Dodge Anderson, Ltd.
3003 North Central Avenue, Suite 1800
Phoenix, Arizona 85012-2909
Telephone: (602) 277-3000
Facsimile: (602) 277-7478
Email: connie@azlawyers.com
Connie J. Mableson, #010665

Public Knowledge
1875 Connecticut Ave. NW, Suite 650
Washington, DC 20009
Telephone: (202) 518-0020
Facsimile: (202) 986-2539
Email: ssiy@publicknowledge.org
Sherwin Siy
Jef Pearlman

Attorneys for ***Public Knowledge***

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC, Plaintiff and Counterdefendant, vs. **BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC.**, Defendants and Counterclaimants,	**Case No.: CV06-02555-PHX-DGC** ***AMICUS CURIAE* BRIEF OF PUBLIC KNOWLEDGE IN SUPPORT OF NEITHER PARTY ON CROSS-MOTIONS FOR SUMMARY JUDMENT**
BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC., Third-Party Plaintiffs, vs. **MICHAEL DONNELLY, an individual,** Third-Party Defendant.	

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

TABLE OF CONTENTS

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

AMICUS CURIAE BRIEF OF PUBLIC KNOWLEDGE IN SUPPORT OF NEITHER PARTY ON CROSS-MOTIONS FOR SUMMARY JUDMENT

INTRODUCTION

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

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

ARGUMENT

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

I. COPYRIGHT OWNERSHIP DIFFERS FROM OWNERSHIP OF A COPY

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

17 U.S.C. § 202.

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

[1] *Compare* 17 U.S.C. § 117(a), above, with Section 109:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or 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.

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

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

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

alter the substantive rights of the parties under contract law should be enforceable, particularly when the contract is not a negotiated agreement, but a shrinkwrap license. Contracts involving intellectual property affect

> not only the immediate parties, but also a host of potential third parties—users, subsequent inventors, and the general public. In other words, agreements to vary intellectual property law create externalities. Enforcing such contracts is inefficient because the contracts do not take into account the full social costs and benefits of the agreement between two parties.
>
> The arguments for contract, moreover, lose much of their force in the case of shrinkwrap licenses governing software transactions. Contract law is at its strongest where there is an actual agreement between the parties. That is, after all, the basis of a contract. Unfortunately, the ideal assumptions behind a "bargained contract" — relatively equal bargaining power, actual discussion and agreement as to individual terms, and joint drafting—often do not reflect reality. In practice, contracts are often entered into between large corporations and consumers. The corporation drafts the contract and sets the price. The consumer merely decides whether or not to sign the contract. In this circumstance, there has been no meaningful "bargaining" over the contract at all, and certainly not over particular terms contained in the form drafted by the large corporation.

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

II. RAM COPIES OF SOFTWARE MADE AS AN ESSENTIAL STEP TO USING THAT SOFTWARE ARE NON-INFRINGING

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

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

[2] Copyright remedies include statutory damages with a required minimum of $750 per infringed work, up to $150,000 for willful infringement, and criminal penalties. 17 U.S.C. §§ 504.In stark contrast, contracts remedies 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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

recommending that users not be held liable for copies created when a work was "placed into a computer:"

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

CONTU Report at 13.

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

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

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

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

1. Ownership is Determined by the Totality of the Circumstances

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

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

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

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

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

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

[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.

[5] It is important to note that not all purported license terms are enforceable. For instance, the terms of contract—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.

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

> Ownership of property is often described as a bundle of rights. . . . It is not clear from the text of § 117(a) how many and what kind of sticks may be removed from the bundle before the possessor of a copy of a computer program is no longer considered its owner for the purposes of § 117(a).

402 F.3d at 122 (internal citation omitted). Notably, though, courts have found a transfer of ownership despite certain limitations on transfer expressed in a EULA. *See, e.g., Softman*, 171 F. Supp. 2d at 1082, n. 6.

2. WoW Users are Owners of their Copies

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

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

[6] The court in *MAI* performed no explicit analysis of Section 117, and courts and commentators have cautioned against an overly broad interpretation of *MAI* in which any licensee (whether of the underlying work or of the individual copy) automatically fails to be an owner. *Wall Data*, 447 F.3d at 785, n. 9 (noting criticism in 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.

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

c) Users are free to discard or destroy their copies of WoW. Users also have the ability to discard or destroy copies as they wish, as the EULA states that users may terminate the agreement "by permanently destroying all copies of the Game in [the user's] possession or control." WoW EULA §6.

d) WoW is stored on users' own personal computers. The WoW game client is stored entirely upon the computer of the user, accessible only to the

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

> You may *permanently transfer all of your rights and obligations* under the License Agreement to another *by physically transferring the original media* (e.g., the CD-ROM or DVD you purchased), all original packaging, and all Manuals or other documentation distributed with the Game; provided, however, that you permanently delete all copies and 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.

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

B. The RAM Copy is Essential to Use of WoW

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

> When users launch a copy of WoW from their hard drive in order to…play the game, the user makes a copy of WoW in RAM.
>
> . . .
>
> [A]s a player moves through the game, additional copyrighted game content is loaded from the hard drive into RAM…

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

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

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

[8] Section 117(a)(2) explicitly grants users the right to create backup copies, only so long as those "archival 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).

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

The effect of accepting Blizzard's construction of the law is to obliterate Sections 109 and 117 of the Copyright Act. As *Wall Data* has noted, software producers rarely, if ever, purport to sell their works, since "[v]irtually all end users do not buy—but rather receive a license for—software." 447 F.3d at 786 n.9 (quoting *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

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

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

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

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

Such a theory is plainly untenable. Naming a character "Inyourface," "Asdfasdf," "Roflcopter," or "CorporalTed" should not result in $750 worth of

[9] Blizzard also reserves the right to alter the terms of the EULA at its own discretion (WoW EULA § 13) and to 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.

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

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

CONCLUSION

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

/ / /

/ / /

/ / /

/ / /

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000

Dated this 2nd day of May, 2008.

DODGE ANDERSON, LTD.

BY:/s/ Connie J. Mableson

Connie J. Mableson, #010665
3003 North Central Avenue, #1800
Phoenix, Arizona 85012
Tel: 602-277-3000
Fax: 602-277-7478
Counsel for ***Public Knowledge***

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:

Name	Email Address
Lance C. Venable, Esq.	docketing@vclmlaw.com
Christian S. Genetski, Esq.	cgenetski@sonnenschein.com
Scott Jeremy Stein, Esq.	sstein@sonnenschein.com
Shane M. McGee, Esq.	smcgee@sonnenschein.com

☒ I hereby certify that on May 2, 2008, I served the attached document by FIRST CLASS MAIL on the following, who are not registered participants of the CM/ECF System:

Name	Email Address

/s/ Connie J. Mableson

DODGE ANDERSON, LTD.
ATTORNEYS AT LAW
PHOENIX CORPORATE CENTER
3003 NORTH CENTRAL AVENUE, SUITE 1800
PHOENIX, ARIZONA 85012-3909
602 277 3000