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Nexon America, Inc. and NEXON  
7 Korea Corporation

8  
9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11  
12 NEXON AMERICA INC., a Delaware  
corporation, and NEXON KOREA  
13 CORPORATION, a Korean  
corporation,

14 Plaintiffs,  
15 v.

16 GAMEANARCHY, LLC, a Georgia  
Limited Liability Company, DAVID  
17 ALLEN BAKER, a/k/a "Drunken  
Cheetah," an individual, and DOES 1  
18 through 10,

19 Defendants.

CASE NO. CV12-2083 MWF (PLAx)

Honorable Michael W. Fitzgerald

**NOTICE OF MOTION AND  
MOTION OF PLAINTIFFS FOR  
SUMMARY JUDGMENT AGAINST  
DEFENDANT DAVID ALLEN  
BAKER**

**[DECLARATIONS OF ANDREW  
BOORTZ, BRADLEY MULLINS,  
AND PETER J. CREATH IN  
SUPPORT]**

**[REDACTED]**

Date: March 4, 2013  
Time: 10:00 a.m.  
Ctrm: 1600 (16th Floor)

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**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE THAT** on March 4, 2013, at 10:00 a.m., or as soon as the matter may be heard in the courtroom of the Honorable Michael W. Fitzgerald, plaintiffs Nexon America Inc. and Nexon Korea Corporation (collectively, “Nexon”) will and hereby do move pursuant to Fed. R. Civ. P. 56 for summary judgment against Defendant David Allen Baker. A separate motion for default judgment against Defendant GameAnarchy LLC is being filed concurrently herewith.

This Motion is made on the following grounds:

1. Baker is liable for violation of Section 1201(a)(2) of the DMCA (the “anti-circumvention provisions”) because the GameAnarchy software circumvents access control technologies used by Nexon to protect its copyrighted software program, Combat Arms.

2. Baker is liable for infringement of copyright or, alternatively, for contributory copyright infringement by virtue of his development, distribution, and sale of the Game Anarchy software, which in its ordinary course of operation modifies Combat Arms and thereby creates a derivative work.

3. Baker is liable to Nexon America, Inc. for intentional interference with contractual relations, for interfering with the Terms of Use between Nexon America, Inc. and its customers.

4. Nexon should be awarded statutory damages on its circumvention claims in the minimum amount allowable by law pursuant to 17 U.S.C. 1203 for

1 each of the approximately 6,000 copies of the Game Anarchy software distributed  
2 to the public.

3

4 5. On its copyright infringement claims, Nexon should be awarded  
5 Baker's profits in the amount of \$232,964.76.

6

7 6. Nexon should be granted a permanent injunction (in the form of the  
8 proposed order filed herewith) enjoining Baker (and GameAnarchy LLC) from any  
9 further circumvention of Nexon's access control technologies or infringement of  
10 Nexon's copyrights via the GameAnarchy software or any similar software product  
11 or service.

12

13 This Motion is based on this Notice of Motion and Motion, the  
14 accompanying Memorandum of Points and Authorities, Nexon's Separate  
15 Statement of Undisputed Facts, any reply memorandum filed by Nexon, the  
16 declarations of Peter Creath, Bradley Mullins, and Andrew Boortz, any oral  
17 argument heard on this motion, and all pleadings and documents on file in this  
18 action.

19

20 This Motion is made following numerous conferences between Nexon and  
21 Baker's counsel, which took place during the months of September and October  
22 2012.

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1 Defendant GameAnarchy LLC is not represented by counsel in this action  
2 and is in default. A separate motion for default judgment against GameAnarchy  
3 LLC is being filed concurrently herewith.

4  
5 Dated: January 30, 2013

MITCHELL SILBERBERG & KNUPP LLP  
MARC E. MAYER

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8 By: /s/Marc E. Mayer  
9 Marc E. Mayer  
10 Attorneys for Plaintiffs  
11 Nexon America, Inc. and  
12 NEXON Korea Corporation  
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**TABLE OF CONTENTS**

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23  
24  
25  
26  
27  
28

	<b><u>Page</u></b>
Introduction.....	1
I. STATEMENT OF UNDISPUTED FACTS. ....	2
II. DEFENDANTS ARE LIABLE FOR TRAFFICKING IN CIRCUMVENTION DEVICES UNDER 1201(a)(2) OF THE DMCA. ....	11
A. HackShield Is A Technological Measure That Effectively Controls Access To Combat Arms. ....	12
B. Game Anarchy Is An Unlawful Circumvention Device.....	14
C. Nexon Is Entitled To A Statutory Damage Award For Each Of The 6000 Distributions Of Game Anarchy.....	16
III. DEFENDANTS ARE LIABLE FOR COPYRIGHT INFRINGEMENT. ...	17
A. Defendants Infringed Nexon’s Adaptation Right By Altering The Operation of Combat Arms In Computer RAM. ....	18
B. Alternatively, Defendants Are Liable For Contributory Infringement.....	20
C. Nexon Is Entitled To \$232,964.76 In Profits Attributable To The Copyright Infringement.....	21
IV. DEFENDANTS INTENTIONALLY INTERFERED WITH THE COMBAT ARMS TOU AND EULA.....	22
V. NEXON IS ENTITLED TO A PERMANENT INJUNCTION. ....	24
Conclusion .....	25

**TABLE OF AUTHORITIES**

**PAGE(S)**

**CASES**

1  
2  
3  
4 321 Studios v. MGM Studios, Inc.,  
5 307 F. Supp. 2d 1085 (N.D. Cal. 2004)..... 12, 13, 16  
6 A&M Records, Inc. v. Napster, Inc.,  
7 239 F.3d 1004 (9th Cir. 2001) ..... 17, 21  
8 Adobe Sys., Inc. v. One Stop Micro, Inc.,  
9 84 F. Supp. 2d 1086 (N.D. Cal. 2000)..... 22  
10 Apple Computer, Inc. v. Franklin Computer Corp.,  
11 714 F. 2d 1240 (3d Cir. 1983) ..... 18, 25  
12 Blizzard Entm’y, Inc. v. Reeves,  
13 No. CV 09-7621 SVW, 2010 WL 4054095 (C.D. Cal. Aug. 10, 2010) ..... 17  
14 Craigslist, Inc. v. Kerbel,  
15 No. C-11-3309 EMC, 2010 WL 3166798 (N.D. Cal. Aug. 2, 2012)..... 24  
16 Craigslist, Inc. v. Naturemarket, Inc.,  
17 694 F. Supp. 2d 1039 (N.D. Cal. 2010)..... 16, 22, 23  
18 Creative Labs, Inc. v. Cyrix Corp.,  
19 42 U.S.P.Q. 2d 1872 (N.D. Cal. 1997)..... 21  
20 Davidson & Assocs., Inc. v. Internet Gateway,  
21 334 F. Supp. 2d 1164 (E.D. Mo. 2004),  
22 aff’d, 422 F.3d 630 (8th Cir. 2005) ..... 22  
23 Davidson & Assocs. v. Jung,  
24 422 F.3d 630 (8th Cir. 2005) ..... 13, 22  
25 DISH Network, L.L.C. v. Sonicview USA, Inc.,  
26 No. 09-cv-1553-L(WVG), 2010 WL 1965279 (S.D. Cal. May 31, 2012)..... 24  
27 Dish Network LLC v. Ward,  
28 Case No. 8:08-cv-590-T-30TBM,  
2010 U.S. Dist. LEXIS 142090 (M.D. Fla. Jan. 8, 2010) ..... 17

**TABLE OF AUTHORITIES**  
**(continued)**

1  
2  
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**Page(s)**

eBay Inc. v. MercExchange, L.L.C.,  
547 U.S. 388 (2006) ..... 24

EchoStar Satellite LLC v. ViewTech, Inc.,  
No. 07cv1273 BEN (WVG), 2011 U.S. Dist. LEXIS 42709 (S.D. Cal.  
Apr. 20, 2011)..... 17

Elektra Entm’t Grp., Inc. v. Bryant,  
No. CV 03-6381GAF(JTLX), 2004 WL 783123 (C.D. Cal. Feb. 13,  
2004) ..... 24

Ellison v. Robertson,  
357 F.3d 1072 (9th Cir. 2004) ..... 20

Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.,  
443 F.2d 1159 (2d Cir. 1971) ..... 20

Hotmail Corp. v. Van\$ Money Pie, Inc.,  
No. C-98-20064, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998) ..... 22

Lava Records, LLC v. Ates,  
No. Civ.A. 05-1314, 2006 WL 1914166 (W.D. La. July 11, 2006) ..... 24

Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.,  
964 F.2d 965 (9th Cir. 1992) ..... 19

MAI Systems Corp. v. Peak Computer, Inc.,  
991 F. 2d 511 (9th Cir. 1993) ..... 18

MDY Indus., LLC v. Blizzard Entm’t, Inc.,  
616 F. Supp. 2d 958 (D. Ariz. 2009) ..... 6

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

Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.,  
545 U.S. 913 (2005) ..... 20, 24

Micro Star v. Formgen Inc.,  
154 F.3d 1107 (9th Cir. 1998) ..... 17, 19, 20

**TABLE OF AUTHORITIES**  
**(continued)**

	<b><u>Page(s)</u></b>
1	
2	
3	
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Mirage Editions, Inc. v. Albuquerque A.R.T. Co.,  
856 F.2d 1341 (9th Cir. 1988)..... 19

Nexon Am., Inc. v. Kumar,  
No. 2:11-CV-06991-ODW,  
2012 WL 1116328 (C.D. Cal. Apr. 3, 2012)..... 16, 24

Ordonez v. Icon Sky Holdings LLC,  
No. 10-60156-CIV, 2011 WL 3843890 (S.D. Fla. Aug. 30, 2011) ..... 22

Pac. Gas & Elec. Co. v. Bear Stearns & Co.,  
50 Cal. 3d 1118 (1990)..... 22

Perfect 10, Inc. v. Amazon.com, Inc.,  
508 F.3d 1146 (9th Cir. 2007)..... 21

Quelimane Co. v. Stewart Title Guar. Co.,  
19 Cal. 4th 26 (1998)..... 22

RealNetworks, Inc. v. Streambox, Inc.,  
No. 2:99-CV-02070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000)..... 13

Schwartz v. Pillsbury Inc.,  
969 F.2d 840 (9th Cir. 1992)..... 6

Sony Computer Entm't Am., Inc. v. Divineo, Inc.,  
457 F. Supp. 2d 957 (N.D. Cal. 2006)..... 16

Sony Computer Entm't Am., Inc. v. Filipiak,  
406 F. Supp. 2d 1068 (N.D. Cal. 2005)..... 16

Sony Computer Entm't Am. Inc. v. GameMasters,  
87 F. Supp. 2d 976 (N.D. Cal. 1999)..... 15

Taylor Corp. v. Four Seasons Greetings, LLC,  
403 F.3d 958 (8th Cir. 2005)..... 25

Transgo, Inc. v. Ajac Transmission Parts Corp.,  
768 F.2d 1001 (9th Cir. 1985)..... 17



1  
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**TABLE OF AUTHORITIES**  
**(continued)**

**Page(s)**

Universal City Studios, Inc. v. Reimerdes,  
111 F. Supp. 2d 294 (S.D.N.Y. 2000) ..... 12, 15

Universal Studios, Inc. v. Corley,  
273 F.3d 429 (2d Cir. 2001) ..... 11, 12

Walt Disney Co. v. Powell,  
897 F.2d 565 (D.C. Cir. 1990)..... 25

WGN Continental Broadcast Co. v. United Video, Inc.,  
693 F.2d 622 (7th Cir. 1982) ..... 19

Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.,  
797 F. 2d 1222 (3d Cir. 1986) ..... 18

1  
2  
3  
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**TABLE OF AUTHORITIES**  
**(continued)**

**Page(s)**

**STATUTES**

Copyright Act, 17 U.S.C.

§ 101 .....	19
§ 106 .....	17, 18
§ 502(a).....	24
§ 504(b).....	21
§ 1201 .....	<i>passim</i>
§ 1203 .....	16, 24

**OTHER AUTHORITIES**

3 M. & D. Nimmer, <u>Nimmer On Copyright</u> § 12.04[A][1], at 12-73 (2009 ed.) .....	6
H.R. Rep. No. 105-551, pt. 1 (1998) .....	12
S. Rep. No. 105-190 (1998).....	11

1 **Introduction**

2 Plaintiffs NEXON Korea Corporation and Nexon America, Inc. (“Nexon”)  
3 are the owners, administrators, and/or exclusive licensees of the popular online  
4 computer game “Combat Arms.” Combat Arms is a popular free-to-play  
5 multiplayer action game, played by millions of people throughout the world, and  
6 developed and maintained at a significant cost by Nexon. Defendant David Allen  
7 Baker is a computer programmer who unfairly and unlawfully sought to profit  
8 from Nexon’s investment in Combat Arms by creating and selling a service that  
9 allows players of Combat Arms to cheat in the game. Baker’s service, known as  
10 “Game Anarchy,” destroys the online experience for legitimate players of Combat  
11 Arms, who find their games plagued with cheaters who ruthlessly manipulate the  
12 game for their own benefit, and to the detriment of others. Baker’s conduct not  
13 only damages Nexon’s valuable computer game and the goodwill of the company,  
14 but causes significant and irreparable harm to Nexon, including due to the exodus  
15 of paying customers who abandon the game because of unfair cheating.

16 Baker has no defense to his conduct. In fact, he has admitted (including in  
17 online posts) that the Game Anarchy service is designed to allow cheating, that it  
18 harms Nexon, and that it has been designed to overcome or circumvent anti-  
19 cheating software used by Nexon. As set forth herein, the undisputed facts  
20 confirm that judgment should be entered on Nexon’s First (or alternatively, its  
21 Second and Third), Fifth and Eighth Claims for Relief:

22 ***First***, Baker is liable for violating the anti-circumvention provisions of the  
23 Digital Millennium Copyright Act (“DMCA”) (Count Five), 17 U.S.C. §1201(a)(2),  
24 by distributing and selling (i.e. trafficking in) the Game Anarchy software and  
25 service, which is (or a portion of which is) primarily designed, marketed, and has  
26 no commercial purpose other than to circumvent technical measures used by  
27 Nexon to control access to Combat Arms and prevent cheating. On this claim, the

1 Court should enter judgment in the amount of \$1,200,000, representing minimum  
2 statutory damages for each of 6,000 distributions of the circumvention software.

3 **Second**, Baker is liable for copyright infringement because Game Anarchy  
4 modifies and manipulates the operation of Combat Arms, causing the game to  
5 execute new commands and operate in unintended ways, thus creating a derivative  
6 work of the original game. Alternatively, to the extent the derivative work is  
7 created by Game Anarchy’s users (and not Game Anarchy itself), Baker is liable  
8 for inducing or contributing to such infringement. On this claim, the Court should  
9 enter judgment in the amount of \$232,964.76, representing Baker’s profits from  
10 the distribution of Game Anarchy.

11 **Finally**, Baker is liable for intentionally interfering with Nexon’s contracts  
12 with its customers – namely, its Terms of Use and End-User License Agreement,  
13 both of which explicitly prohibit the use of cheating software such as Game  
14 Anarchy.

15 For these violations, Nexon also should be awarded a permanent injunction  
16 against Baker.

17 **I. STATEMENT OF UNDISPUTED FACTS.**

18 **Nexon and Combat Arms.** NEXON Korea Corporation (“Nexon Korea”)  
19 is a computer game publisher and owner of the worldwide copyright in the popular  
20 computer game “Combat Arms.” Statement of Undisputed Facts (“SUF”), ¶ 1.  
21 Nexon America Inc. (“Nexon America”), an affiliate of Nexon Korea, is, pursuant  
22 to an agreement with Nexon Korea, the holder of certain exclusive rights in  
23 Combat Arms including the right to distribute and administer Combat Arms in the  
24 United States. SUF, ¶ 2.

25 Combat Arms is an online, multiplayer, “first person shooter” (“FPS”) game.  
26 SUF, ¶ 3. In Combat Arms, players assume the role of a military commando and  
27 engage in weapons-based combat against other players within a computer-  
28 generated “map” or battlefield. SUF, ¶ 4. Because the game takes place from a

1 first-person viewpoint, Combat Arms attempts to emulate the visual field of the  
2 character within the game. Thus, just as a soldier cannot see enemies behind him  
3 or her, behind walls or obstacles, or around corners, Combat Arms players likewise  
4 cannot do so. SUF, ¶¶ 5-6. Combat Arms draws the three-dimensional battlefield  
5 onto the player’s computer screen by a process called “rendering.” SUF, ¶ 7.  
6 Combat Arms calculates what a virtual camera would see, taking into account the  
7 battlefield’s obstacles, lighting, materials, and so on. As the player moves through  
8 the virtual environment, the camera follows, and the scene is rendered again from  
9 the new vantage point. SUF, ¶¶ 7-8.

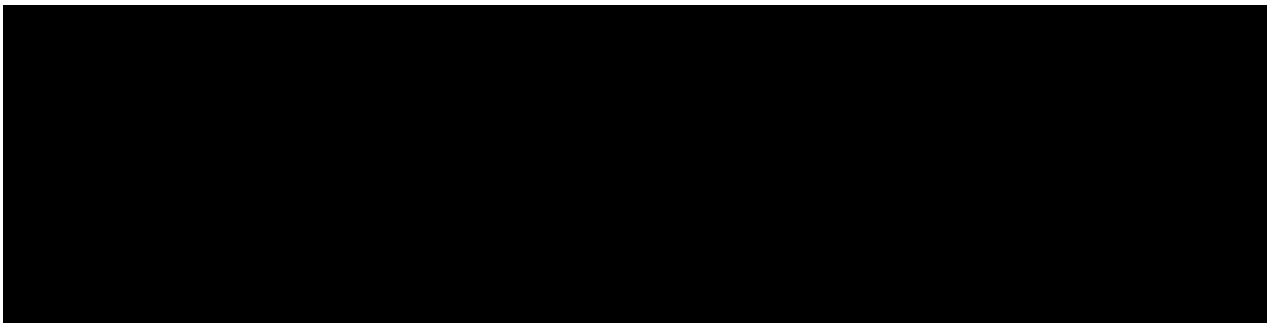
10 In a Combat Arms session, up to 16 players compete against each other  
11 (either in team-based combat or solo combat) on a variety of computer-generated  
12 battlefields (or “maps”). SUF, ¶ 9. As they play the game, players are rewarded  
13 with new weapons or weapon modifications, gain access to different player  
14 models, outfits, and additional game “maps” and “modes,” and advance in the  
15 game’s on-line leaderboards (which ranks players by skill level). SUF, ¶ 10.  
16 Combat Arms is a highly competitive, skill-based game with a fixed set of rules  
17 and regulations that have been carefully designed to ensure that all players stand on  
18 equal footing and have a fair chance to defeat their opponents and progress in the  
19 game. SUF, ¶ 11.

20 **How Combat Arms Operates.** In order to play Combat Arms, the player  
21 must have both a licensed copy of the Combat Arms software client and an active  
22 connection to Nexon’s online computer server. SUF, ¶ 12. The Combat Arms  
23 “client” consists of a number of computer files that are downloaded from the  
24 Internet and then installed to a computer’s hard drive. SUF, ¶ 13. This client  
25 contains the code that allows the game to be played, as well as all of the characters,  
26 textures, objects, and sounds that are part of the game. *Id.* After the Combat Arms  
27 client has been installed on a player’s computer, and launched, various instructions  
28 take place in the computer’s memory (or “RAM”). SUF, ¶ 14. These instructions,

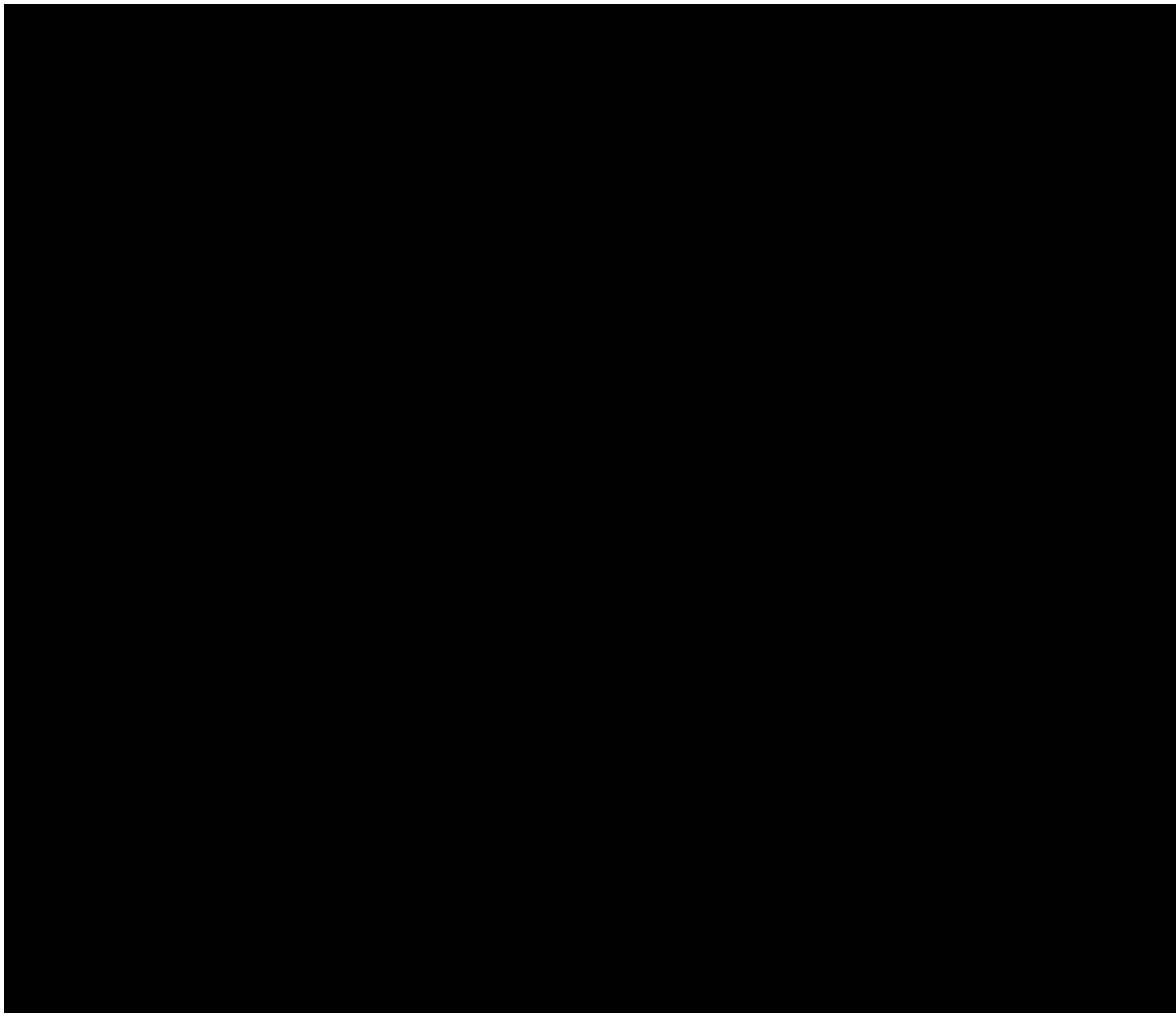
1 for example, cause the computer to render or draw the playing field, to create  
2 character and weapon animations, and to connect and process information received  
3 from the remote server. Id. The Combat Arms “server” is a remote online  
4 computer that enables Combat Arms to be played online and in connection with  
5 other players. The server passes information between and among players of the  
6 game. SUF, ¶¶ 15-17.


7 **Nexon’s Efforts To Protect The Integrity of Combat Arms.** In an effort  
8 to protect the sanctity of Combat Arms, keep the game fair and balanced, and  
9 thwart would-be hackers, Nexon has adopted a combination of technical and  
10 contractual measures. SUF, ¶ 18.

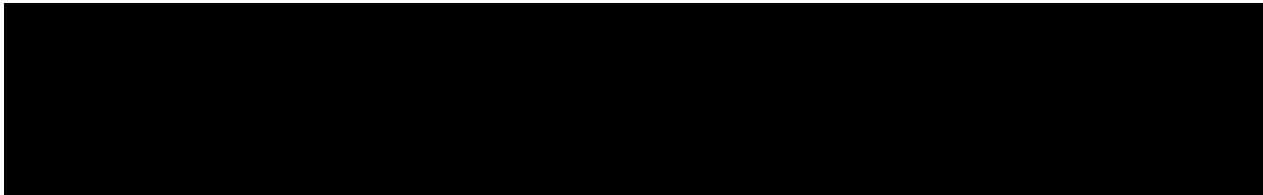
11 (a) **HackShield and Nexon Guard.** The primary device used by Nexon  
12 to prevent hacks and cheats is a software product known as HackShield.  
13 HackShield is a set of anti-cheating and anti-hacking tools that are incorporated  
14 into a number of online computer games, including Combat Arms. SUF, ¶ 19.  
15 The purpose of HackShield is to detect and prevent the use of unauthorized third-  
16 party hacking or cheating software in online games, including software which  
17 allows players to manipulate the game or gain unfair advantages such as extra  
18 items or abilities. SUF, ¶ 20. In its normal course of operation, HackShield is  
19 installed on a user’s computer at the time Combat Arms is installed. SUF, ¶ 21.  
20 Each time the Combat Arms software is run, HackShield also runs as a service in  
21 the background. SUF, ¶ 22.



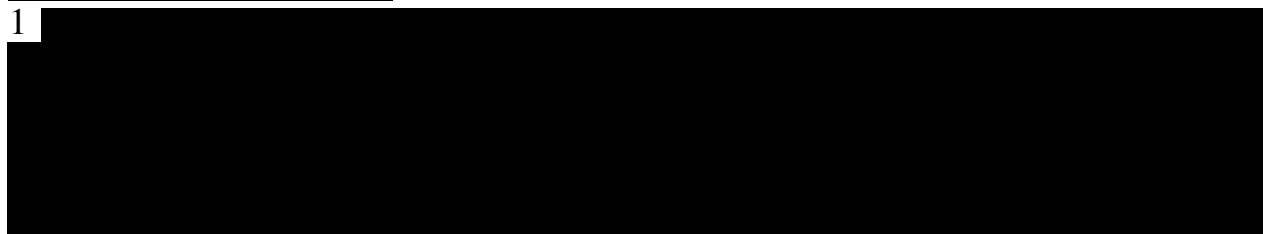
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In addition to HackShield, Nexon employs its own software product known as “NexonGuard.” SUF, ¶ 30. 



(b) **Contractual Measures.** Prior to playing Combat Arms, users must manifest their assent to Nexon’s “Terms of Use” (“ToU”) and “End-User License



1 Agreement” (“EULA”). SUF, ¶ 31. The ToU governs and controls the player’s  
2 access to Nexon’s Combat Arms server, while the EULA governs the use and  
3 installation of the Combat Arms client. *Id.* Combat Arms users must consent to  
4 the ToU on at least two separate occasions before they can play the game. SUF, ¶  
5 32. Also, when a user installs the Combat Arms client, he or she must manifest  
6 assent to the Nexon End User License Agreement (the “EULA”). SUF, ¶ 33.

7 Among other provisions, the ToU provides that users agree not to “. . . (c)  
8 Modify the Software, Cash Items or the Service to change ‘game play,’ including  
9 without limitation, creating cheats and/or hacks or using third-party software to  
10 access files in the Software or Service.” SUF, ¶ 34. Likewise, the EULA prohibits  
11 the modification of Combat Arms software or adding components to the software.  
12 SUF, ¶ 35.

13 **Game Anarchy.** Defendants are the owners and distributors of a computer  
14 game “cheating” service and software program known as “Game Anarchy”  
15 (collectively, “Game Anarchy”). SUF, ¶ 36. Game Anarchy enables players of  
16 Combat Arms to cheat in that game in various ways. SUF, ¶ 46. Defendant Baker  
17 is the developer of Game Anarchy, and the president, CEO, and sole shareholder of  
18 the corporate defendant (Game Anarchy LLC). SUF, ¶ 37. Game Anarchy is  
19 merely a shell corporation; Baker is the sole owner, shareholder and officer of the  
20 corporation, and personally conducted all corporate business, without observing  
21 any corporate formalities.<sup>2</sup> SUF, ¶ 38.

22 \_\_\_\_\_  
23 <sup>2</sup> Individual officers and directors are liable for infringement “if there is a  
24 substantial and continuing connection between them and the corporation with  
25 respect to the infringing acts.” 3 M. & D. Nimmer, *Nimmer On Copyright* §  
26 12.04[A][1], at 12-73 (2009 ed.). See *Schwartz v. Pillsbury Inc.*, 969 F.2d 840,  
27 843 (9th Cir. 1992) (personal liability of a corporate officer who “participate[s] in  
28 the wrong or authorize[s] or direct[s] that it be done”). Baker was directly  
involved in all of the conduct at issue. He personally developed the Game  
Anarchy software, developed and operated the website on which the Game  
Anarchy software was distributed, advertised and marketed the software, and  
personally collected all of the revenue from the activities. *MDY Indus., LLC v.*  
*Blizzard Entm’t, Inc.*, 616 F. Supp. 2d 958, 973 (D. Ariz. 2009) (corporate officer  
“clearly supervised the infringing . . . activities . . . and profited personally from  
their success.”).



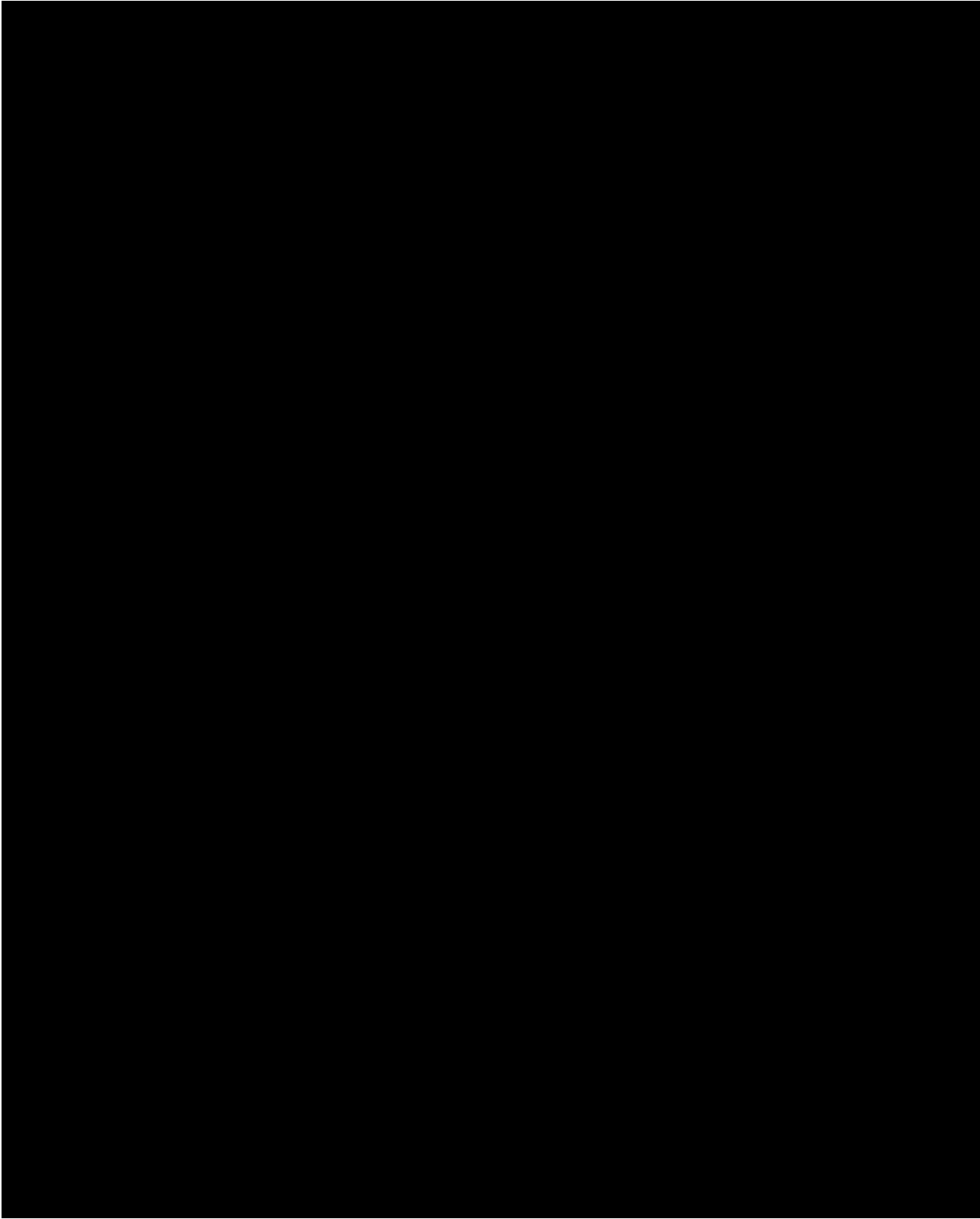
1 Baker promotes Game Anarchy via the website [www.gameanarchy.net](http://www.gameanarchy.net) (the  
2 “Game Anarchy Site.”). SUF, ¶ 40. Two versions of the Game Anarchy service  
3 and software are available: (1) a “public” version, which can be activated using  
4 “public” credits obtained by completing surveys, and (2) a “VIP” version, which  
5 must be activated using “VIP” credits or a VIP subscription, obtained by paying  
6 money to Defendants’ PayPal account. SUF, ¶ 43. The Game Anarchy web site  
7 provides links to purchase or obtain credits, as well as a number of forums or  
8 message boards (some open to the public and others open only to VIP members) in  
9 which users discuss the Game Anarchy software and other various topics. SUF, ¶  
10 44.

11 Upon launching the Game Anarchy software (known as the  
12 “StreamLoader”), the user is presented with a choice as to which game they wish  
13 to “hack” or cheat in. SUF, ¶ 45. If the user has paid sufficient credits to unlock  
14 the “Combat Arms” hacks, then he or she may click a button marked “Stream,”  
15 and shortly thereafter is prompted to launch the Combat Arms game. *Id.* Doing so  
16 causes Combat Arms to operate normally, but the game now presents a window  
17 (the “Game Anarchy Interface”) containing a list of modifications or tweaks that  
18 can be made to the game by checking a box to select them. SUF, ¶ 45. Among the  
19 modifications contained in the Game Anarchy Interface are (1) modifications to the  
20 Combat Arms aiming and firing system (known as “Aimbot”), such as allowing  
21 weapons to “always hit,” giving the user “unlimited ammo,” eliminating weapon  
22 recoil, or increasing the weapon’s aiming distance; (2) modifications to the game’s  
23 visual appearance or display, such as by eliminating fog or highlighting players in  
24 different colors; and (3) various other gameplay tweaks such as allowing users to  
25 kill opponents remotely (“Tele Kill”), shoot through walls (“Super Bullets”),  
26 increase his or her speed or jump height, teleport around the map (“Teleport”), and  
27 turn invisible (“Ghost”). SUF, ¶ 46.

28 Baker distributed the Combat Arms version of Game Anarchy to

1 approximately 6000 customers. SUF, ¶ 67. Baker also admitted that he received  
2 approximately \$213,840 in revenue from that activity since 2008. SUF, ¶ 69-76.

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28 <sup>3</sup> A “subroutine” is a small set of instructions that is part of a computer program.

1 [REDACTED]  
2 [REDACTED]

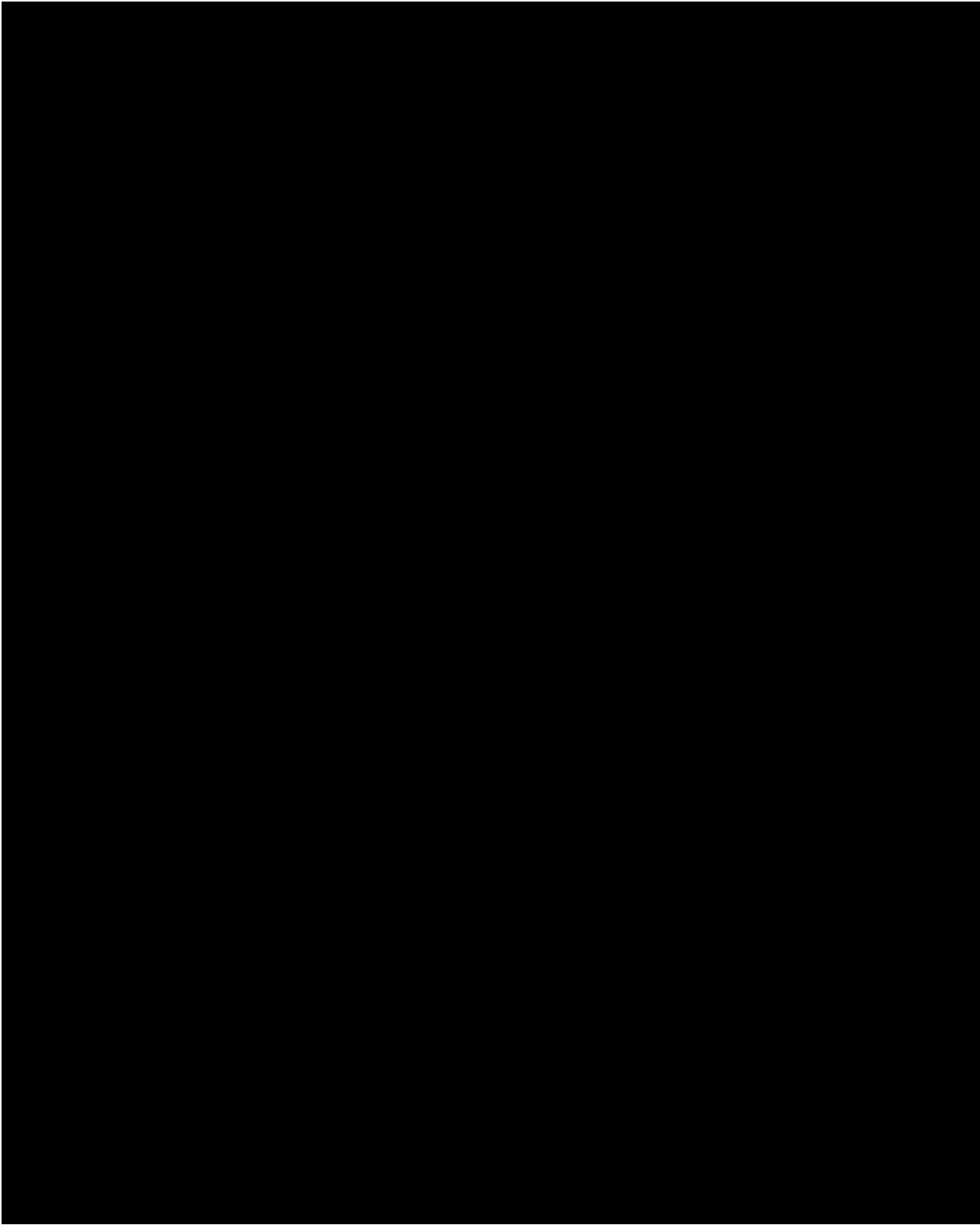
3 Because Combat Arms is an online game where multiple individuals play  
4 simultaneously and gameplay is affected by the state of other players, the effect of  
5 the new functionality introduced by [REDACTED] is not limited to the player's  
6 local computer: instead, it can fundamentally change the shared gameplay of all  
7 players participating in that particular game. *SUF*, ¶ 56. For example, a player  
8 who uses a hack to gain unlimited ammunition causes every other player to have  
9 an insignificant amount of ammunition in comparison. This gives that player an  
10 unfair advantage, and by extension, every other player in the game an unfair  
11 disadvantage. *Id.*

12 **Game Anarchy's Circumvention Of HackShield and NexonGuard.**

13 Baker is aware that Combat Arms is equipped with HackShield and NexonGuard  
14 and thus software such as Game Anarchy normally can and would be detected. As  
15 a result, Baker has programmed and designed Game Anarchy to address and  
16 overcome each of the ways that these products detect and stop hacks such as Game  
17 Anarchy. *SUF*, ¶ 57.

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

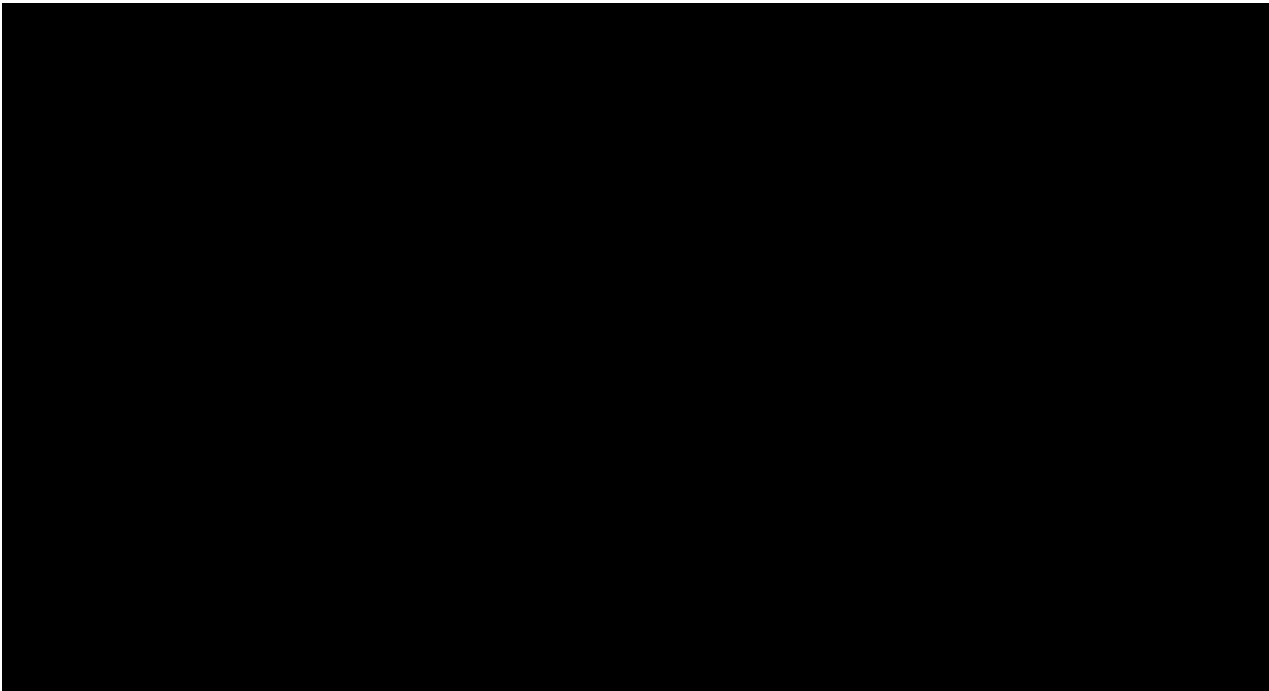
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27 <sup>4</sup> By way of analogy, it is as if each subroutine of Game Anarchy code is stored in  
28 a locked box with a key taped to the side. When the code is needed, the computer  
gets the key, unlocks the box, executes the commands inside, and then returns the  
code to the box, locks it again, and puts the key back. SUF, ¶ 61.

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**II. DEFENDANTS ARE LIABLE FOR TRAFFICKING IN CIRCUMVENTION DEVICES UNDER 1201(a)(2) OF THE DMCA.**

The DMCA was enacted in 1998 to conform the United States’ copyright law to its obligations under two World Intellectual Property Organization (“WIPO”) treaties. MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928, 942 (9th Cir. 2010). A key element of the digital protection envisioned enacted as part of the DMCA was to “provide ‘legal protection and effective legal remedies’ against circumventing technological measures, e.g., encryption and password protection, that are used by copyright owners to protect their works from piracy . . . .” S. Rep. No. 105-190, at 8 (1998). These protections (known as the anti-circumvention provisions) were codified at 17 U.S.C. § 1201, et seq.

Section 1201(a)(2) of the DMCA prohibits the trafficking in technology that circumvents technological measures that control access to copyrighted works. Universal Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001). Specifically:

[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that: (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

1 (B) has only limited commercially significant purpose or use other  
2 than to circumvent a technological measure that effectively controls  
3 access to a work protected under this title; or (C) is marketed by that  
4 person or another acting in concert with that person with that person's  
5 knowledge for use in circumventing a technological measure that  
6 effectively controls access to a work protected under this title.

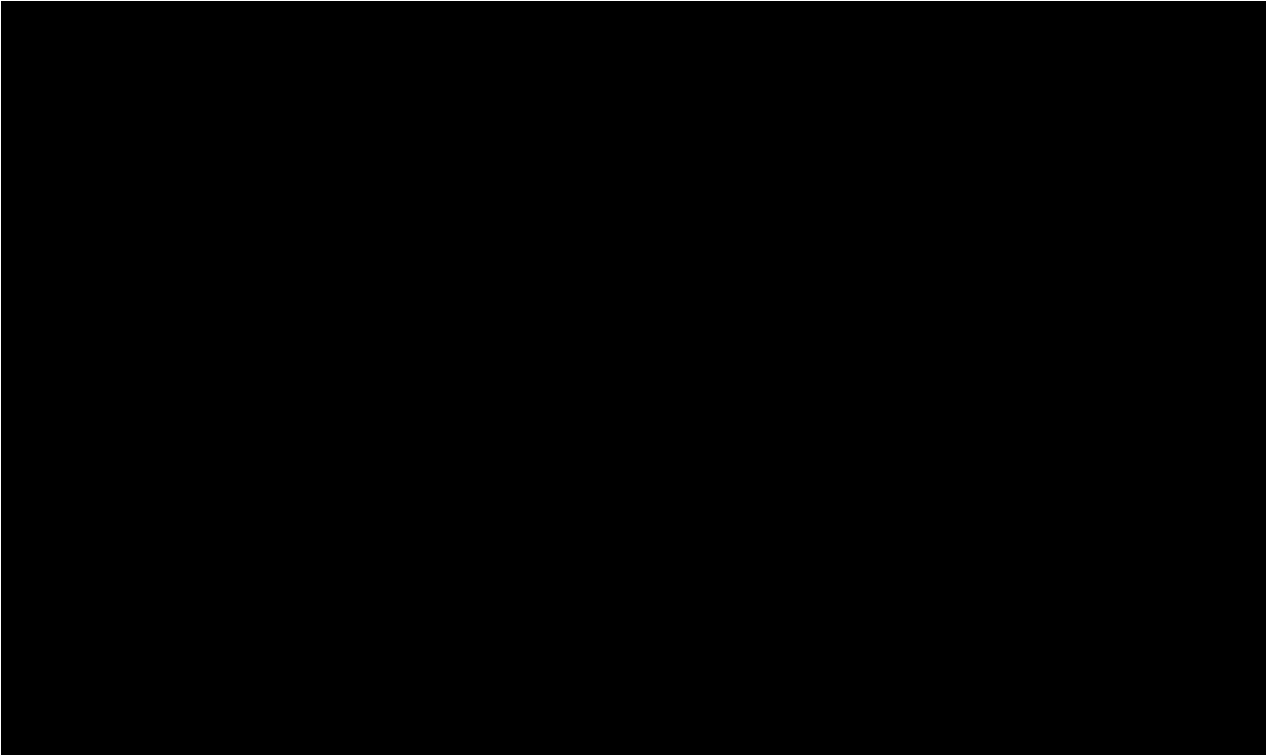
7 17 U.S.C. § 1201(a)(2). “The act of circumventing a technological protection  
8 measure put in place by a copyright owner to control access to a copyrighted work  
9 is the electronic equivalent of breaking into a locked room in order to obtain a copy  
10 of a book.” H.R. Rep. No. 105-551, pt. 1, at 17 (1998). Accordingly, it is not  
11 necessary that the circumvention of access control be in furtherance of (or have  
12 *any* “nexus” to) copyright infringement. MDY, 629 F.3d at 944-952.

13 Game Anarchy “unquestionably is technology” within the meaning of  
14 Section 1201. See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294,  
15 317 (S.D.N.Y. 2000), aff'd sub nom. Corley, 273 F.3d 429 (2d Cir. 2001) (“[A]  
16 computer program . . . unquestionably is ‘technology’ within the meaning of the  
17 statute.”). As set forth below, that technology violates Section 1201(a)(2) because  
18 part of that technology has been “primarily designed,” “marketed,” and has no  
19 commercial purpose other than, to circumvent effective access control measures  
20 contained within HackShield.

21 **A. HackShield Is A Technological Measure That Effectively Controls**  
22 **Access To Combat Arms.**

23 “[A] technological measure ‘effectively controls access to a work’ if the  
24 measure, in the ordinary course of its operation, requires the application of  
25 information, or a process or treatment, with the authority of the copyright owner, to  
26 gain access to the work.” 17 U.S.C. § 1201(a)(3)(B). To “effectively control  
27 access,” a technological measure need not be completely hack-proof; if that were  
28 the case then the statute would “offer protection where none is needed  
but...withhold protection precisely where protection is essential.” Reimerdes, 111  
F. Supp. 2d at 318; see also 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d

1 1085, 1095 (N.D. Cal. 2004) (argument is “equivalent to a claim that, since it is  
2 easy to find skeleton keys on the black market, a deadbolt is not an effective lock  
3 to a door.”)



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16 The security mechanisms contained in HackShield and NexonGuard are  
17 *exactly* the type of technical measures that courts, including the Ninth Circuit, have  
18 held effectively control access to a copyrighted work. See MDY Indus., LLC. v.  
19 Blizzard Entm’t, Inc., 629 F.3d 928, 942 (9th Cir. 2010); Davidson & Assocs. v.  
20 Jung, 422 F.3d 630, 640-41 (8th Cir. 2005) (“secret handshake” that restricted  
21 access to the plaintiff’s online game server was an effective access control  
22 measure); 321 Studios, 307 F. Supp. 2d at 1094-95 (encryption scheme that  
23 restricted access to DVDs without the proper key was an effective access control  
24 technology); RealNetworks, Inc. v. Streambox, Inc., No. 2:99-CV-02070, 2000  
25 WL 127311, at \*7 (W.D. Wash. Jan. 18, 2000) (technology that restricted playback  
26 of media files “effectively controls access”).

27  
28 <sup>5</sup> The Ninth Circuit has referred to this dynamic content as the “dynamic non-  
literal” elements, or “real-time experience” of playing a multiplayer online game.  
MDY, 629 F.3d at 942-43.

1 In MDY, 629 F.3d 928, a computer game developer (Blizzard) brought  
2 claims against the manufacturer of a software product known as “Glider.” Glider  
3 was a “bot” that allowed users to engage in automated, computer-controlled play of  
4 the popular computer game “World of Warcraft” (“WoW”). Among other claims,  
5 Blizzard asserted that Glider circumvented its anti-cheating and bot-detection  
6 technology known as “Warden.” [REDACTED]

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] Like HackShield and NexonGuard, if Warden detected such  
10 software, it denied the user access to Blizzard’s online servers. Like Game  
11 Anarchy, Glider circumvented Warden by taking measures to hide or disguise  
12 itself to avoid detection by Warden (including, just like Game Anarchy, by timing  
13 its operation around Warden’s scans). The Ninth Circuit found that Warden was  
14 an effective access control system, and that by incorporating elements into its  
15 software that were designed to avoid detection by Warden, Glider had engaged in  
16 unlawful circumvention:

17 For a player to connect to Blizzard’s servers which provide access to  
18 WoW’s dynamic non-literal elements, [Warden] must scan the  
19 player’s computer RAM and confirm the absence of any bots or  
20 cheats. The resident component also requires a ‘process’ in order for  
21 the user to continue accessing the work: the user’s computer must  
22 report portions of WoW code running in RAM to the server...  
23 Accordingly, Warden effectively controls access to WoW’s dynamic  
24 non-literal elements.

25 MDY, 629 F.3d at 954. The same rationale applies here. [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

**B. Game Anarchy Is An Unlawful Circumvention Device.**

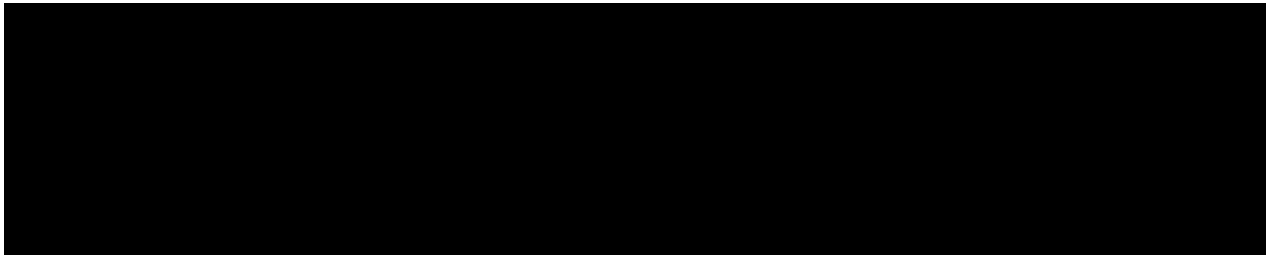
A software product will be deemed a prohibited circumvention device if it,  
*or a part thereof*, is (1) “primarily designed or produced for the purpose of  
circumventing” Nexon’s security measures, (2) “has only limited commercially



1 significant purpose or use other than to circumvent” Nexon’s security measures, *or*  
2 (3) is marketed by Defendant for use in circumventing Nexon’s security measures.  
3 17 U.S.C. § 1201(a)(2).

4 The DMCA defines circumvention as “avoid[ing], bypass[ing], remov[ing],  
5 deactivat[ing], or impair[ing] a technological measure . . . .” 17 U.S.C. §  
6 1201(a)(3). That is exactly what Game Anarchy does. It “avoids” and “bypasses”  
7 HackShield by deliberately and purposefully making itself undetectable by  
8 HackShield through a variety of technical and programming feats. See MDY, 629  
9 F.3d at 936 (Glider avoided detection by concealing itself from Warden’s memory  
10 scans); Sony Computer Entm’t Am. Inc. v. GameMasters, 87 F. Supp. 2d 976, 987  
11 (N.D. Cal. 1999) (“GameEnhancer” circumvented access control technology that  
12 permitted consoles to play encrypted video game CD-Roms). Game Anarchy also  
13 meets all three prongs of Section 1201(a)(2)(A)-(C).

14 *First*, Game Anarchy (or a portion thereof) is “primarily designed” to  
15 circumvent HackShield. See Reimerdes, 111 F. Supp. 2d at 319 (software that  
16 permitted users to access and copy encrypted DVDs violated section 1201(a)(2)).



21 [Redacted] These functions ensure that Combat Arms can be played  
22 even while Game Anarchy is loaded into the computer’s memory.<sup>6</sup> See MDY, 629  
23 F.3d at 954 (“Glider has no function other than to facilitate the playing of WoW”).

25 \_\_\_\_\_  
26 <sup>6</sup> In analyzing whether a device (or part thereof) is “primarily designed” for  
27 circumvention, it is irrelevant what the intent of the developer is; all that matters is  
28 that the relevant portion is designed or produced to circumvent. Reimerdes, 111 F.  
Supp. 2d at 319 (“Whether defendants [offered circumvention device] in order to  
infringe, or to permit or encourage others to infringe, copyrighted works in  
violation of other provisions of the Copyright Act simply does not matter for  
purposes of Section 1201(a)(2).”).

1 Were they not present, Game Anarchy could be detected and the player would not  
2 be able to use Game Anarchy to cheat in the game. SUF, ¶¶ 57-66.

3 **Second**, Game Anarchy is “marketed” for use in circumventing HackShield.  
4 Numerous websites advertise as one of Game Anarchy’s “features”: “**HackShield**  
5 **undetected**,” including “Blogspot” pages, Facebook pages, and YouTube pages  
6 that link to Game Anarchy. SUF, ¶¶ 49-50; 321 Studios, 307 F. Supp. 2d at 1099  
7 (“as 321 markets its software for use in circumventing CSS, this Court finds that  
8 321’s DVD copying software is in violation of the marketing provisions of §§  
9 1201(a)(2) and (b)(1)”).

10 **Finally**, without Game Anarchy’s circumvention functions, Combat Arms  
11 could not be played while Game Anarchy is injected or otherwise residing in  
12 computer memory. Thus, without those provisions, the software product is  
13 completely useless and by definition has no commercially significant purpose.

14 **C. Nexon Is Entitled To A Statutory Damage Award For Each Of**  
15 **The 6000 Distributions Of Game Anarchy.**

16 Under 17 U.S.C. § 1203(c)(3)(A), a plaintiff is entitled to statutory damages  
17 of no less than \$200 and no more than \$2,500 “per act of circumvention, device,  
18 product component, offer, or performance of service, as the court considers just.”  
19 Awards of statutory damages for trafficking in circumvention devices are based on  
20 the number of distributions of each device or product. See Craigslist, Inc. v.  
21 Naturemarket, Inc., 694 F. Supp. 2d 1039, 1063-64 (N.D. Cal. 2010) (basing award  
22 on number of devices distributed); Sony Computer Entm’t Am., Inc. v. Divineo,  
23 Inc., 457 F. Supp. 2d 957, 966-67 (N.D. Cal. 2006) (same); Sony Computer Entm’t  
24 Am., Inc. v. Filipiak, 406 F. Supp. 2d 1068, 1074 (N.D. Cal. 2005) (same).

25 Defendants admit that they distributed Game Anarchy to at least 6,000  
26 people, each of which represents a separate violation. Nexon Am., Inc. v. Kumar,  
27 No. 2:11-CV-06991-ODW, 2012 WL 1116328, at \*6 (C.D. Cal. Apr. 3, 2012)  
28 (“the Court does not quibble with Plaintiff’s premise that the number of UMaple  
members is a reasonable approximation of the minimum number of DMCA

1 violations Defendants committed”); Blizzard Entm’t, Inc. v. Reeves, No. CV 09-  
2 7621 SVW (AJWx), 2010 WL 4054095 (C.D. Cal. Aug. 10, 2010) (“[I]t is  
3 reasonable to infer that Defendant has provided each of its users with anti-  
4 circumvention products or services on at least one occasion. . . . Accordingly, the  
5 Court concludes that each of the 427,393 community members downloaded,  
6 accessed, or otherwise used anti-circumvention software, services, or products . . . .  
7 Accordingly, the Court concludes that the appropriate amount of statutory damages  
8 is \$85,478,600”). Nexon thus is entitled to at least 6,000 awards of *no less than*  
9 the statutory *minimum* of \$200. Thus, the Court should order Defendants to pay to  
10 Nexon **\$1,200,000** in statutory damages for their DMCA violations. This award is  
11 reasonable in light of the number of customers, the damage to Nexon, the  
12 significant revenue generated from Defendants’ activities, and the need for  
13 deterrence.<sup>7</sup>

14 **III. DEFENDANTS ARE LIABLE FOR COPYRIGHT INFRINGEMENT.**

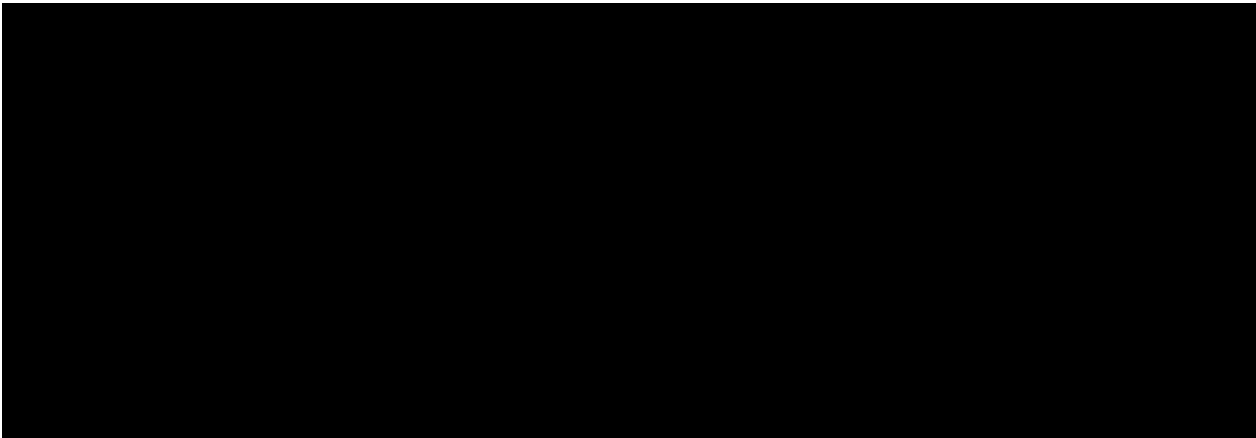
15 Copyright infringement is proven by showing (1) ownership of the works  
16 infringed, and (2) that defendant violated at least one exclusive right under 17  
17 U.S.C. § 106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir.  
18 2001). Nexon’s copyright registration is *prima facie* evidence of that ownership,  
19 including both the human and machine readable computer code and the graphical  
20 and textual elements of the game. Micro Star v. Formgen Inc., 154 F.3d 1107,  
21 1110 (9th Cir. 1998) (“copyright registration creates a presumption of ownership”);  
22 Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1019 (9th Cir.  
23 1985) (“[R]egistration by the Copyright Office is *prima facie* evidence of  
24 copyrightability.”).

25 \_\_\_\_\_  
26 <sup>7</sup> The amount sought is far less than awards issued in other similar cases. See,  
27 e.g., EchoStar Satellite LLC v. ViewTech, Inc., No. 07cv1273 BEN (WVG), 2011  
28 U.S. Dist. LEXIS 42709, at \*\*10-11 (S.D. Cal. Apr. 20, 2011) (\$214,898,600);  
Reeves, at \*\*8-9 (C.D. Cal. Aug. 10, 2010) (\$85,478,600); Dish Network LLC v.  
Ward, Case No. 8:08-cv-590-T-30TBM, 2010 U.S. Dist. LEXIS 142090, at \*20  
(M.D. Fla. Jan. 8, 2010) (\$51,148,200).

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**A. Defendants Infringed Nexon’s Adaptation Right By Altering The Operation of Combat Arms In Computer RAM.**

Section 106(2) of the Copyright Act (sometimes referred to as the “adaptation right”) reserves to copyright owners the exclusive right to “prepare derivative works based on the copyrighted work.” It is well-established that computer code is copyrightable, including when represented and stored in a computer’s memory as “object code” (instructions that are understandable only to the computer). Apple Computer, Inc. v. Franklin Computer Corp., 714 F. 2d 1240, 1249 (3d Cir. 1983). It also is well-established that the copyright in computer software extends not just to the literal code itself but also to the sequence and order of the computer program. See Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F. 2d 1222, 1240 (3d Cir. 1986) (“[T]he Copyright Act of 1976 demonstrates that Congress intended sequencing and ordering to be protectible in the appropriate circumstances . . . and the computer field is not an exception to this general rule.”). Finally, the law is clear in this Circuit that loading a computer program into RAM is a “fixation” sufficient for copyright protection. MAI Systems Corp. v. Peak Computer, Inc., 991 F. 2d 511, 518 (9th Cir. 1993) (“[B]y showing that Peak loads the software into the RAM and is then able to view the system error log and diagnose the problem with the computer, MAI has adequately shown that the representation created in the RAM is ‘sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.’”).

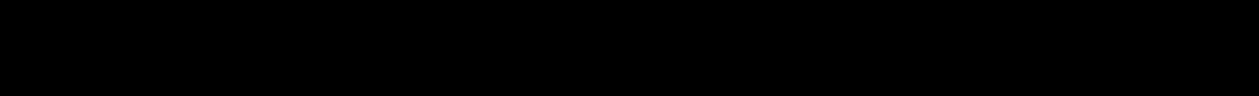




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The integration of new material into the preexisting Combat Arms code as it is being executed is roughly analogous to splicing new scenes into a movie reel, new notes into a song, or additional pages into a book. All of these activities cause the viewer to perceive and experience a similar, but fundamentally altered, version of the work. This new work is an infringing derivative work. 17 U.S.C. § 101 (defining “derivative work” as including “annotations, elaborations, or other modifications...”); see Micro Star, 154 F.3d at 1110-1111 (user-generated video game levels infringed derivative work right); Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988) (derivative work created when images were glued onto tiles and resold); WGN Continental Broadcast Co. v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982) (defendant infringed plaintiff’s copyright by replacing hidden material in the broadcast “vertical blanking interval” with its own text: “[T]hough WGN chooses not to use the vertical blanking interval to overlay additional images... it is clear that United Video may not use it for that purpose without WGN’s permission, any more than if the publisher of a book leaves the inside covers blank the book seller... may inscribe the Lord’s Prayer on them in order to broaden the book’s appeal.”).<sup>8</sup> This is the case even if the *added* material does not itself copy or contain portions of the

<sup>8</sup> In Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965, 968 (9th Cir. 1992), the Court found that a hardware device (the “Game Genie”) that enabled players to enter codes to alter Nintendo games, did not create a derivative work.



Instead, all that Game Genie did was to “block the value for a single *data* byte sent by the game cartridge to the central processing unit in the Nintendo Entertainment System and replace it with a new value.” 964 F.2d at 967 (emphasis added). Additionally, unlike Game Anarchy, which alters the game for all players involved, the Game Genie impacted only a single user’s game experience.

1 original; the critical fact is that after Game Anarchy is injected into a user's  
2 computer, the result is a game that is fundamentally different than what was  
3 created and sold by the developers. See Micro Star, 154 F.3d at 1109-12 (user-  
4 made levels did not contain original art files or alter the game code).

5 **B. Alternatively, Defendants Are Liable For Contributory**  
6 **Infringement.**

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED] However, the Copyright Act also recognizes “secondary,”  
12 contributory liability for those who knowingly encourage, induce, or facilitate  
13 copyright infringement. Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.,  
14 545 U.S. 913, 919 (2005); see also Gershwin Publ’g Corp. v. Columbia Artists  
15 Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (“[O]ne who, with knowledge of  
16 the infringing activity, induces, causes or materially contributes to the infringing  
17 conduct of another, may be held liable as a ‘contributory’ infringer.”) Thus, to the  
18 extent that Game Anarchy’s *users* may be argued to have created the infringing  
19 derivative work, Game Anarchy is secondarily liable:

20 *First*, Baker knew or had reason to know of infringement by Game Anarchy  
21 users. Ellison v. Robertson, 357 F.3d 1072, 1077 (9th Cir. 2004) (first prong  
22 established where defendant “knew or had reason to know of the infringing  
23 activity”). [REDACTED]  
24 [REDACTED]

25 [REDACTED]  
26 Baker also knew exactly what would happen when the Game Anarchy hacks were  
27 streamed to the user’s computer, since he personally designed and programmed the  
28

1 software. SUF, ¶ 39.

2 **Second**, Baker materially contributed to the infringement. He personally  
3 created Game Anarchy, sold it, and physically streamed its code to its users'  
4 computers. That is more than sufficient for material contribution. Perfect 10, Inc.  
5 v. Amazon.com, Inc., 508 F.3d 1146, 1155-56 (9th Cir. 2007) (Google “provides  
6 HTML instructions directing a user’s browser to access a third-party website”);  
7 Ellison, 357 F.3d at 1078 (material contribution “by storing infringing copies of  
8 Ellison’s works on its USENET groups and providing the groups’ users with  
9 access to those copies”); Napster, 239 F.3d at 1021-22 (finding Napster  
10 contributorily liable because it knew of the availability of infringing music files on  
11 its system, assisted users in accessing such files, and failed to block access to such  
12 files). Baker provided technical support to users, operated the website on which  
13 Game Anarchy was made available for purchase, and encouraged Combat Arms  
14 players to use the software. SUF, ¶¶ 40, 42, 44; Creative Labs, Inc. v. Cyrix Corp.,  
15 42 U.S.P.Q. 2d 1872, 1875-76 (N.D. Cal. 1997) (defendant “encouraged and  
16 provided the resources for known infringing activity”).

17 **C. Nexon Is Entitled To \$232,964.76 In Profits Attributable To The**  
18 **Copyright Infringement.**

19 The Copyright Act provides that the copyright owner is entitled to recover  
20 “the actual damages suffered by him or her as a result of the infringement, and any  
21 profits of the infringer that are attributable to the infringement and are not taken  
22 into account in computing the actual damages.” 17 U.S.C. § 504(b). “In  
23 establishing the infringer’s profits, the copyright owner is required to present proof  
24 only of the infringer’s gross revenue, and the infringer is required to prove his or  
25 her deductible expenses and the elements of profit attributable to factors other than  
26 the copyrighted work.” Id. [REDACTED]

27 [REDACTED] That money was deposited directly into Baker’s bank account or  
28 into an account maintained by his girlfriend. SUF, ¶¶ 69-70. Baker has not

1 offered any evidence of his deductible expenses or of the elements of profit  
2 attributable to factors other than the copyrighted work.

3 **IV. DEFENDANTS INTENTIONALLY INTERFERED WITH THE**  
4 **COMBAT ARMS TOU AND EULA.**

5 Under California law, the elements of a claim for intentional interference  
6 with contractual relations are (1) a valid contract between plaintiff and a third  
7 party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts  
8 designed to induce a breach or disruption of the contractual relationship; (4) actual  
9 breach or disruption of the contractual relationship; and (5) resulting damages. See  
10 Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990);  
11 Craigslist, 694 F. Supp. 2d at 1059-60 (entering judgment against defendant for  
12 inducing breach of website terms of service). To prove a defendant's interference  
13 with a contract, "it is not necessary that the defendant's conduct be wrongful apart  
14 from the interference with the contract itself." Quelimane Co. v. Stewart Title  
15 Guar. Co., 19 Cal. 4th 26, 55 (1998). Each of the elements of interference is met  
16 here.

17 **Valid Contract.** "Terms of use" for online services are enforceable  
18 contracts under California law. See Adobe Sys., Inc. v. One Stop Micro, Inc., 84  
19 F. Supp. 2d 1086, 1089-93 (N.D. Cal. 2000) (end user license agreement valid  
20 under California law); Hotmail Corp. v. Van\$ Money Pie Inc., No. C-98-20064,  
21 1998 WL 388389, at \*6 (N.D. Cal. Apr. 16, 1998) (plaintiff likely to prevail on  
22 claim for breach of "clickwrap" agreement). The Eighth Circuit has affirmed the  
23 enforceability of a terms of use agreement for a computer game that is nearly  
24 identical to Nexon's ToU. Davidson & Assocs., Inc. v. Internet Gateway, 334 F.  
25 Supp. 2d 1164, 1170-71, 1177-78 (E.D. Mo. 2004), aff'd sub nom. Jung, 422 F.3d  
26 630 (8th Cir. 2005). Players of Combat Arms necessarily assented to the terms of  
27 the EULA and ToU when they installed the software on their computers and signed  
28 up for a Nexon account. SUF, ¶¶ 31-33; see Ordonez v. Icon Sky Holdings LLC,  
No. 10-60156-CIV, 2011 WL 3843890, at \*6 (S.D. Fla. Aug. 30, 2011)



1 (interference claim where “a contractual relationship existed between Plaintiff and  
2 third party social networks...by virtue of the network policies which prompt new  
3 users to agree to the network’s terms of use before creating an account and  
4 webpage”).

5 **Knowledge.** Baker admitted that he had knowledge of the ToU and EULA  
6 and that the use of Game Anarchy could result in the user losing his or her Combat  
7 Arms account (i.e., being “banned”). SUF, ¶ 47 (“I’m aware of people saying they  
8 have been banned.”). This is further confirmed by postings on the Game Anarchy  
9 website. SUF, ¶ 48. In fact, Baker created and placed his own “Terms of Use” on  
10 the Game Anarchy website, and banned users who failed to comply with those  
11 Terms. SUF, ¶ 51. (Notably, Baker’s “Terms of Use” prohibited the use of Game  
12 Anarchy by Nexon or AhnLab).

13 **Intentional Acts and Actual Breach.** At least 6,000 Combat Arms players  
14 have used Game Anarchy, and each time they did so they breached the ToU and  
15 EULA. Baker engaged in numerous acts designed to induce those breaches. He  
16 created and operated the Game Anarchy software. He also marketed and  
17 advertised the Game Anarchy software, touting the ability of his software to allow  
18 its users to cheat and engage in other activities that violate the ToU and EULA.

19 **Harm.** The harm to Nexon from these breaches is obvious and manifest.  
20 Craigslis, 694 F. Supp. 2d at 1059-60 (“When third parties used Defendants’  
21 software, they breached the ToUs, resulting in monetary and other damages to  
22 Plaintiff.”). The use of hack software such as Game Anarchy has caused harm to  
23 Nexon’s reputation and that of its product, Combat Arms. SUF, ¶¶ 83-86.  
24 Frustration among Combat Arms players is enormous, as evidenced by postings on  
25 Nexon’s message board. SUF, ¶ 80 (“What is happening to Combat Arms?  
26 Hackers are everywhere and none of them are getting banned.”); (“Honestly,  
27 Nexon has to do something about this.”); (“Too many hackers come by, as if nexon  
28 isnt even trying to stop them.”); (“HackShield is't[sic] an obstacle for cheaters.”).

1 In fact, many Combat Arms players have cited the number of cheaters and hackers  
2 as the reason for quitting the game. SUF, ¶ 82 (“Combat Arms reasons not to  
3 download...omg tons of hackers... I Quit combat arms”). Others have warned  
4 would-be players to avoid the game because of the amount of cheating. SUF, ¶ 83  
5 (“If you have a mature attitude this game is not for you....VIP hackers are there  
6 alot but hidden well. Public hhjack users just try and ruin every game.”); (“The  
7 game is so full of hacks that it is all but impossible to play in a fair game.”).

8 **V. NEXON IS ENTITLED TO A PERMANENT INJUNCTION.<sup>9</sup>**

9 Both the Copyright Act and DMCA specifically authorize the Court to grant  
10 injunctive relief, 17 U.S.C. §§ 502(a), 1203, and injunctions are routinely issued in  
11 such cases. Craigslist, Inc. v. Kerbel, No. C-11-3309 EMC, 2010 WL 3166798, at  
12 \*15-16 (N.D. Cal. Aug. 2, 2012); DISH Network, L.L.C. v. Sonicview USA, Inc.,  
13 No. 09-cv-1553-L(WVG), 2010 WL 1965279, at \*14 (S.D. Cal. May 31, 2012);  
14 Kumar, 2012 WL 1116328, at \*7; Elektra Entm’t Grp., Inc. v. Bryant, No. CV 03-  
15 6381GAF(JTLX), 2004 WL 783123, at \*6 n.4 (C.D. Cal. Feb. 13, 2004). Each of  
16 the factors set forth in eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391  
17 (2006), favor granting a permanent injunction here.

18 **Irreparable Injury/Inadequate Legal Remedy:** An award of monetary  
19 damages will not prevent or deter the adverse, long-term effect on Nexon’s ability  
20 to exploit its copyrighted works. See Grokster, 518 F. Supp. 2d at 1217-18  
21 (finding irreparable injury because defendant “induce[d] far more infringement  
22 than it could ever possibly redress with damages”); Lava Records, LLC v. Ates,  
23 No. Civ.A. 05-1314, 2006 WL 1914166, at \*3 (W.D. La. July 11, 2006) (awarding  
24 permanent injunction, in part, because of “the need to prevent irreparable harm to  
25 Plaintiffs, which will not be remedied by a damage award that may or may not be  
26 collectible”). The damage to Nexon includes the loss of players, harm to the  
27

28 <sup>9</sup> Nexon herein sets forth a few basic reasons for injunctive relief. Plaintiffs are prepared to submit a separate motion for injunctive relief if the Court wishes.

1 integrity of Combat Arms, harm to Nexon’s reputation, and, ultimately, the loss of  
2 Nexon’s invaluable right to control how, by whom, and in what manner its works  
3 are exploited. SUF, ¶¶ 82-86; Taylor Corp. v. Four Seasons Greetings, LLC, 403  
4 F.3d 958, 968 (8th Cir. 2005). Notably, Defendants *continue* to infringe to this  
5 day and thus without an injunction they almost certainly will continue their  
6 conduct. SUF, ¶ 78; Walt Disney Co. v. Powell, 897 F.2d 565, 568 (D.C. Cir.  
7 1990) (granting injunction where “history of continuing infringement and a  
8 significant threat of future infringement remains”).

9 **Balance of Hardships:** In contrast to the harm described, Defendants  
10 would face little, if any, hardship if the Court were to enter the permanent  
11 injunction. Here, the permanent injunction is narrowly tailored such that it  
12 prohibits only future infringing conduct by Defendants and those under their  
13 control or direction, and does not limit Defendants’ ability to engage in lawful  
14 business via the Internet.

15 **Public Interest:** “[I]t is virtually axiomatic that the public interest can only  
16 be served by upholding copyright protections and, correspondingly, preventing the  
17 misappropriation of the skills, creative energies, and resources which are invested  
18 in the protected work.” Apple Computer, 714 F.2d 1240 at 1255.

19 **Conclusion**

20 Nexon respectfully requests that the Court enter summary judgment against  
21 Defendants, award to Nexon \$1,200,000 in statutory damages and \$232,964.76 in  
22 actual damages, and enter the requested permanent injunction.

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Dated: January 30, 2013

MITCHELL SILBERBERG & KNUPP LLP  
MARC E. MAYER

By: /s/ Marc E. Mayer  
Marc E. Mayer