of why the corporate form should be ignored and Donnelly held to be personally liable.”⁹⁵ Donnelly wrote his own software, didn't mislead anyone when selling Glider, and was duly diligent in reviewing the EULA, the TOU, and other documents.”⁹⁶ His actions were socially acceptable and economically justifiable — the actions one could reasonably expect from a person in his shoes. He should not be personally liable as a matter of law.⁹⁷

Donnelly cited four cases holding that a corporate officer is not personally liable for acts made in good faith and for the best lawful interests of

⁹⁵ MDY's Opening Brief at 25.

⁹⁶ *Id.* at 48.

⁹⁷ *Id.* at 48.

the corporation — even if those acts are later found tortious.⁹⁸ Public policy shields a corporate officer who furthers “legitimate interests of his corporation” by permitting the officer to act “unhampered by the fear of personal tort liability.”⁹⁹

Blizzard just ignores these cases. Instead, Blizzard rehashes the old argument that it used before the district court; that is, that personal liability of corporate officers should be strictly applied.¹⁰⁰ In support of its position, Blizzard also cites four cases. But those cases merely stand for the unremarkable proposition that “*in general*” the corporate form does not shield officers and directors who participate in tortious acts.¹⁰¹ Factually, however, those cases are beside the point: they address the question whether the corporate form shields directors and officers from personal liability for *inherently unlawful* tortious acts. Of course it does not, but that’s not at issue here.

The district court’s reliance on the “dance hall” cases is equally misplaced. The question in those cases is whether a willfully-blind officer can

⁹⁸ *Id.* At fns. 119, 190 (citing *Ong Hing v. Arizona Harness Raceway, Inc.*, 459 P.2d 107, 115 (Ariz. App. 1969); *Wechsler v. Macke Intern. Trade, Inc.*, 486 F.3d 1286, 1292 (Fed Cir. 2007); *see also, Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841 (N.D. Cal. 1979), *aff’d sub nom*, 658 F.2d 1256 (9th Cir. 1981), *cert denied*, 455 U.S. 1018 (1982); *Hoover Group v. Custom Metalcraft, Inc.*, 84 F.3d 1408 (Fed. Cir. 1996).

⁹⁹ *Ong Hing*, 459 P.2d at 115.

¹⁰⁰ Blizzard’s Response Brief at 72–73.

¹⁰¹ *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985)(quoting the general rule from *Murphy Tugboat.*)

escape personal liability for clear-cut copyright violations.¹⁰² Again the answer is no, but that's also not at issue here.¹⁰³

The question before this Court is whether a corporate officer is liable for *good-faith* measures taken for the best lawful interests of the corporation — even if those acts are later found tortious. Courts, including the Arizona Court of Appeals, say no: a “director should be allowed to advance and protect legitimate interests of his corporation, its stockholders and creditors by discharging his corporate duties unhampered by the fear of personal tort liability.”¹⁰⁴

Donnelly's personal liability should have been analyzed in terms of good faith and the best lawful interests of MDY.¹⁰⁵ Through that lens, the record clearly shows that Donnelly acted only to advance and protect MDY's legitimate business interests.¹⁰⁶

The court erroneously found personal liability under all theories merely by concluding that: (1) Donnelly was aware of his actions at all times; and (2)

¹⁰² See *Shapiro, Bernstein & Co. v. H.K. Green Co.*, 316 F.2d 304, 308–09 (2nd Cir. 1963).

¹⁰³ See MDY's Opening Brief at 6–7, 9, 11.

¹⁰⁴ *Ong Hing*, 459 P.2d at 115.

¹⁰⁵ *Id.*

¹⁰⁶ ER at H8–39.

those actions were later deemed tortious.¹⁰⁷ This Court should correct that erroneous analysis.

VIII. Conclusion

Blizzard has failed to provide compelling responses to MDY's arguments in its opening brief. This Court should reverse the district court's holdings that MDY was liable for secondary copyright infringement, that MDY violated § 1201(a)(2) and § 1201(b)(1) of the DMCA, and that MDY tortiously interfered with Blizzard's contractual relationships. Also, this Court should affirm the district court's ruling that MDY did not violate § 1201(a)(2) of the DMCA pertaining to the literal elements of Blizzard's Warcraft software.

Respectfully submitted this 11th day of December 2009,

s/Lance C. Venable/ /
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¹⁰⁷ See ER at G12–19.

IX. Certificate of Compliance

Under Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the Appellant's reply brief is proportionally spaced, has a typeface of 14 points or more and contains 8,320 words.



Lance C. Venable, Esq.
Attorney for Appellants

December 11, 2009

Date

CERTIFICATE OF SERVICE

I certify that on December 11, 2009, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all registrants of the CM/ECF system for this case.

I certify that on _____, I served the attached document by ELECTRONIC MAIL on the following, who are not registered participants of the CM/ECF System:

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s/ Lance C. Venable