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

DAVIDSON & ASSOCIATES, INC., D.B.A. BLIZZARD ENTERTAINMENT, and VIVENDI UNIVERSAL GAMES, INC.,	)	
Plaintiffs,	)	
v.	)	Case No. 4:02CV498 CAS
INTERNET GATEWAY, INC., TIM JUNG, an individual, ROSS COMBS, an individual, and ROB CRITTENDEN, an individual,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The undisputed facts in this case demonstrate that Defendants have violated the Digital Millennium Copyright Act ("DMCA"). The determination of that issue now will substantially reduce the burden of the trial in this matter for the Court and the parties, and will permit the jurors to focus on the remaining claims.

Summary

The owner of a copyright has the exclusive right to make copies of a protected work. For centuries, the technology for making large numbers of illicit copies could only produce copies that were inherently inferior and easily spotted, so widespread copying was rarely of economic concern. All of this changed in the computer age when the availability of digital technology made it possible to make copies with 100% accuracy at virtually no cost.[1] Illicit copying moved from the realm of a few painstaking counterfeiters to anyone owning a desktop computer.

Creators of works sold in digitized form -- including products such as computer software, music, movies, and games -- responded by building in technological measures that either prevent copying or prevent full use of a copied version of the work. But given sufficient time and energy, *all such technological measures are subject to circumvention*. Indeed, there are many who work to defeat these measures as a sport, a challenge, or a claimed right.[2] This ability to circumvent protective measures creates staggering harm to copyright owners.

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[1] Before data was recorded in digital form, all copying processes produced "analogs" of the original and involved a loss of accuracy and precision. Copies of copies compounded the errors (which is why photocopies of photocopies are often unclear or illegible). But so long as the digits in a copied string of digitized data are the same as in the original, the images or sounds they represent will be indistinguishable from the original source.

[2] Defendants are represented by counsel for the "Electronic Freedom Foundation," which espouses a very similar philosophy. See http://www.eff.org.

Congress reacted by passing the DMCA. This statute met the challenge head on: it prohibited the manufacture or distribution of products or devices that circumvent technological measures used by copyright owners to restrict access to their work. Put bluntly, the DMCA is the 21st century version of laws barring the sale or manufacture of burglary tools.

In this case, the undisputed facts show that Plaintiffs' product has just such an electronic protective measure, or "lock." The DMCA says it is unlawful to pick that lock. Defendants not only picked the lock, but developed a pass key and made that pass key available to anyone who wanted free access to Plaintiffs' computer games. The DMCA was enacted to stop exactly what the undisputed facts show that Defendants did.

Defendants do not contest any of this. Instead, they rely upon alleged "exemptions" in the DCMA, none of which apply. These will be discussed in detail below.

STATEMENT OF FACTS

I. Blizzard Entertainment.

Davidson & Associates, Inc., d.b.a. Blizzard Entertainment, and Vivendi Universal Games, Inc. (collectively "Blizzard") create and sell computer games that are played on personal computers. (Fcts. ¶ 3.)[3] Blizzard's games have become extremely popular since its first game was released in 1994, having sold millions of copies and generated revenue in excess of $480 million since 1998. (Fcts. ¶ 4.) Blizzard's games have also received numerous accolades, including several "Game of the Year" awards. (Id.) Blizzard has valid copyright registrations covering each of its computer games and its online gaming service at issue in this litigation. (Fcts. ¶ 12.)

[3] "(Fcts. ¶ __.)" refers to Plaintiffs' Statement Of Uncontroverted Facts accompanying this memorandum.

A. The Battle.net® Online Gaming Service.

In January 1997, Blizzard launched Battle.net®, a 24-hour on-line gaming service available only to purchasers of its computer games. (Fcts. ¶ 11.) The Battle.net service allows owners of certain Blizzard games to play those games, through their personal computers, against each other by linking together over the Internet ("Battle.net Mode"). (Fcts. ¶ 13.) Battle.net Mode allows users to create and join Internet multiplayer games, to "chat" with other potential players, to record wins and losses and save advancements in a password protected individual game account, and to participate with others in tournament play. (Fcts. ¶ 17.) These unique features are accessed from within the games themselves, but only when the games are in Battle.net Mode. (Fcts. ¶ 17, 18.) As one game reviewer put it, using Battle.net is "the easiest way to use an online game I've ever seen. Even somebody who thinks their CD drive is a cup holder could use battle.net." (Fcts. ¶ 16.)

The Battle.net service is currently the largest online gaming network in the world, with nearly 12 million active users who spend more than 2.1 million hours online per day. (Fcts. ¶ 14.) Blizzard maintains this extensive on-line gaming service at no cost to its game customers because the service creates value for Blizzard in several ways. Most significantly, the Battle.net service provides an inducement to purchase genuine copies of Blizzard games, since Battle.net® is programmed to deny access to copies of Blizzard games that have been illegally copied and distributed ("pirated" copies). (Fcts. ¶ 20.)

Second, Battle.net® displays "ad banners" on the screens of Blizzard game users. (Fcts. ¶ 21.) An ad banner is an electronic advertising space found on many commercial websites. (Fcts. ¶ 22.) In addition to generating revenue by selling the advertising space to other companies, Blizzard also uses ad banners to "cross sell" its own games and related products, such as books and t-shirts. (Fcts. ¶ 24.)

Finally, the Battle.net service offers a means for Blizzard to provide quality control for its games. Each time a customer logs on to the Battle.net service, a Battle.net server checks whether the game is using the latest version of the game software. (Fcts. ¶ 25.) If not, the Battle.net service updates the customer's game with the latest version of the software at no cost to the customer. (Fcts. ¶ 26.)

B. The Battle.net® Service "Secret Handshake."

Every authorized Blizzard game comes with a unique alphanumeric string of characters called a "CD Key" that is printed on a sticker affixed to the CD case of the game. (Fcts. ¶ 28.) The user of the game must input the CD Key into his or her computer when installing the game; it is then permanently stored on the computer for use in logging on to the Battle.net service. (Fcts. ¶ 29.) Typically, unauthorized copies of Blizzard games available over the Internet and elsewhere lack the unique CD Key critical to the authentication of these games.

To log on to the Battle.net service and access Battle.net Mode, the game initiates an authentication sequence or "secret handshake" between the game and a Battle.net server. (Fcts. ¶ 30.) First, the game and the Battle.net server exchange random numbers (one provided by the game and one provided by the server). (Fcts. ¶ 31.) The game then takes the random numbers, as well as information from the CD Key, and calculates an encrypted alphanumeric sequence which is sent to the Battle.net server. (Fcts. ¶ 32.) The game performs this encryption to prevent unscrupulous individuals from stealing the game's CD Key when it is transmitted over the Internet to a Battle.net server. (Fcts. ¶ 33.)

The Battle.net server receives the alphanumeric sequence and other information sent by the game and uses this data to determine whether the CD Key is valid. (Fcts. ¶ 34.) If the CD Key is valid, the Battle.net server will determine whether the same CD Key is already being used by another game that is currently logged on to the Battle.net server. (Fcts. ¶ 35.) If the CD Key

is both valid and not currently being used by other players, the Battle.net server sends a signal allowing the game to enter Battle.net Mode and use the Battle.net gaming service. (Fcts. ¶ 36.)

C. Blizzard's End User License Agreements and the Battle.net® Terms of Use.

Each Blizzard game at issue contains an End User License Agreement ("EULA"), which is displayed to the user during the initial installation of the Blizzard game. (Fcts. ¶ 37.) The user must agree to the EULA by clicking on an "Agree" button, or the game will not install. (Fcts. ¶ 38.) In addition, before a user is allowed to access Battle.net Mode, the user must agree to the Battle.net Terms of Use by clicking on another "Agree" button. (Fcts. ¶ 39.) Among other things, the EULAs and Terms of Use prohibit (1) disassembling, decompiling or otherwise reverse engineering the game software or the Battle.net service; (2) hosting or providing matchmaking services for the game (i.e., creating environments to allow users to play against each other); (3) using "utility programs" to enable network play of the games over the Internet; and (4) emulating (mimicking) or redirecting the communication protocols used by Blizzard for the Battle.net service. (Fcts. ¶¶ 40-49.)

II. The Defendants' Bnetd Project.

The "Bnetd Project" is a confederation of computer programmers and other individuals whose goal was to develop a computer program that emulates, or mimics, the Battle.net service by providing matchmaking services and enabling internet play of Blizzard games. (Fcts. ¶ 50.) The resulting program, Bnetd, is an emulator that provides an unauthorized means by which game players can play Blizzard games via Battle.net Mode over the Internet without using the actual Battle.net gaming service. (Fcts. ¶¶ 52-53.) Defendants Ross Combs, Rob Crittenden, and Tim Jung were lead developers for the project. (Fcts. ¶ 50.) All three individual defendants have, at some point, installed Blizzard games, thus agreeing to the Blizzard's EULAs. (Fcts. ¶¶

55-56, 58.) In addition, defendants Crittenden and Jung have used Blizzard games to log on to the Battle.net service, manifesting assent to the Battle.net Terms of Use. (Fcts. ¶¶ 57, 59.)

Defendants claim that the Bnetd emulator was created for "hack value"[4] and to address perceived deficiencies in the Battle.net service. (Fcts. ¶ 60.) Defendant Combs has offered the additional justifications that users should not be "forced" to view advertisements displayed via the Battle.net service, and that it is "wrong in a moral sense" for Blizzard to require users to agree to the Battle.net Terms of Use or other restrictions imposed by Blizzard. (Fcts. ¶ 61.)

A. Development of the Bnetd Emulator.

The Bnetd Project was organized and managed over the Internet through a website, available at www.bnetd.org, which provided online discussion forums, information about the emulator, and free access to the emulator's computer code for others to copy and modify. (Fcts. ¶¶ 63-64.) This website was made available to the public through defendant Internet Gateway, Inc., an Internet service provider co-owned and operated by defendant Jung. (Fcts. ¶ 6, 63.) The goal of the Bnetd Project is to implement all of the "user-visible" features of the Battle.net service. (Fcts. ¶ 54.)

Development of the Bnetd emulator originated in 1998, when a computer programmer named Mark Baysinger (not a party to this litigation) created a website called "StarHack" that featured technical information about Blizzard's StarCraft game. (Fcts. ¶ 65.) Baysinger created a prototype of a game server program intended to mimic Blizzard's Battle.net service, although the prototype lacked important features and stability. (Fcts. ¶¶ 66, 67.) As Baysinger noted at

[4] "Hack value" is generally defined as the "reason or motivation for expending effort toward a seemingly useless goal …." Free Online Dictionary of Computing, at http://wombat.doc.ic.ac.uk/foldoc/foldoc.cgi?query=hack+value.

the time, "[i]f you actually want to USE this server (and not just test it) be prepared to make lots of changes to the source code."[5] (Fcts. ¶ 67.) (emphasis in original).

Baysinger abandoned his work on StarHack in December, 1998 (Fcts. ¶ 68.), but defendants took his advice and made significant changes to the source code. In fact, defendant Combs testified that, in the time since he started work on Bnetd, the program grew to be ***ten times*** the size of the original program. (Fcts. ¶ 69.) Defendants Combs and Crittenden were able to make many of these improvements to Bnetd based, in part, on admitted "reverse engineering"[6] of Blizzard games. (Fcts. ¶¶ 70-74.) For example, these defendants used sophisticated programming tools to capture and analyze information sent over the Internet between Blizzard games and the Battle.net service. (Fcts. ¶¶ 70-71.) Additionally, Crittenden used a program called "ripper" to disassemble "Blizzard client files which were compiled together into one file and break them into their component pieces." (Fcts. ¶ 72.) Crittenden used the ripper program to figure out how Blizzard games displayed ad banners so the Bnetd emulator could display its own advertisements to users. (Fcts. ¶ 73.) Similarly, Combs tried to disassemble a Blizzard game to figure out how to implement a feature that allowed Bnetd to protect the password that the user enters when creating an account in Battle.net Mode. (Fcts. ¶ 74.) As a result of this reverse engineering, Defendants were able to incorporate many of the graphical images displayed when the user of the game enters Battle.net Mode. (Fcts. ¶ 75.)

B. Technology of the Bnetd Emulator.

Blizzard games are programmed to connect only to Battle.net servers. (Fcts ¶ 80.) To trick a Blizzard game into connecting to a Bnetd emulator instead, the computer file that contains

[5] "Source code" refers to the human readable computer code used to create software programs.

[6] Reverse engineering is the process of "starting with [a] known product and working backwards to divine the process which aided in its development or manufacture." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

the Internet addresses for Battle.net servers must be modified. (Fcts. ¶ 81.) Although some Blizzard game users may have the skills to locate and alter the standard list of Battle.net server addresses, this process is "somewhat involved" and "difficult to do." (Fcts. ¶ 83.) Accordingly, without Blizzard's authorization, defendant Combs helped write a utility program called "BNS" to allow Blizzard games to also connect to Bnetd servers. (Fcts. ¶ 82.) As the bnetd.org website states, this BNS utility "should also be considered part of the bnetd project." (Id.)

Once a Blizzard game has been altered so it will connect to a Bnetd emulator, the game sends information about its CD Key to the Bnetd emulator, just as it would if it were communicating with a real Battle.net server. (Fcts. ¶ 84.) However, unlike Battle.net®, when the Bnetd emulator receives the CD Key information it does not determine whether the CD Key is valid or currently in use by another player. (Fcts. ¶ 85.) Instead, upon receipt of the CD Key information, the Bnetd emulator always sends the Blizzard game an "okay reply" to allow the game to continue interacting with the server. (Fcts. ¶ 86.) Thus, the emulator allows users without valid CD Keys to access Battle.net Mode features. (Fcts. ¶ 87, 89.) In the absence of the "okay" reply, the game would not allow users to access Battle.net Mode on the Bnetd server. (Fcts. ¶ 86.) As defendant Combs explained, the Battle.net service is like a "police officer" who checks identification before allowing access to Battle.net Mode, while "bnetd is a fake officer" that only pretends to check identification, but always allows access. (Fcts. ¶ 88.)

C. Distribution of the Bnetd Emulator.

Defendants were aware that the Bnetd emulator server enabled pirated versions of Blizzard games to access Battle.net Mode. (Fcts. ¶¶ 89-91.) In fact, defendant Crittenden played a pirated version of a Blizzard game on a Bnetd emulator. (Fcts. ¶ 89.) Nevertheless, Defendants made copies of the Bnetd emulator available over the Internet. As defendant Jung explained, Combs or Crittenden would send the Bnetd emulator software they developed to Jung

to post on the www.bnetd.org website for download, or they would put the software on the website themselves. (Fcts. ¶ 93.) In addition, Combs made the Bnetd emulator software available on his website located at www.cs.nmsu.edu/~rocombs/sc/. (Fcts. ¶ 94.) Defendants also posted the BNS utility and the source code for the Bnetd emulator, as well as versions of the emulator that could be hosted by others with minimal computer skills, "[t]o make it more convenient for users" to set up and access the emulator. (Fcts. ¶¶ 95-96, 99.) Finally, defendant Internet Gateway operated a Bnetd emulator server that anyone on the Internet could access and use to play Blizzard games in Battle.net Mode. (Fcts. ¶ 100.)

ARGUMENT

I. Summary Judgment Standard.

Courts must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On summary judgment, the court does not weigh evidence, but rather determines "whether a proper jury question was presented." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). To avoid a grant of summary judgment, defendants are required to "go beyond the pleadings and by [their] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Defendants cannot dispute the material facts here, which are established by their own testimony and documents. Accordingly, the Court may resolve these issues as a matter of law.

II. Defendants Combs, Crittenden, and Jung Violated the Express Terms of the End User License Agreements and/or Battle.net® Terms of Use (Count VII).

The admitted conduct of defendants Combs, Crittenden and Jung violated the End User License Agreements and/or the Battle.net® Terms of Use to which they agreed. First, Combs' and Crittenden's reverse engineering violated the express provisions of the EULAs. Specifically, paragraph 3A of each Blizzard game EULA provides that the user "may not, in whole or in part, … reverse engineer, derive source code, modify, disassemble [or] decompile…" the Blizzard game. (Fcts. ¶ 40.) These prohibitions are valid and enforceable. See, e.g., Bowers v. Baystate Technologies, Inc., 320 F.3d 1317 (Fed. Cir. 2003) (upholding shrink-wrap license agreement shipped with software containing prohibitions on reverse engineering). There is no question that Blizzard's licenses prohibit reverse engineering, that Combs and Crittenden agreed to these licenses, and that these Defendants then disassembled and otherwise reverse engineered Blizzard software. (Fcts. ¶¶ 40, 55-56, 70-74.) Moreover, because defendant Crittenden agreed to the Battle.net Terms of Use (Fcts. ¶ 57.), he also violated paragraph 4(A)(ii) of that agreement, which similarly provides that the user may not "reproduce … reverse engineer, modify, disassemble, or de-compile … any Battle.net software." (Fcts. ¶ 45.) Finally, the Bnetd emulator admittedly "provides matchmaking services for users of Blizzard games who want to play those games in a multiplayer environment … without using Battle.net." (Fcts. ¶ 53.) The distribution and hosting of the emulator by all Defendants thus violated Paragraph 3(C)(iv) Blizzard's EULAs and/or Paragraph 4(A)(iv) of the Battle.net® Terms of Use, which prohibits "host[ing] or provid[ing] matchmaking services for any Blizzard software programs …for any purpose, including, but not limited to, network play over the Internet." (Fcts. ¶¶ 42, 47.) Accordingly, summary judgment should be entered against these defendants on Count VII.

III. Defendants Violated The Anti-Trafficking and Anti-Circumvention Provisions of the DMCA (Count II).

Defendants' conduct violated the anti-trafficking provisions of Section 1201(a)(2) of the DMCA as well as the anti-circumvention provisions of Section 1201(a)(1) of the Act.

A. Defendants Trafficked in Circumvention Devices (Section 1201(a)(2)).

Section 1201(a)(2) of the DMCA prohibits the manufacturing and distribution of technology that circumvents the technological measures that are used by copyright owners to restrict access to their copyrighted works.[7] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440-441 (2d Cir. 2001). The Bnetd emulator is "technology" contemplated by the DMCA. See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 317 (S.D.N.Y. 2000) (aff'd Corley, 273 F.3d 429) (a computer program "unquestionably is 'technology' within the meaning of the statute").

Section 1201(a)(2) contains three independent bases for liability. RealNetworks, Inc. v. Streambox, Inc., No. 2:99CV02070, 2000 WL 127311 at *7 (W.D. Wash. Jan. 18, 2000). The development and distribution of the Bnetd emulator satisfies at least one, if not all three, of the tests for liability under section 1201(a)(2). All three tests have common elements that are present in this case.

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[7] Specifically, 17 U.S.C. § 1201(a)(2) provides that:

> No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -
>
> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
>
> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
>
> (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

First, the "secret handshake" that takes place between the Battle.net server and the Blizzard game is a "technological measure" that "effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a)(2). A technological measure "effectively controls access to a work" as long as that measure, "in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C. § 1201(a)(3)(B). In this case, the secret handshake requires the application of information ***and*** the application of a process to gain access to the copyrighted portions of the games used in Battle.net Mode.

Specifically, Blizzard's secret handshake is an authentication sequence that requires the application of information that is exchanged between the Battle.net server and the Blizzard game, as well as calculations (i.e. processes) by both systems. Because the game client and the Battle.net server must perform the secret handshake for the game to access Blizzard's copyrighted works in Battle.net Mode and interact with the Battle.net service, Blizzard's authentication sequence constitutes a technological measure that effectively controls access to a work. See, e.g., Lexmark Intern., Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943, 968 (E.D. Ky. 2003) (holding that Plaintiff's "authentication sequence effectively 'controls access' … because it controls the consumer's ability to make use of [the copyrighted] programs"); Sony Comp. Ent. Inc. v. Gamemasters, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999) (computer game console designed to allow play of computer games only with certain "data codes" effectively controls access); RealNetworks, 2000 WL 127311 at *7 (a "secret handshake" that must take place prior to granting access to copyrighted material effectively controls access).

The Bnetd emulator circumvents Blizzard's technological measures by bypassing this secret handshake that controls access to the copyrighted portions of the games used in Battle.net Mode. In particular, the Bnetd emulator circumvents Blizzard's technological measure by

imitating the Battle.net service and always sending the game a signal indicating that its CD Key is "okay," resulting in the game proceeding to enter Battle.net Mode.

1. The Only Purpose of the Bnetd Emulator is to Allow Access to Battle.net Mode.

The Bnetd emulator was "primarily designed" for the purpose of circumventing Blizzard's technological measures that control access to the Battle.net Mode of its games. 17 U.S.C. 1201(a)(2)(A). By Defendants' own admission, this is the ***sole*** function of the Bnetd emulator. As defendant Crittenden explained, the emulator, which only works with Blizzard games, was designed to allow access to "Blizzard games in a multi-player environment without using Battle.net." (Fcts. ¶ 52.) Accordingly, the development and distribution of the emulator violates both section 1201(a)(2)(A) of the DMCA, which prohibits programs that were "primarily designed or produced" to circumvent technological measures that effectively control access to a work, and section 1201(a)(2)(B), which prohibits programs with "limited commercially significant purpose or use other than to circumvent a technological measure" that controls access to a work.

Universal City Studios, Inc. v. Reimerdes confirms this analysis. See, generally, 111 F. Supp. 2d at 319. In Reimerdes, the defendants hosted a website that discussed and offered for download a program called "DeCSS," which circumvented an encryption system known as "CSS" that allows DVD movies to be played only on properly licensed DVD players and computers. Id. Thus, DeCSS could be used to copy and play DVDs on devices that were not licensed to display such content. Id.

After determining that CSS was a technological measure that effectively controlled access to copyrighted DVDs, the court in Reimerdes found that distribution of DeCSS violated Section 1201(a)(2) of the DMCA. Id. at 318-19. The defendants argued that the primary purpose of DeCSS was not to allow piracy of DVDs, but rather to develop a DVD player that

would run under a computer operating system called Linux. Id. at 319. Yet the court held that whether DeCSS was developed "in order to infringe, or permit or encourage others to infringe, copyrighted works … simply does not matter for purposes of Section 1201(a)(2)." Id. Because DeCSS was designed to circumvent a technological measure that controls access to copyrighted DVD movies, the court found that distribution of the program violated Section 1201(a)(2)(A) of the DMCA. Id. at 318-19. In addition, because the only purpose of DeCSS was to circumvent CSS, the court found a "prima facie violation of Section 1201(a)(2)(B) as well." Id. at 319.

As was the case in Reimerdes, putative justifications for developing the Bnetd emulator are irrelevant to the question of liability under Section 1201(a)(2). Just as the sole purpose of the DeCSS program was to allow copying and playing of DVDs on unauthorized systems, the sole purpose of the Bnetd emulator is to allow access to Battle.net Mode via unauthorized servers. The inescapable fact is that the Bnetd emulator enables widespread circumvention of technology that permits users to access Battle.net Mode only through Battle.net servers.

2. Defendants Distributed the Bnetd Emulator Knowing It Could be Used to Circumvent Blizzard's Technological Controls.

Defendants also marketed the Bnetd emulator's capability to bypass real Battle.net servers knowing that the emulator would allow users of unauthorized, pirated versions of Blizzard games to access Battle.net Mode on those games. 17 U.S.C. 1201(a)(2)(C). For example, at his deposition, defendant Crittenden testified as follows:

> Q. Were you aware that people were playing those types of unauthorized versions of Blizzard games on bnetd servers?
> A. Yes.
> Q. How did you become aware of that?
> A. Because I did it.

(Fcts. ¶ 89.) Likewise, defendant Jung knew at least as early as July 14, 2001 that the Bnetd emulator did not require that Blizzard games to provide valid CD-Keys to enter Battle.net Mode (Fcts. ¶ 90.), and defendant Combs similarly "suspect[ed] that the Bnetd server would not know

the difference between a real game and a pirated game." (Fcts. ¶ 91.) Thus, even if Defendants had developed the Bnetd emulator to provide functions other than bypassing the secret handshake between Battle.net servers and Blizzard games, their conduct would still violate Section 1201(a)(2)(C), prohibiting the marketing of programs by a person with "that person's knowledge for use in circumventing a technological measure that effectively controls access" to a copyrighted work. 17 U.S.C. § 1201(a)(2)(C). See Corley, 273 F.3d at 444 n.15 (defendants offer for download on their website of a computer program that could be used to copy DVDs constituted "marketing" under 1201(a)(2)(C)).

B. Defendants Circumvented to Gain Access (Section 1201(a)(1)).

Defendants' development of the Bnetd emulator also violates Section 1201(a)(1) of the DMCA because Defendants themselves circumvented Bizzard's technological measures to gain access to Battle.net Mode on their unauthorized emulator.[8] As the Remierdes court explained, "Section 1201(a)(1), the so-called basic provision, 'aims against those who engage in unauthorized circumvention of technological measures.... [It] focuses directly on wrongful conduct, rather than on those who facilitate wrongful conduct...." 111 F. Supp. 2d at 319 (quoting 1 Nimmer On Copyright § 12A.03[A], at 12A-15 (1999 Supp.)). Each defendant used the Bnetd emulator in order to gain personal unauthorized access to Battle.net Mode (Fcts. ¶¶ 76-78.), and defendant Crittenden even made unauthorized copies of Blizzard games and used those copies in Battle.net Mode to facilitate further development of the Bnetd emulator. (Fcts ¶ 79.) Because Defendants were at no time authorized to access Battle.net Mode other than by connecting to the Battle.net service, their conduct was directly prohibited by Section 1201(a)(1).

[8] Section 1201(a)(1)(A) provides that "[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. 1201(a)(1)(A).

IV. None of the DMCA Exemptions Excuses Defendants' Prohibited Conduct.

Defendants will contend that their actions are somehow excused by exceptions found under DMCA sections 1201(c) and/or 1201(f). (Defendants' Amended Answer and Counterclaims ¶ 135.) First, section 1201(c)(1) provides in relevant part that "[n]othing in this section shall affect . . . defenses to copyright infringement, including fair use." Additionally, 17 U.S.C. § 1201(c)(3) provides that "[n]othing in this section shall require that the design of … [a] computing product provide for a response to any particular technological measure …", as long as the computing product "does not otherwise fall within the prohibitions [of the DMCA anti-trafficking prohibitions]." This section is commonly referred to as the "no mandate" exemption, because of Congress's intent that Section 1201 not require a "particular design to be used in the manufacture of computers, consumer electronics, and other equipment." 3-12A Nimmer on Copyright § 12A.05 (citing legislative history). Finally, 17 U.S.C. § 1201(f) provides exemptions for certain forms of reverse engineering to achieve interoperability with other computer programs provided that doing so does not infringe another's copyright. 17 U.S.C. 1201(f). None of these sections provides a justification for Defendants' prohibited conduct.

A. The "Fair Use" Defense Does Not Apply to the DMCA Anti-Circumvention Provisions.

Section 1201(c)(1) "simply clarifies that the DMCA targets the circumvention of digital walls guarding copyrighted material (and trafficking in circumvention tools), but does not concern itself with the use of those materials." Corley, 273 F.3d at 443 (emphasis in original). The Corley court squarely rejected the argument that 1201(c)(1) "can be read to allow the circumvention of encryption technology protecting copyrighted material when the material will be put to 'fair uses.'"[9] Id. As Corley held, "[t]he Appellants' much more expansive

[9] Counsel making this argument in Corley was Defendants' counsel, the Electronic Frontier Foundation.

interpretation of Section 1201(c)(1) is not only outside the range of plausible readings of the provision, but is also clearly refuted by the statute's legislative history." Id. at 443-44. Accord United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002) ("Congress' expressed intent to preserve the right of fair use is not inconsistent with a ban on trafficking in circumvention technologies, even those that could be used for fair use purposes rather than infringement."). Simply put, "it is unlawful to traffic in tools that allow fair use circumvention," (Elcom, 203 F. Supp. 2d at 1125) and any fair use arguments raised by Defendants in this case do not excuse their liability under Section 1201(a)(2).

B. The "No Mandate" Exemption is Inapplicable Here.

The Bnetd emulator fails to meet the requirements of the "no mandate" exemption of Section 1201(c)(3) because it does not merely ignore or choose not to respond to the authentication sequence initiated by the Blizzard game. Rather, Bnetd deliberately interacts with Blizzard's technological measure in order to circumvent it by always sending the Blizzard game an affirmative "okay reply" even if the game does not transmit valid CD Key information. To apply the no mandate exemption to the conduct at issue would gut the DMCA. See id. ("If the statute meant what [defendant] suggests, any manufacturer of circumvention tools could avoid DMCA liability simply by claiming it chose not to respond to the particular protection that its tool circumvents.").

Further, the "no mandate" exemption is inapplicable to the Bnetd emulator because the emulator fails to meet the requirement that any exempted conduct must not *"otherwise fall within the prohibitions of subsections [1201] (a)(2) or (b)(1)"* 17 U.S.C. § 1201(c)(3) (emphasis added). Thus, "[a]s the remainder of the statute and the leading copyright commentator make clear, Section 1201(c)(3) does not provide immunity for products that circumvent technological measures in violation of Section[] 1201(a)(2) …" RealNetworks, 2000 WL 127311 at *10

(citing 1 Nimmer on Copyright (1999 Supp.), § 12A.05[C]). As noted above, Defendants meet all three of the disjunctive tests for liability under Section 1201(a)(2), making the Section 1201(c)(3) exemption inapplicable to their conduct.

C. The Reverse Engineering Exemption is Likewise Inapplicable.

Finally, the reverse engineering exemptions of Section 1201(f) of the DMCA do not apply to Defendants for three reasons.[10] First, Defendants did not "lawfully obtain[] the right to use a copy" of any component of the Battle.net service or of the Blizzard games for the purposes of reverse engineering, as required by 1201(f)(1). Indeed, rather than obtaining the rights to take apart Blizzard's software, Defendants ***explicitly agreed not to reverse engineer*** when they accepted the provisions of the EULAs and/or Battle.net Terms of Use prohibiting all reverse engineering. See Bowers, 320 F.3d at 1323 (holding that copyright law in no way preempts or narrows the scope of a shrink-wrap license agreement prohibiting all reverse engineering).

Second, Defendants did not circumvent for "the sole purpose" of identifying and analyzing those elements of the program that are necessary to interoperate with independently created computer programs. Rather, Defendants copied and distributed Blizzard computer files that were completely unnecessary to achieve interoperability with the Blizzard games. Cf. Lexmark, 253 F. Supp. 2d at 970-71 (wholesale copying not permitted under Section 1201(f) even if done for the purposes of interoperability). In short, Defendants did not just identify and analyze – they copied. Defendants did not limit their review to code that would achieve

[10] The reverse engineering exemptions provide that "a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure … for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs …"; "may develop and employ technological means to circumvent a technological measure … for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability…"; or may make the circumvention technology available to others if that person "provides such … means solely for the purpose of enabling interoperability of an independently created computer program," as long doing any of the foregoing "does not constitute infringement under this title." 17 U.S.C. §§ 1201(f)(1)-(3).

interoperability, but also copied elements that would lead to preservation of player account information, display of icons, and presentation of ad banners. All of these features were unnecessary to make the server interoperate with the Blizzard game, but critical to enabling Defendants to create a server program that would directly imitate and substitute for the Battle.net service.

Finally, Defendants did not even produce an "independently created computer program." Rather, they merely replicated Blizzard's Battle.net service. Indeed, Defendants' goal was to create a program that implemented all of the "user visible" features of the Battle.net service. In so doing, they impermissibly copied portions of Blizzard's copyrighted works. See Sega Enters. Ltd v. Accolade, Inc., 977 F.2d 1510, 1522-23 (9th Cir. 1993) (reverse engineering to discover functional elements of computer program can be non-infringing use, while wholesale copying of copyrighted computer program is likely to be an infringing use). Because the creation and distribution of the Bnetd emulator infringes Blizzard's copyrights, the Section 1201(f) exemptions are inapplicable to Defendants. See generally 17 U.S.C. §1201(f)(1)-(3) (reverse engineering exemptions not available when activities "constitute infringement under [copyright law]").

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT to be served by operation of the Court's electronic filing system on December 22, 2003 upon the following:

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