
Automated Program for Playing Virtual World Game Deemed Copyright Infringement

by James G. Gatto and Benjamin D. Esplin

In July 2008, a U.S. District Court in Arizona found on summary judgment that the use of an automated program to play a virtual world game constituted copyright infringement. This decision turned on findings that both the End User License Agreement and the Terms of Use prohibited such use, and that these prohibitions were limitations on the scope of the copyright license and not merely contract covenants. Based on this, the Court found copyright infringement and not merely a breach of contract, thus resulting in potentially more powerful remedies, including injunctive relief. Interestingly, the copyright owner has requested that the infringer be enjoined from releasing the automated program source code as “open source” software. The Court also found that copying the virtual game software from hard drive to RAM constitutes “copying” for copyright infringement purposes and that the exception under Section 117 of the Copyright Act did not apply here. The Court also addressed Digital Millennium Copyright Act (“DMCA”) claims including whether the infringer circumvented technological measures to prevent access to the game software. This case is significant to the burgeoning field of virtual world games, but its applicability could extend far beyond to many other software disputes.

Background

A virtual world is an online, computer-based simulated environment through which users interact with each other and/or the online environment via avatars. An avatar is a customized (usually 3D) visual representation of a user. Some virtual worlds include a sophisticated online gaming platform that enables many thou-

sands (or more) of players to play the game at once. These games are often referred to as Massively Multi-Player Online Games (“MMOGs”).

One of the most popular virtual world games (and the one at issue here) is World of Warcraft (“WoW”) operated by Blizzard Entertainment, Inc. (“Blizzard”). In WoW, users control an avatar to explore the landscape, fight monsters, complete quests, build skills and interact with other avatars and computer-generated characters. As players succeed, they acquire in-game assets, experience, and power. Players can advance from skill level 1 to level 60 with the basic game, and through level 70 with an expansion module. This in turn makes the avatar more powerful and enhances the playing experience. The acquisition of in-game assets, skills, experience and power is time-consuming, but several options have become available to shorten the time required. For example, users can use real money (e.g., via eBay) to purchase from other users WoW gold (in-world money), equipment, and even avatars with advanced skills. The sellers of these things are often referred to as “goldfarmers,” since they have acquired the “gold,” equipment and/or high level avatars by playing WoW. Thus, real-world value can be created by playing WoW.

Not surprisingly, this has led to opportunistic individuals seeking to make a profit. For example, some users take advantage of automated programs, known as “bots,”¹ that enable them to advance through the levels and acquire more assets within WoW more quickly by automatically controlling their avatar even when users are away from their computers.

One such program, at issue here, is MMO Glider (“Glider”) distributed by MDY Industries, LLC (“MDY”). Glider plays WoW for its owner while the owner is away from his or her computer. Glider thereby enables the owner to advance more quickly through levels within WoW, without personally spending the time to do so.

Blizzard maintains that the WoW is a carefully crafted and maintained environment where players compete against each other and the game to advance through the game’s various levels and to acquire game assets. Blizzard contends that practices such as “goldfarming,” selling in-world assets for real-world money, and using bots upset the competitive balance of WoW. Blizzard contends that this enables some users to advance more quickly and unfairly, thereby diminishing the game experience for other players, and allegedly contributing to user dissatisfaction and/or discontinuation of use for some players.

The WoW software consists of two components: the “game client” software and the “game server” software. The user plays WoW by loading the game client software on his personal computer and accessing the game server software through an online account for which he pays a monthly fee. Use of WoW is governed by an End User License Agreement (“EULA”) and Terms of Use Agreement (“TOU”). Players must agree to the EULA and TOU terms before playing.

WoW has been enormously successful. Blizzard asserts, and MDY does not dispute, that WoW is the largest and most successful multiplayer online game in the world. WoW currently has over 10 million active players and generates more than \$1.5 billion in revenue annually.

Blizzard has tried to preclude use of bot programs through technological means. For example, Blizzard has used software to scan user computers for offending programs when WoW is started and periodically during use of WoW. However, some bot programs, such as Glider, have been carefully created to circumvent such scans. Therefore, efforts to eliminate the use of these bot programs through technological measures has been somewhat ineffective. As a result, Blizzard resorted to legal action.

The Arizona Action

MDY sought a declaratory judgment that Glider does not infringe rights owned by Blizzard. Blizzard filed a counterclaim and third-party complaint asserting seven claims: tortious interference with contract, contributory copyright infringement, vicarious copyright infringement, violation of the Digital Millennium Copyright Act (“DMCA”), trademark infringement, unfair competition, and unjust enrichment. Blizzard sought summary judgment on the claims for contributory and vicarious copyright infringement, violation of the DMCA, and tortious interference with contract. MDY sought summary judgment on all claims except trademark infringement.

The Court found in favor of Blizzard on the copyright infringement claim (one of the most important claims) and the tortious interference with contract claim.²

The Court found in favor of MDY on the part of its DMCA claim that was based on 17 U.S.C. § 1201(a)(2) as far as it applies to Blizzard’s game client software, and its unfair competition claim. The Court denied summary judgment on the DMCA claim in all other respects and on the unjust enrichment claim.

The Court’s Legal Analysis

Copyright Infringement

In deciding the copyright infringement claims, the Court addressed several issues, including: 1) whether copying the game client software to RAM was “copying” for purposes of Section 106 of the Copyright Act; 2) whether Section 117 of the Copyright Act provides an exception for MDY to what would otherwise be copyright infringement; and 3) whether violations of the EULA and TOU are copyright infringement or just breach of contract.

Copying

With respect to the first issue, the Court stated:

MDY does not dispute that Blizzard owns a valid copyright in the WoW game client and game server software. Nor does MDY dispute that the game client software, which typically is located on the hard drive of a player’s personal computer, is copied from the hard drive to the computer’s random access memory (“RAM”) when WoW is played.

Ninth Circuit law holds that the copying of software to RAM constitutes “copying” for purposes of section 106 of the Copyright Act. *MAI Systems. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993). Thus, if a person is not authorized by the copyright holder (through a license) or by law (through section 117, which will be discussed below) to copy the software to RAM, the person is guilty of copyright infringement because the person has exercised a right (copying) that belongs exclusively to the copyright holder.

Does Section 117 Provide an Exception?

MDY and the digital rights organization Public Knowledge (in an *amicus* brief) argued that section 117 creates an exception to section 106 that enables use of Glider in conjunction with the WoW software without infringing Blizzard’s copyright. The Section 117 exception enables an “owner” of a copy of a computer program to make a copy if the copy is made as an “essential step” in using the program. Section 117 states, in part,

Notwithstanding the provisions of section 106, it is not 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 [] that such a new copy of adaptation is created as an essential step in the utilization of the computer program[.]

MDY argued that WoW users are “owners” of copies of the game client software within the meaning of Section 117, that copying the software to RAM is an “essential step” in using the game client software, and that the act of copying to RAM is, therefore, not an infringement, even when done in connection with Glider.

The Court disagreed. It found that Ninth Circuit precedent was squarely on point here, and precluded application of the section 117 exception because the users of WoW are not “owners” of the WoW software for the purposes of section 117. The Court stated:

The resolution of this issue is controlled by Ninth Circuit law. At least three cases – *MAI, Triad*, and *Wall Data Inc. v. Los Angeles County Sheriff's Department*, 447 F.3d 769 (9th Cir. 2006) – hold that licensees of a computer program do not “own” their copy of the program and therefore are not entitled to a section 117 defense. See *MAI*, 991 F.2d at 518 n.5; *Triad* 64 F.3d at 1333; *Wall Data*, 447 F.3d at 784-85. *Wall Data* provides a two-part test for determining whether the purchaser of a copy of a software program is a licensee or an owner: if the copyright holder (1) makes clear that it is granting a license to the copy of the software, and (2) imposes significant restrictions on the use or transfer of the copy, then the transaction is a license, not a sale, and the purchaser of the copy is a licensee, not an “owner” within the meaning of section 117. *Wall Data*, 447 F.3d at 785.³

MDY argued that *Wall Data* is distinguishable from this case because *Wall Data* involved a negotiated license between the software vendor and the software purchaser, not a standard form license like that contained in the WoW game. The Court disagreed, stating:

The software used in *Wall Data* was purchased through an approved vendor and was governed by “volume license booklets.” 447 F.3d at 774. The transaction included a “shrink-wrap license, click-through license, and volume license booklets.” *Id.* at 775. The specific license at issue was the “standard” click-through license. *Id.* at 775 n.5. The Blizzard license in this case is also a standard click-through license.

MDY also urged the Court to follow the approach recently taken by the United States District Court for the Western District of Washington in *Vernor v. Autodesk*, 555 F. Supp. 2d, 1164. The *Vernor* Court declined to follow *MAI, Triad*, and *Wall Data*, and instead applied an earlier Ninth Circuit case, *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977). *Wise* involved the application of the “first sale” doctrine under 17 U.S.C. § 109 to various transfer contracts between movie studios and recipients of movie prints. *Vernor* concluded that the critical factor in *Wise* for determining whether a transaction was a sale or a license was “whether the transferee kept the copy acquired from the copyright holder.” 555 F. Supp. 2d at 1170. MDY urged the Court to follow *Vernor* and *Wise* and hold that the users of the WoW game client software are owners of the software because they are entitled to keep the copy of the software they acquire from Blizzard. The Court declined this invitation, stating:

Whatever freedom the Court in *Vernor* may have had to disregard *Wall Data* when applying a different statutory provision – section 109 – this Court does not have the same freedom. This case concerns section 117, the very provision addressed by Ninth Circuit in *Wall Data*. The Court is not free to disregard Ninth Circuit precedent directly on point.⁴

Interestingly, however, the Court did recognize that *Vernor* found the meaning of “owner” to be the same in Sections 109 and 117 and therefore found *Wise* and *Wall Data* to be incompatible.

Based on this analysis the Court found that the use of WoW with Glider constitutes a violation of an exclusive right (copying) granted to Blizzard by Section 106 of the Copyright Act and that the Section 117 exception did not apply.

Copyright Infringement or Breach of Contract?

The Court also addressed whether violation of the EULA and TOU is a copyright infringement or breach of contract. Blizzard alleged that users of WoW are licensees who are permitted to copy the copyrighted game client software only in conformance with the EULA and TOU, and that when users launch WoW using Glider, they exceed the license in the EULA and TOU and create infringing copies of the game client software. MDY argued that if Glider violates terms of the EULA and TOU, they are merely breaching a contract, not infringing a copyright. The Court stated:

MDY contends that users of Glider do not infringe Blizzard’s copyright because they are licensed to copy the game client software to RAM. MDY claims that WoW players acquire this license when they purchase the game client software and load it on the hard drives of their personal computers. MDY claims that contrary provisions of the EULA and TOU, such as express prohibitions on the use of bots, are mere terms of contract, not limitations on the scope of the license granted by Blizzard. Thus, although Blizzard may assert a claim against Glider users for breach of contract, MDY argues, it cannot assert the more powerful claim of copyright infringement.⁵

“Generally, a copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement and can sue only for breach of contract.” *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) (“*Sun I*”) (citations omitted). “If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.” *Id.* To prevail on a copyright infringement claim, therefore, a plaintiff who has granted a license must establish that the license terms are “limitations on the scope of the license rather than independent contractual covenants,” and that the defendant’s actions exceed the scope of the license. *Id.* at 1122.

The Court held that: the very portion of the contract that grants a license to use the game client software also makes clear the license is limited; and Section 4 of the TOU makes clear that although users are licensed to play WoW and to use the game client software while playing, they are not licensed to exercise other rights belonging exclusively to Blizzard as the copyright holder – copying, distributing, or modifying the work. The Court concluded that these provisions are limits on the scope of the license granted by Blizzard, and that users of Glider act outside the scope of the license.

MDY relied on the Federal Circuit’s decision in *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005), to argue that “uses” which violate a license constitute copyright infringement only when the uses themselves infringe one of the exclusive rights granted by the Copyright Act. The Court was not convinced that *Storage Technology* should be read so narrowly, stating:

It is obvious that a person cannot be liable for copyright infringement without committing an act of infringement. Thus, where a license is at issue, the person must not only act outside the scope of the license, but must also engage in an act that infringes upon the exclusive rights granted the copyright holder by Section 106 of the Act. This much is clear from both Ninth Circuit law and *Storage Technol-*

ogy. But to the extent MDY suggests that the act that causes the person to fall outside the scope of the license and the act that constitutes copyright infringement must be one and the same, MDY has cited no Ninth Circuit authority.

Copyright Misuse

MDY contended that Blizzard's prohibition of bots constitutes copyright misuse⁶ because Blizzard is controlling its "licensees' use of independently created and noninfringing third party software." The Court disagreed, stating:

As explained above, however, the use of Glider does infringe Blizzard's copyright. Moreover, while Blizzard has limited the license of its WoW software, there is no evidence that Blizzard has sought to bar third parties from developing competing games. See *A&M*, 239 F.3d at 1027 (rejecting misuse defense where there was no evidence plaintiffs sought to control areas outside the grant of copyright); *Triad Sys. Corp. v. S.E. Express Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995) (rejecting misuse defense because unlike *Lasercomb*, "Triad did not attempt to prohibit [the defendant] from developing its own service software to compete with Triad"). MDY has not established the copyright misuse defense.

Copyright Summary

In summary, the Court reached the following conclusions (based on its interpretation of undisputed facts, construction of the EULA and TOU, and controlling Ninth Circuit law):

Blizzard owns a valid copyright in the game client software, Blizzard has granted a limited license for WoW players to use the software, use of the software with Glider falls outside the scope of the license established in Section 4 of the TOU, use of Glider includes copying to RAM within the meaning of Section 106 of the copyright Act, users of WoW and Glider are not entitled to a Section 117 defense, and Glider users therefore infringe Blizzard's copyright. MDY does not dispute that the other requirements for contributory and vicarious copyright infringement are met, nor has MDY established a misuses defense. The Court accordingly will grant summary judgment in favor of Blizzard with respect to liability on the contributory and vicarious copyright infringement claims in Counts II and III.

The DMCA Claims

Blizzard alleged that MDY violated the DMCA by circumventing technological measures Blizzard uses to control access to its copyrighted work and to protect its rights as the copyright owner of WoW. Blizzard moved for summary judgment on all of its DMCA claims. MDY moved for summary judgment on Blizzard's claim under 17 U.S.C. § 1201(a)(2). The Court granted MDY's motion only insofar as it applied to Blizzard's game client software code, but denied the motions in all other respects.

Succinctly stated, the Court found that Section 1201 (a)(2) of the DMCA

...provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" that is "primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title[.]" 17 U.S.C. § 1201 (a)(2)(A)... "[A] technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." *Id.* § 1201 (a)(3)(B).

Blizzard alleged that MDY violated this provision by enabling Glider to evade Blizzard technologies designed to detect and prevent the use of bots by WoW players. MDY asserted that a user of Blizzard's game client software has full and complete access to the software code, via the CD that contains the game client software or on the user's hard drive once the game client software is loaded on the user's computer. MDY further argued that the user thereafter can view or copy the game client software code, regardless of whether the user actually plays WoW or encounters Blizzard's scanning software. MDY also argued that the user has full access to the non-literal aspects of the WoW software through the game client software, and that these non-literal aspects can be viewed on the user's computer.

With respect to "access" to the code contained in the game client software, the Court agreed with MDY. The Court found no Ninth Circuit law that addressed this issue, but found the following explanation from the Sixth Circuit highly relevant:

It is not Lexmark's authentication sequence that "controls access" to the Printer Engine Program. See 17 U.S.C. § 1201(a)(2). It is the purchase of a Lexmark printer that allows "access" to the program. Anyone who buys a Lexmark printer may read the literal code of the Printer Engine Program directly from the printer memory, with or without the benefit of the authentication sequence, and the data from the program may be transferable into readable source code after which copies may be freely distributed. No security device, in other words, protects access to the Printer Engine Program code and no security device accordingly must be circumvented to obtain access to that program code....

Because the statute refers to "control[ling] access to a work protected under this title," it does not naturally apply when the "work protected under this title" is otherwise accessible. Just as one would not say that a lock on the back door of a house "controls access" to a house whose front door does not contain a lock and just as one would not say that a lock on any door of a house "controls access" to the house after its purchaser receives the key to the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-readily-accessible copyrighted works.

Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 547 (6th Cir. 2004).

The Court found this to be true with respect to the code contained in Blizzard's game client software, stating:

A user has full access to that code once the game client software has been placed on the user's computer. The user need not pass through Blizzard's security devices to gain access to the code. The user may view the code on the hard drive and may freely copy it to another hard drive, a CD, a jump drive, or other media. The Court therefore will grant summary judgment in favor of MDY on this issue.⁷

Other Claims

The Court denied summary judgment with respect to the non-literal elements of Blizzard's game and the Section 1201 (b)(1) claim under the DMCA due to insufficient and/or disputed "facts." The Court also denied MDY's motion for summary judgment on Blizzard's unjust enrichment claim due to insufficient evidence establishing a lack of genuine issue.

Scope of Injunction

On July 23, 2008, Blizzard moved for a permanent injunction. In its motion, Blizzard alleges that:

Following the entry of the Court's order finding that MDY's sale, marketing, and support of Glider products constituted secondary copyright infringement and tortious interference, MDY has continued its activities unabated. Specifically, MDY has refused to honor Blizzard's demand to cease and desist selling and updating Glider.

The scope of the injunction requested includes requests to enjoin MDY from:

1. operating its authentication server;
2. developing or maintaining Glider;
3. releasing the Glider source code to third parties; and
4. providing assistance to others in developing their own bots for use with WoW.

Points 1 and 2 are fairly conventional. Points 3 and 4 are not so conventional. On point 3, Blizzard expressed specific concern that:

Some Glider users have suggested on internet forums that MDY provide the Glider source code as "open source" software—free for use. [cite omitted] If MDY is allowed to distribute the source code, Blizzard will be faced with numerous parties around the world infringing its copyright—and possibly doing so without a revenue stream with which to compensate it for damage to WoW. Preventing this sort of irreparable harm is one of the purposes of an injunction, and thus such a provision should be included in the injunction here in order to protect Blizzard's rights.

On point 4, Blizzard stated:

Numerous other individuals around the world, many of whom may be difficult to sue in United States Courts, would undoubtedly be interested in picking up Glider's mantle and continuing to provide an equally successful bot for use in WoW, something that has thus far proved beyond the ability of anyone other than MDY. Preventing MDY from not only releasing the source code, but providing advice to those individuals creating their own bots would prevent the irreparable injury that could result from the creating of botting software by disparate individuals and companies from whom a judgment might be difficult or impossible to collect.

It will be interesting to see how the Court rules on these issues.

Ramifications Beyond Virtual Worlds and Online Gaming

Although the rulings here deal specifically with the use of third-party bot programs in conjunction with virtual world games, they may have implications for software disputes in other contexts, including cases involving issues of whether:

1. violation of EULA or TOU terms is a copyright infringement or breach of contract;
2. loading software from a hard drive to RAM constitutes "copying";
3. technological measures to prevent access are circumvented in violation of the Digital Millennium Copyright Act; and

4. injunctive relief is available to preclude a copyright infringer from releasing the infringing code as “open source” software.

Copyright Infringement or Breach of Contract?

In *Blizzard*, the Court found, based on the facts of this case, that the relevant restrictions in the EULA and TOU governing WoW were limitations of the license under which the software associated with WoW was distributed. However, this legal result was based on these facts and is not necessarily a *per se* rule. Other Courts have found violations of software license agreements to be breach of contract, rather than a copyright infringement.

This aspect of the *Blizzard* case demonstrates the importance of crafting a EULA and/or TOU in such a way that important terms limit the copyright license and do not just constitute contract covenants. Failure to do so may minimize the available remedies if a violation occurs. See Fn. 5, *supra*.

This point may be relevant to other web-based services⁸ and other software, which require users to accept a copyright license set forth in a EULA and/or TOU. Depending on how these EULAs and/or TOU are crafted may well determine whether violation is a copyright infringement or merely a breach of contract.

Is Copying to RAM Infringement?

Blizzard also addressed the copyright implications of copying software into the RAM of a computer executing the software and the applicability (or not) of the Section 117 exception. These issues likely will arise in other software disputes. As was the case here, the copyright owner will want to make sure the license is crafted in such a way to ensure that the user is not deemed an “owner” of the software. However, this is an issue that perhaps is not quite so settled.

In arriving at this holding, the Court followed a recent line of 9th Circuit cases, namely, *MAI*, *Triad*, and *Wall Data*. However, another recent case (*Vernor*) declined to follow *MAI*, *Triad*, and *Wall Data*, and found a purchaser of a copy of software covered by a copyright license to be the “owner” of the software for the purposes of § 117. The Court in *Vernor* eschewed the *MAI-Triad-Wall Data* line of cases, and instead relied on an older 9th Circuit case, *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), involving transfer contracts between movie studios and recipients of movie prints. *Wise* applied the “first sale” doctrine under 17 U.S.C. § 109 to the transfer contracts at issue. *Vernor* determined that the analysis in *Wise* as to whether a recipient of copyrighted material was a licensee or an owner hinged on the presence or absence in the license agreement of a requirement that the recipient return the material to the copyright holder. Since the software in *Vernor* was subject to no such requirement, it was held that the purchaser of the software was an owner.

DMCA

With respect to the portion of the DMCA addressed by the Court, it is clear the focus was on whether the technological means prevents “access.” If code is accessible, despite technological measures to prevent certain uses, this may be fatal to a DMCA claim. The lesson here is to control “access” more completely to facilitate a DMCA claim. For example, the Court here distinguished this case from the *Ticketmaster* case, where Ticketmaster used the CAPTCHA software as a technological means to block access to its software. See, fn. 7, *supra*.

Impact on Open Source?

It will be interesting to see if the Court enjoins distribution of Glider under an open source license. This will be of particular interest to the Open Source community. We will monitor this decision and provide relevant updates.

Conclusion

Blizzard and other cases make clear that the law is evolving in this area and that carefully crafted licenses are a must. Should you have any questions on the Blizzard case or how best to draft license terms in light of the cases discussed herein, please feel free to contact us.

For further information, please contact:

James G. Gatto (bio)
Northern Virginia
+1.703.770.7754
james.gatto@pillsburylaw.com

Benjamin D. Esplin (bio)
San Diego–North County
+1.858.847.4126
ben.esplin@pillsburylaw.com



- ¹ The term “bot” is derived from the term “robot,” suggesting the automated control of the avatar by the bot program.
- ² In a fairly straightforward analysis, the court found that MDY did not dispute several elements of the relevant test for the tortious interference claims and that there was no genuine dispute on the other elements. This will not be further addressed in this advisory.
- ³ In *Wall Data*, the Los Angeles County Sheriff’s Department purchased nearly 4,000 licenses to *Wall Data*’s computer software, but installed the software on more than 6,000 computers. *Id.* at 773. The license granted a right to use the software on a “stand alone workstation” or a “networked station which [did] not permit the [s]oftware to be shared with other networked stations.” *Id.* at 775 n.5. The license also limited the transfer of the software to “not more than once every 30 days.” *Id.* The Ninth Circuit concluded that “[t]hese restrictions were sufficient to classify the transaction as a grant of a license to *Wall Data*’s software, and not a sale of *Wall Data*’s software.” *Id.* at 785. The court therefore concluded that “the Sheriff’s Department [was] not the ‘owner’ of copies of *Wall Data*’s software for purposes of § 117.” *Id.*
- ⁴ The Vernor court elected to follow the older precedent of *Wise*. *Id.* This Court, however, is confronted with recent Ninth Circuit authority not only interpreting section 117, but also explicitly declining to reconsider the rule established in *MAI* and *Triad*. *Wall Data*, 447 F.3d 785 n.9. If the Circuit’s interpretation of section 117 is to be reconsidered, it must be done by the Circuit, not this Court. Moreover, it is not at all clear that the result in this case would be different even if the Court were to follow *Wise*. Under *Wise*, a transaction is a license where the recipient is required to return the copy to the copyright owner or the copyright owner retains title to the copy. 550 F.2d at 1190-92. As noted above, section 3 of the EULA provides that Blizzard explicitly retains title to “all copies” of the game client software. Dkt. #42 at 3.
- ⁵ Breach of contract damages generally are limited to the value of the actual loss caused by the breach. See 24 Richard A. Lord, *Williston on Contracts* §65.1 (4th ed. 2007). Copyright damages, by contrast, include the copyright owner’s actual damages and any additional profits of the infringer, or statutory damages as high as \$150,000 per infringed work. 17 U.S.C. §504; see *Frank Music Corp. v. MGM, Inc.*, 772 F.2d 505, 512 n.5 (9th Cir. 1985). Courts may also impose injunctive relief, seize infringing articles, and award costs and attorneys’ fees. 17 U.S.C. §§ 502, 503, 505.
- ⁶ The defense of copyright misuse “prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) (citing *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990)).
- ⁷ Blizzard argued for a contrary result on the basis of *Ticketmaster*. In *Ticketmaster*, however, the district court concluded that Ticketmaster’s protective software, known as CAPTCHA, “controls access to a protected work because a user cannot proceed to copyright protected web pages without solving CAPTCHA[.]” 507 F. Supp. 2d at 1112 (emphasis in original). A purchaser of Blizzard game client software, by contrast, can view and copy the code within that software without passing through scan.dll or the resident software.
- ⁸ By way of example, a social-networking service such as MySpace, Facebook, or LinkedIn that permits third-party software to be used in conjunction with their service, within prescribed boundaries (set forth in the EULA or TOU), may in some circumstances be able to prevent certain activities by third-party software used with their services, if the EULA/TOU is properly crafted.

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2008 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.