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11 **IN THE UNITED STATES DISTRICT COURT**
12 **IN AND FOR THE DISTRICT OF ARIZONA**

<p>13 MDY INDUSTRIES, LLC,</p> <p>14 Plaintiff and Counterdefendant,</p> <p>15 vs.</p> <p>16 BLIZZARD ENTERTAINMENT,</p> <p>17 INC., and VIVENDI GAMES, INC.,</p> <p>18 Defendants and Counterclaimants,</p>	<p>Case No.: CV06-02555-PHX-DGC</p> <p>AMICUS CURIAE BRIEF OF PUBLIC KNOWLEDGE IN SUPPORT OF NEITHER PARTY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT</p>
<p>19 BLIZZARD ENTERTAINMENT,</p> <p>20 INC., and VIVENDI GAMES, INC.,</p> <p>21 Third-Party Plaintiffs,</p> <p>22 vs.</p> <p>23 MICHAEL DONNELLY, an</p> <p>24 individual,</p> <p>25 Third-Party Defendant.</p>	

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1 **AMICUS CURIAE BRIEF OF PUBLIC KNOWLEDGE IN SUPPORT OF**
2 **NEITHER PARTY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

3
4 **INTRODUCTION**

5 *Amicus curiae* Public Knowledge is a Washington, D.C. based public interest
6 group working to defend citizen rights in the emerging digital culture (“*Amicus*” or
7 “PK”). Among the most important digital freedoms are the ability to use, adapt, and
8 enjoy music, movies, and software consistent with copyright law. Fair use, first sale
9 and the right to use and adapt one’s own copy of digital content are important for
10 freedom, innovation, commentary and critique. Congress ensured that users would
11 enjoy these rights by enacting copyright law that balances the rights of copyright
12 holders with the rights of copy owners. *See, e.g.*, 17 U.S.C. §§ 107, 109, 117.

13 *Amicus* urges this court to uphold the rights of the digital consumer by finding
14 that ordinary purchasers of software are owners of that software entitled to exercise
15 their fair use, first sale and essential usage rights under copyright law, even if that
16 software is distributed with a shrink-wrap or click-wrap license. This rule ensures that
17 the rights of copyright owners and consumers remain balanced. Licensors may be
18 entitled to contract remedies for breach of the license contract, and in that case,
19 contract law principles protect the balance of rights between those two parties. Any
20 other rule allows content corporations to use take-it-or-leave-it software licenses to
21 take the best of both worlds for the content distributors and leave citizens with
22 onerous, socially undesirable, and unlawful restrictions, backed by penalties far out of
23 proportion to possible violations.

24 *Amicus* therefore submits this brief in the interests of preserving the balance
25 between buyer and seller; reader and author. In filing this brief, *Amicus* expresses no

1 opinion on theories of liability unrelated to copyright, and expresses no approval,
2 endorsement, or encouragement of MDY’s behavior.

3 At the heart of this case lies a simple principle: a party cannot license what it
4 does not own. In order for a program to be used on a computer, a copy of that
5 program, or a portion of it, must be made in the computer’s Random Access Memory
6 (“RAM”). Defendant Blizzard insists that users of its software must rely upon a
7 license from Blizzard to make RAM copies, and users infringe copyright when they
8 use the software in a way not permitted by the license agreement. But the license
9 agreement cannot govern users’ rights to make RAM copies, because that right is
10 already reserved to users under 17 U.S.C. § 117. Therefore, Blizzard cannot claim any
11 infringement of its copyrights based upon the creation of RAM copies because the
12 right to make those copies was never Blizzard’s to license in the first place.

13 To get around this basic problem, Blizzard must argue that (1) notwithstanding
14 statutory limitations to its copyrights, its contract with its software customers governs
15 all uses of the software, *and* (2) any violation of this contract is necessarily a violation
16 of its copyrights. Blizzard’s argument would eviscerate the traditional relationship
17 between copyright and contract and, in the process, upset the delicate equilibrium
18 between the rights of copyright holders to manage their intellectual property (“IP”),
19 and the rights of the public to use the products that embody that IP. Under Blizzard’s
20 theory, a copyright owner could not only contractually impose the most onerous
21 restrictions on its customers—restrictions that undermine rights guaranteed by
22 copyright and First Amendment law—but could also enforce those conditions with the
23 threat of copyright law’s high statutory damages. Blizzard’s attempt to use contract to
24 alter and displace those aspects of copyright law it does not like, while using copyright
25

1 penalties to construe and enforce the terms of that alteration, is untenable, and the
2 Court should not endorse it.

3 ARGUMENT

4 World of Warcraft (“WoW”) users who use Glider in contravention of the
5 WoW Terms of Use (“TOU”) have not infringed copyright merely by violating the
6 license terms. Without direct infringement by individual users, Blizzard has no claim
7 against MDY for contributory copyright liability. That is not to say that Blizzard has
8 no recourse against users who break the rules or entities like MDY who encourage and
9 enable such abuses. Blizzard has options for addressing cheaters, including disabling
10 their accounts and bringing actions for breach of contract. It may also have remedies
11 against MDY based on tortious interference with contract or other non-copyright
12 causes of action. However, in seeking to curb MDY’s allegedly perfidious behavior,
13 Blizzard may not undo Congress’ work in establishing statutory rights for the rest of
14 the WoW users or for digital consumers more generally.

15 I. COPYRIGHT OWNERSHIP DIFFERS FROM OWNERSHIP OF A 16 COPY

17 When a customer buys a copyrighted work, there are two separate sets of rights
18 subject to the transaction: the right in the product itself and the right in the intellectual
19 property contained within. Copyright law governs the relationship between a bona fide
20 possessor of software and the copyright owner, while contract law governs the
21 relationship between an purchaser and a seller of software.

22 A. Copyright Law Reserves Certain Rights in a Copy to Owners of 23 That Copy

24 The Copyright Act draws a clear line of demarcation between the right of
25 ownership in a copyright and the right of ownership in a product:

1 Ownership of a copyright, or of any of the exclusive rights under a
2 copyright, is distinct from ownership of any material object in which the
3 work is embodied. Transfer of ownership of any material object,
4 including the copy or phonorecord in which the work is first fixed, does
5 not of itself convey any rights in the copyrighted work embodied in the
6 object; nor, in the absence of an agreement, does transfer of ownership
7 of a copyright or of any exclusive rights under a copyright convey
8 property rights in any material object.

9 17 U.S.C. § 202.

10 The idea that a copyright and a copy are two different things is also enshrined
11 in other sections of the Copyright Act, including the first sale doctrine and the right to
12 make copies essential to the use of computer programs. The first sale doctrine
13 provides that the owner of a particular copy of a work may distribute, sell, or
14 otherwise dispose of a work without the authorization of the copyright holder. 17
15 U.S.C. § 109. This separation of ownership in copyright from ownership in a copy
16 allows the functioning of libraries, used book and record stores, and video rental
17 establishments, as well as the simple act of loaning a book to a friend.

18 Similarly, the right to copy software into RAM is provided for under Section
19 117(a) of title 17, which limits the exclusive rights of software copyright owners to
20 reproduce and adapt copyrighted software. Specifically, it states:

21 Notwithstanding the provisions of section 106, it is not an infringement
22 for the owner of a copy of a computer program to make or authorize the
23 making of another copy or adaptation of that computer program
24 provided:

25 (1) that such a new copy or adaptation is created as an essential step in
the utilization of the computer program in conjunction with a machine
and that it is used in no other manner . . .

17 U.S.C. § 117(a). The purpose of Section 117(a) is unambiguous: owners of copies
have rights separate from the rights of the copyright holder. By extension, copyright
holders cannot license these rights because they do not initially vest in the author of

1 the copyright in a piece of software, but in the owner of the copy of that software.
2 Copyright owners cannot license rights they do not have.

3 Both Sections 109 and 117 limit a copyright owner's exclusive rights with
4 respect to the "owner" of a particular copy of a work. *DSC Comms. Corp. v. Pulse*
5 *Comms., Inc.*, 170 F.3d 1354, 1361 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 923
6 (1999). The court in *DSC* explicitly refers to both Sections as "rights [one] would
7 enjoy as 'owners of copies' of software." *DSC*, 170 F.3d at 1361; *see also Novell, Inc.*
8 *v. Network Trade Center, Inc.*, 25 F. Supp. 2d 1218 (D. Utah 1997) (citing section 109
9 cases in applying section 117); Christian H. Nadan, *Software Licensing in the 21st*
10 *Century*, 32 AIPLA Q.J. 555, 563 (2004) ("Sections 109 and 117 work in concert to
11 empower the owner of a copy of a computer program . . ."). Further, both Sections
12 use almost identical language in referring to the "owner," differing only in the rights
13 and types of works which are affected.¹

14 The concept that the copyright is separated from the copy is essential to the
15 purposes of the Copyright Act. It preserves consumers' ability to purchase, use, enjoy
16 and innovate with copies of copyrighted works, without fear of becoming an infringer
17 in the ordinary course of using their lawfully obtained copies. Similarly, the separation
18 of rights allows authors to sell and distribute copies of their works without fear of
19 waiving any of their rights to the underlying work under copyright law.

20
21
22
23 ¹ Compare 17 U.S.C. § 117(a), above, with Section 109:

24 Notwithstanding the provisions of section 106(3), the owner of a particular copy or
25 phonorecord lawfully made under this title, or any person authorized by such owner, is
entitled, without the authority of the copyright owner, to sell or otherwise dispose of the
possession of that copy or phonorecord...

17 U.S.C. § 109(a). Thus, the analyses performed to determine "ownership" of a copy for Section 109 purposes
are equally relevant to a Section 117 case.

1 **B. Ownership and Exploitation of Copyright Are Structured—but Not**
2 **Replaced—by Contract**

3 Copyright rights and remedies are governed by copyright law, while use of the
4 copy may be governed by contract law. Copyright reserves certain exclusive rights for
5 the creator of intellectual property, establishes limitations and exceptions to those
6 rights (including the first sale doctrine, the fair use doctrine, and software use
7 limitations) and provides for stringent civil and criminal remedies. Contract law
8 enforces private agreements assigning property rights while placing strict limits on
9 enforceability and remedies, such as requiring acceptance of terms, barring
10 unconscionability, and requiring mitigation of damages. Thus:

11 [F]ederal copyright doctrine leaves to state law the vast bulk of issues
12 concerning contracts affecting copyright . . . state contract law (and
13 cognate state doctrines arising under state law) determine to a great
14 extent the destiny of the copyrighted work and the physical object in
15 which it is embodied.

16 D. Nimmer et al, *The Metamorphoses of Contract Into Expand*, 87 Cal. L. Rev. 17, 26
17 (1999). This separation, too, is essential to maintaining “delicate equilibrium” between
18 “the rights of copyright holders to reap the rewards of their intellectual property and
19 the rights of the public to unimpeded advancement of knowledge and expression.” *Id.*
20 There are benefits to allowing parties to privately allocate rights through contract (e.g.,
21 private parties are best positioned to assess their own costs and benefits), and there are
22 benefits to allowing statutory copyright law to strike the right balance of rights
23 between buyers, sellers and the public (e.g., Congress is better placed to measure the
24 broader effects of granting limited monopolies on the public at large).

25 There is no benefit and much harm, however, from treating the mere breach of
a private agreement as if it were a violation of statutorily-defined copyright rights, as
Blizzard seeks to do here. Some commentators have questioned whether contracts that

1 alter the substantive rights of the parties under contract law should be enforceable,
2 particularly when the contract is not a negotiated agreement, but a shrinkwrap license.

3 Contracts involving intellectual property affect

4 not only the immediate parties, but also a host of potential third
5 parties—users, subsequent inventors, and the general public. In other
6 words, agreements to vary intellectual property law create externalities.
7 Enforcing such contracts is inefficient because the contracts do not take
8 into account the full social costs and benefits of the agreement between
9 two parties.

10 The arguments for contract, moreover, lose much of their force in the
11 case of shrinkwrap licenses governing software transactions. Contract
12 law is at its strongest where there is an actual agreement between the
13 parties. That is, after all, the basis of a contract. Unfortunately, the ideal
14 assumptions behind a “bargained contract” — relatively equal
15 bargaining power, actual discussion and agreement as to individual
16 terms, and joint drafting—often do not reflect reality. In practice,
17 contracts are often entered into between large corporations and
18 consumers. The corporation drafts the contract and sets the price. The
19 consumer merely decides whether or not to sign the contract. In this
20 circumstance, there has been no meaningful “bargaining” over the
21 contract at all, and certainly not over particular terms contained in the
22 form drafted by the large corporation.

23 Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev.
24 1239, 1286-87 (1995).

25 What Blizzard seeks to do here is worse. It not only seeks to enforce the WoW
End User License Agreement (“EULA”), it seeks to get *copyright* remedies for
contract violations. Blizzard alleges that any WoW user who violates the EULA or
TOU (for instance, by simultaneously running Glider) becomes a copyright infringer
when the game is loaded into RAM. Blizzard MSJ at 5. Copyright remedies are more
severe than contract remedies because Congress has assured itself that the substantive
law properly balances the rights of the parties while minimizing externalities and

1 social costs.² Contracts by and large are not subject to the same balancing, and there is
2 a real risk of social harm from enforcing certain private agreements. Without robust
3 substantive safeguards, contract breaches are not entitled to the heavy penalties used
4 to dissuade copyright violations. While we express no opinion on whether the WoW
5 EULA is enforceable, it is clear that a EULA violation unrelated to an author's rights
6 under Section 106 is not a copyright violation.

7 **II. RAM COPIES OF SOFTWARE MADE AS AN ESSENTIAL STEP TO**
8 **USING THAT SOFTWARE ARE NON-INFRINGEMENT**

9 Blizzard attempts to extend enforcement of its contracts into the copyright
10 realm by claiming infringement when RAM copies are made. However, 17 U.S.C.
11 § 117 protects owners from copyright infringement liability for merely making use of
12 a computer program. Section 117 reserves to users the right to make copies if (i) the
13 copy or adaptation is made by “the owner of a copy of [the] computer program;” (ii)
14 the copy or adaptation was “created as an essential step in the utilization of the
15 computer program in conjunction with a machine;” and (iii) the copy or adaptation
16 was used in “no other manner.” *Krause v. Titleserv, Inc.*, 402 F.3d 119, 122 (2d Cir.
17 2005), *cert. denied*, 546 U.S. 1002 (2005).

18 In adopting Section 117 in its current form, Congress was implementing the
19 recommendations of the National Commission on New Technological Uses of
20 Copyrighted Works (“CONTU”). H.R. Rep. No. 1307, 96th Cong., 2d. Sess., pt. 1, at
21 23 (1980). In 1978, CONTU issued a detailed report (“the CONTU Report”)³
22

23 ² Copyright remedies include statutory damages with a required minimum of \$750 per infringed work, up to
24 \$150,000 for willful infringement, and criminal penalties. 17 U.S.C. §§ 504. In stark contrast, contracts remedies
25 are generally limited to civil enforcement, disfavoring liquidated damages unrelated to the value of actual losses.
24 Williston on Contract § 65:1 (4th Ed.).

³ *Final Report*, Commission on New Technological Uses of Copyrighted Works (1978); *available at*
<http://digital-law-online.info/CONTU/PDF/index.html>

1 recommending that users not be held liable for copies created when a work was
2 “placed into a computer.”

3 Because the placement of a work into a computer is the preparation of a
4 copy, the law should provide that persons in rightful possession of
5 copies of programs be able to use them freely without fear of exposure
6 to copyright liability.

7 CONTU Report at 13.

8 An essential part of running any normal computer program is copying it, or
9 portions of it, into the temporary storage of a computer’s RAM so that it may be
10 readily accessed. *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d
11 506, 600 n.1 (9th Cir. 2000). Since a program must be copied into RAM in order to be
12 used, any user of a computer program would otherwise be liable for copyright
13 infringement each time the program was utilized. Lacking Section 117(a), all software
14 users would be hampered to an absurd degree.

15 Tellingly, CONTU anticipated not just the threat of overbroad copyright
16 liability exposure, but also the threat of copyright holders attempting to improperly
17 leverage this outsized liability:

18 Obviously, creators, lessors, licensors, and vendors of copies of
19 programs intend that they be used by their customers, so that rightful
20 users would but rarely need a legal shield against potential copyright
21 problems. It is easy to imagine, however, a situation in which the
22 copyright owner might desire, for good reason or none at all, to coerce a
23 lawful owner or possessor of a copy to stop using a particular program.
24 One who rightfully possesses a copy of a program, therefore, should be
25 provided with a legal right to copy it to that extent which will permit its
use by that possessor.

26 CONTU Report at 13. Moreover, the principle behind Section 117—allowing the use
27 of computer programs without undue interference by copyright holders—should be
28 applied across a variety of relationships between user and author. According to the

1 CONTU Report, whether a copy of a computer program is sold, leased, or licensed,
2 the user must not be constrained from use of a lawfully acquired copy.

3 The unique nature of software and its use requires such a provision for a
4 rational copyright regime. The analog equivalent might be that of a reader requiring a
5 license from a book's author each time she wished to open and read the book. Like
6 merely reading a book, merely using the software should not automatically implicate
7 copyright due to an inherent feature of computing technology.

8 **III. WOW PLAYERS ARE OWNERS OF THEIR SOFTWARE, AND**
9 **THEREFORE DO NOT INFRINGE COPYRIGHT BY USING THEIR**
10 **SOFTWARE IN A MANNER AUTHORIZED BY SECTION 117.**

11 A purchaser of software has the right under Section 117 to copy the software
12 into RAM to operate the software. A user of WoW, whether or not she also uses
13 Glider, meets all of the criteria of Section 117(a)(1). First, having purchased or
14 downloaded the game client, the user is the owner of that copy. Second, creating a
15 RAM copy is an absolute prerequisite to using the WoW client on the user's
16 computer. Third, the RAM copy would not be used for any purpose beyond its normal
17 utilization—that is, the playing of the game.

18 When WoW is loaded into a user's RAM, the user is therefore making a lawful
19 copy of the game, regardless of any rights granted or withheld by a license agreement
20 imposed on the software by Blizzard.

21 **A. WoW Purchasers Are Owners For Purposes of Section 117.**

22 Blizzard insists that WoW players are only licensees of the individual game
23 copies, not owners entitled to rights under Section 117. Blizzard Response to MDY's
24 SOF at 2 ("The WoW client is licensed, not purchased."). This is incorrect; when
25 viewed in light of the actual circumstances of the transaction, WoW players are
owners of their copies and are protected by Section 117.

1 **1. Ownership is Determined by the Totality of the**
2 **Circumstances**

3 Courts have outlined a variety of factors to determine whether a user of a piece
4 of software is a licensee or an owner of that copy—responding, in part, to similar
5 efforts by copyright holders to avoid the effect of 117. *See e.g., Wall Data v. Los*
6 *Angeles County Sheriff's Dept.* 447 F.3d 769 (9th Cir. 2006) (considering, in *dicta*,
7 whether purchaser was owner or licensee in the context section 117); *Krause*, 402
8 F.3d 119, 123-24 (2d Cir. 2005) (holding that defendant was owner, not licensee, and
9 therefore entitled under section 117 to modify software where such modification was
10 essential to use); *DSC*, 170 F.3d at 1360-61 (determining ownership of software
11 copies according to factors apart from mere formal title). *See also Advent Sys. Ltd. v.*
12 *Unisys Corp.*, 925 F.2d 670, 676 (3d Cir.1991) (holding the sale of software is the sale
13 of a good, conveying ownership, within the meaning of Uniform Commercial Code);
14 *Step-Saver Data Systems, Inc. v. Wyse Tech.*, 939 F.2d 91, 99-100 (3d Cir 1991)
15 (holding that ownership of software transferred to buyer, based on actions and intent
16 of parties, despite shrinkwrap license reserving title); *Softman Prods. Co. LLC v.*
17 *Adobe Systems, Inc.*, 550 171 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001); *Novell v.*
18 *Unicom*, 2004 WL 1839119 (N.D. Cal. 2004); *Stuart Weitzman, LLC v.*
19 *MicroComputer Resources, Inc.*, 510 F. Supp. 2d 1098 (S.D. Fla. 2007); *Adobe*
20 *Systems, Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090-91 (N.D. Cal. 2000)
21 (analyzing both language of the contract and extrinsic evidence of intent in construing
22 a EULA); *Adobe Systems, Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051, 1055-
23 56 (N.D. Cal. 2002).

24 While conclusions vary according to circumstances, a consensus has emerged
25 that the question does not turn on whether a license exists, nor on how the copyright

1 holder describes the transaction in a written instrument, but rather on whether the
2 substance of the transaction indicates ownership. *See Wall Data* at 785 (observing, in
3 dicta, that likely no ownership where transaction as a whole imposed severe
4 restrictions on use);⁴ *Krause*, 402 F.3d at 123-24 (the absence of formal title may be
5 outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights
6 over it to be sensibly considered its owner.) After all, neither Sections 109 nor 117
7 should be rendered useless simply because a seller provides a bare recitation of title
8 ownership, in contradiction of the parties’ understanding or the realities of the
9 transaction.

10 Taken together, these cases have considered the totality of the circumstances
11 surrounding the transaction, including the presence and terms of any license,⁵ the
12 relationship of the parties, and other external factors which may indicate the presence
13 or absence of a sale. This Court should likewise consider all of the relevant facts in
14 determining whether WoW users are “owners” of the purchased game client software.

15 Although individual cases may provide unforeseen yet relevant factors to
16 consider, the leading cases have indicated the following principal indicia suggesting
17 ownership:

18 **a) Does the possessor of the copy purchase a single copy for a single**
19 **price?** As the court stated in *Softman*, “If a transaction involves a single payment
20 giving the buyer an unlimited period in which it has a right to possession, the
21 transaction is a sale.” 171 F. Supp. 2d at 1086 (citing Raymond Nimmer, *The Law of*

22 _____
23 ⁴ The Ninth Circuit’s discussion of ownership in *Wall Data* is *dicta*, because the court decided the case on the
basis that the copying in question was not an essential step in use of the program) 447 F.3d at 786 n.9.

24 ⁵ It is important to note that not all purported license terms are enforceable. For instance, the terms of contract—
25 especially contracts of adhesion—may be found unconscionable. *See* 8 Williston on Contracts §§ 18:1, 18:13.
While a discussion of which of Blizzard’s EULA and TOU terms are not enforceable is outside the scope of this
brief, unenforceable contract terms should not be considered as evidence that a copy has been licensed rather
than a sale.

1 *Computer Technology* § 1.18[1] p. 1-103 (1992)). Thus, where the purchaser obtains a
2 single copy of the software for a single price, which the purchaser pays at the time of
3 the transaction, and which constitutes the entire payment for the “license;” and the
4 license runs for an indefinite term without provisions for renewal, the transaction is a
5 sale and the purchaser an owner. *Softman*, 171 F. Supp.2d at 1085; *DSC*, 160 F.3d at
6 1362 (“the fact that...the possessor’s rights were obtained through a single payment, is
7 certainly relevant to whether the possessor is an owner”); *Telecomm Tech. Svcs., Inc.*
8 *v. Siemens Rolm Comms., Inc.*, 66 F. Supp. 2d 1306, 1325 (N.D. Ga. 1997); *see also*
9 *Unicom*, 2004 WL 1839119 at *9 (finding that a recurring license fee militated against
10 finding of ownership).

11 **b) Does purchase of that copy include the right to possess the copy**
12 **for an unlimited time?** In *Krause*, the court investigated whether or not the seller
13 reserved the right to repossess copies used by the buyer. Absent such a provision, and
14 since the buyer had the right to continue to possess the programs after the relationship
15 was terminated, the court found that the transaction was a sale. *Krause*, 402 F.3d at
16 124; *see also DSC*, 170 F.3d at 1362 (holding that a perpetual right of possession was
17 relevant to finding of ownership); *Stuart Weitzman*, 510 F. Supp. 2d at 1108. The
18 *Softman* court also put it succinctly: “The pertinent issue is whether, as in a lease, the
19 user may be required to return the copy to the vendor after the expiration of a
20 particular period. If not, the transaction conveyed not only possession, but also
21 transferred ownership of the copy.” *Softman*, 171 F. Supp. 2d at 1086; *see also*
22 *Unicom*, 2004 WL 1839119 at *9 (holding that a limited term of a license militated
23 against finding of ownership).

24 **c) Does the user have the right to discard or destroy copies as he**
25 **wishes?** The right to dispose of a copy (as opposed to an obligation to return) implies

1 that the parties intended the buyer to have permanent possession of the copy. *Krause*,
2 402 F.3d at 124. If so, that fact would tend to favor ownership. *See also Unicom* 2004
3 WL 1839119 at *9 (holding that a requirement that software be returned at conclusion
4 of license term militated against finding of ownership).

5 **d) Is the program stored on the user’s hardware?** *Krause* also relies
6 upon the fact that the software at issue was stored on the buyer’s hardware. 402 F.3d
7 at 124; *Stuart Weitzman*, 510 F. Supp. 2d at 1108. This factor reflects a practical
8 consideration of the control a buyer can exercise over a copy—a buyer has more
9 control over software stored on her own computer than that stored remotely, or on
10 hardware owned by the seller.

11 **e) Are there severe restrictions on resale or other use?** In a sense,
12 this factor represents the flip side of a rule expressed in *Krause*—that with sufficient
13 indications of a user’s intended control, a user gains ownership. 402 F.3d at 123-24.
14 For example, in *One Stop*, the sale agreement included restrictions on resale, which
15 had to be within the country and only to qualified educational customers, as well as a
16 provision that the reseller was bound by the EULA. 84 F. Supp. 2d 1086. This
17 suggested that the copy of the software was not owned by the buyer. *Id.* at 1091. In
18 *DSC*, the court considered whether or not the transaction placed more severe
19 restrictions on a licensee’s rights “than would be imposed on a party who owned
20 copies of software.” 170 F.3d at 1360. In *MAI v. Peak*, the Ninth Circuit found a user
21 of software was a licensee in a situation where the license in question, inter alia,
22 limited use of the software to a single computer (with one back up copy permitted)
23 “solely to fulfill internal information processing needs on the particular items of
24 Equipment” for which the software was configured, and required the user to keep the
25

1 software confidential.⁶ *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517
2 n. 3 (9th Cir. 1993). However, merely finding *some* restrictions on use need not
3 determine that the buyer is not an owner of a copy. As *Krause* notes:

4 Ownership of property is often described as a bundle of rights. . . . It is
5 not clear from the text of § 117(a) how many and what kind of sticks
6 may be removed from the bundle before the possessor of a copy of a
7 computer program is no longer considered its owner for the purposes of
8 § 117(a).
9 402 F.3d at 122 (internal citation omitted). Notably, though, courts have found a
10 transfer of ownership despite certain limitations on transfer expressed in a EULA. *See*,
11 *e.g.*, *Softman*, 171 F. Supp. 2d at 1082, n. 6.

12 2. WoW Users are Owners of their Copies

13 Applying the factors set forth above, WoW players who legally download or
14 purchase the game are indisputably owners of their copies of the game.

15 **a) The WoW client is purchased for a single price.** Users buy the
16 game client for the consideration of a flat fee at software retailers, or download the
17 software in a one-time transaction, with no obligation to pay a recurring fee or to sign
18 a lease agreement.⁷ MDY SOF ¶ 1. Consumers purchase the WoW client off of a shelf
19 at a retail outlet just as they purchase a copy of a book, CD, or DVD. *Id.* Alternatively,
20 consumers download the game client from the website in a transaction that is identical
21 to the purchase or gift of digital media, whether those files are text, audio, video, or

22 ⁶ The court in *MAI* performed no explicit analysis of Section 117, and courts and commentators have cautioned
23 against an overly broad interpretation of *MAI* in which any licensee (whether of the underlying work or of the
24 individual copy) automatically fails to be an owner. *Wall Data*, 447 F.3d at 785, n. 9 (noting criticism in
25 *Nimmer on Copyright* § 8.08[B][1][C], at 8-136 and in *DSC*).

⁷ The software at issue in this case, which is copied into RAM as a user plays, is purchased at retail or
downloaded in a single transaction. Although users must pay a subscription fee to connect to Blizzard's servers,
subscription to this access is a transaction completely separate from purchase of the game client. Buyers of the
WoW game client are under no obligations to subscribe to the online game service or to make recurring
payments. Thus, whether or not a user must pay a recurring fee to access online servers is immaterial to their
ownership of the client software.

1 executable programs. *Id.* No further payment is required for the user to maintain
2 possession or use of the copy they have purchased.

3 **b) Users have the right to possess their copy for an unlimited time.**

4 There is no agreement between Blizzard and the user prior to or at the purchase of the
5 client software that limits the time the user may possess the copy. Moreover, neither
6 the terms of the EULA or the TOU, nor any actions ever taken by Blizzard, have ever
7 limited the duration of possession. Nor is continued use or possession conditioned on
8 any subsequent payments by the user. The licenses similarly lack any renewal
9 provisions, again creating a transfer unlimited in time.

10 This unlimited, permanent possession is underscored by the fact that Blizzard
11 does not repossess copies of the game after a termination of the license agreement. In
12 fact, violators of the TOU or EULA are allowed to continue using their exact same
13 copy of the game client, provided only that they create a new account to use the online
14 service. MDY SOF ¶ 24. Blizzard, having distributed millions of copies of its game
15 client, makes no actual effort to exercise ownership of these particular physical copies,
16 regardless of the language in the EULA. In fact, Blizzard itself claims that when a the
17 license agreement between Blizzard and the user is terminated, the user retains the
18 ability to create new accounts—presumably, and in all practical cases, with the same
19 copy of the software originally purchased. Blizzard Resp. to MDY SOF at 13.

20 **c) Users are free to discard or destroy their copies of WoW.** Users

21 also have the ability to discard or destroy copies as they wish, as the EULA states that
22 users may terminate the agreement “by permanently destroying all copies of the Game
23 in [the user’s] possession or control.” WoW EULA §6.

24 **d) WoW is stored on users’ own personal computers.** The WoW

25 game client is stored entirely upon the computer of the user, accessible only to the

1 user upon purchase. Blizzard SOF ¶ 16; To the extent that this is the copy that is
2 loaded into RAM, its presence on a user's own hard drive and nowhere else weighs in
3 favor of finding that the user owns the copy. The fact that the client can connect to
4 Blizzard servers does not alter ownership of the game that is copied into RAM upon
5 use. The presence of Internet-enabled software upon an enhanced CD or DVD does
6 not give a record label or movie studio any more ownership over a consumer's
7 physical disc than it would normally have.

8 e) **There are no severe restrictions on transfer or other use.** Again,
9 no agreement reached before or during the purchase of the client restricts how a user
10 may distribute his copy of the game client after purchase. Furthermore, even the terms
11 of Blizzard's own EULA regarding a user's ability to transfer the software similarly
12 indicate that the purchase is best viewed as a transfer of ownership. Section 3.B of the
13 EULA states:

14 You may *permanently transfer all of your rights and obligations* under
15 the License Agreement to another *by physically transferring the original*
16 *media* (e.g., the CD-ROM or DVD you purchased), all original
17 packaging, and all Manuals or other documentation distributed with the
18 Game; provided, however, that you permanently delete all copies and
19 installations of the Game in your possession or control, and that the
recipient agrees to the terms of this License Agreement. The transferor
(i.e., you), and not Blizzard, agrees to be solely responsible for any
taxes, fees, charges, duties, withholdings, assessments, and the like,
together with any interest, penalties, and additions imposed in
connection with such transfer.

20 WoW EULA, § 3.B (emphasis added). This provision of the EULA parallels an
21 owner's right to first sale. Unlike the extensive restrictions upon transfer or disposition
22 noted in *DSC*, the restrictions listed here do not purport to prevent transfer or the
23 exercise of any rights that the user may have to distribute, sell, or otherwise dispose of
24 their original copy. Instead, they merely reiterate the restrictions Section 117 already
25

1 places upon the creation of archival copies.⁸ In addition, section 3.B of the EULA
2 notes that the user is solely responsible for taxes or other fees involved in the later
3 transfer of ownership. Blizzard is, in effect, divorcing itself from responsibility to the
4 transactions after the initial sale. As such, this minimal restriction on distribution
5 rights falls far short of the severe restrictions in *MAI* or *DSC* that militated against a
6 transfer of ownership.

7 All of these factors, weighed against the Blizzard’s bare assertion that they
8 retain ownership of each and every physical copy of WoW held by millions of users
9 around the world, militate towards a finding that a user’s copy is in fact owned by the
10 user.

11 **B. The RAM Copy is Essential to Use of WoW**

12 Blizzard admits that it is necessary to copy WoW into RAM in order to make
13 use of the software:

14 When users launch a copy of WoW from their hard drive in order
15 to...play the game, the user makes a copy of WoW in RAM.

16 ...

17 [A]s a player moves through the game, additional copyrighted game
content is loaded from the hard drive into RAM...

18 Blizzard SOF at ¶¶ 50-51. Therefore, the creation of the RAM copy is an essential
19 step in using the program.

20 **C. The RAM Copy is Used Only as an Essential Step in Playing**
21 **WoW.**

22 The copy of WoW necessarily made in RAM when a user decides to play the
23 game is made only in that way essential to its use. Although users who are

24 ⁸ Section 117(a)(2) explicitly grants users the right to create backup copies, only so long as those “archival
25 copies” are destroyed at the termination of ownership. 17 U.S.C. § 117(a)(2). Restrictions on the rental or lease
of the program are also in lockstep with the exceptions to Section 109 that prevent its application to downstream
rental of computer software. *Compare* WoW EULA § 4.B.i; 17 U.S.C. §109(b).

1 simultaneously using Glider may be violating the terms of the EULA or the TOU,
2 simply using a program in a manner disfavored by the copyright owner (even if this
3 disfavor is expressed in a license agreement) is not sufficient to defeat the operation of
4 Section 117.

5 In a landmark case interpreting Section 117, the Fifth Circuit determined that a
6 use does not fall outside the scope of Section 117 simply because that use was not
7 intended by the copyright holder. In *Vault Corp. v. Quaid Software, Inc.*, defendant
8 Quaid not only used and loaded into RAM Vault's program, he created copies of the
9 program in the process of reverse-engineering it. 847 F.2d 255 (5th Cir. 1988).
10 Although these uses were clearly against Vault's wishes, the court rejected the idea
11 that software must be used only for the intended purpose of the author to be protected
12 under Section 117:

13 Section 117(1) [*sic*] contains no language to suggest that the copy it
14 permits must be employed for a use intended by the copyright owner.

15 *Vault*, 847 F.2d at 261. Such a ruling comports with the intent of the statute as stated
16 by the CONTU Report. Allowing copyright holders to restrict the kinds of "uses" that
17 qualify under Section 117 would give copyright holders exactly the kind of arbitrary
18 authority over users that Congress intended to prevent. *See* CONTU Report at 13. If,
19 however, copies were made that were not essential to the use, as in *Wall Data*, where
20 defendants not only made RAM copies but also copied the software to additional hard
21 drives, then 117 should not apply. *Wall Data*, 447 F.3d at 786 n. 9. Neither Glider nor
22 its users make additional copies of WoW beyond those required to play WoW.

1 **IV. COPYRIGHT POLICY REQUIRES THAT A CUSTOMER WHO**
2 **PURCHASES MASS MARKET SOFTWARE BE AN OWNER OF THAT**
3 **SOFTWARE**

4 Copyright is governed by federal law, and by a carefully crafted balance
5 between the rights of creators and the rights of users of copyrighted works. On one
6 side of this balance, the Copyright Act gives creators several “exclusive rights” which
7 they can retain or exchange through contract. *See* 17 U.S.C. § 106. On the other side
8 of the balance, the public is given its own set of rights through limitations on the
9 creators’ rights, including fair use, library uses, first sale, educational uses, private
10 home viewing rights, and others. *See* 17 U.S.C. §§ 107-122. These limitations are not
11 optional. They are rights that do not belong to the creator in the first place, because
12 Congress has decided that balance demands that they be reserved to the public.

13 Blizzard’s attempt to recapture these rights from the public exceeds the scope
14 of copyright law. Much as it is copyright misuse for a copyright holder to “attempt to
15 use its copyright . . . to control competition in an area outside the copyright,”
16 *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990), it is
17 unacceptable to use copyright as a lever to acquire rights which are explicitly reserved
18 for the user instead of the creator. Congress made a specific reservation of rights in the
19 Copyright Act, and Blizzard cannot undo that by adding the word “license” to the box
20 on a store shelf.

21 The effect of accepting Blizzard’s construction of the law is to obliterate
22 Sections 109 and 117 of the Copyright Act. As *Wall Data* has noted, software
23 producers rarely, if ever, purport to sell their works, since “[v]irtually all end users do
24 not buy—but rather receive a license for—software.” 447 F.3d at 786 n.9 (quoting
25 *One Stop*, 84 F. Supp. 2d at 1091 (internal citations and quotations omitted)).
Congress inserted the Section 109 and 117 protections because it recognized that

1 software makers had an incentive to attempt to retain indefinite control over individual
2 copies of their works, and further recognized that the public interest was best served
3 when the public was given those rights explicitly and by law.

4 WoW is but one of thousands of works of copyrighted software sold daily on
5 store shelves and on the Internet. If Blizzard’s theory of copyright liability is correct,
6 every one of these copies is not actually owned by the person who walks out of the
7 door holding a box. Moreover, the terms of a license drafted by the copyright holder
8 contained within that box could expose these users to liability for copyright
9 infringement for any number of activities totally unrelated to copyright.

10 The WoW EULA itself provides concrete examples of the unworkability of this
11 scenario. Blizzard claims that any violation of its EULA, and the incorporated-by-
12 reference TOU, is an infringement of its copyrights. The terms included within these
13 documents not only prohibit unauthorized reproduction, distribution, display or
14 performance, but also giving a character an unpronounceable otherwise disfavored
15 name (WoW TOU § 5.A); communicating with certain other WoW players (WoW
16 TOU § B.10); posting any content that Blizzard, in its sole discretion, deems offensive
17 (WoW TOU § B.1); or in fact any conduct at all that Blizzard considers “outside the
18 spirit of the Game” or “contrary to the ‘essence’ of the program.”⁹ Any of these
19 violations of the rules of the game—which are entirely legal exercises of free speech
20 and entirely unrelated to Blizzard’s copyright—would, in Blizzard’s formulation,
21 amount to infringement of Blizzard’s copyrights and trigger severe statutory damages.

22 Such a theory is plainly untenable. Naming a character “Inyourface,”
23 “Asdfasdf,” “Roflcopter,” or “CorporalTed” should not result in \$750 worth of

24 ⁹ Blizzard also reserves the right to alter the terms of the EULA at its own discretion (WoW EULA § 13) and to
25 modify the TOU without prior notice and at its own discretion. WoW TOU § 9. To the extent that these
provisions may also lack enforceability under contract, we do not discuss further the potential effects of such
malleable terms on users’ copyright liability under Blizzard’s theory of copyright infringement.

1 statutory damages liability. Nor should Blizzard be allowed to use copyright law to
2 enforce restrictions on speech and behavior so far removed from its rights in the
3 software.

4 Extending Blizzard's theory beyond the terms stated in their TOU leads to
5 further, more threatening absurdities. If the recitation of title in a EULA could bind a
6 buyer to any additional terms in the document, manufacturers could easily use the
7 threat of infringement actions to enforce anticompetitive practices. Microsoft might
8 include terms conditioning use of its operating systems on users not installing
9 software made by Apple. Apple might threaten copyright infringement suits against
10 users who use its software with competing digital music players. While such
11 agreements might be enforceable in contract, subjecting enforcement of these
12 agreements to the strict penalties of copyright law would utterly frustrate competition
13 and copyright policy alike.

14 CONCLUSION

15 Blizzard's copyright infringement claims against MDY rest upon finding
16 individual WoW users liable for copyright infringement for merely using the software
17 they have purchased in ways Blizzard disfavors. However, Section 117 prevents a
18 finding of copyright infringement, as WoW users own the game client and cannot
19 therefore be liable for making the RAM copies upon which Blizzard bases its
20 copyright claim. Therefore, the Court should reject any arguments which are premised
21 on copyright liability for RAM copies of the software.

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Dated this 2nd day of May, 2008.

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I hereby certify that on May 2, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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