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 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12

13 BLIZZARD ENTERTAINMENT,
 INC.,
 14
 Plaintiff,
 15
 v.
 16 BOSSLAND GMBH, a corporation;
 17 and Does 1 through 10, inclusive,
 18
 Defendants.

CASE NO. 8:16-cv-01236 DOC (KESx)

Honorable David O. Carter

**NOTICE OF MOTION AND
 MOTION FOR ENTRY OF
 DEFAULT JUDGMENT AGAINST
 BOSSLAND GMBH;**

**MEMORANDUM OF POINTS AND
 AUTHORITIES AND
 DECLARATIONS OF MARC E.
 MAYER AND CLINT RICE IN
 SUPPORT THEREOF**

[Proposed] Order and Judgment Lodged
 Concurrently Herewith

Date: April 10, 2017
 Time: 8:30 a.m.
 Ctrm.: 9C, Santa Ana

1 **TO DEFENDANT BOSSLAND GMBH AND ITS COUNSEL OF**
2 **RECORD:**

3
4 **PLEASE TAKE NOTICE THAT** on April 10, 2017, at 8:30 a.m., or as
5 soon thereafter as this matter may be heard by the above-entitled Court, located at
6 411 W. Fourth Street, Santa Ana, California 92701, Plaintiff Blizzard
7 Entertainment, Inc. (“Blizzard”) will and hereby does move for an order entering
8 default judgment pursuant to Federal Rule of Civil Procedure 55(b)(2) against
9 Defendant Bossland GMBH (“Bossland”). Bossland has been served with the
10 Complaint, appeared in this action to contest jurisdiction, and is aware of this
11 action but has knowingly elected not to proffer a defense.

12
13 Blizzard requests the following relief:

14
15 1. An injunction, ordering that Bossland and all persons acting under its
16 direction or control (including but not limited to its agents, subsidiaries,
17 representatives and employees), shall immediately and permanently cease and
18 desist from any and all of the following activities:

19
20 (a) taking any steps on Bossland’s own behalf or assisting others in
21 distributing, advertising, marketing, selling, reselling, uploading, downloading,
22 offering for sale, or otherwise disseminating in the United States any software
23 whose use infringes any of Blizzard’s U.S. copyrights, patents, or trademarks
24 (Blizzard’s “Intellectual Property”), circumvents technological measures that
25 control access to Blizzard’s games in the United States, or violates Blizzard’s End
26 User License Agreement (“EULA”) with its U.S. customers, including but not
27 limited to the software products known as “Honorbuddy,” “Demonbuddy,”
28 “Stormbuddy,” “Hearthbuddy,” and “Watchover Tyrant,” and any other software

1 product designed to exploit or enable the exploitation of any game owned,
2 published, or operated by Blizzard;

3

4 (b) obtaining, possessing, accessing or using in the United States any
5 software whose use infringes any of Blizzard’s Intellectual Property, circumvents
6 technological measures that control access to Blizzard’s games, or violates the
7 EULA, including but not limited to the software products known as
8 “Honorbuddy,” “Demonbuddy,” “Stormbuddy,” “Hearthbuddy,” and “Watchover
9 Tyrant,” and any other software product designed to exploit or enable the
10 exploitation of any game owned, published, or operated by Blizzard;

11

12 (c) assisting in any way with the creation or development in the United
13 States of any software whose use infringes any of Blizzard’s Intellectual Property,
14 circumvents technological measures that control access to Blizzard’s games, or
15 violates the EULA, including but not limited to the software products known as
16 “Honorbuddy,” “Demonbuddy,” “Stormbuddy,” “Hearthbuddy,” and “Watchover
17 Tyrant,” and any other software product designed to exploit or enable the
18 exploitation of any game owned, published, or operated by Blizzard;

19

20 (d) publishing or distributing in the United States any source code or
21 instructional material for the creation of any software whose use infringes any of
22 Blizzard’s Intellectual Property, circumvents technological measures that control
23 access to Blizzard’s games, or violates the EULA, including but not limited to the
24 software products known as “Honorbuddy,” “Demonbuddy,” “Stormbuddy,”
25 “Hearthbuddy,” and “Watchover Tyrant,” and any other software product designed
26 to exploit or enable the exploitation of any game owned, published, or operated by
27 Blizzard;

28

1 (e) selling, transferring, or assigning to any person or entity the
2 intellectual property in any product (including the rights in any source code) whose
3 use infringes any of Blizzard’s Intellectual Property, circumvents technological
4 measures that control access to Blizzard’s games, or violates the EULA, including
5 but not limited to the software products known as “Honorbuddy,” “Demonbuddy,”
6 “Stormbuddy,” “Hearthbuddy,” and “Watchover Tyrant,” and any other software
7 product designed to exploit or enable the exploitation of any game owned,
8 published, or operated by Blizzard;

9
10 (f) operating, assisting or linking to any website located in the United
11 States or directed at United States residents that is designed to provide information
12 to assist others in accessing, developing or obtaining any software whose use
13 infringes any of Blizzard’s Intellectual Property, circumvents technological
14 measures that control access to Blizzard’s games, or violates the EULA, including
15 but not limited to the software products known as “Honorbuddy,” “Demonbuddy,”
16 “Stormbuddy,” “Hearthbuddy,” and “Watchover Tyrant,” and any other software
17 product designed to exploit or enable the exploitation of any game owned,
18 published, or operated by Blizzard;

19
20 (g) investing or holding any financial interest in any enterprise which
21 Bossland knows or has reason to know is now, or intends in the future to be,
22 engaged in any activities in the United States that are prohibited by this Judgment
23 and Permanent Injunction.

24
25 (h) reverse engineering, decompiling, packet editing, or otherwise
26 manipulating without authorization in the United States, any game owned,
27 published, or operated by Blizzard or a Blizzard subsidiary or providing assistance
28 to any person or entity engaged in such activities.

1 2. A monetary award to Blizzard, for Bossland’s infringing conduct
2 within the United States, in the sum of **\$8,740,235.41**, constituting:

3
4 (a) Statutory damages in the minimum allowable amount (\$200 per
5 violation) under § 1203(c)(3)(A) of the Digital Millennium Copyright Act
6 (“DMCA”), for each of Bossland’s 42,818 violations within the United States,
7 totaling \$8,563,600.00. This amount is not punitive in nature.

8
9 (b) Attorneys’ fees totaling \$174,872.00, and

10
11 (c) Costs of suit totaling \$1,763.41.

12
13 This Motion is brought on the grounds that entry of default judgment is
14 appropriate in this case because: (1) Blizzard has satisfied the procedural
15 requirements of Federal Rule of Civil Procedure 55(b)(2) and Local Rule 55-1, (2)
16 Blizzard would suffer prejudice if default judgment is not entered because it would
17 be denied the right to judicial resolution of its claims, (3) the Complaint sets forth
18 *prima facie* claims showing that Bossland is liable for inducement to infringe
19 copyrights, contributory copyright infringement, vicarious copyright infringement,
20 violation of Section 1201 of the DMCA (i.e. trafficking in circumvention devices),
21 and intentional interference with contractual relations, (4) the monetary award
22 sought by Blizzard is factually and legally supported and is reasonable, (5) there is
23 no possibility of dispute regarding the material facts of the case, and (6) Bossland’s
24 default did not result from excusable neglect.

25
26 Notice of this Motion was served on Bossland’s counsel of record via the
27 Court’s electronic filing system.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This action arises from the development, distribution, and sale of software
4 “hacks” or “cheats” in the United States that are designed to alter and impair the
5 online functionality of Plaintiff Blizzard Entertainment, Inc.’s (“Blizzard”) popular
6 computer games, by defendant Bossland GmbH (“Bossland”). Bossland initially
7 appeared in this action through experienced and reputable counsel in order to
8 contest personal jurisdiction. However, after the Court denied Bossland’s motion
9 to dismiss for lack of jurisdiction Bossland elected to voluntarily default rather
10 than defend this case on the merits. The court clerk entered Bossland’s default on
11 February 16, 2017. Blizzard now moves for issuance of a default judgment against
12 Bossland.

13 Bossland is an archetypal bad actor. The products at issue in this case have
14 only one purpose -- to allow Bossland’s customers to cheat in Blizzard’s games --
15 to the detriment of Blizzard and its player base, and to the massive financial benefit
16 of Bossland and its employees. Bossland has made millions of dollars from this
17 business, knowing that its products harm Blizzard and that their use in the United
18 States is unlawful. For months leading up to this litigation, Bossland’s principal,
19 Zweten Letschew, bragged online that Blizzard could not sue it in the United
20 States because, according to Bossland, courts in the United States lack personal
21 jurisdiction over Bossland. *See* Declaration of Mayer E. Decl. (“Mayer Decl.”), Ex.
22 4 (“Now Blizzard wants to try it [litigation] in the US US courts in general
23 think they can decide about the future of anyone, however even they have
24 regulations.”). Upon learning that this Court *could* constitutionally exercise
25 jurisdiction over Bossland, Bossland promptly notified counsel for Blizzard that,
26 rather than defend its conduct on the merits, it had elected to default.

27 Bossland’s goal with respect to this purely strategic default is clear: it hopes
28 that a default judgment issued by this Court will be difficult to enforce in

1 Germany, and that its foreign assets will go undisturbed. Thus, Bossland
2 apparently intends to continue “business as usual,” distributing its infringing
3 products around the world, including in the United States, with perceived
4 impunity. In the meantime, by defaulting Bossland is attempting to avoid being
5 subjected to any discovery and prevent Blizzard from learning the scope of its
6 conduct and the amount of profit it has received from its unlawful products in the
7 United States.

8 Default judgment against Bossland is manifestly appropriate. By its
9 activities, Bossland has engaged in a variety of unlawful activities. Specifically:

10 ● Bossland distributed and actively encouraged the use of software
11 which, when used by the end user, creates a derivative work of one or more of the
12 Blizzard Games. Bossland also encouraged and facilitated acts of copyright
13 infringement by its freelance contractors and software developers. This conduct
14 constitutes secondary copyright infringement.

15 ● Bossland created and distributed computer files designed to
16 circumvent and bypass access controls put into place by Blizzard. This conduct
17 violates Section 1201 of the DMCA.

18 ● Bossland, with knowledge that others had entered into valid and
19 binding contracts with Blizzard, encouraged those people to engage in conduct that
20 plainly violated those contracts.

21 The relief that Blizzard seeks in this motion is eminently reasonable and
22 appropriate. It is limited only to those Bossland products that violate Blizzard’s
23 rights, and is further limited only to conduct Bossland has committed or may
24 commit in the future within the United States. With respect to monetary relief,
25 Blizzard seeks only the *minimum* awardable statutory damages for violation of
26 Section 1201 of the Copyright Act. It seeks such an award not to punish Bossland
27 or obtain an unjustified windfall, but as a fair monetary award *in lieu* of actual
28 damages, which are undoubtedly very large but are extremely difficult to precisely

1 calculate, especially without the benefit of discovery. Additionally, the form of
2 injunctive relief sought by Blizzard is one that other courts (including Courts in
3 this District) have previously approved in analogous cases.

4 Because there is no dispute as to the relevant facts and law, and the
5 requested relief is reasonable and appropriate, the requested default judgment
6 should promptly be entered in favor of Blizzard.

7
8 **II. STATEMENT OF FACTS**

9 **Blizzard and its Games.** Blizzard is a developer and publisher of high-
10 quality computer games. Its products include the massively popular online
11 computer games “World of Warcraft” (“WoW”), “Diablo 3” (“D3”), “Heroes of
12 the Storm” (“HOTS”), “Hearthstone,” and “Overwatch” (WoW, D3, HOTS,
13 Hearthstone, and Overwatch collectively are referred to as the “Blizzard Games.”).
14 Compl., ¶¶ 1, 13. The success of each of the Blizzard Games rests in large part on
15 Blizzard’s ability to offer a consistently compelling player experience so that its
16 customers remain invested in the Blizzard Games and play them for a sustained
17 period of time. *Id.* ¶ 14. *See also* Declaration of Clint Rice (“Rice Decl.”), ¶¶ 4-8.
18 Accordingly, it is critical to Blizzard’s business model that its online games are
19 free from interference by cheaters, hackers, or others who seek to manipulate the
20 game experience (either for their own personal gain or simply to disrupt and annoy
21 others).

22 In order to protect the integrity of its products and the sanctity of its users’
23 game experience, Blizzard employs both technical and contractual security
24 measures. Compl., ¶ 20.

25 **Blizzard’s Technical Measures.** In order to protect its games from
26 cheating and unauthorized exploitation, Blizzard has developed and employs a
27 software program called “Warden.” Warden is a technical measure that prevents
28 unauthorized access to the Blizzard Games, restricts users from loading

1 unauthorized copies of the Blizzard Games, and otherwise monitors the game
2 client and environment for malicious or unauthorized software processes. *Id.* ¶ 21.
3 Among other things, Warden runs targeted scans for the presence and/or use of
4 “signatures” of known unauthorized third-party programs that facilitate cheating or
5 allow the modification of the game interface and/or experience in any way not
6 authorized by Blizzard. *Id.* ¶ 22. If Warden detects that a user is engaged in
7 prohibited hacking or cheating activities, it will deny that user access to the
8 Blizzard Game. *Id.* As a result, for any hack or cheat software to be effective, the
9 software must be designed to prevent its detection by Warden, either by concealing
10 itself from Warden or by disabling Warden. *Id.* See *MDY Indus., LLC v. Blizzard*
11 *Entm't, Inc.*, 629 F.3d 928, 954 (9th Cir. 2010) (cheat software circumvented
12 Warden in violation of 17 U.S.C. § 1201(a)(2)).

13 **Blizzard’s Contractual Measures.** In order to access, download, or play
14 any of the Blizzard Games, users must create and register an account with
15 Blizzard’s proprietary Battle.net system. *Id.* ¶ 24. To create a Battle.net account,
16 users must expressly manifest their assent to the “Battle.net End User License
17 Agreement” (the “EULA”). *Id.* The entire text of the EULA is displayed to users
18 at the time they are asked to assent to its terms. The EULA also is made available
19 on Blizzard’s website at <http://us.blizzard.com/en-us/company/legal/eula.html>. See
20 *Blizzard Entm't Inc. v. Ceiling Fan Software LLC*, 28 F. Supp. 3d 1006, 1015 (C.D.
21 Cal. 2013) (discussing Blizzard’s EULA).

22 The EULA is a conditional, limited license agreement between Blizzard and
23 its users. Under the EULA, Blizzard licenses the right to download, copy, install,
24 and play the Blizzard Games, subject to certain terms, restrictions, and conditions.
25 Among other provisions, the EULA expressly states that, as a condition to the
26 limited license: “You agree that you will not, in whole or in part or under any
27 circumstances, do the following:

1 Derivative Works: Copy or reproduce (except as
2 provided in Section 1(B)), translate, reverse engineer,
3 derive source code from, modify, disassemble,
4 decompile, or create derivative works based on or related
5 to the Battle.net Client or Games.

6 Cheating: Create, use, offer, advertise, make available
7 and/or distribute the following or assist therein:

8 1. Cheats; i.e. methods, not expressly authorized by
9 Blizzard, influencing and/or facilitating the gameplay,
10 including exploits of any in-game bugs, and thereby
11 granting you and/or any other user an advantage over
12 other players not using such methods;

13 2. Bots; i.e. any code and/or software, not expressly
14 authorized by Blizzard, that allows the automated control
15 of a Game, Battle.net and/or any component or feature
16 thereof, e.g. the automated control of a character in a
17 Game;

18 3. Hacks; i.e. accessing or modifying the software of
19 a Game or Battle.net in a manner, not expressly
20 authorized by Blizzard; and/or

21 4. any code and/or software, not expressly authorized
22 by Blizzard, that can be used in connection with the
23 Battle.net client, Battle.net, a Game and/or any
24 component or feature thereof which changes and/or
25 facilitates the gameplay;”

26 Compl., ¶ 25. The Blizzard Games are made available to the public exclusively
27 through Blizzard’s proprietary Battle.net system. (This includes any physical
28 copies of the Blizzard Games, which must be activated and played through the
Battle.net system.) Thus, it is not possible for a user to lawfully obtain access to or
play any of the Blizzard Games without expressly consenting to the EULA. *Id.*

¶ 26.

Bossland and its Hacks. Bossland is engaged in the for-profit business of
creating, producing, marketing, distributing, and supporting a suite of malicious
software products that specifically are designed to harm Blizzard and the Blizzard
Games. Compl., ¶ 27. Defendants have created and distributed numerous cheat
programs for use with Blizzard’s Games. These include: “Honorbuddy” (for use
with WoW), “Demonbuddy” (for use with D3), “Stormbuddy” (for use with

1 HOTS), “Hearthbuddy” (for use with Hearthstone), and “Watchover Tyrant” (for
2 use with Overwatch) (these programs collectively are referred to as the “Bossland
3 Hacks”). *Id.* ¶ 29. Subscriptions for each of the Bossland Hacks are sold through
4 dedicated websites owned and operated by Bossland, at a minimum cost of 12.95
5 Euros (approximately \$14.50) per month or as much as 199 Euros (approximately
6 \$224) for a full-featured yearly subscription. *Id.*, ¶¶ 30, 34.

7 Bossland has received enormous sums of money from selling and
8 distributing its products in the United States. *According to Bossland*, during the
9 period of time from July of 2013 until June of 2016, Bossland sold no less than
10 **118,939** units of its cheats to users *within the United States*. Mayer Decl., Ex. 7
11 (Declaration of Zweten Letschew I/S/O Bossland’s Motion to Dismiss (ECF No.
12 16-1)), ¶¶ 44-79. Moreover, according to Bossland, this figure represents only
13 between 10 and 30% of its global sales for the same period. *Id.*; *see also* Order
14 Denying Bossland’s Motion to Dismiss (ECF No. 23) (the “MTD Order”) at 2. In
15 this Motion, Blizzard only seeks damages for the exploitation of the Bossland
16 Hacks in the United States.

17 **Bossland’s Unlawful Circumvention.** Normally, Blizzard’s Warden
18 technology prevents users of Blizzard’s products from using cheats and hacks such
19 as the Bossland Hacks. Thus, in order for the Bossland Hacks to work, they must
20 avoid, bypass, or circumvent Blizzard’s Warden technology. One of the ways that
21 Bossland does this is by building into each of the Bossland Hacks a software
22 application known as “Tripwire.” Compl., ¶ 39. Bossland describes Tripwire as
23 follows:

24 Tripwire is anti-spyware technology built into Bossland
25 GmbH products to “watch the watchers.” Tripwire is
26 always active. It is constantly looking at [Warden].
27 Tripwire will automatically render all active sessions of a
28 Buddy bot as invalid if it detects [Warden] doing
anything sneaky. Bossland GmbH can also manually
activate Tripwire upon discovery of something untoward.

1 *Id.* Tripwire is incorporated into each of the Bossland Hacks. *Id.* ¶ 40. The sole
2 purpose of Tripwire is to avoid detection of the Bossland Hacks by Warden, and
3 Defendants advertise it as such. *Id.* As Bossland posts on its forum, “the Buddy
4 bot is responsible for avoiding client-side detection [i.e. Warden].” (emphasis
5 added). *Id.* The Bossland Hacks would not have any commercial value or appeal
6 without the Tripwire technology incorporated therein. *Id.*

7 **The Severe and Irreparable Harm to Blizzard.** Bossland has caused and
8 continues to cause serious harm to the value of Blizzard’s games and to Blizzard’s
9 online community. *See* MTD Order at 2 (“Bossland and its Bots undermine
10 Blizzard’s efforts to create games that are enjoyable and fair to players of all skill
11 levels.”). Such harm is immediate, massive and irreparable, and includes the
12 following.

13 First, Bossland’s products irreparably harm the ability of Blizzard’s
14 legitimate customers in the United States to enjoy and participate in its games. For
15 example, certain of Blizzard’s games (such as Hearthstone, Overwatch, and Heroes
16 of the Storm) are competitive multiplayer games that require that users be on a
17 level playing field in order to be enjoyable. Others (World of Warcraft and Diablo
18 3) rely on their immersive game worlds to keep their players interested. The
19 Bossland Hacks destroy both the level playing field players expect in a competitive
20 Blizzard Game, and the immersive game worlds players expect from the other
21 Blizzard Games. As a result, affected players may (and do) grow dissatisfied with
22 the Blizzard Games and stop playing. *See* Rice Decl., ¶¶ 9-15.

23 When Blizzard loses a player, it directly results in a loss of revenue to
24 Blizzard. Compl., ¶ 48. Thousands of customers have cancelled World of
25 Warcraft subscriptions, citing bots as the reason for their cancellation. *Id.*; Rice
26 Decl., ¶ 12. A World of Warcraft subscription costs \$14.99 per month, and thus
27 the loss of a single long-term subscriber could result in damage to Blizzard of
28 approximately \$150 per year. Compl., ¶ 48. In addition, Hearthstone and Heroes

1 of the Storm are “free to play” games, and generate revenue for Blizzard only
2 when players invest in “in-game” microtransactions (such as by purchasing new
3 cards or unlocking cosmetic modifications). When users stop playing, they will no
4 longer purchase in-game items and will not recommend the game to friends. This
5 also results in a direct loss of revenue to Blizzard.

6 Second, Bossland’s conduct has forced Blizzard to spend large sums of
7 money (and equally large amounts of time) attempting to remediate the damage
8 caused by the Bossland Hacks. Rice Decl., ¶¶ 9, 12-14; Compl., ¶ 48. This
9 includes creating and releasing new versions of the Blizzard Games that counteract
10 the Bossland Hacks, responding to player complaints, employing personnel to
11 police the games to detect the use of the Bossland Hacks, and “banning” (*i.e.*,
12 permanently deleting the accounts of) users who are using the Bossland Hacks. *Id.*

13 Third, Bossland’s conduct harms Blizzard’s reputation and results in the loss
14 of customer goodwill, in the United States and worldwide. Compl., ¶ 48.

15 Unless Bossland is permanently enjoined, Blizzard will continue to suffer
16 severe monetary and non-monetary harm from the Bossland Hacks. *Id.* ¶ 49.

17

18 **III. PROCEDURAL HISTORY AND BOSSLAND’S PURPOSEFUL**
19 **DEFAULT.**

20 Blizzard filed its Complaint on July 1, 2016. ECF No. 1. Bossland was
21 timely served with the initiating papers through the provisions of the Hague
22 Service Convention. Service on Bossland was completed on October 6, 2016.
23 Mayer Decl., ¶¶ 2, 4.

24 On November 18, 2016, Bossland appeared in this action (via two sets of
25 counsel) and filed a Motion to Dismiss Blizzard’s Complaint, arguing that this
26 Court lacked personal jurisdiction over Bossland. ECF No. 16. On January 25,
27 2017, the Court denied Bossland’s motion and ruled that it could constitutionally
28 assert personal jurisdiction over Bossland. ECF No. 23. Bossland filed a motion

1 to certify the question of personal jurisdiction to the Ninth Circuit on February 7,
2 2017, and at the same time requested additional time to file its Answer to
3 Blizzard's Complaint. On February 10, 2017, the Court denied Bossland's request
4 for a further extension, and ordered Bossland to file its Answer within twenty-four
5 hours. ECF No. 27. Bossland did not file its answer within twenty-four hours, or
6 at all. Instead, on February 14, 2017, counsel for Bossland contacted counsel for
7 Blizzard and notified them that Bossland had *voluntarily elected* to default, and
8 would not defend this litigation. Mayer Decl., ¶ 7. Subsequently, on February 15,
9 2017, Bossland withdrew its motion for certification. ECF No. 29. The Clerk
10 entered Bossland's default on February 16, 2017. ECF No. 30.

11 Bossland's decision to default is a calculated and bad-faith tactic designed to
12 shield its unlawful conduct from the reach of United States law. By defaulting,
13 Bossland apparently hopes to block Blizzard from taking any discovery into its
14 conduct, thereby concealing from Blizzard the scope of its unlawful conduct, the
15 amount of revenue it has received from the Bossland Hacks, and the whereabouts
16 of its assets. Bossland also hopes that by hiding this information it may avoid a
17 monetary judgment or render any judgment that may be entered against it either
18 unenforceable in the courts of Germany or uncollectable. Thus, Bossland hopes
19 that it will be able to continue to conduct business as usual, and that Blizzard will
20 be unable to avail itself of the relief to which it is entitled.

21

22 **IV. BLIZZARD IS ENTITLED TO ITS REQUESTED RELIEF**

23 In addition to the procedural requirements set forth in Local Rule 55-1 and
24 Fed. R. Civ. P. 55(b)(2), a court's decision to grant default judgment is guided by
25 the following factors (known as the *Eitel* factors):

26 (1) the possibility of prejudice to the plaintiff, (2) the
27 merits of plaintiff's substantive claim, (3) the sufficiency
28 of the complaint, (4) the sum of money at stake in the
action, (5) the possibility of a dispute concerning material
facts, (6) whether the default was due to excusable
neglect, and (7) the strong policy underlying the Federal

1 Rules of Civil Procedure favoring decisions on the
2 merits.

3 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *see also Warner Bros.*
4 *Entm't Inc. v. Caridi*, 346 F. Supp. 2d 1068, 1071-73 (C.D. Cal. 2004) (granting
5 default judgment based on *Eitel* factors). While the decision to grant a default
6 judgment is left to the sound discretion of the Court, “default judgments are more
7 often granted than denied.” *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432
8 (C.D. Cal. 1999).

9 In determining whether to grant a default judgment, “[t]he general rule of
10 law [is] that upon default the factual allegations of the complaint, except those
11 relating to the amount of damages, will be taken as true.” *TeleVideo Sys., Inc. v.*
12 *Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). *See also Visoneering Constr. v.*
13 *U.S. Fidelity & Guar.*, 661 F.2d 119, 124 (6th Cir. 1981) (“Well pleaded
14 allegations of the petition . . . are taken as admitted on a default judgment.”).
15 While a plaintiff must “prove up” damages when seeking a default judgment, this
16 evidentiary burden is “relatively lenient.” *Elektra Entm't Grp., Inc. v. Bryant*, 2004
17 U.S. Dist. LEXIS 26700, at *5 (C.D. Cal. Feb. 13, 2004).

18 “[T]he Court must draw all reasonable inferences in Plaintiff’s favor on
19 account of defendant’s failure to participate in the litigation process.” *Blizzard*
20 *Entm't, Inc. v. Reeves*, 2010 U.S. Dist. LEXIS 85560, at *8 (C.D. Cal. Aug. 10,
21 2010). That rule is particularly applicable here, since Bossland’s default certainly
22 was driven by a desire to deprive Blizzard of the discovery it requires to accurately
23 and fully assess the precise number of Bossland Hacks in the marketplace and the
24 harm they are causing to Blizzard and its game. *See Henry v. Sneiders*, 490 F.2d
25 315, 317 (9th Cir. 1974) (noting on motion for default judgment that “[a]ny
26 insufficiency of plaintiff’s evidence was a direct result of appellant’s refusal to
27 comply with a legitimate request for discovery.”).

1 Blizzard has satisfied the procedural requirements of the Federal and Local
2 Rules, the *Eitel* factors weigh in favor of entering default judgment against
3 Bossland, and Blizzard’s requested relief is reasonable and supported.

4 **A. Blizzard Has Satisfied The Procedural Requirements For Entry**
5 **Of Default Judgment Against Bossland.**

6 The requirements of Federal Rule of Civil Procedure 55(b)(2) and Local
7 Rule 55-1 plainly have been met. Bossland has been served, and has deliberately
8 and strategically elected not to defend this litigation. Mayer Decl., ¶¶ 4-8. The
9 clerk has entered Bossland’s default.. *Id.* ¶ 9. Bossland is not an infant or
10 incompetent. *Id.* ¶ 10; *see* L.R. 55-1(c). The Servicemembers Civil Relief Act (50
11 U.S.C. App. § 521) does not apply. Mayer Decl., 10; *see* L.R. 55-1(d). Blizzard
12 timely notified Bossland of this Motion for Default Judgment. Mayer Decl., ¶ 11,
13 Exs. 2, 3; *see* L.R. 55-1(e); Fed. R. Civ. P. 55(b)(2).

14 **B. The Allegations Of The Complaint, Taken As True, Establish**
15 **Liability On Blizzard’s Claims.**

16 After the entry of default, the factual allegations of the complaint are taken
17 as true. *Heidenthal*, 826 F.2d at 917-18. Blizzard’s Complaint pleads facts
18 sufficient, as a matter of law, to establish that Bossland is liable for violations of
19 the DMCA, secondary copyright infringement (specifically, inducement of
20 copyright infringement, contributory and vicarious infringement), and intentional
21 interference with contract.

22 **Violations of the DMCA.** The “anti-trafficking” provision of the Digital
23 Millennium Copyright Act (17 U.S.C. § 1201(a)(2)) provides:

24 No person shall manufacture, import, offer to the public,
25 provide, or otherwise traffic in any technology, product,
26 service, device, component, or part thereof, that: (A) is
27 primarily designed or produced for the purpose of
28 circumventing a technological measure that effectively
controls access to a work protected under this title; (B)
has only limited commercially significant purpose or use
other than to circumvent a technological measure that
effectively controls access to a work protected under this

1 title; or (C) is marketed by that person or another acting
2 in concert with that person with that person's knowledge
3 for use in circumventing a technological measure that
effectively controls access to a work protected under this
title.

4 17 U.S.C. § 1201(a)(2). Blizzard's Complaint properly alleges all of the elements
5 of a Section 1201(a)(2) violation:

6 ● Blizzard has incorporated into its games technological measures,
7 including Warden, that effectively control access to the Blizzard Games, including
8 to the dynamic audiovisual elements that comprise the games' virtual worlds.
9 Compl., ¶¶ 21-23; *MDY Indus. v. Blizzard Entm't, Inc.*, 629 F.3d 928, 942, 954
10 (9th Cir. 2010) (security software that scans for unauthorized cheats and denies
11 access to computer game world was an effective access-control measure);
12 *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889, at *18 (W.D.
13 Wash. Jan. 18, 2000) (technology that restricted playback of digital media files was
14 a technological measure that "effectively controls access").

15 ● The Bossland Hacks are comprised of or contain technologies,
16 products, services, devices, components, or parts thereof that primarily are
17 designed and produced for the purpose of circumventing technological measures,
18 including Warden, that effectively control access to Blizzard's copyrighted work,
19 and thereby protect the exclusive rights of a copyright owner. Compl., ¶¶ 38-40;
20 *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 (S.D.N.Y.
21 2000) (computer program "unquestionably is 'technology' within the meaning of"
22 the DMCA); *Reimerdes*, 111 F. Supp. 2d at 319 (software that permitted users to
23 access and copy encrypted DVDs violated Section 1201(a)(2)); *Sony Computer*
24 *Entm't Am. Inc. v. GameMasters*, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999)
25 (Defendant's "GameEnhancer" circumvented plaintiff's access control technology
26 that ensured that PlayStation consoles operate only when encrypted data is read
27 from an authorized CD-ROM).

1 • The Bossland Hacks have no commercially significant purpose or use
2 other than to circumvent a technological measure that effectively controls access to
3 copyrighted work and that protects the exclusive rights of a copyright owner.
4 Compl., ¶ 54; *MDY Indus.*, 629 F.3d at 953 (software bot had no purpose other
5 than to facilitate the playing of an online computer game).

6 • Bossland markets the Bossland Hacks with knowledge of their use to
7 circumvent Blizzard’s technological access controls and copyright protection.
8 Compl., ¶ 55.

9 • As a result of the foregoing, Bossland is offering to the public,
10 providing, or otherwise trafficking in technology in violation of 17 U.S.C.
11 § 1201(a)(2).

12 **Copyright Infringement.** As the owner of the copyright in the Blizzard
13 Games (Compl., ¶ 9), Blizzard possesses the exclusive rights to, among other
14 things, reproduce the Blizzard Games, distribute the Blizzard Games, and create
15 derivative works of (i.e., adapt) the Blizzard Games. 17 U.S.C. § 106(1), (2), (3).
16 Blizzard has sufficiently alleged that the creation, distribution, and use of the
17 Bossland Hacks infringes Blizzard’s copyright in a number of ways, and that
18 Bossland is secondarily liable for each of those acts of infringement under theories
19 of inducement to infringe copyrights, contributory infringement, and vicarious
20 infringement.

21 First, in order to create, improve, test, and maintain the Bossland Hacks,
22 Bossland employees (or freelance hackers retained by Bossland) fraudulently
23 obtained access to Blizzard’s software clients for each of the Blizzard Games.
24 Compl., ¶¶ 41-43. Once in possession of Blizzard’s copyrighted software code for
25 the Blizzard Games, Bossland or those acting on its behalf engaged in acts of
26 unauthorized reproduction, adaptation, and/or distribution of Blizzard’s games as
27 part of the process by which they created and/or maintained the Bossland Hacks.
28 For example, to build the Bossland Hacks, individuals working on behalf of

1 Bossland loaded the Blizzard Games onto their personal computers and then used
2 third party software to either obtain Blizzard's source code or to obtain and analyze
3 data that would be necessary for the creation of the Bossland Hacks. *See MAI Sys.*
4 *Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 519 (9th Cir. 1993) (unauthorized
5 copies of software in RAM memory constituted unauthorized reproductions under
6 the Copyright Act).

7 Second, when users download, install, and use the Bossland Hacks they
8 infringe Blizzard's copyright by altering the Blizzard Games' gameplay and
9 presentation, thereby creating a derivative work of the video game. For example,
10 Overwatch Tyrant generates a dynamic screen overlay which it then incorporates
11 into Overwatch's screen display. *See Compl.*, ¶¶ 32-37; 65; 71; 77; *Midway Mfg.*
12 *Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1013-14 (7th Cir. 1983); *Micro Star v.*
13 *Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998).

14 Blizzard's Complaint properly alleges that Bossland is secondarily liable for
15 the foregoing infringements in the following ways:

16 • ***Inducement to Infringe.*** “[O]ne who distributes a device with the
17 object of promoting its use to infringe copyright, as shown by clear expression or
18 other affirmative steps taken to foster infringement, is liable for the resulting acts
19 of infringement by third parties.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster,*
20 *Ltd.*, 545 U.S. 913, 918 (2005). Bossland has encouraged and induced third-party
21 “freelancers” or contractors in the United States to fraudulently obtain access to the
22 Blizzard Games and then, having done so, to engage in unauthorized reproduction
23 of the Blizzard Games. *Compl.*, ¶ 65. Bossland also has actively encouraged and
24 induced users of the Bossland Hacks located in the United States to engage in
25 direct infringement of Blizzard's games, including, among other things, by
26 promoting the Bossland Hacks and providing users of Bossland Hacks within the
27 United States with the tools to infringe, instructions on how to install and use the
28 Bossland Hacks, instructions on how to use the Bossland Hacks in a manner least

1 likely to be caught or arouse suspicion, and the ability to infringe anonymously.
 2 Compl., ¶¶ 29-36; 41-43; 64-69; *Grokster, Ltd.*, 545 U.S. at 918; *Arista Records*
 3 *LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011) (defendant
 4 “actively assisted LimeWire users in committing infringement” by offering
 5 technical assistance to users, thereby helping users obtain unauthorized copies of
 6 recordings).

7 • ***Contributory Infringement.*** “[O]ne who, with knowledge of the
 8 infringing activity, induces, causes or materially contributes to the infringing
 9 conduct of another, may be held liable as a ‘contributory’ infringer.” *A&M*
 10 *Records v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001). Bossland has actual
 11 and constructive knowledge of the infringements by users of the Bossland Hacks in
 12 the United States. Compl., ¶ 71. Bossland has materially contributed to the
 13 foregoing infringements, including by creating the Bossland Hacks, making the
 14 Bossland Hacks available to the public in the United States, instructing users how
 15 to install and operate the Bossland Hacks, and updating and modifying the
 16 Bossland Hacks to ensure that they continue to function effectively despite
 17 Blizzard’s attempts to disable them. *Id.* ¶¶ 70-75; *Napster, Inc.*, 239 F.3d at 1019.

18 • ***Vicarious Infringement.*** “[One] infringes vicariously by profiting
 19 from direct infringement while declining to exercise a right to stop or limit it.”
 20 *Grokster*, 545 U.S. at 930. Bossland has the right and ability to supervise and
 21 control the infringing conduct of users of the Bossland Hacks within the United
 22 States. Compl., ¶ 77. Bossland has failed and refused to exercise such supervision
 23 and control to limit infringement to the extent required by law. *Id.* Bossland
 24 derives a direct financial benefit from this infringement, including from sales of the
 25 Bossland Hacks in the United States through Bossland’s websites. *Id.* ¶¶ 27-36;
 26 *Grokster*, 545 U.S. at 930.

27 ***Intentional Interference with Contractual Relations.*** “End User License”
 28 agreements (including Blizzard’s EULA) for online services are enforceable

1 contracts under California law. *Blizzard Entm't Inc. v. Ceiling Fan Software LLC*,
 2 28 F. Supp. 3d 1006, 1015 (C.D. Cal. 2013) (granting summary judgment against
 3 hack maker for inducing breach of Blizzard's EULA); *see also Adobe Sys. Inc. v.*
 4 *One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1089-93 (N.D. Cal. 2000) (end user
 5 license agreement valid under California law); *Davidson & Assocs., Inc. v. Internet*
 6 *Gateway*, 334 F. Supp. 2d 1164, 1170-71, 1177-78 (E.D. Mo. 2004), *aff'd*, 422
 7 F.3d 630 (8th Cir. 2005).

8 As is alleged in the Complaint, Bossland's users located in the United States
 9 violate Blizzard's EULA (which Bossland representatives personally reviewed and
 10 assented to) each time they use a Bossland Hack in connection with a Blizzard
 11 Game. Compl., ¶¶ 44-47, 82-90. Furthermore, as is alleged in the Complaint,
 12 Bossland intentionally induced its users in the United States to breach the EULA
 13 by selling and distributing the Bossland hacks, despite its knowledge that licensed
 14 users of the Blizzard Games were required to assent to the EULA. *Id.* As set forth
 15 below, this conduct has caused substantial damage to Blizzard. *Ceiling Fan*
 16 *Software LLC*, 28 F. Supp. 3d at 1015-16.

17 **C. The Eitel Factors Warrant Entry Of Default Judgment.**

18 (1) **Possibility of Prejudice:** The first *Eitel* factor considers whether
 19 Blizzard will suffer prejudice if default judgment is not entered. *Eitel*, 782 F.2d at
 20 1471-72. Prejudice exists where, absent entry of a default judgment, the plaintiff
 21 would lose the right to a judicial resolution of its claims and would be without
 22 other recourse. *See Elektra Entm't Group Inc. v. Crawford*, 226 F.R.D. 388, 392
 23 (C.D. Cal. 2005); *Bryant*, 2004 U.S. Dist. LEXIS 26700, at *8. Without a default
 24 judgment, Blizzard will be deprived of the right to judicial resolution of its claims,
 25 and Bossland will have profited from its conduct with impunity.

26 (2) **Merits of Claim and (3) Sufficiency of Complaint:** The second and
 27 third *Eitel* factors "require that a plaintiff state a claim on which the [plaintiff] may
 28 recover." *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1175 (C.D. Cal.

1 2002) (internal citations omitted). As set forth above, Blizzard has stated
2 numerous claims for relief.

3 (4) **Amount at Stake:** Under the fourth *Eitel* factor, “the court must
4 consider the amount of money at stake in relation to the seriousness of
5 [defendant’s] conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176. As discussed below,
6 the monetary damages at stake are in the millions of dollars, including statutory
7 damages under the DMCA.

8 (5) **Possibility of Dispute Regarding Material Facts:** The fifth *Eitel*
9 factor requires the Court to consider the possibility of a dispute as to a material
10 fact. *Eitel*, 782 F.2d at 1471-72. As a threshold matter, there is no possible dispute
11 concerning the material facts because the factual allegations of Blizzard’s
12 Complaint are taken as true. *Marcelos v. Dominguez*, 2009 U.S. Dist. LEXIS
13 5306, at *11 (N.D. Cal. Jan. 16, 2009). In any event, the facts alleged in the
14 Complaint are straightforward, are confirmed by Blizzard’s investigation, the
15 evidence, and the technology itself, and are not subject to reasonable dispute.

16 (6) **Possibility of Excusable Neglect:** Under the sixth *Eitel* factor, the
17 Court considers whether Bossland’s default resulted from excusable neglect. *Eitel*,
18 782 F.2d at 1471-72. There is no excusable neglect. Bossland *deliberately* chose
19 not to answer or file a responsive pleading. Mayer Decl., ¶¶ 4-8. It did so despite
20 the fact that it was represented by counsel and appeared in this action several
21 times, including to seek additional time to respond and to contest jurisdiction. *Id.*
22 *See Meadows v. Dom. Rep.*, 817 F.2d 517, 521 (9th Cir. 1987) (“A defendant’s
23 conduct is culpable if he has received actual or constructive notice of the filing of
24 the action and failed to answer.”).

25 (7) **Policy for Deciding Case on the Merits:** The final *Eitel* factor
26 considers the preference for deciding cases on the merits. *Eitel*, 782 F.2d at 1471-
27 72. “However, this factor, standing alone, cannot suffice to prevent entry of
28 default judgment for otherwise default judgment could never be entered.” *Caridi*,

1 346 F. Supp. 2d at 1073. Indeed, Rule 55 specifically authorizes the termination of
2 a case before a hearing on the merits in these precise circumstances. *See Bryant*,
3 2004 U.S. Dist. LEXIS 26700, at *13. Here, the only reason this lawsuit cannot
4 proceed to the merits is because Bossland has deliberately chosen not to appear and
5 defend this action.

6 In sum, the balance of *Eitel* factors weigh in Blizzard’s favor, and the Court
7 should grant this motion and enter default judgment against Bossland.

8
9 **V. BLIZZARD’S REQUESTED RELIEF IS APPROPRIATE**

10 **A. Blizzard Is Entitled To The Requested Permanent Injunction.**

11 The Copyright Act specifically authorizes the Court to grant injunctive relief
12 to “prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a).

13 Likewise, the DMCA authorizes the Court to issue temporary or permanent
14 injunctions “on such terms as it deems reasonable to prevent or restrain a violation
15” 17 U.S.C. § 1203(b)(1). A permanent injunction is appropriate where the
16 plaintiff proves (1) irreparable injury, (2) the inadequacy of legal remedies, (3) the
17 balance of hardships favor an injunction, and (4) “that the public interest would not
18 be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547
19 U.S. 388, 391 (2006). All of these factors favor granting a permanent injunction
20 against Bossland’s infringing conduct within the United States.

21 ***Irreparable Injury and Inadequate Legal Remedy:*** These two inquiries
22 collapse into one. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.
23 Supp. 2d 1197, 1219-20 (C.D. Cal 2007). Both are present here.

24 First, the likelihood of future infringements (proven by the fact that
25 Bossland *continues* to infringe to this day (Mayer Decl., ¶ 17)), establish
26 irreparable injury. *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990)
27 (granting injunction where “history of continuing infringement and a significant
28 threat of future infringement remains”); *Microsoft Corp. v. Coppola*, 2007 U.S.

1 Dist. LEXIS 40515, at *9-10 (N.D. Cal. May 24, 2007) (granting permanent
2 injunction where plaintiff continued to infringe despite actual notice of
3 infringement).

4 Second, sufficient compensation by monetary damages is virtually
5 impossible. In fact, even calculating Blizzard's actual damages to date is
6 extremely difficult. In order to calculate Bossland's overall revenue or to correlate
7 Blizzard's lost revenue to the number of users who have quit or been banned from
8 the Blizzard Games by reason of the Bossland Hacks, Blizzard would need a
9 substantial amount of discovery from Bossland. Bossland's deliberate default has
10 precluded that discovery.

11 Moreover, Bossland goes to great lengths (including the software program
12 known as "Tripwire," *see* Complt., ¶ 39) to prevent its products being detected. In
13 addition to its Warden circumvention, Bossland counsels its users as to the best
14 and most effective ways to avoid detection by Blizzard employees. Thus,
15 identifying specific instances in which a user has used a Bossland Hack would be
16 quite difficult.

17 Third, Bossland has taken, and is continuing to take, every measure to avoid
18 being actually bound by a money judgment. Bossland makes no secret of its goal
19 to hide behind principles of extraterritoriality and jurisdiction in an effort to
20 operate with impunity. The difficulty in enforcing a judgment against Bossland
21 also militates in favor of an injunction. *Lava Records, LLC v. Ates*, 2006 U.S.
22 Dist. LEXIS 46683, at *12 (W.D. La. July 11, 2006) (awarding permanent
23 injunction, in part, because of "the need to prevent irreparable harm to Plaintiffs,
24 which will not be remedied by a damage award that may or may not be
25 collectible").

26 Fourth, irreparable injury exists here because an award of monetary damages
27 against Bossland likely will not prevent or deter the adverse, long-term effect on
28 Blizzard's ability to exploit its copyrighted works. *See Grokster*, 518 F. Supp. 2d

1 at 1217-18 (finding irreparable injury because defendant “induce[d] far more
2 infringement than it could ever possibly redress with damages”).

3 Fifth, Bossland’s infringement deprives Blizzard of the fundamental right of
4 a property owner to control how, by whom, and in what manner its works are used.
5 *See Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 968 (8th Cir.
6 2005). The Bossland Hacks specifically harm Blizzard by using and exploiting
7 Blizzard’s intellectual property in a manner not authorized or intended by Blizzard.
8 For this reason, and for those listed above, Bossland is causing Blizzard to suffer
9 irreparable injury, for which there is no adequate remedy at law.

10 ***Balance of Hardships***: Likewise, the third factor favors granting Blizzard’s
11 requested permanent injunction. Many of the same reasons supporting a finding of
12 irreparable injury also show the extreme hardships faced by Blizzard. *See*
13 *Grokster*, 518 F. Supp. 2d at 1220. Conversely, Bossland would face little, if any,
14 hardship if the Court were to enter the permanent injunction. Here, the permanent
15 injunction is narrowly tailored such that it prohibits only future infringing conduct
16 by Bossland and those under its control or direction,¹ and the injunction does not
17 limit Bossland’s ability to engage in ***lawful*** business via the Internet. Moreover, if
18 Bossland truly believed that it would suffer hardship from an injunction, it would
19 have defended this action.

20 ***Public Interest***: The fourth and final factor also supports granting the
21 permanent injunction. “[I]t is virtually axiomatic that the public interest can only
22 be served by upholding copyright protections and, correspondingly, preventing the
23 misappropriation of the skills, creative energies, and resources which are invested
24 in the protected work.” *Apple Computer, Inc. v. Franklin Computer Corp.*, 714
25 F.2d 1240, 1255 (3d Cir. 1983) (internal quotation marks and citation omitted).
26 Thus, Blizzard is entitled to a permanent injunction against Bossland.

27
28 ¹ Courts routinely issue permanent injunctions enjoining a defendant from
infringing in the future. *E.g., Bryant*, 2004 U.S. Dist. LEXIS 26700, at *19 n.4.

1 ***Form of the Injunction.*** As noted, the proposed injunction is narrowly
2 tailored to prevent only certain specific categories of unlawful conduct. It would
3 not prevent Bossland from selling other software products that do not infringe
4 Blizzard’s rights. The same or similar language proposed by Blizzard here has
5 been used in many other injunctions – including an injunction issued by Judge
6 Selna in a case very similar to this one. *See* Mayer Decl., ¶ 14, Exs. 5, 6. (*Ceiling*
7 *Fan* injunction, *LeagueSharp* injunction).

8 **Blizzard Is Entitled To \$8,563,600 In Minimum Statutory**
9 **Damages For Bossland’s Violations Of The DMCA.**

10 Under the DMCA, a plaintiff is entitled to statutory damages of “not less
11 than \$200 or more than \$2,500 *per act* of circumvention, device, product,
12 component, offer, or performance of service, as the court considers just.” 17
13 U.S.C. § 1203(c)(3)(A) (emphasis added). In the analogous context of copyright
14 infringement, statutory damages can be awarded to compensate a plaintiff when
15 actual damages are inadequate or difficult to prove. *See Nintendo of Am., Inc. v.*
16 *Dragon Pac. Int’l*, 40 F.3d 1007, 1011 (9th Cir. 1994); *Capitol Records, Inc. v.*
17 *Thomas-Rasset*, 799 F. Supp. 2d 999, 1011 (D. Minn. 2011) (“One purpose of
18 statutory damages under the Copyright Act is to act as a substitute for actual
19 damages when they are difficult to calculate.”); *Malibu Media, LLC v.*
20 *Guastafarro*, 2015 U.S. Dist. LEXIS 99217, at *14 (E.D. Va. July 28, 2015)
21 (“[O]ne purpose of statutory damages is to approximate actual damages that are
22 difficult to prove.”). By seeking only the minimum amount allowed under the
23 DMCA, Blizzard seeks only compensation for the harm it has suffered (which is
24 hard to quantify); it does not seek the heightened punitive amount (though
25 Bossland’s conduct clearly is willful). *Nintendo of Am., Inc.*, 40 F.3d at 1011
26 (“The punitive and deterrent purposes explain the heightened *maximum* award . . .
27 .”) (emphasis added).

1 Awards of statutory damages for trafficking in circumvention devices are
2 based on the number of distributions of each device or product. *See* 4 Melville B.
3 Nimmer & David Nimmer, *Nimmer On Copyright*, § 12A.13 (Rev. Ed.) (awards
4 under § 1203(c)(3)(A) “can be compounded”); *see also Craigslist, Inc. v.*
5 *Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1063-64 (N.D. Cal. 2010) (basing award
6 on number of devices distributed); *Sony Computer Entm’t Am., Inc. v. Divineo,*
7 *Inc.*, 457 F. Supp. 2d 957, 966-67 (N.D. Cal. 2006) (same); *Sony Computer Entm’t*
8 *Am., Inc. v. Filipiak*, 406 F. Supp. 2d 1068, 1074 (N.D. Cal. 2005) (same). That is,
9 Blizzard is entitled to a separate award for **each download** by an end-user of the
10 Bossland Hacks. *Dish Network, L.L.C. v. SatFTA*, 2011 U.S. Dist. LEXIS 25038,
11 at *20-*21 (N.D. Cal. Mar. 9, 2011) (awarding damages “on a per-download
12 basis”); *Reeves*, 2010 U.S. Dist. LEXIS 85560, at *5 (statutory damages based on
13 number of people who obtained circumvention device). Courts routinely award
14 statutory damages as part of default judgments in cases involving violations of the
15 DMCA. *See, e.g., Reeves*, 2010 U.S. Dist. LEXIS 85560, at *5; *Craigslist*, 694 F.
16 Supp. 2d at 1063-64; *see also Ortiz-Gonzalez v. Fonovisa*, 277 F.3d 59, 63-64 (1st
17 Cir. 2002).

18 In this case, Bossland itself submitted evidence demonstrating the number of
19 individual downloads of its hacks in the United States. Mayer Decl., Ex. 7
20 (Letschew Decl.), ¶¶ 44-79. By Bossland’s own count, its products have been
21 downloaded **no less than 118,939** times since July of 2013 by users in the United
22 States alone. *Id.* These figures purportedly reflect sales of all Bossland Products
23 (14 in total), including the nine products Bossland purports to sell for games other
24 than the Blizzard games.

25 While it is certainly the case that Bossland’s Blizzard-related products
26 account for the vast majority of its sales (as opposed to products for far less
27 popular games such as “Path of Exile” or “Neverwinter”), for purposes of this
28 motion Blizzard is prepared to assume that all of the products are of equal value.

1 Thus, at minimum, roughly 36% of Bossland’s U.S. sales are of products for use
2 with the Blizzard Games. In light of the foregoing, and given Bossland’s
3 deliberate decision to default and avoid discovery, it is fair and reasonable to
4 assume that at least² 36% of those downloads were of the Bossland Hacks, and not
5 Bossland products for use with other games. Thus, Blizzard is entitled to at least
6 **42,818** (roughly 36% of 118,939) separate statutory damages awards under the
7 DMCA.

8 In this case, Blizzard is only seeking the *minimum* statutory damages of
9 \$200 per infringement, for a total of **\$8,563,600.00**. While Blizzard would surely
10 be entitled to seek a larger amount, Blizzard seeks only minimum statutory
11 damages. Blizzard does not seek such damages as a “punitive” measure against
12 Bossland or to obtain an unjustified windfall. Rather, such damages are being
13 sought *in lieu* of actual damages or profits, *see* 17 U.S.C. § 1203(c)(2), because of
14 the difficulty of proving the precise amount of actual damages and Bossland’s
15 refusal to participate in discovery into its profits. Notably, \$200 approximates the
16 cost of a one-year license for the Bossland Hacks. So, it is very likely that
17 Bossland actually received far more than \$8 million in connection with its sale of
18 the Bossland Hacks.

19 The statutory damages calculation proposed by Blizzard was applied by
20 Judge Wilson in *Blizzard Entm’t, Inc. v. Reeves*, 2010 U.S. Dist. LEXIS 85560
21 (C.D. Cal. Aug. 10, 2010). In *Reeves*, Blizzard brought DMCA claims against the
22 operator of a private, unauthorized computer game server (known as
23 “Scapegaming”) that distributed circumvention software (targeted towards
24 Blizzard’s “World of Warcraft” game) in the course of operating its service. In its
25 motion for default judgment, Blizzard requested an award of statutory damages for
26 _____

27 ² Due to the overwhelming popularity of Blizzard’s Games, this figure is extremely
28 conservative. In actuality, the Bossland Hacks targeted towards Blizzard’s Games
likely make up the vast majority of Bossland’s sales.

1 each member of the Scapegaming community – a total of 427,393 members. The
2 Court agreed:

3 [I]t is reasonable to infer that defendant has provided
4 each of its users with anti-circumvention products or
5 services on at least one occasion. Although Plaintiff is
6 unable to prove this fact definitively, the Court must
7 draw all reasonable inferences in Plaintiff’s favor on
8 account of defendant’s failure to participate in the
9 litigation process Accordingly, the Court concludes
10 that each of the 427,393 community members
11 downloaded, accessed, or otherwise used anti-
12 circumvention software, services, or products.
13 Defendant’s website’s primary purpose was to enable
14 users to circumvent Plaintiff’s technological protection
measures, and defendant has failed to introduce any
evidence showing that any of defendant’s users were
engaged in benign activities. Accordingly, the Court
concludes that the appropriate amount of statutory
damages is \$85,478,600 (that is, 427,393 users multiplied
by the statutory minimum of \$200 per “act of
circumvention” and/or “performance of service”). To the
extent that this figure appears unreasonably large,
Congress has mandated this approach and the Court is
unable to deviate from it.

15 *Reeves*, 2010 U.S. Dist. LEXIS 85560, at *8 (internal citations omitted).³ Here, the
16 minimum statutory damages award sought by Blizzard would be only a small
17 fraction of the amount awarded in *Reeves*.

18 **C. Blizzard Is Entitled To Its Reasonable Attorneys’ Fees And Costs.**

19 As the “prevailing party,” Blizzard is entitled to an award of an attorneys’
20 fees and “full costs.” 17 U.S.C. § 505; *see Twentieth Century Fox Film Corp. v.*
21 *Streeter*, 438 F. Supp. 2d 1065, 1073-74 (D. Ariz. 2006) (plaintiff securing default
22 judgment is “prevailing party”). Specifically, Blizzard is entitled to an award of
23 attorneys’ fees in the amount of no less than **\$174,872.00**. *See* L.R. 55-3 (for a
24 default judgment award in excess of \$100,000, attorneys’ fees are \$5,600 plus 2%
25

26 ³ The amount sought here is far less than was sought in other DMCA cases. *See,*
27 *e.g., EchoStar Satellite LLC v. ViewTech, Inc.*, 2011 U.S. Dist. LEXIS 42709, at
*10-11 (S.D. Cal. Apr. 20, 2011) (\$214,898,600); *Dish Network L.L.C. v. Ward*,
2010 U.S. Dist. LEXIS 142090, at *20 (S.D. Fla. Jan. 8, 2010) (\$51,148,200);
28 *Reeves*, 2010 U.S. Dist. LEXIS 85560, at *9 (\$85,478,600).

1 of the amount over \$100,000). This is based on *minimum* awardable statutory
2 damages.

3 Additionally, the Copyright Act allows for the recovery of “full costs.” 17
4 U.S.C. § 505. Blizzard’s costs of suit in this action are \$1,763.41. Mayer Decl.,
5 ¶ 16, Ex. 8.

6

7 **VI. CONCLUSION**

8 For the foregoing reasons, Blizzard respectfully requests that the Court enter
9 default judgment, and grant Blizzard the requested relief.

10

11 DATED: March 13, 2017

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