

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MISSOURI  
EASTERN DISTRICT

DAVIDSON & ASSOCIATES, INC.,  
D.B.A. BLIZZARD ENTERTAINMENT,  
and VIVENDI UNIVERSAL GAMES,  
INC.,

Plaintiffs

v.

INTERNET GATEWAY, INC., TIM  
JUNG, ROSS COMBS and ROB  
CRITTENDEN,

Defendants.

Case No. 4:02CV498CAS

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## I. INTRODUCTION

This case is about a simple and yet fundamental question: when you go to Best Buy, Circuit City or Wal-Mart and buy a product, what rights do you have to use that product?

Defendants' answer is straightforward: when you buy a product, you own it, subject only to: (1) the limitations provided by law and (2) terms and conditions you knew about prior to purchase or expressly and voluntarily assented to thereafter.

Blizzard contends, to the contrary, that when you pay your money for one of their computer games, you have not purchased any right to use the game at all. Instead, your right to use the game accrues only after you take the game home, open the box, install it on your computer, read dozens of additional terms (for the first time) on the screen, and finally click a mandatory "I AGREE" box. Then and only then do you have a right to use what you paid for. On the other hand, if you refuse to follow Blizzard's prescribed procedures and do not click the box, you paid your \$49.99 for, well . . . nothing.

Blizzard's contortions do not end there. Even if you do click the box, Blizzard contends that you still do not have the right to use all of your game. Instead, to gain the right to use what Blizzard calls "BATTLE.NET Mode," which is nothing more than a feature of the game that you already paid for, you must read even more previously undisclosed terms and then click yet another mandatory box labeled "AGREE". If you do not click this second box, Blizzard says that you cannot ever use the online feature of the game, even though this feature was among those for which paid your \$49.99.

Although the product at issue in this case is a computer game, the same question would arise from the sale of many other consumer products that we all use, such as cars, computers or garage door openers. Fortunately for us all, Blizzard's Byzantine view of

these transactions is not the law in Missouri. Under Missouri law, when Defendants purchased Blizzard's games at the retail counter, they purchased the right to take the games home and use them. In particular, Missouri law protects consumers by providing that when companies such as Blizzard attempt to add previously undisclosed terms and obligations post-sale, consumers such as Defendants have the right to use the products they purchased without agreeing to the terms. Missouri law also does not allow companies like Blizzard to force consumers to agree to End User License Agreements ("EULAs") or Terms of Use ("TOU") by technologically extorting consumers into clicking on an "I Agree" button to install the games on their computer. Not only are such "agreements" unconscionable contracts of adhesion, but they also violate federal law doctrines of conflict preemption and copyright misuse.

Blizzard's attempt to control consumers post-sale also runs afoul of protections afforded consumers under the Digital Millennium Copyright Act ("DMCA" or "the Act"). Despite happily taking Defendants' money at the store, Blizzard now contends that Defendants have no fair use rights to reverse engineer under Section 1201(f) of the DMCA or any rights to access the full content of the games under Section 1201(a) of the Act. Both the plain language of the Act and its legislative history, however, guarantee consumers these rights.

In short, Blizzard's assault on consumer rights in this case contradicts both long-standing precedent under Missouri law and the recent pronouncements of Congress when it passed the DMCA. Accordingly, Blizzard's motion for partial summary judgment or its claim for breach of contract (Count VII) and circumvention (Count II) should be denied.

## II. **BLIZZARD’S EULAS AND TOU MAY NOT BE ENFORCED UNDER MISSOURI LAW, THE DOCTRINE OF CONFLICT PREEMPTION AND THE DOCTRINE OF COPYRIGHT MISUSE**

### A. **UNDER UCC 2-207, BLIZZARD’S EULAS AND TOUS WERE NOTHING MORE THAN PROPOSED ADDITIONS TO THE CONTRACT THAT WERE NEVER ACCEPTED AND ARE IN ANY EVENT UNCONSCIONABLE.**

Blizzard’s claim in Count VII, that its post-sale EULAs and TOU somehow bound Mr. Jung, Mr. Crittenden and Mr. Combs to various terms that they later breached, completely ignores established Missouri law.

Under Missouri’s implementation of the Uniform Commercial Code, in typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.<sup>1</sup> Neither Blizzard nor its retail vendor partners ever presented the terms of its EULAs or TOU prior to the vendor accepting Defendants’ offer to purchase the games. As a result, the EULAs and TOU were not part of any contract between the parties. Instead, pursuant to UCC 2-207(2), these “additional terms are to be construed as proposals for addition to those contracts.”<sup>2</sup>

Defendants never accepted these proposals. Instead, Defendants simply took the games they purchased home and used them, as any ordinary consumer would. Blizzard contends that during the course of installing and using the games, Defendants assented to the EULA and TOU terms by clicking mandatory boxes labeled “I AGREE” or

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<sup>1</sup> See *Brown Mach. Div. of John Brown Inc. v. Hercules, Inc.*, 770 S.W.2d 416, 419 (Mo. App. 1989). Accord *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 765 (D.Ariz 1993).

<sup>2</sup> UCC 2-207(2). The Official Comment to UCC 2-207 further supports this conclusion that the contract was formed long before the additional terms in the EULAs and Terms of Use were presented to the Defendants: “[2-207 applies] where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding terms not discussed.” See also *Central Bag Co. v. W. Scott and Co.*, 647 S.W.2d 828, 830 (Mo. App. 1983) (applying UCC 2-207 where one or both parties sent written communications after oral

“AGREE” which appeared on their screens under a list of previously undisclosed terms. But the one case to apply Missouri law to mandatory software licensing terms held that such implied manifestations of assent are, in fact, not assent at all.

In *Klocek v. Gateway*,<sup>3</sup> the District of Kansas applied Missouri law implementing the UCC to an arbitration provision in Gateway Computer’s “shrinkwrap” license — the physical equivalent to Blizzard’s “clickwrap” EULAs and TOUs.<sup>4</sup> After examining Missouri law, the Court held that Gateway’s “Standard Terms,” including the arbitration agreement, were never part of the parties’ contract and therefore could not be enforced.

The Court first noted that because plaintiff Klocek was not a merchant, “additional or different terms contained in the Standard Terms did not become part of the parties’ agreement unless plaintiff *expressly* agreed to them.”<sup>5</sup> It then held that Klocek’s “act of keeping the computer past the five-day review-and-return period was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms.”<sup>6</sup> The Court based its holding on two key factors: (1) Gateway’s failure to disclose the substance of the terms prior to the formation of the contract and (2) Gateway’s unilateral attempt to define Klocek’s assent to those terms in a way that reflected only Gateway’s, not Klocek’s, actual intent.<sup>7</sup>

These same factors preclude the enforcements of Blizzard’s EULAs and TOU in this case. Like the plaintiff in *Klocek* who was forced to open the “shrinkwrap”

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contract.)

<sup>3</sup> *Klocek v. Gateway*, 104 F. Supp.2d 1332 (D. Kan. 2000).

<sup>4</sup> See generally Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239, 1241-48 (1995).

<sup>5</sup> *Klocek*, 104 F. Supp.2d at 1341 (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



surrounding his Gateway computer and keep the computer in order to use it, Defendants were forced to click the “AGREE” buttons in the games they purchased from Blizzard in order to use those games. Just as Klocek never expressly agreed to the arbitration clause imposed by Gateway, despite doing exactly what Gateway unilaterally defined as assent, Defendants never expressly agreed to the terms unilaterally imposed by Blizzard, even though they clicked a box unilaterally labeled “AGREE” by Blizzard. Instead, like Klocek, Defendants simply kept what they purchased and completed the installation process in order to use their products.<sup>8</sup>

Furthermore, even if Defendants may be held to have expressly assented to Blizzard’s EULAs and TOU, those documents are classic contracts of adhesion that are unenforceable under Missouri’s doctrine of unconscionability.<sup>9</sup> Under Missouri law, provisions in a contract of adhesion that fail to square with the reasonable expectations of the parties and that are unexpected and unfair may not be enforced.<sup>10</sup> “Because standardized contracts address the mass of users, the test for ‘reasonable expectations’ is objective, addressed to the average member of the public.”<sup>11</sup>

What average member of the public would expect that when he pays \$49.99 for a computer game at the store, he cannot use the game when he gets home? And what

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<sup>8</sup> See also Comment 2 to U.C.C. section 2-209 (providing that “the extortion of a ‘modification’ without legitimate commercial reason is ineffective as a violation of the duty of good faith”); Memorandum in Support of Defendant’s Motion for Summary Judgment (“Defendants’ Mem.”), at 15.

<sup>9</sup> See *Hartland Computer Leasing Corp. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989) (“In Missouri, an adhesion contract, as opposed to a negotiated contract, has been described as a form contract created and imposed by a stronger party upon a weaker party on a ‘take this or nothing basis,’ the terms of which unexpectedly or unconscionably limit the obligations of the drafting party.”).

<sup>10</sup> See *id.* at 527-28.

<sup>11</sup> *Id.*

average member of the public would reasonably expect to be barred from installing the game he just bought until he is forced to agree to terms that: (1) he has never seen before and (2) strip him of rights to use that game? Like most average members of the public, Defendants did not expect to be bound to any of the terms they were forced to “click” through on their screens, particularly since they were not offered any additional consideration for assent to those terms. To find themselves now in federal court, facing the threat of a multi-million dollar judgment simply because they were forced to click on a box would no doubt “produce[e] an exclamation” from average consumers.<sup>12</sup> At minimum, this issue raises a genuine issue of fact for the jury.

Blizzard’s licensing practices thus put its customers in an impossible position: either purport to “agree” to onerous additional terms without any additional consideration or forfeit the right to use Blizzard’s games as they were marketed and sold. Missouri law recognizes this abuse for what it is and bars enforcement of any “contract” that aims to achieve this result.

**B. BLIZZARD’S EULAS AND TOUS “PROTECT THAT WHICH CONGRESS INTENDED TO BE FREE FROM RESTRAIN” AND THUS IMPERMISSIBLY CONFLICT WITH THE COPYRIGHT ACT.**

Blizzard’s EULAs and TOU cannot be enforced against Defendants for a second reason: they impermissibly conflict with the Copyright Act’s protection of fair use.

To appreciate this, this Court need not look any further than the Fifth Circuit’s

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<sup>12</sup> *State, Missouri Dep’t of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001) (en banc). *Cf. Comb v. PayPal, Inc.*, 218 F. Supp.2d 1165, 1177 (N.D. Cal. 2002) (finding mandatory arbitration clause in “clickwrap contract” substantively unconscionable); *People v. Network Associates, Inc.*, 758 N.Y.S.2d 466 (N.Y. Sup. Ct. 2003) (enjoining software company from enforcing clickwrap clause barring critical review of company’s product).

decision in *Vault v. Quaid*.<sup>13</sup> In *Vault*, the Fifth Circuit held that license restrictions that prohibit fair use reverse engineering “conflict[] with the rights of computer program owners ... and clearly ‘touch[] upon an area’ of federal copyright law.”<sup>14</sup> It then explicitly held that, because of this interference, “at least this provision of Louisiana's License Act is preempted by federal law, and thus that the restriction in Vault's license agreement against [reverse engineering] is unenforceable.”<sup>15</sup>

Blizzard’s licensing restrictions on fair use by reverse engineering are identical to those in *Vault* and therefore conflict no less with the fair use rights set forth in the Copyright Act. Like *Vault*, Blizzard is attempting to use *state* enforcement of private contracts in way that impermissibly “touches upon an area of *federal* copyright law.” Accordingly, Blizzard’s attempt should similarly be rejected.<sup>16</sup>

**C. BLIZZARD’S EULAS AND TOUS MISUSE BLIZZARD’S LIMITED RIGHTS UNDER THE COPYRIGHT ACT BY STRIPPING LICENSEES OF FAIR USE RIGHTS REQUIRED BY CONGRESS.**

Blizzard’s EULA and TOU terms cannot be enforced against Defendants for a third reason: the EULAs and TOUs are an abuse — and thus misuse — of its copyrights.<sup>17</sup>

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<sup>13</sup> *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988).

<sup>14</sup> *Id.* at 270.

<sup>15</sup> *Id.*

<sup>16</sup> See also Defendants’ Mem. at 16-17; Amicus Curiae of Intellectual Property Law Professors (“Professors’ Amicus Brief”), at 12-14. Blizzard cites to one case, *Bowers v. Baystate Techs, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), that addresses preemption by the Copyright Act of licensing terms restricting reverse engineering. But the issue presented in *Bowers* was statutory preemption under Section 301(a) of the Act, not conflict preemption under the Supremacy Clause. *Id.* at 1324.

<sup>17</sup> There is no dispute that copyright misuse is an absolute defense to infringement in the Eighth Circuit: “judicial authority teaches that the patent misuse doctrine may be applied or asserted as a defense to copyright infringement.” *United Tel. Co. of Mo. v. Johnson Pub. Co.*, 855 F. 2d 604, 612 (8th Cir. 1988).

To appreciate the merit of applying the misuse doctrine in this case, the Court need only consider the articulation of the policy behind the doctrine, as set forth in the Fourth Circuit’s seminal decision in *Lasercomb v. Reynolds*.<sup>18</sup> In *Lasercomb*, the Fourth Circuit reviewed a license that barred licensees for 99 years from developing, even by reverse engineering, any products that could compete with Lasercomb’s copyrighted software. Concerned that the “creative abilities” of the licensee would be withdrawn from the public, thereby frustrating the very purpose of copyright law to promote the creation of new work, the Court found that Lasercomb’s restriction was “egregious” and therefore “amount[ed] to misuse of its copyright.”<sup>19</sup>

Blizzard’s restrictions are, if anything, more offensive than those in *Lasercomb*. First, like Lasercomb, Blizzard attempts to prohibit any commercial use of its software, regardless of whether such use would violate its copyright. Second, while Lasercomb’s restrictions were aimed at limiting commercial competition, Blizzard’s restrictions extend past commercial endeavors to directly bar its own customers from developing their own not-for-profit alternatives for playing Blizzard games over the Internet. Third, Blizzard’s restrictions are aimed squarely at precluding fair use by reverse engineering, even though scientific authorities, courts and Congress have recognized reverse engineering as promoting the fundamental purposes of the Copyright Act. Finally, while the restriction in *Lasercomb* barred activity for 99 years, Blizzard’s restrictions bar its purported licensees forever. Because Blizzard’s license terms misuse its copyrights as much, if not more so, than Lasercomb’s did, they should similarly be barred as unenforceable.<sup>20</sup>

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<sup>18</sup> *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990).

<sup>19</sup> *Id.* at 979.

<sup>20</sup> See also Defendants’ Mem. at 17-20; Professors’ Amicus Brief at 14-19.

### **III. BLIZZARD FUNDAMENTALLY MISREADS THE DMCA AND ITS DEFENSES**

There are numerous reasons why Blizzard’s DMCA claim fails in this litigation,<sup>21</sup> but none more clear than: (1) the explicit statutory reverse engineering defense of Section 1201(f) and (2) the fact that Defendants had authority to access the games they purchased.

#### **A. SECTION 1201(F) PROVIDES A COMPLETE DEFENSE TO DEFENDANTS’ CONDUCT**

As noted in Defendants’ Memorandum Supporting their Motion for Summary Judgment,<sup>22</sup> even if Defendants had circumvented, or provided tools for circumvention, Section 1201(f) of the Act provides a complete defense to all of Blizzard’s allegations. Section 1201(f) provides a specific exception to the prohibitions on circumvention set forth in Section 1201(a) when such circumvention is done for the sole purpose of creating and distributing interoperable computer programs such as the bnetd matchmaking server.<sup>23</sup> Here, the only admissible evidence before the Court unequivocally demonstrates that the sole purpose of creating and distributing the bnetd server is to interoperate with Blizzard video games.<sup>24</sup> Accordingly, Section 1201(f) applies.

Blizzard does not contest that interoperability was Defendants’ sole purpose; rather, it makes three misguided arguments against the application of Section 1201(f). First, Blizzard argues that Defendants did not “lawfully obtain[] the right to use a copy”

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<sup>21</sup> See Defendants’ Mem. at 12-14.

<sup>22</sup> Defendants’ Mem. at 12.

<sup>23</sup> 17 U.S.C. § 1201(f)(1)-(3).

<sup>24</sup> See Felten Decl. Ex. A (Felten Report, ¶¶ 73-77); Carter Decl. Ex. 12 (Defendants’ Amended Responses to Plaintiffs’ Requests for Admission, at 3); Grewal Decl. Ex. B (DeLong Report, at 21:27-30; 27:25-27; 26:8-12). (“Decl.” cites refer to declarations submitted in support of Defendants’ Motion for Summary Judgment and Plaintiffs’ Motion for Partial Summary Judgment; “Opp. Decl.” cites refer to declarations submitted

of any component of the BATTLE.NET service or their Blizzard games for the purpose of reverse engineering. This statement, however, completely disregards the record. It is undisputed that all of Defendants' videogames were legally purchased from authorized local retailers such as Best Buy or Wal-Mart.<sup>25</sup> It is also undisputed that all of the purchased games came with valid CD Keys that entitled the Defendants to legally access BATTLE.NET.<sup>26</sup> Defendants did not steal their games; they paid good money for them and thereby obtained the "right to use a copy" within any reasonable interpretation of those words.<sup>27</sup>

Blizzard attempts to call into question Defendants' right to use the products they purchased by invoking yet again its EULAs and TOUs, asserting that because Defendants were not specifically licensed under the EULAs and TOU to reverse engineer, they could not have obtained a lawful right to use their games to do so. Not surprisingly, Blizzard cites no case law or legislative history that supports this theory.<sup>28</sup>

In fact, the legislative history and case law surrounding the DMCA quickly dispose of Blizzard's theory. As noted in Defendants' Memorandum supporting their Motion for Summary Judgment,<sup>29</sup> the Senate Committee Report on the DMCA explicitly stated that Section 1201(f) was intended to codify the holding of the seminal reverse

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with this opposition brief to Plaintiffs' Motion for Partial Summary Judgment).

<sup>25</sup> Jung Decl. ¶ 7; Crittenden Decl. ¶ 5; Combs Decl. ¶ 7.

<sup>26</sup> Plaintiffs' Memorandum in Support of its Motion for Partial Summary Judgment ("Plaintiffs' Mem."), at 4.

<sup>27</sup> See *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942) ("incident to the purchase of an article ... is the right to use and sell it."); see also 17 U.S.C. § 117(a)(1) (granting owners of copy of software the unconditional right to use it on their computers).

<sup>28</sup> Blizzard's citation to *Bowers* does not provide any support for its "legal use" theory; rather, Blizzard is merely attempting once again to buttress the validity of its EULAs and TOU against Defendants' preemption arguments.

<sup>29</sup> Defendants' Mem. at 12.

engineering case of *Sega v. Accolade*.<sup>30</sup> In *Sega*, the Ninth Circuit explicitly considered whether the Copyright Act permits persons “who are neither copyright holders *nor licensees*” to reverse engineer a competitor’s computer program.<sup>31</sup> Defendant Accolade had purchased Sega’s GENESIS console commercially but had no license or other authority to use the console’s software for any purpose, including reverse engineering.<sup>32</sup> Nonetheless, the Court found that Accolade was permitted to reverse engineer Sega’s programs under the fair use doctrine, regardless of whether those activities were authorized or not.<sup>33</sup> Thus, it is immaterial to the Section 1201(f) defense whether Defendants were licensed to reverse engineer Blizzard’s software.<sup>34</sup>

Next, Blizzard attempts to deny Defendants’ Section 1201(f) defense by claiming that Defendants distributed certain files as part of the bnetd server that were not necessary for interoperability. What Blizzard fails to mention, however, is that none of these files are part of the CD Key “handshake” protocol that Blizzard claims as a technological measure protected under the DMCA.<sup>35</sup> The Section 1201(a) prohibition only applies to use and distribution of technologies that circumvent such protection measures.<sup>36</sup> Thus, because the additional files identified by Blizzard have nothing to do with the “handshake” protocol, they are simply irrelevant to Blizzard’s Section 1201 claim and

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<sup>30</sup> S. Rep. No. 105-190 at 32 (1998).

<sup>31</sup> *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1513-14 (9th Cir. 1992) (emphasis added).

<sup>32</sup> *Id.* at 1514-15.

<sup>33</sup> *Id.* at 1527.

<sup>34</sup> Even if Blizzard could establish that Defendants were barred under the EULAs and TOU from reverse engineering Blizzard’s games, copyright and contract and two separate bodies of law and attempting to use the EULA to restrict a party’s ability to invoke the 1201(f) defense only further demonstrates the preemptive conflict between Blizzard’s EULAs and TOU and federal copyright law.

<sup>35</sup> Felten Opp. Decl. ¶¶ 5-7.

any associated defenses.

Blizzard's third argument is equally specious. Blizzard argues that the bnetd server program is somehow not an "independently created computer program" because it "replicate[s] Blizzard's BATTLE.NET service" and thereby competes with it. Blizzard provides no citation or support for this premise, which also directly contradicts established reverse engineering precedent. For example, in *Sega*, there was no dispute that Accolade's games were specifically intended to compete with Sega's videogames.<sup>37</sup> In fact, this was one of the bases upon which the Ninth Circuit found Accolade's reverse engineering to be fair use — the promotion of competition and alternatives in the videogame marketplace.<sup>38</sup> *Sega* and its prodigy are the blueprints for Section 1201(f). Blizzard's "replication" theory must therefore be rejected, lest it contradict the very precedents Congress intended to codify.<sup>39</sup>

**B. BLIZZARD MISREADS THE "ACCESS" AND "AUTHORITY" ELEMENTS OF THE DMCA.**

Apart from Defendants' Section 1201(f) defense, Blizzard fundamentally misreads both the "access" and the "authority" requirement of Section 1201(a).

**1. The DMCA only protects initial access to copyright works, not subsequent access.**

In line with consumer expectations, the legislative history of the DMCA makes it clear that Section 1201(a) of the DMCA regulates only initial access to copyright works,

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<sup>36</sup> See 17 U.S.C. §§ 1201(a)(1), (2).

<sup>37</sup> *Sega*, 977 F.2d at 1523.

<sup>38</sup> *Id.* See also *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000) (finding reverse engineering to create "emulator" transformative fair use despite emulator competing with Sony in market for platforms on which Sony and Sony-licensed games can be played).

<sup>39</sup> Blizzard also makes vague allegations of copyright infringement that supposedly eliminate Defendants' Section 1201(f) defense. See Plaintiffs' Mem. at 19. However,



not access or “use” of the work once the user has been granted initial access.<sup>40</sup> For example, the Senate Report states:

Subparagraph (1) defines the term “circumvent a technological protection measure” as meaning “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner. This definition applied to paragraph (a) only, which covers protections against unauthorized *initial* access to a copyrighted work.”<sup>41</sup>

Likewise, the House Judiciary Committee Report states:

Paragraph (a)(1) does not apply to the *subsequent actions* of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. . . . So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.<sup>42</sup>

Even *Corley*, the primary case relied upon by Blizzard, supports this reading: “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.”<sup>43</sup> In other words, the DMCA controls only whether you can initially access digital content, not what you do with that content once you have access to it.<sup>44</sup>

There is no dispute that Defendants lawfully acquired their videogames through purchase at a local retail store.<sup>45</sup> There is also no dispute that Blizzard explicitly authorized Defendants to initially access the games and BATTLE.NET by including a

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once again, Blizzard’s motion is bereft of *any* evidence to support these allegations.

<sup>40</sup> *Cf.* 17 U.S.C. § 1201(b) (regulating uses).

<sup>41</sup> S. Rep. No. 105-190, at 29 (emphasis added).

<sup>42</sup> H.R. Rep. No. 105-551, pt. 1 at 18.

<sup>43</sup> Plaintiffs’ Mem. at 16 (quoting *Corley*, 273 F.3d at 443 (emphasis in original)).

<sup>44</sup> 3 Nimmer on Copyright § 12A.03[D], at 12A-33 -12A-34 (2003).

<sup>45</sup> Jung Decl. ¶ 7; Crittenden Decl. ¶ 5; Combs Decl. ¶ 7.

valid CD Key in the box.<sup>46</sup> Having been granted initial access by Blizzard, Defendants cannot have violated Section 1201(a) of the DMCA by subsequently using the game, including use of the game's "BATTLE.NET Mode" function.

**2. Defendants had authority to access the "Battle.net Mode" Function.**

The DMCA also outlaws only circumvention "without authority of the copyright owner."<sup>47</sup> Thus, if authorization has been given, either explicitly or implicitly, no DMCA violation is possible.<sup>48</sup> As noted above, customers who purchase Blizzard games have everything they need both to access and activate all aspects of the game: the software and the CD Key. Blizzard's own declarant confirms this: "[t]he Battle.net service is designed to prohibit access and use of Battle.net features by *unauthorized or 'pirated'* copies of Blizzard games."<sup>49</sup> Thus, Blizzard acknowledges that its DMCA-protected CD Key handshake protocol is intended to block access to BATTLE.NET by unauthorized or pirated games, not access by legitimate game owners.

When Defendants bought their Blizzard games, Blizzard gave them a valid CD Key.<sup>50</sup> These keys authorized them to use the games and distinguished them from being "pirates."<sup>51</sup> Thus, Blizzard authorized Defendants to access the alleged "BATTLE.NET Mode" function.<sup>52</sup>

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<sup>46</sup> Fitzgerald Decl. ¶¶ 15-23.

<sup>47</sup> 17 U.S.C. § 1201(a)(3)(A).

<sup>48</sup> *See Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 292 F. Supp. 2d 1040, 1043-44 (N.D. Ill. 2003).

<sup>49</sup> Fitzgerald Decl. ¶ 11 (emphasis added).

<sup>50</sup> Plaintiffs' Mem. at 4; Fitzgerald Decl. ¶ 15.

<sup>51</sup> Fitzgerald Decl. ¶¶ 11, 15-23.

<sup>52</sup> Blizzard may attempt to argue that any implied authority to use the game with alternatives to BATTLE.NET is undermined by the terms of its EULA or TOU. However, while some of those terms attempt to restrict users from "hosting" other servers

The recent ruling in *Chamberlain v. Skylink*, involving garage door openers, is instructive on this point. There, Chamberlain attempted to use the DMCA to stop Skylink from selling a “universal remote” for door openers because Chamberlain customers could use these remotes to “access” the software inside Chamberlain’s opener to open their garage doors.<sup>53</sup> The Court, however, found that no DMCA violation occurred.<sup>54</sup> Instead, the Court held that, by selling its customers the opener, Chamberlain had given them authorization to open their garage door in any manner they wished, including by use of a universal remote. The Court analogized such use to using a universal remote for one’s television or VCR; it could not be the case, the Court reasoned, that Congress intended to outlaw such useful alternative devices when used by legitimate owners.<sup>55</sup> Thus, because legitimate owners have authority to access products they purchased, there was no DMCA violation.

Here, as in *Skylink*, the bnetd server simply offers legitimate game owners an alternative way to use their game. Because legitimate game owners have authority from Blizzard to access the game, including the alleged “BATTLE.NET Mode” function, Defendants do not violate Section 1201(a)(1) of the DMCA by using their games with the bnetd server or violate Section 1201(a)(2) by distributing the server to others.

#### IV. CONCLUSION

For the reasons stated above, Blizzard’s motion should be denied.

Dated: January 26, 2004

Respectfully submitted,

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or “matchmaking” games for other users, none of them restrict users from choosing a different server to play on.

<sup>53</sup> *Chamberlain*, 292 F. Supp. 2d at 1041-42.

<sup>54</sup> *Id.* at 1045-46.

<sup>55</sup> *Id.*

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