

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

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

MDY INDUSTRIES, LLC,)
)
Plaintiff/Counterdefendant)

Case No.: CV06-02555-PHX-DGC

**BLIZZARD ENTERTAINMENT,
INC.’S REPLY IN SUPPORT OF ITS
MOTION FOR ENTRY OF
DMCA DAMAGES JUDGMENT**

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.)

Blizzard Entertainment, Inc. (“Blizzard”) files this short Reply in support of its motion for entry of a DMCA damages award to address the primary argument in MDY Industries, LLC and Michael Donnelly’s (collectively, “MDY”) Response, namely that the Court should reduce or remit any statutory damages award because MDY and Donnelly are “innocent infringers” under 17 U.S.C. § 1203(c)(5)(A). In support of this position, MDY erroneously contends that the DMCA uniquely and unambiguously disfavors awarding damages in cases where the defendant is “only deemed a violator in

1 hindsight.”¹ MDY offers no authority, however, that supports this view of the DMCA.
2 In fact, contrary to MDY’s suggestion, the “innocent infringer” provision in the DMCA
3 mirrors the same provision in the Copyright Act, and in that context both courts and
4 commentators have rejected MDY’s interpretation of the requirement that the infringer
5 was “not aware and had no reason to believe that its acts constituted a violation.”²
6

7 MDY contends that because this case is one of first impression it had no reason to
8 believe its sale of Glider violated the DMCA prior to such a finding by the Court, and
9 therefore its violations were innocent. As cases employing the identical standard in the
10 copyright context demonstrate, however, MDY confuses the standard for *willful*
11 infringement with that for *innocent* infringement. Courts and commentators alike have
12 noted that defendants who, as MDY positions itself here, “ha[ve] been notified that
13 [their] conduct constitutes copyright infringement, but who reasonably and in good faith
14 believe[] the contrary, [are] not ‘willful’ [infringers].”³ These same authorities also
15 recognize, however, that a lack of willfulness does not equate to innocence:
16
17

18 It is plain that ‘willfully’ infringing and ‘innocent intent’ are
19 not the converse of one another. Thus, it is possible in the
20 same action for a plaintiff not to be able to prove a
21 defendant's willfulness, and, at the same time, for the
22 defendant to be unable to show that it acted innocently.⁴

22 ¹ See MDY Response, p. 2.

23 ² See U.S.C. 17 § 504(c)(2).

24 ³ 4 Melville D. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.04[B][3][a] (citing
25 *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584 (6th Cir. 2007); *Danjaq*
26 *LLC v. Sony Corp.*, 263 F.3d 942, 959 (9th Cir. 2001)).

27 ⁴ *Fitzgerald Publ'g Co. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1115 (2d Cir.1986); see also
28 *4 Nimmer on Copyright* § 14.04[B][3][a] (“willfully means with knowledge that the
defendant's conduct constitutes copyright infringement. Otherwise, there would be no point
in providing specially for the reduction of minimum awards in the case of innocent
copyright infringement as any infringement that was nonwillful would by definition be

1 On the contrary, the burden of establishing that the defendant had no reason to
2 believe its conduct was infringing “is a heavy one, and it is difficult to see how any
3 commercial entity could satisfy it under normal conditions.”⁵ Indeed, the innocent
4 infringer provision “is directed toward individuals who acted in complete ignorance of
5 the fact that [their] conduct might somehow infringe upon the rights of another party.”⁶
6 For example, in *National Football League v. Primetime 24*, the court noted that it “ha[d]
7 not turned up any case where a defendant who knew of the plaintiff’s copyright claim but
8 disagreed with the claim was held an ‘innocent’ infringer” and that the provision’s use
9 “appears to have has [sic] been limited to cases where the defendant (often
10 unsophisticated) proves that it did not know about plaintiff’s copyright and *immediately*
11 *ceased its infringing conduct upon being made aware of plaintiff’s copyright claim.*”⁷ In
12 short, defendants who are put on notice of a copyright holder’s assertion of a claim and
13 nonetheless persist in the conduct giving rise to that claim may, in a “close” or “first
14 impression” case, avoid a finding of willfulness, but cannot meet their burden for
15 establishing innocence.⁸
16
17
18
19
20

21 innocent.”)

22 ⁵ 2 William F. Patry, *Copyright Law & Practice* at 1175 (1994); *see also* 4 *Nimmer on*
23 *Copyright* § 14.04[B][2][a].

24 ⁶ *Id.* (citing cases).

25 ⁷ 131 F.Supp. 2d 458, 477 (S.D.N.Y. 2001) (emphasis added). In *National Football*
26 *League*, the court also expressed doubt that a defendant’s reliance on counsel’s advice that
its conduct was non-infringing would support a finding of infringement where the defendant
was aware of the plaintiff’s assertion of a claim.

27 ⁸ *Broadcast Music, Inc. v. Blueberry Hill Family Restaurants, Inc.*, 899 F.Supp. 474, 476
28 (D. Nev. 1995)(rejecting assertion of innocent infringement where plaintiff had sent several
notices of claimed infringement to defendant and paid a personal visit).

1 Finally, the only case either party cites that specifically addresses the DMCA's
2 innocent infringer provision is consistent with these authorities. In *Sony Comp. Enter.*
3 *Am., Inc. v. Divineo, Inc.*,⁹ the court refused to find the defendant an innocent violator
4 and instead assessed enhanced DMCA damages based on the defendant's continued sale
5 of certain circumvention devices after the filing of plaintiff's suit, even where the
6 defendant ceased selling another circumvention device. In conclusion, although the
7 evidence and argument MDY puts forth may be relevant to a determination of
8 willfulness, MDY has failed to carry the heavy burden of proving it is an innocent
9 infringer. Blizzard respectfully requests that the Court enter an Order awarding Blizzard
10 statutory damages on its DMCA claim in one of the alternate forms provided in the
11 proposed order filed with its motion.
12
13

14
15 Dated: March 17, 2009

Respectfully submitted,

16 Shaun Klein
17 SONNENSCHNEIN NATH &
18 ROSENTHAL LLP
19 2398 East Camelback Road, Ste 1060
20 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

21 Attorneys for Defendants/Counterclaimants Blizzard Entertainment, Inc. and
22 Vivendi Games, Inc.
23
24
25
26
27

28 _____
⁹ 457 F. Supp. 2d 957, 967 (N.D. Cal. 2006).

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 March 17, 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 Mableson	connie@azlawyers.com

/s/ Christian S. Genetski