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Alessandra Garbagnati

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The Wrath of the Blizz King¹: How the Ninth Circuit’s Decision in *MDY Industries, Inc. v. Blizzard Entertainment* May Slay the Game Genie

by
ALESSANDRA GARBAGNATI*

I. Introduction	314
II. Legal Background	315
A. Early Case Law	315
B. The Digital Millennium Copyright Act	317
1. Anti-Circumvention Provisions of the DMCA.....	317
2. DMCA Case Law	319
3. Rulemaking Provisions of the DMCA	320
III. <i>MDY Industries v. Blizzard Entertainment</i>	322
A. Background	322
B. The District Court.....	325
C. Ninth Circuit Decision.....	327
1. Copyright Infringement	327
2. Access v. Circumvention.....	328
3. Distinction from the Federal Circuit	329
IV. Concerns with the Ninth Circuit’s Decision	330
A. <i>MDY Industries v. Galoob Toys</i>	331
B. Should a Separate Cause of Action Exist?.....	333

1. This title is a play on the third expansion of the *World of Warcraft*, entitled “The Wrath of the Lich King.”

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C. Is this Separate Cause of Action Necessary?	334
V. Proposals	335
A. New Rulemaking Exemption for Private Uses of Videogames	335
B. Case Law.....	336
C. Nonlegal Methods.....	338
VI. Conclusion.....	339

I. Introduction

Since its release in 2004, Blizzard Entertainment’s (“Blizzard”) *World of Warcraft* (“WoW”) has become the world’s most infamous and popular massively multiplayer online role playing game (“MMORPG”).² The game’s popularity has been accompanied by a wealth of controversy. Although much of this controversy has revolved around the rising concern for users’ game addiction,³ much of it has also revolved around Blizzard’s staunch policy against cheating. Blizzard’s anti-cheating policy has culminated in the recent Ninth Circuit decision in *MDY Industries v. Blizzard Entertainment* (“*MDY Industries*”). Although this decision has clarified some provisions of the Digital Millennium Copyright Act (“DMCA”), at least in the context of gaming, it also strays from other DMCA decisions and allows rights holders to enforce the DMCA where there is no copyright infringement.⁴

The underlying situation in *MDY Industries* seems innocuous. At its core, the decision prevents gamers from cheating, and cheaters generally do not warrant significant sympathy. However, the Ninth Circuit’s decision is troublesome because it gives rights holders the ability to use copyright law to control such undesirable behavior where they had been unable to do so in the past.⁵ This decision may

2. Ross Shikowitz, Note, *License to Kill: MDY v. Blizzard and the Battle over Copyright in World of Warcraft*, 75 BROOKLYN L. REV. 1015, 1019 (2010). See also, *World of Warcraft: Cataclysm Moves 4.3 Million Units in One Month*, GAME POLITICS (Jan. 10, 2011), <http://www.gamepolitics.com/2011/01/10/world-warcraft-cataclysm-moves-43-million-units-one-month> (describing the record breaking sales of the latest WoW expansion).

3. See, e.g., Jeremy Reimer, *Doctor Claims 40 Percent of World of Warcraft Players are Addicted*, ARS TECHNICA (Aug. 9, 2006, 5:11 PM), <http://arstechnica.com/old/content/2006/08/7459.ars>; Ben Kuchera, *Neglected Child Dies While Parents Play World of Warcraft. This Isn’t Gaming News*, ARS TECHNICA (June 21, 2005, 10:44 PM), <http://arstechnica.com/gaming/news/2005/06/547.ars>.

4. See *Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d 1178 (Fed Cir. 2004). See also Thomas Carey, *The DMCA Re-Fanged: Courts Now at Odds Over Copyright Protection for Software Security Devices*, 2011 EMERGING ISSUES 5476 (Jan. 6, 2011).

5. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

create a dangerous precedent whereby rights holders are able to control for more than merely end use, a level of control that other circuits had previously sought to avoid.⁶

This paper seeks to explore the impact that the Ninth Circuit's decision in *MDY Industries* will have on the videogame industry in light of its decision almost ten years earlier in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* ("*Galoob Toys*").⁷ Although cheating in videogames is ultimately an undesirable behavior, loathed by both the industry and gamers alike, copyright law should not be used to prevent such behavior, especially where it had been unable to do so in the past. This paper will outline the legal history surrounding this issue. First, it will discuss some of the landmark cases involving the distribution of programs that enable players to cheat. It will then discuss the DMCA and some of the early decisions on the access control provision. Next, this paper will discuss the litigation surrounding this case, primarily focusing on the copyright and DMCA issues. The final part of this paper will compare these cases and ultimately decide that the Ninth Circuit's stance creates a dangerous precedent that might grant rights holders too much control over something that copyright law should not be addressing and will put forth several proposals in light of this decision.

II. Legal Background

A. Early Case Law

The Ninth's Circuit's recent decision in *MDY Industries* was not the circuit court's first stab at software of this nature. Almost twenty years earlier, in *Galoob Toys*, the Ninth Circuit considered whether Galoob's game enhancing program, the Game Genie, infringed Nintendo's copyright.⁸ The Game Genie allowed the player to alter certain aspects of the game in the cartridge during the duration of the gameplay to enhance their gameplay by gaining extra lives or jumping higher, for example.⁹ In order to make these changes, the player could enter one of a combination of codes provided to them by the

6. See Mark DeFeo, Note, *Unlocking the iPhone: How Antitrust Law Can Save Consumers from the Inadequacies of Copyright Law*, 49 B.C. L. REV. 1037, 1055 (2008); Fred Von Lohmann, *Unintended Consequences: Twelve Years After the DMCA*, ELEC. FRONTIER FOUND. (Feb. 2010), <http://www.eff.org/files/eff-unintended-consequences-12-years.pdf>.

7. *Lewis Galoob Toys*, 964 F.2d 965.

8. *Id.* at 967.

9. *Id.*

manufacturer.¹⁰ These alterations were only temporary and did not change, alter, or affect the actual Nintendo game cartridges.¹¹ Nintendo sued Galoob for copyright infringement. The Ninth Circuit affirmed the district court's holding that the alterations made by Game Genie were not sufficiently permanent or fixed to have violated any of Nintendo's statutory rights.¹² It relied on the fact that the Game Genie itself did not create any audiovisual displays, so any resulting effects of the alterations would never be sufficiently permanent or embodied to constitute a derivative work.¹³ The Ninth Circuit further held that even if the Game Genie violated one of Nintendo's statutory rights, the private and noncommercial use of the game system would constitute fair use.¹⁴

Several years later, the Ninth Circuit reconsidered the copyright issues underlying videogame modifications in *Microstar v. Formgen, Inc.*¹⁵ At issue in *Microstar* was whether a third party company could sell user-created levels to the popular videogame *Duke Nukem*.¹⁶ This videogame came with a feature that allowed players to create their own maps and levels for gameplay. Microstar compiled three hundred user-created levels and maps and sold them commercially.¹⁷ The company sought a declaratory judgment in district court to say that its product did not create derivative work of the original game.¹⁸ Here, the Ninth Circuit distinguished the user-generated levels from the temporary modifications of *Galoob Toys*, holding that because these levels were created in .MAP files, they were sufficiently permanent and stable to be considered derivative works.¹⁹ The court further denied the argument that such a work could be classified as fair use and held that the sales of these user-generated levels interfered with the right holder's ability to create subsequent *Duke Nukem* games.²⁰

10. *Id.*

11. *Id.*

12. *Id.* at 968.

13. *Id.*

14. *Id.* at 972.

15. *Microstar v. Formgen, Inc.*, 154 F.3d 1107 (9th Cir. 1998).

16. *Id.* at 1109.

17. *Id.*

18. *Id.*

19. *Id.* at 1111.

20. *Id.* at 1113.

B. The Digital Millennium Copyright Act

As copyrighted works became increasingly digitalized, the ease through which the public could reproduce and distribute the works also subsequently increased.²¹ Although some rights holders used technological protection measures (“TPMs”) to protect their works from unlawful distribution, prior to the DMCA, copyright law or contract law could not adequately protect these rights holders from the hackers who would find ways to bypass those controls.²² To address this problem, the World Intellectual Property Organization (“WIPO”) enacted the WIPO Copyright Treaty in 1996.²³ Specifically, Article 11 of WIPO’s treaty obligated any parties to the treaty to enact laws to legally protect rights holders who placed TPMs on their copyrighted works.²⁴ Thus, Congress in 1998 added the DMCA to the Copyright Act through the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998.²⁵

1. Anti-Circumvention Provisions of the DMCA

The anti-circumvention provisions of the DMCA generally prohibit the circumvention of TPMs put in place to control the access to or reproduction of copyrighted works.²⁶ For the most part, the DMCA deals with two types of TPMs—those that protect access

21. See Michael J. Chang, Comment, *Digital Copyrightability of Lexmark Toners and Cartridges under the Digital Millennium Copyright Act*, 17 ALB. L.J. SCI. & TECH. 559, 564 (2007).

22. Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 471 (2003).

23. ROGER SCHECHTER & JOHN R. THOMAS, PRINCIPLES OF COPYRIGHT LAW 278 (Thomson Reuters 2010).

24. World Intellectual Property Org., *WIPO Copyright Treaty*, Dec. 20, 1996, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240. Article 11 states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

25. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 12A.03 (2011).

26. 17 U.S.C. § 1201 (West 2011). See also Madison, *supra* note 22, at 471.

control to copyrighted works,²⁷ and those that protect the rights of the copyright holder.²⁸

Sections 1201(a)(1)(A) and 1201(a)(2) prohibit the circumvention of TPMs put in place for access control to a copyrighted work.²⁹ Section 1201(a)(1)(A) specifically prohibits a person from circumventing a technological measure that controls access to a copyrighted work.³⁰ The statute defines circumvention as means that “descramble a scrambled work . . . decrypt an encrypted work, or otherwise . . . avoid, bypass, remove, or impair a technological measure without the authority of the copyright holder.”³¹ Section 1201(a)(2) prohibits the “manufacture, import” or general distribution of any “technology, product, service, device, component, or part thereof” that might be used to circumvent such access controls.³² Thus, while section 1201(a)(1)(A) prohibits a person from engaging in the act of circumvention, Section 1201(a)(2) prohibits a person from distributing or manufacturing products or services that would enable someone else to circumvent a TPM.

Section 1201(b) prohibits the manufacture, import, or trafficking of a product or service that can circumvent a TPM put in place to protect the statutory rights of the copyright holder.³³ A violation of this section requires that the trafficked product or service must have been primarily designed to circumvent one of the copyright holders exclusive rights enumerated in Section 106 of the Copyright Act.³⁴ For example, if a rights holder put in place a TPM that prevented the copying of a song, a product distributed to circumvent that technology would trigger this part of the DMCA. Unlike the access control provisions, Section 1201(b) only prohibits the manufacture and trafficking of such products or services and does not forbid the individual acts of circumvention.³⁵

27. § 1201(a)(3)(B).

28. § 1201(b)(2)(B).

29. § 1201(a)(1)(A); § 1201(a)(2).

30. § 1201(a)(1)(A).

31. § 1201(a)(3)(A).

32. § 1201(a)(2).

33. § 1201(b)(1)(A).

34. *Id.*

35. SCHECHTER & THOMAS, *supra* note 23, at 284. As these authors note, however, such conduct could still violate other provisions of the Copyright Act.

2. *DMCA Case Law*

The first major decision involving the access control provisions of the DMCA was *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, which dealt with TPMs used in garage door openers (“GDOs”).³⁶ Chamberlain manufactured GDOs, devices that allow a person to remotely open his or her garage.³⁷ One line of these GDOs contained special copyrighted code that would change the transmitter required to open the door, which acted as an additional security measure by making it harder for burglars to bypass the code and enter the home.³⁸ Skylink manufactured and sold universal transmitters, which could be used with any GDOs regardless of whether they used rolling or regular codes.³⁹ These transmitters would circumvent Chamberlain’s products by simulating the “rolling code” feature of the GDOs.⁴⁰ Although Chamberlain sued Skylink for patent infringement, copyright infringement, and violation of Section 1201(a)(2) of the DMCA, the only issue before the court on appeal was the DMCA violation.⁴¹ The Federal Circuit held that a DMCA violation could not exist without some nexus between the technological protection and copyright infringement.⁴² To hold otherwise, the Federal Circuit stated, would allow copyright holders and manufacturers to bypass antitrust law and the doctrine of copyright misuse.⁴³

Besides the recent Ninth Circuit decision, only one other circuit court has analyzed the access control provision of the DMCA.⁴⁴ *MGE UPS Systems* dealt with “uninterruptible power supply” machines, which are used as backup energy supplies during power outages.⁴⁵ MGE’s machines could only be fully serviced using MGE’s copyrighted software.⁴⁶ To protect its software, MGE placed “dongles,” external hardware keys that expire after a certain number of uses, onto its machines.⁴⁷ A group of hackers bypassed the code

36. *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1183 (Fed. Cir. 2004).

37. *Id.*

38. *Id.*

39. *Id.* at 1184.

40. *Id.* at 1184–85.

41. *Id.* at 1185.

42. *Id.* at 1202.

43. *Id.* at 1193.

44. *MGE UPS Sys. v. GE Consumer & Indus.*, 612 F.3d 760 (5th Cir. 2010).

45. *Id.* at 763.

46. *Id.*

47. *Id.*

and posted the information on the Internet, which allowed people to access the software without using the security keys.⁴⁸ MGE sued a company that used the leaked information to service MGE's machines for copyright infringement, trade secret misappropriation, and DMCA violations.⁴⁹ Although MGE prevailed on copyright infringement and trade secret misappropriation, the district court dismissed the DMCA claims.⁵⁰ On appeal, the Fifth Circuit relied on *Chamberlain* to hold that “[m]erely bypassing a technological protection that restricts a user from viewing or using a work is insufficient to trigger the DMCA’s anti-circumvention provision.”⁵¹ Because MGE had not shown that there was an underlying copyright interest, the Fifth Circuit affirmed the district court’s dismissal of the DMCA claims.⁵² The Fifth Circuit later withdrew this opinion.⁵³ Although upon reconsideration, it once again affirmed the dismissal of the DMCA claims, it avoided the copyright nexus discussion of *Chamberlain* and instead held that the DMCA did not apply because the TPM had already been circumvented.⁵⁴

3. *Rulemaking Provisions of the DMCA*

To ensure that the DMCA properly adapts to advances in technology and maintains a proper balance between the interests of the public and of rights holders, the DMCA contains a rulemaking provision which orders the Library of Congress to reconsider the DMCA and grant exemptions that would benefit the public interest.⁵⁵ Section 1201(a)(1)(C) of the DMCA orders the Librarian of Congress (“Librarian”) to conduct rulemaking every three years to create exemptions to the DMCA that would maintain a healthy balance between rights holders and the public.⁵⁶ According to the statute, the Librarian must take into account factors such as the “availability for use of copyrighted works,”⁵⁷ the “impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching,

48. *Id.*

49. *Id.*

50. *Id.* at 764.

51. *Id.* at 765.

52. *Id.* at 765–66.

53. *MGE UPS Sys. v. GE Consumer & Indus.*, 622 F.3d 361, 363 (5th Cir. 2010).

54. *Id.* at 366.

55. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 951 (9th Cir. 2010).

56. 17 U.S.C. § 1201(a)(1)(C) (West 2011).

57. *Id.* at § 1201(a)(1)(C)(i).

scholarship, or research,”⁵⁸ and other factors that try to ensure that the DMCA does not entirely overstep the fair use doctrine of copyright law.⁵⁹ Further, this rulemaking occurs triennially to ensure that the DMCA can reflect the most current technology.⁶⁰

In July 2010, the Librarian granted exemptions for six classes of work.⁶¹ The most notable of these exemptions essentially allowed owners of smart phones to “jailbreak” their phones.⁶² This exemption, which the Electronic Frontier Foundation had lobbied extensively for, would allow users to install programs on their phones that were not designated or allowed by the original manufacturer.⁶³ Prior to this rulemaking, it was a violation of the DMCA to jailbreak or unlock a smartphone.⁶⁴ Preventing consumers from unlocking phones meant that they were bound to one network provider, that network provider’s rates, and, if that provider did not provide service abroad, geographical restrictions locked the phone and consumers were, therefore, locked into the applications that the phone company had approved.⁶⁵ Other designated classes included allowances for DVD owners to rip their DVDs for educational use, documentary use, and noncommercial videos;⁶⁶ for circumvention of access controls for videogames where such access is solely for the good faith testing of security flaws;⁶⁷ and computer programs protected by dongles.⁶⁸

58. 17 U.S.C. § 1201(a)(1)(C)(iii) (West 2011).

59. Christopher Moseng, *The Failures and Possible Redemption of the DMCA Anticircumvention Rulemaking Provision*, 12 J. TECH. L. & POL’Y 333, 336 (2007).

60. Bill Rosenblatt, *Fair Use and the DMCA Triennial Rulemaking*, COPYRIGHT AND TECH. (July 29, 2010, 5:50 AM), <http://copyrightandtechnology.com/2010/07/29/fair-use-and-the-dmca-triennial-rulemaking/>.

61. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 25, 2010) (to be codified at 37 C.F.R.pt. 201), available at <http://www.copyright.gov/fedreg/2010/75fr43825.pdf> [hereinafter “Librarian of Congress Exemptions”].

62. *Id.* at 43,828.

63. Michael K. Cheng, Note, *iPhone Jailbreaking Under the DMCA: Towards a Functionalist Approach in Anti-Circumvention*, 25 BERKELEY TECH. L. J. 215, 216 (2010).

64. Cody Gillians, *Is this Mine or Yours? The Effects of the Rulings in Vernor v. Autodesk and the Library of Congress in the Determination of Who Owns Software Copies*, 12 N.C. J.L. & TECH. 205, 207–208 (2010). To put it simply, both jailbreaking and unlocking a phone requires the consumer to modify the software of the phone. When someone jailbreaks a phone, he or she is modifying the software to allow for the installation of unauthorized programs. When someone unlocks the phone, he or she modifies the software to allow the phone to be used with a different mobile service. See Cheng, *supra* note 61, at 218.

65. See Cheng, *supra* note 63, at 218.

66. Librarian of Congress Exemptions, *supra* note 59, at 43,827.

67. *Id.* at 43,832.

68. *Id.* at 43,833.

Despite the potential benefits of Sections 1201(a)(1)(C) and (D) in ensuring the public interest is not ignored, some scholars have criticized the effectiveness of the rulemaking process in effectively protecting public interest and fair uses of copyrighted works protected by TPMs.⁶⁹ For one, the exemptions set forth triennially only last until the next rulemaking period begins and no longer.⁷⁰ Although this allows for the DMCA to adjust more fluidly to ever-changing technology, it also creates inconsistencies with the treatment of the DMCA. Since the enactment of the DMCA, this rulemaking process has occurred four times.⁷¹ During each of these rulemaking periods, the Librarian has sought comments from the public to assist it in understanding the real-life application of the DMCA.⁷² In the earlier rulemakings, the Librarian ran into problems in establishing proper classifications to use to grant exemptions.⁷³ The result has been a lack of consistency in the nature of the exemptions granted by the Librarian.⁷⁴

III. *MDY Industries v. Blizzard Entertainment*

A. Background

Despite its recent decline in subscribers, WoW continues to be the world's most popular MMORPG.⁷⁵ The game takes place in the fantasy world of Azeroth, where players choose avatars of one of the game's two warring factions (Horde or Alliance), and play with or against other players to advance their characters, complete quests, obtain achievements, and retrieve rare items and upgrades.⁷⁶ Although a player purchases the initial software as well as the subsequent expansions, players also pay a monthly subscription fee to

69. See Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyright Works*, 22 BERKELEY TECH. L. J. 981, 1007 (2007) (outlining some of the key criticisms of the DMCA's rulemaking process).

70. *Id.*

71. See *id.* at 344. As noted above, the most recent of these rulemaking processes concluded in July 2010. See Gillians, *supra* note 62, at 207–08.

72. Moseng, *supra* note 59, at 344.

73. *Id.* at 349.

74. *Id.* at 336.

75. Carol Pinchefskey, *World of Warcraft May Protect the Aging Brain*, FORBES (February 28, 2012, 7:28 PM), <http://www.forbes.com/sites/carolpinchefskey/2012/02/28/world-of-warcraft-may-protect-the-aging-brain/>. See also Chris Pereira, *Blizzard's Latest Attempt to Lure Back WoW Subscribers Reeks of Desperation*, 1UP.COM (Mar. 8, 2012), <http://www.1up.com/news/lure-back-wow-subscribers-desperation>.

76. See Shikowitz, *supra* note 2, at 1020–22.

play WoW.⁷⁷ In order to create an environment that encourages players to continue gameplay after achieving the maximum level, Blizzard has taken great efforts to induce players to return to the game. It has released three expansion packs since releasing the original game in 2004, all of which increased the maximum level that a player's avatar can reach.⁷⁸ Players can also engage in raids with members of their guilds to obtain achievements and other rare items.⁷⁹

Seeking to profit from WoW's success, businesses such as MDY Industries ("MDY") created "bots," programs that allow users to cheat within the game.⁸⁰ Use of these bots violates Blizzard's Terms of Use ("ToU").⁸¹ Like the Game Genie, these bots do not alter or copy the game itself and can only be used within the game.⁸² They either allow the player to rapidly advance through the game, or allow players to obtain rare items. MDY's Glider, perhaps the most famous of the bots, was released in June 2005 and had earned over \$3.5 million in revenue prior to litigation.⁸³ Glider allowed players to engage in gameplay and advance their characters while players were away from the computer.⁸⁴ It also allowed players to mine and farm⁸⁵ the game in order to obtain rare and collectible items.⁸⁶

77. *Id.* at 1018.

78. At the writing of this paper, the maximum level that players may attain through the latest *Cataclysm* expansion is level eighty-five. See Mike Sharkey, *Cataclysm Player Hits Level 85 in Five Hours*, GAME SPY (Dec. 7, 2010), <http://pc.gamespy.com/pc/world-of-warcraft-expansion-3/1138891p1.html>. It should be noted that both MDY decisions speak of lower maximum levels because they came out prior to the later expansions.

79. In fact, because of the game features available only to players who have reached the maximum level, many WoW enthusiasts do not consider the game to have started until that level has been obtained. See, e.g., Michael Gray, *WoW Rookie: You're Level 85 ... Now What?*, WOW INSIDER (May 5 2011, 9:00 AM), <http://wow.joystiq.com/2011/05/05/wow-rookie-youre-level-85-now-what/>.

80. MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 935 (9th Cir. 2010).

81. *Id.* See also Shikowitz, *supra* note 2, at 1024.

82. MDY, 629 F.3d at 935.

83. *Id.*

84. *Id.*

85. Gold farming, a practice primarily engaged in less developed countries abroad, is the process through which players collect virtual gold in WoW and sell it for real money to other players in the game. See, e.g., Dave Rosenberg, *'Gold Farming' Good for Multiplayer Games?*, CNET NEWS (Oct. 2, 2008, 4:42 AM), http://news.cnet.com/8301-13846_3-10056262-62.html?tag=mncol;txt. Such practices are highly controversial, not only because it constitutes cheating, but because those foreign workers who engage in gold farming are given low wage and put into poor working conditions to farm the gold. See Cory Doctorow, *Chinese Gold Farming*, BOING BOING (Mar. 5, 2009, 3:16 PM), <http://boingboing.net/2009/03/05/chinese-gold-farming.html>.

86. MDY, 629 F.3d at 935.

Although there have been disputes about the effects of these bots on regular players, Blizzard put forth evidence demonstrating the negative impact of bots, both financially and on the regular gameplay.⁸⁷ According to Blizzard, such programs ruin the “carefully balanced competitive environment” of the game.⁸⁸ For instance, the prevalence of rare items allegedly “upsets the game’s economy, diminishing the value of the assets acquired by regular game users.”⁸⁹ The company received over four hundred thousand complaints about these bots between December 2004 and September 2008.⁹⁰ Additionally, Blizzard provided evidence at trial it had lost subscription fees from users who were able to advance to the maximum level faster than they would have without the assistance of bots.⁹¹

In order to combat cheating, Blizzard developed Warden, a TPM that detects and blocks the use of unauthorized third-party programs within the game.⁹² Warden operates in two ways. First, when a player tries to log onto Blizzard’s server, Warden scans the computer to detect the existence of unauthorized programs.⁹³ If Warden detects these programs, it will prevent the user from logging onto the server.⁹⁴ Warden also employs a “resident” component that runs while the player is engaged in gameplay. This component requests the player’s software to send portions of the memory. If the memory is “clean,” Warden will let the player continue; if it detects the presence of unauthorized programs in the memory, it will ban the player from the game.⁹⁵ When Blizzard first introduced Warden, it almost immediately detected and banned the accounts of most Glider users.⁹⁶ As a result, MDY modified Glider to avoid Warden’s detection and released the software as an additional subscription service for users who wanted to avoid Warden.⁹⁷ This service greatly bolstered the bot’s marketing success.⁹⁸

87. *Id.* at 936.

88. *See MDY*, 616 F. Supp. 2d 958, 963 (D. Ariz. 2009).

89. *Id.*

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

91. *Id.*

92. *Id.* at 935.

93. *MDY*, 616 F. Supp. 2d at 964.

94. *Id.*

95. *Id.*

96. *Id.*

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

98. *MDY*, 616 F. Supp. 2d at 966.

In 2006, Blizzard sent a cease-and-desist letter to MDY, alleging that a screenshot of the game on the MDY website and the install file of the game infringed Blizzard's copyright.⁹⁹ Although MDY removed the screenshot from the website, it questioned why the bot itself infringed Blizzard's copyright.¹⁰⁰ MDY therefore filed a complaint in the Arizona district court seeking a declaration that Glider did not infringe Blizzard's copyright.¹⁰¹ In response, Blizzard filed counterclaims against both MDY and Donnelly for indirect copyright infringement, tortious interference of copyright, and violation of sections of the DMCA.

B. The District Court

The district court ruled that MDY was liable for violation of the DMCA and tortious interference with contract, and that Donnelly was personally liable for copyright infringement.¹⁰² It ordered a permanent injunction against the further distribution of the Glider software.¹⁰³ The court granted a permanent injunction against the sales of the Glider bot and entered a judgment of \$6.5 million against MDY and Donnelly.¹⁰⁴

Blizzard claimed that Glider had violated both Sections 1201(a)(2) and 1202(b)(1) of the DMCA.¹⁰⁵ In finding that the Glider bot violated the DMCA, the district court distinguished between the literal and nonliteral aspects of the game, which determined how Glider interacted with Warden, and therefore, determined the extent to which the bot circumvented Blizzard's technical protection.¹⁰⁶

The court first considered the literal aspects of the game, which are stored in the game's installation file and can be found in the game's actual code.¹⁰⁷ Because the literal aspects of the game are stored in the data files on a player's computer, the player need not enter Blizzard's server in order to access these aspects of the game.¹⁰⁸ Because the player does not need to access the server in order to use or copy the literal elements, and Glider, therefore, did not have to

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

100. *Id.*

101. *Id.* at 937.

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

103. *Id.*

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

105. *MDY*, 616 F. Supp. 2d at 963.

106. *Id.* at 964.

107. *Id.*

108. *Id.*

bypass Warden to access these elements, the court granted summary judgment in favor of MDY and Donnelly on the 1201(a)(2) claim with regards to the literal elements.¹⁰⁹ However, the court also held that the literal code was only a small part of the game's software.¹¹⁰

The court next looked at the nonliteral aspects of the game client software, which the court decided make up the majority of the WoW experience. The nonliteral aspects consist of the multi-media aspects of the game, including the sounds, graphics, music, and avatars.¹¹¹ The court held that these aspects of the game created the "dynamic WoW environment."¹¹² In analyzing the nonliteral aspects of the game's software, the court further divided the nonliteral aspects into discrete and dynamic nonliteral elements.¹¹³ The discrete nonliteral elements of the game consist of the individual sounds, images, etc. that are stored on the user's hard drive.¹¹⁴ Although a player can access the non-discrete elements individually without accessing Blizzard's server, the player does not enter the "dynamic world" of WoW until he or she accesses the server.¹¹⁵ The nonliteral aspects of the game's software are stored on the computer's hard drive and can be accessed individually without accessing the server.¹¹⁶ As with the literal aspects, the district court held that MDY and Donnelly did not violate Section 1201(a)(2) of the DMCA with regards to the discrete nonliteral aspects of the game because the player did not have to access the server in order to access the individual multi-media aspects of the game.¹¹⁷

However, the district court granted summary judgment in favor of Blizzard with regards to the dynamic nonliteral elements of the game software.¹¹⁸ These elements are the overall aspects of the game that allow a player to immerse himself or herself into the world of Azeroth. Blizzard's server often controls the dynamic elements of the game, such as "where each monster will spawn, what type of monster will appear, the monster's capabilities, and what treasure will be

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 965.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 966.

118. *Id.*

recovered if the monster is defeated.”¹¹⁹ Thus, the player could only experience WoW if he or she accessed the dynamic nonliteral elements in Blizzard’s server.¹²⁰ Because Warden controls access to this server and Glider would need to circumvent Warden to access it, the district court granted summary judgment in favor of Blizzard with respect to the dynamic elements of the game.¹²¹ The district court also rejected MDY and Donnelly’s argument that Section 1201(a)(2) did not apply.¹²² Although they argued that Section 1201(a)(2) was inapplicable because the dynamic nonliteral aspects of the game could not be copyrighted, the court disagreed, relying on the precedent that audio-visual elements of video games, even when controlled by the player, can be awarded copyright protection.¹²³

The court also held that MDY and Donnelly violated section 1201(b)(1) of the DMCA.¹²⁴ Although the parties disagreed as to which rights under the Copyright Act the game software triggered, the court ultimately held that Glider copied the dynamic elements of the game whenever a player used it to access Blizzard’s servers.¹²⁵

C. Ninth Circuit Decision

1. Copyright Infringement

On appeal, the Ninth Circuit reversed the district court’s finding of secondary liability for copyright infringement.¹²⁶ The court acknowledged that players who accessed the game made a copy of it in their random access memory.¹²⁷ Furthermore, it relied on a recent decision to find that people who purchased WoW did not own, but merely licensed the game.¹²⁸ However, the Ninth Circuit held that a license violation does not constitute copyright infringement unless there is “some nexus between the condition and the licensor’s exclusive right of copyright.”¹²⁹

119. *Id.* at 965.

120. *Id.*

121. *Id.* at 966.

122. *Id.* at 966–77.

123. *Id.*

124. *Id.* at 968.

125. *Id.*

126. MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928, 941 (9th Cir. 2010).

127. *Id.* at 938.

128. *Id.* at 938–39.

129. *Id.* at 941.

In order for a breach of contract to constitute copyright infringement, the complaint must be grounded in one of the exclusive statutory rights under the Copyright Act.¹³⁰ Although the Ninth Circuit acknowledged that some aspects of the ToU dealt with Blizzard's statutory rights, it also found that many of the terms did not.¹³¹ It distinguished between a user who might create a derivative work based on WoW and someone who might disrupt the game for other players.¹³² Because the aspects of the ToU that applied to Glider did not deal with Blizzard's statutory rights under copyright law, the Ninth Circuit held that there could be no copyright infringement.¹³³ Further, because the user could not directly infringe Blizzard's copyright, the Ninth Circuit also held that MDY or Donnelly could not be liable for secondary infringement.¹³⁴ The Ninth Circuit justified this holding by stating that deciding otherwise would grant copyright holders far more expansive rights than copyright law would allow.¹³⁵

2. *Access v. Circumvention*

The Ninth Circuit considered three provisions of the DMCA in its holding—Section 1201(a)(1)(A), Section 1201(a)(2), and Section 1201(b)(1). The court interpreted these provisions of the DMCA to create “two distinct types of claims.”¹³⁶ In order to reach this analysis, it considered the text of the three DMCA provisions, distinguishing between Section 1201(b)(1)'s language about the “right of the copyright owner” and Section 1201(a)'s language referring to a “work protected by this title.”¹³⁷ The court also distinguished between Section 1201(a)'s prohibition against circumvention and Section 1201(b)(1)'s prohibition against trafficking of such devices, specifically noting that the Copyright Act already covers the prohibition against circumvention of Section 1201(b)(1).¹³⁸ The Ninth Circuit also looked to the legislative history of the DMCA and

130. *Id.* at 940.

131. *Id.* at 940–41.

132. *Id.*

133. *Id.* at 941.

134. *Id.*

135. *Id.* at 940–41.

136. *Id.* at 944.

137. *Id.* at 944–45.

138. *Id.* at 945.

distinguished this case from other circuit court decisions that had interpreted Section 1201(a) differently.¹³⁹

The Ninth Circuit read Section 1201(a) to prohibit the circumvention of TPMs that control access to copyrighted work.¹⁴⁰ The right, according to the court, does not require a nexus to any of the statutory rights under copyright law. Rather, it merely protects TPMs that control access itself.¹⁴¹ Using this interpretation of Section 1201(a)(2), the court affirmed the district court's holding with regards to the literal and discrete nonliteral aspects of the game because Glider would not have to circumvent Warden in order to access these elements.¹⁴² Similarly, the court affirmed the district court's holding that MDY and Donnelly violated 1201(a)(2) with regards to the dynamic nonliteral elements of the game because Glider had to circumvent Warden in order to access those aspects of the game.¹⁴³

On the other hand, the Ninth Circuit read Section 1201(b) to prohibit technologies that circumvent TPMs created to protect the copyright holder's statutory rights.¹⁴⁴ These would therefore be the technological measures created by copyright holders to protect against copyright infringement.¹⁴⁵ Because Warden was not created to protect Blizzard's statutory rights, the Ninth Circuit held that Section 1201(b)(1) was inapplicable to Glider.¹⁴⁶ Because MDY and Donnelly did not violate Section 1201(b)(1), the Ninth Circuit vacated those aspects of the permanent injunction dealing with those provisions of the DMCA.¹⁴⁷

3. *Distinction from the Federal Circuit*

The Ninth Circuit's decision in *MDY Industries* departed from that of other courts which required a nexus between the anti-circumvention technology and the exclusive rights of the copyright holder.¹⁴⁸ Specifically, the Ninth Circuit took significant measures to distinguish itself from the decision in *Chamberlain*.

139. *Id.* at 946–52. *See also supra* Part II.B.2.

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

141. *Id.*

142. *Id.* at 952.

143. *Id.* at 954.

144. *Id.* at 944.

145. *Id.* at 946.

146. *Id.* at 954–55.

147. *Id.* at 955 n.20.

148. *See supra* Part II.B.2.

In *MDY Industries*, the Ninth Circuit criticized the reasoning of *Chamberlain*. It first discussed the statutory inconsistencies created by the Federal Circuit's reading of the DMCA.¹⁴⁹ The Ninth Circuit also noted that the Federal Circuit's reading of the DMCA would "deprive copyright owners of the important enforcement tool that Congress granted them to make sure that they are compensated for valuable non-infringing access."¹⁵⁰ The Ninth Circuit also looked to the legislative history of the DMCA, citing a Senate Judiciary Committee report that explicitly distinguished the rights set forth in Sections 1201(a)(2) and (b)(1) and making sure to note the rights "are not interchangeable."¹⁵¹

The Ninth Circuit also rejected the Federal Circuit's concern that copyright holders would use the DMCA to use technological protection measures to control works in anticompetitive ways.¹⁵² Although the court did not deny that such occurrences were possible, it refused to consider the argument because such behavior was not of concern in Blizzard's gaming context.¹⁵³ Relying on the DMCA's order to allow the Library of Congress to create exceptions to the DMCA every three years, the court held the absurd concerns the Federal Court discussed in *Chamberlain* would never actually come to fruition.¹⁵⁴

IV. Concerns with the Ninth Circuit's Decision

At issue in *MDY Industries* was whether the DMCA could be used to circumvent a TPM put in place to block cheating in an online videogame. On its face, such a decision may seem harmless. It is hard to feel sympathy for a cheater and perhaps even harder to do so for a company that profits from cheaters. Nevertheless, the Ninth Circuit's decision in *MDY Industries* sets a dangerous precedent that grants copyright holders a standalone cause of action separate from copyright law. Although cheating is not a trait favored in society, it is also not a type of behavior that should be governed by copyright law. Such precedent would allow rights holders to use the DMCA to step

149. *MDY*, 629 F.3d at 950.

150. *Id.*

151. *Id.* at 946–47.

152. *Id.* at 950–51.

153. *Id.* at 951.

154. *Id.*

beyond the reach of copyright law and control behavior and use of goods while blocking out competition.¹⁵⁵

A. *MDY Industries v. Galoob Toys*

The concern with the distinction established in *MDY Industries* is that reading Section 1201(a)(1) as a broad right to control access allows rights holders to regulate downstream use of a videogame where such a right did not exist before. In many respects, the Game Genie is very different from the Glider bot. *Galoob Toys* predated the age of online multiplayer games and its gameplay was limited to one player (or two in some cases). Cheating in these videogames does not, for the most part, affect the gameplay of other players. The temporary effects of these games are only experienced by the one or two players involved in the game.

Other subtle distinctions exist between the two cases. The central issue in *Galoob Toys* was whether the Game Genie was an unlawful and infringing derivative work.¹⁵⁶ On the other hand, the infringement analysis central to *MDY Industries* was whether cheating in violation of the ToU of a software license could constitute copyright infringement.¹⁵⁷ Both decisions, however, ultimately found no copyright infringement. However, what ultimately led these two cases to different results was the enactment of the DMCA. The DMCA adds limits where one would have previously been able to enjoy a noninfringing use of a videogame, even where the use was outside of what was intended by the rights holder. Should Nintendo or some other gaming company wish to prevent further in-game cheating, they can simply add TPMs to block programs like Game Genie. Any circumvention of these TPMs would violate the DMCA and create the possibility of undoing *Galoob Toys*.

Many of the courts that had allowed consumer modification in the past relied on the courts' unwillingness to classify modifications as non-infringing use. These courts were unwilling to classify the behavior as such because the use was "for personal use, the immediate financial harm to the copyright owner [was] questionable, and the act of modification is difficult to separate from consumers' customary dominion over tangible property."¹⁵⁸ Even though the

155. See Cheng, *supra* note 63, at 240.

156. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992).

157. *MDY*, 629 F.3d at 941.

158. Alan Durham, *Consumer Modification of Copyrighted Works*, 81 IND. L. J. 851, 893 (2006).

Ninth Circuit held that cheating on WoW could not constitute copyright infringement, it is easy to see where the distinctions between Glider and Game Genie may make MDY seem like a much less sympathetic party. Blizzard has demonstrated that it has been harmed by MDY's distribution of the Glider bot because it has had to spend a substantial amount of money to deal with other players' complaints about in-game cheating.¹⁵⁹ Furthermore, although many players used Glider to level up their characters for some personal reason, whether to quickly join their friends in raids with their new character or from a lack of patience, many used Glider in order to obtain and sell rare items for personal profit.¹⁶⁰

The use involved in programs like the Game Genie, on the other hand, has much less of an impact on the rights holders themselves because the effects of the use are generally only limited to personal and non-commercial use.¹⁶¹ Controlling such use would be akin to preventing people who purchased Monopoly from modifying the rules of the game in their own home.¹⁶² Such use bears little relation to the actual statutory rights of the rights holders, but only reflects their belief that they are entitled to control end user experience of the game.¹⁶³ This form of cheating causes little to no harm to rights holders, so allowing these entities to use the DMCA to control end user behavior sets a far more intrusive precedent than it does with Glider. This, however, is not to say that the Ninth Circuit incorrectly held that use of Glider infringes Blizzard's copyright. Rather, the argument here is that, if anything, the decision in *MDY Industries* should not be used to allow companies to control the consumer experience in single player games. Because such use is limited to personal use and is entirely noncommercial, the rights holders' preference of how the consumer experience should play out should not necessarily dominate over what the consumer wants.¹⁶⁴

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

160. See Shikowitz, *supra* note 2, at 1026.

161. See Durham, *supra* note 158, at 893.

162. See *id.* at 885–86 (comparing the modification of videogame play through Game Genie to modification of the rules to the board game).

163. *Id.* at 886.

164. See, e.g., Durham, *supra* note 158, at 909.

B. Should a Separate Cause of Action Exist?

Cheating, although frowned on by both game developers and other gamers,¹⁶⁵ is not something that should be dealt with through copyright law. As the Ninth Circuit acknowledged in *MDY Industries*, prohibiting cheating is not one of the statutory rights that is addressed by the Copyright Act.¹⁶⁶

Although the Ninth Circuit held otherwise, the legislative history does not necessarily support the argument that the DMCA creates a right to access control entirely separate from copyright law. The Senate Judiciary Report read that although “sections 1201(a)(2) and 1201(b) of the bill are worded similarly and employ similar tests, they are designed to protect two distinct classes of devices.”¹⁶⁷ This can still be read to require, as the Federal Circuit in *Chamberlain* did, that there be a nexus between the access control and copyright infringement to invoke the protection. Section 1201(b)(1), for example, can be read to only apply to TPMs specifically created to protect a statutory right, such as copy protection specifically created to prevent consumers from copying an .mp3 file. Section 1201(a)(2), on the other hand, would be read to prevent consumers from circumventing access control in order to infringe on one of the author’s statutory rights. For example, this would prevent someone from circumventing the access controls on an eReader to copy and paste the text of a book. Such a reading of the statute and interpretation of the legislative history seems more consistent with the ultimate intent of the DMCA, which is to provide further copyright protection to rights holders in the digital environment.¹⁶⁸ Further, it would better coincide with Congress’ intent to ensure that fair use and noninfringing use rights remain intact in light of the new law.¹⁶⁹

The Ninth Circuit’s decision also creates a dangerous and unfortunate precedent, not only in the context of gaming, but for copyright law in general. In *MDY Industries*, the Ninth Circuit

165. Clive Thompson, *What Kind of Game Cheater Are You?*, WIRED (Apr. 23, 2007), http://www.wired.com/gaming/virtualworlds/commentary/games/2007/04/gamesfrontiers_0423.

166. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 955 (9th Cir. 2010).

167. S. Rep. No. 105-190, at 12 (1998), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt190/pdf/CRPT-105srpt190.pdf>.

168. *Id.* at 8.

169. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERK. TECH. L. J. 519, 546–47 (1999).

downplayed the emphasis on the anticompetitive potential for creating a new cause of action for access control.¹⁷⁰ Rather, the court left this issue open for future consideration.¹⁷¹ Although cases like *Chamberlain* have ultimately been decided in favor of the public interest, they also demonstrate that rights holders are willing and interested in using the DMCA to control downstream uses that should not be governed by copyright in the first place.¹⁷² Following the Ninth Circuit's decision, these concerns may be exacerbated as some of the biggest media industries, such as the film and videogame industries, exist largely within the Ninth Circuit's jurisdiction.

C. Is this Separate Cause of Action Necessary?

Game developers should not be able to use copyright law to control the end user experience, even in an online or multiplayer environment, especially where alternative theories of liability exist. An important underlying issue in *MDY Industries* was whether Glider subscribers breached the terms of their contract. This cause of action can and should be addressed in such a manner.¹⁷³ This is something that should be handled by contract law, not copyright law. In *MDY Industries*, for example, the Ninth Circuit held that the cause of action for tortious interference with contractual relations was not preempted by copyright law.¹⁷⁴ Although the court vacated the district court's granting of summary judgment, it left the matter open for further consideration.¹⁷⁵ Such a cause of action would be far more suitable in this instance because this is a contract issue and not a copyright one. It would also allow Blizzard to target the third party distributor of such a program, instead of dealing individually with each breaching WoW subscriber.

Furthermore, the Computer Fraud and Abuse Act ("CFAA") may be another viable alternative to the DMCA for violation of ToU. The CFAA prohibits the unauthorized and knowing access of a protected computer to obtain information.¹⁷⁶ The CFAA also allows for civil suits where the damage caused by such unauthorized access exceeds five thousand dollars within a one year period.¹⁷⁷ A lawsuit

170. *MDY*, 629 F.3d at 950–51.

171. *Id.* at 951.

172. *See generally* Reichman et al., *supra* note 69, at 1025–32.

173. *MDY*, 629 F.3d at 955.

174. *Id.* at 957.

175. *Id.* at 958.

176. 18 U.S.C. § 1030(a)(2)(C) (2010).

177. 18 U.S.C. § 1030(a)(4).

under the CFAA, however, may be tricky as critics and courts seem unwilling to consider use exceeding the ToU “unauthorized access.”¹⁷⁸ Despite the aversion to using ToU for a CFAA violation, it remains possible that the CFAA could still be used in similar DMCA situations. For instance, when George Hotz posted information about jailbreaking the PlayStation3, Sony alleged that Hotz had violated the CFAA through his unauthorized access.¹⁷⁹ Because this case eventually settled, however, the question of whether the CFAA could apply to a DMCA-like situation remains open.¹⁸⁰

V. Proposals

The Ninth Circuit’s decision in *MDY Industries* allows rights holders to use copyright law and the DMCA to control end user experience of a videogame where no such statutory right exists. Although behavior such as in-game cheating is neither favorable nor sympathetic, rights holders should not be able to extend the law to control the user experience where they would not otherwise have a right to do so. Several potential solutions may arise.

A. New Rulemaking Exemption for Private Uses of Videogames

One potential solution is that, should the Ninth Circuit’s decision interfere with programs such as Action Replay or Game Shark (modern iterations of Game Genie), the Librarian in its next rulemaking could establish an exemption for noninfringing uses of single player videogames. Because, as established above, such use of videogames is far more benign than Glider, the Librarian should recognize that such use should be protected and exempted with the next rulemaking.

178. See *United States v. Drew*, 259 F.R.D. 449, 467 (C.D. Cal. 2009) (holding that finding that a conscious breach of a website’s contract violates the CFAA would make the law overly broad). See also Brief for Electronic Frontier Foundation et al. as Amici Curiae Supporting Defendants, *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009), available at https://www.eff.org/files/filenode/US_v_Drew/Drew_Amicus.pdf; Jennifer Granick, *CFAA Prosecution of Wiseguys Not So Smart*, EFF DEEPLINK (July 2, 2010), <https://www.eff.org/deeplinks/2010/07/cfaa-prosecution-wiseguys-not-so-smart>.

179. Ben Kuchera, “*OtherOs*” *Class Action Lawsuit: GeoHot, Sony Now Share Same Charge*, ARSTECHNICA (Feb. 21, 2011, 10:39 AM), <http://arstechnica.com/gaming/news/2011/02/otheros-class-action-lawsuit-geohot-sony-now-share-same-charge.ars>.

180. Jason Mick, “*GeoHot*” *Settles with Sony in PS3 Jailbreaking Case, Offers Brief Comment*, DAILYTECH (Apr. 11, 2011, 3:42 PM), <http://www.dailytech.com/GeoHot+Settles+With+Sony+in+PS3+Jailbreaking+Case+Offers+Brief+Comment/article21348.htm>.

Although this rulemaking would not occur for several years, it would be sufficient time to determine whether *MDY Industries* actually poses a threat to these devices. Congress passed the DMCA in 1998. Since then, the gaming industry and developers of devices that allow single user cheating have managed to coexist free of any major legal problems. This could be attributed to the fact that videogame advancements have moved away from the single player interface. Even games such as *Pokemon* allow players to remotely compete and battle against other players.¹⁸¹ Furthermore, although these devices still exist, they are limited in their console compatibility. Action Replay, for example, is for the most part limited to only Nintendo DS consoles.¹⁸² Before the next rulemaking, the Librarian should consider whether there actually is a risk posed by this decision and should only go forward should there be an actual threat.

The other limitation of a solution posed by the DMCA rulemaking is that many critics remained unconvinced that it is a successful tool to maintain a balance between the interests of the public and of rights holders.¹⁸³ Although the Librarian grants exemptions to acts of circumvention, it does nothing to exempt the distribution or tools or services to enable such circumvention.¹⁸⁴ This means that even if the Librarian were to create an exemption to allow for use in single player videogames, the distribution and production of third-party programs and devices to enable such use would still be prohibited. Thus, should this be addressed in future rulemakings, the Librarian should tread carefully to enable some balance that would allow for continued use without preventing other Game Genies from distributing their product, and at least protect this end user behavior in single player videogames.

B. Case Law

As discussed above, rights holders should not be able to use copyright law or the DMCA to prevent users from cheating in games. Although this behavior is disliked by rights holders and most consumers, there are alternative avenues through which to deal with this issue. Moreover, the Ninth Circuit's reading of the DMCA may

181. See Joey Davidson, *Pokemon Black and White WiFi Battle!*, TECHNOBUFFALO (Jan. 26, 2011), <http://www.technobuffalo.com/gaming/pokemon-black-and-white-wifi-wireless-battle-system>.

182. See *DSi Action Replay*, CODE JUNKIES, http://uk.codejunkies.com/Products/DSi-Action-Replay__EF000815.aspx (last visited May 13, 2011).

183. See Reichman et al., *supra* note 69, at 1007.

184. *Id.*

have harmful effects not just in the realm of videogames, but in other areas of the marketplaces where rights holders might try to use the DMCA to limit competition.¹⁸⁵

Other circuits should follow the Federal Circuit's analysis of the DMCA when faced with this issue. The Federal Circuit's analysis takes into account the threat of anticompetitive behavior from rights holders and still manages to retain a usable and legally sound interpretation of Section 1201(a)(2) through the copyright nexus requirement.¹⁸⁶ This interpretation would further prevent rights holders from trying to extend their control over their works where copyright would not otherwise be involved. In the gaming context, this still leaves open other theories of liability that should be used in lieu of the DMCA.¹⁸⁷

The Ninth Circuit's decision also effectively creates a split between circuits as to the interpretation of the access control provisions of the DMCA. This brings to question whether the Supreme Court should address this issue. If the Supreme Court does, it, too, should follow the Federal Circuit's interpretation of the statute. However, some may express concerns about whether this would be successful. The Supreme Court's recent track record on intellectual property issues has been minimal, murky, and unclear.¹⁸⁸ Its decision in *MGM v. Grokster*, which came out in favor of rights holders and distanced itself from the previous law,¹⁸⁹ further suggest that the Court may not follow the Federal Circuit should it consider this issue. Further, some offer concerns about the Court's technology prowess.¹⁹⁰ As the circumvention provisions of the DMCA will almost

185. See Lohmann, *supra* note 6, at 1.

186. *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004).

187. See *supra* Part III.C.

188. For instance, in its decision in *Bilski v. Kappos*, the Court held that business methods could be patentable, but set forth little to no guidelines on how they should be interpreted. See *Bilski v. Kappos*, PATENTLY-O (Jun. 28, 2010, 10:00 AM), <http://www.patentlyo.com/patent/2010/06/bilski-v-kappos-business-methods-out-software-still-patentable.html>. Likewise, the Court in a per curiam decision affirmed the Ninth Circuit's previous holding in *Costco v. Omega*, but because it was a split panel, created no precedent and made no clarifications about the issue of gray market goods. See *Costco v. Omega*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/costco-v-omega> (last updated Mar. 10, 2012).

189. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005).

190. See, e.g., Bianca Bosker, *Sexting Case Befuddles Supreme Court: 'What's the Difference Between Email and a Pager?'*, HUFFINGTON POST (Apr. 21, 2010, 8:56 AM), http://www.huffingtonpost.com/2010/04/21/ontario-quon-sexting-case_n_545764.html

necessarily involve a discussion of technology, this might pose some concern. However, this would be minimal if anything. At least with videogames and speech, the Court has not shown too much hesitancy in discussing technology.¹⁹¹

With the outlook of a Supreme Court decision unclear, perhaps it might be more fitting for the Ninth Circuit to reconsider the issue. In *MDY*, the Ninth Circuit left open the possibility to revisit the Federal Circuit's fear that the DMCA may be abused if the right case came before them.¹⁹² Perhaps, then, the best solution would be for a more compelling DMCA case with more anticompetitive undertones to come before the Ninth Circuit. One of *MDY*'s problems ultimately may have been that it was not a sympathetic party.¹⁹³ Should a more compelling defendant come before the Ninth Circuit on the same issue, the court may be more inclined to address the other instances in which the potential for abuse by rights holders had been addressed. Having the Ninth Circuit readdress this issue, in light of the alternative and viable causes of action that could be used opens the potential for the decision to be overturned. Even if the Ninth Circuit does not overturn the decision, a more sympathetic defendant may at least force the Ninth Circuit to reconsider the issue.

C. Nonlegal Methods

Solutions may not solely rest within the law. In one of his earlier writings on cyberlaw, Professor Lessig described four modalities he believed would govern norms and behavior in cyberspace—the law, social norms, architectural constraints, and the marketplace.¹⁹⁴ Applying the DMCA to videogames governs two of these modalities, but does not necessarily address social norms or the marketplace. For example, Blizzard's staunch policy against cheating ultimately derives from the fact that the company received thousands of complaints from other consumers.¹⁹⁵ Many avid gamers generally frown on in-

(discussing the Supreme Court Justices' difficulties in understanding text message technology).

191. See generally, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2737-43eh (2011) (No. 08-1448).

192. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 951 (9th Cir. 2010).

193. See Von Lohmann, *supra* note 6, at 19.

194. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

195. See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 616 F. Supp. 2d 958, 963 (D. Ariz. 2009) (citing the hundreds of thousands of user complaints about in-game cheating as the reason that the Warden technology was necessary).

game cheating as it disturbs their own gameplay as well.¹⁹⁶ Blizzard and other videogame companies could perhaps let social norms for Internet gameplay dictate the prevalence of cheating within a game. Players, for instance, may not accept cheaters into their guild, something that may significantly limit the cheating player's experience.

Alternatively, Blizzard could accept the fact that there is and always will be a market for cheaters in the gaming world. They could market "cheating" devices, but only limit those players to certain servers that specifically cater to players who wish to use cheat codes or add modifications to their gameplay. This might decrease the necessity of TPMs like Warden and would allow Blizzard themselves to profit from the marketplace of cheaters.

Another approach that Blizzard could take is to enforce its policies more aggressively. Blizzard has historically only temporarily banned first time offenders. It may serve as a greater deterrent to permanently delete the accounts of users upon their first offense.¹⁹⁷ However, this approach might ultimately serve as negative publicity for a company that is already seeing a decline in their subscription numbers.¹⁹⁸

VI. Conclusion

In *MDY Industries*, the Ninth Circuit established a different interpretation of Section 1201(a)(2) of the DMCA, one that is at odds with the Federal Circuit's previous interpretation of the law in *Chamberlain*. This interpretation turns the access control provision of the DMCA into a cause of action entirely separate from copyright law. This holding seemingly oversteps Congress' intent to strengthen the rights of copyright owners while ensuring the consuming public's interests are protected. In the context of gaming, it runs the risk of overturning the Ninth Circuit's decision in *Galoob Toys*, which allowed for the noninfringing uses of videogames in the single player context.¹⁹⁹ Such protection seems unnecessary in light of the limited harms posed by the devices that enable such cheating. Should this

196. *See id.*

197. Simon Priest, *Blizzard Banhammer "Over 320,000" Warcraft III and Diablo II Users*, STRATEGY INFORMER (Apr. 21, 2010, 2:33 PM), <http://www.strategyinformer.com/news/7770/blizzard-banhammer-over-320000-warcraft-iii-and-diablo-ii-users>.

198. Jamie Pert, *World of Warcraft Subscriptions Decline—Blizzard to Respond*, PRODUCT REVIEWS (May 10, 2011), <http://www.product-reviews.net/2011/05/10/world-of-warcraft-subscriptions-decline-blizzard-to-respond>.

199. *See supra* Part II.A.

pose a serious problem to those industries, care should be taken to protect these rights. Further, because this issue should not be addressed through copyright law, but through other areas of law like contract law, other circuits, when presented with this issue, should follow the Federal Circuit's analysis. Although the proverbial sky has not yet fallen as a result of this decision, care should be taken to ensure that the balance between rights holders and consumers be maintained.