

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

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

Plaintiffs,)

v.)

Case No. 4:02CV498 CAS

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

Defendants.)

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

If defendants did not want to play Blizzard games on the Battle.net service or did not wish to agree to Blizzard's license agreements and the Battle.net® Terms of Use, then they had a powerful, perfectly legal remedy available to them: they could have gone elsewhere in the marketplace. Defendants were entitled to return their games for a full refund (Sup. Fcts. ¶ 14),¹ and could have given their \$50 to one of Blizzard's many competitors. They could have spent their money on any number of other amusements. They even could have done what the founders of Blizzard did when they were dissatisfied with the current state of the computer game market, and created their own new and innovative computer games and gaming service.

Defendants could have done any of those things, but they didn't. Instead, they purchased Blizzard games -- indeed, sometimes acquiring multiple Blizzard game titles over time -- and agreed to the licenses for those games. But unlike millions of other law-abiding game users, they decided that federal law and licenses they explicitly agreed to did not apply to them. As defendants would have it, fifty dollars buys them the unfettered "right" to total and complete access to a company's computer game software; the "right" to go back on their word and take apart the game even after they promised not to; the "right" to redistribute computer files that do not belong to them; the "right" to disable a company's advertising mechanisms; and the "right" to distribute a means for anyone with stolen copies of the game to unlock one of those games' core features. In short, as defendants would have it, fifty dollars buys the "right" to disable technological protections for a copyrighted work and cost the author untold lost revenue. Fortunately for everyone who creates software for a living, the law is otherwise.

¹ "(Fcts. ¶ __.)" refers to Blizzard's Statement Of Uncontroverted Facts filed with its summary judgment memorandum. "(Sup. Fcts. ¶ __.)" refers to Blizzard's Supplemental Statement of Uncontroverted Facts accompanying its opposition to defendants' summary judgment brief.

ARGUMENT

I. The End User License Agreements and Battle.net® Terms of Use Agreed to By Defendants Are Valid, Enforceable Contracts.

A. California Law -- Which Has Repeatedly Enforced “Clickwrap” License Agreements -- Is Applicable Here.

Defendants mistakenly assume that Missouri law governs the interpretation of their contracts. But when defendants were seeking to avoid this venue, they were quick to point out² that both Blizzard’s End User License Agreements (“EULAs”) and the Battle.net® Terms of Use (“TOU”) choice-of-law provisions require that “any dispute arising hereunder shall be resolved in accordance with the laws the State of California.” (12/22/03 Carter Dec. Exs. 7-8.) Indeed, one of the primary arguments then urged by defendants was that “[t]he transferee court, sitting in California, may be presumed to have greater familiarity with the California law underlying these [contract] claims.” (Defs’. Trans. Venue Br. at 13.)

Defendants’ new position is of no help to them. A federal court sitting in diversity is “required to look to the choice-of-law principles of the forum state.” PVI, Inc. v. Ratiopharm GmbH, 253 F.3d 320, 329 (8th Cir. 2001). Thus, because “Missouri courts generally enforce contractual choice-of-law provisions,” California law controls here. Id. (using Missouri choice-of-law principles to apply Delaware law due to choice-of-law provision in contract). Moreover, even without an explicit choice-of-law provision, choice-of-law principles in Missouri dictate that Missouri law does not apply to all of defendants’ contracts. With respect to contract issues, courts in Missouri apply the “most significant relationship” test set out in the Restatement (Second) of Conflict of Laws § 188. Amtech Lighting Servs. Co. v. Payless Cashways, Inc., 203 F.3d 1081, 1084 (8th Cir. 2000). Under this test, the court weighs the following factors: “(1) the

² See Defendants Internet Gateway, Inc., Tim Jung, Ross Combs and Rob Crittenden’s Motion to Transfer Venue and Memorandum in Support of Motion (“Defs’. Trans. Venue Br.”).

place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.” Id.

Here, two of the three defendants do not reside in Missouri (Fcts. ¶ 8; Defendants’ Statement of Material Facts for which a Genuine Issue Exists ¶ 1), and defendants present no evidence that either Mr. Combs or Mr. Crittenden was ever physically present in Missouri for any part of the negotiation, creation, or performance of their contracts. At most, Missouri law might conceivably apply to the contracts of only one defendant -- Tim Jung -- and even then only if there were some rationale under Missouri law to reject the explicit choice-of-law provisions in the contracts. This outcome is unlikely given that “Missouri courts regularly give effect to such clauses.” PVI, 253 F.3d at 326.

1. The contracts are valid and enforceable under California law.

California law, which controls here, has repeatedly assumed the validity of “clickwrap” license agreements such as those at issue in this case. See, e.g., Pollstar v. Gigmania Ltd., 170 F. Supp. 2d 974 (E.D. Cal. 2000) (applying California law and denying motion to dismiss a contract claim based on a clickwrap agreement); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1080-81 (C.D. Cal. 1999) (software manufacturer that distributes software over the Internet may use an interactive clickwrap agreement to require a consumer to agree to a choice-of-venue clause); Hotmail Corp. v. Van\$ Money Pie Inc., 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998) (granting preliminary injunction against a bulk e-mail solicitor and finding plaintiff likely to prevail on its breach of contract claim for violation of e-mail services clickwrap agreement).

Indeed, courts in California determining the enforceability of license agreements have relied upon the Seventh Circuit’s seminal decision in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (upholding a shrinkwrap license agreement for computer software where contract

terms were presented on computer screen after purchase and citing examples from other industries where “money now, terms later” constitutes a valid contract), as well as its successor cases. See, e.g., Bischoff v. DirecTV, Inc., 180 F. Supp. 2d 1097, 1105 (C.D. Cal. 2002) (citing ProCD and noting the “economic and practical considerations involved in selling services to mass consumers which make it acceptable for terms and conditions to follow the initial transaction”); Pollstar, 170 F. Supp. 2d at 981 (noting that “the Seventh Circuit’s opinion in ProCD provides some policy considerations that are helpful to the court”). In short, “money now, terms later” is an acceptable way to form contracts relating to the use of computer software, and Blizzard’s EULAs and TOU are enforceable under California law.

2. The primary authority relied upon by defendants is inapplicable.

Even if Missouri law did apply to any of their contracts, the Kansas district court case upon which defendants rely is inapplicable. First, the court in Klocek was not discussing software licenses at all -- it dealt with the sales of hardware. See, generally, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000). This distinction is important, because ProCD, “the leading case on shrinkwrap agreements,” and its progeny stand for the proposition that such agreements are not only permitted by the Uniform Commercial Code, but are “a practical way to form contracts, *especially with purchasers of software.*” i.LAN Sys., Inc. v. NetScout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (emphasis added) (enforcing clickwrap agreement). As the ProCD court explained, “[v]endors can put the entire terms of a [software] contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both.” 86 F.3d at 1451. In fact, the only case cited by defendants even addressing the “custom and usage” of computer software contracts came out over a decade ago -- several years

before ProCD or any of the other modern cases enforcing clickwrap and shrinkwrap license agreements for software were decided.

Second, in Klocek there was “no evidence that at the time of the sales transaction, [Gateway] informed plaintiff that the transaction was conditioned on plaintiff’s acceptance” of the contract. 104 F. Supp. 2d at 1341. Here, by contrast, the outside packaging of the games made it clear that the use of the games was subject to a EULA and that the use of the Battle.net service was subject to the Battle.net TOU. (Sup. Fcts. ¶ 13.) Thus, even if the contract were formed upon purchase, defendants agreed to take the software subject to additional terms and conditions. ProCD, 86 F.3d at 1450 (“one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license”).

Finally, the Klocek court found no evidence that the plaintiff expressly agreed to the additional contract terms, because the contracting party’s assent was supposedly indicated by failure to return bulky pieces of computer hardware within 5 days of receiving them. 104 F. Supp. 2d at 1341. But unlike that “failure to object,” the agreements at issue here require an affirmative manifestation of assent: defendants expressly indicated that they would abide by the terms of their contracts when they clicked on buttons labeled “I Agree.” (Fcts. ¶¶ 38-39.) See also i.LAN Sys., 183 F. Supp. 2d at 338 (“If ProCD was correct to enforce a shrinkwrap license agreement, where any assent is implicit, then it must also be correct to enforce a clickwrap license agreement, where the assent is explicit”).

As the court in Klocek observed, Missouri courts have not examined the enforceability of shrinkwrap agreements. 104 F. Supp. 2d at 1337. Thus, even if Missouri law, rather than California law (or Maryland or New Mexico law) applied, the concerns that troubled the Klocek court are not present here. Defendants’ representation to this Court that the license discussed in Klocek is “equivalent to Blizzard’s ‘clickwrap’ EULAs and TOUs” is simply not the case.

Clickwrap agreements are the modern manifestation of the enforceable agreements in ProCD and its progeny. Where, as here, the user affirmatively indicates assent to the terms by clicking “I agree” and may return the product for a full refund if he or she does not agree (Sup. Fcts. ¶ 14), the agreements are enforceable.

3. The contracts are not “unconscionable” or otherwise unenforceable.

Defendants’ claim that the clickwrap agreements at issue are somehow “unconscionable adhesion contracts” because the defendants were “forced” to agree to the EULAs is in direct contravention to the facts as well as the substantial number of decisions that have repeatedly enforced clickwrap agreements. With no factual support whatsoever, defendants boldly claim that the EULAs “strip [the defendants] of rights to use that game.” This is nonsense. After agreeing to Blizzard’s contracts, defendants were still free to play the games as much as they wanted to in single player mode and were similarly given unlimited free access to Blizzard’s Battle.net service to play those games online.

Defendants cite only two cases that actually discuss the unconscionability of specific clickwrap or shrinkwrap agreements, and both turned largely upon egregious prohibitions contained in those contracts that are absent here. In Comb v. PayPal, Inc., the agreement at issue “categorically prohibited individual customers from joining or consolidating claims in arbitration,” even though the average transactions at issue were so small that individual arbitration would have been cost prohibitive for the plaintiffs, and even though the contract provided that the defendant was allowed to ‘retain[] funds that it alone determined were subject to dispute ... for an indefinite period of time.’ 218 F. Supp. 2d 1165, 1174-76 (N.D. Cal. 2002).³

³ In its Memorandum in opposition to defendants’ motion for summary judgment, Blizzard incorrectly stated in a parenthetical that, in Comb, the arbitration agreement at issue in the clickwrap agreements was enforced. While the court in Comb observed that “an electronic record constitutes sufficient evidence that the parties have entered into a binding agreement,” the court did *not* enforce the arbitration clause at issue in the case on grounds of unconscionability. 218 F. Supp. 2d at 1166, 1171.

Similarly, in People v. Network Assocs., Inc., a software company distributed a product with a statement prohibiting, among other things, even *publishing a review of the product*. 758 N.Y.S.2d 466, 467 (Sup. Ct., NY County 2003). In fact, the enclosed statement gave the misimpression that this restriction resulted not from a licensing agreement, but “from some binding law or other rules or regulations imposed by an entity other than [the software company].” Id. at 470. Thus, the deceptive language was not merely unenforceable, but warranted an injunction and the imposition of civil sanctions under New York law. Id.

Defendants can cite no example of similarly outrageous restrictions in Blizzard’s licenses. Instead, the prohibitions on reverse engineering at issue here have already been enforced by the courts. All that is left of defendants’ argument is their contention, in the face of multiple courts holding otherwise, that somehow the formation of the clickwrap agreement itself is unconscionable. In addition to the courts that have had no problem enforcing clickwrap agreements, this very argument has already been examined and rejected by at least one district court. See DeJohn v. .TV Corp. Int’l, 245 F. Supp. 2d 913, 919 (C.D. Ill. 2003) (analyzing and rejecting defendant’s argument that the clickwrap agreement he entered into with a much bigger corporation was an unconscionable adhesion contract). As the DeJohn court explained:

[T]he contract between Register.com and DeJohn is not an unenforceable adhesion contract. DeJohn does not contend that Register.com used high-pressure tactics or deceptive language to induce him to click on the “I agree” button. Instead, he argues merely that Register.com’s superior bargaining power left him with no choice but to agree to the dictated terms of the agreement without negotiation. As noted above, however, it is the unfair use of, not the mere existence of, unequal bargaining power that is determinative. Although it is true that the terms of the contract were dictated solely by Register.com, DeJohn expressly indicated that he read, understood and agreed to those terms when he clicked the box on Register.com’s website. ... DeJohn cannot get out of the contract now simply because he regrets his decision.

Id. In sum, Blizzard’s contracts are enforceable, and defendants cannot escape liability for their violations on the misguided theory that their purchase of Blizzard games is not subject to a

license, and thus somehow the equivalent of acquiring unlimited and unfettered rights in the copyrighted games.

B. The Contracts at Issue are not Preempted by the Copyright Act.

Blizzard has already addressed defendants' claim that the EULAs and TOU are preempted by the Copyright Act in its opposition to defendants' motion for summary judgment. As described there, the Federal Circuit has already examined the very question of whether a license agreement prohibiting reverse engineering is preempted by the Copyright Act, and answered the question in the negative. Bowers v. Baystate Techs., Inc., 320 F.3d 1317 (Fed. Cir.), cert. denied, Baystate Techs., Inc. v. Bowers, 123 S. Ct. 2588 (2003) (shrinkwrap agreement prohibiting *all* reverse engineering of software is enforceable). Defendants' only response is to cite an inapplicable Fifth Circuit case, Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988).

As Bowers made clear, the Vault case only held that a *state law* prohibiting all copying is preempted by the federal Copyright Act. Bowers, 320 F.3d at 1325. This is not the issue here. Indeed, the Bowers court refused to expand the Vault holding "to include private contractual agreements supported by mutual assent and consideration." Id. Accordingly, because "private parties are free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act," Vault simply does not apply to preemption of the private license agreements entered into between Blizzard and defendants. See id. at 1325-26.

C. The Doctrine of "Copyright Misuse" Does Not Excuse Defendants' Breach.

Blizzard also has already addressed defendants' allegations of copyright misuse in its opposition brief. As shown there, the doctrine of copyright misuse is a defense to claims of *copyright infringement*, not breach of contract. Even when properly applied as a defense to copyright infringement, however, the Eighth Circuit has never upheld the defense.

The cases cited by defendants are inapplicable. Lasercomb Am., Inc. v. Reynolds, the primary case relied upon by defendants, discussed copyright misuse in the context of a company attempting to restrict its competitors “from *participating in any manner*” in an entire software market, including “writing, developing, producing or selling” competing software. 911 F.2d 970, 972-73, 978 (4th Cir. 1990) (applying copyright misuse defense where plaintiff’s license agreement “forbids the licensee to develop or assist in developing *any* kind of computer-assisted die-making software” for a period of 99 years) (emphasis added). Thus, the “creative abilities” of the licensee were completely withdrawn from the public. Id. at 978. As Blizzard explained in its opposition brief, the other cases cited by defendants contain similarly broad restrictions, in one case prohibiting even the use of any competitors’ products. See, e.g., Practice Mgmt. Info. Corp. v. Am. Med. Ass’n, 121 F.3d 516, 521 (9th Cir. 1997).

Here, Blizzard’s licenses do not foreclose participation in the software market for computer games or any other software market -- defendants (or anyone else) are still free to use games that compete with Blizzard, to independently create their own computer games to compete with Blizzard, and to write their own online gaming service for the games they create. Cf. United Tel. Co. of Missouri v. Johnson Publ’g Co., Inc., 855 F.2d 604, 612 (8th Cir. 1988) (rejecting copyright misuse defense where defendant failed to show that there was any effort by plaintiff to restrain competition in the area for competing works); Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995) (affirming summary judgment rejecting defendant’s copyright misuse defense where plaintiff’s contract restricted copying and third-party use); Sony Computer Entm’t Am. Inc. v. GameMasters, 87 F. Supp. 2d 976, 988-89 (N.D. Cal. 1999) (no copyright misuse where game console manufacturer created access control measure that precluded users from playing non-authorized video games on that console). As the Syncsort case confirms, standard contract terms prohibiting reverse engineering or the use of the

licensed software to develop competing products do not constitute copyright misuse. Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 336-37 (D. N.J. 1999) (distinguishing Lasercomb and finding no copyright misuse where software manufacturer contractually prohibited “reverse engineering, reverse assembly or reverse competition” and also prohibited use of the software to “develop[] and/or market[] ... a product competitive with” the software). Thus, even if this Court were to consider defendants’ invitation to apply the copyright misuse defense to a breach of contract claim, the private contracts between Blizzard and defendants simply are not abuses of a monopoly power sufficient to trigger this rarely upheld defense.

II. Blizzard’s DMCA Claims are Based Upon a Sound Construction of the Act.

A. Defendants Did Not Have Authority to Access Battle.net Mode Via a Fake Battle.net Server.

As set forth in Blizzard’s opening brief, the Digital Millennium Copyright Act (“DMCA”) prohibits circumvention of technological measures that effectively control access to a copyrighted work, as well as manufacturing or distributing technology that circumvents such technological measures. 17 U.S.C. § 1201(a)(1)(A), (a)(2).⁴ Under the DMCA, Blizzard may set up a digital barrier protecting its work wherever it wishes, and that barrier may be removed only with Blizzard’s approval. See 17 U.S.C. § 1201(a)(3)(B) (a technological measure “effectively controls access to a work” when that measure “requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work”). Defendants’ claim that they had “authority” to defeat Blizzard’s technological protections by creating a fake Battle.net server fails on a number of grounds.

⁴ Defendants filed a Notice of Constitutional Challenge to 17 U.S.C. § 1201 pursuant to Fed. R. Civ. P. 24(c), but at the close of motion practice have yet to raise any arguments concerning the constitutionality of the DMCA.

First, defendants cite to committee reports for the proposition that only “initial” circumvention of a copyrighted work is prohibited by the DMCA, and that subsequent circumvention is somehow exempt from the Act’s prohibitions.⁵ This supposed exemption did not make it into the text of the DMCA itself, and there is nothing in the plain language of the statute itself that supports defendants’ theory. See In re Erickson Partnership, 856 F.2d 1068 (8th Cir. 1988) (rejecting committee report in favor of the “plain language” of the statute, and observing that, “[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete”) (citations omitted). Moreover, even if defendants’ theory were correct, the scope of initial access to Battle.net Mode was specifically limited to connections with authentic Battle.net servers. Thus, operating a fake server and then modifying Blizzard’s games to connect to that server is not merely a subsequent “use” of existing access. Cf. Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), aff’d, Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (rejecting argument that granting access to DVD movies via authorized players also gives consumers the right to circumvent access control measures to play those movies via unauthorized players).

Second, the core of defendants’ argument rests on the incorrect assumption that granting permission to access Battle.net Mode via actual Battle.net servers creates “implied authority” to access Battle.net Mode via a fake Battle.net server. (Defs’. Opp’n at 14 and n.52.) In fact, not only did Blizzard never expressly authorize such access, it even implemented technical and contractual measures to prevent such access. (Fcts. ¶¶ 42-44, 47-49, 81-82.) As defendants even admit, the contracts they executed prohibit hosting other servers or providing matchmaking

⁵ This theory, based on the premise that defendants “lawfully acquired their videogames through purchase at a local retail store,” does not apply to at least one defendant. Rob Crittenden made unauthorized copies of a Blizzard game while developing the Bnetd emulator, thus unquestionably initially accessing Battle.net Mode without authority from Blizzard. (Fcts. ¶ 79.)

services for the games, which defendants concededly did when they operated their Bnetd emulator.

The very section of the EULAs and TOU quoted by defendants in their brief also prohibits the user of the game from “redirect[ing] the communication protocols used by Blizzard in the network feature of the Program ... for any purpose including, but not limited to network play over the Internet ... without the prior written consent of Blizzard.” (Fcts. ¶¶ 44, 49.) **Yet this is exactly what a user of a Blizzard game must do to connect to a Bnetd emulator instead of the Battle.net servers.** In fact, because one of the defendants found the process of getting the Blizzard game to redirect its information to an unauthorized server “somewhat involved” and “difficult to do,” he helped create a utility program to facilitate this task. (Fcts. ¶¶ 82-83.) In short, Blizzard expressly prohibits and deters the very type of access that defendants urge should be “implied.”

Finally, even if defendants were allowed to access Battle.net Mode with fake a fake Battle.net server using their personal copies of Blizzard games, defendants still would face liability under all three subsections of Section 1201(a)(2) of the DMCA, which prohibits trafficking in circumvention technology, including by offering the means of circumvention for download on a website. See, generally, Reimerdes, 111 F. Supp. 2d 294. Here, defendants distributed a tool that permitted others with pirated copies of Blizzard games -- those who clearly had no authority to access Battle.net Mode -- to circumvent Blizzard’s technological protections (Fcts. ¶¶ 87, 89, 93-94, 99-100). Defendants’ papers completely fail to address this independent basis for summary judgment.

B. The Reverse Engineering Exemptions are Inapplicable Here.

The reverse engineering exemptions to the DMCA found in 17 U.S.C. § 1201(f) “are not broad exceptions that can be employed to excuse any behavior that makes some device

‘interoperable’ with some other device.” Lexmark Int’l, Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943, 970 (E.D. Ky. 2003). Indeed, because “making such circumvention information or tools generally available [in the name of reverse engineering] would undermine the objectives of [the DMCA], this section imposes strict limitations.” S. Rep. No. 105-190 at 33 (1998). Here, defendants cannot rely upon the reverse engineering exemptions because they run afoul of several of these limitations: they contractually waived their right to reverse engineer, foregoing whatever implied rights to use the games for purposes of reverse engineering that they may have had; they distributed files that were unnecessary to achieve interoperability; and they did not even author an “independently created computer program.”

Defendants’ reliance on Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1993), in which the court held that some intermediate reverse engineering of an **unlicensed computer program** may constitute a defense to copyright infringement under the doctrine of fair use, is misplaced. In contrast to Sega, the issue here is whether someone who has specifically agreed not to reverse engineer can nevertheless have such access to the copyrighted work. Defendants not only failed to affirmatively obtain permission, but ***explicitly agreed not to reverse engineer*** when they assented to the terms of the EULAs and TOU. This distinction cannot be overstated: because defendants specifically gave up whatever exemption they may have had, this Court does not even need to consider how the Sega court’s discussion of fair use in the copyright context might apply here.

Defendants attempt to address the issue in a footnote, arguing that even if the contracts at issue are enforceable, “copyright and contract are two separate bodies of law,” as if this fact somehow supports their preemption arguments. (Defs’. Opp’n at 11 n.34.) However, as set forth both in Blizzard’s papers and in a case relied upon by defendants, “a copyright owner can by contract limit copying beyond the right that a copyright confers.” Assessment Techs. of WI,

LLC v. WIREdata, Inc., 350 F.3d 640, 646 (7th Cir. 2003) (citing ProCD, 86 F.3d at 1453-55).

See also Bowers, 320 F.3d at 1323-26. In short, defendants contractually agreed that they would not reverse engineer Blizzard's games, and for this reason alone the Section 1201(f) exemptions do not apply.

Second, defendants reverse engineered not only to "identify" and "analyze" the elements of the program that might have been necessary to interoperate with independently created computer programs, but also as part of a process of copying and distributing Blizzard computer files. These activities are beyond the scope of permissible reverse engineering. Defendants' only response is that the anti-circumvention and anti-trafficking provisions of the DMCA do not prohibit use and distribution of others' copyrighted works. This statement is true enough -- Blizzard's separate copyright infringement claims cover these activities -- but it fundamentally ignores the plain language of the statute. As Section 1201 makes clear, the reverse engineering exemption is triggered *only* when the reverse engineering at issue was done "for the *sole purpose* of identifying and analyzing those elements of the program that are necessary to achieve interoperability." 17 U.S.C. § 1201(f)(1) (emphasis added). Here, because the goal of defendants' reverse engineering unquestionably was to copy and distribute Blizzard's computer files in addition to whatever "identifying" and "analyzing" they may have done, defendants' conduct never fall under the exemption in the first place.

Finally, defendants fail to qualify for any protection under the reverse engineering exemptions because there is no "independently created computer program" with which to interoperate, as required by the statute. As set forth in Blizzard's opposition brief, the Bnetd emulator is not a transformative use of the real Battle.net service. Indeed, defendants have stated that the goal of the project was merely to implement the "user visible" features of the already

existing Battle.net service. Moreover, as further set forth in Blizzard's opposition, the emulator is distributed with files authored by Blizzard. (Fcts. ¶ 75) (Sup. Fcts. ¶¶ 8, 11-12.)

Defendants attempt another sleight of hand here, suggesting that Blizzard's argument is based on the defendants' emulator being a "competitor" to the Battle.net service. But unlike the new and original video games created as a result of reverse engineering in defendants' example, defendants' end product is not original -- it merely supplants the real Battle.net service. Additionally, unlike the new and original works created in Sega, defendants' emulator contains Blizzard's copyrighted files. (Id.) Defendants therefore violate the Copyright Act every time they distribute the Bnetd emulator, and the reverse engineering exemptions are unavailable to them. See, generally, 17 U.S.C. § 1201(f)(1)-(3) (reverse engineering exemptions not available when activities "constitute infringement under [copyright law]"). Defendants have exceeded the "strict limitations" imposed on the reverse engineering exemption by Congress no less than three unique ways. As a result, Section 1201 provides no excuse for their prohibited conduct.

CONCLUSION

For the foregoing reasons, Blizzard asks that this Court grant Blizzard's Motion for Partial Summary Judgment on Count II (Circumvention of Copyright Protection Systems and Trafficking in Circumvention Technology Under the Copyright Act § 1201(a)) and Count VII (Breach of End User License Agreements and Battle.Net® Terms of Use) of its Second Amended Complaint.

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Respectfully submitted,

/s/

Stephen H. Rovak, #4218
Kirill Y. Abramov, #109139
SONNENSCHN NATH & ROSENTHAL LLP
One Metropolitan Square

Suite 3000
St. Louis, Missouri 63102
Telephone: (314) 241-1800
Facsimile: (314) 259-5959

Carol Anne Been, *pro hac vice*
Gerald E. Fradin, *pro hac vice*
S. Roberts Carter III, *pro hac vice*
SONNENSCHN NATH & ROSENTHAL LLP
233 South Wacker Drive
8000 Sears Tower
Chicago, Illinois 60606
Telephone: (312) 876-8000
Facsimile: (312) 876-7934

Attorneys for Plaintiffs Davidson & Associates,
Inc., D.B.A. Blizzard Entertainment, and Vivendi
Universal Games, Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT to be served by operation of the Court's electronic filing system on February 17, 2004 upon the following:

Mark Sableman
Matthew A. Braunel
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101-1611

Robert M. Galvin
Paul S. Grewal
Richard C. Lin
Day Casebeer Madrid & Batchelder, L.L.P.
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014

Jason M. Schultz
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

/s/

S. Roberts Carter III, *pro hac vice*
SONNENSCHNEIN NATH & ROSENTHAL LLP
233 South Wacker Drive
8000 Sears Tower
Chicago, Illinois 60606
Telephone: (312) 876-8000

Attorney for Plaintiffs Davidson & Associates, Inc.,
D.B.A. Blizzard Entertainment, and Vivendi
Universal Games, Inc.