NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
10 NC JOLT ONLINE ED. 1 (2008)

MDY INDUSTRIES V. BLIZZARD ENTERTAINMENT: PREVENTING THE USE OF SOFTWARE ROBOTS IN AN ONLINE GAME WITH COPYRIGHT LAW

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In MDY Industries v. Blizzard Entertainment, *the United States District Court of Arizona had an opportunity to clarify the concept of ownership in software copyright law. The* MDY *court held that users of Blizzard's computer video game do not own the physical copies of the game software and thus can only load the game software into their computer's memory, subject to Blizzard's license. Several players of Blizzard's computer video game used software manufactured by MDY Industries in conjunction with the game—a use prohibited by Blizzard's license. The* MDY *court held that, by violating Blizzard's license, these users committed copyright infringement. MDY Industries was also found liable for contributory copyright infringement. Although the* MDY *court stated that they were applying Ninth Circuit precedent, the court actually applied a significantly more expansive test for determining ownership.*

I. INTRODUCTION

The recent decision of the United States District Court of Arizona, in *MDY Industries v. Blizzard Entertainment*,[2] examines whether players of Blizzard Entertainment's ("Blizzard") video game, World of Warcraft ("WoW"), which use MDY Industries' ("MDY") software robot in conjunction with WoW, are liable to Blizzard for copyright infringement if WoW's license prohibits the

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[2] No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *1 (D. Ariz. July 14, 2008), *and motion for permanent injunction and alternative motion to amend the judgment denied,* No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008), *available at* http://docs.justia.com /cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/82/0.pdf.

use of such software robots.[3] This issue turns on whether the purchasers of Blizzard's software are owners of their software copies under 17 U.S.C. § 117(a)(1) or licensees, as the statute exempts purchasers from liability for copyright infringement—but only if they own the copy of the software they are using.[4] Because software transactions typically involve licenses,[5] determining whether the software license conveys ownership of the software copy is an inquiry that bridges both copyright and contract law.[6] The Ninth Circuit has examined this issue before,[7] and the *MDY* court purportedly based its finding that purchasers of software subject to "a license . . . [with] significant restrictions on . . . use"[8] are not owners under 17 U.S.C. § 117(a)(1) upon the test stated in

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[3] *Id.* at *2–6.

[4] 17 U.S.C. § 117(a) (2006) ("Notwithstanding the provisions of section 106, it is not an infringement for the *owner* of a copy of a computer program . . . .") (emphasis added); *MDY*, 2008 U.S. Dist. LEXIS 53988 at *25 ("At least three cases . . . hold that licensees of a computer program do not 'own' their copy of the program and therefore are not entitled to a section 117 defense.").

[5] Christopher B. Yeh, *Wall Data Inc. v. Los Angeles County Sheriff's Department: License Versus Sale At the Crossroads of Contract and Copyright*, 22 BERKELEY TECH. L.J. 355, 357 (2007) ("In the software industry, almost all software is licensed rather than sold (i.e. transferred with full ownership).").

[6] *See id.* at 360 (discussing the relationship between copyright and contract law in the software licensing context and referring to it as the "Intersection of Copyright and Contract [Law]").

[7] *See, e.g.,* Wall Data Inc. v. Los Angeles County Sheriff's Dep't, 447 F.3d 769, 785 (9th Cir. 2006) ("Generally, if the copyright owner makes it clear that she or he is granting only a license to the copy of software and imposes significant restrictions on the purchaser's ability to redistribute or transfer that copy, the purchaser is considered a licensee, not an owner, of the software."); Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330, 1333 (9th Cir. 1995) (implying that only an "owner" could invoke 17 U.S.C. § 117); MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511, 518 n.5 (9th Cir. 1993) ("Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117."); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088–89 n.9 (9th Cir. 1989) (distinguishing the rights granted by the Copyright Act to "owners" of software as opposed to "mere possessors."). *Cf.* Vernor v. Autodesk, Inc., 555 F. Supp. 2d 1164, 1171–72 (W.D. Wash. 2008) (analyzing 17 U.S.C. § 117 in the context of the first sale doctrine).

[8] *MDY*, 2008 U.S. Dist. LEXIS 53988, at *25.

Wall Data, Inc. v. Los Angeles County Sheriff's Department.[9] This Recent Development will argue that *MDY*'s application of the *Wall Data* test was overly broad and departs from Ninth Circuit precedent.

Part II of this Recent Development outlines the relevant statutory and case law. Part III summarizes the pertinent facts of *MDY*. Part IV shows how these facts, coupled with Ninth Circuit precedent, support the conclusion that the *MDY* court improperly expanded the *Wall Data* test. Finally, Part V concludes that *MDY*'s holding is too broad and should not be followed when applying the *Wall Data* test.

II. BACKGROUND

A. *The Difference Between Copies of a Work and the Copyright*

The Copyright Act distinguishes between a "copy"[10] embodying a creative work and the work itself.[11] For example, the purchaser of a copyrighted book has a *copy* of the copyrighted work, not a *copyright* in the underlying creative work.[12] Similarly,

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[9] *Wall Data*, 447 F.3d at 785 (stating a test to determine whether a software user is a licensee). "Under the two-part test for ownership in *Wall Data*, the transactions between Blizzard and persons who acquire copies of its game client software are licenses, not sales." *MDY*, 2008 U.S. Dist. LEXIS 53988, at *26.

[10] " 'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 (2006). Copies need not be physical objects; an electronic copy can be "reproduced" with the assistance of a mechanical device. *See* Midway Mfg. Co. v. Artic Int'l, Inc., 547 F. Supp. 999, 1007–08 (N.D. Ill. 1982) (holding that although a video game manufacturer's ROM device could not physically store the images at issue, a copy existed because the game's microprocessor generated the images and displayed them on the game's screen by using the data stored on the ROM), *aff'd*, 704 F.2d 1009 (7th Cir. 1983).

[11] 17 U.S.C. § 202 (2006) ("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.").

[12] *Id.*

in the software context, each physical object containing the software is a "copy."[13]

B. *Loading Software into RAM Creates a Copy Under 17 U.S.C § 101*

Computers function by loading software from "long term memory (. . . disk) into . . . short-term memory" ("RAM").[14] Under copyright law, the software that exists in RAM is a copy.[15] The "copyright owner" has the exclusive right to make or authorize copies,[16] including those in RAM.[17] These temporary copies are byproducts of the user's interaction with the computer.[18] Although the user may not even be aware of these temporary copies, they are unavoidable.[19] Because software in RAM is a copy under copyright law, the user must have statutory authorization or obtain

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[13] Copies are the "material object[s]" containing the copyrighted work. *Id.*

[14] MARK A. LEMLEY ET AL., SOFTWARE AND INTERNET LAW 93 (3rd ed. 2006) ("The use of any modern computer program necessarily involves the creation of transitory copies in the RAM memory of a computer, and because running a computer program necessarily involves copying the program from long term memory (ROM, CD-ROM, or disk) into the short-term memory of the computer, it is virtually impossible to use any computer program without making a 'copy' of the entire program.").

[15] MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511, 519 (9th Cir. 1993) ("However, since we find that the copy created in the RAM can be 'perceived, reproduced, or otherwise communicated,' we hold that the loading of software into the RAM creates a copy under the Copyright Act." (quoting 17 U.S.C. § 101)).

[16] 17 U.S.C. § 101 (2006). (" 'Copyright owner,' with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.") The exclusive right to create copies is reserved to the copyright owner. *Id.* § 106(1).

[17] *MAI Sys.*, 991 F.2d at 518 (holding that copyrighted software loaded into RAM without copyright ownership or permission from the copyright owner is copyright infringement).

[18] *See, e.g.,* JESSICA LITMAN, DIGITAL COPYRIGHT 95 (2001) (stating that "us[ing] . . . a computer to view, read, reread, hear, or otherwise experience a work in digital form . . . require[s] reproducing that work in a computer's memory.").

[19] *See* LEMLEY ET AL., *supra* note 14 (explaining that using software requires temporary RAM copies).

permission from the copyright owner for each use which results in a RAM copy.[20] This requirement differentiates the use of software from that of other creative works—where copying and use are not so closely intertwined.[21] In the context of *MDY*, each time a user loads Blizzard's software into RAM, a copy is created—which requires permission by license or statute to be lawful.[22]

C. *17 U.S.C. § 117(a)(1) Allows Owners to Make RAM Copies Without Risking Infringement*

According to the *MDY* court, 17 U.S.C. § 117(a)(1) allows owners of software copies to make RAM copies, if the use causing the copy is "an essential step in using the computer program,"[23] without risking infringement.[24] Because RAM copies must be made before software is used,[25] this statutory exception gives users that own their copy of the software the right to actually use the

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[20] MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *10–11 (D. Ariz. July 14, 2008), *motion for permanent injunction and alternative motion to amend the judgment denied*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008) ("Thus, if a person is not authorized by the copyright holder (through a license) or by law . . . to copy the software to RAM, the person is guilty of copyright infringement because the person has exercised a right (copying) that belongs exclusively to the copyright holder."), *available at* http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/82/0.pdf.

[21] *See* LITMAN, *supra* note 18, at 16 (explaining that many common uses of other copyrighted works, such as reading a chapter of a book in a bookstore, do not require the author's permission). The inseparability of use and copying in the software context conflicts with the basic premise of copyright law. *See* Mark A. Lemley, *Convergence in the Law of Software Copyright?*, 10 HIGH TECH. L.J. 4 (1995) ("Copyright law was designed in order to protect physical works of creative authorship which could be *used* without being *copied*.").

[22] *See MDY*, 2008 U.S. Dist. LEXIS 53988, at *10–11 (explaining that making a RAM copy "authorized by . . . license . . . or by law" is not infringement).

[23] The *MDY* court focused its 17 U.S.C. § 117(a)(1) analysis on the question of ownership, not whether their use of Glider was an "essential step" in playing WoW. *Id.* at *24–32.

[24] *Id.*; *see also* 17 U.S.C. § 117(a)(1) (2006).

[25] *See* LEMLEY, *supra* note 14 and accompanying text.

copy without requiring additional licenses.[26] Such federal protection helps maintain a workable balance[27] between "copyright holders' " rights and the right of users, who own their copy, to use software.[28]

Because the statute only applies to owners, determining whether a user is an owner or a licensee is critical.[29] This is problematic in practice, as noted by the United States District Court for the Eastern District of New York, because users often license software "and the license[] . . . [may] not . . . distinguish between the copyright and the copy."[30] Ninth Circuit courts have

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[26] *See MDY*, 2008 U.S. Dist. LEXIS 53988, at *10–11 (explaining that making a RAM copy "authorized . . . by law" is not infringement).

[27] Mark Lemley has commented on this balance:

> Because of the nature of computer technology, and because vendors can rely on several different intellectual property regimes concurrently, the balance of intellectual property law is already tilted heavily in favor of the intellectual property owner. The only countervailing forces favoring users are those rights specifically granted to users by federal law. In this context more than any other, therefore, it is justifiable to fear that removing or eviscerating those user rights may bring the whole edifice tumbling down.

Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1282 (1995)

[28] Corynne McSherry, *Do You Own Your Software? WoW Glider Case Not Just About Getting to Level 70*, http://www.eff.org/deeplinks/2008/05/do-you-own-your-software-wow-glider-case-not-just- ("This rule is a crucial part of the balance Congress crafted between the rights of the copyright holder to manage and benefit from its expressive work, and the rights of the public to innovate, recreate and otherwise use and build on that work.") (last visited Oct. 24, 2008) (on file with the North Carolina Journal of Law & Technology). In this Recent Development, copyright holder generally refers to someone who possesses a copyright. *Id. See also,* LITMAN, *infra* notes 81–82 and accompanying text for similar uses of the term.

[29] 17 U.S.C. § 117(a) (2006) (applying statute to "owner[s] of a copy"). *See* Wall Data Inc. v. L.A. County Sheriff's Dep't , 447 F.3d 769, 784–85 (9th Cir. 2006) (explaining that users who license their copy of the software are not entitled to an "essential step defense" under the Copyright Act).

[30] *See* Applied Info. Mgmt., Inc. v. Icart, 976 F. Supp. 149, 153 (E.D.N.Y. 1997) ("The simple conclusion that Section 117 applies only to the owner of a copy of a computer program, however, has proven difficult to apply because

differed on the degree to which the license should be scrutinized and which factors should be used to determine whether the license conveys ownership of the software copy.[31] *MDY* is important because it adds the presence of "significant restrictions on . . . use" as a factor sufficient to classify the user "as a [mere] licensee" of their software copy.[32] Because use is such an expansive concept, this holding threatens to render the statute useless.[33]

D. *Users as Licensees of the Copy, Prior to* MDY*:* MAI, Triad, *and* Wall Data

1. MAI *and* Triad – *Precedent, but No Principle for Determining Ownership*

The *MDY* court based its 17 U.S.C. § 117 analysis on three Ninth Circuit cases: *MAI Systems Corp. v. Peak Computer,*[34] *Triad Systems Corp. v. Southeastern Express Co.*,[35] and *Wall*

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software companies frequently license their programs and the licenses do not always distinguish between the copyright and the copy.").

[31] *See* Microsoft Corp. v. DAK Indus. Inc., 66 F.3d 1091, 1095 (9th Cir. 1995) (stating that determining whether an agreement is a sale or a license requires analyzing more than the terms of the transaction). *But see* MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511, 518 n.5 (9th Cir. 1993) (holding that because the software was licensed, the user was not an owner).

[32] MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *25 (D. Ariz. July 14, 2008), *motion for permanent injunction and alternative motion to amend the judgment denied*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/82/0.pdf.

[33] *See* Corynne McSherry, *You Bought It, But You Don't Own It*, http://www.eff.org/deeplinks/2008/07/you-bought-it-you-dont-own-it (arguing that the *MDY* court did not adequately consider the likelihood that its decision would allow copyright holders to bypass 17 U.S.C. § 117 altogether) (last visited Oct. 24, 2008) (on file with the North Carolina Journal of Law & Technology); *supra* note 18 and accompanying text (describing range of uses that result in RAM copies).

[34] 991 F.2d 511 (9th Cir. 1993).

[35] 64 F.3d 1330 (9th Cir. 1995).

Data.[36] In *MAI*, the court did not explore the possibility that a software licensee could own their copy of the software and thus claim an exception under 17 U.S.C. § 117(a)(1).[37] Although commentators have been critical of the *MAI* court's lack of analysis regarding the applicability of 17 U.S.C. § 117(a) to software licensees,[38] the *MDY* court nonetheless cited *MAI* as supporting its holding that Blizzard's licensees do not own their copies.[39] The *Triad* court merely confirmed the essence of 17 U.S.C. § 117—that the statute applies to "outright" owners of software copies.[40] These cases, on which *MDY* relied,[41] do not

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[36] Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006); *see MDY*, 2008 U.S. Dist. LEXIS 53988 at *25. The *MDY* court declined to follow Vernor v. Autodesk, Inc., 555 F. Supp. 2d 1164 (W.D. Wash. 2008). "The Court declines this invitation. Whatever freedom the court in *Vernor* may have had to disregard *Wall Data* when applying a different statutory provision—section 109—this Court does not have the same freedom. This case concerns section 117, the very provision addressed by the Ninth Circuit in *Wall Data*. The Court is not free to disregard Ninth Circuit precedent directly on point." *Id.* at *30.

[37] MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 n.5 (9th Cir. 1993). 17 U.S.C. § 117 was amended in 1998 to include a provision exempting RAM copies made in conjunction with computer maintenance and repair from copyright infringement. *See* Digital Millennium Copyright Act, 105 Pub. L. No. 304, § 302, 112 Stat. 2860, 2887 (1998).

[38] *MAI*, 991 F.2d at 518 n.5 ("Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117."). The *MAI* court's refusal to elaborate on their reasoning has been criticized. *See, e.g.,* MELVILLE B. & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[B][1][c] (2008) ("The court's opinion does not address the distinction between intangible and physical ownership, leaving unanswered whether the relevant copies were owned, and hence whether the Section 117 exemption should have applied. Accordingly, its logic is inadequate.") (footnote omitted); Yeh, *supra* note 5, at 363 (acknowledging the criticism of *MAI*).

[39] *See MDY*, 2008 U.S. Dist. LEXIS 53988, at *25–32.

[40] Triad Systems Corp. v. Se. Express Co., 64 F.3d at 1333 (confirming that in situations where software was sold, the purchaser was an owner under 17 U.S.C. § 117).

[41] *See MDY,* 2008 U.S. Dist. LEXIS 53988, at *25 (identifying three Ninth Circuit cases dealing with 17 U.S.C. § 117 and software licenses).

clearly distinguish between licensing a copy and licensing the copyrighted work.[42]

2. Wall Data *Provides a Test to Determine Ownership*

In contrast, *Wall Data* provides a more substantial analysis of the extent to which a user's license conveys ownership to the copy of the software, as opposed to the software itself (the copyrighted work).[43] The *Wall Data* court cited *MAI* as precedent for holding that the defendants were licensees and not owners, but also noted the criticism surrounding *MAI*'s treatment of 17 U.S.C. § 117(a)(1).[44] More importantly, the *Wall Data* court took a step beyond *MAI* and articulated a two-part test that clarifies when a purchaser is an owner and when a purchaser is a licensee of the software copy: "Generally, if the copyright owner makes it clear that she or he is granting only a license to the copy of software and imposes significant restrictions on the purchaser's ability to redistribute or transfer that copy, the purchaser is considered a licensee, not an owner, of the software."[45] The second prong of the *Wall Data* test is critical. It requires "*significant* restrictions on the purchaser's ability to *redistribute* or *transfer* that copy."[46] The mere existence of terms restricting other uses or the description of the agreement as "a license to the copy of software" does not satisfy the *Wall Data* test.[47] The *MDY* court expanded the *Wall Data* test by adding "significant restrictions on . . . use" to the set

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[42] *See* David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 38 & n.82 (1999) (stating that *Triad* and *MAI* do not clearly distinguish between selling a copy subject to a license and licensing a copy).

[43] Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 784–86 (9th Cir. 2006) (providing analysis of a license to determine whether a user owned their software copies).

[44] It is important to also note the *Wall Data* court's qualified reliance on *MAI*: "We recognize that our decision in *MAI* has been criticized . . . . We decline to revisit our precedent in this case, because the Sheriff's Department's 'essential step' defense fails for a more fundamental reason—that hard drive imaging was not an essential step of installation—and thus any error is harmless." *Id.* at 785 n.9 (citations omitted).

[45] *Id.* at 785.

[46] *Id.*

[47] *Id.*

of factors that should be considered when deciding ownership of a copy of software.[48]

III. THE FACTS OF *MDY V. BLIZZARD*

Blizzard and Vivendi run the popular online game World of Warcraft ("WoW").[49] MDY created and sold a "bot"[50] program called WowGlider ("Glider").[51] A "bot" is "a word derived from 'robot' " referring to programs that can emulate certain user actions in the game.[52] WoW players use bots while they are unable to play the game themselves, for example, while sleeping or at work.[53] This allows players to advance more rapidly in the game than they would have otherwise.[54] WoW players use Glider in conjunction with WoW—in violation of WoW's Terms of Use ("TOU").[55] Basing its holding on the *Wall Data* test, the *MDY* court found that the users held licenses, limited by Blizzard's TOU and End User License Agreement ("EULA"),[56] to their copies of the software.[57] Because Glider creates an "unauthorized"[58] copy of Blizzard's software in RAM, Blizzard can hold users of Glider

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[48] MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *25 (D. Ariz. July 14, 2008), *motion for permanent injunction and alternative motion to amend the judgment denied*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/82/0.pdf.

[49] *See id.* at *2–3.

[50] *Id.* at *3–4.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] "Blizzard claims that Glider . . . enable[s] some payers [sic] to advance more quickly and unfairly, diminishing the game experience for other players." *Id.* at *4.

[55] *Id.* at *18–19.

[56] *Id.* at *31–32. The holding that Blizzard granted a license that is limited in scope is important because it is a prerequisite for a finding of copyright infringement. *Id.* at *12.

[57] *Id.* at *24–32.

[58] *Id.* at *18–19 (explaining that "the use of bots" violates Blizzard's TOU and that the activity is "unauthorized").

liable for copyright infringement.[59] Furthermore, MDY, as Glider's owner and distributor, faces liability for contributory copyright infringement.[60]

IV. ANALYSIS: *MDY* EXPANDED THE *WALL DATA* TEST TO ENCOMPASS USER CHEATING WITH ROBOTS

A. *The* MDY *Court Expanded the Scope of the* Wall Data *Test*

Instead of merely following the *Wall Data* test, the *MDY* court expanded it. The *MDY* court stated the second prong of the *Wall Data* test as follows:

> *Wall Data* provides a . . . test for determining whether the purchaser of a copy of a software program is a licensee or an owner: if the copyright holder . . . imposes significant restrictions on the *use* or transfer of the copy, then the transaction is a license, not a sale, and the purchaser of the copy is a licensee, not an "owner" within the meaning of section 117.[61]

Wall Data does not specify use as a factor of the test.[62] The second prong of the Wall Data test is limited to "redistribut[ion] or transfer" of the software copy.[63] By adding the term *use*,[64] the *MDY* court could then incorporate the provisions from Blizzard

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[59] *Id.* at *31–32.

[60] MDY Industries owns and distributes Glider. *Id.* at *3–4. MDY Industries was found liable for contributory copyright infringement. *Id.* at *31–32.

[61] *Id.* at *25 (second emphasis added).

[62] *See* discussion of *Wall Data* test, *supra* Part II.D.2.

[63] Wall Data Inc. v. L.A. County Sheriff's Dep't, 447 F.3d 769, 785 (9th Cir. 2006); *see also* discussion of *Wall Data* test, *supra* Part II.D.2. *Wall Data* does state that, "[t]he Sheriff's Department's use of and rights to the RUMBA software products were restricted under the terms of the click-through and volume booklet licenses." *Wall Data*, 447 F.3d at 785. However, because this language is explanatory, "use" in this sentence likely refers to the redistribution and transfer term stated previously in the test. *Id.* In addition, the excerpt of the click-through license does not restrict "use" in the general sense; instead, it specifically identifies uses related to distribution and transfer of the software. *Id.* at 775 n.5. Finally, the volume license booklets specified the number of licenses available to the Sheriff's Department, not the manner in which they were to be used. *Id.* at 774.

[64] *See supra* notes 62–63.

TOU prohibiting the use of "bots."[65] *MDY* represents a significant expansion of the *Wall Data* test because any interaction between a user and a software program is a use and the *MDY* court does not clearly define which uses meet the threshold of their test.[66] In contrast, the narrower *Wall Data* test extends only to situations where a software copy changes hands due to "redistribut[ion] or transfer."[67]

B. MDY*'s Expansion of the Wall Data Test Creates Incentives for More Restrictive Licenses*

MDY provides an incentive for copyright holders to incorporate broad usage restrictions in their licenses.[68] Copyright holders often have an advantage in software licensing; as one empirical analysis of software contracts revealed: "[i]t is clear that EULAs are almost always more pro-seller than the default rules of the UCC."[69]

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[65] MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *27 (D. Ariz. July 14, 2008), *motion for permanent injunction and alternative motion to amend the judgment denied*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008), *available at* http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/82/0.pdf ("As discussed above, the TOU places additional restrictions on the use of the software."). *Supra* notes 52–53 and accompanying text (defining and discussing "bots").

[66] The *MDY* court, in its 17 U.S.C. § 117(a)(1) analysis, refers to Blizzard's TOU as containing specific examples of uses which meet its test. *MDY*, 2008 U.S. Dist. LEXIS 53988, at *27. However, it does not articulate a general principle for analyzing license agreements to determine whether a use meets its criteria in the context of 17 U.S.C. § 117(a)(1). *Id.* at *24–32. LEMLEY, *supra* note 14 (explaining that using software requires temporary RAM copies).

[67] *Wall Data*, 447 F.3d at 785.

[68] *Cf.* Amicus Curiae Brief of Public Knowledge In Support of Neither Party On Cross-Motions For Summary Judgment at 24, MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *1 (D. Ariz. July 14, 2008) (Document 63-2), *available at* http://www.publicknowledge.org/pdf/pk-amicus-20080502.pdf (arguing that if software manufacturers could use copyright law to impose blanket restrictions on use, license terms fostering anticompetitive practices will emerge).

[69] Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements*, 4 J. EMPIRICAL LEGAL STUD. 677, 703 (2007).

Considering the seller's favorable position, it seems likely that they will craft licenses which take advantage of the vague language of the *MDY* court's test.[70] By adding license terms to sidestep 17 U.S.C. § 117(1), copyright holders can require licenses for uses which might otherwise have been authorized by statute.[71]

Statutory damages for copyright infringement are significant.[72] *MDY* provides copyright owners access to these statutory damages by linking whether a user is an "owner of a copy"[73] to whether the license term "imposes significant restrictions on . . . use."[74] The prospect of statutory damages will push copyright owners to limit use through licensing because each use authorized by license becomes a potential source of revenue—enforceable by threat of liability for copyright infringement.[75]

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[70] *See* Amicus Curiae Brief of Public Knowledge, *supra* note 68.

[71] McSherry, *supra* note 33. ("The logical implication of the holding is that any time you buy software . . . software owners can always use license agreements to prevent you from ever having full control over your software and taking advantage of standard copyright limitations . . . .").

[72] Current copyright law provides statutory damages ranging from $750 to $30,000. 17 U.S.C. § 504(c)(1) (2006). The court may increase the damages awarded to $150,000 in the case of willful infringement. *Id.* at § 504(c)(2).

[73] *Id.* at § 117(a).

[74] MDY Indus., LLC v. Blizzard Entm't, Inc., No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 53988, at *25 (D. Ariz. July 14, 2008), *motion for permanent injunction and alternative motion to amend the judgment denied*, No. CV-06-2555-PHX-DGC, 2008 U.S. Dist. LEXIS 78432, at *1 (D. Ariz. Sept. 18, 2008), *available at* http://docs.justia.com/federal/courts/arizona/azdce/322017/82/0.pdf.

[75] *See* JESSICA LITMAN, DIGITAL COPYRIGHT 83 (2001) "If the law requires that we obtain a license whenever we wish to read protected text, it encourages copyright owners to restrict the availability of licenses whenever it makes economic sense for them to do so."). Although discussing the availability of licenses in the context of access control technology, Litman's general point is applicable. If there is an economic incentive, revenue from licensing uses for example, copyright owners will seek to capture that revenue by requiring additional licenses.

C. MDY *Erodes User Protections Granted by Congress*

Copyright law seeks to balance copyright owners' right to control their creative work and society's right to create new works using the "ideas and information conveyed by . . . [the] work."[76] Congress facilitates this balance by granting "limited . . . statutory monopol[ies]" that stimulate the creation of new works while also compensating authors.[77] As the Supreme Court explained in *Twentieth Century Music Corp. v. Aiken*:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.[78]

17 U.S.C. § 117(a)(1) is an important limitation on the copyright holder's right to control copying and, by implication, use in the digital context.[79] The statute allows consumers to use software without seeking the copyright holder's permission prior to the creation of each temporary RAM copy.[80] In her analysis of

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[76] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) ("To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); *see also* Dennis S. Karjala, *Symposium: Copyright Owners' Rights and Users' Privileges on the Internet: Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 512 (1997) ("Copyright has always represented a balance between owners' and users' rights.").

[77] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (explaining that the purpose of copyright law is to ensure that the public has access to a wide array of creative works).

[78] *Id.* (footnote omitted). *See, e.g.,* Karjala, *supra* note 76 at 512 (analyzing copyright law's purpose).

[79] "[M]aking copies is an essential part of using computer programs. Because of this important difference between computer software and other types of copyrightable material, Congress followed the recommendations of CONTU and passed section 117." MARK A. LEMLEY ET AL., SOFTWARE AND INTERNET LAW 99 (3rd ed. 2006).

[80] *Id.*

proposed changes to copyright law during the 1990's, copyright scholar Jessica Litman highlights the importance of statutory authorization:

> Most notably, since any use of a computer to view, read, reread, hear, or otherwise experience a work in digital form would require reproducing that work in a computer's memory, and since the copyright statute gives the copyright holder exclusive control over reproductions, everybody would need to have either statutory privilege or the copyright holder's permission to view, read, reread, hear or otherwise experience a digital work, each time she did so.[81]

In this scenario, without "statutory privilege," every unlicensed use is potentially infringing.[82] *MDY* is a step in this direction[83], and it risks fundamentally altering the balance between the rights of "authors, publishers, users, and society."[84]

V. CONCLUSION

Blizzard's concern that the use of bots will undermine the WoW gaming experience is legitimate, but regardless of copyright law, contract law provides an adequate remedy for this violation of WoW's Terms of Use."[85] With the exception of *Wall Data*, the Ninth Circuit precedent relied upon in *MDY* provides very little analysis of the applicability of 17 U.S.C. § 117(a)(1).[86] *MDY*'s

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[81] JESSICA LITMAN, DIGITAL COPYRIGHT 95 (2001) (footnote omitted) (analyzing proposed changes to copyright law during the 1990's).

[82] *Id.*

[83] *See* McSherry, *supra* note 33 (arguing that *MDY* paves the way for restrictive licenses that bypass 17 U.S.C. § 117).

[84] "The result is that the public's 'reward' for copyright—access to the ideas in the public domain—is protected only tenuously for computer software in copyright law, by the right in section 117 of the Copyright Act to make certain copies . . . ." Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1280 (1995). *See* David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 77 (1999) (" 'Expand through contract' is a slogan that offends a constitutionally defensible copyright regime. But when copyright's delicate equilibrium is respected, authors, publishers, users, and society at large are all winners.").

[85] *See* McSherry, *supra* note 28 (noting contract law as a remedy).

[86] *See* discussion *supra* Part II.D.

restatement of the *Wall Data* test is vague.[87] This uncertainty provides incentives for the creation of more restrictive licenses which undermine the balance Congress struck between copyright holders and users.[88] Consequently, the Ninth Circuit should abandon *MDY* in favor of a more literal application of the *Wall Data* test.

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[87] *See supra* note 66.
[88] *See supra* notes 76–84 and accompanying text.