

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' REPLY MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	PAGE NO.
I. INTRODUCTION	1
II. BLIZZARD CONCEDES ALL BUT FOUR OF ITS COPYRIGHT ALLEGATIONS, INCLUDING ALL ALLEGATIONS AGAINST DEFENDANT INTERNET GATEWAY, INC.	1
III. BLIZZARD’S FOUR REMAINING COPYRIGHT CLAIMS FAIL.....	1
A. Blizzard Admits that Defendants’ Reverse Engineering of its Communications Protocols was “Necessary” for Interoperability.....	2
B. The purpose and character of the bnetd emulator is both noncommercial and highly transformative.	2
C. Blizzard’s icons are <i>de minimis</i> , fair use aspects of Battle.net.	4
D. Blizzard’s “handshake” algorithm is uncopyrightable.	7
E. Blizzard’s BNSERVER Allegations Are Untimely.....	7
IV. BLIZZARD FAILS TO REBUT DEFENDANTS’ DMCA ARGUMENTS.....	8
V. BLIZZARD’S ARGUMENTS IN SUPPORT OF ITS BREACH OF CONTRACT CLAIMS IGNORE RELEVANT CASE LAW AND MISSTATE RELEVANT EQUITABLE DOCTRINES	10
VI. BLIZZARD HAS FAILED TO PRESENT ANY GENUINE ISSUE OF MATERIAL FACT TO SUPPORT ITS TRADEMARK CLAIMS	11
A. No Reasonable Jury Could Find Blizzard’s Scant Evidence Sufficient to Prove a Substantial Likelihood of Confusion.	12
B. No Reasonable Jury Could Find a Likelihood of Confusion Between the “BATTLE.NET” and “Bnetd Project” Marks.	12
C. Blizzard Has Failed To Show Any Protectable Interest In The “BNET” Mark Or Any Trade Dress.	13
D. Blizzard Presents No Evidence Of Actual Dilution.....	14

TABLE OF AUTHORITIES

	PAGE NO.
Cases	
<i>Aktiebolaget Electrolux v. Armatron Int’l, Inc.</i> , 999 F.2d 1 (1st Cir. 1993).....	13
<i>Alcatel USA, Inc. v. DGI Techs., Inc.</i> , 166 F.3d 772 (5th Cir. 1999)	11
<i>Andy Warhol Foundation for Visual Arts, Inc. v. Federal Ins. Co.</i> , 189 F.3d 208 (2nd. Cir. 1999)	7
<i>Apple Computer, Inc. v. Microsoft Corp.</i> , 35 F.2d 1435 (9th Cir. 1994)	5
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	3, 4
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	2
<i>Chamberlain Group, Inc. v. Skylink Techs., Inc.</i> , No. 02 C6376, 2003 WL 22697217 (N.D. Ill. Nov. 13, 2003).....	9
<i>Duluth News Tribune v. Mesabi Pub. Co.</i> , 84 F.3d 1093 (8th Cir. 1996)	12, 13
<i>Falcon Rice Mill, Inc. v. Comm. Rice Mill, Inc.</i> , 725 F.2d 336 (5th Cir.1984)	13
<i>Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.</i> , 626 F.2d 193 (1st Cir. 1980).....	12
<i>Gade v. National Solid Waste Mgmt. Ass’n</i> , 505 U.S. 88 (1992).....	11
<i>Gordon v. Nextel</i> , 345 F.3d 922 (6th Cir. 2003)	5
<i>Harper & Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	3
<i>Kellogg Co. v. Toucan Golf, Inc.</i> , 337 F.3d 616 (6th Cir. 2003)	15
<i>Klocek v. Gateway</i> , 104 F. Supp.2d 1332 (D. Kan. 2002).....	10, 11

TABLE OF AUTHORITIES

	PAGE NO.
<i>Luigino’s, Inc. v. Stouffer Corp.</i> , 170 F.3d 827 (8th Cir. 1999)	12, 13
<i>Matthew Bender & Co., Inc. v. West Pub. Co.</i> , 158 F.3d 674 (2nd Cir. 1998)	7
<i>Moseley v. V Secret Catalogue, Inc.</i> , 537 U.S. 418 (2003).....	15
<i>Nabisco, Inc. v. Warner-Lambert Co.</i> , 220 F.3d 43 (2d Cir. 2000)	12
<i>Newton v. Diamond</i> 349 F.3d 591 (9th Cir. 2003)	5
<i>Nitro Leisure Products, L.L.C. v. Acushnet Co.</i> , 341 F.3d 1356 (Fed. Cir. 2003)	14
<i>Pignons S.A. de Mecanique de Precision v. Polaroid Corp.</i> , 657 F.2d 482 (1st Cir. 1981).....	13
<i>ProCD, Inc. v. Zeidenberg</i> , 86 F.3d 1447 (7th Cir. 1996)	10
<i>Rexnord, Inc. v. Modern Handling Systems, Inc.</i> , 379 F.Supp. 1190 (D. Del. 1974).....	5
<i>Scott and Fetzer Co. v. Dile</i> , 643 F.2d 670 (9th Cir. 1981)	8
<i>Secular Organizations for Sobriety, Inc. v. Ullrich</i> , 213 F.3d 1125 (9th Cir. 2000)	14
<i>Sega Enterprises Ltd. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992)	2, 3, 4, 8
<i>Sengoku Works Ltd. v. RMC Int’l, Ltd.</i> , 96 F.3d 1217 (9th Cir. 1996)	14
<i>Softman Prods. Co., LLC v. Adobe Sys., Inc.</i> , 171 F. Supp.2d 1075 (C.D. Cal. 2001)	9
<i>Sony Computer Entertainment, Inc. v. Connectix Corp.</i> , 203 F.3d 596 (9th Cir. 1999)	2, 3, 4, 5, 6, 9
<i>Sundeman v. Seajay Society, Inc.</i> , 142 F.3d 194 (4th Cir. 1998)	7

TABLE OF AUTHORITIES

	PAGE NO.
<i>Universal City Studios, Inc. v. Corley</i> , 273 F.3d 429 (2d Cir. 2001)	9
<i>Vault Corp. v. Quaid Software, Ltd.</i> , 847 F.2d 255 (5th Cir. 1998)	5
<i>Vitek Systems, Inc. v. Abbott Labs.</i> , 675 F.2d 190 (8th Cir. 1982)	12
<i>Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.</i> , 210 F.Supp.2d 147 (E.D.N.Y. 2002)	6
Statutes	
15 U.S.C. § 1125(c)	15
17 U.S.C. § 301	11
17 U.S.C. §107	3
Fed. R. Civ. P. 26(a)(2)	8
Fed. R. Civ. P. 37	8
Fed. R. Civ. P. 56	14
Other Authorities	
2 <i>McCarthy on Trademarks and Unfair Competition</i> , § 16.4 (4th ed. 2003)	14
Batya Goodman, <i>Honey, I Shrink Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract</i> , 21 <i>Cardozo L. Rev.</i> 319 (1999)	11
Larry Lessig, <i>Architecting Innovation</i> , 49 <i>Drake L. Rev.</i> 397, 403 (2001)	5

I. INTRODUCTION

Try as it might, Blizzard's opposition to Defendants' summary judgment motion fails to identify a single genuine issue of material fact regarding any of Blizzard's seven claims against Defendants. As set forth below, on each of the seven counts in Blizzard's Second Amended Complaint ("SAC"), Blizzard cannot overcome the legal bars to its claims. Accordingly, the time has come to put an end to the three years of intensive litigation waged by Blizzard, and enter judgment on all counts for Defendants.

II. BLIZZARD CONCEDES ALL BUT FOUR OF ITS COPYRIGHT ALLEGATIONS, INCLUDING ALL ALLEGATIONS AGAINST DEFENDANT INTERNET GATEWAY, INC.

First and foremost, the Court should note what Blizzard does *not* oppose in its brief. Defendants' Motion for Summary Judgment sought to dismiss all copyright infringement claims under Count I of Blizzard's SAC. In its Opposition, however, Blizzard attempts to sustain its allegations concerning only four specific expressions: (1) Blizzard's communication protocols, (2) various Blizzard "chat room" icons, (3) Blizzard's so-called "handshake" algorithm, and (4) Blizzard's previously unidentified "bserver" files. Having failed to respond to Defendants' motion on all other allegations,¹ Blizzard thus concedes that it lacks sufficient evidence on these allegations to reach a jury.²

III. BLIZZARD'S FOUR REMAINING COPYRIGHT CLAIMS FAIL

Blizzard's four remaining copyright claims should also be rejected. First,

¹ These allegations include: (a) direct infringement of Blizzard's video game clients (SAC ¶¶ 62, 72, 98), (b) direct infringement of "other code" from Blizzard's game client (SAC ¶¶ 45, 52, 94), (c) derivative infringement using the BNS program (SAC ¶¶ 60-61, 96), (d) any infringement of its public performance rights (SAC ¶¶ 67, 97), and (e) all allegations of contributory, vicarious, or inducing infringement (SAC ¶¶ 69-71, 99-101). They also include any allegations against Defendant Internet Gateway, Inc.

Defendants' reverse engineering of Blizzard's communication protocols was necessary, noncommercial, and sufficiently transformative to qualify as fair use. Second, any icons that were copied are either *de minimis* to the overall videogame programs or fair use and therefore non-infringing. Third, Blizzard fails to contest that its handshake algorithm is uncopyrightable and therefore unprotectable. Finally, Blizzard's assertions of copied "bserver" files are untimely and based on improper expert testimony.

A. BLIZZARD ADMITS THAT DEFENDANTS' REVERSE ENGINEERING OF ITS COMMUNICATIONS PROTOCOLS WAS "NECESSARY" FOR INTEROPERABILITY.

Under both *Sega v. Accolade* and *Sony v. Connectix*, Defendants cannot be liable for copyright infringement by reverse engineering Blizzard's communication protocols if the reverse engineering was "necessary" to achieve interoperability between the bnetd server and Blizzard's video game clients.³ This is undisputedly the case here. Blizzard's own technical expert openly conceded that that reverse engineering was necessary for achieving interoperability both in his expert report and during his deposition.⁴ For this reason alone, Defendants are entitled to summary judgment.

B. THE PURPOSE AND CHARACTER OF THE BNETD EMULATOR IS BOTH NONCOMMERCIAL AND HIGHLY TRANSFORMATIVE.

Blizzard nonetheless argues Defendants' reverse engineering should not qualify as fair use because the bnetd emulator is not "transformative." This argument not only ignores the fact that Defendants already qualify for fair use under the "necessary for

² *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

³ See *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 1999) ("Central to our decision today is the rule set forth in *Sega*.").

⁴ Grewal Decl. Exs. B (DeLong Report at 4:28-29; 9:10-16) and C (DeLong Dep. Tr. 67:12-22) (references herein to "Grewal Decl." refer to the Declaration of Paul S. Grewal in Support of Defendants' Motion for Summary Judgment).

interoperability” test, it also ignores the noncommercial and highly transformative nature of the bnetd server.

Fair use is a four-factor test, as Blizzard itself notes.⁵ No one factor is dispositive,⁶ and here Blizzard does not dispute that three factors (including the fourth and most important factor⁷) weigh in Defendants’ favor here. The only factor which Blizzard does dispute is the first factor. Therefore, unless the first factor weighs *heavily* in Blizzard’s favor, the Court must presumptively find Defendants’ use to be fair.

As Blizzard suggests, the first factor of the fair use analysis, “the purpose and character of the work,” incorporates questions of transformation. But what Blizzard does not address at all is that the factor also includes an enquiry into whether the use is *commercial or non-commercial* in nature.⁸ And significantly, noncommercial use is presumptively fair.⁹ Here, it is undisputed that Defendants’ work on the bnetd project was entirely non-commercial.¹⁰ In particular, Defendants never charged anyone for any work they performed that was related to the project nor were they compensated for the time they dedicated to it.¹¹ Because their primary purpose was and remains undisputedly non-commercial, the first fair use factor thus weighs in favor of Defendants.¹²

The transformative nature of the use also weighs in favor of Defendants. First and foremost, there is no dispute that Blizzard’s copyright accusations focus only on a small percentage of the bnetd server’s code, leaving the remaining *majority* of the bnetd

⁵ See *Connectix*, 203 F.3d at 602 n.5 (citing 17 U.S.C. §107).

⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-8 (1994).

⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

⁸ See *Acuff-Rose*, 510 U.S. at 578.

⁹ See *Sony Corp. v. Universal City Studios, Inc.* 464 U.S. 417, 449 (1984).

¹⁰ Response to Plaintiffs’ [sic] Statement of Uncontroverted Facts, ¶¶ 10-11.

¹¹ *Id.*

¹² Notably, this starkly contrasts both *Sega* and *Connectix*, where the Ninth Circuit found

server's computer code as entirely original and distinct "new expression" as defined by *Acuff-Rose* and *Connectix*.¹³ In addition, the bnetd server gives users a chance to play purchased games in different environments – including behind firewalls, with a select group of friends or free from the profanity, hacking and cheating that plague Battle.net¹⁴ – much as the flexibility to play Sony Playstation games in new computing environments was deemed transformative in *Connectix*.¹⁵

Yet another transformation the bnetd server offers is that of open source code. The bnetd project releases its code and its program for free to anyone on the Internet – including Blizzard game players – so they can configure and customize it to meet their personal needs, such as creating private game clubs, personalizing welcome and help messages, inviting others who are not logged in to play, or even setting up game-specific servers, such as one that plays only Starcraft.¹⁶ This kind of transformative use – empowering users to become authors and creators themselves – emphasizes the purpose of the Copyright Act – "To Promote the Progress of Science and the Useful Arts."¹⁷

C. BLIZZARD'S ICONS ARE *DE MINIMIS*, FAIR USE ASPECTS OF BATTLE.NET.

Faced with the threat of summary judgment on its copyright claims and its inability to distinguish *Connectix* and *Sega*, Blizzard falls back on trivial allegations entirely unrelated to the main claims in its case – copying of its chat room icons. These

that the defendants' purposes were commercial in nature.

¹³ Felten Reply Decl. ¶¶ 7-14 (percentage of code Blizzard accuses of infringing is no more than 0.46 % of code in bnetd server program).

¹⁴ See Felten Reply Decl. ¶¶ 4-6 (explaining firewalls); Grewal Reply Decl. Ex. A (Crittenden Dep. Tr. 155:11-156:21) (bnetd can run behind firewalls while Battle.net cannot); Grewal Decl. Exs. L (Sams 30(b)(6) Dep. Tr. 76:15-77:8, 94:21-95:7, 96:8-101:24) and O (Morhaime Dep. Tr. 96:14-97:3, 98:11-23) (discussing profanity, hacking, cheating, and latency problems with BATTLE.NET).

¹⁵ 203 F.3d at 606.

¹⁶ Combs Reply Decl. ¶¶ 2-12.

“images” are nothing more than simple little graphics that appear next to a user’s name when he or she logs into a chatroom on BATTLE.NET or bnetd. They are not much more than the “smiley-face” icons that people use in emails and other chat rooms all the time.¹⁸ Such trivial copying, even if true, hardly qualifies as infringement under both the “*de minimis* use” doctrine and fair use.

The copyright doctrine of *de minimis* use is based on the axiom “*De minimis non curat lex*” or “The law shall not concern itself with trifles.”¹⁹ In other words, there are those cases where copying may have technically occurred, but the amount copied is so minor and insignificant to the overall work as a whole, that courts should not waste judicial resources sending such cases to trial; the “*de minimis*” use is excused.²⁰ For example, in *Newton v. Diamond*, the court found that copying three notes, or 2%, from a song was *de minimis* and therefore non-infringing.²¹

The icons here are insignificant as a proportion of the copyrighted works. The entire file of icons, called “icons.bni,” is only 15 kilobytes, or 15KB, in size.²² By comparison, Blizzard’s Diablo II video game client program is 575 megabytes in size, or 588,800 KB.²³ Thus, “icons.bni” makes up only 0.0025% of the Diablo II game, a microscopic percentage well below established *de minimis* use thresholds.

¹⁷ Larry Lessig, *Architecting Innovation*, 49 Drake L. Rev. 397, 403 (2001).

¹⁸ In fact, one court has held that such icons are not protectable under copyright law when part of a user interface such as BATTLE.NET because they are so common as “scenes-a-faire” or “to be expected” by users. *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.2d 1435, 1444 (9th Cir. 1994).

¹⁹ *Sony*, 464 U.S. at 451 n.34; *Rexnord, Inc. v. Modern Handling Systems, Inc.*, 379 F.Supp. 1190, 1194 (D. Del. 1974) (“On the principle of *de minimis non curat lex*, it is necessary that a substantial part of the copyrighted work be taken.”).

²⁰ *Gordon v. Nextel*, 345 F.3d 922, 924 (6th Cir. 2003).

²¹ 349 F.3d 591, 597 (9th Cir. 2003). *See also Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 267-8 (5th Cir. 1998) (30 characters from 50 pages *de minimis*).

²² Felten Reply Decl. ¶¶ 7-8.

Despite these irrefutable facts, Blizzard attempts to argue each icon itself is a copyrighted image. However, a claim of copyright infringement requires the court to compare the *registered* copyright as a whole with the allegedly copied material – even where the subcomponents of the work might have independent copyrightability.²⁴ Blizzard might have individually registered its icons with the Copyright Office and thereby obtained the right to sue on them independently. But it did not. Having chosen not to do so, it can sue now only for infringement of its game client as a whole. Under this analysis, copying 0.0025% cannot qualify as anything other than *de minimis*.

Moreover, even if the copying were not *de minimis*, it would be fair use. Beginning with the fourth and most important factor, effect on the market for the work, Blizzard admits that it does not sell or license any of these icons at issue independently of its game clients or Battle.net.²⁵ In other words, there is *no market* for Blizzard's icons as individual copyrighted works.²⁶ Rather, they are simply a microscopic part of Blizzard's massive videogame system. Blizzard's failure to register the icons individually only underscores their lack of value. The first and third factors again weigh in Defendants' favor. As noted above, the bnetd server program is a non-commercial effort to transform the ways in which users can play Blizzard games. As for factor three – the amount of the work taken – again, in light of the fact that the *registered* work is the game client,

²³ Felten Reply Decl. ¶ 15.

²⁴ *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F.Supp.2d 147, 167 (E.D.N.Y. 2002) (“the illegal copying prong may only be satisfied by reference to the registered work, Well-Made's 20 inch doll.”)

²⁵ Grewal Decl. Ex. I (Pltffs' Resp to Defs' Requests for Admission, ¶¶ 13-15).

²⁶ *See Sony v. Universal*, 464 U.S. at 450 (“a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create.”).

0.0025% taken is a fact that must weigh in Defendants' favor.²⁷

D. BLIZZARD'S "HANDSHAKE" ALGORITHM IS UNCOPYRIGHTABLE.

In its Opposition, Blizzard devotes a single footnote to alleging that Defendants copied "a programming error or 'bug' in an algorithm used by Blizzard."²⁸ Presumably, this is the "handshake" algorithm discussed in Defendants' opening motion because Blizzard has never alleged copying of any other algorithm in this case.²⁹ Once again, Blizzard fails to provide a single citation to the record supporting its allegations. Moreover, in Defendants' Motion, Defendants specifically pointed out that algorithms, such as Blizzard's handshake, are uncopyrightable.³⁰ Blizzard provides no citation or argument to the contrary in its opposition. Therefore, the Court should grant summary judgment for Defendants on this allegation.

E. BLIZZARD'S BNSERVER ALLEGATIONS ARE UNTIMELY.

Finally, as part of a last-ditch effort to create disputed facts and avoid summary judgment, Blizzard also alleges in the same footnote, for the very first time, that "other Blizzard files such as bserver.ini or bserver-D2DV.ini" were copied. Such belated allegations are improper. Defendants specifically asked Blizzard via interrogatories to identify any specific files that it believed Defendants had copied. The bserver files were never included in these responses.³¹ Blizzard cannot raise them now for the first time in

²⁷ *Andy Warhol Foundation for Visual Arts, Inc. v. Federal Ins. Co.*, 189 F.3d 208, 217 (2nd Cir. 1999) (one percent of work considered a "very small portion" under factor three); *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 674, 687 (2nd Cir. 1998) (one to two percent of works copied would be fair use); *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 206 (4th Cir. 1998) (four to six percent of novel considered fair use).

²⁸ Plaintiffs' Opp. at 7 n. 5.

²⁹ See Defendants' Mem. at 5-10; Grewal Decl. Ex. A at 2-3).

³⁰ Defendants' Mem. at 9-10.

³¹ Grewal Decl. Ex. H (Pltffs' Supp Resps to Defs' 1st Set of Interrogatories, at 4-5).

its opposition, having led Defendants to rely on its previous discovery response.³²

Moreover, these allegations are premised on Mr. Fitzgerald's previously undisclosed expert opinion³³ and therefore are improper under Fed. R. Civ. P. 26(a)(2) as well.³⁴

IV. BLIZZARD FAILS TO REBUT DEFENDANTS' DMCA ARGUMENTS

Blizzard's opposition to Defendants' motion on Count II (DMCA) is as weak as its copyright claims. For example, Blizzard asserts "the Ninth Circuit's much earlier decision in *Sega*, discussing a fair use defense to copyright infringement, does not apply to the DMCA."³⁵ As Defendants' Opposition to Blizzard's partial summary judgment motion points out,³⁶ however, Congress *specifically included* the Section 1201(f) defense to preserve settled caselaw on reverse engineering and interoperability and *specifically* cited to the *Sega* case as an example.

Blizzard's Opposition ignores not only this legislative history of the DMCA, but also the entirety of Section 1201(f). It is true that subsection (f)(1) exempts only reverse engineering circumvention for the purposes of identification and analysis, but the section continues with (f)(2) and (f)(3), which further exempt distribution of circumvention technologies that are used solely as a means for enabling interoperability between software programs such as the bnetd matchmaking server and Blizzard's game clients.³⁷

³² See Fed. R. Civ. P. 37(c)(1) (failure to amend a prior discovery response as required by Rule 26(e)(2) precludes use of new information on motion); *Scott and Fetzer Co. v. Dile*, 643 F.2d 670 (9th Cir. 1981) (abuse of discretion for court to allow plaintiff to argue alternative theory of trademark infringement not disclosed in interrogatory responses).

³³ 1/26/04 Carter Decl. Ex. 1 (Fitzgerald Decl., ¶ 10).

³⁴ Were Blizzard's "bserver" allegations timely and admissible, they would not help its case. Both bserver files are 0.35 KB in size, almost 50 times smaller than the icons.bni file and thus also de minimis or fair use. Felten Reply Decl. ¶ 13.

³⁵ Plaintiffs' Opp. at 10.

³⁶ Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 10-11.

³⁷ As to Blizzard's additional erroneous arguments as to why 1201(f) should not apply, see Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Next, Blizzard attempts to undermine Defendants’ “authority” argument by referencing the *Skylink* case.³⁸ Blizzard simply misreads *Skylink*. In *Skylink*, the Court held that because plaintiff Chamberlain had not placed any restrictions on the type of garage door opener its customers could use, there was no DMCA violation when using an alternative opener. It distinguished *Corley*,³⁹ not because of its software license, but rather because the plaintiff there *had* specifically limited use of DVDs to specifically authorized DVD players. Thus, the issue was not whether there was a software license or not, but rather whether the copyright holder had placed any restrictions on the purchaser’s options. Like Chamberlain, Blizzard has placed *no* restriction at all on what kind of matchmaking server its customers can use. Once customers have purchased the game, they have the “authority” to use whatever matchmaking server they prefer. Therefore, like Chamberlain, Blizzard cannot sue purchasers who choose to use a different server.

Finally, Blizzard suggests that Defendants were not authorized to access the games they had purchased because Blizzard somehow does not “sell” its game – rather, it “licenses” them subject to various access restrictions. Beyond ignoring Missouri law and the vast body of case law from other jurisdictions establishing that in circumstances such as these software is in fact “sold” rather than licensed,⁴⁰ Blizzard ignores its own assertions in the Second Amended Complaint. No less than ten times, Blizzard asserts

Blizzard makes one additional accusation that Defendant Crittenden made an unauthorized copy of a Blizzard game during the course of developing the bnetd emulator. However, such additional copies were necessary to test the interoperability of the bnetd server with multiple games, Crittenden Reply Decl. ¶¶ 2-4, and such copying was explicitly approved of in *Connectix*. See *id.*, 203 F.3d at 605.

³⁸ *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, No. 02 C6376, 2003 WL 22697217 (N.D. Ill. Nov. 13, 2003).

³⁹ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁴⁰ See *Softman Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp.2d 1075, 1084-85 (C.D. Cal. 2001) (collecting cases).

that it “sells” its games or that customers “purchase” them.⁴¹ Regardless of the consequences to its case, Blizzard cannot now run from what it has pled to this Court.⁴²

V. BLIZZARD’S ARGUMENTS IN SUPPORT OF ITS BREACH OF CONTRACT CLAIMS IGNORE RELEVANT CASE LAW AND MISSTATE RELEVANT EQUITABLE DOCTRINES

Blizzard’s opposition on its contract claim (Count VII) also fails to meet the burden under Rule 56.

On the issue of contract formation, Blizzard ignores Missouri law, and particularly how Missouri has enforced the provisions of the UCC Section 2-207(2). Nor does Blizzard ever address *Klocek v. Gateway*,⁴³ the one case to apply Missouri’s version of Section 2-207(2) to form contracts of adhesion in the computer industry.⁴⁴

Instead, Blizzard simply urges the Court to follow the lead of the Seventh Circuit in *ProCD v. Zeidenberg*.⁴⁵ That case, however, did not address the issue of enforceability of particular software licenses under Missouri law. And to the extent it provides general guidance on the application of UCC Section 2-207(2), *ProCD* has been roundly

⁴¹ SAC ¶¶ 11, 15, 22, 26, 27, 36, 47, 65, 79, 83.

⁴² Blizzard attempts to re-interpret Defendants’ car club analogy claiming that Defendants’ software allows them to “drive off in your favorite car without paying for it.” Plaintiffs’ Opp. at 1. This, however, misrepresents the analogy. Defendants ***already own the cars they are modifying***. They bought and paid for them at local retail stores. What Blizzard wants is to use the DMCA to force all of its customers to drive exclusively on Blizzard-made roads, *i.e.*, Battle.net. Defendants’ software simply allows customers to choose which roads they want to drive on – Blizzard or otherwise.

⁴³ *Klocek v. Gateway*, 104 F. Supp.2d 1332 (D. Kan. 2002).

⁴⁴ Blizzard’s only discussion of Section 2-207(2) contends that, because Blizzard does not impose an additional charge for its BATTLE.NET service, its Terms of Use for BATTLE.NET are not subject to Section 2-207. This, however, ignores the obvious economic reality that Blizzard customers pay for both the Blizzard game itself and access to BATTLE.NET when they purchased their Blizzard games, and that customers cannot access BATTLE.NET ***unless*** they pay for a Blizzard game.

⁴⁵ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

criticized, not only in academic commentaries,⁴⁶ but also in *Klocek* itself – once again, the only published opinion on Missouri’s implementation of Section 2-207(2).⁴⁷

On the issue of implied conflict preemption, Blizzard presents no opposition at all. Rather strangely, every case to which it cites concerns express statutory preemption under 17 U.S.C. § 301. The Supreme Court has explained that statutory preemption and conflict preemption are two entirely different doctrines,⁴⁸ and Defendants explicitly limited their motion to a conflict preemption analysis.⁴⁹ Because Blizzard offers no response at all to the conflict preemption that is the basis for Defendants’ argument, summary judgment based on conflict preemption should be granted.

Finally, regarding Defendants’ affirmative defense of copyright misuse, Blizzard misguidedly asserts the doctrine of unclean hands. However, a defendant’s own unclean hands cannot shield a plaintiff from this defense; rather the sole area of inquiry is the behavior of the copyright plaintiff.⁵⁰

VI. BLIZZARD HAS FAILED TO PRESENT ANY GENUINE ISSUE OF MATERIAL FACT TO SUPPORT ITS TRADEMARK CLAIMS

Blizzard’s opposition brief is filled with vague assertions that there are genuine issues of material fact regarding its trademark claims (Counts III, IV, V, and VI). Yet

⁴⁶ See, e.g., Batya Goodman, *Honey, I Shrink Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 Cardozo L. Rev. 319 (1999).

⁴⁷ See *Klocek*, 104 F. Supp.2d at 1339 (“The Court is not persuaded that Kansas or Missouri courts would follow the Seventh Circuit’s reasoning.”). Any effort by Blizzard to enforce the California choice-of-law provisions in its licenses is unwarranted. Blizzard’s position would have this Court rely on its licenses’ invocation of California for choice-of-law purposes, even though it has already rejected those same licenses’ invocation of California courts for purposes of venue.

⁴⁸ See, e.g., *Gade v. National Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

⁴⁹ Defendants’ Mem. at 16-17.

⁵⁰ See *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 794 (5th Cir. 1999) (holding that even if defendants themselves had “very dirty mitts,” plaintiff’s request for relief made its “hands alone that must pass the hygienic test”).

Blizzard cites virtually no *actual evidence* in the record to support its assertions.

A. NO REASONABLE JURY COULD FIND BLIZZARD’S SCANT EVIDENCE SUFFICIENT TO PROVE A SUBSTANTIAL LIKELIHOOD OF CONFUSION.

As an initial matter, Blizzard claims that, because the likelihood of confusion test “is necessarily a fact-based inquiry that requires the careful weighing of several factors,” the court cannot make a summary judgment ruling for Defendants on Blizzard’s trademark claims. This is simply not the case. Eighth Circuit law is clear that summary judgment of no trademark infringement is proper if no reasonable jury could find a likelihood of confusion.⁵¹ Moreover, a mere possibility of confusion is not enough; rather, “there must be a *substantial likelihood* that the public will be confused.”⁵²

B. NO REASONABLE JURY COULD FIND A LIKELIHOOD OF CONFUSION BETWEEN THE “BATTLE.NET” AND “BNETD PROJECT” MARKS.

First, as discussed in Defendants’ opening brief, the dissimilarity between the “BATTLE.NET” and “bnetd project” marks alone warrants summary judgment for the Defendants on Blizzard’s Count III.⁵³ Also weighing heavily in Defendants’ favor is the fact that Blizzard has still failed to come forward with any *admissible* evidence of actual customer confusion. Blizzard’s sole set of “evidence” are *two hearsay statements* in a declaration from Paul Sams, a Blizzard employee.⁵⁴ These vague assertions regarding what other unnamed people have said when contacting Blizzard constitutes inadmissible hearsay, and therefore cannot be considered as evidence of actual confusion.⁵⁵ Even if

⁵¹ See *Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827, 832 (8th Cir. 1999); *Duluth News Tribune v. Mesabi Pub. Co.*, 84 F.3d 1093 (8th Cir. 1996).

⁵² *Vitek Systems, Inc. v. Abbott Labs.*, 675 F.2d 190, 192 (8th Cir. 1982) (quoting *Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.*, 626 F.2d 193, 194 (1st Cir. 1980)).

⁵³ *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 46 (2d Cir. 2000).

⁵⁴ See Plaintiffs’ Supplemental Statement of Uncontroverted Facts, ¶¶ 19-20; 1/26/04 Carter Decl. Ex. 7 (Declaration of Paul W. Sams, ¶¶ 5-6).

⁵⁵ See *Duluth*, 84 F.3d at 1098; *Vitek*, 675 F.2d at 193.

these statements were admissible, misdirected communications such as these have been considered in other cases to be “de minimis and to show inattentiveness on the part of the caller or sender rather than actual confusion.”⁵⁶

Blizzard tries to minimize this gaping hole in its case by arguing that evidence of actual confusion is not necessary to establish likelihood of confusion.⁵⁷ But Blizzard ignores the law that the absence of actual confusion, coupled with a long period of co-existence between the parties’ marks, is strong evidence of no likelihood of confusion.⁵⁸ Here, the two marks at issue have co-existed for *more than five years*⁵⁹ without a single admissible example of confusion.⁶⁰ Thus, this Court should grant summary judgment for Defendants on Blizzard’s Count III trademark claim.⁶¹

C. BLIZZARD HAS FAILED TO SHOW ANY PROTECTABLE INTEREST IN THE “BNET” MARK OR ANY TRADE DRESS.

Blizzard’s spends much of its brief arguing that it has a protectable right in the “BNET” mark, based on the public’s purported use of the name “BNET.” But Blizzard completely ignores the fundamental tenet of trademark law that a trademark infringement

⁵⁶ *Duluth*, 84 F.3d at 1098.

⁵⁷ Plaintiffs’ Opp. at 22.

⁵⁸ See *Aktiebolaget Electrolux v. Armatron Int’l, Inc.*, 999 F.2d 1, 4 (1st Cir. 1993) (“an absence of actual confusion, or a negligible amount of it, between two products after a long period of coexistence on the market is highly probative in showing that little likelihood of confusion exists.”); *Falcon Rice Mill, Inc. v. Comm. Rice Mill, Inc.*, 725 F.2d 336, 347 n. 13 (5th Cir.1984).

⁵⁹ See Response to Plaintiffs’ [sic] Statement of Uncontroverted Facts, ¶¶ 1 (Blizzard admits BATTLE.net launched in 1996-97), 8 (Blizzard admits bnetd existed by 1998).

⁶⁰ Cf. *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 490-91 (1st Cir. 1981) (affirming summary judgment of no trademark infringement, finding that evidence of only *one* instance of actual confusion over the *four years* in which the parties’ marks coexisted “strongly indicates” no likelihood of confusion).

⁶¹ While Blizzard has presented minimal evidence on both the strength of its mark and the proximity of the goods at issue, Eighth Circuit caselaw has established that without more, these two factors alone are insufficient to succeed on the merits of a trademark claim. See *Luigino’s*, 170 F.3d at 830-32; *Duluth*, 84 F.3d at 1099.

plaintiff must prove that it was the first user of the disputed marks.⁶² Blizzard concedes that the bnetd project has been using the bnetd name since the project began in 1998.⁶³ It presents no evidence that anyone used “BNET” to refer to BATTLE.net prior to that date. One these facts, the court should grant summary judgment for Defendants on Count IV.⁶⁴

D. BLIZZARD PRESENTS NO EVIDENCE OF ACTUAL DILUTION.

On its claim of dilution, Blizzard takes an even more precarious position. It argues that because no appellate court has instructed this Court or the parties on the exact legal test for actual dilution, the court should send the question to the jury.⁶⁵ This makes no sense. This Court is more than capable of deciding whether Blizzard has presented evidence sufficient for a jury to find actual dilution, and in fact, that is this Court’s duty under Fed. R. Civ. P. 56. To send the case to the jury simply because the legal standard is not well-defined ignores the Court’s Rule 56 responsibility.

Regardless, Blizzard fails to come forward with any evidence of actual dilution of any mark. Although Blizzard asserts in its opposition brief that it “has alleged sufficient facts” to defeat summary judgment on this claim, it provides no citations to where in the record these supposed facts can be found.⁶⁶ Also conspicuously absent is any expert

⁶² *Secular Organizations for Sobriety, Inc. v. Ullrich*, 213 F.3d 1125, 1130 (9th Cir. 2000); *Sengoku Works Ltd. v. RMC Int’l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (“It is axiomatic in trademark law that the standard test of ownership is priority of use.”); 2 *McCarthy on Trademarks and Unfair Competition*, § 16.4 (4th ed. 2003).

⁶³ See Response to Plaintiffs’ [sic] Statement of Uncontroverted Facts, ¶¶ 31, 8.

⁶⁴ Additionally, Blizzard does not dispute that it has no evidence to support key elements necessary for its other Count IV theory of trade dress infringement. See Defendants’ Mem., at 24 n. 87. Thus, summary judgment for Defendants on this claim is proper.

⁶⁵ Plaintiffs’ Opp. at 24.

⁶⁶ See *id.*; see also *Nitro Leisure Products, L.L.C. v. Acushnet Co.*, 341 F.3d 1356, 1366 (Fed. Cir. 2003) (trademark dilution plaintiff’s “conclusory statements it made before the district court, with little more” were insufficient to show actual dilution).

testimony on actual dilution.⁶⁷

Blizzard tries to conceal its utter lack of evidence of actual dilution with two arguments. First Blizzard contends that “the existence of identical marks may provide circumstantial evidence of actual dilution . . . and here defendants’ nearly identical mark is much more similar to Blizzard’s mark than were the marks in Moseley.”⁶⁸ But the fact that identical marks may provide circumstantial evidence of actual dilution is completely irrelevant, since clearly “bnetd project” is not identical to “BATTLE.NET” or “BNET.”⁶⁹

Blizzard’s further argument is that because “defendants used Blizzard’s mark to identify a service which they promoted as a direct replacement or substitute for Blizzard’s services,” this shows evidence of actual dilution.⁷⁰ This argument fails for two reasons. First, there is no evidence of this in the record, which is why Blizzard provides no supporting record cites in its opposition brief.⁷¹ Second, Blizzard’s assertion fails to comport with the rule that evidence of actual dilution must be “empirical evidence that consumers no longer clearly underst[an]d to which products” the plaintiff’s mark is related.⁷² It is this test which Blizzard must meet to avoid summary judgment, and this test which it has failed to satisfy in its Opposition.

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Respectfully submitted,

Jason M. Schultz, *pro hac vice*
Electronic Frontier Foundation

By: /s/ Paul S. Grewal
 Paul S. Grewal
Robert M. Galvin, *pro hac vice*
Paul S. Grewal, *pro hac vice*

⁶⁷ Cf. *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 434 (2003).

⁶⁸ Plaintiffs’ Opp. at 24.

⁶⁹ Moreover, Blizzard has failed to provide any evidence that “BNET” is a famous mark protected under 15 U.S.C. § 1125(c) or address the issue of priority.

⁷⁰ Plaintiffs’ Opp. at 24.

⁷¹ See *id.*

⁷² *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 628 (6th Cir. 2003).

454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Fax: (415) 436-9993
Email: jason@eff.org

Richard C. Lin, *pro hac vice*
Day Casebeer Madrid & Batchelder LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Fax: (408) 873-0220
E-mail: pgrewal@daycasebeer.com

Matthew Braunel (109915)
Mark Sableman (4244)
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101-1611
Telephone: (314) 552-6000
Fax: (314) 552-7000
Email: mbraunel@ThompsonCoburn.com