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12

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THE NEXUS ANALYSIS: LICENSE ENFORCEMENT IN THE WAKE OF *MDY V. BLIZZARD*

Erik Bauman[†]

Upon installing iTunes, you click “I agree.” When you update your Adobe reader, you do the same. You might have even diligently read and understood the terms you were agreeing to. But what could happen if you did not follow one of the terms you agreed to—if you breached your license? The worst outcome, criminal acts aside, would be that you committed copyright infringement, which can carry severe statutory penalties. Should it make a difference if you breached by making extra copies the license didn’t allow, by purchasing a competitor’s product that the license forbade, or by giving them a bad review on your blog after the license explicitly told you not to? The intuition that copyright law should not treat each of these license breaches the same is the subject of recent Ninth Circuit attention, and in an increasingly technological society the implications of breaching a license will only become more important.¹

It has become a standard industry practice for producers of digital goods to include an End User License Agreement that a consumer must agree to in order to use the item. These licenses, known as “click wrap” agreements, frequently take the form of a window that opens upon downloading the product, laying out the terms and conditions of the license and requiring the user to click “accept” or “agree” before the digital purchase can be used.² These licenses often include terms defining the number of copies a user may make and whether the user can transfer copies. The terms also frequently include restrictions on how the user may use the software, where legal disputes will be heard, and affirmative actions the user is obligated to take.³

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

2. Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5TH 309, 317 n.1 (2003).

3. See, e.g., *iTunes Terms and Conditions*, APPLE, <http://www.apple.com/legal/itunes/us/terms.html> (last updated Oct. 12, 2011) (“You shall be authorized to burn an audio playlist up to seven times.”); *ADOBE Software License Agreement*, ADOBE, http://www.adobe.com/products/eulas/pdfs/Gen_WWCombined-20080205_1329.pdf (last visited Feb. 7 2012) (“This agreement will be governed by and construed in accordance with the

The terms of licenses are unilaterally drafted by producers for the purpose of limiting and preventing undesirable actions by consumers. These agreements have been consistently upheld by the courts.⁴

MDY Industries, LLC v. Blizzard Entertainment, Inc., a recent Ninth Circuit decision, held that breaking the terms of such an agreement can be considered copyright infringement only when the violated term is a condition precedent and is related to an exclusive right of copyright; otherwise, a violation is merely breach of contract.⁵ In that case, Blizzard's online game World of Warcraft had a license term banning various types of cheating in the game, including the use of "bots" that play the game without user input.⁶ MDY had created and distributed a program called Glider, which was widely used, that plays the game for the user while they are away from the computer.⁷ This automation gave an unfair advantage to players who used it and was considered cheating.⁸ Blizzard argued that Glider should be held liable for contributory copyright infringement since they encouraged users to violate the anti-cheating term in the license.⁹ The outcome hinged on whether the user violated copyright by using Glider, or whether they only breached their contract with Blizzard. This distinction was important because it determined both the extent of monetary damages available to the copyright holder and whether there can be contributory infringement by non-parties to the contract, such as MDY.¹⁰ The test presented in *Blizzard* to determine this legal fact restricts copyright liability to conditions for which there is "a nexus between the condition and the licensor's exclusive rights of copyright."¹¹ The purpose of the test was explicitly to prevent copyright holders from expanding their rights in ways not intended by the copyright act.¹² However, the Ninth Circuit's description of what constitutes a nexus with copyright is

substantive laws in force in: (a) the State of California, if a license to the Software is obtained when you are in the United States, Canada, or Mexico. . . . If a verification discloses that your use is not in conformity with a valid license, you shall immediately obtain valid licenses to bring your use into conformity.").

4. Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 583 (2007).

5. *Blizzard*, 629 F.3d at 940–41.

6. *Id.* at 938.

7. *Id.* at 928.

8. *See id.* at 936.

9. *Id.* at 937–38.

10. *Id.* at 938.

11. *Id.* at 941.

12. *Id.*

not specific enough to evaluate the outcome of many cases.¹³ This creates uncertainty for both consumers and producers of copyrighted material. A specific rule for applying the nexus test should be established to clarify the scope and ramifications of license agreements.

This Note argues that a nexus should be found only where federal copyright law would find infringement if the allegedly violated term was not in the license at all. This would result in a clearly defined nexus that would prevent producers from using license agreements to expand the intended scope of copyright protections. Part I will give background on the copyright law, licensing, and *Vernor v. Autodesk, Inc.*—the case that in many ways set the stage for *MDY Industries, LLC v. Blizzard Entertainment, Inc.* Part II will explicate the decision in *Blizzard* and the policy implications of that court’s nexus test. Part III will describe the Nexus Test advocated for by this Note and its basis in the reasoning and examples in *Blizzard*. Part IV will apply the Nexus Test to various license terms whose status may be unclear following *Blizzard*. Part V presents the conclusion and reiterates policy considerations.

I. BACKGROUND

This Part first explains the statutory basis of copyright law and how Congress sought to strike a balance between social benefit from creative works and incentives to authors by incorporating the doctrines of first sale and essential steps into the statutory framework. This Part then explains the way that licensing has developed within this statutory framework. Finally, this Part presents the recent Ninth Circuit case of *Verner v. Autodesk, Inc.*, the most recent development in this area, which explains the legal context in which *Blizzard* was decided.

A. PURPOSE AND SCOPE OF EXCLUSIVE RIGHTS OF COPYRIGHT

Congress is empowered to govern copyright by Article 1 Section 8 of the Constitution. This section states that Congress may enact laws “to promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴ This establishes the underlying rationale for copyright: that society benefits from creative works, and authors of such works should be incentivized so that society as a whole will benefit from increased

13. Molly Shaffer Van Houweling, *Touching and Concerning Copyright: Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 51 SANTA CLARA L. REV. 1063, 1084 (2011).

14. U.S. CONST. art. I, § 8.

productivity.¹⁵ Those authors are granted exclusive rights for a period of time so that they can monetize their creativity, and society enjoys more creative works as a result.¹⁶ The particular rights that current copyright holders possess, defined in 17 USC § 106, include: (1) reproduction; (2) creating derivative works; (3) distribution; (4) public performance; and (5) display.¹⁷ These rights can be either exercised by the creator of a work or sold to another person or corporation for their use.¹⁸ The reproduction right permits its holder to create copies of an original work, such as making a duplicate of a photograph from the negatives.¹⁹ A derivative work is created when an original copy is used to create another work, such as a melody from one song being used to make a different song.²⁰ In addition to controlling the creation of new copies and derivative works, the distribution right allows copyright holders to control how any copies are distributed.²¹ For works like songs, the rights holder also controls the conditions under which the work can be performed in public, and also how a work like a painting can be displayed in public.²² Together, these rights allow copyright holders to use their works to generate revenue through almost any use of their intellectual property.²³

However, in order to strike an appropriate balance between producer incentives and consumer benefit, these exclusive rights are limited by several doctrines, most notably fair use,²⁴ first sale,²⁵ and essential steps.²⁶ These doctrines allow the use of copyrighted works in particular ways regardless of whether the copyright holder has given permission.²⁷ For this Note, the first sale and essential steps doctrines are particularly relevant. The first sale doctrine allows consumers who own a copy of some copyrighted work to transfer, resell, or alter that copy regardless of the copyright holder's

15. Bill Hinsee, *Wrath of the EULA: Can the Use of Bots Lead to Copyright Infringement?*, 17 B.U.J. SCI. & TECH. L. 160, 161–62 (2011).

16. *Id.*

17. 17 U.S.C. § 106 (2006).

18. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.02 (Matthew Bender, rev. ed. 2010).

19. See 2 *id.* § 8.02.

20. See 2 *id.* § 8.09.

21. See 2 *id.* § 8.11.

22. See 2 *id.* § 8.14.

23. See 2 *id.* §§ 8.02–8.22.

24. 17 U.S.C. § 107 (2006).

25. *Id.* § 109.

26. *Id.* § 117.

27. Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1891 (2010); Raymond T. Nimmer, *Copyright First Sale And The Over-Riding Role Of Contract*, 51 SANTA CLARA L. REV. 1311, 1314 (2011).

desires.²⁸ The essential steps doctrine allows owners of a copy of a computer program to the copies necessary to run the program, such as RAM copies, without violating copyright.²⁹ While these rights for consumers are firmly established, they only apply to those who actually *own* the copy they are using. Any copyrighted item that is rented, leased, or licensed does not grant these rights to the recipients of the copyrighted works because they are not owners.³⁰ This provides an incentive for copyright holders to license their products instead of selling them.

B. THE RISE OF LICENSING AND ITS RELATION TO COPYRIGHT LAW

Modern digital goods, especially software and digitally downloaded music, books and movies, are usually subject to an End User License Agreement (“EULA”) or a Terms Of Use (“TOU”) policy.³¹ EULAs and TOU licenses are contracts that generally set forth the conditions on which the digital good may be used³² and explicitly state that the recipient does not own their particular copy.³³ Such contracts are presented to the user in a pop-up window before the digital good can be used and require the consumer to agree to their terms before using the product.³⁴ These contracts are binding once agreed to, even if the person who clicked “I agree” did not really agree, did not read, or misunderstood the terms.³⁵ The terms contained in these agreements specify that the good is being licensed and not sold, meaning the consumer is not an owner and the first sale and essential steps doctrines do not apply.³⁶ Licenses can also specify how the recipient is allowed to use the product, how many copies they may make, and various actions that they are not allowed to take. A variety of specific examples will be addressed in Part III of this Note, *infra*.

This control over how a product is used and distributed can create benefits for both the producer and the consumer. Producers, or the copyright holders, are better able to control the uses and transfer of their

28. See Nimmer, *supra* note 27, at 1311.

29. Carver, *supra* note 27, at 1892; 2 NIMMER & NIMMER, *supra* note 18, § 8.08.

30. David A. Costa, *Vernor v. Autodesk: An Erosion of First Sale Rights*, 38 RUTGERS L. REC. 1, 4 (2011).

31. See, e.g., *iTunes Terms and Conditions*, *supra* note 3; *ADOBE Software License Agreement*, *supra* note 3.

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

33. See Vernor v. Autodesk, 621 F.3d 1102, 1111 (9th Cir. 2010).

34. Kevin W. Grierson, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309, 317 n.1 (2003).

35. See Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH L.J. 577, 579 (2007).

36. Nimmer, *supra* note 27.

products and can also gain access to consumer information to improve both their product and marketing.³⁷ Perhaps most importantly for copyright holders, licensing prevents consumers from reselling their product, which eliminates secondary “used” markets. Apart from copyright holder benefits, licensing allows flexibility in pricing structures by restricting resale, which can benefit consumers. For example, companies may distribute software at a very low price for students and non-profits because they are able to charge corporate clients much larger sums without worry of such clients resorting to secondary markets saturated by student and non-profit copies.³⁸ Producers of digital goods may also be able to offer discounted upgrading to current customers because they know that the old copies will not go to another party who would otherwise buy a new copy from them.³⁹ These aspects of licensing alter markets in ways that are both desirable for copyright holders and beneficial to consumers.

While there are notable benefits of licensing, there have been many critics of such practices. Brian Carver argues that denying ownership of a product when a user has perpetual possession of and control over it, such as a song that is downloaded, conflates intangible copyrights with tangible copies.⁴⁰ He argues that if a license grants perpetual possession, it should be viewed as a sale, creating first sale and essential step rights for the user that allow them to resell their copy and create a secondary market despite licensing terms that purport to restrict such activity.⁴¹ Currently, these rights do not attach under license agreements of any kind.⁴² Others also argue that licensing has been used as a tool to circumvent consumer protections in ways that are contrary to congressional intent.⁴³ This argument presents the presence of secondary markets and their benefits, such as availability of out of print works and a competing market, as a desired outcome that Congress intended when balancing producer and consumer rights.⁴⁴ The erosion of this market is then

37. See Jonathan C. Tobin, *Licensing As A Means Of Providing Affordability and Accessibility In Digital Markets: Alternatives To A Digital First Sale Doctrine*, 93 J. PAT. & TRADEMARK OFF. SOC'Y 167, 180–81 (2011) (arguing that copyright holders are better able to tailor digital rights management and differentiate products to suit different consumers with stronger rights).

38. See *Vernor*, 621 F.3d at 1114.

39. See *id.* at 1104.

40. Carver, *supra* note 27, at 1896–97.

41. See *id.* at 1953–54.

42. See *Vernor*, 621 F.3d at 1112 (citing 17 U.S.C. § 109(a) (2006)).

43. See, e.g., Jim Graves, *Who Owns A Copy?: The Ninth Circuit Misses An Opportunity To Reaffirm The Right To Use And Resell Digital Works*, 2 CYBARIS AN INTELL. PROP. L. REV. 45, 67–68 (2011); Costa, *supra* note 30, at 13.

44. Costa, *supra* note 30, at 5.

a departure from a status quo that has been effective at promoting the arts, and should be rectified by either Congress changing the wording of the statute⁴⁵ or courts adopting an “economic realities” test that would consider some licenses to be sales.⁴⁶ The common theme of these objections to licensing practices is that they erode established consumer rights for the benefit of copyright holders.⁴⁷

Regardless of one’s position on the policy impact of using license agreements to distribute digital goods, EULAs and TOUs create an intersection between copyright and contract law that can create difficulties when the two conflict. The primary conflicts arise when the copyright holder or good distributor seeks to enforce the terms of the license. They can either file a suit for breach of contract or for copyright infringement, which have different standards of liability and different available remedies.⁴⁸ Specifically, in a breach of contract action there is no third party liability possible, but under copyright law vicarious and contributory infringement are viable claims.⁴⁹ This is an especially important distinction for digital goods that are distributed on a large scale since suing individual users would be an extremely inefficient enforcement mechanism. In addition, damages for breach of contract actions are typically limited to expectation damages, whereas copyright claims can create an opportunity for much higher statutory damages.⁵⁰ Rights holders are therefore incentivized to seek copyright claims and damages and modify their licenses in ways that allow them to pursue copyright claims so that the licenses can be feasibly enforced.

C. RECENT NINTH CIRCUIT ANALYSIS

In 2010, the Ninth Circuit decided several cases directly addressing licensing practices. The trio of *Vernor v. Autodesk, Inc.*,⁵¹ *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,⁵² and *UMG Recordings, Inc. v. Augusto*⁵³ were heard on the same day. The opinions for these cases were released sequentially, *Vernor* in September 2010, *Blizzard* in December 2010, and *UMG* in January 2011. These cases have received a great deal of attention and analysis from

45. *Id.* at 14.

46. Graves, *supra* note 43, at 72.

47. See Carver, *supra* note 27, at 1891; Costa, *supra* note 30, at 13–14; Graves, *supra* note 43, at 72.

48. Justin Van Etten, *Copyright Enforcement of Non-Copyright Terms: MDY v. Blizzard and Krause v. Titleserve*, 2011 DUKE L. & TECH. REV. 7, 11–13 (2011).

49. *Id.*

50. See 17 U.S.C. § 504 (2006); Van Etten, *supra* note 48, at 11.

51. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

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

53. *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2010).

commentators, and have effectively redefined the landscape of licensing law in the Ninth Circuit.⁵⁴ *Vernor* presented a test to determine whether a sale or license has been created by a transaction that makes it easy for producers to create a license.⁵⁵ *Blizzard* and *UMG* then apply this test and limit the copyright liability implications of licenses.⁵⁶ This Section will describe the holding and reasoning in *Vernor*, which provides the context necessary to understand the role of *Blizzard* in Part II.⁵⁷

In *Vernor v. Autodesk, Inc.*, Vernor sought declarative relief stating that he had not violated Autodesk's copyright when he bought used copies of AutoCAD software from a third party and sold them on eBay.⁵⁸ The software was subject to a license agreement that stated the software was licensed and not sold, and that transferring copies was not allowed.⁵⁹ The third party had upgraded from version 14 to 15 at a discounted price, and was obligated by the license to destroy previous versions or return them, but instead they sold the old versions to Vernor.⁶⁰

The court held that a copy is licensed and not sold if a EULA or TOU agreement (1) specifies the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.⁶¹ This case also re-established that a license precludes application of the first sale and essential steps doctrines.⁶² Applying this test to the facts, the court found that the license did specify it was a license; restricted the user from transferring the software at all; and limited the things a consumer was permitted from doing with the software such as modifying or reverse engineering it.⁶³ This met all three prongs of the test, meaning that the original purchaser of the software never owned it in the first place, and thus could not legitimately sell it to Vernor to resell on eBay.⁶⁴ The case was remanded for reconsideration with the understanding that Vernor could not invoke the first sale and essential steps doctrines.⁶⁵

54. See Nimmer, *supra* note 27; Robert H. Rotstein et al, *The First Sale Doctrine In The Digital Age*, 22 No. 3 INTELL. PROP. & TECH. L.J. 23 (2010).

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

56. Hinsee, *supra* note 15, at 169–70; Nimmer, *supra* note 27, at 1343.

57. This Note will not significantly address *UMG Recordings, Inc. v. Augusto*.

58. *Vernor*, 621 F.3d at 1103.

59. *Id.* at 1104.

60. *Id.*

61. *Id.* at 1111.

62. *Id.*

63. *Id.* at 1111–12.

64. *Id.* at 1112.

65. *Id.* at 1115.

The test imposed in *Vernor* is very broad. It may be instructive to compare the language required by *Vernor* to the language that was unenforceable in *Bobbs-Merrill v. Straus*, the case which established the modern first sale doctrine.⁶⁶ In that case, Bobbs-Merrill Co. had printed a book and wanted to control the price at which it was distributed through copyright.⁶⁷ They include a warning printed immediately below the copyright notice that the defendant admitted reading, however the Court did not enforce the warning because a sale had occurred.⁶⁸ The language found to be unenforceable was: “The price of this book is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as infringement of the copyright.”⁶⁹

Based on *Vernor*, if the phrases “this is a license accepted by purchasing the book from the publisher” and “this copy is for personal entertainment uses only” were added, the license test in *Vernor* would be facially met.⁷⁰ This type of comparison with well-established examples of first sale language has led to substantial criticism. Opponents of the *Vernor* rule argue that it allows certain “magic words” to circumvent consumer protections incorporated into the Copyright Act.⁷¹ Since licenses can establish the basis for copyright claims with no first sale or essential steps defense, these defenses may effectively cease to exist for consumers if licenses are too easy for copyright holders to establish.⁷² Opponents of the *Vernor* rule assert that Congress implemented these doctrines in the statute for a reason, and such easy circumvention alters the balance of interests against consumers.⁷³

However, it is worth noting that these objections are less forceful under the facts in *Vernor* because Autodesk’s licensing structure did provide consumer benefits. The licensing structure of Autodesk allowed alternative low pricing for students and non-profits, which they could only implement if the student and non-profit copies couldn’t be resold to undercut their corporate prices.⁷⁴ Further, the company that sold their copy to Vernor had

66. Costa, *supra* note 30, at 3.

67. *Bobbs-Merrill Co. v. Straus*, 21 U.S. 339, 341 (1908).

68. *Id.* at 342.

69. *Id.* at 341.

70. *But see* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175 (9th Cir. 2010) (finding that even though the language of a license may facially meet the *Vernor* test, other considerations, such as lack of assent, may preclude a license from being created).

71. *See, e.g.,* Carver, *supra* note 27 at 1913; Jim Graves, *Who Owns A Copy?: The Ninth Circuit Misses An Opportunity To Reaffirm The Right To Use And Resell Digital Works*, 2 CYBARIS AN INTELL. PROP. L. REV. 45 (2011).

72. Costa, *supra* note 30, at 10–14.

73. *See* Graves, *supra* note 43, at 72.

74. *Vernor v. Autodesk, Inc.*, 621 F.3d 1104 (9th Cir. 2010).

received over an 85% discount for upgrading to a new version before selling the older version.⁷⁵ Autodesk would not be encouraged to offer upgrade incentives like these if secondary markets undercut new sales whenever an upgrade occurred. While the outcome of *Vernor* may have struck a reasonable balance between consumer and producer benefits for that particular license, these facts were not incorporated into the rule enunciated by the court and consumer benefits are not considered when determining if a sale or license has occurred.

II. *MDY INDUSTRIES, LLC V. BLIZZARD ENTERTAINMENT, INC.*

While the rule in *Vernor* was broad, its implications for copyright liability were narrowed significantly in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, a case heard the same day as *Vernor* but whose opinion was released a few months later.⁷⁶ In this case, Blizzard produced and distributed a massively multiplayer online game called World of Warcraft.⁷⁷ In order to use this software and access the online service required to play, users were required to agree to Blizzard's EULA and TOU.⁷⁸ One of the terms included in those licenses prohibited cheating in the game.⁷⁹ MDY created a program called Glider that played the game for the player.⁸⁰ A player could start up Glider, go to work for the day, and come back to an in-game character that had much more items and experience than before.⁸¹ This was a form of cheating explicitly prohibited by the license that a user had already agreed to.⁸² While the facts were clear that players who used Glider violated their license, Blizzard wanted the court to grant an injunction against MDY, not the players.⁸³ This remedy would only be available for contributory copyright infringement and not breach of contract, because MDY was not a party to the contract.⁸⁴ Therefore the case hinged on whether this particular violation

75. *Id.* at 1105.

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

77. *Id.* at 934.

78. *Id.* at 935.

79. *Id.* at 938 (“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; or (iii) use any third-party software that intercepts, ‘mines,’ or otherwise collects information from or through the Program or Service.”).

80. *Id.* at 935.

81. *Id.*

82. *Id.* at 938.

83. *Id.* at 942.

84. *Id.* at 937–38.

of the license by players was copyright infringement or merely a breach of contract.⁸⁵

The court recognized that if any violation of a EULA or TOU constituted copyright infringement, then a company could include conditions wholly unrelated to their copyrights and enforce them through threat of a copyright action.⁸⁶ Based on this worry, the court held that terms within a license must be (1) a condition precedent to the license, as opposed to a mere covenant, and (2) have “a nexus between the condition and the licensor’s exclusive rights of copyright” in order to be enforced as a violation of copyright.⁸⁷ Any breach of EULA or TOU that falls short of these two conditions is only a breach of contract and does not open a consumer, or third parties contributing to the consumer’s actions, to copyright liability.⁸⁸ The court very clearly defined the difference between a condition and a covenant for the first prong, but the nature of the “nexus” was not clearly delineated.⁸⁹

The court in *Blizzard* distinguished two different types of provisions that might be in a license agreement: license conditions and contractual covenants.⁹⁰ A covenant is a contractual promise, while a license condition is an act or event that must occur before a duty to perform a promise arises.⁹¹ For example, a covenant might read “the end user is forbidden from installing this software on an Apple computer.” However, a condition would need to be phrased in a manner such as “you are granted this license only if you meet the condition that you do not install this software on an Apple computer; failure to meet this condition rescinds any grant of license.”⁹² As seen with this example, any covenant in a contract could be made into a condition with language indicating that the license as a whole is contingent upon fulfilling that clause. However, the language must be explicit because ambiguous contract provisions are interpreted as covenants.⁹³

85. *Id.*

86. *Id.* at 941.

87. *Id.*

88. *Id.*

89. *Id.* at 939–40; Van Houwelling, *supra* note 13, at 1084–85 (2011) (“suffice it to say that the Ninth Circuit’s specific articulation of the nexus test does not provide a satisfactory answer in this and in other difficult cases”).

90. *Blizzard*, 629 F.3d at 939.

91. *Id.*

92. This language was created merely as exemplary of the difference in question, based on the description in *Blizzard*. *Id.* at 939.

93. *Id.*

In *Blizzard*, the license provisions at issue⁹⁴ did not explicitly condition the license on adherence to the relevant provisions and therefore were mere covenants, enforceable under contract law but not copyright law. The covenant/condition distinction alone could have determined the outcome in *Blizzard* since both prongs of the test must be met for copyright liability to attach.⁹⁵ However, the court also addressed what would be required for a valid condition to have a nexus with exclusive rights of copyright.⁹⁶

In addition to requiring that the subject clause is a condition and not a covenant, the court in *Blizzard* ruled that the condition must also “be grounded in an exclusive right of copyright.”⁹⁷ The court reasoned that if this were not the rule, any software copyright holder could “designate any disfavored conduct during software use as copyright infringement by purporting to condition the license” on a user’s adherence to that term in the license.⁹⁸ If a copyright holder could successfully enforce such provisions under the copyright act, they would be afforded “far greater rights than Congress has generally conferred on copyright owners.”⁹⁹ Therefore, the court held that in order for a condition of a license to open a user to a claim of copyright infringement, there “must be a nexus between the condition and the licensor’s exclusive rights of copyright.”¹⁰⁰

This court did not explain what a nexus would entail, or what test should be applied to determine if a nexus exists.¹⁰¹ The only guidance the court gave regarding the scope of a potential nexus is that the condition should not expand the rights of copyright holders beyond what Congress has generally conferred.¹⁰² The court also delineated certain provisions that would create a

94. *Id.* at 938 (“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; or (iii) use any third-party software that intercepts, ‘mines,’ or otherwise collects information from or through the Program or Service.”).

95. *Id.* at 939.

96. *Id.* at 940.

97. *Id.*

98. *Id.* at 941.

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.*

nexus with an exclusive right of copyright¹⁰³ and others that would not.¹⁰⁴

III. NEXUS TEST ANALYSIS

This Note aims to fill in the details left out of the *Blizzard* court's nexus test. An appropriate test can be developed using the principle of not expanding copyright powers beyond congressional intent, combined with the examples given by the court. Any rule that would find copyright liability solely because a clause was included in the EULA or TOU would inherently allow copyright holders to expand their rights by including such a clause.

At least commentator,¹⁰⁵ Molly Van Houwelling, has considered a rule that is similar in structure to the test this Note proposes but much broader in application. That formulation states that violation of a license term is infringing if that action would violate copyright if there were no license at all.¹⁰⁶ The shortcomings of this test are most apparent in the software context. The use of any software creates RAM copies, which violate copyright if the person using the software is not licensed to do so.¹⁰⁷ If the test for infringement asks whether an act infringes if there is no license at all, and any use of software infringes via RAM copies without a license, then such a rule would find infringement for violating any term in a software license. This runs contrary to the desire to prevent copyright holders from expanding their rights through licenses. Van Houwelling comes to this same conclusion and rejects such a test.¹⁰⁸ Moreover, the violated license provisions in *Blizzard* violated copyright under this broader test, yet the court found no nexus.¹⁰⁹ An alternative, narrower test is necessary.

The test for whether a nexus exists with an exclusive right of copyright should be: if an act that allegedly violates a term in a license would violate copyright law if the *violated term* were not in the license at all, then the term

103. *Id.* at 940–41 (“For instance, ToU § 4(D) forbids creation of derivative works based on WoW without Blizzard’s consent. A player who violates this prohibition would exceed the scope of her license and violate one of Blizzard’s exclusive rights under the Copyright Act.”).

104. *Id.* at 941 (“ToU § 4(C)(ii) prohibits a player’s disruption of another player’s game experience. [. . .] Although this conduct may violate the contractual covenants with Blizzard, it would not violate any of Blizzard’s exclusive rights of copyright.”).

105. Van Houwelling, *supra* note 13, at 1083.

106. *Storage Tech*, 421 F.3d at 1316; Van Houwelling, *supra* note 13, at 1083.

107. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 519 n.5 (9th Cir. 1993); Carver, *supra* note 27, at 1893.

108. *See* Van Houwelling *supra* note 13, at 1084.

109. *Blizzard*, 629 F.3d at 941.

has a nexus with an exclusive right of copyright. I will call this the “Nexus Test” throughout this Note. The Nexus Test differs from the formulation considered and rejected by Van Houweling because it does not consider whether there would be infringement without any license at all, but whether there would be infringement if the license as a whole were intact but the sole violated provision were excised. The Nexus Test determines if violation of a license term results in copyright liability, which does not preclude copyright liability established on separate grounds.¹¹⁰ This particular formulation has not been considered by a court. The Nexus Test accounts for the conditions in *Blizzard* explicitly found to create a nexus as well as those that do not, and also provides a reliable method of deciding borderline cases without granting additional rights to copyright holders beyond those intended by Congress.¹¹¹

IV. APPLYING THE NEXUS TEST

This Part will first apply the Nexus Test to conditions that are clearly determined within the *Blizzard* decision in order to establish that the Nexus Test is consistent with the goals of the court. Then this Part will apply the Nexus Test to a variety of conditions that are not clear under *Blizzard*, showing the results of the Nexus Test and arguing that these outcomes reflect the reasoning of the court. In order to facilitate a deeper analysis of the nexus prong of the *Blizzard* test, all examples will be considered conditions even if they are not phrased that way in their current form. This is practical as a policy matter since any covenant could be rephrased in a way that makes it a condition.¹¹²

A. TERMS WHOSE NEXUS STATUS IS CLEAR UNDER *BLIZZARD*

1. *Terms That Do Create a Nexus*

The terms laid out by *Blizzard* as creating a nexus with an exclusive copyright would also establish a nexus under the Nexus Test. The court in *Blizzard* explicitly held that a condition limiting the number of copies a licensee is able to produce or restricting the licensee from making derivative works without permission would create an appropriate nexus.¹¹³ Each of these conditions directly invokes an exclusive right of copyright by name.¹¹⁴ Further, each of these conditions would clearly be considered a nexus under

110. For instance, if a licensee created derivative works without permission, then the presence or absence of a license term prohibiting such conduct would be moot.

111. *See infra* Part IV.

112. *Blizzard*, 629 F.3d at 941.

113. *Id.* at 940–41.

114. *See* 17 U.S.C. § 106 (2006).

the Nexus Test this Note proposes, because making a copy or derivative work would violate copyright if that particular term were not in the license. While this principle does not shed light on grey areas, it is an important baseline that any viable test must meet.

2. *Terms that Do Not Create a Nexus*

The Nexus Test is consistent with the court's description of conditions that fail to form a nexus. The *Blizzard* court held that the covenants at issue in the case would not have established a nexus even if they were conditions.¹¹⁵ In particular, the provisions barring users from installing and using third party software as well as restrictions on conduct while using the licensed software were held to not have a nexus with any exclusive copyright.¹¹⁶ The court reasoned that restrictions on third party software or restricting other conduct while using a copyrighted work could be used to discourage competing products or make arbitrary demands of consumers.¹¹⁷ The court held that these are not within the powers granted to copyright holders by Congress, and should only be enforceable through contract law.¹¹⁸ The Nexus Test reaches the same conclusion. Since a consumer would be allowed to use any third party software without violating copyright if the restricting term were not in the license, the Nexus Test would not find copyright liability for violating that term.

Another type of license provision that would almost certainly fail to establish a nexus with copyrights are restrictions of legal rights. For example, a provision dictating choice of law, mandating arbitration, or preventing the user from entering a class action lawsuit, would likely be held not to implicate any exclusive right of copyright. This is a very clear application of the Nexus Test, since any legal right a licensee would exercise without a restriction in the license would be allowed without any copyright considerations. Creating copyright liability for violating legal right restrictions in a contract would be a dramatic expansion of copyright powers of exactly the type the court in *Blizzard* sought to avoid.¹¹⁹ The Nexus Test accurately traces the court's determination of conditions that are excluded from forming a nexus.

115. *Blizzard*, 629 F.3d at 941.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See id.*

B. TERMS WHOSE NEXUS STATUS IS UNCLEAR UNDER BLIZZARD

Conditions in licenses that seem to have some connection to an exclusive right but do not directly invoke that right are likely to be the subject of future lawsuits. This Section will apply the previously described Nexus Test to various EULA and TOS licenses that are required for a variety of mediums. The goal of this section is to explore what kinds of considerations are likely to arise when implementing the Nexus Test in real world contexts. Towards that end, the examples used are from mainstream companies that have established considerable market shares in their respective industries. These are the rights holders who are likely to be most influential in changing license language. For the sake of analysis, each provision at issue will be considered a condition whether or not it is phrased as one.

1. *Preconditions for Installation*

License terms that establish preconditions for installation may be ambiguous upon initial examination, but are meaningfully analyzed by the Nexus Test. Certain types of software licenses, particularly operating system licenses, often prohibit installation of the product if certain conditions won't be met after the product is installed. For example, Windows 7 OEM discs prohibit installation if the installer does not distribute the computer the software is installed on and provide technical support to the recipient,¹²⁰ and Apple's Mac OS X license agreement prohibits installation of the operating system on any non-Apple computer.¹²¹ Under the Nexus Test, these types of conditions would not implicate an exclusive right under the copyright act. This is not to say that all preconditions for installation wouldn't invoke an exclusive right, but that such conditions do not inherently do so.

In the case of the Windows 7 OEM agreement, if the condition requiring the installer to sell the machine and provide service was not in the license at all, failure to perform those actions could not be construed as a copyright violation. This coincides with the court's desire expressed in *Blizzard* to prevent expansion of powers under copyright.¹²² Requiring a consumer to transfer the machine and provide services is not a restriction but an affirmative duty, and the copyright act permits rights holders "to do and to authorize" actions, not mandate them.¹²³ Allowing such provisions to be

120. *Microsoft OEM System Builder License*, MICROSOFT, http://oem.microsoft.com/public/sblicense/2008_sb_licenses/fy08_sb_license_english.pdf (last visited Feb. 7 2012).

121. *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1153 (9th Cir. 2011).

122. *See Blizzard*, 629 F.3d at 941.

123. 17 U.S.C. § 106 (2006).

enforced through copyright would expand the powers of rights holders to include creating affirmative duties.

The Apple case is tougher because the prohibition on installing MAC OS X on non-Apple computers has an effect on the means of distribution of MAC OS X.¹²⁴ This could be read to implicate the distribution right since copyright does aim to let rights holders control the manner in which copies are distributed. However, if the condition were not included in the license, then the particular branding of the pieces of hardware surrounding the hard drive the OS is installed on would have no copyright implications so long as the user would be authorized to make that copy elsewhere in the license. Although installing Mac OS X on a non-Apple computer has the effect of using the software in a way contrary to Apple's desired usage, it does not produce or distribute an unauthorized copy of the software, and does not create any derivative work.¹²⁵

This same license provision was at issue in the Ninth Circuit case *Apple v. Psystar*,¹²⁶ and the Nexus Test outcome is consistent with the outcome of that case. There, Psystar was mass producing non-Apple computers equipped with Mac OS X.¹²⁷ They did this by using one copy of the software to create a digital image, and then copied this exact same image onto each of the computers they sold.¹²⁸ Apple brought suit for copyright infringement, arguing in part that the violation of their license agreement provided grounds for copyright liability.¹²⁹ The license issue was not specifically analyzed in *Apple v. Psystar* because the primary issue on appeal was copyright misuse.¹³⁰ However, the district court held that Psystar had created a derivative work by producing the image they cloned onto each computer, and had thus violated copyright in that manner, which the Ninth Circuit affirmed.¹³¹ The Nexus test, as noted in the preceding paragraph, would not find infringement on the basis of the license—the license provision does not implicate Apple's exclusive rights under copyright. Of course, the result of the Nexus Test here would not preclude a finding that Psystar infringed Apple's copyrights

124. *Software License Agreement For Mac OS X*, APPLE, <http://images.apple.com/legal/sla/docs/macosx106.pdf> (last updated July 15, 2009).

125. RAM copies would need to be otherwise authorized in another section of the license, which is necessary for the software to be installed and used in any manner without violating copyright.

126. *Apple*, 658 F.3d at 1153.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.*

131. *Id.* at 1154, 1162.

regardless of the statement in the license agreement.¹³² The *Pystar* court found infringement on the independent grounds of unauthorized derivative works, and is entirely consistent with the Nexus Test. This example demonstrates that the Nexus Test only determines if a *license violation* in itself creates copyright infringement liability, it is silent on whether any other activity can create liability separately.

Conditions for installation of operating system software should not be viewed as inherently having a nexus with an exclusive right, although a particular condition could have a nexus.¹³³ Whether a nexus is found should be decided by determining if the action is infringing without that condition in the contract. Otherwise software distributors can obtain greater rights, such as imposing affirmative obligations and hardware restrictions, through the Copyright Act than were intended.

2. *Digital Media*

Forms of traditional media, books, music, and videos, are now widely available in digital formats. Digital music over the past year had a \$4.6 billion market value¹³⁴ and e-readers are becoming increasingly more popular.¹³⁵ iTunes was responsible for more than half of all digital music downloads in 2010,¹³⁶ and Amazon accomplished the same feat in the eBook market with their Kindle.¹³⁷ Given the prodigious market share of these two companies, their license agreements will likely be models for the industry and deserve analysis. Determining whether certain provisions can be enforced using copyright will be important as the law develops following *Blizzard*. This Section analyzes two such licenses, Apple's iTunes license and Amazon's Kindle license, under the Nexus Test.

The iTunes Store, which contains all of Apple's digital music downloads, is governed by a Terms of Use agreement.¹³⁸ Certain usage rules in this

132. *Id.*

133. For example, a restriction prohibiting backup copies from being made.

134. *IFPI Digital Music Report 2011*, INT'L FED'N OF THE PHONOGRAPHIC INDUS., <http://www.ifpi.org/content/library/DMR2011.pdf> (last visited Feb. 23, 2012).

135. Kristen Purcell, *E-reader Ownership Doubles in Six Months*, PEW INTERNET AND AMERICAN LIFE PROJECT (June 27, 2011), <http://pewresearch.org/pubs/2039/e-reader-ownership-doubles-tablet-adoption-grows-more-slowly>.

136. Eric Slivka, *iTunes Store Reaches 28% Overall Share, 70% Download Share of US Music Sales*, MACRUMORS (May 26, 2010, 2:07 PM), <http://www.macrumors.com/2010/05/26/itunes-store-reaches-28-overall-share-70-digital-share-of-u-s-music-sales>.

137. David Carnoy, *Amazon: We have 70–80 percent of e-book market*, CNET REVIEWS (Aug. 2, 2010, 1:08 PM), http://reviews.cnet.com/8301-18438_7-20012381-82.html.

138. *iTunes Terms and Conditions*, APPLE, <http://www.apple.com/legal/itunes/us/terms.html> (last updated Oct. 12, 2011).

agreement clearly have a nexus with an exclusive right of copyright, such as “you shall be authorized to burn an audio playlist up to seven times” or “you shall not be entitled to burn video iTunes Products or tone iTunes Products.”¹³⁹ These are restrictions on the right to reproduce the copyrighted work, and such actions would clearly be infringing if these terms were not included in the agreement at all.

However, there are other provisions where the presence of a nexus is less clear. One such section states “you shall be authorized to use iTunes Products on five iTunes-authorized devices at any time.”¹⁴⁰ If a user was to use their downloaded songs on six devices at a time, would they face copyright liability? Would a third party who sold software explicitly to facilitate exceeding this device limit be subject to contributory infringement liability? In this case, the Nexus Test would indicate that there is no nexus and copyright liability does not attach. If the provision were not in the agreement at all, assuming that other parts of the agreement permitted copies to be placed on six devices in the first place, their simultaneous use by itself would not implicate any exclusive right. Essentially this is a restriction on how a consumer may use otherwise authorized copies, and would thus be analogous to the restrictions against using cheats while playing that Blizzard included in its license.¹⁴¹ Both restrictions are on the manner in which a copy is used for personal enjoyment, not on how it is reproduced, transferred, or any other exclusive right of copyright. Because of this, a third party enabling this kind of violation would not face liability, and Apple would only be able to sue the iTunes user for expectation damages caused by the breach of contract.

A similar provision raises a slightly different set of considerations. “You shall be able to store iTunes Products from up to five different Accounts at a time on compatible devices.”¹⁴² Here, the analysis differs because the usage of the products is not at issue, but the location of materials attached to particular accounts. In this case there could be two different types of license violations. One could be a situation where five people have accounts on the same computer, and they each store all of the music on the computer on their personal MP3 players. Under the Nexus Test, this would be infringing because if this clause were not in the contract unauthorized copies would be made to non-licensees. However, if the same person owned over five

139. *Id.*

140. *Id.*

141. *See* MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928, 938 (9th Cir. 2010).

142. *iTunes Terms and Conditions*, APPLE, <http://www.apple.com/legal/itunes/us/terms.html> (last updated Oct. 12, 2011).

accounts, copyright liability would not attach under the Nexus Test because absent this provision, an individual with six or more accounts would be permitted to store all of their music on one device from any number of accounts without violating copyright.¹⁴³ Thus for media provisions like this one, the facts at issue will determine whether or not the clause was breached in a way that creates a nexus.

Amazon's Kindle has a EULA and TOU that raises different nexus issues. One provision states that digital content can be used "solely on the Kindle or a Reading Application," where a Reading Application is the Kindle App for a smartphone or tablet.¹⁴⁴ This TOU is similar to the wording of the Mac OS X EULA, discussed in section IV.B.1, *supra*, and the analysis follows the same path. Since the purchase of the ebook for a non-Kindle device without such a clause does not implicate an exclusive right, there is no nexus formed upon violation of this provision.

Ultimately, the specific facts of each case will be important in determining if there is a nexus regarding terms that define a user's ability to store and transfer digital media, but generally terms that restrict the manner in which media is used on a device will fail to create a nexus.

3. *Software*

There is such a wide variety of software with accompanying license agreements that a fully representative survey is impossible. However, there are some pieces of software that are commonly used in both business and home computing where the question of contributory liability and statutory damages under copyright infringement would be especially salient, since contract remedies against individual users would be impractical to pursue on a large scale.

One commonly used type of software is a Portable Document Format program. Free versions of these programs allow users to read PDF files, and priced versions allow further capabilities such as file conversion and editing. The Adobe Acrobat software suite is by far the leading PDF software program.¹⁴⁵ This Section will analyze the license agreement of this software suite.

143. As before, this assumes that the copies are authorized initially elsewhere in the license.

144. *Amazon.com Kindle License Agreement and Terms of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=200506200 (last updated Sept. 28, 2011).

145. See Abhishek Baxi, *The Underdogs In Adobe vs. Foxit PDF World*, THE WINDOWS CLUB (Aug. 1, 2010), <http://www.thewindowsclub.com/the-underdogs-in-adobe-vs-foxit-world>; see also FOXIT, http://www.foxitsoftware.com/pdf/rd_eula.htm (last visited Feb. 4,

Adobe has a section in their license designed to allow the software distributor to check if companies are following the terms of the license. Adobe's policy reads:

If you are a business, company or organization, you agree that, no more than once every 12 months, Adobe or its authorized representative shall, upon 10 days' prior notice to you, have the right to inspect your records, systems, and facilities to verify that your use of any and all Adobe Software is in conformity with your valid licenses from Adobe. If a verification discloses that your use is not in conformity with a valid license, you shall immediately obtain valid licenses to bring your use into conformity.¹⁴⁶

In this case the Nexus Test would determine that there is not a nexus to any exclusive right of copyright. If the term were not in the license, the affirmative action not taken by the licensee could not implicate copyright, similarly to the affirmative obligations imposed by Microsoft's OEM Windows license discussed in Part IV.B.1, *supra*. While the purpose of clauses like these may be to check for copyright violations, failure to comply with such inspections would not in and of itself be a violation of copyright. In the case of Adobe's license, the additional requirement that a violation be remedied by purchasing the necessary licenses could also fail to satisfy a nexus analysis. It is possible that the company violated a non-copyright related portion of the contract. Therefore, breaching this clause alone wouldn't inherently implicate a copyright nexus, although it might be likely.

Adobe also has a provision that raises the question of how the term that is hypothetically excised from the license during the Nexus Test analysis should be defined. The interpretive problem is determining how much of a clause should hypothetically be excluded when performing a nexus analysis. The relevant language states that a primary user:

may install a second copy of the Software for his or her exclusive use on either a portable Computer or a Computer located at his or her home, provided that the Software on the portable or home Computer is not used at the same time as the Software on the primary Computer.¹⁴⁷

If the entire sentence is hypothetically excluded from the license, then the creation of a second copy clearly meets the nexus requirement by implicating

2012) (Foxit is another relatively popular PDF program, and its license agreement contains provisions similar to those discussed in the Adobe license).

146. *ADOBE Software License Agreement*, ADOBE, http://www.adobe.com/products/eulas/pdfs/Gen_WWCombined-20080205_1329.pdf (last visited Feb. 7 2012).

147. *Id.*

the right of reproduction. However, since a violation would be triggered by simultaneous use, one could interpret the test to only exclude the grammatical clause beginning at “provided.” In that scenario, the Nexus Test would determine that because usage restrictions do not inherently implicate an exclusive right, there is no nexus.

It is likely that similar interpretive problems will arise in future litigation, and courts should establish a principled rule to clearly define exactly what language within any particular term is being hypothetically excluded for the purpose of the Nexus Test. The rule should be that the language hypothetically excluded is limited to the language defining the alleged conduct that violated the license. In this case, since the violation could only be triggered by simultaneous usage and not merely by simultaneous installation, only the clause beginning at “provided” should be at issue for the nexus analysis and therefore a nexus should not be found. This provision is a conditional right to make a copy granted by the license, and in order to implicate copyright would need to be embedded in language that conditions the entirety of the license on satisfaction of this condition.¹⁴⁸

While the court in *Blizzard* only addressed conditions in the context of distinguishing them from covenants, it is logically consistent that embedded conditions be treated the same as conditions to the license as a whole. To do otherwise would open the door for licenses to be worded in such a way that copyrights are conditionally tied to use restrictions, which would expand copyright holders’ rights in exactly the way the court in *Blizzard* sought to avoid.¹⁴⁹ For example, a license from Blizzard could state “you may make RAM copies of this program only if you do not use third party software while playing the game” and included the necessary language to condition the license as a whole on this clause. Assuming RAM copies are not allowed elsewhere in the license, removing that term in its entirety in the course of the Nexus Test would make use of the software infringing. Blizzard would be able to circumvent the explicit determination that restrictions on third party programs did not have a nexus to copyright if the Nexus Test is interpreted this way. While this would involve a fair deal of textual acrobatics to meaningfully incorporate into a license, the Nexus Test should be interpreted in the way most logically consistent with the reasoning in *Blizzard*. In the case of dependent conditions as seen in the Adobe license, only the prohibition on behavior should be hypothetically excluded from the license during the Nexus Test, and not the privilege that is conditioned upon it.

148. See the discussion of how covenants can be rephrased as conditions in *supra* Part II.

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

A reasonable objection to this interpretation is that it creates a disincentive for Adobe and others to grant conditional rights to users. In the example in question, it seems likely that many consumers would not violate the term and gain substantial benefit from having a copy on both a desktop and laptop. While it is true that this construction would create some level of disincentive for such terms, it is important to note that contract remedies are still available if a violation is detected. Moreover, the cost benefit analysis of including such terms likely already presumes few enforcement efforts. The apparent primary benefit of including the term is improving consumer satisfaction, with little harm to the licensor even if the term were violated. While it is possible that there could be unanticipated market effects of this Nexus Test interpretation, the types of terms currently included in licenses such as Adobe's do not create reasonable anticipation of any seriously deleterious effects towards either licensees or licensors.¹⁵⁰

4. *Video Games*

While technically a subset of software, video games also incorporate media elements and are available on both consoles and personal computers. Regardless of the exact status of video games as a medium, the license agreements pertaining to PC games tend to take the same clickwrap form as other software licenses.

A game called *Call of Duty: Modern Warfare 3* set records by grossing \$775 million globally in the first five days after it was released, selling 6.5 million units in the US and UK in the first 24 hours it was available.¹⁵¹ The license agreement for the PC version of the game includes provisions very similar to those in *Blizzard*, restricting the use of hacking and cheats.¹⁵² However, there are other provisions that might be subject to litigation following the ruling in *Blizzard*.

One such condition states that “you shall not exploit this Program or any of its parts commercially, including but not limited to use at a cyber café, computer gaming center or any other location-based site.”¹⁵³ In order to run

150. See *ADOBE Software License Agreement*, *supra* note 146.

151. *Call of Duty: Modern Warfare 3 Sets All-Time Record*, ACTIVISION (Nov. 11, 2011), <http://investor.activision.com/releasedetail.cfm?ReleaseID=623056>.

152. Compare *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 938 (9th Cir. 2010) (“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”), with *ACTIVISION BLIZZARD INC., CALL OF DUTY MW3 INSTRUCTION BOOKLET 8* (2011) (“You shall not hack or modify (or attempt to modify or hack) the Program, or create, develop, modify, distribute or use any software programs in order to gain . . . advantage”).

153. *ACTIVISION*, *supra* note 152.

the program in a cyber café, you would need a separate, and likely more expensive, license.¹⁵⁴ If this term were not in the license, these actions would form a nexus with the exclusive right to public performance. Since all the locations mentioned were in public places with open access to the game, a nexus should be found under the Nexus Test. This is especially the case for video games since the e-sports industry has begun developing in the US, where games are played competitively on a public stage for cash prizes.¹⁵⁵ Terms like this one are necessary for software developers to ensure that they receive additional compensation for such commercial uses. Nevertheless, the exact terms of such licenses would need to be evaluated in each case to ensure that the restricted activity constitutes a public performance.

V. CONCLUSION

This Note proposes that a nexus between a condition in a license and an exclusive right afforded to copyright holders should be found only if the activity would be infringing if the allegedly violated term were not in the license at all. While the Nexus Test would still require a case by case analysis of both the nature of the allegedly infringing action and the license condition in question, it would provide a stable and reliable framework to judge those factors with. It would also inherently prevent copyright holders from expanding the rights granted by federal law through the wording of their licenses. This potential expansion of the powers that copyright holders possess is especially worrisome in the context of *Vernor*, since first sale and essential steps defenses will not be available to the consumers of many digital goods. Any method that relies on the particular language of the condition would be subject to abuse at the expense of consumers and contrary to the holding in *Blizzard*.

154. *Id.*

155. See, e.g., *Intel Extreme Masters: New York*, ELECTRONIC SPORTS LEAGUE, <http://www.esl-world.net/masters/season6/newyork/> (last visited Feb. 23, 2011).