

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellants Internet Gateway, Inc., Tim Jung, Ross Combs and Rob Crittenden (“Appellants”) seek to overturn the District Court’s entry of summary judgment in favor of Appellees Davidson & Associates, Inc., D.B.A. Blizzard Entertainment,¹ and Vivendi Universal Games, Inc. (“Blizzard”), and denial of summary judgment for Appellants. There is no dispute between the parties concerning material facts, and the appeal concerns application of law to the facts. Application of the Digital Millennium Copyright Act (“DMCA”) to the facts of this case fully supports affirmance of Appellants’ violation of the DMCA’s anti-circumvention and anti-trafficking provisions, and Appellants’ ineligibility for any exemption thereto. Application of the well-established law of contracts and copyright preemption fully supports affirmance of the finding that Appellants breached their binding agreements with Blizzard not to reverse engineer or take other steps which they admittedly did in the development, use and distribution of their circumvention device.

Blizzard requests thirty minutes for oral argument per side.

¹ On December 3, 2004, Blizzard Entertainment was separately incorporated as Blizzard Entertainment, Inc., a Delaware corporation.

CORPORATE DISCLOSURE STATEMENT

Appellees, Davidson & Associates, Inc., d/b/a Blizzard Entertainment, and Vivendi Universal Games, Inc., pursuant to Rule 26.1, F.R.A.P., and Eighth Circuit Rule 26.1A, disclose the following information:

1. *All parent corporations:* Vivendi Universal Publishing Acquisition Company, Vivendi Communications North America, Inc., Vivendi Universal S.A.
2. *All publicly held companies owning 10% or more of Appellees' stock:* Vivendi Universal S.A.

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STATEMENT OF THE ISSUES

The District Court properly applied the DMCA to bar Appellants' circumvention of Blizzard's encryption program restricting access to online play of its copyrighted games, and to bar Appellants' trafficking in the circumvention device. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

The District Court properly held that Appellants' circumvention device was not exempted from liability under the DMCA. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

The District Court properly followed this Circuit's law to find that the Copyright Act does not preempt Blizzard's enforceable licenses that accompany its games. *National Car Rental System, Inc. v. Computer Associates Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993).

STATEMENT OF THE CASE

Blizzard accepts Appellants' statement of the case and adds the following supplemental information about the Consent Decree and the decision below.

Consent Decree:

The Consent Decree agreed to by the parties and entered by the District Court (see Blizzard's Addendum) states the following concerning copyright infringement:

1. Copyrighted materials created by Blizzard, including code, files and images from Blizzard's Battle.net server and game clients, were duplicated and incorporated into Defendants' bnetd server program without Blizzard's authorization; ...

A. Defendants are permanently enjoined from knowingly writing or contributing computer code, performing network packet analysis ("packet sniffing"), disassembling or decompiling computer programs, submitting patches, or otherwise taking an active development role in connection with any project or program whose purpose is to interact with or emulate gaming software created or developed by Blizzard;

Further, Blizzard chose to forego its monetary claims in this case and to seek only injunctive relief. As stated in the Consent Decree:

B. This decree shall also constitute the full and complete relief to Plaintiffs and Defendants for and in respect to all monetary relief, costs, or fees related to this action,

Decision Below:

The District Court held that Blizzard's license agreements with end users of its games are enforceable contracts under both California and Missouri law.

Davidson & Associates, Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1177

(E.D. Mo. 2004). The District Court also held that Blizzard's license agreements

are enforceable under the Uniform Commercial Code. *Id.* The District Court

further held that Blizzard's license agreements are not procedurally or

substantively unconscionable. *Id.* at 1179-80. Appellants do not appeal any of

these holdings. *See* Appellants' Brief ("App. Br.") 1-2.

The District Court held that Blizzard’s license agreements “do not constitute copyright misuse,” and was “reluctant to apply the copyright misuse defense to a contract claim.” *Id.* at 1182. The District Court concluded, “Therefore, the copyright misuse defense fails.” *Id.* at 1183. Appellants do not appeal this holding. *See* App. Br. 1-2.

STATEMENT OF THE FACTS

I. **BLIZZARD ENTERTAINMENT.**

Davidson & Associates, Inc., d.b.a. Blizzard Entertainment, and Vivendi Universal Games, Inc. (collectively “Blizzard”) create and license computer games that are played on personal computers. DER 352. Blizzard’s games have become extremely popular since the first game was released in 1994, having sold millions of copies and generated revenue in excess of \$480 million since 1998. DER 352. Blizzard’s games have also received numerous accolades, including several “Game of the Year” awards. DER 352.

A. **Blizzard Games.**

Blizzard offers several computer games that are at issue in this litigation, including StarCraft, StarCraft: Brood War and WarCraft II: Battle.net Edition. DER 352. These games are distributed to consumers on CD-ROM media subject to license agreements. DER 355. Consumers purchase a copy of the CD-ROM and a license to use the game when they buy a Blizzard game package. Blizzard games are capable of being played online against the computer, locally against one or more friends, or over the Internet in “online” play. DER 353.

Blizzard has valid copyright registrations covering each of its computer games at issue in this litigation. DER 352. Blizzard has a valid copyright registration covering Battle.net®, its proprietary server software that facilitates the

online play of Blizzard games. DER 352. Blizzard's icons, graphical images that are displayed during online play of its games, are included in some of Blizzard's game copyright registrations and in the Battle.net server copyright registration. DER 372.

B. Online Play Of Blizzard Games.

Each Blizzard game copy distributed on CD-ROM includes the means for the game to engage in online play through Blizzard's Battle.net servers, and a license to do so. DER 352, 355-57. The games are programmed to access Blizzard's Battle.net servers from the user's personal computer. DER 353. The server matches authorized Blizzard games to play against each other over the Internet ("Battle.net Mode"). DER 353. Battle.net Mode also allows users to create and join Internet multiplayer games, to "chat" with other potential players, to record wins and losses and save advancements in a password protected individual game account, and to participate with others in tournament play. DER 353. These unique features are accessed from within the games themselves, but only when the games engage in online play. DER 353. The great popularity of Blizzard's games arises from the ability to engage in online play in Battle.net Mode. DER 352. Blizzard offers one of the largest online gaming networks in the

world, with nearly 12 million active users who spend more than 2.1 million hours online per day. DER 352.

The online play of Blizzard games and access to Battle.net Mode is included with the purchase of a license to use Blizzard games. DER 352-53. Online play and Battle.net Mode are not sold separately from Blizzard games; Blizzard offers online play at no separate cost to its game customers. DER 353. The availability of online play as part of Blizzard games creates value for Blizzard in several ways. Most significantly, Blizzard's method of allowing online play of its games requires purchase of genuine copies of Blizzard games, since games that have been illegally copied and distributed ("pirated" games) ordinarily cannot access Battle.net Mode. DER 354.

Further, while in online play, the Battle.net servers display "ad banners" on the computer screens of Blizzard game users. DER 354. An ad banner is an electronic advertising space found on many commercial websites. DER 354. In addition to generating revenue by selling the advertising space to other companies, Blizzard also uses ad banners to "cross sell" its own games and related products, such as books and t-shirts. DER 354.

C. The “Secret Handshake” To Gain Access To Online Play -- A Technological Measure To Restrict Access To Blizzard’s Copyrighted Works.

Recognizing that its games can be easily copied and distributed over the Internet, DER 353, Blizzard distributes its games with an authentication process for online play. Authorized Blizzard games come with a unique alphanumeric string of characters called a “CD Key” that is printed on a sticker affixed to the case for the CD-ROM of the game. DER 355. Blizzard does not disclose the methods it uses to generate CD Keys. DER 368. The user of the game must input the CD Key into his or her computer when installing the game; it is then permanently stored in the computer for use in logging on to the Battle.net servers. DER 355. Thus, unauthorized copies of Blizzard games available over the Internet and elsewhere lack the unique CD Key critical to the authentication of these games.

To ensure that only legitimately purchased copies of Blizzard games would be played online, Blizzard designed a protocol that checks the game CD Key for authenticity and duplication each time a game tries to enter online play. DER 355. Blizzard restricts access to online play to games with a valid CD Key. DER 355. To commence online play, the Blizzard game is programmed to access a Battle.net server. The game then initiates an authentication sequence or “secret handshake”

between the game and the Battle.net server. DER 355. Both the game and the Battle.net server perform parallel calculations through an encryption sequence and compare the results to see if they match. This determines whether the game is using an authorized, unique CD Key and thus is an authorized copy. DER 355. The game performs this encryption to prevent unscrupulous individuals from stealing the game's CD Key when it is transmitted over the Internet to a Battle.net server. DER 355.

Blizzard games are programmed to deny access to online play until they receive an "OK" signal from the Battle.net server. DER 356. If the CD Key is both valid and not currently being used by other players, the Battle.net server sends a signal to the game indicating "OK." The game is programmed to then allow the game to commence online play, granting access to Blizzard's copyrighted game, icons and related works in Battle.net Mode. DER 356. If the game does not receive any message from the Battle.net server, or receives a negative message, the game will not commence online play and the user is denied access to online play of the game. DER 356. This authenticity check is a technological measure to control access to online play of its games, hence the term "secret handshake."

D. Blizzard's End User License Agreements And Terms Of Use.

In addition to the use of technological measures to restrict access to its copyrighted works, Blizzard distributes its games on CD-ROM containing and subject to an End User License Agreement (“EULA”). DER 356-57. The EULA permits the licensee to use the game in a variety of different ways at the player’s option: to play alone against the computer; to play on a local area network against friends who also have purchased licensed copies of the game; to play online in a private game; and to play online with other game enthusiasts who “meet” over the Internet to play Blizzard games through matchmaking by Blizzard’s specially designed Battle.net servers, or in “Battle.net Mode.”

The fact that the game CD-ROM is sold subject to a license is stated on the outside packaging of the game. DER 358. The EULA is displayed to the user during the initial installation of the Blizzard game. DER 356. The user must agree to the EULA by clicking on an “Agree” button, or the game will not install. DER 357. A licensee who does not agree to the EULA may return the game within thirty days of purchase and receive a full refund of the purchase price. DER 358.

In addition, before a user is allowed to access online play of Blizzard games, the user must agree to the Battle.net Terms of Use (“TOU”) by clicking on yet another “Agree” button. DER 357. The TOU are displayed when the user first

accesses the Battle.net server. DER 357. A user who does not agree to the TOU may return the game within thirty days of purchase and receive a full refund of the purchase price. DER 358.

Among other things, the EULA and TOU prohibit (1) disassembling, decompiling or otherwise reverse engineering the game software or the Battle.net service; (2) hosting or providing matchmaking services for the game (i.e., creating environments to allow users to play against each other, apart from the types of play permitted under the EULA); (3) using “utility programs” to enable network play of the games over the Internet; and (4) emulating (mimicking) or redirecting the communication protocols used by Blizzard for the Battle.net service. DER 358-59.

II. APPELLANTS’ BNETD SERVER PROGRAM.

Appellants developed the “Bnetd” server program to enable unauthorized online play of Blizzard games without connecting to Battle.net. DER 362. The Bnetd server program is an “emulator” that provides matchmaking services for Blizzard games to play against each other online. DER 362. Appellants Ross Combs, Rob Crittenden and Tim Jung were lead developers for the Bnetd server. DER 362. All three individual Appellants have, at some point, installed Blizzard games and agreed to Blizzard’s EULA. DER 360. In addition, at least two

Appellants have used Blizzard games to play online through Battle.net Mode, and agreed to Blizzard's TOU. DER 360.

Appellants' goal in developing the Bnetd server was to implement all of the "user-visible" features of the Battle.net service. DER 362. Appellants further claim that the Bnetd emulator was created for "hack value"² and to address perceived deficiencies in the Battle.net service. DER 361. Appellants offered the additional justifications that users should not be "forced" to view advertisements displayed via the Battle.net service, and that it is "wrong in a moral sense" for Blizzard to require users to agree to the TOU. DER 361.

A. Development of the Bnetd Emulator.

Appellants admitted to "reverse engineering"³ Blizzard games in the development of the Bnetd emulator. DER 365. For example, they used sophisticated programming tools to capture and analyze information sent over the Internet between Blizzard games and the Battle.net servers. DER 365. Appellants also used a "ripper" program to disassemble "Blizzard client files which were

² "Hack value" is generally defined as the "reason or motivation for expending effort toward a seemingly useless goal" Free Online Dictionary of Computing, at <http://wombat.doc.ic.ac.uk/foldoc/foldoc.cgi?query=hack+value>.

³ Reverse engineering is the process of "starting with [a] known product and working backwards to divine the process which aided in its development or manufacture." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).

compiled together into one file and break them into their component pieces.” DER 366. The ripper program was used to figure out how Blizzard games displayed ad banners so the Bnetd emulator could strip out Blizzard’s ad banners and display its own advertisements to users. DER 366. Similarly, Appellants tried to disassemble a Blizzard game to figure out how to implement a feature that allowed Bnetd to protect the password that the user enters when creating an account in Battle.net Mode. DER 366. As a result of this reverse engineering, Appellants were able to incorporate into the final Bnetd emulator server over 50 of Blizzard’s copyrighted graphical images that Blizzard displays to the user of the game when playing online as well as additional code from two Battle.net games. DER 373.

B. Technology of the Bnetd Emulator.

Blizzard games are programmed to connect only to Battle.net servers. DER 366. To trick Blizzard games into connecting to a Bnetd emulator instead, Appellants created a program to modify the part of the Blizzard game that contains the Internet addresses for Battle.net servers. DER 366-67. Accordingly, without Blizzard’s authorization, Appellants helped write a utility program called “BNS” to allow Blizzard games to also connect to servers running the Bnetd emulator. DER 366-67. As the bnetd.org website states, this BNS utility “should also be considered part of the bnetd project.” DER 366-67.

Once a Blizzard game has been altered so that it will connect to a Bnetd emulator, the game sends the emulator encrypted information about its CD Key, just as it would if it were communicating with a real Battle.net server. DER 367. However, unlike Blizzard's Battle.net servers, when the Bnetd emulator receives the encrypted CD Key information from the game, it does not run a parallel encryption program and comparison to determine whether the CD Key is valid or currently in use by another player. DER 367. Instead, upon receipt of the CD Key information, the Bnetd emulator always sends the Blizzard game an "OK" reply. As described above, when the game receives an "OK" reply, it will then provide access to online play. DER 367. Thus, the emulator allows users without valid CD Keys to access online play and Battle.net Mode. DER 368. In the absence of the false "OK" reply, the game would not allow users to access online play and Battle.net Mode. DER 355-56. Thus, Appellants' Bnetd server avoids, bypasses and impairs Blizzard's authentication check without Blizzard's authorization, enabling unauthorized access to online play of Blizzard games, including games that do not have authorized CD Keys and thus would not otherwise be allowed to engage in online play.

C. Distribution Of The Bnetd Emulator.

Appellants were aware that the Bnetd emulator server enabled pirated versions of Blizzard games to access online play in Battle.net Mode. DER 367, 370. In fact, at least one of the Appellants played a pirated version of a Blizzard game on a Bnetd emulator. DER 370. Appellants made copies of the Bnetd emulator available to others over the Internet. Appellants posted the Bnetd server program on the www.bnetd.org website for download by anyone visiting the website. DER 364, 370-71. This website was made available to the public through Appellant Internet Gateway, Inc., an Internet service provider co-owned and operated by Appellant Jung. DER 351, 364, 371. In addition, Appellant Combs made the Bnetd emulator software available on his website located at www.cs.nmsu.edu/~rocombs/sc/. DER 371. Appellants also posted the BNS utility and the source code for the Bnetd emulator, as well as versions of the emulator that could be hosted by others with minimal computer skills, “[t]o make it more convenient for users” to set up and access the emulator. DER 371. Finally, Appellant Internet Gateway operated a Bnetd emulator server that anyone on the Internet could access and use to play Blizzard games -- authentic or pirated -- in unauthorized online play. DER 371.

Appellants' use and distribution of the Bnetd server program had a negative commercial impact on Blizzard by enabling users of pirated copies of Blizzard games to gain online access. DER 367, 379. This enabled copyright infringement, decreasing sales of Blizzard games, and denying Blizzard advertising opportunities. DER 354.

Appellants widely distributed the Bnetd emulator program and encouraged others to use, develop and distribute it, and hosted sites offering its use to others, DER 364, knowing that the device facilitated the play of pirated Blizzard games. DER 366-68.

SUMMARY OF ARGUMENT

The owner of a copyright has the exclusive right to make copies of the work, or to license others to do so. For centuries, the technology for making large numbers of illicit copies could only produce copies that were inherently inferior and easily spotted, so widespread copying was rarely of economic concern. All of this changed in the computer age when the availability of digital technology made it possible to make copies with 100% accuracy at virtually no cost.⁴ Illicit copying

⁴ Before data was recorded in digital form, all copying processes produced “analogs” of the original and involved a loss of accuracy and precision. Copies of copies compounded the errors (which is why photocopies of photocopies are often unclear or illegible). But so long as the digits in a copied string of digitized data are

moved from the realm of a few painstaking counterfeiters to anyone with a desktop computer.

Creators of works distributed in digitized form -- including computer software, music, movies and games -- responded by building in technological measures that either prevent copying or prevent full use of a copy of the work, and by using license agreements restricting use and access. But given sufficient time and energy, *all such technological measures are subject to circumvention, and the type of person that circumvents such measures rarely pays attention to contractual restrictions.* Indeed, there are many who work to defeat these measures as a sport, a challenge,⁵ or a claimed right.⁶ This ability to circumvent protective measures creates staggering harm to copyright owners and inhibits the development of online markets for copyrighted works.

the same as in the original, the images or sounds they represent will be indistinguishable from the original source.

⁵ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 320 (S.D.N.Y. 2000) (DVD circumvention code created by hacker who viewed “cracking” DVD encryption as end in itself and means of demonstrating his talent, knowing its use would not be confined to Linux machines), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁶ Appellants are represented by counsel for the Electronic Frontier Foundation (“EFF”), which espouses a very similar philosophy. See <http://www.eff.org>.

Congress reacted by passing the DMCA. This statute met the challenge head on: it prohibited the circumvention and the distribution of products or devices that circumvent technological measures used by copyright owners to restrict access to their work.⁷ Put bluntly, the DMCA is the 21st century version of laws barring the use and sale of burglary tools. “A program that circumvents ‘digital walls’ in violation of the DMCA...is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store’s products” or “a digital crowbar.” *Corley*, 273 F.3d at 453 and n.27.

In this case the undisputed facts show that Blizzard’s games have just such an electronic protective measure, or “lock.” The DMCA makes it unlawful to pick that lock, and by contract Appellants agreed not to do so. Appellants not only picked the lock, but developed a skeleton key and made that key available to anyone who wanted unfettered access to online play of Blizzard’s computer games. The

⁷ “Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied material, Congress sought to combat piracy at its earlier stages, before the work was even copied. The DMCA therefore backed with legal sanctions the efforts of copyright owners to protect their work from piracy behind digital walls such as encryption codes and password protection.” *Corley*, 273 F.3d at 435.

DMCA was enacted to stop precisely the type of conduct demonstrated by the undisputed facts of this case.

Blizzard took two key steps to protect its copyrighted works: (1) it set contractual limits in its game licenses; and (2) it implemented technological means to prevent pirated copies of Blizzard games from being played online.

Copyright license restrictions, the first step, have been repeatedly enforced by the courts to restrict licensees' uses, even when those contracts do not involve individual negotiation, and even when those contracts bar reverse engineering, commercial use, or even rights that are analogous to but not protected by copyright.

Technological measures to restrict access to works, the second step, began with the distribution of copyright works over the Internet,⁸ and now receive specific protection under the DMCA. *See* 17 U.S.C. § 1201(a) and (b).

Appellants, sophisticated computer programmers, circumvented Blizzard's technological measures that control access to its games. They did so in violation of the DMCA and only after they agreed with Blizzard not to do so. Appellants then further violated the DMCA by widely distributing their circumvention device, and

⁸ *See, e.g.*, discussion of motion picture studios' hesitation to release movies in digital form until they had technological safeguards against piracy. *Corley*, 273 F.3d at 435.

through their trafficking enabled rampant piracy of Blizzard games by providing a means for online play of Blizzard games with no check for authenticity.⁹

Appellants seek to avoid liability under the DMCA by urging that they are entitled to an exemption for “reverse engineering” and a copyright defense for “fair use,” claiming that those privileges ought be read very, very broadly for reasons of “public policy.” But Congress took the identical arguments into account in passing the DMCA. Congress was keenly aware of the need for a proper balance between competing interests in copyright law: the societal benefit from both the incentive to create through protection of copyrighted works, and limitations on protection so others can continue to create.¹⁰ Congress debated what exemptions and privileges should apply and determined that the general “fair use” defense to copyright infringement would not apply to a DMCA violation.

⁹ “Congress targeted not only those pirates who would circumvent these digital walls,... but also anyone who would traffic in a technology primarily designed to circumvent a digital wall...” *Corley*, 273 F.3d at 435.

¹⁰ “Congress shall have the Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8; *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (copyright may be defined as a system of intangible property rights that balances the interests of authors to control and exploit their writings with society’s competing interests in the free flow of ideas).

In fact, Appellants and the EFF wish the DMCA did not exist: they disagree not only with application of the DMCA to the facts of this case, but its application to the facts of virtually every case.¹¹ They disagree with the balance struck by Congress¹² and seek to have the DMCA declared unconstitutional.¹³ But this appeal concerns application of current law to the facts of this case -- no more, no

¹¹ Many of the same law professors seeking to support Appellants' position also contributed amicus briefs in *Corley* and *321 Studios* (see Section I, *infra*), but their positions were rejected.

¹² The House Commerce Committee rejected the position of many of the same copyright law professors appearing as amici in this case, when they objected to the "expansion" of copyright law by regulating conduct separate and independent of infringement, saying:

While the Committee on Commerce agrees with these distinguished professors, the Committee also recognizes that the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works--at virtually no cost at all to the pirate. As technology advances, so must our laws.

Besek, June M., *Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts*, 27 Colum. J.L. & Arts 385, 483 (2004) (hereinafter, "*Anti-Circumvention Report*"), citing H.R. Rep. No. 105-551, at 25 (1998).

¹³ The EFF filed amicus briefs in *321 Studios* and *Elcom* (see Section I.C.1, *infra*) seeking unsuccessfully to have the DMCA declared unconstitutional.

less. This is precisely the type of case the DMCA was intended to address, and Blizzard's concerns are the grievances the DMCA was intended to remedy.

Appellants then seek to avoid their contracts with Blizzard on the grounds that the terms are preempted by the Copyright Act. They do this despite the overwhelming case law rejecting their position -- and the complete lack of case law supporting it. In fact, this Court could ignore the DMCA altogether and still affirm the findings of the District Court because, separately, contract law also provides relief for Blizzard's grievances.

APPLICABLE STANDARD OF REVIEW

The District Court's grant of summary judgment is reviewed *de novo*. "The district court's decision should be affirmed if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Grey v. City of Oak Grove*, No. 03-3532, 2005 WL 195447, at *3 (8th Cir. Jan. 31, 2005).

ARGUMENT

I. APPELLANTS VIOLATED THE ANTI-CIRCUMVENTION AND ANTI-TRAFFICKING PROVISIONS OF THE DMCA AND THEIR CONDUCT IS NOT EXEMPT FROM LIABILITY.

Blizzard proved all of the elements of illegal circumvention and trafficking under the DMCA. Appellants' efforts to squeeze their violative conduct within the

reverse engineering exemption to DMCA liability or to create a general “fair use” defense failed below and deserves rejection on appeal as well.

In the short history of the DMCA, the Second Circuit and several district courts have held conduct similar to that of Appellants violative of the DMCA. In *Corley*, the Second Circuit affirmed, and in *321 Studios*,¹⁴ *Gamemasters*,¹⁵ and *RealNetworks*,¹⁶ the district courts found DMCA violations and rejected fair use defenses where offered under similar facts: limited access to electronic entertainment products was provided to the public, and unauthorized tools were developed and distributed to gain broader, unauthorized access, thereby enabling widespread piracy.

Appellants seek a ruling that would gut the DMCA. While the DMCA was passed as a tool to prevent piracy, Appellants attempt to use the DMCA to justify it.

¹⁴ *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

¹⁵ *Sony Computer Entertainment America, Inc. v. Gamemasters*, 87 F. Supp. 2d 976 (N.D. Cal. 1999).

¹⁶ *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99 CV 02070, 2000 WL 127311 (W.D. Wash. 2000) (copy in Blizzard’s Case Appendix). Although this is an unpublished decision, it has been cited in subsequent reported decisions under the DMCA.

A. Blizzard Established A Prima Facie Case Of Appellants' Violation Of The Anti-Circumvention And Anti-Trafficking Provisions Of The DMCA.

Appellants assert the same two grounds to attack both the District Court's findings of their violations of the circumvention¹⁷ and trafficking¹⁸ prohibitions of the DMCA. App. Br. 51-52. First, they allege that Blizzard's digital walls do not protect works subject to copyright protection. Second, they allege that Blizzard's digital walls do not effectively control access to Blizzard's works. Neither assertion is correct. Notably, Appellants do not contest that they circumvented

¹⁷ "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a)(1)(A).

¹⁸ "No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component or part thereof, that--

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

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

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

17 U.S.C. § 1201(a)(2). See *Remierdes*, 111 F. Supp. 2d at 317 (S.D.N.Y. 2000) (defendants trafficked by making the circumvention device available for download on their website).

Blizzard's gatekeeping encryption technology and anti-piracy solution, or that they trafficked in the circumvention device.

1. Blizzard's Technological Measures Protect Access to "A Work Protected Under this Title."

Blizzard used technological measures contemplated by the DMCA to protect access to its copyrighted works, and Appellants intentionally circumvented those controls. No one questions that Blizzard's computer games are registered copyright works protected by the Copyright Act. DER 73-90 (Certificates of Copyright Registration); Consent Decree at 1. The works to which the technological measures restricted access were Blizzard's copyrighted computer games, graphical images and related programs, which Appellants admit copying. *See* Consent Decree at 1.¹⁹

Appellants argue that Blizzard's "Battle.net Mode" is strictly functional and not protected by the DMCA. App. Br. 52-53. In fact, Blizzard's copyrighted computer games and related programs are the protected works. Appellants created a functional alternative for "Battle.net Mode" by circumventing Blizzard's encryption program that served as its technological measure. Blizzard's digital

¹⁹ Appellants' references to the Consent Decree dismissing Blizzard's copyright counts omit the fact that the Consent Decree also includes Appellants' admission that they copied and incorporated Blizzard's copyrighted works without authorization. Consent Decree 1; *see* App. Br. 9-10, 45, 51.

lock protects access to Blizzard’s copyrighted computer games and related programs in online play. Appellants gained access to Blizzard’s games in online play without authorization and without Blizzard’s authenticity check to prevent piracy. The aspect of “Battle.net Mode” relevant here is online play of Blizzard games, to which Blizzard expressly limits access and which digital lock Appellants picked. *See, e.g., Corley*, 273 F.3d at 443 (DMCA violation by breach of digital wall restricting access to DVDs; circumvention device enabled unauthorized access to and copying of movies); *321 Studios*, 307 F. Supp. 2d at 1094-95 (enjoining distribution of device to circumvent digital controls on DVDs as a DMCA violation); *Gamemasters*, 87 F. Supp. 2d at 987 (Sony’s encryption program restricted access to computer games, and was breached by Gamemasters’ device that enabled unauthorized access to and copying of Sony’s games).

Appellants’ reliance on *Lexmark Int’l, Inc. v. Static Control Components, Inc.*²⁰ is misplaced. There the court found that the works protected from access by a technological measure were functional and not subject to copyright protection, thus finding no DMCA violation in unauthorized aftermarket toner cartridges that work with Lexmark’s printers. *Id.* Unlike Blizzard’s computer games, icons and related software, Lexmark’s protected software served *solely* functional purposes,

²⁰ 387 F.3d 522 (6th Cir. 2004).

such as reading the amount of toner or directing a paper feed through the printer. Here, in contrast, the software to which access was protected includes Blizzard's copyrighted game software, the very essence of Blizzard's creative product.²¹

The Sixth Circuit in *Lexmark* distinguished those facts, where the code was not accessed for “expressive purposes,”²² 387 F.3d at 558, from situations where the DMCA does apply because the protected software is used for expressive purposes. For example, the Sixth Circuit *would* apply the DMCA to protect computer games like Blizzard's because “the program commands in software for video games or computers translate into some other visual and audio manifestation ... and restricting ‘use’ of the work means restricting consumers from making use

²¹ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004), which found no DMCA violation in unauthorized aftermarket remote controls for garage door openers, is likewise distinguishable. Unlike here, Chamberlain did not allege copyright infringement or contributory infringement. *Id.* at 1197. Further, the aftermarket remote control made only legitimate use of Chamberlain's software in the openers to open garage doors. Skylink's circumvention did not cause piracy of the work. *Id.* at 1198.

²² Prof. Jane Ginsburg's testimony in hearings prior to enactment of the DMCA specifically argued that printer cartridges and garage door openers should not fall within DMCA protection. *Lexmark*, 387 F.3d at 549. In contrast, the DMCA's protections “facilitate making available quickly and conveniently via the Internet the movies, music, software and literary works that are the fruit of American creative genius.” S.Rep. No. 105-190, at 65 (1998) (Statement of Mr. Leahy of the Committee on the Judiciary).

of the copyrightable expression in the work.”²³ *Id.* at 548. Thus, *Lexmark* supports the finding that Blizzard’s games are works protected under this title and that Appellants’ conduct constitutes DMCA violations.

2. **Blizzard’s Technological Measures “Effectively Control Access” To Blizzard’s Copyrighted Works.**

The encryption routine in Blizzard’s games “effectively control access”²⁴ to works protected under this title, *i.e.*, Blizzard games in online play, as required by the anti-circumvention and trafficking sections of the DMCA. Appellants miss the point by asserting that the ability to read the literal code on the game CD-ROM somehow obviates the control that Blizzard’s technological measures exert to prevent unauthorized access to online game play. App. Br. 59. *See Lexmark*, 387 F.3d at 548-49 (the DMCA only protects content that would otherwise be

²³ “[T]he DMCA applies in these settings [referring to *Corley*, 321 *Studios* and *Gamemasters*] when the product manufacturer prevents all access to the copyrightable material and the alleged infringer responds by marketing a device that circumvents the technological measure designed to guard access to the copyrightable material.” *Lexmark*, 387 F.3d at 548.

²⁴ “[A] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” 17 U.S.C. § 1201(a)(3)(B).

unavailable to the consumer). While a consumer could *read* the game code and encryption code from Blizzard’s game CD-ROM, the consumer can only gain access to *play* the game online by performing Blizzard’s “secret handshake.” See *RealNetworks*, at *9-10 (preliminarily enjoining trafficking in devices that circumvented copyright owners’ access restrictions, i.e., their “secret handshake”).²⁵

In fact, despite protracted efforts Appellants could not break the encryption code and could not enable unauthorized access to online play without circumventing the code.²⁶ Reading the encryption code without being able to break it, or reading the copyrighted game program without being able to access it for online play, is not equivalent to obtaining access to online play.

²⁵ In *RealNetworks*, music and movies were delivered online by “streaming” under a technological measure that allowed the consumer to view the movie or hear the music, but prevented the “stream” from being copied or remaining on the computer for further use or copying. *RealNetworks*, at *1-2. Streambox overrode the on/off switch by circumventing the “secret handshake” and enabled unauthorized copying of the copyrighted works in violation of the DMCA. *Id.* at *8.

²⁶ Appellants erroneously claim that the Battle.net server code is entirely present on the game CD-ROM. App. Br. 59.

Blizzard therefore uses an encryption program to restrict access to its copyright works. Its encryption program effectively controls access.²⁷ The fact that Appellants ultimately figured out how to circumvent Blizzard’s access control does not diminish the statutory “effectiveness” of Blizzard’s control. A technological measure “effectively controls access” even if an “enterprising end user” can evade it. *RealNetworks*, at *9. A copyright owner is not obligated to create an “impervious shield.” *Lexmark*, 387 F.3d at 549; *see also Reimerdes*, 111 F. Supp. 2d at 318 (measure effectively controls access “if its *function* is to control access”) (emphasis in original); *321 Studios*, 307 F. Supp. 2d at 1095 (access control is effective despite ready availability on the Internet of the device to bypass DVD access control).²⁸

²⁷ *Cf. Agfa Monotype Corp. v. Adobe Systems, Inc.*, No. 02 C 6320 (N.D. Ill. Jan 13, 2005) (digitally embedded description of license terms did not effectively control access to licensed type fonts in PDF files because description was not encrypted, scrambled or authenticated; passive description merely indicated vendor’s preferences).

²⁸ *See also Pearl Investments, LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 350 (D. Me. 2003) (“The question of whether a technological measure ‘effectively controls access’ is analyzed solely with reference to how that measure works ‘in the ordinary course of its operation.’ The fact that [defendant] had alternative means of access to the works is irrelevant”; finding DMCA violation).

Blizzard's anti-theft encryption technology effectively controls access to its copyrighted games and related programs in online play. Appellants' effort to avoid their circumvention and trafficking violations must fail.

B. Appellants Do Not Qualify For The Reverse Engineering Exemption To DMCA Liability In Letter Or Spirit.

Appellants' efforts to broaden the reverse engineering exemption to the DMCA's protection of digital locks into a full-blown fair use defense to a copyright infringement claim is directly contrary to the DMCA and its intent. Appellants admit that if even one of the several requirements described below for application of the exemption is not met, the defense fails. App. Br. 43. The key requirements are:

- Appellants must have lawfully obtained the right to use Blizzard's program for reverse engineering; and
- The "sole purpose" of the reverse engineering must be for the identification of elements necessary to achieve "interoperability" of ...
- An "independently created" computer program; and
- Such acts must not constitute copyright infringement.²⁹

Appellants fail to meet even one of these requirements.

²⁹ See 17 U.S.C. §1201(f), included in Blizzard's Addendum.

**1. Appellants Did Not “Lawfully Obtain The Right To Use”
Blizzard’s Program For The Purpose Of Reverse
Engineering.**

Appellants fail to meet the first requirement of the exemption because they did not “lawfully obtain[] the right to use a copy of a computer program.” 17 U.S.C. § 1201(f)(1).

Appellants purchased licenses to play Blizzard games, and the licenses to which Appellants agreed expressly prohibited reverse engineering. Appellants were never granted -- and never possessed -- any right to use Blizzard’s games for the purpose of reverse engineering. *See 321 Studios*, 307 F. Supp. 2d at 1096 (purchase of DVD does not grant right to circumvent for unauthorized access or “give to the purchaser the authority of the copyright holder”). Thus, Appellants do not qualify for the exemption from liability for their circumvention. As the District Court held, “It is true the [Appellants] lawfully obtained the right to use a copy of the computer programs when they agreed to the EULAs and TOU. The statute, however, exempts only those who obtained permission to circumvent the technological measure, not everyone who obtained permission to use the games and Battle.net.”³⁰ *Davidson*, 334 F. Supp. 2d at 1185, *citing Corley*, 273 F.3d at

³⁰ Appellants cite only the first sentence in their brief, omitting the District Court’s conclusion. App. Br. 44.

444 (“Defendants offered no evidence that the plaintiffs have either explicitly or implicitly authorized DVD buyers to circumvent encryption technology to support use on multiple platforms.”).

2. Appellants Fail The Tests Of “Sole Purpose” Of “Interoperability” Of An “Independently Created” Computer Program With Other Programs.

a. “Interoperability” Was Not Appellants’ “Sole Purpose.”

Appellants cannot establish that they reverse engineered Blizzard’s authentication system for the “sole purpose” of achieving purported “interoperability.” Appellants’ purpose in creating the rogue server was to enable online play of Blizzard games without using Battle.net. *Davidson*, 334 F. Supp. 2d at 1172. Appellants did so by developing a key to bypass Blizzard’s authentication system -- its digital lock -- put in place to prevent piracy of its games. The sole purpose of Appellants’ endeavor was not to identify and analyze Blizzard code to achieve “interoperability” of an “independently created program” with other programs, but to enable unauthorized online play of Blizzard games. As the District Court held, “[Appellants’] actions constituted more than enabling interoperability.... The bnetd emulator developed by [Appellants] always allows the Blizzard game to access Battle.net mode features even if the user does not have a valid or unique CD Key, because the bnetd emulator does not determine whether

the CD Key is valid or currently in use by another player.” *Davidson*, 334 F. Supp. 2d at 1185. Appellants’ claim that it did not affirmatively encourage piracy or help make pirated copies, App. Br. 15, would be irrelevant even if true, since they knowingly enabled online play of pirated copies. *See Reimerdes*, 111 F. Supp. 2d at 320 (developer of circumvention device fully expected that its use would not be confined to Linux machines for alleged “interoperability”; “defendants, however, did not post DeCSS ‘solely’ to achieve interoperability with Linux or anything else”).

While “reverse engineering” was “necessary” for Appellants to determine how to circumvent Blizzard’s access controls, *see Davidson*, 334 F. Supp. 2d at 1172, this *de facto* physical necessity cannot legitimize the illegal goal of Appellants’ endeavor. Appellants set out to gain impermissible access that was digitally locked out by Blizzard. The fact that the lock could not be picked except by “reverse engineering” cannot sanitize otherwise illegitimate conduct that fails to meet the requirements of Section 1201(f), as the District Court held. *Davidson*, 334 F. Supp. 2d at 1185. The fact that Blizzard chose not to disclose its authentication system does not give Appellants the right to circumvent. *Cf.* App. Br. 47.

Further, Appellants admitted using a pirated copy of Blizzard games in the course of their development of the rogue emulator. Because pirated games are infringements of Blizzard’s game copyrights, Appellants could not have lawfully obtained access to pirated games for any purpose, including reverse engineering.

b. No “Independently Created” Computer Program That Interoperates With Other Programs Resulted From Appellants’ Activity.

As the object of the alleged “interoperability,” “[Appellants] did not create an ‘independently created computer program’ but a functional alternative to the Battle.net service. Once game play starts, there are no differences between Battle.net and the bnetd emulator from the standpoint of a user who is actually playing the game.” *Davidson*, 334 F. Supp. 2d at 1185. This is not the type of “independently created” work protected by the reverse engineering exemption.

Appellants set out to create a program that implemented all of the “user visible” features of online play of Blizzard games. Appellants’ purpose was not to add to the body of creative works, but to provide a direct substitute for the functional aspects of a proprietary program (authenticity check, matchmaking), with Appellants’ own functionality (matchmaking after circumventing the authenticity check), in a program that was as closely similar in the player’s experience to Battle.net Mode as Appellants could achieve. The purported

“improvements” made by Appellants relate to enabling online access to Blizzard games without Blizzard’s authorization or control.

Appellants incorrectly rely on *Sony Computer Entertainment, Inc. v. Connectix Corp.*³¹ to support their claim of an independently created program for reverse engineering. App. Br. 49. First, *Connectix* analyzed reverse engineering as a fair use defense to a claim of copyright infringement, not a DMCA violation as claimed and found here. In that analysis, the court found that the Connectix device was transformative and that it did not merely supplant the Sony platform, *Connectix*, 203 F.3d at 606, unlike the “functional alternative” that Appellants created here. *Davidson*, 334 F. Supp. 2d at 1185. Second, *Connectix* was decided after the DMCA was enacted, and thus is not part of the then-existing interpretation of the copyright defense that the reverse engineering exemption to the DMCA was intended to reflect. *Anti-Circumvention Report* at 508 (“The privilege to circumvent is limited by the terms of § 1201(f) to the privilege as it existed in 1998.”). In fact, *Gamemasters* involved facts similar to *Connectix* but

³¹ 203 F.3d 596 (9th Cir. 2000).

was brought under the DMCA rather than as a copyright infringement claim, and did result in the finding of a DMCA violation.³²

Of even greater importance is the simple fact that *Connectix* involved products sold separately in commerce, games and a game console, and so involved the interoperation between separate products. Blizzard offers nothing comparable to Sony's separate but complementary commercial products. Blizzard only sells licenses to its games distributed on CD-ROM which permit and enable several types of access, including both offline and online play, as a feature of the game. The availability of online play is announced on the outside packaging of the games. There is no additional or separate charge for online play of the games; there is no separate console or other hardware sold in commerce. To enable Blizzard games in remote locations to play against each other, Blizzard provides, as part of its games, servers that are not "sold" or made available as articles in commerce and for which no fee or price is charged. The servers include the same encryption program found on the games, and compare the encryption computations

³² In *Gamemasters*, Sony distributed its PlayStation games and consoles with an encryption measure to restrict access to authorized games. The court granted a preliminary injunction under the DMCA to prevent Gamemasters from trafficking in game accessories that circumvented Sony's technological measures on its consoles by overriding the console's validity check, thus enabling access to unauthorized games. *Gamemasters*, 87 F. Supp. 2d at 987-88.

as an authenticity check and access limitation before allowing the games to play online.

Unlike *Connectix* and all the reverse engineering cases cited by Appellants, Blizzard sells only one product, its games. The “platform to game” argument based on *Connectix* made by Appellants’ amici, Amicus Brief of Intellectual Property Law Professors (“IPLP”) at 11, is simply not applicable. Appellants did not create any interoperable work, because they just substituted their program to trick Blizzard’s games into online play in lieu of Blizzard’s authentication sequence and matchmaking function that restricts access to online game play.

3. Appellants’ Copyright Infringement Also Precludes Application Of The Reverse Engineering Exemption.

As the District Court held, by reason of their copyright infringement, *inter alia*, Appellants were not entitled to the reverse engineering exemption. *See Davidson*, 334 F. Supp. 2d at 1185. That finding is well supported in fact and law. Appellants admitted copying Blizzard’s copyrighted materials, including code, files and images, into their circumvention program without authorization. Consent Decree at 1. Appellants copied into their final product original works of Blizzard -- its images and code that were unnecessary for an independent work and unnecessary to achieve interoperability -- solely because Appellants wanted to

recreate Battle.net Mode as faithfully as possible.³³ Indeed, at least one Appellant admitted playing a pirated game to test the “interoperability” of the bnetd emulator, which itself is copyright infringement. Further, Appellants were well aware that their emulator enabled play of pirated games.

These acts of copyright infringement prevent Appellants from benefiting from the protection of the reverse engineering exemption by its very terms. *See* 17 U.S.C. § 1201(f).

4. Appellants’ Arguments Ignore The Reverse Engineering Balance Struck By Congress In The DMCA.

The DMCA provides a new form of protection that Congress determined was necessary to encourage companies like Blizzard to develop online markets for their copyrighted works. Congress determined that these protections would cause creation of new works that would be made available to the public, thus promoting creativity and economic development.³⁴ Reflecting its position on the Constitutional balance, Congress included a number of narrow, specific

³³ If these copied works were as “de minimus” and “unrelated” as Appellants now claim, App. Br. 50-51, query why Appellants chose to copy them into their final product. “No plagiarist can excuse the wrong by showing how much of his work he did not pirate.” *Sheldon v. Metro-Goldwyn-Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936) (Learned Hand, J.).

³⁴ S.Rep.No. 105-190 at 2 (1998) (DMCA “creates the legal platform for launching the global digital on-line marketplace for copyrighted works”).

exemptions to the DMCA’s prohibitions on circumvention that are similar -- but not identical -- to defenses to copyright infringement.³⁵ Apropos here, Congress carved out a narrow exemption to DMCA liability for “reverse engineering.”³⁶ Certain acts of circumvention may be exempted from DMCA violations as “reverse engineering” if they meet the specific requirements stated in Section 1201(f) of the DMCA, but Appellants fail to meet them.

Appellants’ arguments on “interoperability,” if accepted, would exempt from liability the very target of the DMCA -- the circumvention program itself. Appellants developed a circumvention program for the purpose of avoiding Blizzard’s authenticity check for online game play and thus enabled unauthorized

³⁵ For example, in addition to the Section 1201(f) exemption, Section 1201(d) exempts libraries and educational institutions that gain access for the limited purpose of making acquisition decisions, and Section 1201(g) exempts certain permissible acts of encryption research.

³⁶ In the 2004 biannual rule-making under 17 U.S.C. § 1201(a)(3) to determine if any new exemptions should be added to the DMCA, “the Copyright Office considered, and rejected, numerous other proposed exemptions. These include, for example, exemptions for all works for non-infringing uses; for ‘fair use works,’ for ‘thin copyright works,’ for works to which the user had initial lawful access; for public domain works; for musical works whose access controls make them inaccessible due to malfunction, damage or obsolescence; for various categories of works designed for use on specific platforms; and for reverse engineering for interoperability.” *Anti-Circumvention Report*, at 422, citing *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 68 Fed. Reg. at 62014-18 (proposed Oct. 31, 2003).

online play of Blizzard games. The result of Appellants’ “creativity” was a functionally equivalent “key” to open Blizzard’s “digital lock.” Of course every key must be “interoperable” with the lock in order to work. Of course Appellants’ key was independently developed for “interoperability.” But the same could be said for every circumvention program that the DMCA was designed to prohibit.

Taken to its logical conclusion, Appellants’ argument means that every circumvention tool barred by the DMCA would be permissible under the same statute because those tools, in order to function, must “interoperate” with the very programs they are designed to access. Courts have rejected this position. For example, in *Corley* and *321 Studios*, the distribution of the circumvention program was enjoined, despite its having been independently developed and enabling “interoperability” of DVDs with another platform, Linux (and thereby enabling unauthorized copying and piracy). Similarly, in *Gamemasters*, the violative device made unauthorized games “interoperable” with Sony’s game consoles by removing authenticity checks, yet the court upheld Sony’s DMCA claim.

In sum, through the exemption Congress strove to encourage new interoperable works; but Appellants only stole control of online access to Blizzard’s games. Congress anticipated creative and original works; but Appellants’ device is a functional alternative to and merely supplants a part of

Blizzard’s games. Congress offered protection to works that add value and stand on their own merit; but Appellants’ device offers only a means to bypass Blizzard’s technological measures and gain unauthorized access to Blizzard games, enabling piracy, contrary to the conditions and purpose of the reverse engineering exemption.

C. “Fair Use” Is Not A Defense To A Violation Of The DMCA And Appellants’ Actions Were Not “Fair Use” In Any Event.

1. Appellants Repeat The Soundly Rejected Plea For A Fair Use Defense To Digital Breach.

Appellants next try to create a new DMCA defense rejected by both Congress and the rule-making under Section 1201(a)(3) of the DMCA. In arguing that their violation of the DMCA is somehow protected “fair use,”³⁷ Appellants fail to acknowledge a simple reality: fair use is not a defense to a DMCA violation.³⁸

In *Corley*, the Second Circuit examined the scope of Section 1201(c)(1), which provides that “[n]othing in this section shall affect rights, remedies,

³⁷ Reverse engineering under appropriate conditions has been recognized as a type of fair use, which is a defense to a copyright infringement claim. *See, e.g., Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); 17 U.S.C. § 107.

³⁸ *See, e.g.,* Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Final Rule*, 37 C.F.R. Part 210, 65 Fed. Reg. 64556-01, at 64561 (October 27, 2000) (“fair use ... is not a defense to the cause of action created by the anti-circumvention prohibition of Section 1201”).

limitations or defenses to copyright infringement, including fair use, under this title.” The Second Circuit concluded that Section 1201(c)(1) provides no fair use exemption to DMCA liability. In particular, the court noted:

[Subsection 1201(c)(1)] simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the *use* of those materials after circumvention has occurred. Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the “fair use” of information just because that information was obtained in a manner made illegal by the DMCA.

273 F.3d 429, 443 (2d Cir. 2001). *See also Real Networks*, at *8 (defendant’s claim that its circumvention tool allowed customers to make “fair use” copies fails because the DMCA provides no fair use defense to the anti-trafficking provision); *accord Chamberlain*, 381 F.3d at 1202 (DMCA granted additional legal protection for access controls to copyright holders while retaining the fair use defense to use of the copyrighted materials themselves).

If a person who has accessed the work in violation of the DMCA *thereafter* infringes its copyright, a fair use defense might be available for the ensuing copyright infringement, while liability for the DMCA violation remains unaffected. This distinction, disregarded by Appellants, is essential to a correct reading of

Section 1201.³⁹ If, as Appellants claim, a general “fair use” defense also applies to DMCA violations, the specific exemptions to the DMCA would be rendered superfluous and overwhelmed by a broad defense for all fair use. As *Corley* states, “It would be strange for Congress to open small, carefully limited windows for circumvention to permit fair use ... if it then meant to exempt in subsection 1201(c)(1) any circumvention necessary for fair use.” 273 F.3d at 443 n.13. This cannot be Congress’s intent. *See Chamberlain*, 381 F.3d at 1192 (statutes must be read to be internally consistent).

In rejecting a fair use defense to the DMCA, Congress considered the potential tension between anti-circumvention provisions and the fair use defense to copyright infringement. Congress determined that the anti-circumvention provisions were necessary to properly protect copyright owners in the digital age, with narrowly defined exemptions and no overarching “fair use” defense. This

³⁹ As the participants in the Columbia University Kernochan Center for Law, Media and the Arts conference in 2004 concluded in their thoughtful report on the DMCA and copyright, “[a]n exaggerated perception of the scope of fair use and other privileges in the copyright law has contributed to the controversy over § 1201. Some of the privileges users feel they are being denied have not been recognized by Congress or the courts. The extent to which permissible uses have been foreclosed is exaggerated, because the scope of permissible uses is exaggerated. Users’ chagrin at the possible effects of § 1201 is based in significant part on uses they would like to make rather than on uses they are legally entitled to make.” *Anti-Circumvention Report* at 471.

balance was struck despite its possible impact on the full range of uses that might otherwise have been permitted:

Access control measures . . . do involve some risk of preventing lawful as well as unlawful use of copyrighted material. Congress, however, clearly faced up to and dealt with this question in enacting the DMCA If Congress had meant the fair use defense to apply to such actions, it would have said so. Indeed, as the legislative history demonstrates, the decision not to make fair use a defense to a claim under Section 1201(a) was quite deliberate.

Reimerdes, 111 F. Supp. 2d at 322; *Corley*, 273 F.3d at 429 (“Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original”). *See also United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1134-35 (N.D. Cal. 2002) (DMCA does not prevent quoting from a work or comparing texts for study or criticism; “The fair user may find it more difficult to engage in certain fair uses with regard to electronic books, but nevertheless, fair use [of the copyrighted work] is still available”).⁴⁰

⁴⁰ Appellants’ recitation of possible contractual restrictions on fair use in the absence of preemption, App. Br. 39, was *favorably* contemplated by the Working Group on Intellectual Property Rights. The Working Group’s White Paper proposing a legislative framework that eventually became the DMCA rejected concerns that an anti-circumvention law would impede copyright fair use. Fair use “does not require a copyright owner to allow or facilitate access or use of a

2. Even If Copyright Fair Use Applied To The DMCA, Appellants' Conduct Would Not Merit That Defense.

The fair use defense to copyright infringement involves the balancing of factors. Here the factors would show no fair use by Appellants.

The fair use defense to copyright infringement is expressly for “purposes such as criticism, comment, news reporting, teaching . . . , scholarship or research.” 17 U.S.C. § 107. Section 107 offers four factors to be considered in determining whether the use made of the work that otherwise would be copyright infringement is defensible as “fair use”: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.* These factors do not support “fair use” by Appellants, even if the line of

work.... Otherwise copyright owners could not withhold works from publication; movie theaters could not charge admission or prevent audio or video recording; museums could not require entry fees or prohibit the taking of photographs. Indeed if the provision of access and the ability to make fair use of copyrighted works were required of copyright owners -- or an affirmative right of the public -- even passwords for access to computer databases would be considered illegal.” *Anti-Circumvention Report* at 401, citing Working Group on Intellectual Property Rights, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure (1995).

cases addressing the reverse engineering defense to copyright infringement relied upon by Appellants were applicable here.⁴¹

The reverse engineering copyright defense cases do not protect all reverse engineering, but only reverse engineering that is legitimate. To qualify for the copyright defense, the copyright owner's work must be used as an intermediate step and may not be incorporated in the final product. Appellants engaged in more than intermediate copying, and incorporated Blizzard's copyrighted material into their final product. *See Atari Games Corp. v. Nintendo of America Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (affirming no fair use defense for reverse engineering where defendant "replicated protected expression"; the limited exception for intermediate copying "is not an invitation to misappropriate protectable expression"). *Cf. Connectix*, 203 F.3d at 604 n.7, 606 (defendants engaged in intermediate copying only; no infringing material in final product); *Sega*, 977 F.2d at 1526 (case involved only intermediate copying).

The result of the reverse engineering must be a work that is creative and transformative. Appellants' emulator is not transformative, but rather merely supersedes Blizzard's work. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.

⁴¹ The only fair use exemption to the DMCA is through Congress' enactment of the specific reverse engineering exemption in Section 1201(f). *See* discussion in Section I.C.1, *supra*.

569, 579 (1994) (work that merely supersedes the objects of the original creation is not transformative, thus less likely to be considered fair use). *Cf. Connectix*, 203 F.3d at 606 (defendants’ work was “transformative” and did not “merely supplant” the copyrighted work); *Sega*, 977 F.2d at 1523 (independently designed game to play on Sega game console was “growth in creative expression”).

Because Appellants’ functional alternative to Blizzard’s work is not “transformative,” the harm to Blizzard’s potential market prevents fair use. *Cf. Connectix*, 203 F.3d at 607; *Sega*, 977 F.2d at 1523 (no basis for claimed harm to market “since a consumer might easily purchase both” defendant’s and plaintiff’s different games). Appellants effectively created a market for pirated games involving wholesale infringement of Blizzard’s copyrighted works. *See Harper & Row Publishers, Inc. v. Nation Enters., Inc.*, 471 U.S. 539, 568 (1985) (“[T]o negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work.”) (internal quotes omitted); M. Nimmer and D. Nimmer, 1 *Nimmer on Copyright* §1.10[D], at 1-152 (“Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.”).

The access to the copyright owner’s work must be authorized. Appellants did not have authorized access to Blizzard’s works for purposes of reverse engineering. *See, e.g., Atari*, 975 F.2d at 842 (affirming no permissible reverse engineering due in part to unauthorized access to copy of program); *Harper & Row*, 471 U.S. at 562-63 (knowing use of copy gained by unauthorized access is not “good faith” and “fair dealing” required by fair use defense).

Here, Blizzard’s copyrighted work *was* incorporated into Appellants’ final product, the final product was *not* transformative, and access to Blizzard’s work was *not* authorized. *Davidson*, 334 F. Supp. 2d at 1185. In short, nothing about “reverse engineering as fair use” has any applicability to this case.

II. FEDERAL COPYRIGHT LAW DOES NOT PREEMPT BLIZZARD’S STATE CONTRACT CLAIMS.

Appellants’ breach of contract independently supports the relief granted by the District Court. Consistent with decisions of this and other courts throughout the country, the District Court rejected Appellants’ argument that the federal Copyright Act preempts Blizzard’s breach of contract claims. Appellants and their amici attempt to overturn the long history of copyright licensing by seeking to impose the doctrine of “conflict preemption,” yet that doctrine has never been held to preempt a contract. Appellants give no sound reason to do so now.

A. Eighth Circuit Law Denies Copyright Preemption Of License Agreements Under The Extra Element Test, Which Is Followed By All The Circuits.

The preemption clause of the Copyright Act does not preempt all state law claims. Instead, it limits preemption to “equivalent” rights.⁴² Only state law claims that are equivalent to any of the exclusive rights specified in Section 106⁴³ are preempted. The obverse is also true: any non-equivalent right is not preempted. *See National Car Rental System, Inc. v. Computer Associates Int’l, Inc.*, 991 F.2d 426, 428 (8th Cir. 1993); *see also Huckshold v. HSSL, L.L.C.*, 344 F. Supp. 2d 1203, 1207 (E.D. Mo. 2004).⁴⁴ In determining whether rights are equivalent to the exclusive rights under copyright, courts apply the “extra element” test. *See, e.g., National Car Rental*, 991 F.2d at 431.

Applying the extra element test, this Court has already ruled that breach of contract claims for use of a copyrighted work in violation of a license agreement

⁴² Section 301(b) provides in pertinent part that “[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to ... (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106.” 17 U.S.C. § 301(b).

⁴³ The exclusive rights under copyright are reproduction, preparation of derivative works, distribution, performance and display. *See* 17 U.S.C. § 106.

⁴⁴ Appellants’ discussion relies heavily on cases in non-copyright areas of law that do not have the same statutory directive on preemption found in the Copyright Act. *See* App. Br. 35-37.

are not preempted by the Copyright Act. In *National Car Rental*, a software developer licensed its database software to an automobile rental company “only for the internal operations of Licensee and for the processing of its own data.” *Id.* at 427. When the developer learned that the licensee was using the program to process the data of third parties, it sued alleging that such use violated the license agreement. *Id.* at 428.

This Court ruled that “the alleged contractual restriction on National’s use of the licensed programs constitutes an extra element in addition to the copyright rights making this cause of action qualitatively different from an action for copyright.” *Id.* at 431. The Court distinguished contractual restrictions on use from restrictions on the exclusive copyright rights -- reproduction, performance, distribution, or display -- noting that National’s “processing of data for third parties is the prohibited act” under the contract. *Id.* at 433. The Court concluded that “[n]one of the exclusive copyright rights grant [] that right of their own force,” and thus that the software developer “is alleging that the contract creates a right not existing under the copyright law, a right based on National’s promise, and that it is suing to protect that contractual right.” *Id.* Therefore, “[t]he contractual restriction on use of the programs constitutes an extra element that makes this cause of action qualitatively different from one for copyright.” *Id.*

Here, as in *National Car Rental*, Blizzard’s software licenses prohibit a particular type of use. In *National Car Rental*, the prohibited use was processing third party data, while in the case at hand, the prohibited use at issue is reverse engineering, matchmaking and emulating. In both cases the prohibited uses are *not* among the exclusive rights under copyright in Section 106 for which Section 301 provides preemption, and are extra elements. Thus, under *National Car Rental*, the restrictions on reverse engineering and related activities in the Blizzard contracts are not preempted under Eighth Circuit law. *See also Huckshold*, 344 F. Supp. 2d 1203 (E.D. Mo. 2004) (no preemption of software license that barred, *inter alia*, transfer of the software; licensee breached agreement by allowing third party to copy software for purpose of developing similar software).

Like the Eighth Circuit, other courts have adopted and apply the “extra element” test to evaluate whether federal copyright law preempts state claims. Despite Appellants’ suggestion that it is “roundly criticized,”⁴⁵ App. Br. 34 n.7, *all*

⁴⁵ Appellants note the criticism of the extra element test in *Ritchie v. Williams*, No. 03-1279, 2005 WL 41553 (6th Cir. Jan. 11, 2005), which nonetheless applied the test. *Ritchie* found no “extra element” present because the contracts concerned copyright *ownership*, not copyright *licenses*. Both parties there claimed to have full rights under Section 106 to reproduce, perform and distribute the work -- rights equivalent to the exclusive rights under copyright.

*twelve circuits apply the extra element test for preemption in copyright cases.*⁴⁶

B. Consistent with *National Car Rental*, Other Circuits Have Enforced Software Licenses And Prohibitions On Reverse Engineering Despite Preemption Arguments.

On facts nearly identical to those at issue in this appeal, the Federal Circuit in *Bowers v. Baystate Technologies, Inc.* denied preemption in harmony with this Court's *National Car Rental* analysis. *Bowers* held that a software license agreement prohibiting reverse engineering was enforceable and not preempted by copyright law. 320 F.3d 1317, 1323 (Fed. Cir. 2003), *cert. denied sub nom. Baystate Techs. v. Bowers*, 539 U.S. 528 (2003). In doing so, the court concluded that the mutual assent and consideration required for a valid contract was the extra element, and rendered a contract claim qualitatively different from copyright

⁴⁶ See, e.g., *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1164 (1st Cir. 1994), *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004); *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 217 (3d Cir. 2002); *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 229-30 (4th Cir. 1993); *Carson v. Dynegy, Inc.*, 344 F.3d 446, 456 (5th Cir. 2003); *Stromback v. New Line Cinema*, 384 F.3d 283, 301 (6th Cir. 2004); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); *National Car Rental*, 991 F.2d 426, 431 (8th Cir. 1993); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004); *Harold Stores, Inc. v. Dillard Dept. Stores, Inc.*, 82 F.3d 1533, 1543 (10th Cir. 1996); *Foley v. Luster*, 249 F.3d 1281, 1285 (11th Cir. 2001); *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317, 1324 (Fed. Cir. 2003), *cert. denied sub nom. Baystate Techs. v. Bowers*, 539 U.S. 928 (2003).

infringement. *Id.* at 1325.⁴⁷

Other circuits have likewise held that rights created by copyright licenses are not equivalent to exclusive copyright rights either because of the nature of the rights or the promise of the agreement. *See, e.g., ProCD*, 86 F.3d at 1454 (holding that a shrink wrap license barring commercial use of plaintiff’s software was not preempted by copyright law); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990) (a private contract prohibiting, *inter alia*, competitive use of company trade secrets and materials was not preempted because the promise in the contract constituted “an element in addition to mere reproduction”); *Telecom Technical Services Inc. v. Rolm Co.*, 388 F.3d 820, 833 (11th Cir. 2004) (state law claim requiring plaintiff to demonstrate that defendant violated terms of software license for third parties was not preempted); *cf. Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001) (an implied contract consisting only of a promise not to reproduce, perform, distribute, or display a copyrighted work would be preempted, but a promise to pay for such use was an extra element that was not preempted).

⁴⁷ Amici try to distinguish *Bowers* with a claim that under their interpretation, Baystate’s reverse engineering was not fair use. IPLP at 24-25. But *Bowers* did not turn on a fair use analysis. Acknowledging that the agreement at issue barred all reverse engineering, *Bowers* upheld enforceability of the agreement regardless of the type of reverse engineering.

Appellants rely on *Vault Corp. v. Quaid Software Ltd.*, a Fifth Circuit case invalidating on preemption grounds a Louisiana statute that permitted software licenses banning all copying or reverse engineering. 847 F.2d 255, 268 (5th Cir. 1988). Appellants fail to point out that two years after *Vault* was decided, the Fifth Circuit rejected copyright preemption in a breach of contract case in which one party contracted not to develop competing products, solicit customers of the other party, or convert the other party's trade secrets for its own use. *Taquino*, 893 F.2d at 1501 (5th Cir. 1990). The Fifth Circuit itself declined to extend *Vault* to contract claims and found no preemption, holding that “[t]his action for breach of contract involves an element in addition to mere reproduction, distribution or display: the contract promise made by *Taquino*, therefore, it is not preempted.” *Id.*

The fact that *Vault* struck down a state statute, rather than a private contract, distinguishes that decision from the repeated judicial rejection of preemption arguments concerning copyright contracts between private parties.⁴⁸ *See Bowers*, 320 F.3d at 1323 (holding no preemption of private contractual agreements barring reverse engineering). *See also Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1318

⁴⁸ Appellants' amicus IEEE-USA errs in arguing that “the ‘extra element’ test applies solely to statutory preemption,” and therefore that *Vault* rather than *Bowers* applies to this contract case. *See Amicus Brief of IEEE-USA at 20.*

(11th Cir. 2001) (“courts generally read preemption clauses to leave private contracts unaffected”); *ProCD*, 86 F.3d at 1455 (“a simple two-party contract is not ‘equivalent to any of the exclusive rights within the general scope of copyright’ and therefore may be enforced”).

In short, *National Car Rental*, *Bowers*, *Taquino*, *ProCD*, and many other cases have applied the “extra element” test to contract claims based on copyright licenses like this one and found no preemption. The District Court’s decision correctly follows this precedent.

C. Preemption Would Not Serve The Full Purposes and Objectives of Congress.

Appellants argue that the many federal courts declining to find copyright preemption of contract claims all applied the wrong standard, and instead should have applied “conflict preemption.” Under conflict preemption, “a state law that obstructs the accomplishment of the full purposes and objectives of Congress is preempted.” *Brown v. Ames*, 201 F.3d 654, 659-60 (5th Cir. 2000).

Appellants rely on *Brown* for their conflict preemption argument, but *Brown* found no copyright conflict preemption with regard to a misappropriation claim. 201 F.3d at 661. Appellants also cite *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1997), which preempted not a contract, but Pennsylvania’s motion picture fair business practices statute. App. Br. 35. Neither case furthers

Appellants' argument.

Contrary to Appellants' position, software licenses such as Blizzard's agreements do not conflict with the full purposes and objectives of Congress; instead, they help carry out the purposes of the Copyright Act. Judge Easterbrook, in *ProCD*, discusses the benefit of private contracts in the field of software licensing, and concludes that "[t]o the extent licenses facilitate distribution of object code while concealing the source code (the point of a clause forbidding disassembly), they serve the same procompetitive functions as does the law of trade secrets."⁴⁹ 86 F.3d at 1455. "Terms and conditions offered by [software licensing] contract[s] reflect private ordering, essential to the efficient functioning of markets." *Id.* By providing vital additional means for authors and copyright owners to protect their works and remain competitive in the digital marketplace, restrictions on use in software licenses provide an incentive for copyright owners to produce and disseminate new works with protections against piracy, in complete congruence with the purposes of the Copyright Act.

The Copyright Act includes both protections for copyright owners and allowances for uses beneficial to society. Congress could easily have drafted Section 301 to expressly preempt contractual restrictions on copyright use, fair use

⁴⁹ Disassembly is a step in reverse engineering. *See, e.g.*, DER 366.

or even reverse engineering, but did not. Instead, Congress crafted the Copyright Act's preemption clause in a manner that allows contract to complement copyright. This balance between fostering ingenuity and encouraging public access represents Congress' full purposes and objectives. Appellants' and their amici focus only on half of the story, access, and ignore the broader purpose of the Copyright Act and the balance struck by Congress. There is no conflict preemption here.

III. APPELLANTS ENTERED INTO AND BREACHED ENFORCEABLE AGREEMENTS WITH BLIZZARD BARRING REVERSE ENGINEERING.

While Appellants do not appeal the District Court's finding that Blizzard's license agreements are fully enforceable, Appellants repeatedly attack the agreements by describing them as "contracts of adhesion" that they were "forced to accept" with "no power to negotiate" and "no choice." App. Br. 8, 16, 29, 30. Solely to counter these attacks and Appellants' amici's arguments on enforceability of the agreements, Blizzard includes this discussion without prejudice to Blizzard's position that contract enforceability is not properly before this Court.

A. Agreements Such As Blizzard’s Are Consistent With Industry Practice And Widely Upheld.

Shrink wrap licenses⁵⁰ and click wrap or click through licenses⁵¹ are a standard feature of the licensing landscape. Despite some articles attacking these licenses, many authored by the amici in this case, shrink wrap and click wrap licenses are fundamental to the efficient and broad distribution of copyright works to the public. *ProCD*, 86 F.3d at 1455; *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (“Customers as a group are better off when vendors ... use instead a simple approve-or-return device.”).

Shrink wrap and click wrap licenses have been widely upheld and enforced. The courts recognize the validity of the parties’ assent and the advantages to society of enhancing electronic distribution through standard, non-negotiated contracts. The District Court’s decision is consistent with other courts that have repeatedly recognized the validity and enforceability of shrink wrap and click wrap agreements.

⁵⁰ “Shrink wrap” licenses are printed on the outside of packaging containing licensed software, and are deemed entered into by the purchaser’s act of breaking the see-through “shrink wrap” plastic covering. *See, e.g., Pro CD*, 86 F.3d at 1449.

⁵¹ “Click wrap” licenses display the license terms to the consumer electronically, then allow the consumer to manifest assent to the terms by “clicking” on an acceptance button. *See, e.g., I. Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002).

At least three federal circuit courts have enforced click wrap or shrink wrap copyright licenses. *See, e.g., Bowers*, 320 F.3d at 1325 (enforcing shrink wrap agreement prohibiting reverse engineering); *Hill*, 105 F.3d at 1147 (7th Cir. 1997) (enforcing contract placed in box of mail-order computer that permitted return within 30 days); *ProCD*, 86 F.3d 1447 (7th Cir. 1996) (enforcing shrink wrap agreement); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996) (enforcing online software distribution agreement where user typed “AGREE”).

Many other federal and state courts have enforced click wrap licenses. *See, e.g., Hotmail Corp. v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998) (plaintiff likely to prevail on the merits of a contract claim where defendants agreed to clickwrap agreement); *I. Lan Sys., Inc.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (enforcing agreement where customer clicked “I Agree”); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. 2002) (enforcing agreement where customer clicked “Accept”); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (2002) (enforcing agreement where customer clicked “I agree”); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J. App. Div. 1999) (enforcing agreement where customer clicked “I Agree”).⁵²

⁵² Yet other courts have enforced shrink wrap licenses. *See, e.g., O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Adobe Sys. Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002); *Brower v.*

Non-negotiated licenses serve as a practical and inexpensive means to enable wide public distribution and access to copyright works. Appellants were not forced to accept Blizzard’s licenses; they could have declined them and returned Blizzard’s games. Blizzard’s click wrap agreements are binding on Appellants, who had notice of their terms and willingly provided their assent.

B. Reverse Engineering May Be Prohibited By Contract.

The District Court held that Appellants may, and did, waive their “fair use rights” by agreeing to Blizzard’s licenses. *Davidson*, 334 F. Supp. 2d at 1181. Whether *all* rights, statutory or otherwise, may be waived by contract is simply not relevant here. Appellants discuss patent and employment cases holding that certain statutory rights may not be waived, App. Br. 35-37, and then summarily conclude that “The situation is no different in the area of copyright.” *Id.* But the situation is *entirely* different under copyright law, in light of the specific purposes and objectives of Congress as reflected in the Copyright Act and carried out by the host of cases denying preemption and enforcing copyright licenses that prohibit

Gateway 2000, 676 N.Y.S.2d 569 (1998); *Arizona Retail Sys., Inc., v. Software Linc. Inc.*, 831 F. Supp. 59 (D. Ariz. 1993); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000).

reverse engineering, copying, commercial use, conversion of trade secrets, and other “rights.”

Appellants’ discussion of contractual waiver of statutory rights is inapplicable for a further reason. Reverse engineering is not a right, let alone a statutory right. The Copyright Act provides a fair use defense to copyright infringement, but fair use is not an affirmative right. *See* 17 U.S.C. § 107. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (“Since fair use is an affirmative defense its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”) (footnote omitted). *See also* n.40, *supra*.

Finally, Blizzard’s license agreements and the District Court’s decision do not “outlaw fair use,” “forbid all fair use,” or “turn[] ... fair use on [its] head[.]” Access to Blizzard’s works is conditioned on its licensees’ agreement to limit their use. The limitations on use include the agreement not to reverse engineer nor take other steps that lead to piracy. The various purposes for which use of a particular work may be considered “fair” include criticism, comment, news reporting, teaching, scholarship, and research. *See* 17 U.S.C. § 107. None of those uses is restrained in Blizzard’s agreements, and Appellants did not engage in those activities. To say that Blizzard seeks to “forbid all fair use” is patently incorrect.

The potential harm to Blizzard's rights from lack of control over reverse engineering is apparent from the immediate impact of Appellants' breach of Blizzard's agreements: unchecked distribution of a tool that enabled worldwide piracy of Blizzard games for online play. Denying the copyright owner a means to bar reverse engineering in private contracts would discourage the continuing creation and dissemination of new creative works to the detriment of society.

CONCLUSION

Appellants' arguments against their DMCA violations, and attempt to shield their conduct through an exemption to DMCA liability which does not apply to their conduct, must fail. Alternatively, Appellants' effort to elevate an inapplicable defense to copyright infringement -- "fair use" -- to an independent right which supposedly trumps both state contract law and the DMCA itself, is without merit. This Court would serve the constitutional balance struck by Congress by enforcing the DMCA and contract law as intended, and rejecting Appellants' appeal.

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Certificate of Compliance

The undersigned hereby certifies that this brief complies with Fed.R.App.P. 32(a)(7)(B). It contains 13,761 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii); has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman font; and includes a virus free 3.5” floppy disk in .pdf format.

Dated: February 18, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the BRIEF OF PLAINTIFFS- APPELLEES DAVIDSON & ASSOCIATES, INC. D.B.A. BLIZZARD ENTERTAINMENT, AND VIVENDI UNIVERSAL GAMES, INC., was duly served upon the following, by forwarding two copies of the Brief, one copy of Blizzard’s Case Appendix, and a 3.5” floppy diskette containing a .pdf version of the Brief via overnight courier addressed to:

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Additionally, the original and nine copies of the Brief and Blizzard's Case Appendix, and one 3.5" floppy diskette containing a .pdf copy of the Brief, also have been sent via overnight courier for next business day delivery to:

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This 18th day of February, 2005.

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