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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MDY INDUSTRIES, LLC,)
)
Plaintiff and Counter-Claim)
Defendant)

Case No.: CV06-02555-PHX-DGC

vs.)

**BLIZZARD ENTERTAINMENT,
INC. AND VIVENDI GAMES,
INC. RESPONSE TO THE BRIEF
OF AMICUS CURIAE PUBLIC
KNOWLEDGE**

BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
Defendants and)
Counter-Claim Plaintiffs.)

The Honorable David G. Campbell

BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)

Third-Party Plaintiffs,)

vs.)

MICHAEL DONNELLY,)
)
Third-Party Defendant.)

Amicus Curiae (“*Amicus*”) intervenes in this commercial dispute and asks this Court to reach a legal conclusion that would, in effect, reject binding Ninth Circuit precedent, create an unalienable right to copy software into RAM, and undermine established licensing practices for most consumer software sold in the United States. Nothing in the record of this case indicates that such a sweeping change in Ninth Circuit law is warranted, nor that the broader issues *Amicus* raises are even in controversy in this case. Tellingly, MDY Industries, LLC (“MDY”) did not make a similar argument in any filing prior to receiving *Amicus*’ brief. The reason is simple: *Amicus* asks this court to

1 amalgamate a number of disparate cases—none supportive of the broad holding it
2 advocates—to alter long-standing precedent.

3 In seeking to validate its request for a sea change in Ninth Circuit law, *Amicus*
4 mischaracterizes Blizzard as attempting to “eviscerate the traditional relationship
5 between copyright and contract” and transform End User License Agreement (“EULA”)
6 violations unrelated to an author’s rights under 17 U.S.C. § 106 into copyright violations.
7 (Am. Br. at 4, 10.) To the contrary, Blizzard’s EULA and Terms of Use (“TOU”) form a
8 valid license, and World of Warcraft® (“WoW”) users are licensees of the WoW Client
9 software who may not copy the software into RAM, except as allowed under those
10 agreements.

11 ARGUMENT

12 **I. The Ninth Circuit Recognizes That a Copyright Owner May Trump** 13 **§ 117(a) by Placing License Restrictions on the Right to Make Copies** 14 **in RAM**

15 Much of *Amicus*’ argument boils down to a fundamental disagreement with
16 binding Ninth Circuit precedent establishing that copying code into RAM is copying
17 under the Copyright Act. As *Amicus* states, “it is clear that a EULA violation unrelated
18 to an author’s rights under Section 106 is not a copyright violation.” (Am. Br. at 10
19 (emphasis added).) In *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir.
20 1993), however, the Ninth Circuit expressly held that Section 106 protects loading
21 software into RAM: “loading of copyrighted software into RAM creates a ‘copy’ of that
22 software in violation of the Copyright Act.” *Id.* at 518.¹ The Copyright Act allows
23 copying into RAM if “the owner of a copy of a computer program” makes a copy in
24 RAM that is “an essential step in the utilization of the computer program in conjunction
25 with a machine and that it is used in no other manner,” *id.* §117(a)(1). Software
26 developers now routinely condition the sale of software under a license included in the

27 ¹ See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 717 (9th Cir. 2007)
28 (citing *MAI* with approval); *Practiceworks, Inc. v. Prof'l Software Solutions of Ill.,*
Inc., Nos. Civ. JFM-02-1205, Civ. JFM-02-1206, 2004 WL 1429955, at * 5-6 (D.
Md. June 23, 2004) (addition of Section 117(c) does not overrule *MAI*).

1 software box or presented to the user upon installation. Courts have routinely enforced
2 these agreements against users.² In *MAI*, the Court interpreted § 117 to mean that if a
3 developer “license[s] its software, the [purchasers] do not qualify as ‘owners’ of the
4 software and are not eligible for protection under § 117.” 991 F.2d at 519 n.5.

5 In direct contradiction to *MAI*, *Amicus* argues that § 117(a) provides an inalienable
6 right. *Amicus* argues that Blizzard “cannot license what it does not own,” and thus “the
7 license agreement cannot govern users’ right to make RAM copies, because that right is
8 already reserved to users under 17 U.S.C. § 117.” (Am. Br. at 4.) The *MAI* court,
9 however, specifically addressed § 117(a) and held that it did not preclude a developer
10 from selling software pursuant to a license that prevents users from copying a program
11 into RAM. *See MAI*, 991 F.2d at 517-20.³ The Ninth Circuit subsequently reaffirmed
12 that copyright owners may trump §117(a) rights by license.⁴ As *MAI* and its progeny
13 make clear, Blizzard owns the right to make RAM copies of its software—and its license
14 restrictions on users’ rights to make such RAM copies are not only allowable, but
15 combined with the other restrictions in the EULA discussed below, are clear evidence of
16 an intent to form a license agreement rather than effect an outright sale of a copy.

17 In seeking to distinguish *MAI*, *Amicus* attempts to cobble together a number of
18 disparate cases into a coherent “test” to substitute for *MAI*, but none of the cases *Amicus*
19 cites suggest that the purchase of consumer software pursuant to a licensing agreement
20 confers “ownership.” In fact, several of the cases *Amicus* cites involve no applicable

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22 ² *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (clickwrap
23 agreement held enforceable); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir.
24 1996) (shrinkwrap license on outside of software box held enforceable); *Davidson &*
25 *Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (court found both the EULA and the
TOU in a clickwrap agreement enforceable and not preempted); *Hill v. Gateway*
2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (license contained inside computer box
was enforceable).

26 ³ In fact, one case *Amicus* cites held that an express restriction of § 117 rights—a
27 right otherwise granted to the owner of a copy—is evidence that the parties intended
to transfer a license rather than effect an outright sale. *DSC Commc’ns Corp. v.*
Pulse Commc’ns, Inc., 170 F.3d 1354 (Fed. Cir. 1999).

28 ⁴ *Wall Data Inc. v. Los Angeles County Sheriff’s Dep’t*, 447 F.3d 769, 785 (9th Cir.
2006); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1333 (9th Cir. 1995).

1 license agreement.⁵ Thus, contrary to *Amicus*' analysis, *MAI* and its progeny accept at
2 face value that where software is subject to a license, the right to copy that software is
3 licensed, not owned, and software developers may restrict the right to copy their software
4 into RAM the same way they may restrict the right to copy in any other manner.

5 Like the copyright owner in *MAI*, Blizzard has restricted a user's right to copy its
6 software into RAM. Blizzard requires that all purchasers of a copy of its WoW client
7 software affirmatively agree to the EULA, and upon joining Blizzard's on-line service,
8 the TOU.⁶ The EULA states that "[a]ll title, ownership rights and intellectual property
9 rights ... are owned or licensed by Blizzard." (Ex. 21 to Blizzard Entertainment, Inc. and
10 Vivendi Games, Inc. Statement of Facts in Support of their Motion for Summary
11 Judgment ("Blizzard SOF") ¶ 3A (emphasis added).) Under the EULA, "[s]ubject to [a
12 user's] agreement to and continuing compliance with this License Agreement," a user
13 may "install the Game Client" and "use the Game Client in conjunction with the [WoW
14 massively multi-player on-line role-playing game] service." (Ex. 21 to Blizzard SOF ¶
15 1.) The EULA, states that "[s]ubject to the license granted hereunder, you may not, in
16 whole or in part, copy, photocopy, reproduce, translate, reverse engineer, derive source
17 code from, modify, disassemble, decompile, or create derivative works based on the

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19 ⁵ *Krause v. Titleserv, Inc.*, 402 F.3d 119, 124 (2d Cir. 2005) (oral representations at
20 issue did not constitute a license because "when read in context" they "relate to the
21 ownership and/or right to use of the *copyright*, and not to ownership of the copies")
(emphasis added); *SoftMan Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d
22 1075, 1087 (C.D. Cal. 2001) (distributor "is not bound by the EULA because there
23 was no assent to its terms"). Other cases cited involve the creation of custom
24 software designed specifically for a particular user *and* without a license agreement
25 stating that the user did not own the software. *Krause*, 402 F. 3d at 124 (employer
26 owned a copy because it "paid . . . substantial consideration to develop the programs
27 for" his employer's sole benefit, and the programs were "customized ... to serve [the
28 employer's] operations"); *Stuart Weitzman, LLC v. MicroComputer Res., Inc.*, 510 F.
Supp. 2d 1098, 1101 (S.D. Fla. 2007) (involved the development of custom-made,
proprietary software for a business where there was *no license agreement* for the first
twelve years of the parties' relationship). A final case addresses only whether the
software is intellectual property or a *good* subject to the Uniform Commercial Code.
Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991).

⁶ Blizzard takes the extraordinary step of requiring its users to scroll through the
entire text of both the EULA and TOU before the Game Client will permit them to
click on the "I ACCEPT" button.

1 Game, or remove any proprietary notices or labels on the Game.” (Ex. 21 to Blizzard’s
2 SOF ¶ 4A.) “Failure to comply with the [terms of the EULA] shall result in the
3 immediate, automatic termination of the license granted hereunder and may subject you
4 to civil and/or criminal liability.” (Ex. 21 to Blizzard SOF ¶ 4A.) Accordingly, the
5 EULA and ToU make clear that Blizzard only intends to transfer a license to use WoW
6 software, and under *MAI*, WoW users may not copy software into RAM except as
7 permitted by the EULA and TOU.

8 **II. The Provisions of the WoW EULA Make Clear, Even Under the**
9 **Test Formulated by *Amicus*, That WoW Purchasers are Licensees, not**
10 **Owners.**

11 Even setting *MAI* and its progeny aside and adopting the “test” advocated by
12 *Amicus*, those cases addressing valid, written license agreements with language similar to
13 that contained in WoW’s EULA and TOU clearly support a finding that WoW Game
14 Client purchasers are licensees, not owners. Indeed, as shown below, each of the key
15 license provisions discussed in the cases upon which *Amicus* relies weighs in favor of a
16 conclusion that WoW purchasers are licensees.

17 **1. WoW users do not obtain rights through a single payment.** *Amicus*
18 relies on *SoftMan Products*, for the proposition that where ““the possessor’s rights were
19 obtained through a single payment, [that fact] is certainly relevant to whether the
20 possessor is an owner,”” (Am. Br. at 15), and argues that WoW users purchase their
21 software with a single payment (*id.* at 14-15, 17-18). *Amicus* ignores the fact that WoW
22 is an on-line game, and purchase of the WoW client alone will not permit the graphical
23 display of WoW’s interactive, immersive multimedia experience—the very expression
24 copyright law protects—without a working connection to one of Blizzard’s game servers.
25 (Blizzard SOF ¶¶ 9, 18.) In order to access Blizzard’s servers, users must pay a monthly
26 fee. The EULA expressly precludes a user from using the client software to “facilitate,
27 create or maintain any unauthorized connection to the Game or the Service, including
28 without any limitation any connection to any unauthorized server that emulates, or
attempts to emulate, the Service,” and requires that “[a]ll connections to the Game and/or

1 the service ... may only be made through methods and means expressly approved by
2 Blizzard.” (Ex. 21 to Blizzard SOF ¶ 4B(iv).) The Game Client’s lack of independent
3 functionality coupled with the restrictions on playing WoW independent of Blizzard’s
4 servers have the effect of requiring a recurring monthly payment to access and use the
5 copyrighted elements of the software. Functionally, then, users do not obtain the rights to
6 use the copyrighted material through a single payment, but instead through a series of
7 ongoing payments. If the payments cease, the Game Client becomes useless. These
8 recurring payments support a finding that Blizzard has licensed, not sold, the WoW
9 Game Client.

10 **2. The EULA places restrictions on transfer.** In another case *Amicus*
11 cites, *Adobe Systems Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000),
12 the court found that restrictive language in a EULA that allowed resale only within the
13 country where the reseller’s principal place of business was located, subject to the EULA,
14 through the reseller’s direct sales force, and “solely in the form obtained from Adobe”
15 were sufficient restrictions to constitute a license, not a sale. *Id.* at 1091; *see also Adobe*
16 *Sys. Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1056 (N.D. Cal. 2002) (holding
17 that the same agreement constituted a license).

18 Like the EULAs in *One Stop* and *Stargate*, the WoW Game Client EULA also
19 contains a number of restrictions inconsistent with a transfer of ownership. For instance,
20 a user may only transfer the program “by physically transferring the original media (e.g.
21 the CD-ROM or DVD you purchased), all original packaging, and all Manuals or other
22 documentation distributed with the Game.” (Ex. 21 to Blizzard SOF ¶ 3B.) As in *One*
23 *Stop*, resale may therefore only be accomplished “solely in the form” the game was
24 “obtained from” Blizzard (or a reseller). 84 F. Supp. 2d at 1093. The EULA also
25 restricts the form of the transfer—requiring transferees to be subject to the EULA and
26 precluding a user from “rent[ing], leas[ing] or licens[ing] the Game to others.” (Ex. 21 to
27 Blizzard SOF ¶ 4B(i).)

28 **3. Contrary to *Amicus*’ statements, users do not have an unlimited**

1 **right to possession, because Blizzard may require users to destroy their copies**
2 **of the Game Client at any time and for any reason.** *Amicus* states that
3 “unlimited, permanent possession is underscored by the fact that Blizzard does not
4 repossess copies of the game after a termination of the license agreement.” (Am. Br. at
5 18.) While Blizzard does not repossess the physical CD-ROM or packaging—material
6 that is so inexpensive it is barely worth the cost of postage to return—the EULA grants
7 Blizzard the right to “repossess” the software upon termination of the license agreement
8 by requiring users to destroy their copies. The EULA states that “Blizzard may terminate
9 this Agreement at any time for any reason or no reason. In such event, you *must*
10 *immediately and permanently destroy all copies of the Game in your possession and*
11 *control and remove the Game Client from your hard drive.* Upon termination of this
12 Agreement for any reason, all licenses granted herein shall immediately terminate.” (Ex.
13 21 to Blizzard SOF ¶ 6 (emphasis added).) Thus, Blizzard *does* repossess the licensed
14 material on termination, and the right to require destruction of the copyrighted material at
15 any time for any reason is clearly contrary to ownership by the end user.⁷

16 **4. The EULA grants Blizzard other rights inconsistent with ownership**
17 **by the end user.** A possessor is not an owner “if the possessor’s right to use the
18 software is heavily encumbered by other restrictions that are inconsistent with the status
19 of owner.” *DSC Commc’ns Corp.*, 170 F.3d at 1362. Generally, “[a]n author has the
20 exclusive right to control *copying*, but once a given copy has been sold its owner may do
21 with it as he pleases (provided that he does not create another copy or a derivative

22 ⁷ *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), which the District Court for
23 the District of Washington relied on in *Vernor v. Autodesk, Inc.*, --- F.Supp.2d ---,
24 No. C07-1189RAJ, 2008 WL 2199682 (W.D. Wash. May 20, 2008) does not alter
25 this analysis. In *Wise*, the court held that requiring the return of film stock at the end
26 of a specified term rendered a transaction a license rather than a sale. *Wise*, 550 F.2d
27 at 1191. *Autodesk’s* statement that “a requirement that the print be salvaged or
28 destroyed, was insufficient” misstates *Wise*. *Autodesk*, 2008 WL 2199682, at *6. In
Wise, the Court analyzed destruction where the copyright owners sold the film to a
salvage company *for destruction*—not an instance where the license allowed the
studio to order a licensee to destroy film at will. 550 F.2d at 1193. Further, to the
extent *Autodesk* seeks to distinguish *MAI* and its progeny, it does so in the altogether
different context of the first-sale doctrine, and not in a case (like *MAI* its progeny,
and the present case) evaluating the right to restrict copying.

1 work).” *Vincent v. City Colleges of Chicago*, 485 F.3d 919, 923 (7th Cir. 2007)
2 (emphasis in original). The EULA provides Blizzard the right to modify the game client
3 “remotely, including without limitation, the Game Client residing on the user’s machine,
4 without the knowledge or consent of the user, and ... grant[s] to Blizzard ... consent to
5 deploy and apply such patches, updates and modifications.” (Ex. 21 to Blizzard SOF ¶
6 8.) Similarly, in the TOU, “Blizzard reserves the right” to alter “the availability of any
7 feature of the Program, hours of availability, content, data, software, or equipment
8 needed to access the Program, effective with or without prior notice Blizzard may
9 change, modify, suspend or discontinue any aspect of the Program at any time. Blizzard
10 may also impose limits on certain features or restrict your access to parts of all of the
11 Program without notice or liability.” (Ex. 18 to Blizzard SOF ¶ 9.) While restrictions in
12 the TOU generally concern the online component of the game, because the Game Client
13 will not function without a connection to Blizzard’s server, terms in the TOU have the
14 effect of restricting a user’s access to copyrighted content available on the CD-ROMs
15 they purchase. The reservation of a right to restrict use and alter the game after the user
16 purchases a license in such a way thus conflicts with the rights of owners to do as they
17 please with their copies, is not consistent with a sale, and demonstrates that users only
18 receive a license to the software.

19 Accordingly, Blizzard’s WoW EULA clearly constitutes a license rather than a
20 sale even under the “test” formulated by *Amicus*. In this way it is also similar to the sort
21 of license agreements that are part of almost every piece of software sold in the United
22 States. *See supra* note 2. *Amicus’* attempt to cobble together dissimilar cases to overturn
23 this long standing and long enforced practice of licensing consumer software should be
24 rejected and should not preclude this Court from entering summary judgment in
25 Blizzard’s favor on its copyright claims.

1 **CONCLUSION**

2 For the reasons stated herein, Blizzard respectfully requests that this Court reject
3 *Amicus*' contention that WoW users are owners, rather than licensees, of the WoW
4 software.

5 Dated: June 20, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 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:

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