

5-1-2012

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Recommended Citation

Brandon T. Crowther, *Keep Your Program Out of My Game: The Ninth Circuit's Convoluted Copyright Analysis in MDY Industries, Inc. v. Blizzard Entertainment, Inc*, 2012 BYU L. Rev. 461 (2012).

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Keep Your Program Out of My Game: The Ninth Circuit's Convolved Copyright Analysis in *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*

I. INTRODUCTION

World of Warcraft (“WoW”), a popular online game, boasts over twelve million users¹ and generates more than \$1.5 billion annually.² Blizzard Entertainment, the company that runs WoW, claims in its end user license agreement (“EULA”) to grant purchasers “a limited, non-exclusive license” to install and use the game subject to numerous restrictions.³ Besides retaining the ability to terminate the license agreement at will, Blizzard also requires users to agree that any violation of the restrictions on the license agreement constitutes “an infringement of Blizzard’s copyrights in and to the Game.”⁴ Under U.S. copyright law, the penalty for copyright infringement can be steep: statutory damages of up to \$150,000 for willful infringements, or actual damages if they can be proved.⁵

With so much risk for so many users, it is critical that courts craft copyright law to account for the realities of the marketplace and the protection of consumers. Additionally, courts should be sensitive to the interests of others trying to lawfully create products that integrate into other digitally based products, such as online games, especially when those integrations do not harm demand for the original product. Unfortunately, the Ninth Circuit has taken a different approach in *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*⁶ In that case, the court provided only

1. Press Release, Blizzard Entm’t, World of Warcraft Subscriber Base Reaches 12 Million Worldwide (Oct. 7, 2010), *available at* <http://us.blizzard.com/en-us/company/press/pressreleases.html?id=2847881>.

2. *MDY Indus., Inc. v. Blizzard Entm’t, Inc.*, 616 F. Supp. 2d 958, 962 (D. Ariz. 2009), *vacated*, 629 F.3d 928 (9th Cir. 2010), *amended by* 2011 U.S. App. LEXIS 3428 (9th Cir. 2011).

3. *World of Warcraft End User License Agreement*, BLIZZARD ENTM’T, http://us.blizzard.com/en-us/company/legal/wow_eula.html (last updated Oct. 29, 2010).

4. *Id.*

5. 17 U.S.C. § 504 (2006).

6. 629 F.3d at 935. In the order amending the court’s original opinion, the Ninth Circuit denied a rehearing and added a footnote to clarify that the court did not decide whether a statutory provision, DMCA § 1201(f), applied because the argument was not raised

incomplete protection for consumers and severely punished MDY Industries for providing a product to consumers that arguably added value to WoW without detracting from its demand.

This Note argues that the Ninth Circuit's decision in *MDY* is erroneous for several reasons. First, the court followed an ownership/licensing distinction for software that undermines the "first sale" doctrine, is strongly in favor of copyright holders, and conflicts with consumer perceptions. Second, the court applied a misguided test to determine whether violating a license provision constitutes copyright infringement based on a distinction between covenants and conditions. Third, the court needlessly created a circuit split to hold MDY liable under the DMCA anti-circumvention provisions where MDY was not liable for copyright infringement.

Part II provides the facts and procedural history of *MDY*. Part III summarizes the three main holdings of the Ninth Circuit's decision. Part IV analyzes each of the court's holdings, demonstrating the errors in the court's logic and policy judgments. Part V offers a brief conclusion.

II. FACTS AND PROCEDURAL HISTORY

Blizzard Entertainment is the creator of the massively multiplayer online role-playing game ("MMORPG"), World of Warcraft. In this game, "players control their 'avatar' characters within a virtual universe, exploring the landscape, fighting monsters, performing quests, building skills, and interacting with other players and computer-generated characters."⁷ As characters perform these tasks, they gain experience and advance levels.⁸ In March 2005, Michael Donnelly, owner of MDY Industries, developed a software program that would automatically simulate play for some of the lower levels of WoW.⁹ Donnelly originally designed his software, known as Glider, for personal use, but later began selling the program to other WoW users through MDY's website.¹⁰

to the district court or presented in the parties' appellate briefs. 2011 U.S. App. LEXIS 3428, at *27 n.19. All other aspects of the court's original opinion remained unchanged by the amending order.

7. *MDY*, 616 F. Supp. 2d at 962.

8. *Id.*

9. *MDY*, 629 F.3d at 935.

10. *Id.* at 935-36.

However, to play WoW, Blizzard requires that a player read and accept two separate agreements.¹¹ When installing the game client on a computer and first running WoW, the user must agree to Blizzard's EULA.¹² When connecting to Blizzard's online service to play the game, the user must accept Blizzard's Terms of Use ("ToU").¹³ At the time that Donnelly began marketing Glider, he reviewed both documents and concluded that bots (software, such as Glider, that automates game play) were not prohibited.¹⁴ However, later that year, Blizzard launched a technology known as Warden, which was "developed to prevent [] players who use unauthorized third-party software, including bots, from connecting to WoW's servers."¹⁵ At the time of its launch, Warden was capable of detecting Glider, and Blizzard used the technology to ban most Glider users.¹⁶ In response, MDY modified Glider to be more difficult for Warden to detect and continued to market the product to WoW users.¹⁷ MDY also "modified its website to indicate that using Glider violated Blizzard's ToU."¹⁸

Following Glider's modifications, Blizzard responded to MDY with a cease-and-desist letter, alleging that players' use of Glider infringed Blizzard's copyrights.¹⁹ When MDY refused to remove Glider from its site, Blizzard threatened suit while MDY commenced legal action "seeking a declaration that Glider does not infringe Blizzard's copyright or other rights."²⁰ Blizzard asserted counterclaims for "contributory and vicarious copyright infringement, violation of DMCA [Digital Millennium Copyright Act] §§ 1201(a)(2) and (b)(1), and tortious interference with

11. *Id.* at 935.

12. *Id.*

13. *Id.*

14. *Id.* at 936. Blizzard's EULA and ToU were subsequently changed to make clear that "cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience" are prohibited. *World of Warcraft End User License Agreement*, *supra* note 3; *World of Warcraft Terms of Use*, BLIZZARD ENTMT, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Dec. 9, 2010).

15. *MDY*, 629 F.3d at 936.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 936–37.

contract.”²¹ DMCA § 1201(a)(2) provides penalties for providing a product that circumvents technology that controls access to a copyrighted work.²² Similarly, § 1201(b)(1) prohibits providing a product that circumvents technology designed to protect the rights of a copyright owner.²³

The district court granted partial summary judgment to Blizzard, finding that MDY was liable for contributory and vicarious copyright infringement, as well as tortious interference with Blizzard’s contracts.²⁴ The district court granted MDY partial summary judgment only on the issue of whether MDY violated DMCA § 1201(a)(2) by accessing WoW’s source code.²⁵ Following a bench trial, the district court ultimately found MDY liable for violating Section 1201(a)(2), because it circumvented Blizzard’s Warden

21. *Id.* at 937.

22. 17 U.S.C. § 1201(a)(2) (2006). The full text of the statute provides:

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.

Id.

23. *Id.* § 1201(b)(1). The full text of the statute provides:

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 protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

Id.

24. *MDY*, 629 F.3d at 937.

25. *Id.*

technology, and liable for violating Section 1201(b)(1).²⁶ Consequently, the court held Donnelly personally liable for \$6.5 million in damages.²⁷

III. THE NINTH CIRCUIT OPINION

On appeal, the Ninth Circuit reversed on the issues of contributory and vicarious copyright infringement and liability under DMCA § 1201(b)(1).²⁸ However, MDY was still found to be liable under DMCA § 1201(a)(2).²⁹ The court did not decide the issue of tortious interference, but vacated the district court's grant of summary judgment because there were issues of material fact that needed to be considered.³⁰

The court began its analysis by first considering the copyright infringement claims.³¹ MDY stipulated that if WoW users violated Blizzard's copyright by installing and using Glider, MDY would be liable for contributory and vicarious infringement.³² As part of its analysis, the court first determined whether WoW players owned the game or merely licensed it from Blizzard.³³ Based on a recent test that the Ninth Circuit used in *Vernor v. Autodesk, Inc.*,³⁴ the court in *MDY* concluded that WoW players are licensees rather than owners.³⁵ Because of this, WoW users were not eligible for the "essential step" defense that could protect their use of the game.³⁶ After determining that Glider users were licensees, the court examined whether violating the license agreement constituted copyright infringement.

26. *Id.* at 937, 943.

27. *Id.* at 937.

28. *Id.* at 958.

29. *Id.*

30. *See id.*

31. *Id.* at 937.

32. *Id.* at 938.

33. *Id.*

34. 621 F.3d 1102, 1111 (9th Cir. 2010) ("[A] software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."). The problematic nature of this test is taken up in Part IV.A.

35. *MDY*, 629 F.3d at 938.

36. *Id.* at 939. By contrast, if WoW players were owners of the software, they would not be liable for copyright infringement where they made the copy as an "essential step" in using the software (i.e., copying the software into a computer's RAM before playing the game). *Id.* at 938.

Under Ninth Circuit precedent, a licensee who acts outside of the license agreement may be liable for copyright infringement.³⁷ To ascertain this, the Ninth Circuit applied Delaware law³⁸ to determine whether the term in the EULA and ToU that prohibited bots was a “condition” of the license agreement or a “covenant.”³⁹ While the two seem indistinguishable on their face, the ultimate effects of either classification are vastly different. Breaching a condition of a license agreement constitutes copyright infringement, with its accompanying statutory damages, while violating a covenant of a license results in an action for breach of contract, in which recovery is limited to actual damages.⁴⁰

To distinguish the two provisions in a license agreement, the Ninth Circuit defined a covenant as “a contractual promise, i.e., a manifestation of intention to act or refrain from acting in a particular way, such that the promisee is justified in understanding that the promisor has made a commitment.”⁴¹ On the other hand, a condition falls under a narrower class that encompasses “an act or event that must occur before a duty to perform a promise arises.”⁴² Stated another way, a breach of a license agreement results in liability for copyright infringement where “(1) the copying [] exceed[s] the scope of the defendant’s license and (2) the copyright owner’s complaint [is] grounded in an exclusive right of copyright.”⁴³ Applying this standard, the Ninth Circuit determined that Blizzard’s prohibition on bots was a covenant and, consequently, Glider users did not infringe Blizzard’s copyrights.⁴⁴ Based on this holding, the Ninth Circuit also held that MDY was not liable to Blizzard for contributory or vicarious infringement.⁴⁵

After addressing the copyright infringement claims, the court addressed Blizzard’s claims under the DMCA regarding MDY’s

37. *See id.* at 939.

38. Delaware law was applied here because Blizzard’s EULA and ToU “provide that they are to be interpreted according to Delaware law.” *Id.*

39. *Id.* at 939–40.

40. *Id.* at 941 n.3.

41. *Id.* at 939.

42. *Id.*

43. *Id.* at 940.

44. *Id.* at 941.

45. *Id.* at 941–42. The court’s misguided application of the condition/covenant distinction is addressed in Part IV.B.

circumvention of Blizzard's Warden technology.⁴⁶ The court noted that the purposes of the DMCA are to protect copyright owners and "mitigate the problems presented by copyright enforcement in the digital age."⁴⁷ As mentioned above, DMCA §§ 1201(a)(2) and (b)(1) prohibit trafficking in technology that circumvents technological protections.⁴⁸ Section 1201(a)(2) prohibits bypassing a technological measure that controls access to a copyrighted work while Section 1201(b)(1) prevents bypassing protection that a technological measure provides to rights of a copyright owner.⁴⁹ While at first glance the textual differences between these two sections appear small, the court relied heavily on these small differences. The court used these differences as the basis for some legal gymnastics to conclude that Section 1201(a)(2) focuses on access to a copyrighted work, which is not a traditional right protected by copyright law, while Section 1201(b)(1) addresses traditional copyright protections for "reproduction, distribution, public performance, public display, and creation of derivative works."⁵⁰

In arriving at these conclusions, the Ninth Circuit rejected Federal Circuit precedent by deciding that a violation of Section 1201(a)(2) did not require that the circumventing device actually facilitate copyright infringement.⁵¹ Based on the court's interpretation of these DMCA provisions, it held that MDY did not violate Section 1201(b)(1), but that it was liable under Section 1201(a)(2).⁵² The end result of the Ninth Circuit's decision was to reverse MDY's liability for copyright infringement, but paradoxically, to hold MDY liable for violating the DMCA anti-circumvention statute when no copyright infringement had occurred.

46. *MDY*, 629 F.3d at 942.

47. *Id.*

48. *Id.*

49. 17 U.S.C. § 1201(a)(2), (b)(1) (2006). For the full text of these statutes, see *supra* notes 22, 23.

50. *MDY*, 629 F.3d at 944.

51. *Id.* at 950.

52. *Id.* at 954–55. The dangerous precedent and purposeful circuit split created by the Ninth Circuit's interpretation of the DMCA is addressed in Part IV.C.

IV. ANALYSIS

The Ninth Circuit's decision in *MDY* illustrates that it favors the interests of copyright holders over those of software users and developers. Each main holding in the case has this bias and undermines one of the key purposes of copyright law: to balance copyright protections while not deterring "artistic creation for the betterment of society."⁵³ This Part analyzes each of those holdings and discusses where the Ninth Circuit went wrong.

A. Purchasing Physical Media Without Owning It

One of the key issues in *MDY* was whether players of WoW actually owned copies of the game, or whether they were only using them under a license from Blizzard. In this case, the outcome of that issue determined whether the "essential step" defense could be invoked by users who ran Glider, and consequently whether they could be classified as copyright infringers.⁵⁴

Prior to *MDY*, the Ninth Circuit held in *Mai Systems Corp. v. Peak Computer, Inc.* that running a program by copying it into a computer's RAM constituted making a copy of the program for purposes of copyright infringement.⁵⁵ Congress had previously responded to concerns that anybody using a computer could be considered a copyright infringer by creating the "essential step" exception, which generally allows an owner of copyrighted work to make a copy of that work where doing so is an "essential step" in using the product.⁵⁶ However, in *Mai* the Ninth Circuit nonetheless held that computer repair persons were liable for copyright infringement when they turned on a computer because the computer created a copy of the operating system as it was loaded into RAM and the repair persons were not the owners of the copyrighted material.⁵⁷ After the Ninth Circuit's debacle, however, Congress was

53. See Kelly Cochran, *Facing the Music: Remixing Copyright Law in the Digital Age*, 20 KAN. J.L. & PUB. POL'Y 312, 320 (2011).

54. *MDY*, 629 F.3d at 938.

55. 991 F.2d 511, 519 (9th Cir. 1993).

56. 17 U.S.C. § 117(a)(1) (2006); see also Bill Hinsee, *Wrath of the EULA: Can the Use of Bots Lead to Copyright Infringement?*, 17 B.U. J. SCI. & TECH. L. 160, 163 (2011).

57. See *Mai*, 991 F.2d at 517-19.

more explicit and specifically exempted computer repair people from copyright infringement when repairing a computer.⁵⁸

Although the “essential step” exception resolved some of the confusion over making copies to run a program, the exception still generally applies only to “owners.” In this case, because the users physically purchased a CD to run WoW, it could have been simple for the Ninth Circuit to declare that the users owned the individual copies of the CD and its software. However, the Ninth Circuit instead chose to continue to apply bad principles by using its controversial test articulated in *Vernor v. Autodesk, Inc.*⁵⁹

In *Vernor*, the Ninth Circuit held “that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.”⁶⁰ The *Vernor* test is so easy to meet that it severely weakened the value of the “first sale” doctrine, which generally precludes liability for copyright infringement for resale of a copy of a work where the person actually *owns* that copy.⁶¹ After *Vernor*, virtually every person who purchases a copy of software no longer owns that software, but is a licensee instead. The *Vernor* test has thus been justly criticized as “drastically shift[ing] the rights of downstream consumers back to copyright holders, severely damaging a century’s worth of rights balancing which promotes restraints on alienation and the demise of secondary media markets.”⁶² In *MDY*, the Ninth Circuit could have overturned or limited *Vernor* without causing much difficulty because it had not been around long enough to garner substantial reliance. However, by upholding *Vernor*, the court once again affirmed its new course toward protecting copyright

58. 17 U.S.C. § 117(c).

59. 621 F.3d 1102 (9th Cir. 2010); *see also* Molly Shaffer Van Houweling, *Touching and Concerning Copyright: Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 51 SANTA CLARA L. REV. 1063, 1078–79 (2011) (“To reach [its] conclusion, the Ninth Circuit followed its own controversial logic from *Vernor v. Autodesk*, in effect allowing the copyright holder to impose, via EULAs and ToUs, servitudes that restrain the otherwise permissible, ‘ordinary’ behavior of users in lawful possession of copies of copyrighted works.”).

60. *Vernor*, 621 F.3d at 1111.

61. Marcelo Halpern, Yury Kapgan & Kathy Yu, *Vernor v. Autodesk: Software and the First Sale Doctrine Under Copyright Law*, 23 INTEL. PROP. & TECH. L.J. 7, 7 (2011).

62. David A. Costa, *Vernor v. Autodesk: An Erosion of First Sale Rights*, 38 RUTGERS L. REC. 213, 213 (2010).

holders at the expense of software purchasers and traditional copyright doctrines.

Another problem with the Ninth Circuit's distinction between licensing and ownership is that it does not reflect market perceptions. "[C]onsumers naturally feel that purchasing a given product should confer ownership and allow for freedom in that product's disposition."⁶³ Many WoW users would likely be surprised to hear that the CD that they purchased at the store is actually the property of Blizzard Entertainment. While consumer desires and perceptions should not dictate the law, they do show how far distant the Ninth Circuit's view of copyright is from reflecting the realities of marketplace perceptions.

B. Covenants, Conditions, and Confusion

The Ninth Circuit in *MDY* claimed to follow precedent when it determined that violating the license agreement was a breach of contract rather than copyright infringement.⁶⁴ The court applied a test based on a distinction between covenants and conditions, where a breach of a condition of a license agreement constituted copyright infringement while a breach of a covenant limited liability to breach of contract damages. However, in applying this test, the court improperly stretched precedent to fit a particular policy result, which ended up creating an unworkable and unpredictable test for future cases.

One commentator has pointed out that the major distinction between breach of contract and copyright law is that copyright law is ultimately an enforcement of property rights.⁶⁵ To make copyright infringement depend on violation of a condition rather than a covenant does not make sense because property rights are already defined by copyright law and are unchanged by a license, which merely defines authorization and access to certain property rights. Viewing the Ninth Circuit's covenants/conditions test in this light illustrates that all the test accomplishes is that it determines whether someone committed copyright infringement by reference to whether

63. Michael V. Sardina, *Exhaustion and First Sale in Intellectual Property*, 51 SANTA CLARA L. REV. 1055, 1056 (2011).

64. *MDY Indus., Inc. v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010), amended by 2011 U.S. App. LEXIS 3428 (9th Cir. 2011).

65. Raymond T. Nimmer, *Copyright First Sale and the Over-Riding Role of Contract*, 51 SANTA CLARA L. REV. 1311, 1311 (2011).

they actually violated the copyright (and lacked authorization to do so). By creating such a simplistic test and packaging it in terms of whether licensing provisions are covenants or conditions, the Ninth Circuit has injected unnecessary confusion and complexity into copyright law.

Another commentator, Dennis Karjala, has strongly criticized the Ninth Circuit's covenant/condition distinction.⁶⁶ He argues that such an approach is “incompatible with true licenses that are negotiated between knowledgeable parties, which often condition the continuation of the license on compliance with promises that have nothing to do with the exclusive rights of the copyright owner.”⁶⁷

Karjala raises two good points that warrant further elaboration. First, giving software licensing agreements with consumers the same force as a true licensing agreement—one between sophisticated merchants—does not make sense. Boilerplate, one-size-fits-all agreements are generally one-sided, and while enforceable under *ProCD*,⁶⁸ courts should treat them with caution, knowing that the consumer is already the vulnerable party. Further, consumers are extremely unlikely to have read software licensing agreements. While this is not an excuse to avoid enforcing all license agreements, this general trend ought to give courts some hesitation when trying to split hairs between whether a term is a condition or covenant.

Second, if conditions truly warrant treating software licensing agreements as “true licenses” (or if courts are determined to take that position), then there is no reason to make any distinction between covenants and conditions at all. If parties are being treated as knowingly agreeing to the terms of the license, those terms should govern in their entirety. For example, Blizzard's EULA states that “[a]ny use of the Game in violation of the License Limitations will be regarded as an infringement of Blizzard's copyrights in and to the Game.”⁶⁹ While it seems illogical to hold inexperienced consumers absolutely to such licensing agreements, if courts are to treat consumers as knowledgeable licensees then they ought to be willing to fully support freedom of contract by enforcing any violation of the

66. Dennis S. Karjala, *Protecting Innovation in Computer Software, Biotechnology, and Nanotechnology*, 16 VA. J.L. & TECH. 42, 61 n.93 (2011).

67. *Id.*

68. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996).

69. *World of Warcraft End User License Agreement*, *supra* note 3.

licensing agreement as a copyright violation. Rather than taking either this position or recognizing the problems with enforcing licensing agreements against consumers, the Ninth Circuit in *MDY* has perpetuated a legal fiction with its current test. This legal fiction undermines the freedom to contract, creates uncertainty, and only offers meager protection to consumers who are unlikely to be aware of licensing terms or to understand which terms are linked with copyright infringement.

C. DMCA Anti-Circumvention Liability Without Copyright Infringement

Perhaps the most damaging precedent that the Ninth Circuit created in *MDY* was to hold MDY liable under the DMCA anti-circumvention provisions even though it was not liable for copyright infringement.

The Ninth Circuit's decision to hold MDY liable under these provisions contradicts the superior approach taken by other courts.⁷⁰ Those courts "hold that only circumvention that supports copyright infringement is prohibited."⁷¹ For example, in *Chamberlain Inc. v. Skylink Technologies, Inc.*, the Federal Circuit was presented with a case where a garage door opener manufacturer had installed a "rolling code" program for its transmitters that would regularly change the code needed to open the garage door.⁷² Skylink, a manufacturer of universal transmitters, bypassed the "rolling code" to allow its transmitters to work with Chamberlain's garage door openers.⁷³ Chamberlain sued Skylink, alleging violations of the anti-circumvention provisions of the DMCA.⁷⁴ To prevent a possible DMCA interpretation that would "grant manufacturers broad exemptions from both the antitrust laws and the doctrine of copyright misuse," the Federal Circuit declared that the DMCA anti-circumvention provisions "do not establish a new property right"

70. Stephen McJohn, *Top Tens in 2010: Copyright and Trade Secret Cases*, 9 NW. J. TECH. & INTELL. PROP. 325, 332 (2011).

71. *Id.* (citing *MGE UPS Sys. v. GE Consumer & Indus. Inc.*, 622 F.3d 361 (5th Cir. 2010); *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005); *Chamberlain Grp., Inc. v. Skylink Tech., Inc.*, 381 F.3d 1178, 1203 (Fed. Cir. 2004)).

72. *Chamberlain*, 381 F.3d at 1183.

73. *Id.*

74. *Id.* at 1185.

and “simply provide property owners with new ways to secure their property.”⁷⁵ Consistent with this approach, the court held that the DMCA provisions “prohibit[] only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.”⁷⁶

The position taken by the Federal Circuit appears to be the most logical approach to applying these DMCA provisions. It prevents abuse of copyright law by limiting the scope of DMCA liability so that copyright holders are not equipped with weapons that extend beyond the protections that traditional copyright law affords, while retaining those traditional protections. The Ninth Circuit reached a result that has potential for abuse by overzealous copyright holders who can now threaten or sue others under the DMCA, even though there is no copyright violation.⁷⁷ And rather than ignoring Federal Circuit precedent, the Ninth Circuit expressly rejected the better approach offered in *Chamberlain* on this issue, creating an unnecessary circuit split.⁷⁸

Another problem with the Ninth Circuit’s DMCA analysis is that it is inconsistent with the underlying purposes of the DMCA and copyright law. The court recognized that the DMCA exists to “conform United States copyright law to its obligations under two World Intellectual Property Organization (“WIPO”) treaties, which require contracting parties to provide effective legal remedies against the circumvention of protective technological measures used by copyright owners.”⁷⁹ However, the court failed to take account of the *broader* purposes of copyright law, which have been summarized by scholars as protecting authors’ ownership of their works *alongside*

75. *Id.* at 1192–94.

76. *Id.* at 1201.

77. Interestingly, the Ninth Circuit was unwilling to adopt an “infringement nexus” requirement for DMCA violations while it required “that for a licensee’s violation of a contract to constitute copyright infringement, there must be a *nexus* between the condition and the licensor’s exclusive rights of copyright.” *MDY Indus., Inc. v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 941, 950 (9th Cir. 2010), *amended by* 2011 U.S. App. LEXIS 3428 (9th Cir. 2011) (emphasis added).

78. *Id.* at 950 (“While we appreciate the policy considerations expressed by the Federal Circuit in *Chamberlain*, we are unable to follow its approach.”). *But see* Raymond Nimmer, *Ninth Circuit Rejects Chamberlain, Places DMCA Back on a Proper Track*, 16 CYBERSPACE L. 21, 21 (2011) (“The Ninth Circuit, in *MDY* . . . expressly rejects *Chamberlain*, returning the statute to its intended purpose—creating a right to protect controls on access to works in digital contexts.”).

79. *MDY*, 629 F.3d at 942.

encouraging “artistic creation for the betterment of society”⁸⁰ or “provid[ing] *just enough* incentive to prompt the creation of new works.”⁸¹ These purposes would justify allowing noninfringing innovative products, such as Glider, particularly where such products do not harm demand for the original product.⁸² By ignoring the larger context of copyright law, the Ninth Circuit reached the untenable conclusion that MDY was liable for circumventing Warden even though MDY and all other Glider users were not liable for copyright infringement. Instead of furthering the purposes and consistency of copyright law, the Ninth Circuit created an unnecessary circuit split, adopted bad policy, and added new protections for copyright holders at the expense of innovation and artistic creation.

V. CONCLUSION

In *MDY*, the Ninth Circuit sent a strong and clear message from Blizzard and other game owners to future software developers: “Keep your program out of my game.” At the expense of innovation and clarity in copyright law, the court reaffirmed the controversial *Vernor* test delineating whether a software purchaser is an owner or a licensee. Further, the court inconsistently applied an already confusing standard for copyright infringement involving conditions and covenants. In addition, it created a new circuit split in order to protect a previously nonexistent right of copyright holders to enforce the DMCA anti-circumvention provision against software developers that do not even engage in copyright infringement.

The Ninth Circuit’s slant in favor of copyright holders at the expense of software purchasers and innovative software developers is evident throughout *MDY*. If the Ninth Circuit continues on its misguided path through copyright law, Congress or the Supreme Court will need to step in and restore the balance of interests

80. Cochran, *supra* note 53, at 320.

81. Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 905 (2011) (emphasis added).

82. The parties in *MDY* disputed whether Glider harmed Blizzard’s revenues, and the court did not decide the issue. *MDY*, 629 F.3d at 939. It is entirely possible that Glider increased Blizzard’s revenues.

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Keep Your Program Out of My Game

between copyright holders, software purchasers, and innovative developers.

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