

LEGAL UPDATE

WRATH OF THE EULA: CAN THE USE OF BOTS LEAD TO COPYRIGHT INFRINGEMENT?

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I.	INTRODUCTION
II.	COPYRIGHT.....
	A. <i>The Purpose of Copyright Law</i>
	B. <i>Copying as an Infringement</i>
	C. <i>Copying to Random Access Memory</i>
	D. <i>The “Essential Step” Provision</i>
III.	LICENSE AGREEMENTS.....
	A. <i>What is a License Agreement?</i>
	B. <i>Breach of a License Agreement</i>
IV.	MDY V. BLIZZARD.....
	A. <i>Background</i>
	B. <i>The District Court Holding</i>
V.	PUBLIC POLICY CONCERNS
VI.	THE NINTH CIRCUIT
VII.	CONCLUSION

I. INTRODUCTION

The Ninth Circuit has long held that a copy of a computer program² that exists in a computer’s random-access memory (“RAM”) qualifies as a “copy” under the copyright statute.³ Every time a computer program is run, parts of the program are copied to RAM. Owners of a copy of software would be perpetual copyright infringers if not for the “essential step” provision in the copyright statute.⁴ This provision authorizes the “owner of a copy of a computer program” to make a copy provided that it is “created as an essential step in the utilization of the computer program”⁵ Because copying to RAM is necessary to use a computer program, the “essential step” provision provides a defense against copyright infringement for the software copy owner.

The Ninth Circuit takes a textualist approach to the “essential step”

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² I will use the terms “software,” “computer program,” and “program” interchangeably.

³ *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

⁴ 17 U.S.C. § 117(a) (2006).

⁵ *Id.*

provision and has held that a computer repairperson is a copyright infringer simply by turning on the computer that he or she is working with.⁶ This is because turning on the computer copies parts of the operating system to RAM, which the computer repairperson is not authorized to do as he or she is neither the “owner” of the software copy nor a licensee of the software.⁷ Recently a question arose regarding software licensees who make RAM copies while violating the terms of the license agreement. Specifically, what happens when a video game player who makes RAM copies violates the license agreement by running unauthorized third-party software that plays the game for the player? The Ninth Circuit previously held that because software licensees are not “owners” they are not eligible to use the “essential step” defense.⁸ So is the video game player a copyright infringer when he or she violates the license agreement in that way? The U.S. District Court of Arizona thought so but the Ninth Circuit, in a moment of clarity, disagreed.⁹

II. COPYRIGHT

A. *The Purpose of Copyright Law*

The purpose of copyright law is to spur innovation and creativity by granting certain rights to the author of a work for a limited time.¹⁰ These rights incentivize authors to create new works by allowing authors to earn an income from the distribution of their creations.¹¹ The underlying economic assumption is that authors might be reluctant to invest the time and resources into creating works if they cannot protect their investments.¹² To protect the author’s investment, copyright law provides the author with monetary and/or injunctive relief if someone infringes on one of the author’s rights without permission.¹³

⁶ *Mai*, 991 F.2d at 519. Note that Congress later added a provision allowing for such copying for purposes of maintenance or repair. 17 U.S.C. § 117(c) (2006).

⁷ *Mai*, 991 F.2d at 518 n.5.

⁸ *Id.*

⁹ See *MDY Indus., LLC v. Blizzard Entm’t., Inc.*, No. CV-06-2555-PHX-DGC, 2008 WL 2757357, at *6 (D. Ariz. July 14, 2008); *MDY Indus., LLC v. Blizzard Entm’t., Inc.*, Nos. 09-15932, 09-16044, 2010 WL 5141269 (9th Cir. Dec. 14, 2010).

¹⁰ U.S. CONST. art. 1, § 8.

¹¹ Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 8-9 (2010).

¹² See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”).

¹³ 17 U.S.C. §§ 502-505 (2006).

B. Copying as an Infringement

One right given to an author is the exclusive right to “reproduce the copyrighted work.”¹⁴ A “copy” is defined as a material object “in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁵ “A work is ‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁶ In other words, someone who does not have the author’s permission cannot make a copy of the author’s work in some physical form where it will reside for some period of time (e.g., paper, CD, DVD, computer hard drive).¹⁷

C. Copying to Random Access Memory

A computer consists of three major components: (1) the central processing unit (“CPU”), which executes the programs stored in the main memory; (2) memory, where the programs and data are stored; and (3) input/output devices, such as keyboards, mice, monitors, and printers.¹⁸ Computer memory can be further subdivided into hierarchical subcomponents.¹⁹ Located at the top of the hierarchy are the CPU registers.²⁰ Below the CPU registers are cache memory (consisting of RAM), primary (main) memory (consisting of RAM), and secondary (mass) memory (e.g., hard drives).²¹ As one moves down the hierarchy, the cost per bit and speed of the memory decrease (i.e., cache memory is fastest but most expensive while hard drives are least expensive but slow).²² Memory is organized in this way to enable a speed-cost tradeoff that gives the CPU quick access to programs and data as needed while allowing for cheap storage of programs and data when not needed.²³ Software is stored in

¹⁴ 17 U.S.C. § 106(1) (2006). Note that the exclusive rights are subject to some limitations such as “fair use.” See 17 U.S.C. §§ 107-112, 117, 119, 121-122 (2006).

¹⁵ 17 U.S.C. § 101 (2006).

¹⁶ *Id.*

¹⁷ Subject to some limitations such as “fair use.” See 17 U.S.C. §§ 107-112, 117, 119, 121-122 (2006).

¹⁸ ANDREW S. TANENBAUM, STRUCTURED COMPUTER ORGANIZATION 51, 69, 102, 105-06, 110, 112 (5th ed. 2006).

¹⁹ SAJJAN G. SHIVA, COMPUTER ORGANIZATION, DESIGN, AND ARCHITECTURE 428 (4th ed. 2008).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 425-28.

secondary memory when installed on a computer.²⁴ However, programs must be in primary memory when the CPU needs to access them so portions of the program are copied from secondary memory to primary memory and from primary memory to cache memory as needed for the CPU.²⁵

The Ninth Circuit held in *MAI* that such copying to RAM constitutes a “copy” under the copyright statute.²⁶ The court reasoned that because a system error log existed that allowed a computer technician to make a diagnosis, the copy of the operating system that existed in RAM was “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁷ Based on this holding, someone who is not authorized by the copyright holder to make a RAM copy could become a copyright infringer by virtue of simply running a computer program. This decision has received much criticism.²⁸

D. The “Essential Step” Provision

The “essential step” provision allows the “owner of a copy of a computer program” to make another copy of the computer program provided “that such a new copy . . . is created as an essential step in the utilization of the computer program.”²⁹ This provision allows the owner of a copy of software to use the software because the copy made to RAM is necessary to run the software. Congress added this provision at the recommendation of the Commission on New Technological Uses of Copyrighted Works (“CONTU”), which was established to “study and propose legislation regarding the reproduction and use of copyrighted works in relation to computers and photocopiers.”³⁰ However, in adding the provision, Congress substituted the term “owner” in place of “rightful possessor” (CONTU’s proposed language) without offering

²⁴ *Id.* at 426.

²⁵ SAJJAN, *supra* note 19, at 425, 427.

²⁶ See *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

²⁷ *Id.* at 518.

²⁸ See Trinnie Arriola, *Software Copyright Infringement Claims After MAI Systems v. Peak Computer*, 69 WASH. L. REV. 405, 422 (1994) (arguing that allowing RAM copies as a basis for copyright infringement undermines the goals of the Copyright Act); Michael E. Johnson, *The Uncertain Future of Computer Software Users’ Rights in the Aftermath of MAI Systems*, 44 DUKE L.J. 327, 335-36 (1994) (arguing that allowing RAM copies to lead to copyright infringement is contrary to the purpose of the Copyright Act); Jule L. Sigall, Comment, *Copyright Infringement Was Never This Easy: RAM Copies and Their Impact on the Scope of Copyright Protection for Computer Programs*, 45 CATH. U. L. REV. 181, 215-17 (1995) (arguing that allowing RAM copies to qualify as copyright infringement leads to unfair results and should be excused as “fair use”).

²⁹ 17 U.S.C. § 117 (2006).

³⁰ Sigall, *supra* note 28, at 185.

any explanation.³¹ This small change had substantial implications.

The Ninth Circuit interpreted the language from the “essential step” provision textually in *MAI* and held that computer repairpersons were not eligible for the “essential step” defense because they did not qualify as “owners.”³² The court considered repairpersons copyright infringers when they ran software licensed only to their customers “to the extent that the repair and maintenance process necessarily involves turning on the computer to make sure it is functional and thereby running the operating system [and copying parts of the operating system to RAM].”³³ Congress overturned this holding five years later by adding a provision to the Digital Millennium Copyright Act of 1998 (“DMCA”) explicitly allowing such copying for maintenance or repair.³⁴

III. LICENSE AGREEMENTS

A. *What is a License Agreement?*

Licensing agreements are contracts governed by state law.³⁵ License agreements (e.g., End User License Agreements (“EULA”) and Terms of Use (“TOU”)) are commonly used by software vendors to establish a licensee relationship with their users rather than giving users ownership rights to software copies that were purchased.³⁶ These license agreements inform the licensee of his or her rights relating to the software.³⁷

B. *Breach of a License Agreement*

Because license agreements are contracts between the licensor and licensee, the licensee must conform to the terms of the license agreements or risk breaching the contract. In addition to breach of contract, many courts have held that a breach of a license agreement can constitute copyright infringement.³⁸ That depends on whether the licensing term that was breached

³¹ *Id.*

³² *Mai*, 991 F.2d at 518 n. 5.

³³ *Id.* at 518-19.

³⁴ 17 U.S.C. § 117(c) (2006).

³⁵ See *Power Lift, Inc. v. Weatherford Nipple-Up Systems, Inc.*, 871 F.2d 1082, 1085 (Fed. Cir. 1989) (“A license agreement is a contract governed by ordinary principles of state contract law.” (citing *Sun Studs, Inc. v. Applied Theory Assocs.*, 772 F.2d 1557, 1561 (Fed. Cir. 1985))).

³⁶ Peter C. Quittmeyer, *Software Licensing*, 763 PLI/PAT 903, 909 (2003).

³⁷ *Id.* at 924-25.

³⁸ See, e.g., *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (“A licensee infringes the owner’s copyright if its use exceeds the scope of its license.” (citing *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 20 (2d Cir. 1976))).

was a limitation on the scope of the license, a breach of which would exceed the scope of the license and could constitute copyright infringement, or merely a separate contractual covenant, a breach of which would be merely a contract dispute.³⁹ This distinction is the crux of this case.

IV. MDY V. BLIZZARD

A. *Background*

Blizzard Entertainment, Inc. and Vivendi Games, Inc. (collectively, “Blizzard”) are the creators of the massively multiplayer online role-playing game (“MMORPG”) World of Warcraft (“WoW”), which was released in November 2004.⁴⁰ WoW players control avatars in a virtual game world and perform quests and fight monsters to gain experience in order to advance to higher levels.⁴¹ Michael Donnelly, the founder of MDY Industries, LLC, is the creator of Glider, a computer program known as a “bot,” which automatically controls a player’s avatar and plays the game while the player is away from his or her computer, allowing for quicker advancement.⁴² Glider was released in June 2005.⁴³ Blizzard notified Donnelly personally in October 2006 that the sale and use of Glider violated Blizzard’s rights in WoW.⁴⁴ MDY filed an action seeking a declaratory judgment that Glider did not infringe upon Blizzard’s rights.⁴⁵ Blizzard responded by filing a counterclaim and third-party complaint asserting, *inter alia*, contributory and vicarious copyright infringement.⁴⁶ This legal update is only concerned with the underlying copyright infringement claim itself, not the contributory or vicarious elements of that claim.

Blizzard’s argument concerning the underlying copyright infringement claim can be summarized as follows: (1) WoW players are not owners of the game client software⁴⁷ but rather licensees who are governed by the license agreements (i.e., the EULA and TOU); (2) WoW players make RAM copies of the game client software by virtue of playing the game; (3) Blizzard authorizes WoW players to make such copies in conformity with the EULA and TOU; (4)

³⁹ Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9th Cir. 1999).

⁴⁰ MDY Industries, LLC v. Blizzard Entm’t, Inc., No. CV-06-2555-PHX-DGC, 2008 WL 2757357, at *1 (D. Ariz. July 14, 2008).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at *2.

⁴⁵ *Id.*

⁴⁶ MDY, 2008 WL 2757357, at *2.

⁴⁷ “Game client software” refers to the software that is loaded onto the WoW player’s computer to play WoW.

The TOU forbids WoW players from using “bots;” and (5) WoW players who use “bots” have violated the license agreements and are no longer authorized to make RAM copies of the game client software.⁴⁸ Therefore WoW players who use “bots” directly infringe upon Blizzard’s copyright.⁴⁹

B. The District Court Holding

The U.S. District Court of Arizona noted that Ninth Circuit law dictates that copying software to RAM creates a “copy” for purposes of the Copyright Act.⁵⁰ The court then stated that a WoW player would be guilty of copyright infringement if the WoW player was not authorized by the copyright owner or by statute to make the RAM copy.⁵¹ This is because without such authorization the WoW player “has exercised a right (copying) that belongs exclusively to the copyright holder.”⁵² The court then turned its discussion to the license agreement and the scope of the license.⁵³

The WoW EULA states in the opening paragraph: “IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, YOU ARE NOT PERMITTED TO INSTALL, COPY OR USE THE GAME.”⁵⁴ The next paragraph states that “[a]ny and all uses of the [game client software] are governed by the terms of the [EULA]” and that the game client software is “distributed solely for use by authorized end users according to the terms of the [EULA].”⁵⁵ Section 1 of the EULA grants “a limited, non-exclusive license” to install and use the game for non-commercial entertainment purposes subject to the EULA and TOU.⁵⁶ The EULA further states that “[a]ny use, reproduction, modification or distribution of the [game client software] not expressly authorized by the terms of the [EULA] is expressly prohibited.”⁵⁷ The district court concluded that the EULA clearly stated that Blizzard was granting a limited license that was restricted by the terms contained within the

⁴⁸ Answer, Counterclaims and Third-Party Complaint at 9, 15, MDY Industries, LLC v. Blizzard Entm’t, Inc., 2008 WL 2757357 (D. Ariz. July 14, 2008) (No. CV-06-2555-PHX-DGC), Dkt. # 10, available at <http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/10/>.

⁴⁹ *Id.*

⁵⁰ MDY, 2008 WL 2757357, at *3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at *4.

⁵⁴ World of Warcraft End User License Agreement at 2, MDY Industries, LLC v. Blizzard Entm’t, Inc., 2008 WL 2757357 (D. Ariz. July 14, 2008) (No. CV-06-2555-PHX-DGC), Dkt. # 42.

⁵⁵ *Id.*

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 2.

EULA and TOU.⁵⁸ Furthermore, the district court ruled that because Blizzard was clear it was granting a limited license and that it imposed restrictions on the transfer and sale of the game client software, WoW players are licensees and are not eligible to use the “essential step” defense.⁵⁹ Since WoW players are not authorized to make RAM copies by statute, the question of copyright infringement turns to the scope of the license.

The district court determined that the TOU contained provisions that established limitations on the scope of the license designed to protect Blizzard’s copyright interests.⁶⁰ Of particular importance is the provision against the use of “bots” or any “third-party software designed to modify the [WoW] experience”⁶¹ The district court found that when a WoW player used Glider the player violated this provision and therefore was acting outside the scope of the license.⁶² The district court held that copying the game client software to RAM while engaged in this unauthorized activity constituted copyright infringement.⁶³

V. PUBLIC POLICY CONCERNS

From a public policy perspective, the ruling from the district court is not desirable. The public interest group, Public Knowledge, argues that Blizzard is attempting to circumvent the consumer protections that Congress added to the copyright statute (i.e., the “essential step” provision) by declaring software users as licensees rather than owners.⁶⁴ Hypothetically, by making software users licensees, the copyright owner can impose any restriction on the licensee with the threat of a copyright infringement suit looming in the background.

There are three elements that taken together allow this to occur. First, the Ninth Circuit qualifies RAM copies as “copies” under the Copyright Act.⁶⁵ Without that precedent lingering in the background no “copying” would take place when a player employs Glider. Without any “copying” there would be no grounds for a copyright infringement claim. Second, the Ninth Circuit interprets “owner” in the “essential step” provision such that software licensees do not fall within the protection of the provision.⁶⁶ The Federal Circuit,

⁵⁸ *MDY*, 2008 WL 2757357, at *4.

⁵⁹ *Id.* at *8-9.

⁶⁰ *Id.* at *5.

⁶¹ *Id.* at *6.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Brief for Public Knowledge, as Amicus Curiae in Support of Reversal at 3, *MDY Indus., LLC. v. Blizzard Entm’t., Inc.*, Nos. 09-15932, 09-16044, 2009 WL 5538911 (9th Cir. filed Sep. 23, 2009).

⁶⁵ *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

⁶⁶ *Id.* at 518 n.5.

however, refused to adopt such a characterization, noting that the Ninth Circuit has been criticized for failing to recognize ownership of a copyright, which can be licensed, and ownership of copies of the copyrighted work.⁶⁷ The Ninth Circuit, in *Wall Data*, stated it was aware of the criticism directed at it, but declined to revisit the question at that time, stating that it would not have affected the outcome of the case at hand.⁶⁸ It is possible that the materiality of how ownership is defined in this case would be enough reason for the Ninth Circuit to revisit that decision. Third, software is often licensed rather than sold and is not treated the same way as printed books. If buying software was like buying a printed book the purchaser would be the owner of the software copy and would be eligible for the “essential step” defense. Despite this negative consequence, there are benefits to the public in allowing software licensing. Rejecting software licenses would force software sales into a one-size-fits-all model and would eliminate educational discounts and other gradient methods of pricing that benefit the public.⁶⁹ Furthermore, enforceable software licenses are necessary for the survival of the open source movement,⁷⁰ which relies upon copyright protection to enforce its licenses.⁷¹ Ultimately, the Ninth Circuit upheld all its precedent and took a different route altogether.

⁶⁷ *DSC Commc’n. Corp. v. Pulse Commc’ns., Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999).

⁶⁸ *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 786 n.9 (9th Cir. 2006).

⁶⁹ See Brief for Software & Information Industry Alliance (SIIA), as Amicus Curiae Supporting Appellee at § I (A), *MDY Indus., LLC. v. Blizzard Entm’t., Inc.*, Nos. 09-15932, 09-16044, 2009 WL 5538913 (9th Cir. filed Nov. 16, 2009) (discussing pricing in relation to granted rights).

⁷⁰ The open source movement is a collaborative effort by individuals to develop software using a distributed peer review model. Open source software provides more rights to users than is given with commercially produced software. Open source rights include the right to make copies, the right to distribute those copies, the right to have access to the source code (the software in its human-readable code rather than the machine-readable compiled code that is used to run the software), and the right to make modification to the software. See *History of the OSI*, OPEN SOURCE INITIATIVE, <http://www.opensource.org/history> (last visited December 18, 2010); *The Open Source Definition*, OPEN SOURCE INITIATIVE, <http://www.opensource.org/docs/osd> (last visited December 18, 2010).

⁷¹ See Brief for Software & Information Industry Alliance (SIIA), as Amicus Curiae Supporting Appellee at § I (B), *MDY Indus., LLC. v. Blizzard Entm’t., Inc.*, Nos. 09-15932, 09-16044, 2009 WL 5538913 (9th Cir. filed Nov. 16, 2009) (discussing innovation in business models spawned by software licensing); *Jacobsen v. Katzer*, 535 F.3d 1373, 1382-83 (Fed. Cir. 2008) (holding terms of a public license are enforceable copyright conditions).

VI. THE NINTH CIRCUIT

On the same day that *MDY* was argued before the Ninth Circuit, the court also heard oral arguments for a different software case regarding the licensee/owner distinction, *Vernor v. Autodesk, Inc.*⁷² In the *Vernor* opinion, the Ninth Circuit summarized its previous holdings regarding licensees versus owners and articulated three considerations to determine whether a software user is a licensee rather than an owner of a copy.⁷³ These conditions are whether the copyright owner “(1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.”⁷⁴ The Ninth Circuit used the newly articulated *Vernor* test in analyzing *MDY*.

First, the Ninth Circuit reaffirmed that RAM copies made while playing WoW would potentially infringe unless the player “(1) is a licensee whose use of the software is within the scope of the license or (2) owns the copy of the software.”⁷⁵ The court then found WoW players to be licensees under the *Vernor* test because Blizzard (1) grants players a non-exclusive, limited license; (2) imposes transfer restrictions by requiring players to transfer original packaging and documentation, delete all copies and installation of the game client, and transfer only to a recipient who accepts the EULA; and (3) imposes use restrictions by allowing the game to be used only for non-commercial use and not allowing players to use unauthorized third-party programs concurrently.⁷⁶ The court, following its earlier precedent, stated that because WoW players were licensees they are not eligible for the “essential step” defense.⁷⁷ Therefore, WoW players could be subject to copyright infringement if their usage falls outside the scope of the license.⁷⁸

The relevant section of the WoW license agreement is § 4(B) of the TOU, which states:

You agree that you will not (i) modify or cause to be modified any files that are part of the Program or the Service; (ii) create or use cheats, bots, “mods,” and/or hacks, or any other third-party software designed to

⁷² See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (Vernor purchased used copies of AutoCAD software from one of Autodesk’s direct customers to resell on eBay. The Ninth Circuit held that AutoDesk did not sell the software to its customers, but licensed it which prevented the customers from selling it and barred Vernor from reselling the software or asserting the “essential step” defense on behalf of his customers.).

⁷³ *Id.* at 1110.

⁷⁴ *Id.* at 1111.

⁷⁵ *MDY Indus., LLC v. Blizzard Entm’t., Inc.*, Nos. 09-15932, 09-16044, 2010 WL 5141269, at *4 (9th Cir. Dec. 14, 2010).

⁷⁶ *Id.* at *5.

⁷⁷ *Id.*

⁷⁸ *Id.*

modify the World of Warcraft experience; or (iii) use any third-party software that intercepts, “mines,” or otherwise collects information from or through the Program or Service.⁷⁹

The Ninth Circuit determined that the restriction against the use of bots was a covenant rather than a condition because nothing in the section conditions Blizzard’s grant of a limited license on players’ compliance with the restriction to not use bots.⁸⁰ That determination alone was sufficient to overturn the district court’s ruling on the underlying copyright infringement claim. However, the Ninth Circuit went on to clarify when a breach of a license agreement can lead to copyright infringement.

A copyright infringement claim is possible when a license agreement is breached “only where the licensee’s action (1) exceeds the licensee’s scope (2) in a manner that implicates one of the licensor’s exclusive statutory rights.”⁸¹ In other words, “there must be a nexus between the condition and the licensor’s exclusive rights of copyright.”⁸² The court made the distinction between violating the WoW license agreement by creating a derivative work (which not only violates the license agreement but also one of the licensor’s statutory rights⁸³) and using a bot (which only violates the license agreement⁸⁴).⁸⁵ The court stated:

Were we to hold otherwise, Blizzard-or any software copyright holder-could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player’s abstention from the disfavored conduct. The rationale would be that because the conduct occurs while the player’s computer is copying the

⁷⁹ World of Warcraft Terms of Use Agreement at § 4(B), MDY Industries, LLC v. Blizzard Entm’t, Inc., 2008 WL 2757357 (D. Ariz. July 14, 2008) (No. CV-06-2555-PHX-DGC), Dkt. # 41-7.

⁸⁰ MDY, 2010 WL 5141269, at *6.

⁸¹ *Id.* at *7.

⁸² *Id.*

⁸³ World of Warcraft Terms of Use Agreement at § 4(B), MDY Industries, LLC v. Blizzard Entm’t, Inc., 2008 WL 2757357 (D. Ariz. July 14, 2008) (No. CV-06-2555-PHX-DGC), Dkt. # 41-7 (“You agree that you will not (i) modify or cause to be modified any files that are part of the Program or the Service”); 17 U.S.C. § 106(2) (2006) (The copyright owner has the exclusive right “to prepare derivative works based upon the copyrighted work.”).

⁸⁴ World of Warcraft Terms of Use Agreement at § 4(B), MDY Industries, LLC v. Blizzard Entm’t, Inc., 2008 WL 2757357 (D. Ariz. July 14, 2008) (No. CV-06-2555-PHX-DGC), Dkt. # 41-7 (“You agree that you will not ... (ii) create or use cheats, bots, ‘mods,’ and/or hacks, or any other third-party software designed to modify the World of Warcraft experience.”).

⁸⁵ MDY, 2010 WL 5141269, at *7.

2011] *BOTS AND COPYRIGHT INFRINGEMENT*

software code into RAM in order for it to run, the violation is copyright infringement. This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners.⁸⁶

The Ninth Circuit was clearly concerned with the public policy implications of its decision.

VII. CONCLUSION

The Ninth Circuit upheld its earlier holdings that RAM copies qualify as “copies” under the Copyright Act and software licensees are not eligible for the “essential step” defense. The court also affirmed the enforceability of software licenses but limited copyright infringement claims spawned by them to those breaches “where the licensee’s action (1) exceeds the licensee’s scope (2) in a manner that implicates one of the licensor’s exclusive statutory rights.” The court’s recent ruling quashes the use of license agreements as a tool for frivolous copyright infringement claims and overturned what could have been a devastating blow to software licensees.

⁸⁶ *Id.*