UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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MDY INDUSTRIES, LLC,, Plaintiff and Counter-Claim Defendant, vs. BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC., Defendants and Counter-Claim Plaintiffs	**CIV06-02555-PHX-DGC** Phoenix, Arizona June 26, 2008 2:58 p.m.
BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC. Third-Party Plaintiffs, vs. MICHAEL DONNELLY, Third-Party Defendant.	

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE
REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

A P P E A R A N C E S

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P R O C E E D I N G S

(Called to the order of court at 2:58 p.m.)

THE CLERK: Civil case 06-2555. MDY Industries, LLC v. Blizzard Entertainment, Incorporated, and others. This is the time set for motion hearing.

Counsel, please announce your presence for the record.

MR. VENABLE: Your Honor, Lance Venable for the plaintiff MDY Industries, LLC and Third-Party Defendant Michael Donnelly.

THE COURT: All right. Good afternoon.

MR. GENETSKI: Good afternoon, Your Honor. Christian Genetski on behalf of Blizzard Entertainment, Vivendi Games, and I'm joined by my colleague Shane Mc Gee, also from Sonnenschein, and Rod Rigole, Senior Counsel at Blizzard.

THE COURT: All right. Good afternoon.

Okay. Our purpose this afternoon is for oral argument on the various motions for summary judgment that have been filed. I have read the briefs. I have read many of the cases. I have read the statutes. I have looked at portions of the record, so I understand the issues in the case and you don't need to repeat basic arguments.

I do want to start with a couple questions before I actually hear your arguments, because they may affect my thinking as we go through these issues. I want to start with you, Mr. Genetski, with a question.

Blizzard clearly argues in this case that a copyright violation occurs when game client software is copied from the users' hard drive to RAM.

Do you also contend that a copyright violation occurs because software from the server at Blizzard is copied to the user's RAM? Or is your claim limited to the software that's on the game client disk?

MR. GENETSKI: Yes, Your Honor.

Your Honor, the -- our claim is limited to the software -- the copying of the software on the client with a caveat, which is the software that's resident on the client, the protected code on the client, is when it is connected to the game servers, Blizzard's proprietary game servers, and interacts with that code. That interaction in the server environment, in the online environment, displays -- enables the display of the expressive elements of the copyrighted code, but that code does -- is loaded into RAM from the client. And it's the code loaded into RAM from the client, in conjunction and interaction with the server code, that forms the basis for our copyright infringement claim.

THE COURT: So you are not contending that there is code on the server that is copied to RAM in violation of the Copyright Act?

MR. GENETSKI: Not my users of Glider.

THE COURT: Okay. You said something a moment ago

that you said in your brief, which is when the code on the user's computer interacts with the server at Blizzard -- I can't remember the word that you used -- "expressive."

MR. GENETSKI: Yes, Your Honor.

THE COURT: Something expressive. What's the phrase you've used?

MR. GENETSKI: "Nonliteral elements" is another phrase we've used that comes from the case law. The --

THE COURT: Give me an example of an expressive nonliteral element.

MR. GENETSKI: The display screen, the way that the character -- the art, the different characters in the game is displayed, the display that show user chat windows, if you are communicating online with people during the game, the screen that shows the amount of loot that your character has collected during that session.

All of the graphical display, the music, the multimedia, the sound, all those things can only be experienced in the online environment. You have to run the client code and connect to the servers to be able to see those graphical displays.

This might be an opportune time to mention to Your Honor, we have brought today a four-minute video of -- it's sort of an introduction to World of Warcraft. It just shows with no sound -- just shows what it looks like when it is

displayed on the screen.

We also have a short four-minute video, out of fairness of MDY's Glider program, running in World of Warcraft also that we have discussed with Mr. Venable about using as a demonstrative exhibit -- and I understand he has no objection -- we defer to the Court, if it would be helpful just to your question: What am I talking about --

THE COURT: You didn't provide that explanation in the brief, so I wasn't sure what you meant when you referred to nonliteral expressive elements.

But I want to come back and be clear. When -- so you are saying the copyright infringement, that is, the copying in violation of Section 106, is simply the copying of code from the game client to RAM?

MR. GENETSKI: Yes, Your Honor.

THE COURT: Is there an additional copyright violation you are asserting in that these expressive elements are somehow misappropriated by MDY?

MR. GENETSKI: They are -- those elements -- the reason to draw the distinction between the code that's resident on the client and that code when it is loaded into RAM in connection with the server, when the user is connected to the server, is that MDY has made an issue in the case of the ability to cut and paste the code into Notepad or another program, regular program you have, and have said in the context

of the DMCA claims, it doesn't prevent all copying of that code.

And our position is that the important copying, what's protected by our copyright, are the nonliteral elements, these expressive graphic display elements of the code which is resident on the client. But when it interacts with the server, that's the only context in which that content is displayed.

Our claim is limited to infringement when a user without authorization in excess of his authorized right to load the copy into RAM under our license loads that -- pardon me -- loads that content into RAM in connection with the server.

THE COURT: You just said that the expressive elements are resident on the client, correct?

MR. GENETSKI: The code that enables them to be displayed is resident on the client, but by necessity, must interact with the server code to be displayed.

THE COURT: So we're just talking about the code, right? That's the copyright violation is the copying of the code from the game client to RAM?

MR. GENETSKI: Yes, Your Honor, from the game client to RAM, yes.

THE COURT: Okay. Thank you.

Mr. Venable, did you want to say anything on this issue before we talk about other general matters?

MR. VENABLE: Yes, Your Honor, just briefly.

I think what Mr. Genetski is confusing here is the issue of the difference between the code and what can be loaded into RAM and viewed with whether or not World of Warcraft is active or not.

The code that is on the software -- the code that is on the hard drive can be loaded into RAM using Notepad viewer. It can be loaded using a picture viewer. Use of these things that he's referring to, these expressive elements that he is referring to, can all be viewed independently of World of Warcraft. You don't need to actually log onto the server to see these.

Admittedly, you do need to log onto the server to use them in the concept of playing the game, but unfortunately there is no case law to support -- I should say, fortunately for us, there is no case law to support the concept of taking something that's a protected element on the hard drive and saying that, well, it's only -- it's only accessible because of this access that they require to be able to use it within the concept of the game. That's functional.

And the functional elements of playing the game within the ability to see these things that he's referring to is just not protected under Section 106 of the Copyright Act, Your Honor.

THE COURT: Okay. We will come to that on the DMCA claim.

Let me ask you one other question, Mr. Genetski. Are there World of Warcraft players today in the world that are operating under the two older versions of the EULA? Or is everybody effectively today operating under Exhibit 21, the 2007 version of the EULA?

MR. GENETSKI: Everyone currently playing the game is operating -- if they have logged on since that new EULA was updated, they're playing under the new EULA.

THE COURT: Then that's the only EULA at issue in this case, isn't it?

MR. GENETSKI: That would be our position, yes, Your Honor.

THE COURT: Is the same true of the TOU? Anybody who is using the game today is under the most recent version of the TOU?

MR. GENETSKI: Yes, Your Honor.

THE COURT: Okay. Thank you. Mr. Venable, do you disagree with that?

MR. VENABLE: I'm sorry, Your Honor?

THE COURT: The question that I put to him was whether there are users of World of Warcraft anywhere in the world today who are using it under the two older versions of EULA. And his answer was no. Everybody who is using it today is using it under the current version of EULA, which would be the 2007 revision.

And then I asked him, well, then that's the only EULA issue in this case, and he agreed with that.

What's your view on that issue?

MR. VENABLE: Well, it is in terms of whether or not someone is in breach of an agreement today, but there are issues that we have raised in our briefs regarding what Mr. Donnelly understood at a certain time.

THE COURT: Right. I understand for the tortious interference claim you're saying it wasn't intentional or improper when he started because it wasn't prohibited.

MR. VENABLE: Right.

THE COURT: But you agree that the people who are operating World of Warcraft today are under the current EULA and the current TOU?

MR. VENABLE: Yes. We have no objection to that, Your Honor.

THE COURT: Okay. All right. Okay. That answers the two questions that I wanted to focus on, so Mr. Venable, why don't I let you take 15 minutes or 20 minutes and address the matters you think need to be addressed, and then I will let Mr. Genetski respond, and then we will decide where to go from there.

MR. VENABLE: Thank you, Your Honor.

Your Honor, I understand that since you have a -- read the briefs significantly, I won't try to delve too deep into

things that I believe are a waste of this Court's time. But I do want to start off by addressing what has not been properly -- or I should say what has not been responded to from us on the issue of Section 117, because technically, the amicuses had the opportunity to speak.

We would like to raise a couple of points that I think are imperative to be able to show why this case can be dismissed at this point or grant our motion for summary judgment and deny Blizzard's.

As the Court may be aware, Your Honor, Section 117 of the Copyright Act grants the owner of the copy -- of the copy of the code to make a copy of the code, as long as the copy in question is an essential step to using the software.

And I believe that clearly Congress enacted this exception for a reason, and that reason was to prevent the copyright owner from suing the owner for copyright infringement just for using the very program that he or she owns; for example, as a result of a retail sale.

Blizzard's sole basis for its copyright infringement claims against MDY are derived from this issue of whether or not the copy is made from the point it is -- Blizzard's software is residing on the user's hard drive and taking it into RAM. And that's it.

If there is no copyright infringement that is occurring as a result of that action, then there can be no

direct infringement by the user of the World of Warcraft software. And, of course, if there is no direct infringement, there can be no vicarious or contributory infringement either, which means my client has no liability under the copyright statutes.

And Blizzard cannot dispute the fact that when I walk into Best Buy, for instance, and I walk into Best Buy and I pick up this box off of the shelf, which I believe goes for $39.99. I go up to the cash register. I pay for it. I walk out of the store. I have a receipt that shows I am the owner of this box that contains several disks which contain the code that they claim is protected under the copyright law. And we don't dispute the fact that this code is, in fact, protected under the copyright law.

I could take this box and as I'm walking out of the Best Buy, if someone was walking into the Best Buy and said that they were interested in going to buy this box to play World of Warcraft at home, I could sell them my box of World of Warcraft software. I could sell them to it for whatever price I choose to sell it for and there is nothing that Best Buy or Blizzard or any other person can do to stop me.

I don't purchase that software under any restrictions from Best Buy. In fact, I don't really purchase that software under any restrictions from Blizzard.

So the only question is whether Blizzard's customers

become owners of these copies despite Blizzard including a license agreement that somehow restricts how long it can be played after I have loaded that software onto my computer.

But prior to the time I have loaded that software onto the computer, there's no doubt, Your Honor, that I'm an owner of that package.

And this is, I think, really the heart of the question under 117, is that when I go in and do this -- when I take -- when I do this transaction with, you know, a retail establishment such as Best Buy, am I not an owner?

What am I at that point? In fact the question is really is Best Buy the owner of the software when they sold it to me?

THE COURT: Well, let me interrupt you on that for a minute, Mr. Venable.

MR. VENABLE: Yes.

THE COURT: When the Sheriff's Department in the *Wall Data* case purchased their disks and had them in hand before they loaded it, they're in the same position you are in your hypothetical walking out of Best Buy, right?

MR. VENABLE: Well, there is a slight difference there, Your Honor? The *Wall Data* case did not involve the retail sale of a single purchase of a --

THE COURT: Right.

MR. VENABLE: -- of a piece of software. *Wall Data*,

there was several thousand copies that were purchased, and it was at that time, I believe, the License Agreement that was in place was actually negotiated between them and the *Wall Data* to be able to get a discount, and there were all sorts of things.

So when we do this with *Wall Data*, this is not your -- this is not really classified as a typical retail sale.

Certainly, a person who walks into Best Buy expects that they would be the owner of this software, at least the copy of the software; not the copyright, but just the software itself, the disks. And so I think that's how we would distinguish ourselves from the *Wall Data* case.

THE COURT: Well, in *Wall Data* the Ninth Circuit said that the two factors the courts must consider in deciding whether you own the rights to the software when you walk out of Best Buy is whether the copyright owner, Blizzard --

MR. VENABLE: Yes.

THE COURT: -- has made it clear that it's granting only a license to you, number one; and number two, whether it places significant restrictions on your use or transfer of it.

Isn't that the test I have to apply in deciding whether, in fact, you are -- or a user is an owner under 117?

MR. VENABLE: Well, actually, Your Honor, this sort of leads me into my next point, because the Western District of Washington just in the last couple of weeks has come out on this issue.

THE COURT: Is this *Verner*?

MR. VENABLE: This is the *Verner* case.

THE COURT: I have read *Verner*.

MR. VENABLE: Okay. And what *Verner* says, essentially, is that when looking at these cases, there's a trio of cases, the *MAI* case, the *Triad* case, and the *Wall Data* case, is that those cases cannot be reconciled in view of the *Wyse* case which discusses this issue about what really is the main issue when deciding whether or not there's been a -- you know, a first sale.

And the main issue is whether or not -- I should say the primary issue that the Court discussed there -- was whether or not the user, the purchaser of the software, the owner -- the quote-unquote owner of the software -- is allowed to basically keep these copies for as long as they wish.

And certainly, when I walk out of Best Buy, I expect I can hold these disks as long as I want. I don't even have to load them onto my computer if I don't want to load them on my computer. But I certainly would be able to get these disks as long as I want. That was the critical issue.

THE COURT: Well, here's -- yes, and I understand that, and I read Judge Jones' opinion with interest in *Verner*.

Here is what I wrestle with on that, so that you can address it.

In *Verner*, Judge Jones was interpreting the word

"owner" under Section 109 and the First Sale Doctrine.

MR. VENABLE: Yes.

THE COURT: And he was looking at, ***Wyse***, which was a first-sale case, and asking whether the ***MAI*** trio under Section 117 should, in effect, overrule them. And he said I have -- they are essentially indistinguishable. I have to look at the older case ***Wyse***.

I'm in a different position. I'm being asked in this case to apply 117. And the Ninth Circuit has specifically held in ***MAI*** and ***Wall Data*** that under 117, I use the ***Wall Data*** test.

It seems to me if I were to go Judge Jones' route, I would be doing it in direct contravention to Ninth Circuit authority, whether or not I agree that ***Wall Data*** is the correct test.

MR. VENABLE: But the difference, Your Honor, is that in the ***MAI*** trio, ***Triad***, ***MAI***, ***Wall Data***, none of those cases were the case where I walk -- I can walk into a retail establishment, purchase a piece of software, like I can here. None of those cases involve that. All of those cases involve either a negotiated license or something where the person purchased hardware that contained software within it.

In other words, what I bought with MAI or what I bought with Wall Data or what I bought with Triad was the license itself. I'm not doing that in the case here with Blizzard's -- with Blizzard's software. And I think that

what -- I think what also in the *Verner* case is very important to note is that the judge said that you cannot simply look at whether or not something is a sale and say that you're an owner for 109, but you can't be an owner for 117.

You are either an owner or you're not. There is no in-between. And I think that the risk is that if we take the -- you know, we're not asking you to overturn *MAI*. We're not asking you to overturn *Wall Data*. Those cases are easily distinguishable, because they were not involving the sale.

I mean, I think if you take the approach that someone is not an owner of software when they go into a Best Buy and purchase it, I think it could have very detrimental effects on what software creators can allow you to do once you purchase that software.

But there's no doubt, Your Honor, that at the point where I walk in and I buy this box that contains the code, these disks, I certainly own it. Blizzard doesn't restrict my ability to own it. So the only way that they can get to the issue of whether or not I'm no longer an owner is to say that well, when you turn this computer on and install the software -- which by the way under their License Agreement they give you the right to do -- in fact, the two things that Blizzard grants you under their End-User License Agreement are only two things.

They grant you the right to install it on as many

copies as you own of -- I'm sorry, as many computers as you own in your possession so that you can play World of Warcraft on three or four different computers in your house if you so choose. And the other thing is the right to use the software.

So even within their own license, they grant you the right to be able to put it on the computer and at a minimum be able to load it into RAM to be able to access this license that comes up and then says to you, Now you must agree to all these terms.

But what you are really agreeing to is not the issue -- is not a question of ownership. They're asking you to agree to these terms so that you can then access their server and then play the game and then load the code from the hard disk into RAM.

So then what they are essentially doing is they're reaching back and they're saying, Well now you were an owner of this software, but now you are no longer an owner because you are agreeing to these new terms. But that's not the way that 117 works. 117 says that you are an owner at that point. Congress has given you this exception to the normal rule of whether or not something is a copy or not.

And I believe that the intended purpose of this is for this very reason. You can't just simply say that you're an owner for one reason and then you're not under certain circumstances.

And that by allowing you to be able to purchase the software and then say, Now I'm no longer an owner -- and by the way, there's nothing in their License Agreement that says that here is an explicit waiver of Section 117(A) that maybe you were an owner, now you're no longer an owner; or now you no longer have the right to load this program into RAM unless you do certain things, play the game a certain way.

But the issue of whether or not you can play the game a certain way, Your Honor, those are all rights that are granted under contract law. They are not granted under the copyright laws.

Copyright law is a minimalistic statute. It grants five specific rights; copying, derivative works, public display, all those things. But the copy that the -- the copyright law grants you under 106, doesn't count under 117 when it's this loading into RAM if it's an essential step and you're an owner.

THE COURT: Mr. Venable, what if, instead of going to Best Buy and buying the box, you buy it online directly from Blizzard and download it to your computer?

MR. VENABLE: It still would not matter, Your Honor, because I'm still getting the same software. I still own -- I would still be in full possession of the software. I would have it -- and the fact that I think even *Wyse* addressed this issue directly, that just because you don't have to pay for it,

that, you know, you pay value for it, doesn't mean that you are still not an owner of it.

THE COURT: What if Blizzard said before you pushed "yes" to download it, you're agreeing that you're only getting a license?

MR. VENABLE: Well, it still doesn't matter, Your Honor, because the license that they are giving you is a right to play the game under certain circumstances. It's not the right to make copies into RAM. They have implicitly granted you that right even within their license.

THE COURT: So what you are arguing is that retail marketers of software are always under 117? There is no --

MR. VENABLE: At a minimal.

THE COURT: -- there's no way of getting around it?

MR. VENABLE: I don't see any way that you could possibly do it that when you go to buy a single copy, if you are purchasing that software with no restrictions, I don't see how you could not be. And the other thing is we don't necessarily have to say this is specifically tailored to retail.

I'm sure you probably read the *Krause* case. And the *Krause* case, although it's a Second Circuit of New York -- Second Circuit Court of Appeals case, it is one of the leading cases that addresses this very issue about what factors in this License Agreement itself constitute granting the right of

ownership.

And, you know, when you look at all the five factors in the ***Krause*** case, every single one of them, when you look at the Blizzard license, all of them -- and this was discussed very extensively in the amicus brief -- but every single one of those factors align in favor of MDY to show that what they really are doing is just, in fact, giving you the software. They don't ask you to return it, which is key. That's a very key fact.

They even say that you can -- you know, it says here are the five factors.

You can purchase a single copy for a single price. That's a factor in favor of ownership.

Does the purchase of that copy limit the right to possess the copy for an unlimited time? Well, yes. You don't -- you can hold onto your software for an unlimited sometime.

Does the user have the right to discard or destroy the copies as you wish? Well, yes, I can take these disks when I walk out of Best Buy and break them if I want. I can throw them away. I can cut them in half. There is nothing that Blizzard or anyone else can do to stop me from doing that. And those are the disks that contain code.

Is the program stored on the users hardware? Yes, it is. That favors ownership.

And are there severe restrictions on resale or other use? Blizzard themself, even in their License Agreement, says I can take the software I bought or download it, by the way, and I can transfer the rights to the new person that I want to give it to, as long as I destroy all the copies that I had before.

But that's no different, Your Honor than if you went to the store and bought Microsoft Word. You put Microsoft Word on your computer. I certainly could not, nor are we advocating that we could, take Blizzard's software and make copies on computers that I don't own so that my friends could use it. Although I don't really think they would mind that because you can download these programs for free.

But if I had Microsoft Word, if I took Microsoft Word and made a second copy without destroying the copy on my hard drive, then now I have made an unauthorized copy under 106. That's not allowable. But all five of these factors are discussed in the ***Krause*** case and they go directly at, okay, so you give me a license, but the question is --

THE COURT: I understand that.

MR. VENABLE: -- but you have to look to the license.

THE COURT: All right.

MR. VENABLE: Okay. Your Honor, even if the Court doesn't find that Section 117 applies to this case, Blizzard still can't create a cause of action for copyright infringement

merely by having its customers breach a term in its agreement that has no relevance to copyright law, because this is a key factor. There are no -- there are no disputed facts in this case that the reason why Blizzard says that they can sue Mr. Donnelly and his company for copyright infringement is because they say that this license is sort of a big condition precedent. And if you don't agree to it when you load this program into RAM, you are making a copy that's not authorized.

Well, if under 117 that doesn't apply, the question still is what term of the agreement did I actually breach? If I breached the agreement saying that I agreed to not use third-party programs, but then I use this third-party program that Blizzard doesn't like, well I have breached their contract, yes, but I have not breached any act or any right under 106.

THE COURT: Let me give you a hypothetical, Mr. Venable.

MR. VENABLE: Sure.

THE COURT: Let's assume I sell you some software with the agreement that you're going to pay me $10 a month for the license to use it.

MR. VENABLE: Yes.

THE COURT: You pay me this month in July and August and then you stop paying.

MR. VENABLE: Yes.

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

Copyright violation?

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

THE COURT: But in that hypothetical, the act that constituted the breach, which was nonpayment, is different from the act that constitutes the copyright violation, which is copying to RAM. And it seems to me you're arguing they can't be different. They have to be one in the same.

MR. VENABLE: No. But there are several cases out there that address the issue of whether or not you stop making payments for something, because then you are then outside the scope of the license.

THE COURT: Exactly. So what they are arguing is if you breach the contract --

MR. VENABLE: Yes.

THE COURT: -- by using a third-party product such as Glider, you've breached the contract just like you do when you don't pay. You are now outside the scope of the license. And when you load it to RAM, you make a copy in violation of Section 106.

MR. VENABLE: But the case law is different on the issue of payment versus the issue of what they are talking about. The *Storage Tech* case is a classic case that discusses

this, Your Honor. There is a quote in *Storage Tech*.

THE COURT: And I have read *Storage Tech*.

MR. VENABLE: Okay.

THE COURT: And again, the reason I'm sort of pushing you on this is because *Storage Tech* to me is unremarkable. What *Storage Tech* says is if you do something to get outside the license, you're not liable for copyright infringement unless you infringe, unless you engage in an action that's infringing.

But I don't see *Storage Tech* saying that the act of infringement has to be the same act that gets you outside the scope of the license, which is really what you are arguing.

MR. VENABLE: Well, in this case, Your Honor, I think we can distinguish it for one very important fact. What we pay for -- with Blizzard's -- with Blizzard's -- to play Blizzard's game, you pay a $15-a-month fee to be able to play the game.

Okay ? What Blizzard says in its contract is they are giving you the right to use the game. If you are loading the software into RAM, you are technically not using -- you're not playing the game yet. Okay?

So when I stop paying my $15, I'm sure what happens on Blizzard's end is somebody in their Accounting Department says, Well, this person is no longer authorized to play this game. And if I tried to log in, I couldn't play the game. So technically, I would only be violating Blizzard's agreement, if

in fact, I was playing the game, despite the fact that I was not paying $15 a month.

I think Blizzard has already addressed this very issue in the case that they dealt with a couple of years ago, the *B Net D Davidson* case in the Eighth Circuit where somebody was taking a copy of Blizzard's software and actually playing the game on a server that was not connected to Blizzard. And they -- that's exactly what they were doing, which was clearly a copyright infringement.

This was something that was not only outside the scope of the agreement, but it was clearly an infringement, because they were not allowed to do that. Not paying the $15 according to Blizzard's license doesn't say that I'm an infringer, even if I load the program into RAM. What we are paying $15 for is the right to be able to play the game. In fact, I think Mr. Genetski even said that earlier.

THE COURT: Well, I understand that, but they're not claiming that the $15 is -- or the failure to pay the $15 is what gets you outside the scope of the license. They're saying it's when you use Glider, you are now using this program in a way they haven't authorized. It's outside the scope of the license. And once you're outside the scope of the license, as soon as you copy to RAM, you are copying in violation of Section 106, because you're not licensed to do it.

MR. VENABLE: But what the license also says, Your

Honor, is that they have granted us the right to install it and the right to use it. The right to copy it is subject to the right to use. That's right in their agreement. I can point that out to you. I believe it's section IVA of their End User License Agreement. So this whole question of whether or not when I load it into RAM I'm making a copy, well, that's not really a violation of what I'm licensed to do. That's a breach of the agreement. I'm not making a copy under the copyright law that would infringe the copyright law.

At worst, I have just breached their agreement. I am still licensed to use the software. In fact, I'm still licensed to use the software until they terminate the software.

THE COURT: Without Glider.

I mean, their point would be if you're using it without Glider, you're certainly authorized to make copies. They've given you a license.

But once you start using Glider, you step outside the area they've authorized the use for. And when you make a copy outside of that area, it's not authorized. And under ***MAI***, it's a copy and, therefore, an infringement.

Isn't that their argument?

MR. VENABLE: Well, yeah, that's exactly it. And I think if you look at the other things, virtually anything that you do within this Agreement, because that's their interpretation of their agreement, is that if you do anything,

anything whatsoever, that violates one term of their agreement, you want to call your character Michael Vick, well, you are not Michael Vick. That's a violation of the agreement, now you're a copyright infringer.

You want to do -- and then they also use terms like "doing anything that Blizzard considers contrary to the essence of the game."

Well, I wouldn't even know what that is, quite frankly. I don't know what Blizzard considers contrary to the essence of the game unless I sat down and talked with them about it. If I provided a false address to them, I'm now violating the contract and I'm a copyright infringer.

There are ways that you have to do to control your -- what they are trying to do essentially, Your Honor, is they are trying to extend the rights under copyright law through their contract. They are trying to say that, Well, we really can't control what Mr. Donnelly is doing, so here is the way we will do it.

We will just simply say that if he does this, well, it's a violation of the contract. Now everybody who uses this software is a copyright infringer. Image for a second, Your Honor, that if Ford Motor Company was selling automobiles. And, of course, they have software embedded within their ignition system, let's say. And they put a contract on the front of the car saying:

If you buy this automobile and you want to drive it around, that's fine. However, you cannot replace any of the parts on this car with NAPA auto parts.

If you do, you are now outside the scope of your license to be able to drive this car. And when you load that ignition software into RAM, oh, my goodness, you are a copyright infringer. You have loaded something and now you don't have the right to load that software into RAM. So they can --

If you give Blizzard the ability to do this, any company in the world can put in a, you know, a piece of software on their machine, put in some artful contract language and say, here, you know what, if you don't like what we're doing we can sue you for copyright infringement.

That's not what Congress intended, Your Honor. What Congress intended was to grant the author of his work a limited right to be able to protect it from being copied, from making derivative works, so that it can't be exploited.

What Blizzard is trying to do is trying to use this copyright as sort of a punitive measure to be able to try to take out anybody who plays the game in a manner that they don't want it to be played, in a manner that they find is unacceptable. And, you know what, they have every right to control how they want to play their game, they just can't use copyright to do it.

THE COURT: All right. I understand that argument, Mr. Venable. You have used a little over 20 minutes. Were there any other matters you wanted to touch upon?

MR. VENABLE: Your Honor, the only other -- well, yeah, there were a couple of other matters I wanted to -- I haven't even gotten to my DMCA or my tortious interference arguments.

You know, I would just like to say that with regard to the copyright issue, one last matter is that even if you can find that 117 doesn't apply and that there is a copyright infringement under this scheme that Blizzard feels that it can sue you for copyright infringement for, the fact remains is, Your Honor, that under the *Laser Cone* case, this is still copyright misuse.

Again, Congress cannot allow or does not allow people to use copyrights to try to enforce -- to try to prevent some third party from being able to use its software with what Blizzard is doing.

You know, this is -- this goes far beyond what someone can do with their copyrights. They cannot tell a third party that they cannot use something and say that it's all under the guise of copyright law. It's Draconian in terms of its ability to deter what may be a very valid attempt to try to write software and use it for third parties.

My client has expressed in his briefs that his

software -- what started out to be used for Blizzard's World of Warcraft can be used now for many different things. That's -- I think that's basically what I wanted to say in terms of copyright.

There's no set of facts, Your Honor, under the copyright law that you could find for Blizzard on this. There has clearly not been a copyright infringement either under 117 -- people that buy this software are clearly owners -- and there is certainly misuse of copyright if you believe that what they can do is -- or what my client does is infringing.

With regard to the DMCA, Your Honor, very quickly, we have briefed the *Chamberlain* case very extensively. We have basically said that no matter what -- no matter what Blizzard is able to say in terms of their version of the facts, that the Scan.dll and this Warden program, they are just simply not effective measures at being able to control access to what Mr. Genetski said earlier this afternoon that what is really protected is the code.

Warden and Scan.dll are machine -- or software schemes to be able to detect third-party software like Mr. Donnelly's program. They are not designed to protect the actual loading of the copyrighted code into RAM. It's not disputed by the people that we have deposed at Blizzard that despite the fact that Warden runs or despite the fact that Scan.dll immediately detects there is an unauthorized third-party software program,

you are still able to load that software from the hard drive into RAM using Notepad, using any number of code viewers.

And if you can load it into RAM, Your Honor, it's a copy. Just because it's not a copy when it's being played, which is functional and not protected under the copyright law, it is still loaded into RAM.

Therefore, despite the fact that Blizzard says that they have some protected right to this code, these -- these so-called access control measures are not only not effective, they don't do what -- they're not even intended to do what they say they do, which is to protect the code from being loaded into RAM.

Chamberlain spells this out explicitly. The DMCA, Your Honor, and I think *Chamberlain* goes through this explicitly too -- the history of the DMCA was there to protect massive distribution of digitized works.

When I go to the store and I buy a DVD, Your Honor, that DVD is encrypted. I could not make a copy of it on my computer. I could not load it in and say, Here, I want to copy this from the DVD to my hard drive because it's encrypted. It's there because you don't want people to be able to get on the Internet, put this DVD code on there, and then distribute it massively through the Internet.

THE COURT: Let me ask you a question on that, Mr. Venable.

If I conclude that copying code from the game client to RAM is copying for purposes of Section 106, isn't it true that Warden stops a player from performing additional copies to RAM after they're intercepted?

MR. VENABLE: No, it does not. All it can do is -- what Warden does is it detects the presence of, say, Glider. It will notify Blizzard back at its servers, at its headquarters, that there is an unauthorized third-party program that has been found.

And then once that happens, either somebody from Blizzard can notify the Accounting Department and say you can no longer allow this person to play the game. This has happened many, many times, in fact, by the people at Blizzard. It's been well-known, well-documented, and we don't deny the fact that they have detected my client's software on many occasions.

THE COURT: Well, let me ask you this question. Looking at 1201(b)(1)(A), in order for this portion of the Act to apply, Warden must be a technological matter that effectively protects a right of a copyright owner under this title.

MR. VENABLE: Yes.

THE COURT: Where does it say that Warden itself has to shut out the user as opposed to notifying Blizzard so they can shut out the user?

MR. VENABLE: No, Your Honor, but that's not what it does. What it does is it says that you can't play the game anymore. It will effectively lock you out of their server so that you can't load the program into RAM to be able to play it.

It does not prevent you from being able to load the actual code itself into RAM.

THE COURT: I understand that. But let's say it catches you at level 19 and it prevents you from going to level 20. Had you gone to level 20, additional code would have been written to RAM, right?

MR. VENABLE: No. That's not my understanding of how it works. Everything that you have to be able to play the game is already on your hard drive.

THE COURT: On the hard drive.

But Blizzard has asserted that as you progress through the game, additional code is written to RAM. And my point is, if Warden stops you in mid-game, then it prevents you from any of that additional writing to RAM.

MR. VENABLE: I don't believe that that's what happens.

THE COURT: All right. Well, I will hear from Mr. Genetski on that. That has been their assertion.

MR. VENABLE: Okay. Well, my understanding is that is not the case.

THE COURT: So is it your view that everything in the

game client is written to RAM when you turn on the game? There is no additional call to the hard drive to write anything further to RAM?

MR. VENABLE: No. My understanding is that what it does is it goes out on the server and actually gets information about your character, but it doesn't actually put any additional software onto your computer.

Mr. Genetski has even said that earlier. It's all on your hard drive when you load it up. What it does is that it shuts out your access to the server and that's a key distinction.

THE COURT: I understand that distinction. I just understood Blizzard to say that when that happens, it prevents further writing to RAM that would have occurred had you not been shut out. And it sounds like you disagree with that as a factual matter.

MR. VENABLE: I don't believe that is the case.

THE COURT: Okay. We're going to run out of time for the arguments, so why don't you wrap up your points and then I will hear from Mr. Genetski.

MR. VENABLE: Okay. Really quickly, Your Honor, we have already discussed the DMCA. I think the last major issue I just wanted to hit really quickly was the issue of the tortious interference, Your Honor.

And briefly, all of the facts that -- and I'm sure you

will hear a ton of things about -- from Mr. Genetski or Mr. McGee about our client being the devil -- he's a horrific guy. He is interfering with Blizzard's ability to play the game. He is circumventing their detection schemes so that makes him malicious in his attempt to try to, you know, interfere with their contracts.

Your Honor, what is very clear here is that the State of Arizona has adopted the Restatement. The Restatement is followed explicitly by the ***Wagenseller*** case. And in the ***Wagenseller*** case, your Honor, ***Wagenseller*** made it very clear, and I would just like to read the quote really quick from Wagenseller:

It is difficult to see anything defensible in a free society in a rule that would impose liability on one who honestly persuades another to alter a contractual relationship.

The question here is not whether there is any alteration of the contractual relationship, Your Honor, because that's not really the issue that we contest.

The issue here is that all the facts that they have alleged deal with the bad behavior by the end-user regarding the breach itself.

What ***Wagenseller*** says is that there is no tortious interference when one honestly persuades somebody to breach a contract. And there is no set of facts that Blizzard can raise that would show that what my client is doing, Your Honor, isn't

simply honestly persuading people to purchase his software.

He puts it up on the Internet passively. He may advertise through his affiliates. He may use keyword searches that draw people to him by using the word "cheat" or "bot" or whatever. And he even knows full well that maybe Blizzard doesn't like what he is doing.

But what he has done, Your Honor, is that he has notified on his Frequently Asked Questions sections that if you buy his software, that Blizzard probably believes that it is a violation of its term -- of the Terms Of Use of its agreement and that you use this at your own risk. And, in fact, you might even be suspended over it.

He is just simply telling you, use it at your own risk. That is honest persuasion. He is doing no more advertising than I am through my firm's web site to draw people to get me -- to use my services.

THE COURT: I understand that point, Mr. Venable.

MR. VENABLE: Okay.

THE COURT: You had made that point in your brief as well.

MR. VENABLE: Okay. And other than that, Your Honor, again, we just don't believe there are any facts that they can raise that would allow the summary judgment by Blizzard to be granted, and I think ours should be granted. No copyright infringement. No DMCA violation. And certainly, no tortious

interference with contract.

THE COURT: All right. Thank you. Mr. Genetski.

MR. GENETSKI: Your Honor, I think -- again, the Court is obviously very familiar with the briefs. I would try to jump in to the key points and for the sake of time like to start with copyright and try not to cover ground that's already been covered, but just to say that I think Your Honor in some of the questions to Mr. Venable accurately captured our position, that there's a two-part test here. We're talking only about the direct infringement of the Glider users.

I think that the law of the Ninth Circuit is clear that there -- a copy into RAM from a hard drive into RAM of software is a copy under Section 106. The Ninth Circuit does not distinguish -- and somehow much of MDY's briefing seems to suggest -- make that somehow a lesser right or not entitled to the same sorts of protections. Copying into RAM is copying.

So when Blizzard License Agreement, you'll learn it's TOU, expressly limit and condition a user's right to copy, reproduce. That right includes the right to copy into RAM. We're granting a limited conditional license. It says that the "subject to" language that Mr. Venable pointed out we agree.

Subject to the conditions in this license, you may make that copy into RAM. If you exceed the scope of those restrictions, you have forfeited your right to make that copy into RAM.

And I think the case that's most on point for our set of facts is the *Ticketmaster* case which is currently on appeal to the Ninth Circuit.

And the reason I believe that that's very instructive and were the Ninth Circuit to affirm that case, I believe it would be close to a controlling authority on this set of facts, because in *Ticketmaster* what you have is a web site that allows you to download content.

If you go as a human being and enter and try to get the best tickets and solve the caption yourself, you're authorized to get the same exact content loaded into your RAM.

If, however, you use a bot which gives you the advantage -- and the reason Ticketmaster doesn't want bots is it gives you an advantage to move up in the queue and get the best tickets. So if you use a bot, you forfeited your authorized access to make that copy in RAM.

And we feel that our case is very much the same for many of the same reasons. That Glider users running bots are gaining advantages over other users to the detriment of those users, to their frustration, and ultimately, to the detriment of my client.

THE COURT: Mr. Genetski, if I purchase a copy of World of Warcraft and I sign on and use the name Michael Vick, copyright violation?

MR. GENETSKI: I do not think that would be a

copyright violation, Your Honor.

THE COURT: Why?

MR. GENETSKI: I do believe there are -- the limits go to how you use the game client. I believe that under the Ninth Circuit -- ***Nebula*** is a district court case, but under the ***LGS*** case and other cases -- there is a line here between a condition and a covenant.

And we do believe that our -- all the provisions of our EULA and TOU are enforceable. But the provisions in Sections 4 of the EULA and 4 of the TOU which speak to the limitations on use -- and Mr. Venable has made a big distinction between "use" and "copy" -- in this context and part of my initial comments to you were to make the point that that copying into RAM in connection with the server while you are connected is the use.

The Ninth Circuit cases and ***Nebula*** speak of limitations on how the work may be used, as opposed to secondary restrictions that don't deal with use of the word.

THE COURT: So you would say, if I understand you correctly, that the EULA grants the license and says you can't violate TOU or you're outside of the scope of what the license really means. You can't violate Section IV of the TOU or you're outside of the license.

It doesn't mean if you violate Section V, you're outside?

MR. GENETSKI: In this case, the provisions that are at issue are Section IV of the EULA and Section IV of the TOU.

THE COURT: You do a lot of citing of Section V, too.

MR. GENETSKI: I agree, Your Honor. And obviously, the primary provision in the TOU is the prohibition against bots or cheats which there is no dispute of fact that summary judgment that Mr -- that MDY's program is -- falls under that provision.

We believe that any time you are running a program at the same time that you are also loading WoW into RAM, at the same time that you're making that copy, that that action is a direct condition on how you may make that copy.

THE COURT: How do I --

MR. GENETSKI: I think it is clear in this case the provisions that are issue are conditions.

THE COURT: As I read these two contracts together, how do I distinguish between the provisions that are a limitation on the license and those that are merely affirmative contract obligations?

MR. GENETSKI: Your Honor, I think you have to again look to these tests. And I think ***Nebula*** is instructive in saying that where -- it looked at two provisions; one the number of users that could use the software, and the second, what operating systems the software was authorized to be used in conjunction with.

And I think applying that and defining the latter, the operating system to be a condition, and therefore, grounds for infringement and the former to be just a contract provision, I believe that one line that can be drawn are activities that take place "in game" versus activities that take place "out of game."

So we, for instance, the Terms Of Use, say that you cannot sell in the real world the -- an account or the characters or goal that you have acquired in the game.

However, we know that there are, much to my client's dismay, third-party web sites out there that allow people to do this. That would be a violation of the Terms Of Use, but it would not be made in conjunction with loading a copy of our game into RAM, as opposed to running a bot or a cheat, which is done simultaneously with the loading into RAM.

And Your Honor is correct. I just want to make sure that I address the point that you raised about content, continuing to load into RAM as you're connected to the servers. New copyrighted content is moved from the hard drive into RAM and I believe that's an undisputed fact in the Statement of Facts.

THE COURT: But it doesn't sound like it from the hearing it today.

MR. GENETSKI: I believe in the record it is undisputed. They might have had a change of heart. But I

believe that the running of bot, which is happening simultaneously and in conjunction, Glider is also running in RAM. It is interacting with the code of World of Warcraft simultaneously.

And we would submit that that is not a close case; that that falls clearly on the side of a condition that exceeds the scope of the license.

THE COURT: Let me ask you this question just to test your line drawing.

Let's say you've got two boys on the block who are avid World of Warcraft users. Boy number A doesn't like the progress that boy number B is making and so he, at an opportune time, steals into that boy's bedroom and disables his computer.

When boy A goes back home and fires up World of Warcraft, is he infringing the copyright?

Section IV of the TOU says you can't disrupt any other player's use of the game. He's just done it with respect to boy B. Is he now outside the scope of the license and guilty of copyright violations?

MR. GENETSKI: I would say no in that case, your Honor. He is not infringing because he's not committing a violation in conjunction with his loading of the -- his copy into RAM when he is playing. He is playing consistent with the license at that point.

He may have taken a -- engaged in mischief a half-hour

earlier at his friend's house which his friend may then report him to an in-game GM, which may engender some penalty, but I would not put that on the infringement side of the line.

THE COURT: So he has to do the disrupting while he is using the World of Warcraft software?

MR. GENETSKI: I believe that's a fair interpretation of *Nebula* and the Ninth Circuit's standard about provisions that affect the manner of use, part and parcel of the license itself.

Your Honor, I would like to close out copyright, make sure I answer any questions the Court has on the amicus argument under Section 117.

I would just note that the box that Mr. Venable presented does have language on the side, I believe, that indicates that use of the game is subject to a EULA and a Terms Of Use.

It has a paper license in the box that indicates that it's licensed software. Certainly, it's undisputed fact that the first time you loaded it up, you would be presented with the EULA and Terms Of Use which could not be much more clear in our view that Blizzard considers itself retaining ownership of the software and expressly reserving all of its rights, including the right to copy, which is the right to copy into RAM, subject to the terms of the License Agreement.

I think Mr. Venable also fairly pointed out that you

can reject those terms and get a refund if you don't want to ascribe to the license.

We agree with the statement the Court made that the *MIA* and the *Wall Data* cases are controlling in the 117 context. They fairly plainly state that 117 can be trumped by a License Agreement and those cases post-dated Section 117.

THE COURT: Do you agree that they're all negotiated licenses as opposed to off-the-shelf licenses?

MR. GENETSKI: I do agree that that would be the distinction in those cases. But I think the clear distinction between them -- those cases -- that line of cases on the one hand and the *Wyse* case and the *Verner* which, you know, interprets *Wyse* as sort of being a free choice between *Wyse* and *MAI* -- is that I understand *Verner's* argument that the statutory language is similar.

But the rights of a first-sale doctrine versus the right to copy are somewhat different. And in this case, in our EULA we've actually preserved the right, as Mr. Venable notes. It incorporated the right of first-sale doctrine explicitly into the license, which we have not done. We have not acknowledged that a user retains their 117 right in the license. In fact, we have said you may not copy this, except as consistent with the license, and again, "copying" includes copying into RAM.

I also believe that if you look at the factors that

Verner looks at, even if you were to set aside *MAI* and say we take a free, fresh look, Your Honor is right that the test would be whether the owner of the copyright has made clear that it's subject to a license.

And again, there is language. Bold. All caps. Repeatedly on the front page of the license which is in paper and when you sign on saying it's a license and we're the owner.

But I also believe the key restrictions that the courts have looked for when they have looked at these cases are present in the Blizzard EULA and TOU.

First of all, I don't think it's a fair characterization to say it's a one-time purchase and you get the software. To be able to use the software, you have to use it for the way it was intended. You have to be able to connect the Blizzard server and you have to pay ongoing monthly subscriptions.

Blizzard also expressly reserves the right to send out updates to your software, periodically whenever they need to, and you give them the right to make changes to your software pursuant to the license.

And I also believe that Blizzard reserves the right to at least constructively repossess the software when they say if you want to forfeit your license, Blizzard can require you to destroy all your copies, delete all your copies off your hard drive.

They don't require you to return the box and the CD-ROMs, but the value of the software they do require it to be destroyed. So I think that even if we are to treat it as an open playing field, I think that the Blizzard license is much more -- has much more of the terminology and the kind of terms the courts look for to establish a license and is more in line with some of the Adobe cases which are consumer software. They're in the first-sale context, not the 117 context, but they are consumer software cases.

And I think that it is fair to say that it's an industry standard -- I know Mr. Venable said 117 should apply in all cases of consumer software -- I think that would be big news in the consumer software industry.

I think that the notion of shrink-wrap licenses and click-through licenses, creating enforceable rights under copyright is a well-accepted industry norm.

THE COURT: Well, I don't think he was arguing, Mr. Genetski, that they are unenforceable. I think he was saying that the shrink-wrap and click-through licenses can't, in effect, undo what Congress did in Section 117.

MR. GENETSKI: I understand that. I believe there would be some understanding in the industry that the copyright rights would still attach through those EULAs. That was my point.

If I could, I'll move on quickly to the DMCA and I --

THE COURT: Before you do, I want to bring you back to the general copyright issue for a minute to make sure I understand your argument.

It seems to me in the briefs you really argue about two different theories as to why the license doesn't authorize the copying to RAM when you are using Glider.

One theory would be that if you use Glider, you are outside the terms of the granted license because you've only been granted a license to use it without a third-party software. And since you're outside and you make a copy, you are guilty of copyright infringement.

A second argument is what I sort of think of as a self-destructing license argument, which is if you use the software with Glider, your license is immediately eliminated as it says in Section IV of EULA. And once that license self-destructs, any copying you do is unlicensed, and therefore, a copyright infringement.

Which of those two theories are you asserting in this case in your argument that the copying is outside the scope of the license?

MR. GENETSKI: Well, I think, Your Honor, that we are asserting both the theories. I think the first one you articulated is our primary theory, and we think that that is -- that that theory is sufficient.

I would agree, however, that someone that uses Glider

does -- it is at that point forfeiting their license. Our problem obviously as a practical matter is our ability to detect Glider, which is part of the DMCA and the -- you know, when we have been able to successfully detect Glider, we have terminated those licenses.

THE COURT: Well, you have terminated them. But under my second theory, you don't have to do that. They self-destruct. You suggested when you referred to Section IV that the license automatically disappears if somebody uses Glider. And that's what I'm asking.

Are you making that assertion in this case?

MR. GENETSKI: I don't think I fully appreciated your question. And if I do now, I think my answer is: If someone forfeits their license right but we can't detect it, how do we know?

If you're saying that once they've used Glider, we're unaware they're using Glider, it's a self -- their license ends --

THE COURT: Well, let me --

MR. GENETSKI: Yes. It ends and they are then infringing if they continue.

THE COURT: The sentence is Section IV.A of your EULA. There's a sentence in there that says:

Failure to comply with the restrictions and limitations contained in this Section IV shall result in the

immediate, automatic termination of the license granted hereunder.

Are you standing on that sentence in this case? Are you saying that that's what happens is when they use Glider, there's an immediate, automatic termination of license, and therefore, the copying is unlicensed?

MR. GENETSKI: I believe -- yes. I believe they've forfeited their authorization to continue copying under the license when they have used Glider. We may not be able to effectively act on that termination of the license because it's been concealed from us, but --

THE COURT: Well, okay. If you're standing on the provision -- then that gets to my next question, which is, it has to be a violation of Section IV of the EULA for this self-destruct provision, as I call it, to exist.

MR. GENETSKI: That's right.

THE COURT: What provision of Section IV is violated by the use of Glider?

MR. GENETSKI: Of the EULA as opposed to --

THE COURT: Of the EULA.

MR. GENETSKI: As opposed to the TOU?

THE COURT: Yes.

MR. GENETSKI: May I get my copy?

THE COURT: Yes.

MR. GENETSKI: Sorry, Your Honor.

I wanted to grab the briefs so I have the language. I would say Section IV.B-- and this is out of our original brief -- but Section IV.B, Roman IV, which prohibits making unauthorized connections to the game or the service or connections that are not authorized by Blizzard.

Glider at different points in its iteration has been responsible for actually -- you could load WoW with Glider and initiate the connection. Glider made the connection for you. Also independent of that, Glider obviously connects and sends and receives commands with the Blizzard servers.

I would also say Section IV.B.2of the EULA that is exploitation of the game, there's --

THE COURT: But that's only if somebody is selling their gold on eBay, right?

MR. GENETSKI: Or if their -- we would say using a bot to farm the gold in the game is exploiting the game. Running the bot is also exploiting the game.

THE COURT: Well, it has to be for a commercial purpose.

MR. GENETSKI: For a commercial purpose. And I believe there's extensive evidence in the record of -- that that is one of the substantial, if not primary uses, of the Glider program, whether MDY disavows that that's how it wishes it would be used or not.

THE COURT: Well, 4(b)(2) would be limited to those

Glider users who are really farming, correct, and selling? Correct? Farming and selling what they farmed on some commercial --

MR. GENETSKI: Or leveling up an account to sell it, but yes, Your Honor, it would be included with the commercial license.

THE COURT: And you are arguing that 4(b)(4), even though it talks about connecting to an unauthorized server, which sounded like a different -- it sounded like the *Davidson* case that Blizzard brought -- you're saying that you think Glider is an unauthorized connection within 4 (b)(4)?

MR. GENETSKI: To the game or the service because it is connecting -- it is connecting and receiving commands with the service.

But if I could step back for a moment, Your Honor, I -- if we're splitting this apart, I do want to say I'm not superseding the Section IV automatic termination to the first point you made.

THE COURT: I understand. I just wanted to make sure I understand if you were making a self-destruct argument, what it was based on.

Okay. You were going to go on to the DMCA and I think you've got about five minutes left to where you will be where Mr. Venable was.

MR. GENETSKI: Okay. Thank you, Your Honor.

THE COURT: Actually, seven minutes.

MR. GENETSKI: So let me try to skip to what I believe is the crux of the dispute on the DMCA, which is that MDY is relying largely on ***Sky Link*** and ***LexMark***. And the argument he presented today, which is sort of the argument he zeroed in on on the latter rounds of briefing, is that Warden and Scan.dll cannot be accurate -- cannot be effective TPMs, Technology Protection Measures -- because even if they stop you from accessing further copyrighted content as it's loaded into RAM when you are connected to the servers, they don't stop you from doing the copy and paste into Notepad or copying -- excuse me, the static object code in some other form.

But that's -- the DMCA does not say that you must have a copy protection scheme that protects any and all rights that a copyright owner might reserve to themselves. You are allowed to grant different apportioned rights.

And, in fact, the ***LexMark*** case itself says this, that copy protection measures do not have to protect all forms of copying. They just have to protect some form of protected content.

One example of that would be the ***Real Player v. Stream Box*** case out of the Western District of Washington in 2000, which is cited, I believe, in ***LexMark***.

Where in Real Networks, they allowed by license, someone using Real Player to stream music files, audio files,

but they had a switch that prevented only certain licensees from being able to also copy those files.

So depending on the type of license you had, you either had streaming rights, which they had the right to restrict but didn't, or copying rights which they had the right to restrict but didn't.

And Stream Box, the defendant, found a way to circumvent the switch to turn someone who had this subservient license to get the other license rights. And the court said that that's okay. You don't have to prohibit all copying.

And here Warden and Scan.dll may allow some of this static object code that's resident on the client to be copied. But my point in perhaps inarticulately in the brief describing what these nonliteral elements are, but the graphical presentation, the way the characters look like, the way they move, as you get to different levels in the game, more content is loaded. It's not loaded until you reach that next level that presents new scenarios in the game, new content in the game.

THE COURT: Is loaded to RAM?

MR. GENETSKI: Loaded into RAM, yes, Your Honor.

THE COURT: So that's what you're saying is the Copyright Violation Act that Warden prevents in effect?

MR. GENETSKI: Two parts. You don't have access. You won't ever be able to see what the different monsters look like

and what these different presentations look like if you have -- if Warden has detected that you're running probably another cheat, not Glider, since it has difficulty detecting Glider at present, but if it detects a cheat and you are revoked, you will not get access to that next content that was coming in the game, nor will you be able to load it into RAM in connection with the server.

THE COURT: Let me ask you this question about the DMCA claim, Mr. Genetski.

Under 1201 (a)(2)(A) the technological measure has to be one that effectively controls access to the work.

"The work," for purposes of what we're talking about, is the software in the game client, plus --

MR. GENETSKI: As displayed in the online gaming environment.

THE COURT: It's what we talked about in the beginning. It's not code on the server at Blizzard?

MR. GENETSKI: It's not. But it's also not just code on the client.

THE COURT: All right. In order for a measure to effectively control access to a work, 1201 (a)(3)(B) says that it must in the ordinary course of operation require the application of information or a process or a treatment with authority of the copyright owner to gain access to the work.

To the extent "the work" is the code on the game

client, you don't need to get past Warden to get access to it. You've got it. It's on your hard drive, right?

MR. GENETSKI: On your hard drive. You don't get access to it in RAM in the game environment where you can actually view the expressive elements.

THE COURT: All right. I understand the expressive elements.

MR. GENETSKI: Okay.

THE COURT: But looking just at the software code, you don't have to get past Warden to gain access to "the work," which is the code on the game client; do you agree?

MR. GENETSKI: I would -- I believe I agree with the caveat that "work protected under the title" is the finish to the sentence and we believe that the work that's protected under the title is the work as it's displayed, the audio visual representation of that code in the online environment.

So with that caveat --

THE COURT: Well, if that's true, then it's only that display that's a DMCA violation under 1201(a)(2)(A), correct?

MR. GENETSKI: It's the access to that code in RAM. Once that code -- on the hard drive you cannot see that code displayed that way. When it's loaded into RAM in connection with the server, then you can see again the expressive --

THE COURT: Well, but without loading it on the server, without getting past Warden, you can still get full

access to the code on the game client, right?

MR. GENETSKI: Yes. The ones and zeros, the object code sitting on the client, yes, you can move it around.

The analogy, if I may, the analogy I would use is, you know, if an iTunes music file which are protected by rights protection, you can copy and move those files from one hard drive to another, but your ability to hear the music is dependent upon playing it in a manner that is consistent with your license rights to listen to the song.

And I think that's the analogy I would use here for the ability to move the static code of the client from one hard drive to another or to cut-and-paste it into Notepad, does not, in effect, give you real access to the protected work.

THE COURT: All right. I understand your position.

MR. GENETSKI: I think I will use whatever remaining time I have, if I may, to move ahead to tortious interference.

THE COURT: Okay. You'll have to it quickly, because you don't have much time.

MR. GENETSKI: I promise not to do any name calling, but I think that the crux of this issue clearly comes down to two of the elements of the tortious interference claim. The briefs are pretty clear, with the primary one being that the improper purpose element, and the second one being the harm element.

And I think the key distinction to make on the

improper purpose -- and we both agree on the seven-part Restatement test, but I think posited the *American Airlines* case, which we rely heavily on in our brief, because we feel like it is in our exhaustive research, and I assume MDY's, by far the most relevant case we could find to this fact pattern, versus *Bar J Bar*, which is one of the primary Arizona tortious interference cases under the same Restatement tests that MDY relies upon, I think you see the difference.

All the cases that MDY is relying on are the sort of traditional tortious interference cases where you have two competitors. And in the *Bar J Bar* case you have a third party who owns land and leases it to the plaintiff. The defendant comes in and convinces the third party to sell the defendant the land. Plaintiff then has its rights to use that land terminated and sues the person who convinced the third party to sell.

And the court there said, Look, the plaintiff could have negotiated in his contract a right of first refusal to buy that property, if that was important to him. And the court was loath, absent some indication of fraud or inequity on the part of the defendant, to interfere with the third party's right to make a choice that was a valid choice under the contract.

That's not this case. This case is not a case of two competitors or of MDY honestly persuading users of World of Warcraft of a better game for them to play or even a better way

to play our game.

What he is focusing on is like the ticket broker in *American Airlines*, what he is inducing, what he is selling is, I am -- I've got a way to let you cheat and get ahead of everyone else in the game and the key selling point for me is I'm better at helping you conceal those breaches so you can cheat for as long as you want to your full game without Blizzard detecting you, with no consequence.

That's the essence of his offer to those users, which is akin, I believe, to the ticket broker. Again, ticket broker seems to be our closest analogy here. The ticket broker in *American Airlines* saying, Let me help you get the free seat on American Airlines in violation of their contract.

If you follow my steps, I will support you through this. I have come up with a system that works. We believe that that's effectively what MDY is doing here and that *American Airlines* case said, you know, does it fit that neatly into the seven-factor test?

But that is as clear a type of inequitable and improper purpose as you can have to conduct -- to basically engage in an agreement with your users to help assist them in concealing breaches and eliminate Blizzard's right to enforce.

Blizzard -- it would be as if the third party -- Blizzard is the third party in the tortious interference cases. They did bargain for the right to be able to handle this

problem on their own by contract. They have spent a million dollars a year on research and enforcement costs trying to eliminate this problem.

They're going to the wall with their contracts and with their technological measures to try to combat the problem. They are just not winning. And to say that it's honest persuasion and the ability to knowingly encourage these breaches on a record where he stated candidly -- and candidly has not disputed -- on the record in this case that his goal is to drive up Blizzard's costs to the point where they give up.

And he has candidly stated that he knows people don't like bots in the game. He knows that bots are bad for the game and will -- could eventually ruin the game for everyone, but yet he persists, and we think that is clearly a case of tortious interference.

THE COURT: Okay. I understand that point.

Thank you, Mr. Genetski.

MR. GENETSKI: Thank you, Your Honor.

MR. VENABLE: Your Honor, may I have five minutes in rebuttal?

THE COURT: No. I don't have time to give you five minutes. I will give you two. I have some other things I need to attend to, but why don't you --

And I do have a question for you on another matter, Mr. Venable, but why don't you take two minutes to address the

things you think I need to hear.

MR. VENABLE: Yes, Your Honor, very quickly.

When Mr. Genetski was talking about the copyright issues and you were trying to find this distinction between whether a violation of one section and another -- or another section would be an infringement, it says right in the opening part of their -- the end-user License Agreement, Your Honor.

"If you do not agree to the terms of this agreement, you are not permitted to install, copy, or use the game. If you reject the terms of this agreement within 30 days after purchasing the game, you may request a full refund."

It does not specify which terms you have to choose to enforce or which terms you don't. A person who reads this agreement, I believe -- and at least I think that is what they will try to, you know, argue this is the interpretation -- is that it's any term. They don't get specific about which terms would be a violation of the copyright law. And it's really about what would a person who reads this adhesion contract expect under the copyright laws?

So if you call your character Michael Vick, it seems to me that a person who follows their logic, I wouldn't know that that would not be a copyright infringement if I did Michael Vick, but I decided to use Glider instead.

Let's see. Oh. They mentioned this part about that what they do is they reserve the right to return the disk.

Well, it's interesting to note, Your Honor, is that when you buy the software from Best Buy, they tell you that if you would like to request a full refund, you can get the refund, but they never ask you for the disk back. That's right in the agreement, Your Honor.

So then if they give me the money back for my disks, they never say I have to take the disks back to Best Buy and give it back to them. That's a clear indication, Your Honor, that the person who buys that software is an owner, because they don't even ask for it when they give you the refund.

The other thing, Your Honor, when he refers to this "subject to" language, and this is supposed to be the whole basis for why they can say that there is a copyright infringement, Your Honor, that's not what it says in the *Sun* case and that's Ninth Circuit law.

Ninth Circuit in *Sun* said the enforcement of a copyright license raises issues that lie at the intersection of copyright and contract law, an area of law that is not yet well developed. We must decide an issue of first impression, whether there are two sophisticated parties have negotiated a license agreement and dispute its scope. The copyright holder who has demonstrated likely success on the merits is entitled to a presumption of irreparable harm. However, we hold that it is only, but only after the copyright holder has established that the disputed terms are limitations on the scope of the

license rather than independent contractual covenants. In other words, before Sun can gain the benefits of copyright enforcement -- which is what Blizzard is trying to do -- it must definitively establish that the rights it claims were violated were copyright and not contractual.

They have not done that, Your Honor. There is absolutely nothing in either of these two agreements that say when you use his software, when you use Glider, that that is somehow a copyright infringement.

And this was -- this case involved the negotiation of two very sophisticated parties. Certainly, you're not going to expect that when a person signs up online to sign -- to click on an adhesion contract that they probably don't even read in the first place.

THE COURT: Well, it seems to me, Mr. Venable, that's the issue I have to decide. I have to construe this contract and I have to decide if the terms that they are saying are limitations on scope are, in fact, limitations on scope, or whether they are mere affirmative contract limitations.

MR. VENABLE: And also -- I'm sorry -- and also, Your Honor, whether or not somebody who reads it would understand it to mean that.

THE COURT: Well, that's what I wanted to ask you about. You argue in your brief the reasonable expectation doctrine, which is a doctrine of Arizona law.

Don't these agreements choose Delaware law as the governing law?

MR. VENABLE: I don't know, Your Honor. I think -- well, maybe they do.

THE COURT: Section 14 of the EULA, 14(F), I think it is, chooses Delaware law.

If so, should I be looking at Arizona's reasonable expectation law when interpreting this contract?

MR. VENABLE: You know, Your Honor, I honestly don't know the answer to that question. But I believe that at least in interpreting, I think the reasonable expectations of any party should be to be able to read an agreement and understand what it means; and certainly, if it's an adhesion contract.

And finally, Your Honor, this argument that Mr. Genetski makes about the -- or I should say, second to the last thing I wanted to make real quickly, the loading into RAM is what is protected under the DMCA. And that when you -- when this Warden or Scan.dll protects it, that it's preventing you from being able to see these pictures and the animation, Your Honor, that's actually not true.

You can use a program called ModelViewer. It's readily available online. You can use this program and you can load all the code that's on your hard drive and actually see the game being played without it actually -- you don't even need an account to do this, Your Honor.

There is nothing that Warden or Scan.dll prevents you from being able to do that. It's just simply not effective software to stop you. And more importantly, Your Honor, it's not designed to prevent someone from being able to get access to the code. It's designed specifically to try to detect third-party software.

Lastly, Your Honor, they make reference to this *American Airlines* case for the tortious interference. And with regard to that, Your Honor, that is a completely different case. First and foremost, it is a Utah case.

The Arizona state law adopts the Restatement and everybody in Arizona uses the *Wagenseller* case to be able to determine. Factually, maybe these cases are slightly different, but the issue of whether or not someone tortiously interferes is explicit in Arizona law that you have to be using more than just honest persuasion.

And in the *American Airlines* case, the guy that was doing all of the bad behavior was not doing the same behavior that my client was. This guy was actively involved in inducing and scheming and lying to American Airlines to try to get them to do --

THE COURT: Right. I understand.

MR. VENABLE: -- to do certain things.

THE COURT: I understand that. You made that point in your brief and I understand it's a Utah case.

MR. VENABLE: Okay. Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Venable.

All right, counsel. I will take this matter under advisement and I will get you an order. Thank you very much.

MR. VENABLE: Thank you.

MR. GENETSKI: Thank you, Your Honor.

(Proceedings adjourned at 4:24 p.m.)

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C E R T I F I C A T E

I, ELIZABETH A. LEMKE, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 20th day of April, 2009.

s/Elizabeth A. Lemke
ELIZABETH A. LEMKE, RDR, CRR, CPE