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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

MDY INDUSTRIES, LLC, )  
)  
Plaintiff/Counterdefendant )  
)  
)  
)  
)  
vs. )  
)  
BLIZZARD ENTERTAINMENT, INC., )  
and VIVENDI GAMES, INC. )  
)  
Defendants/Counterclaimants )  
)  
\_\_\_\_\_)  
BLIZZARD ENTERTAINMENT, INC., )  
and VIVENDI GAMES, INC. )  
)  
Third-Party Plaintiffs, )  
)  
vs. )  
)  
MICHAEL DONNELLY, )  
)  
Third-Party Defendant. )  
\_\_\_\_\_)

**Case No.:** CV06-02555-PHX-DGC  
**BLIZZARD ENTERTAINMENT,  
INC.'S MOTION FOR ENTRY OF  
DAMAGES JUDGMENT  
ON DMCA VIOLATIONS**

In this Court’s January 28, 2009 Order entered following a bench trial on the merits, the Court ruled that MDY Industries, LLC and Michael Donnelly (collectively, “MDY”) were liable to Blizzard for damages for violations of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 1201(a)(2) and (b)(1). On September 28, 2008, the Court entered an Order and Stipulated Judgment on damages incurred through September 1, 2008 in the amount of \$6,000,000 for Counts I-III, Blizzard’s claims for

1 copyright infringement and tortious interference.<sup>1</sup> Because the parties disagree as to the  
2 proper amount of damages for MDY's violations of the DMCA (Count IV of Blizzard's  
3 Complaint), Blizzard hereby requests that the Court award Blizzard statutory damages on  
4 its DMCA claims pursuant to 17 U.S.C. § 1203, as set forth below.

5  
6 17 U.S.C. § 1203(c) provides that Blizzard may elect actual or statutory damages  
7 for MDY's violations of §§ 1201(a)(2) and 1201(b)(1). Such election may be made "[a]t  
8 any time before final judgment is entered[.]" 17 U.S.C. § 1203(c)(3)(A). Blizzard first  
9 evidenced its election of statutory damages in its Answer and Counterclaim,<sup>2</sup> and in the  
10 absence of a stipulation on DMCA damages between the parties, renews that election  
11 here.

12  
13 Section 1203(c)(3)(A) provides that each violation of section 1201 results in an  
14 award of "not less than \$200 or more than \$2,500 per act of circumvention, device,  
15 product, component, offer, or performance of service, as the court considers just."  
16 Although MDY has not provided a precise accounting of how many Glider licenses have  
17 been sold to date, that number is at least 120,000.<sup>3</sup> Pursuant to this Court's January 28,  
18 2009 Order, each Glider license sold constitutes a separate DMCA violation for purposes  
19 of calculating damages under § 1203(c)(3)(A). *Sony Comp. Enter. Am., Inc. v. Filipiak*,

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23 <sup>1</sup> On February 23, 2009, the parties submitted a second Order and Stipulated  
24 Judgment to include damages incurred between September 1, 2008 and the current  
25 date, increasing the total damages for Counts I-III to \$6,500,000. Blizzard offered to  
26 include the DMCA claims, Count IV, in this stipulated judgment and have the Order  
27 apply equally to Count IV, but MDY declined to so stipulate. Accordingly, Blizzard  
28 brings the present motion. *See* Affidavit of Christian Genetski, ¶ 2, attached hereto  
as Exhibit A.

<sup>2</sup> *See* Blizzard Counterclaim and Third-Party Complaint, ¶ G; *see also* Blizzard  
Memorandum in Support of its Motion for Summary Judgment, p. 13.

<sup>3</sup> MDY had sold approximately 120,000 licenses as of September 10, 2008. *See*

1 406 F. Supp. 2d 1068, 1074 (N.D. Cal. 2005) (§ 1203(c)(3)(A) “authorizes a separate  
2 award of statutory damages for each device sold”). As the Court must award “not less  
3 than \$200” per violation, the minimum statutory damages award for MDY’s DMCA  
4 violations, assuming 120,000 licenses, is \$24,000,000.  
5

6 The Court’s only discretion in reducing the per violation award below \$200<sup>4</sup>  
7 requires a finding that the violations are “innocent,” a standard MDY cannot meet here.  
8 Specifically, section 1203(c)(5) provides courts the discretion to consider reducing  
9 damage awards only where “the violator was not aware and *had no reason to believe* that  
10 its acts constituted a violation,” and places the burden of proof on the violator for  
11 establishing innocent violation (emphasis added). Under the applicable standard, not  
12 only does MDY fail to qualify as an innocent violator, but its willful continued  
13 distribution of Glider after notice by Blizzard of its DMCA claims may entitle Blizzard to  
14 enhanced damages. *See Sony Comp. Enter. Am., Inc. v. Divineo, Inc.*, 457 F. Supp. 2d  
15 957, 967 (N.D. Cal. 2006) (court awards enhanced damages of \$800 per violation for  
16 sales occurring after filing of plaintiff’s suit). As this Court recognized in its January 28,  
17 2009 Order, MDY and Donnelly facilitated the infringement and benefited financially  
18 from it, and thus cannot prove innocent infringement based solely on a lack of specific  
19 knowledge or belief that the activities in which they knowingly engaged violated the  
20 DMCA. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 975 (9<sup>th</sup> Cir.  
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26 Order and Stipulated Judgment, dated September 26, 2008.

27 <sup>4</sup> *See generally, Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9<sup>th</sup> Cir. 1984)  
28 (in copyright context, “the court has wide discretion in determining the amount of  
statutory damages to be awarded, *constrained only by the specified maxima and  
minima*” (emphasis added)).

1 1981) (holding that “a defendant’s mistake as to the legal consequences of his actions  
2 does not constitute an excuse for an infringement. It is only necessary that a copyright  
3 defendant have knowledge of the infringing activity.”), *rev’d on other grounds in Sony*  
4 *Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). At a minimum, MDY  
5 had reason to believe the sale of Glider violated the DMCA from October 25, 2006, the  
6 date Blizzard informed MDY of its intention to pursue DMCA claims and demanded that  
7 MDY cease development and distribution of Glider, and on which MDY filed its  
8 declaratory judgment action. If the Court elects to limit the statutory damages to Glider  
9 sales occurring from October 26, 2006 forward and subtracts the approximately 40,000  
10 licenses sold prior to that date, then MDY should be assessed statutory damages of  
11 \$16,000,000 for the at least 80,000 licenses sold since that date.<sup>5</sup>

14 Finally, should the Court opt to exercise its discretion to further reduce the  
15 statutory damages amount, Blizzard respectfully asserts that the floor for any damages  
16 award should be the \$6.5 million in damages that MDY has stipulated accurately reflects  
17 the damage to Blizzard from MDY’s copyright and tort violations. In this case, the exact  
18 same underlying acts form the basis for each of Blizzard’s claims, and the same harm  
19 flows from those violations, and there is no meaningful basis upon which to distinguish  
20 the damage caused by each violation. Thus, at a minimum, Blizzard requests that the  
21 Court order that the \$6.5 million award in the Order and Stipulated Judgment submitted  
22 by the parties be applied equally to the DMCA claims, resulting in a separate judgment  
23 on the DMCA claims for \$6.5 million.<sup>6</sup>

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27 <sup>5</sup> See Affidavit of Christian Genetski, ¶ 3, attached hereto as Exhibit A.

28 <sup>6</sup> As noted in the proposed Order submitted herewith as Exhibit B, Blizzard

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Dated: February 24, 2009

Respectfully submitted,

Shaun Klein  
SONNENSCHNEIN NATH &  
ROSENTHAL LLP  
2398 East Camelback Road, Ste 1060  
Phoenix, AZ 85106-9009  
Telephone: (602) 508-3900  
Facsimile: (602) 508-3914

/s/ Christian S. Genetski  
Christian S. Genetski  
Shane M. McGee  
1301 K Street NW, Ste 600E  
Washington, DC 20005  
Telephone: (202) 408-6400  
Facsimile: (202) 408-6399

Attorneys for Defendants/Counterclaimants Blizzard Entertainment, Inc. and  
Vivendi Games, Inc.

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recognizes that, consistent with the Order and Stipulated Judgment submitted by the parties, Blizzard shall not be entitled to double, triple, or quadruple recovery on Counts I-IV, but shall be entitled to recover the total DMCA damage award entered by the Court if Count IV is affirmed on appeal, irrespective of the outcome on appeal as to Counts I, II, and III.

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### CERTIFICATE OF SERVICE

I hereby certify that on February 24, 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
Lance C. Venable	docketing@vclmlaw.com
Joseph Richard Meaney	docketing@vclmlaw.com jmeaney@vclmlaw.com
Public Knowledge Connie Jo Mablesen	connie@azlawyers.com

/s/ Christian S. Genetski