

04-3654

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellees,

—against—

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 4:02CV498 CAS

Honorable Charles A. Shaw, United States District Judge

**REPLY BRIEF OF DEFENDANTS-APPELLANTS
INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS and
ROB CRITTENDEN**

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This case is about three avid fans of Blizzard videogames who bought those games and made fair use of them to improve not only their own experience as consumers but the experience of others as well. Properly applied, federal copyright law protects Defendants' fair use of Plaintiffs' software against precisely the type of state law claims and claims under the Digital Millennium Copyright Act ("DMCA") that Plaintiffs brought when they filed this suit.

Plaintiffs' state law contract claim cannot be squared with Congress explicit protections for fair use of copyrighted materials. When it amended the Copyright Act in 1976, Congress was clear: fair use of copyrighted material, even when unauthorized by the copyright owner, is nevertheless authorized in the eyes of the federal copyright law. Since that time, the federal courts have unanimously recognized that reverse engineering is a fair use and in 1998, Congress specifically protected fair use by reverse engineering under section 1201(f) when it further amended the Act. In the face of this explicit federal protection for fair use by reverse engineering, Plaintiffs' shrinkwrap and clickwrap contracts prohibiting all copying of Plaintiffs' software, even for the purpose of fair use by reverse engineering, are unenforceable pursuant to the Supremacy Clause. No less than the contracts prohibiting backup copies in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269-70 (5th Cir. 1988), Plaintiffs' shrinkwrap and clickwrap licenses undermine the balance of policy struck in sections 107 and 1201(f) of the

Copyright Act.

Rather than respond to the charge that their state law claim to enforce these licenses is preempted by this conflict, Plaintiffs simply change the subject. Citing *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993), *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003) and a host of other cases that considered *express preemption* under section 301 of the Copyright Act, Plaintiffs argue that their claims survive preemption because they include an “extra element” beyond the exclusive rights set forth in section 106 of the Act. Defendants, however, have asserted the defense of *conflict preemption*, not express preemption, which the Supreme Court has held must be considered separately and under a different legal standard. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89 (1995). All of Plaintiffs’ arguments and citations are thus inapposite.

Nor can Plaintiffs’ DMCA claims be squared with the clear limitations on liability provided by Congress in both sections 1201(f) and 1201(a). Section 1201(f) exempts from any DMCA liability reverse engineering activities that are for the sole purpose of achieving interoperability of an independently created computer program with other programs. Defendants’ sole purpose in ignoring Plaintiff’s CD Key check was to interoperate with the so-called “Battle.net mode” in Plaintiffs’ videogames. As the District Court and Plaintiffs’ own expert agreed,

because Plaintiffs refused to disclose the mechanism for checking CD Keys, “there is no way that defendants could have implemented a check for CD Key validity in the bnetd program.” *Davidson & Assocs., Inc. v. Internet Gateway, Inc.*, 334 F. Supp.2d 1164, 1173 (E.D. Mo. 2004). Thus any claims against actions taken to create the bnetd program or claims that the bnetd program is a tool of illegal circumvention are foreclosed by section 1201(f). Just like the Virtual Game Machine emulator in *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 606-07 (9th Cir. 2000), the ink cartridges in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 530 (6th Cir. 2004), and the garage door openers in *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1184-85 (Fed. Cir. 2004), the bnetd server was developed by Defendants as an alternative to Plaintiffs’ problem-ridden Battle.net service. Section 1201(f) was adopted to protect exactly these sorts of activities.

Even if section 1201(f) does not protect Defendants here, circumvention liability still does not lie. Section 1201(a)(1)(A) provides that “no person shall circumvent a technological measure that *effectively controls access to a work protected under this title.*” (emphasis added). Similarly, section 1201(a)(2)(A) provides that “no person shall ... traffic in any technology ... that is primarily designed or produced for the purpose of circumventing a technological measure that *effectively controls access to a work protected under this title.*” For both

provisions, the user must be granted access to some independently protected copyrighted work. Yet there is no independently protected copyrighted work called “Battle.net Mode”; nor is there any expression on the user’s videogame CD-ROM that is unavailable except in “Battle.net” mode. What Plaintiffs object to is not access to a copyrighted work, but rather access to embedded functionality in the game that its customers have already purchased and to which consumers already have unfettered access. Protection of such functionality is the domain of patent law, not copyright. Section 102(b) of the Copyright Act makes clear that “methods of operation” like the “Battle.net mode” cannot be protected under the Copyright Act. *See* 17 U.S.C. § 102(b).

The District Court erred by granting summary judgment in favor of Plaintiffs on their claim for breach of contract and violations of the DMCA. Based on settled principles of law, that judgment should be reversed.

I. CONGRESS’ DECISION TO RESERVE FAIR USE OF COPYRIGHTED MATERIAL TO THE PUBLIC PREEMPTS PLAINTIFFS’ CLAIM FOR BREACH OF CONTRACT

A. Plaintiffs’ Contracts Plainly Prohibit Fair Use of Plaintiffs’ Copyrighted Material by Reverse Engineering

The licensing terms at issue here are unequivocal: they ban all copying by purchasers of the games, whether fair use or not, and specifically ban reverse engineering, stating that a consumer “may not, in whole or in part, copy ... [or] reverse engineer ... the Program.” 334 F. Supp.2d at 1170-71; DER258, 261-262, 266, 270; *cf.* DER274. Because all fair use by definition *requires* that some

portion of copyrighted materials be copied, *see, e.g., Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992), Plaintiffs' absolute restrictions are a general ban on all fair use of Plaintiffs' copyrighted expression and a specific ban on fair use by reverse engineering.

B. Plaintiffs' Contracts Conflict with Congress' Explicit Protections for Fair Use by Reverse Engineering

1. *Nat'l Car Rental, Bowers*, and Other Express Preemption Cases are Irrelevant to a Challenge to Plaintiffs' Contract on Conflict Preemption Grounds

In their opening brief, Defendants demonstrated that Plaintiffs' prohibitions on reverse engineering conflicted with Congressional copyright objectives and are thus preempted. Rather than address relevant cases on *conflict preemption*, Plaintiffs and their *amici* instead discuss *Nat'l Car Rental, Bowers*, and a series of other cases that considered whether various state laws were *expressly preempted* by section 301 of the Copyright Act. Because Defendants do not challenge Plaintiffs' license restrictions on section 301 preemption grounds, and did not do so before the District Court, Plaintiffs' arguments are simply not relevant.

The Supreme Court, the Eighth Circuit, and other circuits have explained that there are three at least types of preemption – implied field preemption, express preemption, and conflict preemption. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Kinley Corp. v. Iowa Util. Bd., Utils. Div., Dept. of Commerce*, 999 F.2d 354, 357-58 (8th Cir. 1993); *Ass'n of Am. Med. Colls. v.*

Cuomo, 928 F.2d 519, 522-23 (2nd Cir. 1991) (noting three branches of preemption law in the context of issue of preemption of state law by federal copyright law). The parties agree that implied field preemption is not an issue in this case. But by asserting that their contracts include at least an “extra element” sufficient to avoid express preemption under section 301, and further asserting that by avoiding preemption under section 301 their contract claim is simply “not preempted,” Pls.’ Br. at 49, Plaintiffs ignore the conflict preemption doctrine altogether and the clear teaching of the Supreme Court in *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) that “neither an express preemption provision nor a saving clause ‘bar[s] the ordinary working of conflict preemption principles.’” (citing *Gaier v. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000)). See also *Union Ctr. Redevelopment Corp. v. Nat’l R.R. Passenger Corp.*, 103 F.3d 62, 64-65 (8th Cir. 1997); *Brown v. Ames*, 201 F.3d 654, 659 (5th Cir. 2000) (analyzing express preemption under section 301 and separately analyzing conflict preemption).¹ In short, like the District Court below, when presented with Defendants’ constitutional conflict preemption claim, Plaintiffs simply dodge it.

¹ As one court has explained, “given the fact that the moving plaintiffs do not rely upon § 301 to support their argument that the [state law] is preempted by the Copyright Act, the court sees no reason to engage in a discussion of the applicability of this section to the case at hand.” *Coll. Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 563 n.12 (N.D.N.Y. 1995).

2. Plaintiffs' Contracts Include Restrictions on Fair Use Sufficient for Conflict Preemption in *Vault*

Plaintiffs fail to address the central holding on conflict preemption in *Vault*.

In *Vault*, the Court addressed the conflict between federal law protecting fair use of copyrighted material and state law that seeks to prohibit it and expressly held that state law enforcement of such prohibitions was preempted, even if the prohibitions were embodied in private contracts. Because section 117 of the Copyright Act protects the specific fair use of copyrighted material for archival and back-up purposes, the Fifth Circuit held that Louisiana law could not enforce contracts that restrict fair use:

“The provision in Louisiana’s License Act, which permits a software producer to prohibit the adaptation of its licensed computer program by decompilation or disassembly, conflicts with the rights of computer program owners under § 117 and ‘clearly touches upon an area’ of federal copyright law. For this reason, and the reasons set forth by the district court, we hold that 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 decompilation or disassembly is unenforceable.”

847 F.2d at 270.²

² Despite Plaintiffs’ suggestion to the contrary in their discussion of *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990), the Fifth Circuit has not backed away at all from its holding in *Vault*. In *Taquino*, the Fifth Circuit never addressed the issue of conflict preemption, and it does not appear that the issue was even before that court on appeal. Plaintiffs, in citing to page 1501 of the opinion, appear to have erroneously relied on the district court opinion attached as an appendix to the Fifth Circuit decision. And even the district court’s opinion did not consider conflict preemption, but rather express preemption. As discussed above, express preemption is simply not an issue relevant to this appeal.

Plaintiffs dismiss *Vault* by noting only that “*Vault* struck down a state statute, rather than a private contract.” Pls.’ Br. at 54. But nothing in *Vault* turned on Louisiana acting specifically by passing a statute. Quoting the Supreme Court’s holding in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964), the Fifth Circuit drew no distinction at all between statutory law and common law private rights of action. Instead, it spoke of all state law, period: “[w]hen *state law* touches upon the area of [patent or copyright statutes], it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the *state law*.” *Vault*, 847 F.2d at 269 (emphasis added).

Nor could the Fifth Circuit have drawn any such distinction, because the Supreme Court has consistently held that the plain language of the Supremacy Clause prohibits conflict between federal and any state law, whether the state law is in the form of a statute or a common law cause of action. *See, e.g., Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 65 (2002) (“Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, or if it were impossible to comply with any such regulation without incurring liability under state common law, pre-emption would occur.”); *Freightliner*, 514 U.S. at 282 (applying principles of conflict preemption to issue of whether state common law causes of action were preempted by National

Traffic and Motor Vehicle Safety Act).³ And in any event, as much as the contracts in *Vault*, the contracts at issue here were enforced pursuant to state statutes. *See* 334 F. Supp.2d at 1177 (relying on MO. REV. STAT. § 400.2-204(1)); *see also* CAL. COMM. CODE § 2204(1) (adopting UCC into California contract law via statute).

Here, as in *Vault*, there is no serious doubt that Plaintiffs' state law contract claims "interfere with the framework created by Congress," *Forest Park II v. Hadley*, 336 F.3d 724, 734 (8th Cir. 2003), by proscribing fair use of copyrighted material that Congress has specifically protected.⁴ As in *Vault*, these claims should be dismissed.⁵

3. As Intellectual Property Rights Specifically Reserved By Congress to the Public, Fair Use Rights May Not Be Waived By Contracts and Certainly Not by Contracts of Adhesion

Plaintiffs ignore well-established principles by arguing that Defendants

³ Recognizing that the Supremacy Clause applies equally to state common law claims, this Court only recently held that "[p]reemption stems from the Supremacy Clause of the Constitution and invalidates state positive (statutes or regulations) and common law provisions that interfere with or are contrary to federal law." *Hardin v. BASF Corp.*, No. 03-3624, 2005 WL 323700, at *1 (8th Cir. Feb. 11, 2005). *See also Public Util. Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004) (preempting state contract claims based on impermissible conflict with federal law).

⁴ *See generally*, Mark Lemley, *Beyond Preemption*, 87 Cal. L. Rev. 111, 128-133 (1999).

⁵ *See* Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L.J. 1575, 1660-61 (2002).

simply “waived” their fair use rights by agreeing to Plaintiffs’ licenses. The Supreme Court has explained that a private party cannot waive a private right if such waiver conflicts with the public policy objective that motivated Congress to create the right in the first place. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (“Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”). And as discussed in Defendants’ Opening Brief, the Supreme Court has specifically applied this principal in the context of intellectual property rights. *See Brulotte v. Thys Co.*, 379 U.S. 29, 32-33 (1965); *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 255-56 (1945). None of the briefs from Plaintiffs or their *amici* even address these cases.

Moreover, no court considering conflict preemption has distinguished between affirmative rights and affirmative defenses, as Plaintiffs and their *amici* urge. For example, in applying this principle that “a statutory right may not be disclaimed if the waiver could ‘do violence to the public policy underlying the legislative enactment,’” the First Circuit held that a party could not contractually waive an affirmative defense of ERISA preemption because such waiver would impermissibly conflict with the statutory scheme of ERISA law and objectives that were designed to benefit the public as a whole. *See Tompkins v. United*

Healthcare of New England, Inc., 203 F.3d 90, 97-98 (1st Cir. 2000). By stripping consumers of all fair use rights concerning their software, including the reverse engineering rights recognized by courts and Congress, Plaintiffs' contract restrictions do no less violence to the public policy underlying section 107 of the Copyright Act and section 1201(f) of the DMCA.

II. PLAINTIFFS FAILED TO PROVE THEIR CLAIMS UNDER THE DIGITAL MILLENIUM COPYRIGHT ACT

A. Defendants' Reverse Engineering Activities Were Solely for the Purpose of Achieving Interoperability

In their Opening Brief, Defendants lay out clearly and specifically how they qualify for each and every prong of the statutory section 1201(f) reverse engineering defense to each of Plaintiffs' DMCA claims. In their brief, Plaintiffs do not directly address the core of Defendants' defense – that sending an “OK” signal to the videogame in response to the CD Key was necessary to achieve interoperability. Rather, Plaintiffs discuss irrelevant allegations and cite inapposite standards in an attempt to distract this Court from the applicable statutory standards in this case.

1. Plaintiffs' Claims of Infringement Are Unsupported and Irrelevant

Plaintiffs echo the District Court's erroneous view that Defendants are precluded from the safe harbors of section 1201(f) by reason of their “copyright infringement.” Pls.' Br. at 37 (quoting 334 F. Supp.2d at 1185). But there is simply no evidence in the record that Defendants infringed even a single copyright,

in the Consent Decree or anywhere else for that matter. As the Court can read for itself, Defendants’ “admissions” in the Consent Decree concerned limited copying of code, and included no concessions that such copying was infringing. Although Plaintiffs would like to make this Court believe that any “copying” is infringing, this is not the law. Fair use, by its nature, involves direct copying but is not an infringement. *See* 17 U.S.C. § 107. In fact, the Consent Decree was entirely consistent with Defendants’ claims that the copying was protected under the law either as fair use or, alternatively, *de minimus* use.⁶ Moreover, consistent with Defendants’ fair use and *de minimus* assertions, the District Court dismissed all of Plaintiffs’ copyright claims *with prejudice* without any judgment or finding of infringement against Defendants.

Even if Plaintiffs could point to sufficient evidence in the record to support their allegations of infringement, these allegations do not preclude Defendants from relying upon the safe harbors of section 1201(f). Plaintiffs misrepresent the plain language of section 1201(f) by suggesting that a party loses the section

⁶ Plaintiffs also suggest, without merit, that Defendant Crittenden infringed Plaintiffs’ copyrights when he used a “pirated copy” of a Blizzard game during testing of the bnetd server. But the record is undisputed that Defendant Crittenden purchased (and hence licensed) the very same game title he is accused of “pirating,” and that he made a second copy of the game only to test the bnetd server’s multiplayer functionality by logging into the server with two games at once. DER206-7. Because it was necessary to do so in order to achieve interoperability between the bnetd server and Blizzard games, Defendant Crittenden’s copying was classic fair use, not “piracy.” *See Connectix*, 203 F.3d at

1201(f) defense upon a finding of *any* copyright infringement. In fact, section 1201(f) is only unavailable where the acts of circumvention or means of circumvention would otherwise constitute copyright infringement. *See* 17 U.S.C. § 1201(f) (granting immunity from liability under section 1201(a) for acts of circumvention in order to identify and analyze elements of a computer program that are necessary to achieve interoperability as long as “*such acts of identification and analysis* do not constitute infringement under this title”) (emphasis added). In other words, the only *relevant* copyright infringement for section 1201(f) purposes is either a situation where infringement occurs during the acts of circumvention or where the circumvention mechanism itself contains infringing code, none of which occurred here.

The only alleged “act” of circumvention in this case is the act of sending an “OK” signal to a Blizzard game in order to complete Blizzard’s “secret handshake.” 334 F. Supp.2d at 1173, 1185; DER178. The only alleged circumvention mechanism in this case is the code in the bnetd server program (called “bnethash.c”) that sends this “OK” signal. 334 F. Supp.2d at 1173. Because the record is undisputed both that sending the “OK” signal infringes no copyright and that the “bnethash.c” file contains no infringing code, there is no relevant infringement to disqualify Defendants from complete section 1201(f)

602-603.

immunity.

2. Defendants Had a Legal Right to Use Plaintiffs’ Software Regardless of Plaintiffs’ Unenforceable Restrictions on Fair Use by Reverse Engineering

Ignoring the District Court’s acknowledgement that Defendants “lawfully obtained the right to use a copy of the computer programs when they agreed to the EULAs and TOU,” 334 F. Supp.2d at 1185, Plaintiffs argue that Defendants are nevertheless precluded from relying upon section 1201(f) because they did not have a legal right to *circumvent* any of the protections within those programs.⁷ Pls.’ Br. at 31. In support, Plaintiffs rely on a further statement in the District Court’s order that the DMCA “only exempts those who obtained permission to circumvent the technological measure, not everyone who obtained permission to use the games and Battle.net.” 334 F. Supp.2d at 1185 (citing *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444 (2nd Cir. 2001)). This is precisely where the District Court erred, for at least two reasons.

First, the plain language of the statutory section says “right to use a copy of a computer program,” not “right to circumvent an access control of a computer program.” Had it wanted to limit section 1201(f) in the way suggested by

⁷ Defendants note that the “lawful right to use” requirement is only present in subsection 1201(f)(1) and not subsections (f)(2) or (f)(3); therefore, to the extent the Court might find Defendants did not have such a right, it would only prohibit them from asserting the section 1201(f) defense against acts of circumvention for reverse engineering, not distribution of circumvention tools under subsections 1201(f)(2) and (3).

Plaintiffs, Congress certainly could have used the words “circumvent” or “access” in section 1201(f)(1), just as they did throughout the rest of section 1201.

Second, both Plaintiffs and the District Court misread the *Corley* citation on which they rely. In *Corley*, the court did not discuss whether the defendant had a legal right to use DVDs for purposes of qualifying for the section 1201(f)(1) exemption. Instead, the court discussed whether the defendant had been authorized by the copyright holder under section 1201(a)(3) and thus was not liable under the DMCA as a *prima facie* matter. *See Corley*, 273 F.3d at 444. Section 1201(a)(3) governs the circumstances under which one has authorization to circumvent a technological measure governed by the DMCA. Under section 1201(a)(3), if one has authorization, there is no DMCA violation. In contrast, section 1201(f)(1) governs situations when, after a *prima facie* DMCA violation has occurred, a party is nevertheless immune from liability because of the section 1201(f) affirmative defense. If one had to get authorization to circumvent in order to qualify for the section 1201(f) affirmative defense, one would never have violated the DMCA in the first place under the language of section 1201(a)(3). Clearly Congress would not have intended the section 1201(f) defense to be so illusory.

3. Enabling Online Play of Blizzard Games Achieved Interoperability

Plaintiffs claim Defendants did not have the “sole purpose of achieving interoperability” as required by section 1201(f) because they also had the purpose

of “enabl[ing] online play of Blizzard games without using Battle.net.”⁸ What Plaintiffs fail to recognize is that these purposes are one and the same thing – enabling online play *achieves* interoperability between the bnetd server and Blizzard games.

Any time one makes two programs interoperable, one has the goal of enabling one program to work with the other. Simply because Plaintiffs characterize this goal using different language than that found in section 1201(f) does not change its essential nature. It is undisputed that when the bnetd server enables online play of Blizzard games, it does so through the process of exchanging information with the Blizzard games and then allowing each program to use the information which has been exchanged.⁹ It is also undisputed that this interoperability was the sole purpose of building the bnetd server.

Plaintiffs also complain that Defendants somehow used improper means to achieve interoperability. Section 1201(f), however, imposes no restrictions on how one achieves interoperability, except that acts of interoperability cannot infringe

⁸ Plaintiffs also impermissibly narrow the “sole purpose” language of section 1201(f) by only quoting the “identify and analyze” language of section 1201(f)(1). Subsections 1201(f)(2) and (f)(3) include language applying to the “sole purpose” prong to achieve interoperability in general, not just for identification and analysis purposes. *See* 17 U.S.C. §§ 1201(f)(2), (3).

⁹ The DMCA defines “interoperability” as “the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.” 17 U.S.C. § 1201(f)(4).

the copyright of the program that is reverse engineered.¹⁰ As noted above, there is no evidence that such infringement occurred here. Moreover, the method complained of is “developing a key to bypass Blizzard’s authentication system.” If the simple act of developing a key to bypass an authentication system made a section 1201(f) defense unavailable, then no defendant would ever qualify under section 1201(f) because it provides an affirmative defense to this very act of circumvention, *e.g.* bypassing a key authentication system.

Finally, Plaintiffs mislead this Court by implying that Defendants’ knowledge of bnetd’s use with unauthorized games somehow changes Defendants’ sole purpose under section 1201(f). Purpose is not the same as knowledge.¹¹ Despite Plaintiffs’ baseless speculation, there is no evidence in the record that Defendants *ever* encouraged a specific act of piracy. 334 F. Supp.2d at 1164. In

¹⁰ See also *Connectix*, 203 F.3d 596, 604-5 (finding no reason to differentiate between methods of reverse engineering as long as they were necessary to achieve interoperability between software programs and stating “[e]ven if we were inclined to supervise the engineering solutions of software companies in minute detail, and we are not, our application of the copyright law would not turn on such a distinction.”)

¹¹ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 438-39 (1984) (mere knowledge that users of VCRs would infringe copyrights is not sufficient to find maker of Betamax contributorily liable for those infringements). Plaintiffs’ citation to *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), is inapposite. In *Reimerdes*, the Court found that the primary purpose of the device at issue was to help make illegal copies of DVDs without any program-to-program interoperability. *Id.* at 315. Here, there is no dispute that every single use of the bnetd server involves program-to-program interoperability with Blizzard videogames.

fact, Defendants offered several times to implement features that would prevent use of unauthorized Blizzard games but Plaintiffs refused. 334 F. Supp.2d at 1173; DER 177-78, 368.

4. Defendants Created an Independent Computer Program

Plaintiffs argue that Defendants did not develop an “independently created computer program” because the bnetd server is a “functional alternative” to the Battle.net service. As Defendants articulated in their Opening Brief, this cannot be the standard for what constitutes an “independently created computer program” as *all* interoperable computer programs that compete with a copyright owner’s original program are functional alternatives.¹²

This is exactly what occurred in the seminal reverse engineering cases underlying section 1201(f). In *Sega Enterprises Ltd. v. Accolade, Inc.*, Accolade developed computer games that were intended to serve as competing, functional alternatives to Sega’s games. 977 F.2d 1510, 1514 (9th Cir. 1992). In *Connectix*, Connectix’s emulator was intended to serve as a functional alternative to Sony’s PlayStation console. 203 F.3d at 599. Given Congress’ recognition that *Sega* and its progeny formed the basis for section 1201(f)’s immunization, it cannot be the case that functional alternatives are denied section 1201(f) protection. *See* S. Rep.

¹² Paradoxically, later in its Brief, Plaintiffs admit that the bnetd server “was independently developed for ‘interoperability.’” Pls.’ Br. at 40.

No. 105-190, at 13 (1998); *see also* Brief of *Amici Curiae* Computer & Communications Industry Association, *et al.*, at 14-15.

Plaintiffs attempts to distinguish *Connectix* for two reasons. First, they claim that the holding in this case is outside the scope of section 1201(f) because it was decided after the DMCA was enacted and not on DMCA grounds. However, Congress based section 1201(f) on the doctrine of fair use reverse engineering as a whole, not on a single case. Its citation to *Sega v. Accolade* in the legislative history of section 1201(f) was exemplary, not exclusive. As *Connectix* relied heavily on *Sega* for all of its holdings regarding reverse engineering, fair use, and interoperability and applied the same legal principles as were applied in *Sega*,¹³ there can be no doubt that cases following *Sega*'s holding and reasoning serve to define the scope of the section 1201(f) safe harbor.

Second, Plaintiffs attempt to distinguish *Connectix* on its facts, claiming that because Sony sold two products commercially (the Sony Playstation and Sony videogames), it involved interoperability between two separate products while here, Plaintiffs sell only one product, its videogames. But it simply does not matter whether the programs are sold as one or two products. Section 1201(f) does not talk about interoperability between computer *products* but rather between

¹³ *Connectix*, 203 F.3d at 599-608 (citing *Sega*, 977 F.2d at 1520-24).

computer *programs*.¹⁴ Nothing in the plain language or the legislative history of section 1201(f) suggests otherwise.

Finally, Plaintiffs suggest that the bnetd server is not “independent” because it does not add to the body of creative works or is not “transformative.” This claim is unfounded. The bnetd server is a fully functioning program that contains numerous additional features and options that go far beyond the functionality of Plaintiffs’ Battle.net server. It provides chat services, customizable gaming opportunities, stores passwords, ranks players based on their wins or losses, and even the opportunity to play legitimate Blizzard games on internal networks where access to Battle.net is not allowed. 334 F. Supp.2d at 1173. These functions are highly transformative and required hundreds of hours of programming time to develop and resulted in thousands of lines of entirely new and original code being written and developed. The bnetd server is not simply a program for sending an “OK” signal to Blizzard’s games. In fact, the “bnethash.c” that sends the “OK” signal constitutes less than 0.5% of the entire code in the bnetd program. DER375. Thus, there can be no question that like *Sega* and *Connectix* before it, Defendants’ bnetd server program is an independent, transformative computer program.

Having failed to rebut the application of the section 1201(f) factors to

¹⁴ Nor have courts recognized this distinction. Plaintiffs’ only supporting case, *Sony Computer Entm’t Am. Inc. v. Gamemasters*, 87 F. Supp.2d 976, 987 (N.D. Cal. 1999), is simply inapposite, because it did not involve any application of

Defendants’ conduct, Plaintiffs argue against Congress’ choice to implement the DMCA as it saw fit. For example, they argue that Defendants’ arguments, if accepted, “would exempt from liability the very target of the DMCA – the circumvention program itself.” Pls.’ Br. at 39. Yet when the program is an interoperable computer program, this is exactly what Congress intended. What other purpose could an *exemption* to the provisions of section 1201(a) serve if not to exempt an otherwise unlawful circumvention tool from liability? Section 1201(f) is an *affirmative defense* to violations of the prohibitions on circumvention acts and tools; thus, it must exempt such acts and tools from liability or it is meaningless as a defense.

Taken to its logical conclusion, Plaintiffs’ reading of section 1201(f) would eviscerate any protection for interoperable programs. Quite simply, no program would ever qualify under section 1201(f) if Plaintiffs’ argument prevails. In Plaintiffs’ view, any program that unlocks a lock with a key violates the DMCA and is not eligible for section 1201(f) protection. Yet Congress intended section 1201(f) to allow independently created computers programs to do just that – unlock other company’s locks when such unlocking was necessary to offer interoperable services or products. *See* S. Rep. No. 105-190, at 13 (1998) (section 1201(f) intended to foster competition in the software industry); Brief of *Amici*

section 1201(f).

Curiae Computer & Communications Industry Association, *et al.*, at 14-15; *see also Chamberlain*, 381 F.3d at 1200-01; *Lexmark*, 387 F.3d at 537. Thus, one has to distinguish between those who only provide keys and those who provide independently-created computer programs that use keys to interoperate. Congress intended the DMCA to ban the former and preserve the latter. The bnetd server clearly falls among the latter.

5. Plaintiffs’ Attack on Fair Use is Irrelevant to Their DMCA Arguments

In the last part of its section on the DMCA, Plaintiffs attack generally the notion of a general fair use defense to claims brought under the DMCA. *See* Pls.’ Br. at 41-48. This entire argument, however, is a red herring. Defendants have not asserted any general fair use defense to Plaintiffs’ DMCA claims. Rather, they have specifically relied upon the codification of section 1201(f), the statutory fair use reverse engineering defense.

B. Plaintiffs’ CD Key Check—The Technological Measure Allegedly Circumvented by Defendants—Does Not Protect Any Work Protected By Copyright Law

By claiming the right to limit access to its purely functional “Battle.net mode,” Plaintiffs simply ignore the holding in *Lexmark*, 387 F.3d 522, 550: “the DMCA require[s] the claimant to show that the ‘technological measure’ at issue ‘controls access to a work protected under this title,’ which is to say to a work protected the general copyright statute. To the extent [that which is protected] is

not a ‘work protected under the [copyright statute]’ . . . the DMCA necessarily would not protect it.” *Lexmark*, 387 F.3d at 550. Looking specifically at software performing exactly the same lockout function as the CD Key check here, *Lexmark* held the lockout software entitled to protection under the DCMA could not protect “merely an idea, process, or method of operation.” *Lexmark*, 387 F.3d at 538.

Nothing in *Lexmark* suggests, as Plaintiffs do, that the Sixth Circuit would have extended the protections of the DMCA to the lock-out software codes at issue if the end result of the method of operation protected by the codes was to display any copyrightable images and sounds. While the Court observed that the DMCA would apply where “the program commands in software for video games or computers translate into some other visual and audio manifestation,” *Lexmark*, 387 F.3d at 548, those commands or lockout codes themselves must “create any protected expression.” *Id.* The output of the commands or lockout may not be “purely functional.” *Id.*¹⁵

¹⁵ This does not mean, however, the Plaintiffs could not have prohibited Defendants from accessing this functionality within their games. Patent law, copyright’s constitutional companion, allows companies to protect software functionality by applying for a patent on processes, methods, and modes of operation. *See* 35 U.S.C. § 101. Had Plaintiffs wanted to legally prohibit Defendants from accessing Battle.net mode or creating a functional alternative to Battle.net, all they would have had to do was apply for a patent application from the U.S. government. Yet Plaintiffs *chose* to forgo such protection for its videogames and Battle.net server. In doing so, it waived all rights to restrict such access and dedicated this functionality to the public domain. *See* Brief of IEEE-USA as *Amicus Curiae*, at 23-24. It cannot now regain exclusive control over this

Here, the undisputed evidence in the record shows that “Battle.net Mode” is entirely functional. As Plaintiffs themselves explain, “[t]he aspect of ‘Battle.net Mode’ relevant here is *online play* of Blizzard games, to which Blizzard expressly limits access.” Pls.’ Br. at 25; DER353-54; *see also* Pls.’ Br. at 8 (“This authenticity check is a technological measure to control access to online play of its games[.]”). Online play is a *function* of Plaintiffs’ games, not an artistic expression. Nothing in “Battle.net Mode” is used to express *any* images or sounds during game play. Rather, the sole function of “Battle.net mode” is to transmit a game’s data packets over the internet. Lest there be any doubt that the code implementing “Battle.net mode” “is not a conduit to protectable expression,” *Lexmark*, 387 F.3d at 548, the record is undisputed that every image and sound displayed as a result of this packet transfer is available to game owners in a variety of circumstances that do not call upon any “Battle.net mode” code whatsoever, including “single-player,” “direct connect” and “LAN games.”¹⁶ 334 F. Supp.2d at

functionality through copyright or contract laws. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153, 157 (1989); *Feist Pubs. v. Rural Tel Serv. Co., Inc.*, 499 U.S. 340, 359 (1991).

¹⁶ Desperate to identify some expression protected by “Battle.net mode,” Plaintiffs cites to two pieces of evidence from the record that the District Court chose to ignore: its general-purpose copyright registrations and the Consent Decree. None of these documents, however, even mention “Battle.net Mode” or make any distinction between copyrighted content that is available only in “Battle.net mode” and content that is not.

Because “Battle.net mode” does not protect all access to any copyrightable expression, in contrast to the technological measures at issue in *Corley*, 273 F.3d at

1168.

C. Access to “Battle.net Mode” Is Not Effectively Controlled

Plaintiffs have also failed to address another fatal flaw in their DMCA claims—they cannot establish that the CD Key check mechanism “effectively controls access to a work protected under [the Copyright Act].” 17 U.S.C. § 1201(a)(1)(A). In fact, Plaintiffs’ brief is strangely evasive about what copyrighted work, exactly, is protected by the CD Key check mechanism, claiming variously the works protected were “Blizzard’s copyrighted computer games, graphical images and related programs,” Pls.’ Br. at 24, “online play,” *id.* at 25, and “online access.” *Id.* at 34-35. Plaintiffs’ evasions are understandable, as they attempt to obscure a fatal defect in their DMCA claims.

If the work protected by the CD Key check mechanism is the software contained on the game CDs purchased by Defendants, then Plaintiffs’ claim must fail because their “protection” mechanism in no way prevents game owners from accessing the relevant software. In *Lexmark*, the Sixth Circuit rejected the notion that a technological measure “effectively control access” merely because it “controls the consumer’s ability to make use of the program.” *Id.* at 532, 546.

443, *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp.2d 1085, 1094-95 (N.D.Cal. 2004), and *Gamemasters*, 87 F. Supp.2d at 987, those cases do not apply to “Battle.net mode.” See *Lexmark*, 387 F.3d at 548 (distinguishing such cases where technological measures at issue prevented “*all* access to the copyrightable material”) (emphasis added).

Noting that anyone who purchased Lexmark’s printer could “read the literal code” of the software supposedly protected by Lexmark’s technological measure, the Court held that “[n]o security device, in other words, protects access to the [software] and no security device accordingly must be circumvented to obtain access to that program code.” *Id.* at 546-547. The Court even considered Plaintiffs’ specific argument that “reading the copyrighted game program without being able to access it for online play, is not equivalent to obtaining access to online play,” Pls.’ Br. at 28, holding that

“[t]he authentication sequence, it is true, may well block one form of ‘access’ – the ‘ability to . . . make use of’ the Printer Engine Program by preventing the printer from functioning. But it does not block another relevant form of ‘access’ – the ‘ability to [] obtain’ a copy of the work or to ‘make use of’ the literal elements of the program (its code). Because the statute refers to ‘control[ling] access to a work protected under this title,’ it does not naturally apply when the ‘work protected under this title’ is otherwise accessible.”

Id. at 547.

Plaintiffs’ argument is also contrary to common sense. As the Sixth Circuit further explained:

“Just as one would not say that a lock on the back door of a house ‘controls access’ to a house whose front door does not contain a lock and just as one would not say that a lock on any door of a house ‘controls access’ to the house after its purchaser receives the key to the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works.”

Id. at 547. Because it is undisputed that the entire software program is accessible,

without impediment, to owners of the Blizzard game CDs by reading the literal code of the CD off the disk, Plaintiffs here have left no lock on the front door, and now are left urging that the lock on the back door (the CD Key check mechanism) protects their CD ROM game. This is precisely the argument that was rejected in *Lexmark*.

If, on the other hand, Plaintiffs are contending that the CD Key check mechanism controls access to the “Battle.net mode” or “online play” features of the game software, then their argument collapses because a “mode” or particular functional “features” of the game are not properly copyrightable subject matter, and thus not a “work protected under this title” under 17 U.S.C. § 1201(a)(1)(A).¹⁷ The functional processes that comprise “Battle.net mode” are solely operational, just like reading the amount of toner or directing a paper feed through a printer in *Lexmark*. See *Lexmark*, 387 F.3d at 548.

III. CONCLUSION

Congress has struck a delicate balance between a copyright owner’s right to exclude and the public’s right of fair use. By seeking to enforce a state law claim

¹⁷ What Plaintiffs’ CD Keys actually protect is *not* access to Plaintiffs’ CD ROM games but rather access to its Internet-based Battle.net Server. It is undisputed that one cannot access any of the copyrighted content on the Battle.net Server gateways without passing Blizzard’s CD Key authentication process. DER356, 237. It is also undisputed that the bnetd server is no way facilitates access to any part of Blizzard’s proprietary Battle.net Server programs; thus, circumvention of the CD Key’s true purpose was not at issue in this case. *Cf. RealNetworks, Inc. v. Streambox, Inc.*, 2000 WL 127311, *7 (W.D. Wash. Jan. 18, 2000), (finding

that conflicts with the public's reserved right of fair use and a DMCA claim that ignores important statutory limitations on such claims, Plaintiffs are trying to rewrite this balance in their favor against Congress' wishes, objectives, and goals. This Court should decline Plaintiffs' invitation and correct the decision of the District Court below in accordance.

Dated: March 7, 2005

Respectfully submitted,

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DMCA violation for granting unauthorized access to plaintiffs' Internet servers).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of REPLY BRIEF OF DEFENDANTS-APPELLANTS INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS and ROB CRITTENDEN, was duly served upon counsel for Plaintiffs-Appellees Davidson & Associates, Inc., D.B.A. Blizzard Entertainment, and Vivendi Universal Games, Inc. by forwarding two copies of the Reply Brief 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, ten copies, and a 3.5” floppy diskette containing a .pdf version of the Brief have also been sent via overnight courier for next business day delivery to:

Clerk of the Court
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this 7th day of March, 2005.

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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 6,977 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 pt. Times New Roman font; and includes a virus free 3.5” floppy disk in .pdf format.

Dated: March 7, 2005

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