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## License to Kill: *MDY v. Blizzard* and the Battle Over Copyright in World of Warcraft

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# License to Kill

## *MDY V. BLIZZARD AND THE BATTLE OVER COPYRIGHT IN WORLD OF WARCRAFT*

### I. INTRODUCTION

Copyright law grants a limited bundle of exclusive rights to copyright owners.<sup>1</sup> These rights include the exclusive right to reproduce and distribute the work.<sup>2</sup> However, these rights are limited as the law distinguishes between protecting one's intellectual property in a product and protecting a right to the product in and of itself.<sup>3</sup>

In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*<sup>4</sup> the District Court of Arizona upheld Ninth Circuit precedent that gutted this distinction, finding that the purchaser and user of the video game, World of Warcraft ("WoW"), is a licensee of that game, not an "owner."<sup>5</sup> By finding that a WoW user was a mere licensee and not an "owner" of the software, the *MDY* court concluded that the user was not protected by

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<sup>1</sup> See 17 U.S.C. § 106 (2006). "The purpose of copyright is to grant authors a limited property right in the form of expression of their ideas." NAT'L COMM'N OF NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 16 (Library of Congress 1979), available at <http://digital-law-online.info/CONTU/contu1.html> [hereinafter CONTU REPORT].

<sup>2</sup> Brief for Public Knowledge as Amici Curiae Supporting Neither Party at 5, *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 2008 WL 2757357 (D. Ariz. 2008) (No. CV06-0255-PHX-DGC) available at <http://www.publicknowledge.org/pdf/pk-amicus-20080502.pdf>. [hereinafter Public Knowledge]; see also 17 U.S.C. § 106.

<sup>3</sup> Indeed, Congress specifically recognized this distinction when codifying the Copyright Act.

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (2006).

<sup>4</sup> No. CV-06-02555-PHX-DGC, 2008 WL 2757357 (D. Ariz. July 14, 2008).

<sup>5</sup> *Id.* at \*8-10. The Copyright Act encompasses video games and other similar computer programs. See 17 U.S.C. § 102.

the Copyright Act's Section 117(a)(1) safe harbor provision, which allows "owners" to copy software to a computer's Random Access Memory ("RAM") as an "essential step" in using the program.<sup>6</sup> Thus, the *MDY* court held that when a user played WoW using a popular third-party application known as WoWGlider ("Glider"), the user exceeded his license in the End User License Agreement ("EULA") and Terms of Use ("TOU"), and created infringing copies of the game in the computer's RAM.<sup>7</sup> Because of these infringing copies, the court held MDY Industries, the owner of Glider, liable for contributory and vicarious copyright infringement<sup>8</sup> resulting in \$6,000,000 in damages.<sup>9</sup>

In addition to snuffing out Glider use, the *MDY* decision disrupted the delicate balance between a copyright holder's ability to protect its intellectual property and a consumer's right to use his particular copy without being held liable for copyright infringement. Indeed, the *MDY* decision facilitated a "chilling extension of control" by copyright holders over their software.<sup>10</sup>

While the *MDY* court followed a line of Ninth Circuit precedent under *Wall Data Inc. v. Los Angeles County Sheriff's Department*<sup>11</sup> and *MAI Systems Corp. v. Peak Computer Inc.*,<sup>12</sup> which gave conclusive weight to the software provider's EULA when determining whether a purchaser owned a piece of

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<sup>6</sup> *Id.* at \*8, \*10.

<sup>6</sup> *Id.* at \*1, \*10; RAM is a form of computer data storage in which information can be temporarily recorded. LEE HOLLAR, LEGAL PROTECTION OF DIGITAL INFORMATION, ch.2, sec. II.C.1 (2002), <http://digital-law-online.info/lpdi1.0/treatise20.html>. Whenever software is loaded into RAM, a copy is created. *Id.*; see also *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511, 517-18 (9th Cir. 1993). When the computer is turned off, the data is lost. HOLLAR, *supra*, at ch.2, sec. II.C.1.

<sup>8</sup> *MDY Indus., LLC*, 2008 WL 2757357 at \*10.

<sup>9</sup> MDY paid Blizzard a stipulated judgment pending appeal. Benjamin Druanske, *MDY Agrees to Pay Blizzard \$6m in Damages of Warcraft Bot Lawsuit, Pending Appeal*, VIRTUALLY BLIND, Sept. 29, 2008, <http://virtuallyblind.com/2008/09/29/mdy-blizzard-damages/>. Outside the scope of this note, but of significant interest, is the court's ruling on the remaining issues left unresolved by summary judgment. The court found that MDY violated Sections 1201(a)(2) and 1201(b)(1) of the Digital Millennium Copyright Act ("DMCA"), that MDY's owner was personally liable for MDY's DMCA and copyright violations, and that Blizzard was entitled to a permanent injunction against Glider sales. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 616 F. Supp. 2d 958, 962-68 (D. Ariz. 2009).

<sup>10</sup> The Patry Copyright Blog, <http://williampatry.blogspot.com/2008/07/strange-copyright-world-of-warcraft.html> (July 15, 2008, 08:48 EDT).

<sup>11</sup> 447 F.3d 769 (9th Cir. 2006).

<sup>12</sup> 991 F.2d 511 (9th Cir. 1993).

software,<sup>13</sup> this Note argues the court's holding was ultimately incorrect for three reasons. First, the *MDY* court should have followed an alternative line of Ninth Circuit precedent under *United States v. Wise*<sup>14</sup> and *Vernor v. Autodesk, Inc.*,<sup>15</sup> which more equitably allocates rights between software providers and software purchasers. Specifically, *Wise* and *Vernor* utilized the First Sale Doctrine, which focuses on the economic realities of the underlying transaction surrounding the software purchase to determine whether a purchaser is an "owner" or licensee of the software instead of granting the software provider's EULA conclusive weight.<sup>16</sup> Under this precedent, the *MDY* court should have found for the third-party application maker and held that WoW users are software "owners," not licensees. Second, courts should be informed by John Locke's theory of labor desert when analyzing whether a WoW user is a licensee or an "owner."<sup>17</sup> Lockean labor desert theory argues that ownership rights are created by the investment of time and labor in creating a good such as a WoW user's self-created character, or avatar. Third, the Copyright Act's underlying policies favoring progress and innovation counsel in favor of more substantial protections for WoW users' rights.

Part II of this Note discusses the background of WoW and Glider. Part III then discusses the *MDY* case and the precedent developed under *Wall Data* and *MAI* that led to the court's decision. Part IV argues that *MDY* was wrongly decided. It first examines the contrary Ninth Circuit precedent under *Wise* and *Vernor*. Second, it discusses why courts should afford software purchasers and their time investments greater, though not absolute, protection under Lockean labor desert theory. Third, it argues the policies of copyright law require greater protection of WoW users' rights. This Note concludes by summarizing why the *MDY* decision was incorrect and how the case should have been decided.

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<sup>13</sup> See *MDY Indus. LLC*, 2008 WL 2757357, at \*8.

<sup>14</sup> 550 F.2d 1180 (9th Cir. 1977).

<sup>15</sup> 555 F. Supp. 2d 1164 (W.D. WA 2008).

<sup>16</sup> See *United States v. Wise*, 550 F.2d 1180, 1188-90 (9th Cir. 1977); *Vernor v. Autodesk*, 555 F. Supp. 2d 1164, 1169-70 (W.D. Wash. 2008).

<sup>17</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

## II. BACKGROUND

### A. *World of Warcraft*

#### 1. World of Warcraft and MMORPGs Generally

WoW is a massive multiplayer online role-playing game (“MMORPG”) released in 2004 by Blizzard Entertainment, Inc. (“Blizzard”), based upon the Warcraft universe,<sup>18</sup> a Tolkien-esque fantasy world explicated in a series of video games that Blizzard created.<sup>19</sup> WoW is the most successful MMORPG ever<sup>20</sup>—it has over eleven million players<sup>21</sup> and generates over \$1.5 billion in annual revenue for Blizzard.<sup>22</sup> WoW generates its revenue mainly through a monthly fee.<sup>23</sup> Of course, Blizzard profits from the player’s initial purchase of WoW’s physical software package as well.<sup>24</sup> Blizzard has also released two sizable expansion packs<sup>25</sup> for WoW, which have further contributed to WoW’s success.<sup>26</sup>

In an MMORPG, hundreds or thousands of players exist in the same virtual world<sup>27</sup> at the same time, which creates an

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<sup>18</sup> WorldofWarcraft, Game Guide, What is WoW, [www.worldofwarcraft.com/info/basics/guide.html](http://www.worldofwarcraft.com/info/basics/guide.html) (last visited Jan. 2, 2010). For a discussion of the “Warcraft universe” as well as WoW’s background history, see World of Warcraft Europe, Warcraft History Library, <http://www.wow-europe.com/en/info/story/index.html#history> (last visited Jan. 2, 2010).

<sup>19</sup> *MDY Indus., LLC*, 2008 WL 2757357 at \*1.

<sup>20</sup> *Id.*

<sup>21</sup> Press Release, Blizzard, World of Warcraft® Subscriber Base Reaches 11.5 Million Worldwide (Nov. 21, 2008) (<http://www.blizzard.com/us/press/081121.html>).

<sup>22</sup> *MDY Indus., LLC*, 2008 WL 2757357 at \*1.

<sup>23</sup> World of Warcraft, Game Guide, General F.A.Q., [www.worldofwarcraft.com/info/faq/general.html](http://www.worldofwarcraft.com/info/faq/general.html) (last visited Jan 20, 2009). The monthly fee is required to support customer service and WoW content updates. *Id.*

<sup>24</sup> See Blizzard, Blizzard Store, <http://www.blizzard.com/store/browse.xml?f=p:110000034,p:110000018,p:110000044> (last visited Jan. 20, 2009).

<sup>25</sup> See World of Warcraft, Cataclysm F.A.Q., <http://www.worldofwarcraft.com/cataclysm/faq/> (last visited Mar. 12, 2010).

<sup>26</sup> In 2007, Blizzard released its first expansion pack, “The Burning Crusade,” WorldofWarcraft, Game Guide, Intro to WoW, [www.worldofwarcraft.com/info/beginners/index.html](http://www.worldofwarcraft.com/info/beginners/index.html) (last visited Jan. 29, 2009), and in 2008 Blizzard released the second, “Wrath of the Lich King.” *Id.* Blizzard currently plans to release a third WoW expansion pack (“Cataclysm”), Press Release, Blizzard World of Warcraft: Cataclysm Unveiled (Aug. 21 2009) (<http://us.blizzard.com/en-us/company/press/pressreleases.html?090821>), sometime in 2010. Posting of Adam Holisky to WOW.com, <http://www.wow.com/2009/08/23/world-of-warcraft-cataclysm-targeted-for-a-2010-release-date/> (Aug. 23, 2009, 1:03PM).

<sup>27</sup> “Virtual worlds are persistent, dynamic computer-based environments in which interconnected users interact with each other and the virtual environment around them.” Steven Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH 443, 443-44 (2007).

engaging, interactive atmosphere that more closely approximates human reality than a closed game in which only one or a small number of players are controlled by actual humans and a computer controls the rest of the environment.<sup>28</sup> To illustrate the distinction, imagine if humans controlled the ghosts chasing Ms. Pac-Man in the popular arcade game, thus eliminating any advantage gained by memorizing the computer program's built-in instructions for controlling the ghosts' movement.

Events that change the virtual world and affect other players constantly occur, even when those other players are not playing the game.<sup>29</sup> An MMORPG's immersive, interactive atmosphere adds to the intricacies of the game. These intricacies are far more complicated than other game genres such as "first-person shooter" games in which the objective is to kill computer-generated monsters or other virtual people.<sup>30</sup> Instead, MMORPGs envelop a player in an entire virtual world where users do more than kill. For example, players can role-play with different identities and connect to other users in a virtual community.<sup>31</sup> The absence of a set chain of events and an open-ended storyline creates a history for the player, giving new and significant meaning to every adventure the user undertakes.<sup>32</sup>

MMORPGs further attract players by allowing for thousands of hours of game play and providing an "infinite variety" of tasks, goals, and achievements for them to experience throughout the virtual world.<sup>33</sup> Indeed, because the game never ends for the player, it is impossible to "win" at an MMORPG. Most MMORPGs, including WoW, provide regular monthly content updates that add new creatures to kill, items to acquire, and dungeons to explore.<sup>34</sup>

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<sup>28</sup> World of Warcraft, Game Guide, General F.A.Q., *supra* note 23.

<sup>29</sup> *Id.*

<sup>30</sup> Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043 (2004).

<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at 2057 ("[An MMORPG] player is in a very different situation than someone who operates a pinball machine. . . [they] can take on multiple personas. . . they can create their own stories. . . and they can build things and form communities.").

<sup>33</sup> World of Warcraft, Game Guide, General F.A.Q., *supra* note 23., [www.worldofwarcraft.com/info/faq/general.html](http://www.worldofwarcraft.com/info/faq/general.html) (last visited Mar. 3, 2010).

<sup>34</sup> *See id.*

## 2. Avatar Creation and Improvement

Upon first logging into WoW, a player creates an avatar<sup>35</sup> and chooses from two rival factions: Horde or Alliance.<sup>36</sup> A player's faction choice is significant because a player can only speak to members of his own faction, and other facets of the game, such as the "level"<sup>37</sup> of skill a player may attain, the quests a player is eligible to attempt, and dungeons a player may enter, are organized by faction.<sup>38</sup> Once a player chooses a faction, the player must then choose a "class."<sup>39</sup> Players may further customize their avatar's appearance by choosing the avatar's race, gender, skin color, facial structure, and hair color/style.<sup>40</sup> WoW also enables players to make their avatars unique by adding facial markings, piercings, facial hair, or tusks.<sup>41</sup>

Players improve their avatars by killing monsters and completing quests.<sup>42</sup> Once a player kills enough monsters or finishes enough quests, the avatar will gain a level or "level up."<sup>43</sup> "Leveling" a character requires a great deal of time.<sup>44</sup>

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<sup>35</sup> An avatar represents a player's physical representation in a virtual world. MICHAEL LUMMIS & ED KERN, *WORLD OF WARCRAFT MASTER GUIDE SECOND EDITION STRATEGY GUIDE 4* (Brady Games 2006).

Avatars are "onscreen characters controlled (and often designed) by the players." Theodore Westbrook, Note, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 780 (2006).

<sup>36</sup> Both horde and alliance players have five customizable race choices each with different strengths and weaknesses. World of Warcraft, Races, <http://www.worldofwarcraft.com/info/races/index.html> (last visited Jan. 2, 2010).

<sup>37</sup> In WoW, players are assigned a level that reflects how powerful an avatar is. See LUMMIS & KERN, *supra* note 35, at 5. Avatars begin at level one and the maximum level is level 80. World of Warcraft, Game Guide, Characters F.A.Q., <http://www.worldofwarcraft.com/info/faq/characters.html> (last visited Jan. 2, 2010). As one kills monsters and gains experience points, the player will reach the next level, or "level up," thus increasing the avatar's stats, abilities, and enabling the avatar to accomplish challenges it was not able to accomplish before. See LUMMIS & KERN, *supra* note 35, at 4-5.

<sup>38</sup> See World of Warcraft, Game Guide What is WoW, *supra* note 18.

<sup>39</sup> World of Warcraft, Game Guide, Classes F.A.Q., [www.worldofwarcraft.com/info/faq/classes.html](http://www.worldofwarcraft.com/info/faq/classes.html) (last visited Jan. 20, 2009). When beginning the game, players choose between warrior, mage, rogue, druid, hunter, warlock, priest, paladin, rogue, and shaman classes. See *id.* Within each class, one is able to specialize in different talent trees. See *id.* This provides for greater diversity of skills among classes and allows a player to experience WoW game play from different perspectives See *id.*

<sup>40</sup> WorldofWarcraft.com, Game Guide Characters F.A.Q., <http://www.worldofwarcraft.com/info/faq/characters.html> (last visited Apr. 7, 2010).

<sup>41</sup> *Id.*

<sup>42</sup> See LUMMIS & KERN, *supra* note 35, at 5.

<sup>43</sup> See *id.*

<sup>44</sup> See Extreme Leveling, <http://www.extremeleveling.com/> (last visited Jan. 20, 2009) (Illustrating that creating a level 60 character often requires 19 days, or 456

Players may complete quests to earn experience points, or repeatedly kill a certain type of monster to “level” faster, which most gamers find rather dull compared to high-level game content. Avatars may also improve by acquiring high-level items<sup>45</sup> through professional skills such as crafting,<sup>46</sup> killing enemy bosses,<sup>47</sup> earning reputation awards,<sup>48</sup> engaging in player versus player combat, and purchasing items through an auction house.<sup>49</sup>

Because items such as weapons and armor are needed to level an avatar and accomplish other in-game quests, these items are of great importance. They are so important that players often choose to purchase items in “real world” dollars instead of earning them within the game because many months of game play may be required to attain them.<sup>50</sup> In other MMORPG games, players resort to “camping”<sup>51</sup> and “kill stealing”<sup>52</sup> to obtain these items. However, in developing WoW, Blizzard took elaborate steps to prevent these cheating

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hours of in-game time). However, Blizzard has recently reduced that time. *See* World of Warcraft, Game Guide, The Gods of Zul’Aman Patch 2.3, <http://www.worldofwarcraft.com/info/underdev/implemented/2p3.html> (last visited Jan. 20, 2009); Because players often find the required time commitment to level a maximum level character to be enormous, more experienced WoW players began offering guides, for a fee, to greatly reduce this time. *See* Extreme Leveling, *supra*.

<sup>45</sup> High-level items are separated into four separate classifications. In order of increasing rarity and power, they are uncommon items, rare items, epic items, and the coveted legendary items. *See* LUMMIS & KERN, *supra* note 35, at 14.

<sup>46</sup> Players can create powerful weapons and armor through professions such as blacksmithing, engineering, leatherworking, and tailoring. *See id.* at 246 (Brady Games 2006).

<sup>47</sup> World of Warcraft, Game Guide. Items F.A.Q., <http://www.worldofwarcraft.com/info/items/basics.html> (last visited Jan. 20, 2009).

<sup>48</sup> By increasing one’s reputation with a faction within the WoW virtual world, players gain access to reputation rewards that enable one to acquire high-level items. WorldofWarcraft, Game Guide, Reputations, <http://www.worldofwarcraft.com/info/basics/reputation.html> (last visited Jan. 2, 2010).

<sup>49</sup> An auction house serves as a clearing house for items that players acquire who would rather sell the items than use the items. World of Warcraft.com, Game Guide, Auction Houses, <http://www.worldofwarcraft.com/info/basics/auctionhouses.html> (last visited Jan. 2, 2010). Players may bid on or buy-out weapons, armor, or other in-game goods. *Id.*

<sup>50</sup> Leandra Lederman, “Stranger than Fiction”: Taxing Virtual Worlds, 82 N.Y.U. L. REV. 1620, 1628 (2007).

<sup>51</sup> Camping is when a player monopolizes a group of monsters, killing them over and over again, in order to level-up or acquire loot. *See* LUMMIS & KERN, *supra* note 35, at 4.

<sup>52</sup> World of Warcraft, Game Guide, Gameplay F.A.Q., [www.worldofwarcraft.com/info/faq/gameplay.html](http://www.worldofwarcraft.com/info/faq/gameplay.html) (last visited Mar. 4, 2010). Kill stealing is rushing to kill a monster another player was attempting to kill in order to gain the experience or loot from that monster before the other player. *See* LUMMIS & KERN, *supra* note 35, at 5.



mechanisms by creating a pseudo first-in-time property right, where the first player or group to damage the virtual monster will receive both the experience and the loot.<sup>53</sup> Blizzard has also dispersed the dropping of high-level items across many monsters in the world, resulting in relatively little advantage in camping or racing to kill a specific monster type.<sup>54</sup>

### 3. World of Warcraft as a Social Network

WoW is not only a complex video game, it is also a social network.<sup>55</sup> One of Blizzard's main goals in creating WoW was to encourage in-game socializing.<sup>56</sup> Players can join a guild<sup>57</sup> to socialize with other players, as well as to make group hunting easier.<sup>58</sup> "Guilds are an integral part of the game, allowing like-minded players to join together to achieve goals, not to mention getting to wear a really cool tabard."<sup>59</sup> In regular WoW play, players may group with up to five other players to complete quests.<sup>60</sup> One feature of the game, called an "instance,"<sup>61</sup> allows for the creation of a sub-world within the larger WoW world. In

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<sup>53</sup> WorldofWarcraft.com, Game Guide, Gameplay F.A.Q., *supra* note 52.

<sup>54</sup> *See id.* However, WoW has rare or "elite monsters" which appear from time to time in the game which are more difficult to kill, but almost always drop a high-level item. *See* LUMMIS & KERN, *supra* note 35, at 14. Once they are spotted, players will likely rush to kill the monster to retrieve its high value items.

<sup>55</sup> *See* David Sheldon, Comment, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 757 & n.27 (2007) ("[P]layers of the game enjoy a form of comity rarely seen in the real world; higher-level players go out of their way to tutor newbies and accompany them on quests. Deep friendships are forged. Relationships begin that flower into marriage, with Tauren brides and Undead grooms tying the knot in some virtual tavern in Thunder Bluff." (quoting Steven Levy, *Is World of Warcraft a Game?*, NEWSWEEK, Sept. 18, 2006, at 48) (alteration in original)); *see also* Balkin, *supra* note 30, at 2078 ("Some players already invest enormous amounts of time in these worlds; they make friends there and form attachments.").

<sup>56</sup> *See* World of Warcraft, Game Guide, What is WoW, *supra* note 18.

<sup>57</sup> A guild is an in-game association of players. *See* LUMMIS & KERN, *supra* note 35, at 121. Guilds may provide lower level players with a network to complete quests, receive discounted or free items from other players in the guild, and provide higher level players with a network to complete more difficult game content. *See id.* at 122-23.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.* at 121. A "tabard is a wearable item that proudly displays your guild's chosen symbol and colors." World of Warcraft, Guilds, <http://www.worldofwarcraft.com/info/basics/guilds.html> (last visited Mar. 12 2010).

<sup>60</sup> World of Warcraft, Game Guide, What is WoW, *supra* note 18.

<sup>61</sup> "An instance is a personal copy of the dungeon for you and your party. The only players in [the] instance will be yourself and the members of your party—no one else can enter your dungeon instance." World of Warcraft, Game Guide, Instancing, <http://www.worldofwarcraft.com/info/basics/instancing.html> (last visited Jan. 20, 2009).

an “instance,” players may band together in groups of up to forty players to kill monsters and complete quests that would otherwise be impossible to complete alone.<sup>62</sup>

#### 4. World of Warcraft’s Terms of Use and End User License Agreement

Because WoW has millions of players with deep social connections, a complicated reward structure, and a user-created in-game economy, the game requires rules to protect other players’ in-game rights. Thus, Blizzard provides a EULA<sup>63</sup> and TOU<sup>64</sup> to regulate player conduct. Under Section 2(A) of the TOU, Blizzard banned the use of “cheats, automation software (bots), hacks, mods or any other unauthorized third-party software designed to modify the World of Warcraft experience.”<sup>65</sup> Most significantly, under Section 4(a) of the EULA, Blizzard provided that “[a]ll title, ownership rights and intellectual property rights in and to the Game and all copies thereof. . . are owned or licensed by Blizzard.”<sup>66</sup> Further, Section 4 of the TOU provides, “[a]ll rights and title in and to the Service. . . are owned by Blizzard or its licensors.”<sup>67</sup> Indeed, Section 11 of the TOU specifies:

[y]ou may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game. You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in the game . . . you may not sell in-game items or currency for “real” money, or exchange those items or currency for value outside of the game.<sup>68</sup>

Last, Section 7 of the TOU provides that “you acknowledge and agree that you shall have no ownership or other property interest in the Account, and you further acknowledge and agree that all rights in and to the Account are and shall forever be

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<sup>62</sup> *See id.*

<sup>63</sup> World of Warcraft, World of Warcraft End User License Agreement, <http://www.worldofwarcraft.com/legal/eula.html> (last visited July 29, 2008).

<sup>64</sup> World of Warcraft, World of Warcraft Terms of Use, [www.worldofwarcraft.com/legal/termsofuse.html](http://www.worldofwarcraft.com/legal/termsofuse.html) (last visited July 29, 2008).

<sup>65</sup> *Id.*

<sup>66</sup> World of Warcraft, World of Warcraft End User License Agreement, *supra* note 63.

<sup>67</sup> World of Warcraft, World of Warcraft Terms of Use, *supra* note 64.

<sup>68</sup> *Id.*

owned by and inure to the benefit of Blizzard.”<sup>69</sup> These EULA and TOU provisions grant the copyright holder, Blizzard, title to anything the user procures within the game, thus arming Blizzard with a powerful weapon against any claim the user may have to his virtual commodities.<sup>70</sup> The more restrictive Blizzard makes its EULA, and the more rights Blizzard attempts to withhold from its customers, the more difficult it becomes for WoW users to claim any property rights over their in-game commodities.

Blizzard inhibits virtual property rights and bans account sales in order to protect itself from black market transactions.<sup>71</sup> According to Blizzard, there are two problems with black market transactions. First, if players were allowed to buy a high-level avatar, the player would spend less money on the subscription fees required to level that avatar through game play.<sup>72</sup> Second, with more users playing high-level characters, Blizzard would need to create more high-level content to keep those players satisfied.<sup>73</sup> For Blizzard to be profitable, it must retain a high-level of monthly subscribers who spend a great deal of time experiencing the virtual world. If black market transactions were allowed, Blizzard would receive less money from monthly subscription fees and would have to expend greater resources on content updates, because it would have to update WoW’s content and storyline more frequently to keep it new and challenging.<sup>74</sup> Blizzard’s costs would increase while its revenues would decrease.

Thus, to give force to these EULA and TOU provisions, Blizzard penalizes violating players who lessen the gaming experience for other users.<sup>75</sup> Penalties include a warning for a minor account violation, a brief suspension for moderately severe violations, and account closure for the most severe

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<sup>69</sup> *Id.*

<sup>70</sup> See Joshua A. T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1082 (2005).

<sup>71</sup> Jaime J. Kayser, Note, *The New New-World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59, 73-74 (2007).

<sup>72</sup> *Id.* at 73.

<sup>73</sup> *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> Blizzard, Account Penalties, [http://us.blizzard.com/support/article.xml?locale=en\\_US&articleId=20221&rhtml=y](http://us.blizzard.com/support/article.xml?locale=en_US&articleId=20221&rhtml=y) (Blizzard takes “disciplinary action . . . against disruptive players who are causing damage to other’s play experiences or the service itself.”) (last visited Jan. 20, 2009).

violations.<sup>76</sup> Blizzard has a reputation for aggressively responding to EULA and TOU violations.<sup>77</sup> In November 2006, Blizzard banned 105,000 accounts for selling virtual items for “real world” currency.<sup>78</sup> More strikingly, Blizzard considered canceling accounts of guild leaders trying to recruit for a guild catering to “gay, lesbian, bisexual, and transgendered individuals,” out of a concern that other game players might respond inappropriately.<sup>79</sup> Blizzard ultimately allowed the guild to continue recruiting,<sup>80</sup> however, Blizzard clearly takes a proactive approach to ensure that players’ “real world” rights do not transfer to their “virtual world” pursuits. A prime example of Blizzard’s aggressive defense of itself through its EULA and TOU is the penalties it meted out to players running Glider.

### B. MDY Industries and WoWGlider

MDY Industries is the creator and owner of Glider,<sup>81</sup> a third-party program<sup>82</sup> that plays WoW while the user is away from his computer.<sup>83</sup> Glider’s sophistication allows it to undertake several surprisingly complex tasks. “It grinds, it loots, it skins, it heals, it even farms soul shards . . . without you.”<sup>84</sup> Since MDY began selling Glider in June 2005, “it has sold some 100,000 copies.”<sup>85</sup> MDY advertises and tailors Glider not to new players, but to experienced ones who want to level-up a new avatar quickly.

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<sup>76</sup> See *id.* Blizzard will close accounts when “a player has excessively and/or grossly violated [its] policies” and when a player “insists on negatively affecting other players’ enjoyment of the game or harming the service itself.” *Id.* Blizzard rarely closes accounts. *Id.*

<sup>77</sup> See Sheldon, *supra* note 55, at 769.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 769-70.

<sup>80</sup> *Id.* at 770.

<sup>81</sup> MDY Indus., LLC v. Blizzard Entm’t, Inc., No. CV-06-02555-PHX-DGC, 2008 WL 2757357 (D. Ariz. July 14, 2008) at \*1.

<sup>82</sup> A third-party program is any program developed by someone other than the original software developer, which modifies the original program. Blizzard, Hacks and Third-party Programs, [http://us.blizzard.com/support/article.xml?locale=en\\_US&articleId=21133](http://us.blizzard.com/support/article.xml?locale=en_US&articleId=21133) (last visited Jan. 2, 2010).

<sup>83</sup> Glider, [www.mmoglider.com/default.aspx?LS=54694](http://www.mmoglider.com/default.aspx?LS=54694) (last visited Jan. 20, 2009).

<sup>84</sup> *Id.*

<sup>85</sup> MDY Indus., LLC, 2008 WL 2757357, at \*1; Glider can be purchased for \$25.00. Glider, Frequently Asked Questions, [www.mmoglider.com/FAQ.aspx](http://www.mmoglider.com/FAQ.aspx) (last visited Jan. 20, 2009).

Best priest just quit your guild, but got no good recruits? Want to find out if you should have picked a mage instead of a warlock, but don't want to spend all that hard . . . game time again? Want to get some rogue-riffic revenge on those guys sneaking up on you in Battlegrounds? Those are the problems that the Glider solves.<sup>86</sup>

WoW players can tailor Glider to their own preferences, instructing it to accomplish specific tasks, such as killing a particular monster.<sup>87</sup> Once the player instructs Glider, the program works automatically, allowing the player to return to his computer later and resume playing with the added experience and valuable items Glider earned in the meantime.<sup>88</sup> All a player has to do after launching Glider is to locate an area of monsters to kill, indicate to Glider the radial area the player wants his avatar to patrol, and specify the monsters the player wants to kill.<sup>89</sup>

Players who really want to take full advantage of Glider can “dual box,”<sup>90</sup> which allows a player to have one Glider account active on more than one computer at the same time. Before Blizzard took an active interest in Glider use, Glider had become so widely utilized within avid gaming circles that software developers created third-party add-ons for Glider itself.<sup>91</sup> Thus, there was a third-party program for the third-party program.

MDY recognizes that Glider, its program, is against Blizzard's TOU,<sup>92</sup> and tells its customers as much: “If you are detected using Glider, your account will be suspended for 72 hours and very likely banned completely.”<sup>93</sup> MDY further warns its customers that they use Glider at their own risk.<sup>94</sup> MDY also has a community forum that, in part, is used to advise its users of account closings that may be due to Glider use.<sup>95</sup> These bans often occur in waves when Blizzard changes its monitoring

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<sup>86</sup> Glider, Frequently Asked Questions, *supra* note 85.

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> Dual boxing, or multiboxing describes one player using multiple computers at one time to be active on more than one account at one time. WoWWiki, Multiboxing, <http://www.wowwiki.com/Multiboxing> (last visited Jan. 20, 2009).

<sup>91</sup> Glider, Forums, Best Addons for use with Glider, <http://vforums.mmoglider.com/showthread.php?t=80> (last visited Jan. 6, 2010).

<sup>92</sup> Glider, Frequently Asked Questions, *supra* note 85.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Glider, Forums, Ban Wave in Progress, May 20, 2008, [vforums.mmoglider.com/showthread.php?t=148301](http://vforums.mmoglider.com/showthread.php?t=148301) (last visited Jan. 6, 2010).

“Warden”<sup>96</sup> program or updates the game client and scans a user’s computer<sup>97</sup> before Glider changes its detection evasion coding.<sup>98</sup>

In order to facilitate a player’s Glider use, Glider has defense mechanisms to lower Blizzard’s detection rate of the program.<sup>99</sup> Glider is able to evade detection when Blizzard searches a user’s computer for illegal third-party programs.<sup>100</sup> This feature is what makes Glider such a difficult problem for Blizzard to solve, thus causing Blizzard to divert resources from improving the game to combat Glider.<sup>101</sup>

The legal implications of the Glider program under the Copyright Act arose in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,<sup>102</sup> the subject of Part III.

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<sup>96</sup> Warden is a program used by Blizzard to detect when a player is using an unauthorized third-party program. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, No. CV-06-02555-PHX-DGC, 2008 WL 2757357, at \*11 (D. Ariz. July 14, 2008). Warden detects Glider in two ways. *Id.* First, it will scan the player’s computer to locate the Glider program. *Id.* If Warden does detect Glider, Blizzard will deny the player access to the game server. *Id.* Second, Warden scans the user’s computer while playing WoW as well. *Id.* Again, if Warden detects Glider, “Blizzard revokes access to the game.” *Id.*

<sup>97</sup> Players consent to these computer scans under Section 17(A) of the TOU. World of Warcraft, World of Warcraft Terms of Use, *supra* note 64. Players who do not consent are unable to launch the game. The enforceability of these online click-wrap agreements is outside the scope of this note. *See generally* Kaustuv M. Das, *Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481 (2002). In Blizzard’s TOU, Blizzard capitalized the entire provision. However, that may not matter. For example, to prove a point, PC Pitstop, an internet site offering antivirus and internet speed scans, provided in one of its EULAs that if anyone emailed a certain email address listed in its EULA, the sender would receive \$1000. Larry Magid, *It Pays to Read License Agreements*, PC PITSTOP NEWSL., Feb. 16, 2005, <http://www.pcpitstop.com/spycheck/eula.asp>. After four months and three thousand downloads, someone finally wrote in to receive the money. *Id.* Further illustration of the absurdity of click-wrap contracts can be found in Google’s Terms of Service that includes a clause barring any person not of legal age from using “any of Google’s Web properties.” Chris Soghoian, *Google: No Kids Allowed*, CNET NEWS, Mar. 27, 2008, [http://news.cnet.com/8301-13739\\_3-9902548-46.html](http://news.cnet.com/8301-13739_3-9902548-46.html). Recently, Apple also mistakenly included a clause in its EULA for the Windows version of Safari (an internet browser), providing that the browser was not to be installed on a PC. Jeff Hinman, *I’m a EULA. I’m a Contract. Apple Fumbles, Exposes EULA Dangers*, LEGALITY, Apr. 30, 2008, available at <http://www.thelegality.com/2008/04/30/i%E2%80%99m-a-eula-i%E2%80%99m-a-contract-apple-fumbles-exposes-eula-dangers/> (last visited Jan. 6, 2010).

<sup>98</sup> *See* On Warden, <http://onwarden.blogspot.com/2008/05/may-20th-ban-wave-wow-242.html> (May 20, 2008, 6:14PM).

<sup>99</sup> *See* Glider, Frequently Asked Questions, *supra* note 85.

<sup>100</sup> *See id.*

<sup>101</sup> *MDY Indus., LLC*, at \*15.

<sup>102</sup> No. CV-06-02555-PHX-DGC, 2008 WL 2757357 (D. Ariz. July 14, 2008).

III. *MDY INDUSTRIES, LLC v. BLIZZARD ENTERTAINMENT, INC.*

The main copyright issue that arose in MDY Industries was whether a user infringed Blizzard's copyright in WoW on the ground that whenever a user launched Glider in conjunction with WoW, the user created unauthorized "copies" of those programs in the computer's RAM because Glider use violated WoW's EULA and TOU.

A. *Facts/Claims*

On October 25, 2006, Blizzard representatives traveled to the home of MDY Industries's founder Michael Donnelly and advised him that MDY's Glider sales violated Blizzard's copyright in WoW.<sup>103</sup> Blizzard told Donnelly that if he did not agree to stop selling Glider, they would immediately file a lawsuit against him and MDY.<sup>104</sup> Donnelly refused to stop selling the program, and Blizzard filed suit in Arizona federal district court.<sup>105</sup>

Blizzard claimed that Glider diminished WoW's value, influenced players to deactivate their WoW accounts, and decreased Blizzard's revenue.<sup>106</sup> Due to WoW's meticulously orchestrated competitive balance, Blizzard asserted that players who used Glider were able to unfairly complete tasks

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<sup>103</sup> *Id.* at \*2.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at \*1. Players have terminated their accounts due to other players' Glider use. See EDWARD CASTRONOVA, EFFECTS OF BOTTING ON WORLD OF WARCRAFT® 5 (Nov. 13, 2007), [http://virtuallyblind.com/files/mdy/blizzard\\_msj\\_exhibit\\_7.pdf](http://virtuallyblind.com/files/mdy/blizzard_msj_exhibit_7.pdf). First, players that do not use Glider feel that it is unfair for Glider users who are violating the EULA and TOU to advance through the game more quickly than the users who do not use Glider. See *id.* Second, Glider users, by playing more than humanly possible, negate Blizzard's intent for certain items to cost a certain amount by flooding the in-game WoW economy. See *id.* at 6-8. Thus, a player who does not use Glider will only realize a marginal market return on any in-game goods the user decides to sell. See *id.* at 9. Third, an additional market distortion comes in the form of gold farming, where Glider users sell their in-game currency for "real world" money. See *id.* at 7. Because the average player realizes less of a return from his farming due to Glider users, a user may be forced to buy gold from Glider users to purchase in-game goods, thus decreasing the amount of real-world dollars available for WoW subscription fees, which may force account cancellations. *Id.* at 11. Fourth, Glider use also increases Blizzard's costs of providing WoW by requiring greater customer service costs arising from Glider use complaints, and increasing the cost to technologically eliminate Glider. *Id.* at 14-16. Last, Blizzard markets WoW as an immersive, role-playing, social, in-game experience. *Id.* at 16-17. Glider use is detrimental to this vision in that it incentivizes players to use the game while not at their computers. *Id.* at 18.

throughout the game more quickly than Blizzard intended, and that Glider users lessened the gaming experience for players who did not use Glider.<sup>107</sup> Blizzard further alleged that Glider facilitated “gold farming,”<sup>108</sup> and the selling of in-game gold to other users.<sup>109</sup> Gold farming, like the use of third-party programs, is also expressly prohibited by the TOU.<sup>110</sup>

Specifically, the copyright issue that arose in *MDY* was that whenever a user launched Glider in conjunction with WoW, the user created unauthorized “copies” of those programs in the computer’s RAM because Glider was against WoW’s EULA and TOU.<sup>111</sup> The Ninth Circuit determined in *MAI* that a work copied from software to RAM was sufficiently “fixed in a tangible medium of expression” so that it could be considered a “copy” for purposes of the Copyright Act, because it was present for a period longer than a “transitory duration.”<sup>112</sup>

Nevertheless, software “owners” are permitted to copy software to RAM. Section 117 of the Copyright Act permits the “owner” of a computer program to “copy” software to RAM if the copy was created as an “essential step” in using the program.<sup>113</sup> However, the users in the *MAI* case were not entitled to such a defense because the users were not software

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<sup>107</sup> *MDY Indus.*, 2008 WL 2757357 at \*1.

<sup>108</sup> Gold farming is “an Internet-age phenomenon in which players in less developed countries collect and sell virtual gold . . . to wealthier gamers in the developed world. This enables gamers who have the means to buy virtual gold to get ahead in the games without actually having to accomplish the grunt work.” Dave Rosenberg, *China Bans Online ‘Gold Farming’*, CNET NEWS, June 29, 2009, [http://news.cnet.com/8301-13846\\_3-10275180-62.html](http://news.cnet.com/8301-13846_3-10275180-62.html). Gold farming will often result in bans from the game. *Id.* Gold farming is a one billion dollar industry. Posting of Michael Sacco to WoW.com, <http://www.wow.com/2009/06/29/china-bans-gold-farming> (June 29, 2009 7:40 PM). “Some half a million people in developing nations are working at least part time [farming gold.]” Posting of Mark Hefflinger, to digitalmediawire.com (Aug. 25, 2008, 11:59AM). While gold farming has been big business, China recently banned online gold farming. See Rosenberg, *supra*. Approximately four of every five gold farmers live in China. See Sacco, *supra*.

<sup>109</sup> *MDY Indus., LLC*, 2008 WL 2757357, at \*1.

<sup>110</sup> *Id.* at \*1; see also World of Warcraft, World of Warcraft Terms of Use, *supra* note 64 (Section 9(B)(vii)).

<sup>111</sup> World of Warcraft, World of Warcraft Terms of Use, *supra* note 64 (Section 17(A)).

<sup>112</sup> *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (holding that a computer maintenance company running MAI’s program on its client’s computers as part of a repair job had created an unauthorized “copy” of the software in the RAM of the client’s computer).

<sup>113</sup> *MDY Indus.*, 2008 WL 2757357 at \*6. “It is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided . . . that such a new copy or adaptation is created as an essential step in the utilization of the computer program. . . .” 17 U.S.C. § 117 (2006).



“owners.”<sup>114</sup> Thus, the *MAI* court ruled that users created unauthorized “copies” by merely using software that was then copied into the computer’s RAM.<sup>115</sup> Therefore, the unauthorized copying in *MAI* constituted copyright infringement by a non-owner, as non-owners are not entitled to a Section 117 defense.<sup>116</sup>

Congress intended to render “owners” free from copyright liability for the lawful purchase and use of software, when the software’s use in its intended manner involves the copying of software to RAM.<sup>117</sup> If an “owner” exceeded his license and unlawfully copied software to RAM, the software provider may have a remedy in contract, but not in copyright.<sup>118</sup>

In *MDY*, Blizzard argued that the court should find MDY liable for contributory<sup>119</sup> and vicarious copyright infringement<sup>120</sup> because the individuals who purchased WoW were not “owners” of the game, but instead were licensees, who may not take advantage of the Section 117 safe harbor.<sup>121</sup> Under

<sup>114</sup> *MAI Systems Corp.*, 991 F.2d at 518 n.5.

<sup>115</sup> *Id.* at 518-19.

<sup>116</sup> *Id.* at 518 n.5 & 518-19.

<sup>117</sup> “Because the placement of a work into a computer is the preparation of a copy, the law should provide that persons in rightful possession of copies of programs be able to use them freely without fear of exposure to copyright liability.” CONTU REPORT, *supra* note 1, at 13. Indeed, the situation in MDY is exactly the situation that CONTU commission intended to protect in its recommendations to Congress concerning the Copyright Act. *Id.* The commission stated,

Obviously creators, lessors, licensors, and vendors of copies of programs intend that they be used by their customers, so that rightful users would but rarely need a legal shield against potential copyright problems. It is easy to imagine, however, a situation in which the copyright owner might desire, for good reason or none at all, to force a lawful owner or possessor of a copy [of a program] to stop using a particular program. One who rightfully possesses a copy of a program, therefore, should be provided with a legal right to copy it to that extent which will permit its use by that possessor.

CONTU REPORT *supra* note 1, at 13.

<sup>118</sup> CONTU REPORT, *supra* note 1, at 13-14 (“Should proprietors feel strongly that they do not want rightful possessors of copies of their programs to prepare such adaptations, they could . . . make such desires a contractual matter.”).

<sup>119</sup> “A person commits contributory copyright infringement by ‘intentionally inducing or encouraging direct infringement.’” *MDY Indus., LLC*, 2008 WL 2757357 at \*3 (quoting *MGM Studios Inc. v. Grokster*, 545 U.S. 913, 930 (2005)).

<sup>120</sup> “A person commits vicarious infringement ‘by profiting from direct infringement while declining to exercise a right to stop or limit it.’” *Id.* at \*3 (quoting *MGM Studios Inc. v. Grokster*, 545 U.S. at 930). The court also ruled on summary judgment for MDY’s alleged infringement of Sections 1201(a)(2) and 1201(b)(1) of the Digital Millennium Copyright Act, *see id.* at \*10-14, tortious interference with contract, *see id.* at \*14-16, and unjust enrichment, *see id.* at \*17. These rulings are outside the scope of this Note.

<sup>121</sup> *MDY Indus., LLC*, 2008 WL 2757357 at \*3.

Blizzard's argument, if the purchasers were licensees, they would not be entitled to a Section 117 defense, and thus MDY may be liable for the underlying direct copyright violations.

Blizzard framed its argument in the context of the Ninth Circuit's decisions in *MAI* and *Wall Data*, which held that when software providers utilize a EULA to restrict a purchaser's property interest in software to that of a licensee, the computer program purchasers are not "owners" of the software and are precluded from utilizing Section 117's shield.<sup>122</sup>

Specifically, the *Wall Data* court held that if the copyright holder clearly stated that it only granted the purchaser a license to the software copy, and imposed significant restrictions on that purchaser's ownership interests in terms of redistribution or copying, the purchaser was only licensed to use the software and could not be considered an "owner" under Section 117.<sup>123</sup> In *Wall Data*, the Los Angeles County Sheriff's Department contracted with Wall Data, a developer and seller of computer programs, to purchase eight CD-ROMs that contained Wall Data's terminal emulation program,<sup>124</sup> "RUMBA."<sup>125</sup> Each CD-ROM contained two hundred fifty licenses, for a total of two thousand licenses.<sup>126</sup> However, the parties disagreed as to the relationship between the copies of the software and the license. The Sheriff's Department claimed that it purchased 2,000 *copies* of RUMBA, while Wall Data contended that the Sheriff's Department only bought 2,000 *licenses* of RUMBA.<sup>127</sup> Subsequently, the Sheriff's Department purchased additional RUMBA licenses, which brought it to a total of 3,663 licenses.<sup>128</sup> In order to facilitate the opening of its new detention facility, the Sheriff's Department decided to simultaneously install the RUMBA software onto all

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<sup>122</sup> *See id.*

<sup>123</sup> *Wall Data Inc. v. Los Angeles Cty. Sheriff's Dep't.*, 447 F.3d 769, 785 (9th Cir. 2006).

<sup>124</sup> A terminal emulator is a program that makes a computer "appear to look like another, usually older type of terminal so that a user can access programs originally written to communicate with the other terminal type." SearchNetworking.com, What is Terminal Emulation?, [http://searchnetworking.techtarget.com/sDefinition/0,,sid7\\_gci213121,00.html](http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci213121,00.html) (last visited Jan. 20, 2009).

<sup>125</sup> *Wall Data*, 447 F.3d at 774.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 774 n.2.

<sup>128</sup> *Id.* at 774.

of its 6,007 computers in the new facility, exceeding the 3,663 purchased licenses.<sup>129</sup>

Wall Data learned of the Sheriff's Department's actions and sued for copyright infringement.<sup>130</sup> Wall Data claimed that because the Sheriff's Department over-installed the RUMBA software onto its computers, it violated the terms contained in Wall Data's shrink-wrap,<sup>131</sup> click-wrap,<sup>132</sup> and volume license agreement.<sup>133</sup> Therefore, because Wall Data clearly stated that it only granted the purchaser a license to the software copy, and imposed significant restrictions on that purchaser's ownership interests in terms of redistribution or copying, the court considered the purchaser an unprotected licensee rather than an "owner" who could avail itself of a Section 117 safe harbor defense.<sup>134</sup>

Under the *MAI* and *Wall Data* precedent, the *MDY* court awarded Blizzard summary judgment<sup>135</sup> on its claims for contributory and vicarious copyright infringement. Section 106 of the Copyright Act grants the "owner" of a copyright the exclusive right to "reproduce" the copyrighted work or to prepare derivative works<sup>136</sup> based upon the work, or to distribute copies of work to the public.<sup>137</sup> Further, under Section

<sup>129</sup> *Id.* at 774-75.

<sup>130</sup> *Id.*

<sup>131</sup> A "shrink-wrap license" is a "form on the packing or on the outside of the CD-ROM containing the software which states that by opening the packaging or CD-ROM wrapper, the user agrees to the terms of the license." *Id.* at 774 n.4.

<sup>132</sup> A "click-through license" is a "form embedded in computer software which requires the person initially installing the software onto a computer to affirmatively click a box or an 'accept' button indicating that the user accepts the terms of the license in order to complete the software installation and to use the software after it is installed." *Id.* at 775 n.5.

<sup>133</sup> *Id.* at 775.

<sup>134</sup> *Id.* at 785.

<sup>135</sup> Summary judgment may be granted if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citations omitted).

<sup>136</sup> A "derivative work" is a "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101 (2006).

<sup>137</sup> *Id.* § 106; see also *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-02555-PHX-DGC, 2008 WL 2757357, at \*2 (D. Ariz. July 14, 2008).

501 of the Copyright Act, anyone who violates one of the exclusive rights granted to the copyright holder in Section 106 is an infringer of the copyright.<sup>138</sup>

Applying the *Wall Data* reasoning to *MDY* and looking to the restrictions on ownership Blizzard dictated in its EULA and TOU, the *MDY* court determined that first, Blizzard's EULA stated that it granted a limited license,<sup>139</sup> and second, Blizzard imposed significant restrictions on the transfer and use of the game client software.<sup>140</sup> In further support of Blizzard's argument in favor of classifying a WoW purchaser as a licensee instead of an "owner," Blizzard pointed out the notices on WoW's box, the paper copy of the EULA in WoW's box, and the online notices that appeared when the user installed the WoW game client, which all notified the purchaser of his limited rights in the game as licensees.<sup>141</sup> Therefore, when users launched WoW using Glider, they exceeded Blizzard's license and created infringing copies of the game.<sup>142</sup> Just as in *Wall Data*, the Court refused to afford MDY a Section 117 defense because of Blizzard's restrictive EULA language.<sup>143</sup>

Although *Wall Data's* result may arguably be sound under its facts, *MDY's* facts make clear *Wall Data's* faulty underlying reasoning. Ultimately, allowing a copyright holder to restrict a consumer's legal rights under the Copyright Act by merely including restrictive language in a click-wrap or shrink-wrap contract is inequitable. As seen in today's marketplace, because a shrink-wrap EULA may be the beginning and end of the inquiry in determining ownership, video game manufacturers, music companies, and other software providers only need to include restrictive boilerplate language in their EULAs and TOUs to hold purchasers who exceed these license terms liable for copyright infringement.<sup>144</sup> Illustrating the unfairness of this result, as one commentator suggested, "[n]either the traditional norms of contract law nor the policies behind the protection of intellectual property support

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<sup>138</sup> 17 U.S.C. § 501; see also *MDY*, 2008 WL 2757357, at \*2.

<sup>139</sup> *MDY*, 2008 WL 2757357, at \*8.

<sup>140</sup> *Id.* at \*9.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*3.

<sup>143</sup> *Id.* at \*8-9.

<sup>144</sup> Sherwin Siy, *MDY v. Blizzard: Cheating at WoW May Be Bad, but It's Not Copyright Infringement*, May 5, 2008, <http://www.publicknowledge.org/node/1546> (last visited Mar. 1, 2010).

enforcement of agreements that exist primarily to frustrate public legislation.”<sup>145</sup> Here, Congress intended Section 117 of the Copyright Act to protect software purchasers from copyright liability for making incidental copies of software to RAM.<sup>146</sup> A software provider should not be allowed to thwart that legislative purpose by providing in its EULAs that they sell nothing, and license everything.

Further illustrating *MAI*'s and *Wall Data*'s problematic owner-licensee distinction is the experience of an ordinary purchaser from that purchaser's perspective. One who purchases a copy of *WoW* from her local electronics retailer and leaves the store with the software, never obligated to return the software to the store as if she had temporarily leased the software, would never think she only purchased a software license. On the contrary, the customer would think she purchased a copy of software.<sup>147</sup> The person could dispose of the software copy as she chooses by throwing it in the trash, giving it to a friend, or installing it on her computer.<sup>148</sup> All of these activities are consistent with ownership powers.<sup>149</sup>

Admittedly, allowing software providers to limit a purchaser's rights has several benefits. For example, it is a simple rule to administer. If the software provider implements restrictive language in its EULA, the court need not look elsewhere to discern the purchaser's rights. Further, if the software provider only wants to sell licenses to its software and courts begin holding that the providers are actually selling ownership rights to the particular copy, software providers may stop selling certain software altogether or may adjust prices or other terms.

Nevertheless, the court's method of looking only to the software provider's restrictive EULA language as the dispositive issue in classifying a purchaser as an "owner" or a licensee of the software is ultimately inequitable.

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<sup>145</sup> Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 *GEO. MASON L. REV.* 93, 94 (2006).

<sup>146</sup> CONTU REPORT, *supra* note 1, at 13-14.

<sup>147</sup> *MDY*, 2008 WL 2757357, at \*9.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

IV. *MDY* WAS INCORRECT

The *MDY* court's ruling was incorrect for three reasons. First, the First Sale Doctrine under *Wise* more equitably allocates the rights between software purchasers and software providers by focusing on the economic realities of the underlying transaction to discern whether a software purchaser is an "owner" or licensee of the software. Second, Lockean labor desert theory counsels in favor of more substantial, though not absolute, protection of the users' rights when considering how purchasers utilize their software after the transaction. Third, copyright law's underlying policies suggest greater protection for purchasers because the illusory rights the Ninth Circuit afforded to software users stymie creative development far out of proportion to what Congress intended under the Copyright Act. In *MDY*, the court afforded no rights to software users, but instead merely deferred to what Blizzard provided to the purchasers in its EULA.<sup>150</sup> This is exactly the situation that Congress feared and enacted Section 117 to prevent.<sup>151</sup>

A. *First Sale Doctrine*

## 1. Precedent

*MDY* argued that notwithstanding the *Wall Data* decision, WoW purchasers were software "owners" rather than licensees under the First Sale Doctrine as articulated in *Wise*,<sup>152</sup> and the copying of software to RAM was an "essential step" in using the game client software.<sup>153</sup> According to *MDY*, under Section 117 of the Copyright Act, the software purchasers were authorized to copy the game client software to RAM through the license they acquired when they bought the game.<sup>154</sup> Thus, by creating the RAM copies, Glider users did not infringe upon Blizzard's copyright; they only breached a contract.<sup>155</sup> Therefore,

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<sup>150</sup> *Id.* at \*8-9.

<sup>151</sup> See *supra* note 118 and accompanying text.

<sup>152</sup> *MDY*, 2008 WL 2757357 at \*3.

<sup>153</sup> *Id.* at \*8.

<sup>154</sup> *Id.* at \*3.

<sup>155</sup> *Id.* This distinction is significant because breach of contract damages are generally limited to the value of the actual loss caused by the breach. 24 RICHARD A. LORD, WILLISTON ON CONTRACTS § 65:1, at 213 (4th ed. 2002). In contrast, copyright damages include the copyright owner's actual damages and any additional profits of the infringer or statutory damages. See 17 U.S.C. § 504 (2006).

Glider users did not infringe Blizzard's copyright even when using Glider in violation of Blizzard's EULA and TOU.<sup>156</sup>

*Wise* and *Vernor* defended against the frustration of legislative intent through restrictive private contractual language as seen in *MDY*. In *Wise*, Woodrow Wise, Jr. operated a business that distributed lists of copyrighted movies that he sold to film enthusiasts for home use.<sup>157</sup> Each list included a provision stating, "used film for sale. Sold from one private movie collector to another for home showing only. No rights given or implied."<sup>158</sup> Witnesses who testified against Wise stated that the movie studios that held the copyright to these films did not sell the films to the purchasers, but only licensed their use for specific purposes for a limited time.<sup>159</sup> The studio licenses provided that the studio retained all rights in and title to the movies, and the license further restricted the licensees to only use the movies for their personal use.<sup>160</sup> Further, the copyright holders distributed the films pursuant to a theatrical license agreement, which stated "[t]he distributor grants the Exhibitor and the Exhibitor accepts a limited license under the respective copyrights of the motion picture . . . to exhibit said motion picture."<sup>161</sup> The United States criminally prosecuted Wise for copyright infringement due to Wise's unauthorized film sales in violation of these restrictive licensing terms.<sup>162</sup> Just as in *MDY*, Wise argued in his defense that he was an "owner" and not a licensee of the films.<sup>163</sup>

In contrast to the Ninth Circuit's restrictive decisions in *MAI* and *Wall Data*, the *Wise* Court invoked the First Sale Doctrine.<sup>164</sup> The First Sale Doctrine provides that the Copyright

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<sup>156</sup> *MDY*, 2008 WL 2757357, at \*8.

<sup>157</sup> *United States v. Wise*, 550 F.2d 1180, 1183-84 (9th Cir. 1977).

<sup>158</sup> *Id.* at 1184.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1190.

<sup>162</sup> *Id.* at 1185.

<sup>163</sup> *Id.*

<sup>164</sup> "The first sale doctrine is a narrow limitation on a copyright holder's rights." *Vernor v. Autodesk*, 555 F. Supp. 2d 1164, 1168 (W.D. Wash. 2008). Under the Copyright Act, a copyright holder has the exclusive right to copy his work, 17 U.S.C. § 106(1) (2006); to prepare derivative works, *id.* § 106(2); and to distribute copies of his work, *id.* § 106(3). The first sale doctrine was first articulated in *Bobbs-Merrill Co. v. Strauss*, where a book publisher attempted to restrict resale of a book through a license agreement prohibiting resale for less than one dollar. *Bobbs-Merrill Co. v. Strauss*, 210 U.S. 339, 341 (1908). Defendants sold the book for 89 cents. *Id.* at 342. The court concluded, "[i]n our view the copyright statutes . . . do not create the right to impose, by

Act shall not “forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.”<sup>165</sup> Thus, when a copyright owner first sells a copy of its copyrighted work, the owner is thereafter precluded from using his exclusive right of distribution to prevent the resale of that same copy.<sup>166</sup> The copyright holder still holds the exclusive right to reprint and copy its work, but the purchaser earns the right to sell the transferred copy. Indeed, “the copyright is distinct from the property which is copyrighted, and the sale of one does not constitute a transfer of the other.”<sup>167</sup> Therefore, under the First Sale Doctrine, if the purchaser breaches a contract by selling a copy of a copyrighted work he may be held liable for breach of contract, but not for copyright infringement.<sup>168</sup>

Further, in contrast to the *Wall Data* and *MDY* decisions, which merely considered the software providers’ restrictive EULA language in determining ownership, the *Wise* court looked outside the “four corners” of the contract to discern the rights for which the parties actually bargained.<sup>169</sup> The *Wise* court found that most of *Wise*’s purchases were licenses because the transfer contracts between *Wise* and the film studios transferred only the rights to show or distribute the films for a limited period of time, and *Wise* was to return the films at the end of the license.<sup>170</sup> Even though some of the licenses did not expressly specify the copyright holder reserved title, the court concluded that such a clause was not necessary “where the general tenor of the entire agreement [was] inconsistent with such a conclusion.”<sup>171</sup> Based on this reasoning, the *Wise* court found sales in two instances<sup>172</sup> regardless of other limitations on use.<sup>173</sup>

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notice . . . a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.” *Id.* at 350.

<sup>165</sup> *Wise*, 550 F.2d at 1187; *see also* 17 U.S.C. § 109.

<sup>166</sup> *Id.* at 1187.

<sup>167</sup> *Id.* at 1187 n.9. “[O]wnership of a thing is always separate from ownership of the intellectual property embedded in a thing. Ownership of a book is not ownership of the intellectual property of the novel that the author wrote. The book purchaser owns the physical book, nothing more.” *Fairfield*, *supra* note 70, at 1096.

<sup>168</sup> *Wise*, 550 F.2d at 1187 n.10.

<sup>169</sup> *Id.* at 1190.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1191.

<sup>172</sup> *Id.* at 1191-92.

<sup>173</sup> The limitations on use in these contracts were quite severe. *Id.* at 1192. In one agreement, Warner Brothers sold a print of “Camelot” to Vanessa Redgrave



The First Sale Doctrine as applied in *Wise* related to movie sales, but it has been recently applied by a Ninth Circuit district court to sales of computer software packages like the transactions in *MDY*.<sup>174</sup> In *Vernor*, Plaintiff Timothy Vernor, an eBay entrepreneur, lawfully purchased a used Autodesk software package at a garage sale, and auctioned it on eBay.<sup>175</sup> Included in the package was Autodesk's license agreement.<sup>176</sup> Autodesk sent notice to eBay and claimed that Vernor's sales violated Autodesk's copyright in its software;<sup>177</sup> eBay cancelled the auction.<sup>178</sup> Vernor sent eBay a counter-notice<sup>179</sup> asserting that the software package sale was lawful.<sup>180</sup> After no response from Autodesk, eBay resumed the auction.<sup>181</sup>

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whereby Ms. Redgrave was to pay \$401.59 for the print. *Id.* According to the contract terms, Ms. Redgrave was required to have the print in her possession "at all times"; she was not allowed to sell, lease, license or loan the print; and was restricted from exhibiting it for profit. *Id.* The *Wise* court nevertheless determined this purchase to be a sale instead of a license. *Id.*

<sup>174</sup> See *Vernor v. Autodesk*, 555 F. Supp. 2d 1164 (W.D. Wash. 2008). Following *Wise*, the first sale doctrine has also recently been applied to protect a seller of promotional music CDs against a copyright infringement action. See *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1058 (C.D. Cal. 2008). In *UMG*, a promotional CD contained a license restricting its transfer, but did not contemplate the return of the CDs. *Id.* The court held that licensing language is not dispositive in creating a license; instead, "courts must analyze the 'economic realities' of the transaction." *Id.* at 1060 (citing to *Microsoft Corp. v. DAK Indus.*, 66 F.3d 1091, 1095 (9th Cir. 1995)). The court emphasized that "perpetual possession" without the copyright holder intending the item to be returned is a hallmark of ownership and a sale. *Id.* Thus, UMG still had the exclusive right to distribute and make copies of the copyrighted music, but the copy that the consumer purchased could be resold. See Matthew Schroettig, "Damn The Man!" *The Ability To Sell Second-Hand CDs*, THE LEGALITY, Oct. 16, 2008, <http://www.thelegality.com/2008/10/16/%E2%80%9Cdamn-the-man%E2%80%9D-the-ability-to-sell-second-hand-cds/> (last visited Mar. 3, 2010).

<sup>175</sup> *Vernor*, 555 F. Supp. 2d at 1165.

<sup>176</sup> *Id.* at 1165 n.1. "The License Agreement grants a nonexclusive, nontransferable license to use the enclosed program . . . according to the terms and conditions herein." The license imposed several restrictions on software purchasers such as limiting the number of computers on which the software may be installed, limiting the number of users, "software copying and copying of documentation" and prohibiting "rent, lease, or transfer [of] all or part of the Software, Documentation, or any rights granted hereunder to any other person without Autodesk's prior consent." *Id.* at 1166 (citation omitted) (internal quotation marks omitted).

<sup>177</sup> *Id.* at 1165.

<sup>178</sup> *Id.*

<sup>179</sup> Internet content providers such as eBay enjoy protection from secondary liability for copyright infringement through a take-down notice regime. 17 U.S.C. § 512(c) (2006). Generally, once a content owner sends notice to the content provider of the allegedly infringing content, the content provider will be immune from liability so long as the provider promptly disables access to the material, notifies the user that posted the allegedly infringing material, and did not have actual or constructive knowledge of the allegedly infringing material. *Id.*

<sup>180</sup> *Vernor*, 555 F. Supp. 2d at 1165.

<sup>181</sup> *Id.*

Several years later, Vernor purchased three more Autodesk software packages at an office sale from CTA, an architecture firm.<sup>182</sup> Again, the same process occurred: Vernor auctioned one of the software packages, Autodesk sent notice to eBay to cancel the auction, to which Vernor would respond with his own counter-notice, and the auction was reinstated.<sup>183</sup> However, when Autodesk objected to Vernor's fourth eBay software package auction, eBay suspended Vernor's eBay account for repeatedly infringing its policies by selling the copyrighted software.<sup>184</sup> Vernor filed a declaratory judgment action to establish the legality of the sales.<sup>185</sup>

As in *Wise*, the *Vernor* court held that Vernor's sales were immunized under the First Sale Doctrine.<sup>186</sup> According to the court, "[t]he First Sale Doctrine permits a person who owns a lawfully-made copy of a copyrighted work to sell or otherwise dispose of the copy."<sup>187</sup> Thus, because Vernor lawfully owned the software packages when he purchased them from CTA, he could sell or dispose of them as he wished.<sup>188</sup> The *Vernor* court recognized that the first sale extinguished the copyright holder's ability to further control that copy's distribution.<sup>189</sup>

The critical question for the *Vernor* court, as in *MDY*, was whether Autodesk sold the software packages to CTA or merely authorized a license.<sup>190</sup> Without a sale, Vernor would not have acquired ownership of the copy within the meaning of Section 109(a) of the Copyright Act, and therefore could not rely on the First Sale Doctrine.<sup>191</sup> But if the transactions were sales instead of licenses, breaching the terms of the license would "give rise, at most, to a breach of contract claim."<sup>192</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1165-66.

<sup>184</sup> *Id.* at 1166.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1168.

<sup>187</sup> *Id.* "Notwithstanding the provisions of section 106(3) [17 USCS § 106(3)], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." *Id.* (quoting 17 U.S.C. § 109(a)).

<sup>188</sup> *Id.* "For example, the first sale doctrine permits a consumer who buys a lawfully made DVD copy of 'Gone With the Wind' to resell the copy, but not to duplicate the copy." *Id.*

<sup>189</sup> *Id.* (citing *United States v. Wise*, 550 F.2d 1180, 1187 (9th Cir. 1977)).

<sup>190</sup> *Id.* at 1169.

<sup>191</sup> *Id.* at 1168 (citing *Quality King Distribs., Inc. v. Lanza Research Int'l, Inc.*, 523 U.S. 135, 146-47 (1998)); see also *Wise*, 550 F.2d at 1188-89.

<sup>192</sup> *Vernor*, 555 F. Supp. 2d at 1169 (citations omitted)

In contrast to *Wall Data*, where the court only looked to the EULA language to determine whether the purchaser owned or was licensed to use the software,<sup>193</sup> the *Vernor* court, following *Wise's* reasoning, stated that there was no "bright line rule" to easily determine a purchaser's classification as an "owner" or a licensee.<sup>194</sup> Further, the *Vernor* court explicitly refused to grant conclusive weight to the restrictive language used by the providers in the transaction.<sup>195</sup> Instead, the *Vernor* court analyzed the entirety of both the agreement and the transaction to determine whether the purchase should be considered a sale.<sup>196</sup> Thus, in contrast with *MDY*, the *Vernor* court gave proper deference to Congress' intent of protecting software users from copyright liability under Sections 109 and 117 of the Copyright Act by looking to what the parties actually transacted for, and not solely what the software provider claimed it was selling.<sup>197</sup>

The *Vernor* court concluded that the critical factor in determining whether a purchase was a license or a sale was whether the purchaser was required to return the purchased copy to the copyright holder.<sup>198</sup> Therefore, even though CTA's purchases of Autodesk's software contained limitations on its use, because CTA purchased the copies for a one-time payment at the time of sale and the contract allowed CTA to retain possession of the program, the purchases constituted a sale.<sup>199</sup>

The *Vernor* court explicitly noted the conflicting Ninth Circuit decisions in *MAI* and *Wise*,<sup>200</sup> and its language suggests that it believes *MAI* was incorrectly decided.<sup>201</sup> Indeed, the *Vernor* court pointed out that the *MAI* court neither cited *Wise*, the previously binding Ninth Circuit precedent, nor supplied

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<sup>193</sup> *Wall Data Inc. v. L.A. County Sheriff's Dept.*, 447 F.3d 769, 785 (9th Cir. 2006).

<sup>194</sup> *Vernor*, 555 F. Supp. 2d at 1169 ("[t]he label placed on the transaction is not determinative.").

<sup>195</sup> *Id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See id.* at 1169-70.

<sup>198</sup> *Id.* at 1170. Indeed, "[e]ven a complete prohibition on the further transfer of the print (as in the Redgrave Contract), or a requirement that the print be salvaged or destroyed, was insufficient to negate a sale where the transferee was not required to return the print." *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1171-74.

<sup>201</sup> *Id.* at 1171-72 ("In a single footnote, without analysis or explanation, the [*MAI*] court declared that 'since *MAI* licensed its software, its customers do not qualify as 'owners' of the software and are not eligible for protection under § 117.' The court did not cite *Wise*.") *Id.* at 1171.

any reasoning to support its determination that the purchaser was only a licensee of the software.<sup>202</sup> In contrast with *Wise*'s reasoning, the *MAI* court looked only at the limiting terms of the license to see whether the purchase was a sale or a license, and failed to assess the "general tenor" of the agreement in making its determination.<sup>203</sup> Due to the restrictions on the license, if the *Vernor* court followed *MAI* and its progeny, CTA would have merely received a license for the software packages.<sup>204</sup> Nonetheless, the *Vernor* court followed *Wise*'s reasoning, and held that because Autodesk sold the software packages to CTA and Mr. Vernor lawfully purchased the software from CTA, Mr. Vernor was an "owner" of the copy and was entitled to a Section 117 defense.<sup>205</sup>

## 2. *MDY* and the First Sale Doctrine

The *MDY* court, without elaboration, acknowledged the *MAI* and *Wall Data* decisions as binding precedent and refused to follow *Wise*, thus undermining Congress's intent in protecting software purchasers from extensive copyright liability under Section 117 of the Copyright Act.<sup>206</sup>

The district court, while noting *Wise*, doubted the outcome of *MDY*'s facts under *Wise*.<sup>207</sup> The court stated that under *Wise*, a transaction is a license when the purchaser never receives title in the transaction.<sup>208</sup> Blizzard, in its EULA, provides "that Blizzard explicitly retains title to 'all copies' of the game client software."<sup>209</sup> However, this reasoning is flawed in that it focuses solely on the copyright holder's restrictive EULA terms and fails to consider the economic realities of the transaction, as *Wise* requires.<sup>210</sup>

Applying the reasoning of *Wise* to *MDY*'s facts, when a user purchases a copy of WoW, the user obtains one copy of the

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<sup>202</sup> *Id.*

<sup>203</sup> *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-18 (9th Cir. 1993).

<sup>204</sup> *Vernor*, 555 F. Supp. 2d at 1172.

<sup>205</sup> *Id.* at 1174-75.

<sup>206</sup> See *supra* note 117 and accompanying text.

<sup>207</sup> *MDY Indus., LLC v. Blizzard Entm't, Inc.*, No. CV-06-02555-PHX-DGC, 2008 WL 2757357, at \*10 n. 7 (D. Ariz. July 14, 2008).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *United States v. Wise*, 550 F.2d 1180, 1191 (9th Cir. 1977).

software for a one-time payment<sup>211</sup> from either a retail store or a website.<sup>212</sup> The user is not required to return the purchased copy, is not required to pay Blizzard to retain possession of the copy, and may destroy the copy if the purchaser wishes.<sup>213</sup> These are not characteristics of mere licenses, but are consistent with ownership powers. The *Wise* inquiry is concerned with the economic and social realities of the transaction, not just the restrictive language that copyright holders provide in their contract terms to limit users' rights.<sup>214</sup> Under *Wise*, a WoW purchaser would likely be classified as a software "owner" and, therefore, would be entitled to a Section 117 defense against copyright infringement. Thus, the District Court of Arizona erred in ignoring *Wise* and its progeny.

### B. *Lockean Labor Desert Theory*

In this section, I argue that Lockean labor desert theory should at least influence courts towards classifying a WoW user as a software "owner" instead of a licensee for the purpose of a Section 117 defense, given an MMORPG player's time and labor investment into the virtual world. Because MMORPG users invest substantial amounts of time and money into their avatars' development, they should be afforded more substantial rights in their ability to use the game as they wish, free from fear of liability for copyright infringement.

"Video games are big business."<sup>215</sup> "Millions of people play these games," and their subscription fees make the operators very profitable.<sup>216</sup> In addition to the subscription fees the operators receive, many other MMORPGs, though not WoW, receive advertising dollars from major corporations such as Intel and McDonald's that cater to the gaming community.<sup>217</sup> While the Copyright Act protects the profits of owners, the game players whose time and effort enable those profits

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<sup>211</sup> See Public Knowledge, *supra* note 2, at 15.

<sup>212</sup> See *id.* at 17.

<sup>213</sup> See *id.* at 18.

<sup>214</sup> *Wise*, 550 F.2d at 1191.

<sup>215</sup> Kenneth Hwang, *Blizzard Versus BNETD: A Looming Ice Age for Free Software Development?*, 92 CORNELL L. REV. 1043, 1046 (2006); "Virtual worlds are becoming more important in the lives of average citizens. These virtual worlds produce real effect in the real world." Kayser, *supra* note 71, at 85.

<sup>216</sup> Kayser, *supra* note 71, at 62.

<sup>217</sup> Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 8 (2004).

deserve consideration as well.<sup>218</sup> Because MMORPGs are qualitatively different from most property purchases in how the players interact with their purchase by “living” in the virtual world and investing an extraordinary amount of time and effort into the world, an operator should not be able to merely utilize a EULA to impose unilateral restrictions upon its virtual world inhabitants.

An MMORPG player’s immense time investment into the virtual world is unlikely to be substantial enough to acquire rights the software provider withheld from the user under the EULA or TOU. The EULA and TOU are binding contracts, and the user activity does not occur at the time of the transaction, but instead occurs *ex post*. However, the user’s labor investment into the virtual world after the transaction should at least influence courts towards classifying a user as an “owner” instead of a licensee for the purpose of a Section 117 defense.<sup>219</sup> In other words, a WoW user’s substantial in-game time investment should not insulate the user from breaching Blizzard’s EULA or TOU contracts, but the user’s *ex post* treatment of the software should be a considerable factor in the court’s inquiry as to whether a user is an “owner” or a licensee of that particular software.

Commentators recognize the internet as a space separate and apart from the “real world,” and view internet commodities as a type of quasi-property.<sup>220</sup> But as illustrated in *MDY*, virtual world disputes have “real world” consequences.<sup>221</sup>

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<sup>218</sup> *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, No. CV-06-02555-PHX-DGC, 2008 WL 2757357, at \*9 (D. Ariz. July 14, 2008). For an interesting article concerning players’ rights, see Raph Koster, *Declaring the Rights of Players*, Aug. 27, 2000, [www.raphkoster.com/gaming/playerrights.shtml](http://www.raphkoster.com/gaming/playerrights.shtml) (advocating that players and avatars receive certain inalienable rights).

<sup>219</sup> “Indeed, if a user’s claim to a virtual product were strong enough, courts might be justified in ignoring the terms of a EULA that limited virtual property rights.” Horowitz, *supra* note 27, at 444. “Through time, effort, and often monetary expenditures, players’ avatars build status in their perspective communities, amass virtual property (usually taking the form of weapons or armor), and gain characteristics advantageous to game play.” Westbrook, *supra* note 35, at 780. Indeed, “many [players] spend[] hundreds of hours per year logged in.” *Id.*

<sup>220</sup> See Jessica Vascellaro, *Yahoo Posts Loss as New Chief Plots Strategy*, WALL ST. J., Jan 29, 2009 at B1 (stating that Yahoo is “a fantastic Internet property. . . . It really doesn’t deserve everybody trying to pick it and pull it apart.”).

<sup>221</sup> Horowitz, *supra* note 27, at 443 (describing far more interesting scenarios such as a Chinese gamer killing someone for stealing an online item, and Anshe Chung, who became the first person to become a millionaire through acquiring virtual property); see also Ross Miller, *WoW Character Sells for Nearly \$10,000*, Joystiq, Sept. 17, 2007 available at [www.joystiq.com/2007/09/17/wow-character-sells-for-nearly-10-000/](http://www.joystiq.com/2007/09/17/wow-character-sells-for-nearly-10-000/) (describing a WoW character with “arguably the best gear in the game” that sold for \$9,700).

Nevertheless, as of now, America does not honor virtual property rights,<sup>222</sup> due in part to the lack of any virtual property litigation or legislation.<sup>223</sup> All of the cases where it appeared the court would have to consider virtual property rights have settled.<sup>224</sup> Many articles discuss the possibility of virtual property rights, and one of the arguments most frequently advocated in favor of recognizing these rights is one based on John Locke's theory of labor desert.

Lockean labor desert theory allocates property rights to those who invest their time and effort in distinguishing an object from a commons.<sup>225</sup> When a person mixes her labor with an object from a commons, the person makes that object her property<sup>226</sup> so long as her labor contributed the greatest part of

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<sup>222</sup> "A virtual property right is a property right in a virtual product." Horowitz, *supra* note 27, at 444; *see also* Westbrook, *supra* note 35, at 782. "[C]omputer code enables [virtual items] to resemble real chattels in their 'rivalrousness, persistence, and interconnectivity.' That is, '[i]f I hold a pen, I have it and you don't . . . If I put the pen down and leave the room, it is still there . . . And finally, you can all interact with the pen.'" Lederman, *supra* note 50, at 1631.

<sup>223</sup> Kayser, *supra* note 71, at 65.

<sup>224</sup> Westbrook, *supra* note 35, at 805. However, a Chinese court acknowledged that virtual property is entitled to some protection, ordering an online gaming company to return the user's virtual items after a hacker stole the items when he hacked the game company's servers. *See* Will Knight, *Gamer Wins Back Virtual Booty in Court Battle*, *NewScientist.com*, December 23, 2003, <http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle.html> (last visited Mar. 1, 2010). In that case, Li Hongchen, a twenty-four year old gamer, spent over two years and \$1,210 buying virtual goods in the online game, "Red Moon." *Id.* A hacker infiltrated Red Moon's servers and raided Hongchen's account. *Id.* Hongchen told the Chinese news site Xinhuanet, "I exchanged the equipment with my labour, time, wisdom and money, and of course they are my belongings." *Id.* Hongchen argued "that the developer inadequately protected his virtual belongings from theft by hackers." Westbrook, *supra* note 35, at 805. Indeed, "the line between online games and the real world have [sic] begun to blur. Some gamers already trade game goods and characters for real money through online auction sites like eBay." Knight, *supra*; *see also* Thomas Claburn, *Virtual Property Rights Are No Game*, *INFORMATION WEEK*, Dec. 16, 2006, *available at* [www.informationweek.com/story/showArticle.jhtml?articleID=196604327](http://www.informationweek.com/story/showArticle.jhtml?articleID=196604327) (describing the *Bragg v. Linden Research* case, 487 F. Supp. 2d 593 (E.D. Pa. 2007), which later settled, where "Bragg claim[ed] that Linden Lab froze \$8,000 worth of virtual assets and refused to reimburse him" when Bragg acquired the assets by "taking advantage of a loophole in its code"). The *Bragg* case is different in that *Second Life*, unlike *WoW*, allows players to own the items they acquire. *Id.* A final adjudication in this case would have been significant in that it would provide some clarification on what gamers who possess virtual items actually own.

<sup>225</sup> Horowitz, *supra* note 27, at 451.

<sup>226</sup> "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

the asset's value.<sup>227</sup> When one person labors to acquire a good, that person is entitled to reap its benefit over one who expended no labor.<sup>228</sup> Under the "Enough as Good" proviso, Locke limited application of this theory to situations where "there is enough, and as good left in common for others."<sup>229</sup>

In the case of a WoW purchaser, commentators suggest that there are two competing Lockean claims.<sup>230</sup> The operator, Blizzard, has a Lockean claim because it created and operated the commons, which in this case, is the virtual world of WoW.<sup>231</sup> Because Blizzard is responsible for creating the mechanisms by which WoW players seek to exercise a Lockean claim, a MMORPG player's Lockean claim may not be assertive enough to claim full ownership rights over her virtual property. The virtual world creator not only created the software, but in Lockean terms, the creator also supplied the "raw materials" that the users gathered to create or claim the items that they call "property."<sup>232</sup> Thus, before the user ever entered the world, before the user heard about the game, or even before the game was placed on the shelf, the virtual world operator expended not only its labor, but original, innovative thought in creating the new cyber-world.<sup>233</sup>

On the other hand, the player, prior to entering the game, created a customized avatar, without which the gaming experience would fail to exist at all.<sup>234</sup> Due to WoW's focus on creating a social network to enhance game-play,<sup>235</sup> the network effects of having many players "laboring" in the virtual world are invaluable.<sup>236</sup> Indeed, the distinguishing and most valuable

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<sup>227</sup> JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 28 (1690). "If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby own the sea. . . ?" ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974).

<sup>228</sup> Westbrook, *supra* note 35, at 792; *id.* at 794.

<sup>229</sup> LOCKE, *supra* note 226, at 288.

<sup>230</sup> See Horowitz, *supra* note 27, at 451-56.

<sup>231</sup> Thus, it is possible that the operator's Lockean claim in creating and maintaining the virtual world is strong enough to swallow up the user's claim. See *id.*

<sup>232</sup> *Id.* at 451-53.

<sup>233</sup> *Id.* at 433.

<sup>234</sup> See Westbrook, *supra* note 35, at 792-93.

<sup>235</sup> See *supra* Part II.A.3.

<sup>236</sup> However, there is a good question as to what actually constitutes "labor." See *infra* notes 240-246. Network effects increase "[t]he utility that a subscriber derives from a communications service. . . as others join the system." Jeffrey Rohlfs, *A Theory of Interdependent Demand for a Communications Service*, 5 *The Bell Journal of Economics and Management Science* 1 at 16 (Spring 1974). Historically, network effects have been critical in the development of the telegraph, telephone, broadcast radio,



feature of a MMORPG is the “massive” number of players. Further, all of the in-game assets players acquire, and all of the loot that users create, arose as a result of their time and labor investment. Players spend thousands of hours playing WoW, leveling their avatar, acquiring or crafting rare, high-level items,<sup>237</sup> and may even earn a living in the virtual world.<sup>238</sup> Moreover, the deep virtual world connection causes some players to consider themselves to be dual citizens of their virtual world and the “real world.”<sup>239</sup>

Because of these competing Lockean claims, users may not have a strong enough Lockean claim to assert full ownership rights over their virtual items and thus insulate themselves from breach of contract claims against violating the provider’s EULA and TOU terms. But the labor that users expend into their virtual world assets should be a considerable factor in considering a user’s classification as a software “owner” instead of as a mere licensee.

Indeed, there is a fundamental distinction between the user’s claim and the operator’s claim. While Blizzard’s competing Lockean claim may be strong as to the entire virtual world’s framework, a user’s Lockean claim may be stronger as to the particular WoW account and avatar.<sup>240</sup> In Lockean terms, the WoW purchaser is responsible for the greatest value of the asset, his avatar, because of his expended time and labor. While the operator created the virtual universe, the user created something unique to the commons that was not present before.<sup>241</sup>

The intense labor investment does not cease once an avatar reaches maximum level. Even after reaching maximum level, a WoW player’s adventure has just begun in terms of the

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television, cellular phones, and most recently, the internet. See Robert M. Metcalfe, *It’s All in Your Head*, FORBES, May 7, 2007, available at <http://www.forbes.com/forbes/2007/0507/052.html>.

<sup>237</sup> Westbrook, *supra* note 35, at 792.

<sup>238</sup> See Rob Hof, *Second Life’s First Millionaire*, BUSINESS WEEK, Nov. 26, 2006, available at [http://www.businessweek.com/the\\_thread/techbeat/archives/2006/11/second\\_lifes\\_fi.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html).

<sup>239</sup> Kayser, *supra* note 71, at 60. “Participants make sizable investments of social, human, and economic capital in these virtual worlds, often with the questionable expectation that the items they have collected and creations they have developed are their property.” Sheldon, *supra* note 55, at 751; “Virtual environments are now one of the most important forms of entertainment. More South Koreans play in virtual worlds than watch television.” Fairfield, *supra* note 70, at 1061.

<sup>240</sup> See Horowitz, *supra* note 27, at 452-53.

<sup>241</sup> See Sheldon, *supra* note 55, at 761 (comparing WoW with the popular online game “Second Life,” where users invent new objects).

amount of labor required to find the best weapons, armor, and other items that WoW has to offer.<sup>242</sup> In other words, while an operator is enabling the avatar's existence, a user is contributing her labor to distinguish her avatar from the rest of the commons (the virtual world) in terms of appearance, items, guild affiliation, and social standing in the online community.<sup>243</sup> From this creation and labor, the user creates not only the avatar, but also greatly increases the value of the avatar from zero to as high as \$9,700.<sup>244</sup> Entrepreneurs have created companies whose purpose is to buy and sell virtual items for real money,<sup>245</sup> and some make hundreds of thousands of dollars per year selling virtual items on eBay.<sup>246</sup> This commodification and increased value would fail to exist without the user's labor.

Further, Locke's limiting "Enough as Good" proviso, where one may only claim property to the extent the claimant leaves "enough and as good" in common for others, is a non-issue in most virtual worlds. In contrast with "real world" rivalrous goods where there is only a finite amount of resources for distribution, in virtual worlds, the supply of goods is limited only by the amount of time that a purchaser invests into the game.<sup>247</sup>

Additionally, some players have invested so much time into WoW and have become so skilled at the game that WoW supports their career as professional gamers.<sup>248</sup> Every year, Blizzard sponsors a gaming event titled "Blizzcon" that players can attend to meet with and compete against other players.<sup>249</sup> "Blizzcon" sponsors a WoW player versus player tournament where the winning three-person team takes home \$75,000.<sup>250</sup> Among the entrants to the WoW Tournament are high-profile

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<sup>242</sup> *Id.*

<sup>243</sup> "[W]ithout the inputs of the user, the avatar would not exist at all." Westbrook, *supra* note 35, at 792.

<sup>244</sup> *See supra* note 221.

<sup>245</sup> Westbrook, *supra* note 35, at 790.

<sup>246</sup> Lastowka & Hunter, *supra* note 217, at 39.

<sup>247</sup> *Id.* at 47-48; *see also* Fairfield, *supra* note 70, at 1048-50 (discussing the distinction between rivalrous and nonrivalrous goods).

<sup>248</sup> Westbrook, *supra* note 35, at 789.

<sup>249</sup> Blizzard.com, *What is Blizzcon*, <http://us.blizzard.com/blizzcon/index.xml> (last visited Jan. 6, 2010).

<sup>250</sup> Blizzard.com, *Tournaments*, <http://www.blizzard.com/blizzcon/tournaments/> (last visited Mar. 1, 2010).

professional gaming groups that have earned corporate sponsorship.<sup>251</sup>

The fundamental distinction between Blizzard's Lockean claim as an operator of a commons and a WoW purchaser's Lockean claim as a user of an avatar provides another illustration as to why *MDY* was wrongly decided, and gives further support to the proposition that a WoW user should be classified as an "owner" of the software and not a licensee for the purposes of a Section 117 defense under the Copyright Act.

Blizzard, as the operator and greatest Lockean stakeholder of the virtual world, must equitably allocate the rights among the players. It does this by acting as WoW's gatekeeper, enacting a EULA and TOU barring Glider use and other player conduct.<sup>252</sup> If a player acquired full virtual property rights to his online commodities, the user would undermine Blizzard's gate-keeping role to the detriment of other users. Notwithstanding any profit-seeking motive, Blizzard must retain its breach of contract claim in order to protect other WoW users' rights. But the ability to file copyright infringement actions against a player makes little sense, because Blizzard is acting outside its Lockean claim as protector of the commons and trespassing into the user's Lockean claim as to the player's own individual virtual avatar.

In *MDY*, however, arguing that a WoW purchaser should be treated as an "owner" instead of a licensee because of the purchaser's labor and time investment may be somewhat paradoxical. Under Lockean labor desert theory, rights should be allocated to players based upon the player's labor investment in the game. However, those rights may not be as strong when a player uses Glider, because Glider reduces the net amount of a player's labor by operating the game for the player. Indeed, Glider users are not physically sitting at the computer investing their time and labor into the virtual commons.<sup>253</sup> Instead, players are simply inputting parameters

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<sup>251</sup> TeamPandemic.net, *Pandemic Partners*, <http://www.teampandemic.net/index.php?page=partners> (last visited Mar. 1, 2010). Outside of WoW, other professional internet gamers describe themselves as "cyber-athletes" and in addition to practicing their games eight to twelve hours a day, exercise to maintain high energy levels, preserve quick reflexes, and improve hand to eye coordination. See Daniel Schorn, *Cyber Athlete 'FatalIty'*, Aug. 6, 2006, CBS NEWS, available at, <http://www.cbsnews.com/stories/2006/01/19/60minutes/main1220146.shtml>.

<sup>252</sup> See *supra* notes 63-68.

<sup>253</sup> See *supra* notes 84-85.

into the Glider program and letting it “do the work.”<sup>254</sup> It is difficult to argue that WoW purchasers are investing labor into their avatars or into WoW’s social experience while operating Glider. However, because Glider markets to experienced players who have already completed much of the basic WoW game, and does not market to beginning players, this paradox does not mean that the purchasers have not previously invested a great deal of time into the game. It only suggests that they cheat and thereby lessen the value of others’ labor.

Even though Lockean labor desert theory may not be a strong enough argument to afford WoW players a unilateral virtual property right sufficient to overcome Blizzard’s EULA and TOU, it should influence a user’s classification as an “owner” rather than a licensee when determining her eligibility for a Section 117 defense. This is because the user’s actual usage of the game informs the economic realities of the transaction. While Blizzard created the software and the virtual world, the players created their avatars and added value.<sup>255</sup> Thus, purchasers should be classified as “owners” and accordingly be free from fear of copyright infringement’s statutory damages. WoW players neither think nor act like licensees. The players maintain exclusive possession of the software, invest a great deal of time and money into the game, and do not expect the virtual world operator to have the right to arbitrarily terminate their account or take their in-game earnings.<sup>256</sup> Indeed, as one Second Life player explained:

When a character in the game ‘owns’ something, I feel I ‘own’ it in a similar sense. If the character has the right to destroy it, I feel I have the right to destroy it. If the character has the right to give it away for arbitrary reasons, I feel I have a similar right. Note this isn’t a roleplaying argument, it is quite the opposite. It relies on the avatar and the player being equivalent.<sup>257</sup>

Looking through a Lockean lens at the software transaction and gamers’ subsequent investment in the virtual world, it is counterintuitive to classify these players as

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<sup>254</sup> See *supra* notes 89.

<sup>255</sup> See *supra* note 246.

<sup>256</sup> See Todd David Marcus, *Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content*, 52 N.Y.L. SCH. L. REV. 67, 80 (2007) (describing the user’s frustration and lack of recourse against an operator who deletes the user’s in-game goods due to TOU and EULA restrictions).

<sup>257</sup> Kurt Hunt, *This Land Is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141, 159 (2007).

software licensees instead of “owners.”<sup>258</sup> While the software purchasers may not have a strong enough Lockean claim to assert full ownership rights over their avatar, courts should consider the Lockean argument and the user’s *ex post* handling of the software when determining whether the purchaser is an “owner” or a licensee of the software. Further, the underlying principles of copyright law counsel in favor of granting software purchasers more substantial protections for their online commodities.

### C. Copyright Policies

Copyright protections that are too favorable to software providers stymie creative development far out of proportion to what Congress intended. Copyright law must evolve in order to foster creativity and innovation in online worlds. WoW provides a perfect example.

In the past, users have developed “illegal” third-party programs, many of which Blizzard bought and incorporated into WoW’s user interface in order to improve the gaming experience.<sup>259</sup> This practice allows both Blizzard and the user to benefit from the user’s labor, creativity, and innovation in creating the third-party program. However, the uncertainty of whether the third-party programs will be treated as investment opportunities or copyright infringements expunges any incentive for third-party program developers to innovate on a game. This disincentive is exacerbated if the law allows companies such as Blizzard to irrefutably characterize its sales as “licenses” rather than transfers of ownership.<sup>260</sup> The uncertainty of who the software provider will favor and who the software provider will abhor may lead third-party program developers to cease improving upon the software provider’s original work without permission. Essentially, by frustrating and discouraging further innovation, there is a net societal loss.

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<sup>258</sup> *Id.*

<sup>259</sup> Harald Warmelink, *Blizzard-Cosmos. Negotiating Add-On Development*, Mar. 1, 2007, [http://sybil.nl/2007/index2.php?option=com\\_content&do\\_pdf=1&id=14](http://sybil.nl/2007/index2.php?option=com_content&do_pdf=1&id=14).

<sup>260</sup> See Marcus, *supra* note 256, at 80. However, increased commodification of in-game items may incentivize a shift to allow players to retain copyrights over their virtual property because players will spend most of their time where they will be “best . . . rewarded for their efforts.” *Id.* at 86. “Creating a new virtual platform that allows users to retain copyrights for their creations becomes a safer investment for those seeking new avenues of financial opportunity.” *Id.*

While it may be difficult to argue that Glider improved WoW, for other third-party programs, the line between improvement and harm may be more unclear.<sup>261</sup>

Further, in addition to fostering creativity, Congress intended to protect the incidental copying of software to RAM as a necessary part of everyday software use.<sup>262</sup> Indeed, Congress foresaw the exact problem at issue in *MDY* and recognized that due to the software provider's restrictive EULA language, software purchasers that exceed any provision of the provider's terms, no matter how insignificant, might not qualify for a Section 117 defense under the Copyright Act.<sup>263</sup>

More significantly, virtual worlds such as WoW may be planting the seeds of a future where people may not just inhabit virtual worlds to level a character, but to meet other people, date, or study.<sup>264</sup> There may come a time where the "real" and "virtual" self become so intertwined that there is little distinction between them. Blizzard has the right to make the rules governing how it runs WoW; however, it should not have the right to evade Congressional laws protecting software users from copyright infringement claims under Section 117 defense of the Copyright Act.<sup>265</sup>

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<sup>261</sup> Consider the popular third-party program "Atlas," which allows players to view the layouts of every WoW dungeon without ever visiting the dungeon. See Curse.com, Atlas, available at <http://wow.curse.com/downloads/wow-addons/details/atlas.aspx> (last visited Jan. 26, 2009).

<sup>262</sup> Senator Hatch stated:

Second, I am concerned about the interplay between criminal liability for reproduction in the bill and the commonly-held view that the loading of a computer program into random access memory (RAM) is a reproduction for purposes of the Copyright Act. Because most shrink-wrap licenses purport to make the purchaser of computer software a licensee and not an owner of his or her copy of the software, the ordinary purchaser of software may not be able to take advantage of the exemption provided by sec. 117, allowing the owner of a copy to reproduce the work in order to use it in his or her computer.

143 CONG. REC. S12689 (Nov. 13, 1997) (statement of Sen. Hatch), available at <http://digital-law-online.info/lpd1.0/quotes/fn2-36.htm#q>.

<sup>263</sup> *Id.*

<sup>264</sup> "In the future, virtual worlds platforms will be adopted for commerce, for education, for professional, military, and vocational training, for medical consultation and psychotherapy, and even for social and economic experimentation to test how social norms develop." Balkin, *supra* note 30, at 2044. "[I]t is possible, if not likely, that many virtual spaces will effectively become shopping malls for both real and virtual goods." *Id.* at 2067. "The United States military uses virtual worlds for training . . . [as t]he [virtual] environment re-creates sections of Baghdad down to street signs and palm trees." Fairfield, *supra* note 70, at 1060.

<sup>265</sup> See *supra* note 117.

The rules of the “real world” still apply in the virtual world. Here, Blizzard utilized restrictive EULA language to limit the rights of purchasers, and asserted a copyright infringement claim against MDY when Congress clearly intended to protect the underlying users from copyright liability by enacting Section 117. Courts should reject arguments which advocate that software providers’ rules garner more weight than Congress’ intention of protecting software purchasers.<sup>266</sup>

## V. CONCLUSION

*MDY* was wrongly decided because courts should afford software purchasers and their labor investments greater protection from the statutory damages of copyright liability. The Ninth Circuit recognized this concern and granted software users such protection when it invoked the First Sale Doctrine in *Wise* and *Vernor*. This enhanced protection is supported by John Locke’s labor desert theory, and the underlying purposes of copyright law to encourage innovation.

Courts should interpret Section 117 of the Copyright Act as the consumer expects to be treated, looking to the practical realities of the sale, unconstrained by the “four corners” of the EULA that the provider forces upon its customers. The incidental copying of the software to RAM, even if the copying is in violation of the software provider’s EULA, is the type of benign copying that Congress intended to shield from liability under Section 117 of the Copyright Act. Such expansive copyright liability for users incentivizes software providers to license everything, and “sell” nothing.

Looking forward, under the *MDY* reasoning, software providers, in boilerplate fashion, will continue to incorporate restrictive EULAs into every agreement. The agreement will provide that the purchasers are only licensed to use the software and own nothing. Once the provider exceeds the EULA license terms, instead of relying on a breach of contract claim, software providers may unleash the brutal statutory damages of copyright infringement upon users that never realized that they were copying anything. To avoid this injustice, courts should invoke the First Sale Doctrine, which

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<sup>266</sup> See Tobold’s MMORPG Blog, *Virtual Property Rights*, <http://tobolds.blogspot.com/2008/03/virtual-property-rights.html> (Mar. 23, 2008, 14:30 EST).

more equitably allocates the rights between software providers and software purchasers by considering the economic and social realities of the transaction without giving dispositive weight to a software provider's restrictive EULA terms.

Further, because MMORPG users invest substantial amounts of labor into their games, courts should consider this *ex post* activity in determining whether purchasers are "owners" or licensees. MMORPG players neither think nor act as mere licensees. Instead, they act like "owners." Players spend hundreds of hours in virtual worlds and other online communities where they customize an avatar and immensely increase its value. WoW users also form friendships and take part in other social in-game activities. As technology opens doors to new possibilities in virtual worlds, adhering to precedent that ignores many of the similarities between the "real world" and the virtual world will frustrate innovation and over-protect software providers while abrogating basic rights that Congress afforded to software purchasers.

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