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

DAVIDSON & ASSOCIATES, INC., D.B.A. BLIZZARD ENTERTAINMENT, and VIVENDI UNIVERSAL GAMES, INC., Plaintiffs v. INTERNET GATEWAY, INC., TIM JUNG, ROSS COMBS and ROB CRITTENDEN, Defendants.	Case No. 4:02CV498CAS

DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Of the seven claims presented in their Second Amended Complaint, Blizzard seeks summary judgment on just two: breach of contract (Count VII) and circumvention (Count II). As set forth in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendants' Memorandum in Support of Their Motion for Summary Judgment, and the Law Professors' Brief *Amici Curiae*, Blizzard's motion for summary judgment on these two claims fails for a variety of reasons. In this Supplemental Opposition, however, Defendants will focus on one reason in particular: Blizzard's flagrant misuse of its monopoly power under the federal copyright laws.

No less than seven leading scholars of American copyright law have denounced Blizzard's End User License Agreements and Terms of Use as not only "an effort to bootstrap" their "limited authority conferred upon them by the copyright monopoly" but also "an evasion" of the limitations imposed by the copyright law on that monopoly. These characterizations are well-founded. By using contracts of adhesion to deny consumers fair use rights explicitly protected by Congress, Blizzard has committed precisely the kind of overreaching in copyright licensing that the copyright misuse doctrine aims to prevent.

II. THE COPYRIGHT MISUSE DOCTRINE PROTECTS THE PUBLIC FROM ATTEMPTS TO EXTEND THE MONOPOLY POWER OF A COPYRIGHT BEYOND ITS STATUTORY BOUNDARIES

The doctrine of copyright misuse "prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly."[1] Recognized in association with the related misuse doctrine in the patent law, the

[1] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001).

copyright misuse doctrine is now firmly established as a limitation on licensing restrictions that are either anticompetitive or otherwise violate the public policy underlying the federal copyright laws. The Eighth Circuit is among those courts that recognize the copyright misuse defense: "judicial authority teaches that the patent misuse doctrine may be applied or asserted as a defense to copyright infringement."[2]

Like the patent misuse defense, copyright misuse has not been limited to circumstances in which a plaintiff has violated the antitrust laws. Although a number of cases have found copyright misuse based on antitrust principles, most have relied upon the public policies reflected in the copyright laws themselves.[3] The rationale for copyright misuse in these cases has been that courts should not facilitate the expansion of a copyright beyond the boundaries set forth in the Copyright Act, which is exactly what would happen if they were to enforce certain terms in contracts licensing those copyrights. The boundaries set by the Copyright Act must be respected because they reflect Congress' recognition that intellectual property rights serve the public interest by "increasing the store of human knowledge and arts," and do not serve only the private interest of "rewarding inventors."[4]

Three cases from different federal appellate courts all illustrate that the copyright misuse defense applies any time a copyright owner attempts to circumvent the boundaries surrounding his copyrights under the Copyright Act. Defendants addressed the first case,

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[2] *United Tel. Co. of Mo. v. Johnson Pub. Co.*, 855 F.2d 604, 612 (8th Cir. 1988).

[3] *See, e.g.*, *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 792-95 (5th Cir. 1999); *Practice Mgmt. Information Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 520-21 (1997), *amended* 133 F.3d 1140 (9th Cir. 1998); *DSC Communications Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 601-02 (5th Cir. 1996); *Lasercomb Am. Inc. v. Reynolds*, 911 F.2d 970, 976-79 (4th Cir. 1990).

[4] *Lasercomb*, 911 F.2d at 976.

Lasercomb v. Reynolds, in their earlier opposition brief,[5] and will not further address that opinion here other than to note that, in the opinion, the Fourth Circuit specifically tied the copyright misuse doctrine to any "use of the [copyright] to secure an exclusive right or limited monopoly not granted by the [Copyright] Office and which it is contrary to public policy to grant."[6]

In the second case, *DSC Communications v. DGI Technologies*, the Fifth Circuit observed that "while copyright law [seeks] to increase the store of human knowledge and arts by awarding ... authors with the exclusive rights to their works for a limited time ... the granted monopoly power does not extend to property not covered by the ... copyright."[7] The Court then declared that it "concur[red] with the Fourth Circuit's characterization of the copyright misuse defense."[8]

In the third case, *Practice Management v. American Medical Association*,[9] the Ninth Circuit did exactly the same thing. It quoted the above language from *Lasercomb*, cited to *DSC Communications* and its concurrence with the Fourth Circuit's holding linking the copyright misuse doctrine to any effort to extend a copyright beyond its lawful boundaries, and declared unequivocally that "[w]e now adopt that rule."[10]

Together, these three cases establish a core principle of the doctrine of copyright misuse: no copyright owner may use its copyright to secure additional rights not granted under the Act that would run counter to public policy.

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[5] Defendants' Opp., at 8.
[6] *Lasercomb*, 911 F.2d at 977.
[7] 81 F.3d 597, 601 (5th Cir. 1996).
[8] *Id.*
[9] 121 F.3d 516 (9th Cir. 1997).
[10] *Id.* at 520.

III. BLIZZARD'S END USER LICENSE AGREEMENTS AND TERMS OF USE ARE AN ATTEMPT TO USE ITS COPYRIGHTS TO SECURE FAIR USE RIGHTS THAT CONGRESS HAS EXPLICITLY RESERVED FOR THE PUBLIC

Blizzard's End User License Agreements and Terms of Use not only violate this principle, they make a mockery of it. In each of its agreements, Blizzard strips its customers of all rights to reverse engineer, whether fair use or not. For example, in its End User License Agreement for its StarCraft game, Blizzard states that a customer "may not, in whole or in part, . . . reverse engineer . . . the Program."[11] Similarly, in its Terms of Use, Blizzard insists that a customer "shall not be entitled to . . . reverse engineer . . . in whole or in part any Battle.net software."[12] Blizzard makes no accommodation for even reverse engineering that unequivocally qualifies as fair use.[13] Nor does Blizzard make any attempt to prohibit specifically that reverse engineering which may fall outside of the fair use doctrine. Instead, it simply bans ***all*** reverse engineering. Period.[14]

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[11] 12/22/03 Carter Decl. in Support of Plaintiffs' Motion for Partial Summary Judgment, Ex. 7 at 2.

[12] *Id.*, Ex. 8 at 2.

[13] Even if relevant, Blizzard's "everybody else is doing it" defense of its blanket ban on reverse engineering is demonstrably false. In contrast to Blizzard, many other software firms, including those in the videogame industry, specifically carve out fair use by reverse engineering from the prohibitions on reverse engineering included in their End User License Agreements. *See, e,g.*, 2/9/04 Grewal Decl. Ex. A (Microsoft Corporation End User License Agreement for Microsoft SideWinder Game Controller Software 3.02, at § 2) ("You may not reverse engineer, decompile, or disassemble the SOFTWARE, except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation."); *see also* 2/9/04 Grewal Decl. Ex. B (Apple Computer, Inc. Software License Agreement for QuickTime, at § 2) ("Except as and only to the extent expressly permitted in this License or by applicable law, you may not copy, decompile, reverse engineer, disassemble, modify, or create derivative works of the Apple Software or any part thereof.").

[14] Although the parties disagree about whether Defendants' reverse engineering activities qualify as "fair use" under the holding in *Sega v. Accolade*, this dispute is irrelevant for the purposes of establishing copyright misuse. There is no dispute that Blizzard's End User License Agreements and Terms of Use prohibit ***all*** reverse engineering, whether fair

Furthermore, Blizzard's demand that customers abandon their fair use rights is non-negotiable. It presents its licensing terms to its customers in the form of a "clickwrap" license first disclosed during the customer's installation of a Blizzard game or initial log-on to the BATTLE.NET service. If a customer does not wish to agree to Blizzard's demand, his only option is to attempt to reject the game entirely, even though he has already paid Blizzard his $49.99 for the game. Blizzard's demand thus goes beyond even the paradigm of a "take it or leave it" "offer."[15]

Because reverse engineering is a recognized form of fair use,[16] and fair use is explicitly protected under Section 107 of the Copyright Act,[17] Blizzard's unconditional ban on all reverse engineering undeniably secures to Blizzard an "exclusive right" that was "not granted"[18] by the Copyright Office and explicitly reserved for the public by Congress.[19] To appreciate this, the Court need only note that in Section 106 of the Copyright Act, Congress set forth the six exclusive rights that a copyright owner enjoys: (1) reproduction; (2) creation of derivative works; (3) distribution; (4) public

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use or not. Every court to consider the issue of copyright misuse has held that a defendant alleging misuse need not show that he was personally harmed by the abusive practice. *See, e.g. Lasercomb*, 911 F.2d at 979 ("[T]he defense of copyright misuse is available even if the defendants themselves have not injured by the misuse."); *cf. Morton Salt Co. v. G.S. Suppieger Co.*, 314 U.S. 488 (1942) ("It is the adverse effect upon the public interest of a successful infringement suit in conjunction with the patentee's course of conduct which disqualifies him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent.").

[15] As Defendants noted in their earlier opposition brief, the circumstances surrounding Plaintiffs' End User License Agreements and Terms of Use are unconscionable under Missouri law, and thus render the agreements unenforceable. *See* Defendants' Opp., at 5-6.

[16] *See Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

[17] 17 U.S.C. § 107.

[18] *Lasercomb*, 911 F.2d at 977.

[19] *See* 17 U.S.C. § 107; *see also* 17 U.S.C. § 1201(f) (explicitly preserving the fair use

performance; (5) public display; and (6) digital public performance.[20] Immediately thereafter, in Section 107 under the title "***Limitations on exclusive rights: Fair use***," Congress explicitly reserved fair uses of copyrighted material not to the copyright owner, but to the public. As a result, by taking back the fair use rights explicitly reserved to the public under Section 107, Blizzard's agreements unquestionably "seek to control areas outside of their grant of monopoly" under the Copyright Act.[21] And there is no dispute that the right to fair use promotes a public policy that dates back to the drafting of our national Constitution: the Progress of Science and useful Arts.[22]

The impact of Blizzard's misuse of its copyrights cannot be understated. By misusing its copyrights to extend its "exclusive rights" under Section 106 of the Copyright Act to include the fair use rights reserved to the public under Section 107, Blizzard may not enforce its rights under its End User License Agreements and Terms of Use pursuant to state contract law (Count VII).[23] Although not at issue in this motion, Blizzard is also barred by its misuse from enforcing any of its copyrights by means of any

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reverse engineering defense against claims for circumvention).

[20] 17 U.S.C. § 106.

[21] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001). *Cf. qad, inc. v. ALN Assocs., Inc.*, 770 F. Supp. 1261 (N.D. Ill. 1991) ("Here qad's misuse was even more egregious: ***It used its copyright to sue ALN and to restrain it from the use of material over which qad itself had no rights.*** That is a misuse of both the judicial process and the copyright laws.") (emphasis added).

[22] *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose: '[t]o promote the Progress of Science and useful Arts.") (citing U.S. Const. art. I., §8, cl. 8).

[23] *See Goldstein v. California*, 412 U.S. 546, 559 (1973) (holding that state law may not "protect that which Congress intended to be free from restraint" under the federal copyright law).

claim for infringement (Count I).[24] Finally, because Blizzard relies extensively on the enforceability of its End User License Agreements and Terms of Use to maintain its claims for circumvention,[25] Blizzard's copyright misuse bars that claim as well.

IV. CONCLUSION

"[F]or a copyright owner to use an infringement suit to obtain property protection, here in data, that copyright law clearly does not confer, hoping to force a settlement or even achieve an outright victory over an opponent that may lack the resources or the legal sophistication to resist effectively, is an abuse of process." [26]

Judge Posner's observations could not ring truer than in this case. By its licensing scheme that bars ***all*** reverse engineering, whether fair use or not, and its infringement claims that Defendants' fair use activities violate its copyrights, all against individuals who but for the volunteer services of counsel would have no resources or legal sophistication to resist effectively, Blizzard has undeniably committed an "abuse of process." For this reason alone, as well as those set forth in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, Defendants' Memorandum in Support of their Motion for Summary Judgment, and the Law Professors' Brief *Amici Curiae,* Plaintiffs' motion for partial summary judgment should be denied.

Dated: February 9, 2004

Respectfully submitted,

By: /s/Paul S. Grewal
Paul S. Grewal

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[24] *See Lasercomb*, 911 F.2d at 972 ("A successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright.").

[25] *See, e.g.,* Plaintiffs' Mem. at 18; *see also* Dan Burk, *Anticircumvention Misuse*, 50 U.C.L.A. L. Rev. 1095, 1132-40 (2003).

[26] *Assessment Techs., Inc. v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003).

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