

Nos. 09-15932, 09-16044
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MDY INDUSTRIES, LLC,

*Plaintiff-Counterclaim-Defendant-
Appellant,*

v.

BLIZZARD ENTERTAINMENT, INC. and VIVENDI GAMES, INC.,

*Defendants-Third-Party Plaintiffs-
Appellees-Cross-Appellants*

v.

MICHAEL DONNELLY,

Third-Party Defendant-Appellant

On Appeal from the United States District Court
for the District of Arizona (Phoenix) –
No. 06-CV-02555 – Hon. David G. Campbell

**APPELLEES/CROSS-APPELLANTS REPLY BRIEF
ON CROSS-APPEAL**

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Argument

The response brief of Appellant/Cross-Appellees MDY Industries, LLC and Michael Donnelly (collectively “MDY”) fails to address the fundamental issue raised by Blizzard’s cross-appeal, namely whether Warden’s restriction and limitation of *Glider users’* ability to access and copy into RAM the World of Warcraft (“WoW”) client’s literal software code when they attempt to connect to the WoW servers qualifies for protection under the DMCA. There is no dispute that Glider users circumvent Warden, and thus if Warden’s selective restriction of access to and copying of the literal WoW code is an effective measure, Blizzard must prevail on its DMCA claims as to the literal code in addition to the protected work’s non-literal elements. MDY raises only two points in its response, neither of which addresses this question.

First, MDY attempts to impose an element not required under 17 U.S.C. § 1201(a)(2) by citing *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178 (Fed. Cir. 2004) on grounds irrelevant to the cross-appeal issue. *Chamberlin*, which is not the law of this circuit, is the only case to require subsequent copying of a work after circumvention, and does so in the face of the DMCA’s plain text. *See* Br. of Amicus MPAA at 19-22. But MDY goes even further than the

Chamberlain court by arguing that the circumvention device and the program that performs the subsequent copying of the circumvented work must be one in the same. As amicus MPAA rightfully observes, the *Chamberlain* court’s unique view “essentially rewrites the DMCA and disregards the critical difference between the language of section 1201(a)—which prohibits circumvention of a technological measure that controls *access to a work* protected by Title 17 – and 1201(b)(1), which prohibits circumvention of a technological measure that protects a *right of a copyright owner*. “ *Id.* at 21. *Chamberlain* therefore “transforms section 1201(a) into a section protecting copy controls, not access controls.” *Id.* For purposes of § 1201(a)(2), the only issue is whether Blizzard’s restriction of Glider users’ ability to access the literal code when connected to the WoW servers is protected by the DMCA. It is, and no further copying by Glider or otherwise, is required.

Second, MDY’s attempt to distinguish *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99-CV-02070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000) misconstrues the cross-appeal issue. In *Streambox*, RealNetworks allowed users to stream audio, but chose only to prevent downloading. *Id.* at * 1. The court upheld a DMCA violation under 1201(b)(1) even though the protection measures allowed some forms of copying. In doing so, the Court recognized that the DMCA permitted a copyright owner to restrict copying in *some*, but *not all*, ways. *Id.* at

*9. The Northern District of California reached a similar result when RealNetworks found itself on the other side of the issue in *RealNetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 641 F. Supp. 2d 913 (N.D. Cal. 2009). In that case, RealNetworks argued that, under *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004), the copy protection measures that prevent copying of DVD’s left “other means of copying ‘wide open’ such as sector-by-sector copying or through software re-writing.” *DVD Copy Control Ass’n*, 641 F. Supp. 2d at 939. The district court rejected this “audacious” argument, stating that requiring a copyright owner to prevent all copying “would virtually jettison the law of section 1201(b).” *Id.* Thus, even though the copy protection measures allowed some inconvenient, but possibly useful, copying of DVD content they were still effective.

Blizzard made the same choice here. Warden allows *useless* access to and copying of literal code—for example, users can copy and paste the WoW client’s literal code into notepad or a similar program and read it. Blizzard’s Warden, however, prevents the only useful copying: copying into RAM by Glider users while connected to the WoW servers. Even though the literal code may be copied—as DVD content can be copied sector by sector—it cannot be copied in a useful way before passing through Warden. As such, Warden effectively protects

access to the literal code in addition to the non-literal elements, and the district court erred in not holding that Blizzard was entitled to summary judgment in its favor under the DMCA with regard to the literal code on the WoW client.

CERTIFICATE OF COMPLIANCE WITH RULES 28.1(e)(2)(B)(i) & 32(a)

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 28.1(e)(2)(B)(i) & 32(a)(7)(C) because it contains 714 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a 14-point proportionally spaced font that includes serifs using Microsoft Word.

Date: January 11, 2010

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 11, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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