

LAW OFFICES OF  
VENABLE, CAMPILLO, LOGAN & MEANEY, P.C.  
1938 EAST OSBORN ROAD  
PHOENIX, ARIZONA 85016  
TELEPHONE (602) 631-9100  
FACSIMILE (602) 631 4529  
E-MAIL DOCKETING@VCLMLAW.COM

Lance C. Venable (AZ Bar No 017074)  
Joseph R. Meaney (AZ Bar No. 017371)  
Attorneys for Plaintiff MDY Industries, LLC  
and Third-Party Defendant Michael Donnelly

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**MDY INDUSTRIES, LLC,**  
Plaintiff and Counterdefendant,

vs.

**BLIZZARD ENTERTAINMENT, INC.,  
and VIVENDI GAMES, INC.,**  
Defendants and Counterclaimants,

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

Third-Party Plaintiffs,

vs.

**MICHAEL DONNELLY, an individual**  
Third-Party Defendant.

**Case No.: CV06-02555-PHX-DGC**

**MDY Industries, LLC and Michael  
Donnelly's Brief Regarding Permanent  
Injunctive Relief**

**The Honorable David G. Campbell**

In response to the Court's request for additional briefing related to permanent injunctive relief, MDY and Michael Donnelly (collectively "MDY") request the Court to:

- limit the scope of the permanent injunction to preclude only the acts that the Court has found to be unlawful;
- grant a stay pending appeal of the permanent injunction to the Ninth Circuit Court of Appeals;

- craft a supersedeas bond amount MDY that can realistically secure;
- or, in lieu of a supersedeas bond, require MDY to pay all of its net profits to an escrow account whereby the prevailing party will receive the contents of the account after the parties have exhausted all appellate remedies.

**I. The Court should not enjoin anything more than the activities it has found to be unlawful – the use of Glider with WoW.**

In copyright infringement matters, an injunction cannot serve a fundamentally punitive purpose.<sup>1</sup> A court must carefully craft an injunction’s scope to be coterminous with the infringement.<sup>2</sup> Moreover, courts disfavor blanket injunctions to obey the law.<sup>3</sup> A court should narrowly tailor an injunction to fit specific legal violations.<sup>4</sup> Most importantly, a district court should only include injunctive terms that have a common sense relationship to specific case’s needs, and the conduct for which the defendant has been held liable.<sup>5</sup>

Assuming Blizzard proposes an injunction with virtually identical language to the proposed injunction in its previous motion for permanent injunctive relief, MDY submits the same response: the Court should limit any injunctive relief to prohibiting MDY from marketing or selling Glider licenses, and remotely activating Glider licenses.<sup>6</sup>

**A. Any restriction preventing MDY from developing or maintaining Glider is outside the scope of the Court’s July 14, 2008 and January 28, 2009 Orders.**

The Court should deny any request by Blizzard to enjoin MDY from developing

---

<sup>1</sup> See *Bucklew v. Hawkins, Ash Baptie & Co.*, 329 F.3d 923, 931 (7<sup>th</sup> Cir. 2003)

<sup>2</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 518 F.Supp.2d 1197, 1226 (C.D. Cal. 2007).

<sup>3</sup> *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 n.1 (8<sup>th</sup> Cir. 2004).

<sup>4</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, at 1226. (citing *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994).

<sup>5</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, at 1226-27.

<sup>6</sup> A copy of MDY’s proposed permanent injunction is attached as Exhibit A.

1 or maintaining Glider. The Court's Orders found MDY liable solely for acts pertaining  
2 to Glider's use with World of Warcraft ("WoW"). Blizzard has never alleged and the  
3 Court has never found that Glider by itself violates any law. In addition, Donnelly  
4 testified before the Court in January that Glider has other uses beyond WoW. Thus, by  
5 enjoining MDY from developing or maintaining Glider on MDY's own computers, the  
6 Court would enjoin lawful conduct. Furthermore, the injunction would constitute a  
7 taking of MDY's property without compensating MDY, and would not be narrowly  
8 tailored to ensure that MDY complies with the Court's orders.

9 Therefore, the Court should deny any request by Blizzard to enjoin MDY from  
10 developing or maintaining Glider.

11 ***B. The Court should not enjoin MDY from releasing its Glider source code***  
12 ***to the public or selling its source code to a buyer where its use would be***  
13 ***legal .***

14 Blizzard has not provided any legal support for its position, which seeks to prevent  
15 an author of software from publishing his own source code simply because one use of the  
16 software (but not the only use) interferes with Blizzard's rights. MDY incorporates by  
17 reference the arguments previously made in Section V(B) of its Response to Blizzard's  
18 Motion for Permanent Injunction.

19 The Ninth Circuit has held that computer source code is expressive speech  
20 protected under the First Amendment.<sup>7</sup> Any restriction on the publication of computer  
21 source code violates the First Amendment when the restriction burdens more speech than  
22 necessary to serve the government's interest.<sup>8</sup> This court has ruled that Glider, when  
23 used with WoW, infringes upon Blizzard's rights. And Michael Donnelly testified at trial  
24 that Glider may be used with many applications other than WoW. Accordingly, any  
25 restriction that prevents MDY from publishing Glider's source code is not narrowly  
26 tailored to protect Blizzard's interest and would violate MDY's First Amendment rights.

27  
28 <sup>7</sup> See *Bernstein v. U.S. Dept. of Justice*, 176 F.3d 1132, 1141 (9<sup>th</sup> Cir. 1999).

<sup>8</sup> See *DVD Copy Control Ass'n, Inc. v. Bunner*, 4 Cal.4<sup>th</sup> 864, 882 (2003).

1           Moreover, if the Court restricts MDY from publishing its own software source  
2 code or from selling/licensing its asset to a third party, Blizzard’s victory in this case  
3 would effectively amount to a taking of MDY’s assets without compensating MDY.  
4 Blizzard has offered no legal authority to support this position either.

5           Finally, MDY has received offers from third parties to purchase his company  
6 and/or its assets for substantial money.<sup>9</sup> These offers include uses for Glider that do not  
7 involve WoW.<sup>10</sup> The Court should not enjoin MDY from releasing its software in open  
8 source form. Nor should the Court restrict MDY from selling its software for value (1) to  
9 third parties who may wish to use it for other purposes than using it with World of  
10 Warcraft or (2) to buyers in jurisdictions where its unrestricted use may be legal.

11           ***C.     The Court should not enjoin MDY from consulting with third-parties on***  
12           ***issues pertaining to bot software since it would not relate to conduct,***  
13           ***which the Court has found MDY liable.***

14           Again, assuming Blizzard argues that the Court should restrict MDY from  
15 consulting with third parties pertaining to bot software, MDY incorporates by reference  
16 the text of Section V(C) of its Response to Blizzard’s Motion for Preliminary Injunction.

17  
18           **II.    The Court should stay its Order granting permanent injunctive relief against**  
19           **MDY pending MDY exhausting its appellate rights.**

20           In considering whether to grant a stay, pending appeal, a court must consider the  
21 traditional stay factors. They include: (1) whether the stay applicant has made a strong  
22 showing that he is likely to succeed on the merits; (2) whether the applicant will be  
23 irreparably injured during a stay; (3) whether the issuance of the stay will substantially  
24 injure the other parties interested in the proceeding; and (4) where the public interest  
25 lies.<sup>11</sup> The stay factors contemplate individualized judgments in each case. But  
26 generally, if the harm factors weigh heavily in the movant’s favor, the movant need only

---

27           <sup>9</sup> See Affidavit of Michael Donnelly ¶¶ 7-10, attached as Exhibit B.

28           <sup>10</sup> See *id.*

<sup>11</sup> *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

1 demonstrate a substantial case on the merits.<sup>12</sup>

2 **A. *Legal experts suggest that it is very possible that the Ninth Circuit could***  
3 ***overturn the Court’s ruling.***

4 Courts have interpreted this first criterion as requiring that the movant show that  
5 “the appeal raises serious and difficult questions of law in an area where the law is  
6 somewhat unclear.”<sup>13</sup>

7 The Court understands that this case is one of first impression. And with due  
8 respect to the Court’s orders, very influential voices in the world of Copyright Law and  
9 the DMCA have strongly disagreed with the Court’s holding in this case as it applies to  
10 the copyright and DMCA issues.<sup>14</sup> William Patry, arguably the country’s leading expert  
11 on Copyright Law and author of the seven volume treatise *Patry on Copyrights*, firmly  
12 criticized (1) the Court’s contributory and vicarious copyright liability analysis, (2) how  
13 the Court misapplied the *MAI* ruling, and (3) how the Court rejected the Western District  
14 of Washington’s ruling in *Vernor v. Autocad* on the issue of ownership of software under  
15 17 U.S.C. § 117.<sup>15</sup> In fact, the *Vernor* case represents a trend in the Ninth Circuit that  
16 clearly supports MDY’s position. If the Ninth Circuit affirms *Vernor* on appeal, the  
17 Ninth Circuit would likely use *Vernor* as precedent to reverse this Court’s decision.

18 Authors of law review articles have also criticized the Court’s decision,<sup>16</sup> while  
19

---

20 <sup>12</sup> *Magnesystems, Inc. v. Nikken, Inc.*, 36 F.3d 1114, 1116 (Fed. Cir. 1994).

21 <sup>13</sup> *Overstreet v. Thomas Davis Medical Centers, P.C.*, 973 F.Supp. 1313, 1314 (D. Ariz. 1997)  
22 (quoting *Mamula v. Satralloy, Inc.* 578 F.Supp. 563, 580 (S.D. Ohio 1983).

23 <sup>14</sup> Without a copyright and DMCA violation, Blizzard could not meet the elements of tortious  
interference with contract.

24 <sup>15</sup> See Exhibit C. In addition to Mr. Patry’s blog entry, he further criticizes aspects of the ruling  
in the Comments section of his blog entry. Shortly after his blog entry on July 15, 2008, Mr.  
25 Patry ended his blog after five years. He said that he had become too depressed about what  
copyright law has become. He cited cases like this one, which he believes have led to court  
26 rulings that have made copyright law do nothing more than “... preserve existing failed business  
models, [and] to suppress new business models and technologies...”

27 <sup>16</sup> Exhibit D - Satish Chintapalli, Recent Development, *MDY Industries v. Blizzard*  
28 *Entertainment: Preventing the Use of Software Robots in an Online Game With Copyright Law*,  
10 NC JOLT Online Ed. 1 (2008), <http://cite.ncjolt.org/10NCJOLTOnlineEd1>; Exhibit E - Jordan

1 other copyright lawyers have expressed disapproval of the Court's ruling in online  
2 articles.<sup>17</sup> MDY's counsel has also received notice that several lawyers and academics  
3 will likely submit amicus briefs for MDY when the parties brief the case to the Ninth  
4 Circuit.

5 Without a doubt, MDY has demonstrated that its appeal raises serious and difficult  
6 questions of law in an ambiguous area of law. In fact, not only does MDY have a  
7 substantial case for appeal on the merits, but the Ninth Circuit could ultimately decide  
8 MDY's case in MDY's favor on solid legal and policy grounds.

9 ***B. MDY will clearly suffer irreparable injury.***

10 MDY provided irrefutable testimony at trial that if the Court enjoins MDY from  
11 marketing or selling Glider, MDY will go out of business within a short time thereafter.  
12 Furthermore, businesses outside of the U.S. that sell a similar version of Glider will  
13 simply replace MDY's business, thereby causing MDY to forever lose its market share.  
14 Thus, failing to stay the injunction will cause MDY irreparable injury.

15  
16 ***C. By staying the injunction, Blizzard may continue to invest money in  
17 eradicating Glider, and Blizzard will not sustain substantial injury.***

18 As to the issue of Blizzard's potential injury should the Court grant a stay pending  
19 appeal, MDY incorporates by reference Section I(B)(1-5) of its Response to Blizzard's  
20 Motion for Permanent Injunction. Furthermore, the only evidence presented at trial  
21 regarding damages was Greg Ashe's testimony that Blizzard spends approximately  
22 \$1,000,000 per year (or \$83,333 a month) in its efforts to eradicate bots like Glider.

23  
24 Christopher Redman, Note, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*: "Contracts" That  
Expand Copyrights Have Gone Too Far, \_\_ Jurimetrics J. \_\_-\_\_ (publication date forthcoming).

25 <sup>17</sup> McSherry, Corynne. *You Bought It, But You Don't Own It*. 15 July, 2008,  
26 <http://www.eff.org/deeplinks/2008/07/you-bought-it-you-dont-own-it> attached as Exhibit F; Siy,  
27 Sherwin. *MDY v. Blizzard: Cheating at WoW May Be Bad, But It's Not Copyright Infringement*.  
28 5 May, 2008, <http://www.publicknowledge.org/node/1546> attached as Exhibit G; Lee, Timothy.  
*Judge's Ruling That WoW Bot Violates DMCA Is Troubling*. 29 January, 2009,  
<http://arstechnica.com/gaming/news/2009/01/judges-ruling-that-wow-bot-violates-dmca-is-troubling.ars>  
attached as Exhibit H.

1 Considering that Blizzard receives approximately \$150,000,000 per month in revenue  
2 from WoW alone, any injury is not substantial relative to its overall income.<sup>18</sup> When  
3 considering what Blizzard would lose relative to its overall income pending an appeal,  
4 and comparing it to what MDY stands to lose, this factor clearly favors MDY.<sup>19</sup>

5 ***D. The public interest favors MDY***

6 The Court must balance Blizzard's interest in protecting its copyrights with the  
7 interest the public has in fostering a competitive and innovative market, and allowing  
8 innovative individuals to develop add-on software in the United States.<sup>20</sup> Imposing what  
9 essentially amounts to a corporate death penalty in view of Blizzard's questionable  
10 showing of irreparable injury, could well constitute too powerful of a deterrent to future  
11 legitimate challenges in similar cases.<sup>21</sup> MDY further incorporates by reference its  
12 argument in Section IV of its Response to Blizzard's Motion for Permanent Injunction.

13 All four factors favor MDY. At a minimum, because the harm factors weigh  
14 heavily in MDY's favor, and because MDY has demonstrated a substantial case on the  
15 merits, the Court should grant MDY's request for a stay of any permanent injunction  
16 pending appeal.

17  
18 **III. What bond or other measures – for stay of the injunction and for damages –**  
19 **should the Court impose to protect Blizzard pending appeal.**

20 F.R.C.P. 62 provides that a supersedeas bond may be used to stay execution of a  
21 judgment pending appeal.<sup>22</sup> Additionally, the court has discretion to allow other forms of  
22 judgment guarantee.<sup>23</sup>

23  
24 <sup>18</sup> \$83,333 vs. \$150,000,000 is a miniscule 0.056% of Blizzard's gross monthly revenue derived  
25 from WoW subscriptions.

26 <sup>19</sup> *See In re Hayes Microcomputer Products, Inc. Patent Litigation*, 766 F.Supp. 818, 823 (N.D.  
27 Cal. 1991).

28 <sup>20</sup> *See id.*

<sup>21</sup> *See id.*

<sup>22</sup> *Foster v. Hallco Mfg. Co., Inc.*, 835 F.Supp. 1235, 1236 (D. Ore. 1993).

<sup>23</sup> *Id.*

1 In the event that the Court requires that MDY secure a supersedeas bond, the bond  
2 amount should not exceed \$1,000,000 – the amount that Mr. Greg Ashe testified Blizzard  
3 must spend annually to police its WoW software for Glider users.<sup>24</sup> MDY, however,  
4 cannot afford even that amount. If the Court required MDY to provide at least \$100,000  
5 in cash and collateral totaling \$900,000 to secure the bond, MDY’s lack of funds would  
6 simply make the bond impractical.

7 MDY suggests that security for the stay pending appeal should require MDY to  
8 put all but the necessary funds to operate its business for fixed overhead and salaries<sup>25</sup> in  
9 an escrow account monthly.<sup>26</sup> MDY would report both its monthly income and expenses  
10 to Blizzard during the pendency of the appeal. After all appeals are exhausted, the  
11 prevailing party would receive the contents of the escrow account.

12  
13 **IV. Conclusion**

14 For these reasons, MDY requests the relief as set forth on pages 1 and 2.

15  
16 Dated this 13th day of February, 2009

17  
18 **Venable, Campillo, Logan & Meaney, P.C.**

19  
20  
21 By  /s/Lance C. Venable

22  
23  
24 <sup>24</sup> Blizzard will likely argue that the Court should make the bond amount at least \$6,000,000.  
25 This amount is for past damages – not damages that Blizzard may incur pending appeal.  
26 Therefore, the Court should disregard Blizzard’s suggestion.

27 <sup>25</sup> MDY’s current overhead and salaries total \$39,690.00.

28 <sup>26</sup> See e.g. *Foster v. Hallco Mfg. Co., Inc.*, 835 F. Supp. 1235, 1236 (D. Ore. 1993); *In re Hayes Microcomputer Products Patent Lit.*, 766 F. Supp. 818, 823-24 (N.D. Cal. 1991). (demonstrating that courts have used this scheme as a substitute for a supersedeas bond where the defendant does not have the funds to secure the bond.)



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Lance C. Venable SBN 017074  
Joseph R. Meaney SBN 017371  
1938 East Osborn Road  
Phoenix, Arizona 85016  
Tel: 602-631-9100  
Fax: 602-631-9796  
E-Mail [docketing@vclmlaw.com](mailto:docketing@vclmlaw.com)

*Attorneys for Plaintiff MDY  
Industries, LLC and Third-Party  
Defendant Donnelly*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on February 13, 2009, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Name	Email Address
Christian Genetski, Esq.	<a href="mailto:cgenetski@sonnenschein.com">cgenetski@sonnenschein.com</a>
Scott Jeremy Stein, Esq.	<a href="mailto:sstein@sonnenschein.com">sstein@sonnenschein.com</a> <a href="mailto:wanderson@sonnenschein.com">wanderson@sonnenschein.com</a>
Shane McGee, Esq.	<a href="mailto:smcgee@sonnenschein.com">smcgee@sonnenschein.com</a>

I hereby certify that on \_\_\_\_\_, I served the attached document by FIRST CLASS MAIL on the following, who are not registered participants of the CM/ECF System:

Name	Physical or Email Address

s/ Lance C. Venable