

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC,)	
)	
Plaintiff,)	CV 06-02555-PHX-DGC
)	
vs)	Phoenix, Arizona
)	January 9, 2009
BLIZZARD ENTERTAINMENT, INC., et al.,)	
)	
Defendants.)	
)	

BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL - DAY 2

Official Court Reporter:
Patricia Lyons, RPR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC 41
Phoenix, Arizona 85003-2150
(602) 322-7257

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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

A P P E A R A N C E S

For the Plaintiff:

Venable Campillo Logan & Meaney PC
By: **JOSEPH R. MEANEY**, ESQ.
By: **LANCE C. VENABLE**, ESQ.
1938 E. Osborn Rd.
Phoenix, AZ 85016

For the Defendant:

Sonnenschein Nath & Rosenthal, LLP
By: **CHRISTIAN S. GENETSKI**, ESQ.
By: **SHANE M. MCGEE**, ESQ.
1301 K St. NW, Ste 600 E Twr
Washington, DC 20009

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

I N D E X

EXAMINATION

MICHAEL DONNELLY

Cross-Examination By Mr. Genetski	6
Redirect Examination By Mr. Venable	14

10:04:16 1
2
3
4
10:04:45 5
6
7
8
9
10:04:52 10
11
12
13
14
10:05:06 15
16
17
18
19
10:05:25 20
21
22
23
24
10:05:39 25

MICHAEL DONNELLY,

recalled as a witness herein, having been previously sworn or affirmed, was further examined and testified as follows:

C R O S S - E X A M I N A T I O N

BY MR. GENETSKI:

Q Good morning, Mr. Donnelly.

A Good morning.

Q Mr. Donnelly, you read the summary judgment order entered in this case, correct?

A Yes, I have.

Q Do you now consider the selling of Glider unlawful?

A No, I don't.

Q Do you consider your sale of Glider to be infringing or tortious?

A No, I disagree.

Q During your testimony yesterday you demonstrated how to use a model viewer program and an MPQ Editor program to render images that are embedded in the WoW -- in the code on the WoW client, correct?

A Yes, I did.

Q But you agree that the demonstration you conducted with those model viewer programs is not the same as playing the WoW game, correct?

A It's not the same as the game experience.

Q In fact, you can't use any of the tools that you used in

CROSS-EXAMINATION - MICHAEL DONNELLY

10:05:42 1 your presentation to generate, for example, the same Illidan
2 fight sequence that we witnessed in the video of in-game WoW
3 play during Mr. Ashe's testimony, correct?

4 A I could choreograph that myself but it wouldn't be dynamic
10:06:00 5 like the game is.

6 Q You haven't created any versions of Glider that work with
7 the model viewer program, have you?

8 A No.

9 Q You haven't created any programs to use with any of the
10:06:14 10 model viewer or MPQ Editor or similar programs, have you?

11 A No, I've not.

12 Q During your demonstration yesterday, you played some
13 Illidan sound effects with an MPQ Editor; isn't that correct?

14 A Yes.

10:06:37 15 Q When you generate those Illidan sound effects using that
16 third-party program, that sound is perceived the same way each
17 time you generate it, correct?

18 A That's correct.

19 Q But you'd agree that when a user is connected to the WoW
10:06:52 20 game servers, the server will determine how and when that sound
21 is played, correct?

22 A Well, the server will determine when that sound is played.

23 Q And wouldn't you also agree that the server will determine,
24 for example, how loud the sound is?

10:07:08 25 A Oh, yes. It may change the volume of the sound.

CROSS-EXAMINATION - MICHAEL DONNELLY

10:07:12 1 Q So if that sound is generated from the WoW code in WoW game
2 play, the sound would be, for instance, louder if you're closer
3 to the character that's making that sound, correct?

4 A Right, it might be louder or quieter.

10:07:33 5 Q And you're aware that the model viewer you demonstrated
6 yesterday cannot generate the graphics and the models to appear
7 in exactly the same manner that they appear in the WoW game,
8 correct?

9 A That tool cannot, right.

10:07:48 10 Q Are there any tools that can create those models in the
11 same manner that they appear during the WoW game?

12 A There's none on the market. But it's open source. It
13 would be very easy to create a tool to do that.

14 Q But none exist?

10:08:04 15 A None exist.

16 Q And isn't it true that when those graphics and models are
17 viewed in the context of the WoW game they're rendered
18 differently with different lighting and shadows depending on
19 where they're viewed during the game?

10:08:18 20 A Well, the game will make those decisions based on server
21 rules, yes.

22 Q You testified that MDY continues to offer Glider for sale
23 through the mmoglider.com website, right?

24 A Yes, that's correct.

10:08:48 25 Q You manage and run that website, correct?

CROSS-EXAMINATION - MICHAEL DONNELLY

10:08:51 1 A Well, I manage some of it. Jay, my employee, manages some
2 of it as well.

3 Q And Jay works for you, correct?

4 A Yes, Jay works for MDY Industries.

10:09:00 5 Q And the work that he performs in connection with the Glider
6 business is at your direction?

7 A Yes, it is.

8 Q MDY has sold tens of thousands of copies of Glider,
9 correct?

10:09:10 10 A Yes.

11 Q What are the total sales revenues generated from Glider
12 sales?

13 A I don't have that in front of me. I would approximate
14 between three and a half or four million dollars.

10:09:26 15 Q And the sales of Glider have increased, those sales
16 increased during the months after this litigation commenced;
17 isn't that correct?

18 A They have slowly increased over the lifespan of the
19 product.

10:09:40 20 Q Including in the time after this litigation was filed?

21 A Yes. They decreased as of late, but they were going up
22 before.

23 Q You're the author of the Glider code, correct?

24 A Yes, I am.

10:09:59 25 Q And you're also the author of the program Tripwire?

CROSS-EXAMINATION - MICHAEL DONNELLY

10:10:03 1 A Well, it's a piece of Glider. Yes, I'm the author of that
2 component of Glider.

3 Q And the purpose of Tripwire is to detect when Blizzard
4 makes updates or changes to Warden?

10:10:22 5 A Right. Tripwire is in effect our Warden.

6 Q And you wrote the Launchpad application as well, correct?

7 A Yes, I did.

8 Q When the need arises to make changes to Glider to continue
9 to avoid detection by Blizzard, are you the person who makes
10 those changes to the code?

11 A Typically. Although Jay may make some of them at my
12 direction.

13 Q And when Jay makes the changes to the code, he performs
14 those tasks at your direction?

10:10:48 15 A Yes, in his role as programmer at MDY Industries.

16 Q You market Glider through various forms of Internet
17 advertising, correct?

18 A Currently we only use Yahoo keywords. We were using Google
19 before.

10:11:08 20 Q When you used Google keywords before, did you sign up for
21 that Google program and provide the keywords that were used?

22 A Yes, I did.

23 Q And did you provide the keywords that are used in the
24 current Yahoo advertising program?

10:11:19 25 A I believe Jay has not changed them, so yes.

CROSS-EXAMINATION - MICHAEL DONNELLY

10:11:24 1 Q And you personally participate in the Glider forums and
2 exchange information with users about how to use Glider; is
3 that right?

4 A Yes, I do.

10:11:45 5 Q I believe you testified that you became aware that Blizzard
6 was attempting to detect and block Glider as of September 2005;
7 is that right?

8 A Yeah, that's when there was software detection of Glider.

9 Q But prior to the time of software detection, were there
10 other methods used to detect Warden -- I mean detect Glider?
11 Excuse me.

12 A There were other methods used to detect bots. Not Glider.

13 Q I believe you testified yesterday that during times that
14 the software detection -- you were able to evade the software
15 detection of Glider, that Glider users were still sometimes
16 banned because they were reported by human users, right?

17 A You mean the software detection of Warden?

18 Q Yes.

19 A Okay. Yes, that's true.

10:12:41 20 Q So even when Glider is able to evade Warden, some Glider
21 users are nonetheless banned from the game through detection by
22 human players?

23 A Right. They're banned because of complaint.

24 Q In fact, I believe you testified that you wrote code into
10:12:57 25 Glider to help assist users from being detected by other human

CROSS-EXAMINATION - MICHAEL DONNELLY

10:13:03 1 players in the game; is that right?

2 A Correct, there's code in Glider to avoid either being seen
3 by other players or causing complaints.

4 Q And the reason you need to put that code in there is that
10:13:13 5 when other players in the WoW game see someone operating the
6 Glider bot, they don't like it and they report it to Blizzard;
7 is that right?

8 A They definitely report it to Blizzard, yes.

9 Q And WoW players know that when they report someone using a
10:13:30 10 bot to Blizzard, that if that's verified, that person is likely
11 to be banned from the game, right?

12 A I don't know if they'd know that for sure. I'd guess. I'm
13 sure some WoW players would report a bot and not have any
14 expectation of action because they don't know.

10:13:46 15 Q Is it your assumption that when somebody is reported using
16 a Glider bot and Blizzard confirms it they will be banned?

17 A Yeah, but I'm not a typical WoW player.

18 Q Does MDY sell any other products besides Glider?

19 A No.

10:14:00 20 Q Does Glider have any functionality with any other programs
21 currently other than World of Warcraft?

22 A It can play solitaire. Other than that, no.

23 Q Is that a commercial use of Glider to play solitaire?

24 A No, it's a demonstration of new technology.

10:14:21 25 Q I believe you testified to this on direct, but you control

CROSS-EXAMINATION - MICHAEL DONNELLY

10:14:24 1 the operation of Glider through the issuance of individual keys
2 that enable the program to work; is that right?

3 A Correct. Our Web server does, yes.

4 Q And you control and operate that Web server?

10:14:37 5 A Yeah, we operate the Web server.

6 Q And it's true, right, that Glider won't work for more than
7 a few minutes at a time unless that key is activated to unlock
8 the software?

9 A Yeah. You mean the trial version? That's correct.

10:14:53 10 Q So if you disable Glider's user keys, those Gliders will
11 cease to work; is that right?

12 A For that key, correct.

13 Q Has MDY Industries established a reserve to pay a judgment
14 rendered in this case?

10:15:13 15 A No, we don't have \$6 million.

16 Q Have you set aside any reserve of your available funds to
17 satisfy the extent of the judgment that you can?

18 A No, I've not.

19 Q Have you personally set aside a reserve to pay any eventual
10:15:27 20 judgment that might attach to you personally in this case?

21 A Well, I have not spent any money, so I've reserved what I
22 can.

23 Q You haven't spent any of the money that's been derived from
24 Glider sales since the beginning of this litigation?

10:15:46 25 A I've obviously paid expenses, but I haven't tried to put

CROSS-EXAMINATION - MICHAEL DONNELLY

10:15:51 1 money out of Blizzard's reach or otherwise waste it.

2 MR. GENETSKI: May I take one moment?

3 I have nothing further.

4 THE COURT: Redirect.

11:19:09 5 R E D I R E C T E X A M I N A T I O N

6 BY MR. VENABLE:

7 Q Morning, Mr. Donnelly. I just have a couple quick
8 questions for you. Mr. Genetski asked you about the certain
9 program that you were using with the sounds, I think that was
10 the MPQ Editor?

11 A That's correct.

12 Q Would there be anything that would prevent you from being
13 able to manually adjust your volume on your computer to change
14 the volume that comes out when the sound is made?

10:16:58 15 A Of course not. I can set the volume to anything I want.

16 Q And you also said -- he asked you a question about did
17 Glider work -- did you create Glider to work with any other
18 program. Correct?

19 A Yes.

10:17:09 20 Q And he said -- or you responded by saying it works with
21 solitaire but that wasn't a commercial use; is that correct?

22 A That's right.

23 Q Is it possible that you could have created Glider to work
24 with many other pieces of software besides World of Warcraft?

10:17:26 25 A Oh, absolutely. The solitaire demo was our steps in that

REDIRECT EXAMINATION - MICHAEL DONNELLY
REDIRECT EXAMINATION - MICHAEL DONNELLY

10:17:30 1

direction.

2

Q And why haven't you done that for other pieces of software?

3

A Mostly because the market dominance in WoW makes it unwise

4

to try to work with another game, there's not enough customers,

10:17:41 5

and we have a great healthy fear of being add-on to another

6

program that doesn't like us for whatever reason.

7

MR. VENABLE: Thank you. No further questions.

8

THE COURT: Okay. Thanks. You can step down

9

Mr. Donnelly.

10:17:54 10

Counsel, any other evidence you wish to present?

11

MR. GENETSKI: No. Not from us, Your Honor.

12

MR. VENABLE: None from us, Your Honor.

13

THE COURT: Okay. Why don't we go ahead and hear

14

closings. We'll start with Blizzard and then hear from MDY.

10:18:15 15

MR. VENABLE: Before we get started, Your Honor, I

16

simply wanted to ask a question. I wanted to know if it would

17

be possible for the closing to be split between my partner

18

Joseph Meaney and I. He wants to be able to handle the personal

19

liability aspects and I want to be able to handle the DMCA and

10:18:32 20

injunction part.

21

THE COURT: That's fine.

22

MR. GENETSKI: Your Honor, I believe we're well under

23

our time for the trial but I'd like to reserve a few minutes

24

for rebuttal.

10:18:39 25

THE COURT: That's fine.

10:18:48 1 MR. GENETSKI: Your Honor, as I stated in my opening
2 argument, this is a case about Blizzard's efforts to protect
3 the integrity of its World of Warcraft creation, of its
4 copyrighted work, and about MDY and Michael Donnelly's
10:19:02 5 determined efforts to exploit that work and evade -- both
6 breach Blizzard's contract and evade the technological measures
7 that Blizzard's implemented to try to protect the work.

8 As we discussed, there are three questions before the
9 Court. One, whether the DMCA applies to the technological
10:19:18 10 measures that Blizzard's implemented to safeguard access to
11 and its exclusive rights to World of Warcraft.

12 Two, whether the law dictates that Michael Donnelly
13 should be held personally liable for his direct participation
14 in and direction of and benefit from the activities the Court
10:19:34 15 has deemed infringing and tortious in its summary judgment
16 order.

17 And three, whether MDY and Donnelly should be
18 permanently enjoined from the further development and sales of
19 Glider.

10:19:44 20 As I mentioned in my opening, and I believe the
21 evidence presented to you over the course of yesterday and
22 today confirmed, there are relatively few disputes of actual
23 fact about how the software works, about what the business of
24 Glider is, how Blizzard software works. And the parties
10:20:02 25 largely disagree, I believe, about the legal import of those

10:20:05 1 facts.

2 I'll take each issue in turn and walk through what I
3 believe to be the key issues that are still in dispute.

4 On the DMCA, as an initial matter, I believe there's
10:20:19 5 no question under the evidence of record that as to both DMCA
6 claims, the (a)(2) and (b)(1) claim, that Blizzard has
7 established that MDY traffics in Glider, which is a technology
8 that is designed to circumvent Blizzard's Warden protection.

9 The evidence is that MDY distributes the program from
10:20:39 10 its site, it clearly sells and supports and markets that
11 program, so it is clearly a trafficker. I believe the
12 evidence has been clear that Glider's circumvention
13 functionality is something that Glider -- that MDY and
14 Donnelly are well aware that its users rely upon, as evidenced
10:20:57 15 by the fact that they have to quickly and speedily reinstitute
16 that ability on the few instances where Blizzard's been able
17 to successfully thwart it.

18 With these elements established, the only areas of
19 contention are whether Warden qualifies as a technological
10:21:15 20 measure that protects access under (a)(2) or prevents,
21 restricts or limits the rights of a copyright owner under
22 (b)(1). And I'll discuss (b)(1) first.

23 We believe the evidence makes claim that Glider
24 circumvents Warden and that Warden is a measure that protects
10:21:34 25 Blizzard's right as the copyright owner in WoW.

10:21:36 1 The key language here in 1201(b)(1) is whether
2 Warden, in the course of its ordinary operation, prevents,
3 restricts, or limits the exercise of a right of a copyright
4 owner in a work or a portion thereof.

10:21:51 5 It's the law of this case that copying World of
6 Warcraft into RAM while running Glider during WoW game play
7 exceeds the scope of Blizzard's licenses and is infringing.
8 The Court in fact specifically stated that the act that
9 violates the EULA and TOU and takes Glider users outside the
10:22:19 10 scope of Blizzard's limited license is the use of Glider to
11 play WoW. And the use of Glider to play WoW necessarily
12 includes copying the game client software to RAM.

13 As provided in Blizzard's conclusions of law, and
14 specifically the *Lexmark* case, the DMCA recognizes that a
10:22:42 15 copyright owner doesn't have to protect all of its rights in
16 copyright work. It can protect some of those through
17 technological measures. And here Blizzard's rights to WoW
18 include the right to prevent unauthorized or infringing copying
19 in the specific way that the Court has recognized.

10:22:59 20 Similarly, the DMCA protects Blizzard's right to the
21 copying of the nonliteral elements of WoW into RAM while
22 playing WoW with Glider.

23 The question at summary judgment was, as we discussed
24 in the opening, whether, after you bypass Warden, that code
10:23:14 25 continues to be loaded into RAM, copied into RAM, in this

10:23:21 1 infringing manner, and that question has been answered
2 unequivocally yes, as Mr. Donnelly -- excuse me, Mr. Venable
3 conceded in the opening and the witnesses here all confirmed.
4 That continued loading does take place.

10:23:35 5 The position of MDY now at trial seems to be that
6 although Warden does prevent a user from continuing that
7 infringing copying of code into RAM while they're playing the
8 game, the fact that some code can be loaded into RAM while not
9 running -- while not having a connection to the server negate's
10:23:57 10 Blizzard's rights to protect against the infringement. And we
11 don't believe that this is correct as a matter of law. I think
12 that that argument is significant for the (a)(2) access claim
13 because there is access to the code sitting in a client and you
14 can pull that code out of the client and make copies of it
10:24:21 15 separate and apart from the connection to the server.

16 But (b)(1) is not a lock-out mechanism in the way that
17 (a)(2) is for access. (b)(1) protects rights, protects the
18 right against copying. And the language of (b)(1) speaks to
19 restrictions and limitations on the rights that Blizzard holds
10:24:46 20 in a work or a portion of that work.

21 Here we are clearly restricting and limiting the right
22 to copy that portion of code that continues to load into RAM
23 when you're connected to the servers.

24 The DMCA is designed to allow copyright owners to
10:25:01 25 protect the meaningful part of their work. And as Mr. Ashe

10:25:05 1 testified, the portion of WoW code that generates the graphics
2 and the multimedia content during the context of the game is
3 the meaningful part of Blizzard's work, and that is the right
4 that they're protecting here.

10:25:15 5 The fact that they may not protect all -- any and all
6 ability to load code into RAM in some other respect does not
7 negate the rights under the DMCA to have their technological
8 measure not be evaded for the rights that it is seeking to
9 protect.

10:25:35 10 Now I'll talk about 1201(a)(2), the access claim.

11 THE COURT: Before you leave that, in the summary
12 judgment briefing and during this trial you have talked about
13 two aspects of Blizzard's copyrighted material, the literal
14 aspect, the code, and the nonliteral. I understand your
10:26:08 15 argument on (b)(1). We'll hear from MDY on that in a minute.
16 But here's the specific question I have. I understand how you
17 can argue that after evading Warden a user then copies literal
18 code to RAM.

19 I'm having trouble understanding that argument with
10:26:31 20 respect to the nonliteral content. The user never copies the
21 nonliteral content. The nonliteral that we've been talking
22 about is the sound, the sight, the picture that's on the
23 screen. They may get access to that, and I understand that's
24 a subsection (a) claim, but they don't copy that. What gets
10:26:54 25 copied is the code getting copied into RAM. So can you really

10:26:58 1 argue that there's a (b)(1) violation with respect to the
2 nonliteral aspects?

3 MR. GENETSKI: I understand Your Honor's question.
4 And candidly this is something we've struggled with sorting out
10:27:09 5 ourselves on that claim. I think as from the copying from the
6 hard drive to RAM, I would agree that that is a transfer of
7 code into the nonliteral elements. The nonliteral elements are
8 what is displayed to the user. In order for that to be
9 displayed to the user, the copy has to be made in RAM. And the
10:27:39 10 nonliteral elements, the code for nonliteral elements is fixed
11 in RAM. The copying of the nonliteral elements could be made
12 through making a video of the game, taking screen shots of the
13 game during the game. They can be copied in that way, they can
14 be replicated. But I would agree with Your Honor in terms of
10:27:59 15 the loading of the code into RAM, it really is the code for the
16 nonliteral elements.

17 THE COURT: Well, are you claiming that there is a
18 (b)(1) violation with respect to nonliteral elements or are you
19 limiting the (b)(1) claim to the copying of the literal code
10:28:20 20 into RAM?

21 MR. GENETSKI: I think -- I think we would need to
22 limit it to literal code under Your Honor's formulation, except
23 as to the fact on the moving of the code into RAM. I would
24 state that I believe that once those nonliteral elements are
10:28:45 25 present, they are able to be copied in other ways through the

10:28:49 1 recording of game play and those sorts of things and that you
2 wouldn't be able to get to that content running Glider to be
3 able to make that copy without evading Warden. But as for the
4 circumvention of (b)(1) from the code, then, yes, I would
10:29:08 5 agree.

6 THE COURT: Well, let me ask the question again. Are
7 you making the (b)(1) claim with respect to the nonliteral
8 elements?

9 MR. GENETSKI: Yes, Your Honor. I think we are.
10:29:21 10 We're making a (b)(1) claim as to the subsequent copying.

11 THE COURT: Well, let me state it this way since you
12 just said yes. Your (b)(1) claim with respect to literal
13 elements is based on the fact that Warden prevents the copying
14 of the literal elements into RAM.

10:29:39 15 MR. GENETSKI: Yes.

16 THE COURT: Your (b)(1) claim with respect to the
17 nonliteral elements is based on your contention that if Warden
18 is effective, then the user can't take screen shots or
19 otherwise record the nonliteral expression of the game on the
10:29:57 20 screen; is that right?

21 MR. GENETSKI: I believe that's right, Your Honor.
22 Yes. We clearly focused our presentation of evidence and our
23 arguments on the form or claim that Your Honor has correctly
24 seized on, the point that it is the literal code that moves and
10:30:10 25 gets copied into RAM, and it is our right to prevent that

10:30:13 1 copying that's clearly our principal argument under (b)(1).

2 THE COURT: All right. Before we go to section (a)
3 let me ask you another question about (b). This applies to (a)
4 as well, but let's focus on (b).

10:32:29 5 Is it your contention that Glider is primarily
6 designed or produced for the purpose of circumventing Warden?

7 MR. GENETSKI: Yes, Your Honor. It's our position
8 that Glider meets all three elements -- all three elements of a
9 circumvention device. I believe that's either (a) or (1), is
10 primarily designed for.

11 THE COURT: Yeah. It's (a). Isn't Glider primarily
12 designed to enable automated play of World of Warcraft?

13 MR. GENETSKI: Your Honor, I think the fair
14 description of Glider is that those are equal primary purposes.
15 No one is going to purchase Glider unless it can do both of
16 those things. I realize the nature of the definition of
17 "primary" suggests that one has to be higher in the order than
18 the other, but I believe the testimony's been clear that no one
19 buys Glider unless it can bot and unless it can evade
20 detection.

21 THE COURT: Okay. Go ahead and talk about (a).

22 MR. GENETSKI: Your Honor, I would just add briefly on
23 those points that we do think it most clearly meets the third
24 definition which is marketed with MDY's knowledge that it is
10:33:48 25 used for circumvention and also that it has limited commercial

10:33:54 1 application absent the circumvention feature.

2 As to (a)(2), we believe the evidence has shown that
3 Glider circumvents Warden and that Warden is a technological
4 measure that prevents access to the protected nonliteral
10:34:07 5 elements of the copyrighted WoW game as those are uniquely
6 generated from literal code and perceived by users when
7 connected to the WoW servers.

8 There are two issues that the Court asked us to
9 address at this trial. First, whether Warden meets the
10:34:24 10 1201(a)(3)(B) definition of a technological measure for
11 purposes of an (a)(2) claim, and, second, whether Warden in
12 fact blocks access to WoW's nonliteral elements.

13 The definition under 1201(a)(3)(B) is that the
14 measure must require the application of information or process
10:34:43 15 or treatment with the authority of the copyright owner to gain
16 access to the work.

17 We believe the evidence at trial has more than
18 established that Warden meets this definition. Understanding
19 that the particular manner in which Warden operates is a bit
10:34:58 20 technical and that the semantics of describing its operation
21 have been, I think, a bit clumsy, especially in our
22 presentation of them at the summary judgment stage, it's clear
23 that Warden performs the function that the DMCA is designed to
24 protect. Warden performs an initial scan, we've used the word
10:35:19 25 "scan" and I believe Mr. Ashe at different points in his

10:35:22 1 testimony used that word, of a segment of memory associated
2 with the WoW client. There's no question that this scan is
3 part of Warden running a process and that process is an
4 interactive exchange of hash values and instructions that
10:35:35 5 designate areas of memory to -- from which to extract
6 information.

7 THE COURT: Interactive between or among whom?

8 MR. GENETSKI: Among the elements of Warden from the
9 server and the elements of Warden that are in the client that
10:35:49 10 run in memory.

11 THE COURT: I --

12 MR. GENETSKI: Resident component.

13 THE COURT: I inferred, perhaps incorrectly, from
14 Mr. Ashe's testimony that the Warden code is on the client
10:36:01 15 software itself.

16 MR. GENETSKI: The Warden code is on the client
17 software. It reports back to Blizzard when it's connected to
18 the server. The information is reported back from the client.

19 THE COURT: Well, back by Warden?

10:36:16 20 MR. GENETSKI: Back by the Warden portion in the
21 client. It extracts information from the client and reports it
22 back.

23 THE COURT: If you think he's wrong, Mr. McGee, you
24 can say something.

10:36:28 25 MR. GENETSKI: I'm feeling staring behind me, Your

10:36:31 1 Honor.

2 MR. MCGEE: Your Honor, it's not wrong at all. The
3 server both sends information to Warden and that information
4 is -- was -- and this is what Mr. Ashe testified to yesterday,
10:36:39 5 that information is what memory to scan and what to compare
6 that to. And then Warden will ask the game client for that
7 memory space. It will then compare what it receives from the
8 game client to known hash values of things like Glider and then
9 report back to the server. I think that's the process
10:37:01 10 Mr. Genetski's describing.

11 MR. GENETSKI: Next paragraph of my outline, actually.

12 So I think the way Mr. Ashe formulated was this is
13 akin to other challenge/response authentication sequences
14 where a question is asked and some authentication sequences
10:37:23 15 that a user has to supply a password and if that password
16 matches the stored value password on the application or server
17 that the person is seeking to gain access to, if it's a match
18 they're allowed to proceed.

19 Here, instead of a password, a segment of memory
10:37:42 20 associated with a hash value is reported back. If it's the
21 right answer for Warden, and here that right answer is that
22 that segment of memory is a Glider-free segment of memory,
23 you're admitted entry. If it's the wrong answer, akin to the
24 wrong password, here having the wrong password is information
10:38:01 25 that shows that Glider is running in that space by the hash

10:38:04 1 value, then access is denied.

2 We believe that the text of the DMCA is designed
3 application information process -- application of information
4 or process or treatment is designed to protect this very type
10:38:22 5 of sequence where technology and software requires validation
6 that the user meets the requirements for entry and for access.
7 So we believe that that satisfies the definition of
8 1201(a)(3)(B).

9 The second point of contention is whether Warden
10:38:43 10 prohibits access to the nonliteral elements of WoW. And we
11 believe that the evidence at trial under a proper construction
12 of the meaning of nonliteral elements -- under the meaning of
13 nonliteral elements and copyright law that it clearly does.

14 Here, the work that's being accessed is the WoW game.
10:39:05 15 Specifically the protectable nonliteral elements, which we
16 submit are the expression of the multimedia content that we
17 saw displayed in the video that is generated by the WoW code
18 when the client is connected to the server and being
19 choreographed through that interaction by the server.

10:39:22 20 The facts at trial have been pretty clear on this.
21 The combination, the combination of the graphics, the
22 character interactions, the storylines, the interfaces, the
23 sound effects and the musical arrangements are choreographed
24 by the WoW game servers when you are in game play, and you
10:39:43 25 cannot access that combination of expressive elements anywhere

10:39:47 1 other than on the WoW game servers.

2 Mr. Calandrino and Mr. Donnelly in their respective
3 demonstrations showed the Court a number of facts that we
4 don't contest. It is true that users can access the WoW
10:40:00 5 literal code on their hard drive and that that WoW code is the
6 code that generates the nonliteral elements, that generates
7 the expressive and artistic content. But we believe that both
8 Mr. Donnelly and Mr. Calandrino and MDY in their arguments in
9 this case are conflating the difference between the literal
10:40:26 10 code and nonliteral elements. And what they're in effect
11 doing is asking to have the literal code double-counted,
12 rather than recognizing the two separate planes for the
13 literal code and the nonliteral elements.

14 For example, in Mr. Calandrino's demonstration he
10:40:43 15 focused on the user's ability to access the literal WoW code
16 on a user's drive from which the non-expressive element -- the
17 expressive nonliteral elements are generated.

18 Now, in the hard drive portion of his demonstration,
19 in the green box that he had on the hard drive, he had it
10:40:59 20 labeled incorrectly "nonliteral elements." And I think he
21 candidly in his testimony on cross-examination conceded that
22 he didn't have any prior understanding of the concept of
23 nonliteral elements. Which is understandable given that
24 that's not a term for a computer scientist, it's a term that
10:41:20 25 has meaning in the copyright law.

10:41:22 1 What that term means in the copyright law, as *Lexmark*
2 sets out pretty clearly, and there are a number of other cases
3 cited in our proposed conclusions of law that discuss this as
4 well, when you're talking about software as a copyrighted
10:41:38 5 work, there are the two planes that are equally worthy of
6 protection, the literal code, which is what Mr. Calandrino was
7 largely discussing, and the audiovisual manifestations
8 generated from that code. So if there's a DVD, there's code
9 on the DVD, but the nonliteral elements are the movie that you
10:41:53 10 get to watch from that code. In the case of a computer game,
11 the nonliteral elements, the expression is the game.

12 Now, Mr. Donnelly's demonstration did attempt to
13 address a user's access to these nonliteral elements outside
14 of the game context. But we would submit that his
10:42:14 15 demonstration -- what his demonstration actually did was
16 convincingly show that a user does not have access to those
17 elements absent a connection to the WoW server. We saw the
18 user can, using an assortment of different third-party
19 programs, extract isolated portions of that literal code from
10:42:35 20 which WoW's expressive elements are generated and generate
21 certain individual renderings: Sounds in isolation, the
22 depiction of a character. But by Mr. Donnelly's own admission
23 and Mr. Calandrino's admission, none of these programs, alone
24 or in combination, can replicate the audiovisual
10:42:54 25 manifestations that are generated by that same literal code

10:42:57 1 when a user is connected to the WoW servers and that code is
2 interacting with the choreography of the servers.

3 If you look at the video of WoW game play and see
4 what that literal code generates in the context of the WoW
10:43:15 5 game play, what the user gets to perceive in that game, it
6 bears -- the difference between that and what you can generate
7 with these third-party programs from that same literal code is
8 striking. It's clear that it's not the same thing. A point
9 that's underscored by the fact that a program like Glider is
10:43:36 10 written to work with WoW when it's being played in the game.
11 It's not written to work with a program like a model viewer
12 that can extract little individual elements.

13 Without that connection to the server, not only is
14 the user not able to access the full range of the graphics and
10:43:57 15 text and sound effects and combination, even the individual
16 graphics that Mr. Donnelly showed us are rendered differently
17 than they're rendered in the game. They don't have the same
18 shadows and lighting because those -- the shadows and lighting
19 of those expression of those elements when you're connected to
10:44:17 20 the server depends on where you are in the game. The
21 intensity of sound is not the same. Changing the volume on
22 your computer doesn't -- does not approximate the fact that
23 that same code generates a louder sound because you're in the
24 game closer to the character that makes that sound. From the
10:44:43 25 third-party MPQ Editor the sound is the same every time. You

10:44:48 1 don't adjust the volume in your game to hear that sound
2 differently. That's because that literal code when extracted
3 in connection with the server generates a different
4 expression. And that expression, those are the nonliteral
10:45:00 5 elements.

6 *Lexmark*, although it is a case about printers and not
7 a case about video games or artistic works, it speaks to this
8 point. The losing party in *Lexmark* tried to cite other cases
9 that say access is synonymous or equates to the ability to use
10:45:21 10 the work. And the Court said no, because in *Lexmark* you are
11 only dealing with literal functional code. You weren't
12 dealing with artistic expression that was generated by that
13 code like you are here. And *Lexmark* recognized that in the
14 case where it is an artistic work, and the examples it used
10:45:40 15 were DVDs or video games, that there, of course what the owner
16 of the copyright wants to protect includes the nonliteral
17 works because that is where the enjoyment of the work comes
18 from. It's the audiovisual manifestation of that work as the
19 copyright owner intended for it to be presented that is the
10:46:00 20 protected work.

21 And in that context, access under the DMCA is
22 synonymous with the right to use.

23 Mr. Ashe used the analogy of a symphony, which I
24 believe is an apt analogy, that using model viewers or MPQ
10:46:20 25 Editor may get you a few random notes in isolation from a

10:46:24 1 violinist or a basist or a cellist, but it does not create, it
2 does not give you access to the symphonic convergence of all
3 those elements. And that is what we're protecting here.
4 That's the access we're denying through Warden, but for Glider
10:46:38 5 circumvention.

6 There are other analogies that are perhaps closer
7 than a symphony to this actual case. A pay-per-view movie
8 service may permit the viewing of a couple of select scenes of
9 a movie, but you cannot access the entire work itself. You
10:46:57 10 don't get to access the whole movie. You can get a 30-second
11 snippet of a song, but you don't get access to the entire
12 song. That's because it's the work in its entirety as the way
13 it was -- the way it's rendered by the code, authored by the
14 creator that matters.

10:47:15 15 And Mr. Ashe explained why Blizzard focuses it's
16 protection on that, because the game is the work. The way
17 those elements are expressed Blizzard knows can only be
18 replicated in that environment. There are certain parts of
19 the game, I believe he testified the text quests that only
10:47:33 20 come down from the server to the game. And that client, if
21 you haven't connected to the servers, the game client with
22 that content alone can never be generated through these
23 third-party programs.

24 In summary, Your Honor, if the Court concludes that
10:47:52 25 WoW's protectionable nonliteral elements are the unique

10:47:56 1 multimedia presentation generated by the code in the game
2 client as controlled and choreographed during the connection
3 with the WoW server, then MDY's trafficking of Glider which
4 enables users to circumvent Warden and access those elements
10:48:10 5 which may only be accessed through the connection of the
6 server violates 1201(a)(2).

7 Unless Your Honor has questions, I'll address the
8 other two remaining issues.

9 THE COURT: I do have a question.

10:48:27 10 Before I ask it, counsel, my judicial assistant has
11 indicated that what was sent to chambers for the findings and
12 conclusions was a .pdf file.

13 MR. VENABLE: I'd be happy to provide you with a Word
14 file.

10:48:55 15 THE COURT: If you would. We need it in a word
16 processing form. If you can have your office do that later
17 today that would be helpful.

18 MR. VENABLE: I'll personally take care of it.

19 THE COURT: Okay. Here's the question. 1201(a)(2)(A)
10:49:14 20 talks about a work protected under this title. Is that phrase
21 defined in the statute?

22 MR. GENETSKI: A work protected under this title I
23 believe is defined as a work protected under any of the
24 protected works under section 101 of the copyright act, which
10:49:36 25 would include copyrighted software.

10:49:40 1 THE COURT: Is the phrase "work" or the word "work"
2 defined in 101?

3 MR. GENETSKI: I'm not sure, Your Honor.

4 THE COURT: Okay. Go ahead.

10:49:54 5 MR. GENETSKI: The one final point before we close on
6 (a)(2) that I would direct Your Honor to is the notion that the
7 individual elements, which are protectable in themselves if
8 they have -- are covered by copyright registration and have
9 their own artistic value and a fixed expression, does not mean
10:50:15 10 that the combination of all those elements is not also
11 protected.

12 There's case law dating back to sort of the much
13 earlier renderings of video games, one involving Atari games
14 where now Justice Ginsburg on the D.C. Circuit, in the old
10:50:35 15 breakout game where the ball comes down and you shoot back up
16 to break up the brick wall, in that game even where some of
17 the individual elements, the question was whether those were
18 even copyrightable. And what the Court held there was, what's
19 clearly copyrightable are the fact that the group of images in
10:50:57 20 the context of the game is clearly an audiovisual work that is
21 protected. And Blizzard's copyright here protects the code
22 and those audiovisual images that are generated by the client
23 in WoW game play.

24 The second issue is the individual liability of
10:51:17 25 Michael Donnelly. And here, as I've stated, our position is

10:51:21 1 that Mr. Donnelly's personal participation in and direction of
2 all the acts that the Court has already deemed vicarious and
3 contributory copyright infringement and tortious interference
4 subject him to liability on those claims. And similarly if
10:51:38 5 the Court were to hold that Blizzard prevailed on either its
6 (b)(1) or (a)(2) DMCA claims, that Mr. Donnelly has been
7 equally engaged in the acts that give rise to those potential
8 violations.

9 We cited what we believe to be the appropriate law in
10:51:54 10 the conclusions of law that despite acting within the scope of
11 employment or representation of a corporate entity an officer
12 or director is liable if that officer or director engages in
13 the acts that give rise to liability.

14 And there are a number of acts that the Court
10:52:16 15 specifically found as a matter of law created liability in its
16 summary judgment order: That MDY developed and sold Glider
17 with knowledge that Glider users infringed; that it promoted
18 Glider use with World of Warcraft; that MDY controls Glider's
19 ability to work; profits from Glider sales; knows that Glider
10:52:38 20 use violates the contract between Blizzard and its users;
21 promotes Glider despite that knowledge.

22 The Court specifically found in its order that
23 Michael Donnelly's admission that he knew as of September 2005
24 that Blizzard banned Glider users.

10:52:52 25 Mr. Donnelly's subsequent modification of Glider to

10:52:54 1 evade detection by Blizzard --

2 THE COURT REPORTER: Counsel, I need you to slow down.

3 MR. GENETSKI: Oh, I'm sorry.

4 Mr. Donnelly's admission that he knew as of September
10:53:09 5 2005 that Blizzard banned Glider users. Mr. Donnelly's
6 subsequent modification of Glider to evade detection by
7 Blizzard, and his express acknowledgment that Glider use
8 breached users' contract with Blizzard were all cited by the
9 Court in its order as grounds for imposing liability at that
10:53:32 10 time on MDY.

11 There are a number of findings in summary, Your
12 Honor. I won't go through all of them. They're pages 5 and
13 22 and 23 primarily of the Court's summary judgment order.
14 That established the liability as a matter of law for tortious
10:53:51 15 interference and copyright infringement.

16 Yesterday Mr. Donnelly's testimony on direct
17 examination essentially was a litany of admissions that it was
18 he, Michael Donnelly, as the sole member of MDY, who made each
19 of these significant decisions and committed every significant
10:54:07 20 act that the Court had deemed in that order tortious and
21 infringing. He seem to essentially attempt to reargue all
22 those issues in the same way they were argued on MDY's behalf
23 at summary judgment; that his authorship and promotion of
24 Glider and awareness of the contracts; the rationale for
10:54:24 25 producing the Glider business.

10:54:28 1 But the Court has already found those acts unlawful.

2 Donnelly seemed to argue that perhaps his state of
3 mind at the time were that these pursuits were not unlawful,
4 but there's no basis in law or fact to distinguish his acts.

10:54:45 5 And the Court has already found unlawful as a matter of law as
6 to MDY.

7 And however novel Mr. Donnelly considered and
8 apparently still considers the application of the DMCA and
9 copyright law to his conduct, that doesn't excuse the conduct.

10:55:04 10 And beyond that, Mr. Donnelly was well aware, the record's
11 entirely clear on this, that he was aware from nearly the
12 outset of this business that his actions induced breaches of
13 Blizzard's contracts.

14 There is no law offered by MDY in the proposed
10:55:27 15 conclusions of law to dispute the conclusions that Blizzard
16 offers as to what the proper standards are for imposition of
17 individual liability when the acts are engaged in by the
18 corporate officer, and there's no evidence in the record to
19 detach Michael Donnelly in any way from any of the significant
10:55:41 20 acts that gave rise to MDY. So we would submit that the law
21 compel a finding that Mr. Donnelly is also individually
22 personally liable.

23 Finally, on injunctive relief. Conclusions of law
24 showed both parties agree that the *eBay* test from the Supreme
10:56:03 25 Court is the applicable test here with the four *eBay* elements.

10:56:06 1 I would note that yesterday in either -- I believe it
2 was the pre-opening statement portion, that Mr. Venable cited
3 the *Napster* case as a good analogy to the present one in that
4 it raised novel copyright issues that warranted permitting
10:56:23 5 *Napster* to operate pending a decision from the Ninth Circuit
6 and arguing that here, for similar reasons, *Glider* should be
7 able to continue operation. But *Napster* is not an apt
8 comparison that supports an argument of an entry of an
9 injunction here.

10:56:39 10 In *Napster*, the district court first was dealing in a
11 preliminary injunction context, not making a decision about a
12 permanent injunction at the close of the case.

13 Second, the district court in *Napster* did enter an
14 injunction enjoining *Napster*. The injunction was stayed by
10:56:57 15 the Ninth Circuit.

16 When that case went on appeal, ultimately, of course,
17 the Ninth Circuit affirmed the core holdings of the district
18 court and the injunction was imposed again then at the close
19 of the case.

10:57:15 20 I'd also point out, Your Honor, that unlike *Napster*,
21 in this case, for this case to be overturned, it's going to
22 require an en banc revisitation of the *MAI Systems* case which
23 has been binding precedent in the Ninth Circuit for almost 15
24 years at this point.

10:57:34 25 As to the elements on irreparable harm, we cited a

10:57:38 1 number of case, granted many of them or most of them pre-eBay,
2 that speak to the fact that where liability has been
3 established at a permanent injunction stage -- at the close of
4 the case stage, final judgment stage, and there's still a
10:57:52 5 threat of continuing violations, that that's enough standing
6 alone for a permanent injunction.

7 EBay clearly says you still have to satisfy these four
8 factors. But there is a case from September of this year from
9 the District Court of Arizona, the *Designer Skin* case, and we
10:58:08 10 can provide -- it's an unpublished case but can provide it to
11 the Court. It is a copyright infringement case that analyzes
12 how the eBay rule should be applied in a copyright infringement
13 case and it's squared with the prior case law. And what that
14 court says is that -- the eBay court didn't address what the
10:58:29 15 necessary showing was to establish irreparable harm, just that
16 you needed to establish it.

17 And that what the court there says is that the burden
18 of proof that the plaintiff must carry may be carried by
19 showing that it satisfies this old two-part test. It just has
10:58:51 20 a burden. It isn't automatically entitled to an injunction it
21 must prove it. But the old two-part showing of establishment
22 of liability and a threat of continued violations, particularly
23 in copyright infringement case, could satisfy prong one, the
24 irreparable harm prong of the eBay test.

10:59:11 25 Beyond that, here we heard a lot of evidence in this

10:59:14 1 case that shows that Blizzard will -- is suffering and will
2 continue to suffer ongoing irreparable harm if MDY and Donnelly
3 are not enjoined. It is clear that MDY is persisting in
4 selling and supporting Glider despite the Court's order issued
10:59:30 5 in July.

6 It is also clear from Mr. Ashe's testimony that the
7 continued sale and use of Glider damages Blizzard's reputation
8 with its customers. The complaints continue to file in about
9 Glider use. Blizzard continues to devote significant resources
10:59:45 10 to try to find a way to stop Glider technologically. Those
11 efforts have remained frustrated to date.

12 And that's money that could be reallocated, as
13 Mr. Ashe noted, to much more productive endeavors by Blizzard
14 if Glider was no longer an issue.

11:00:03 15 Mr. Ashe also testified as to the inadequacy of legal
16 remedies in this case. While Blizzard has been able to quantify
17 a measure of damages, a baseline measure of damages and the
18 hard costs that they're expending to combat Glider, what they
19 can't quantify is the overall effect on the user population
11:00:22 20 through that loss of their goodwill, how much bots are driving
21 users from the game, soiling Blizzard's reputation in the
22 marketplace for gamers as a company who cannot control bots and
23 cheats in their game. There is no available method short of an
24 injunction that will allow Blizzard to be compensated for these
11:00:47 25 losses.

11:00:47 1 Mr. Donnelly noted in his testimony that a number of
2 users of bots are eagerly awaiting to hear whether MDY will be
3 enjoined in this case. I think he noted that there was a
4 competitor that has a bot that he testified is easily detected
11:01:01 5 by Blizzard, but is attempting -- is already trying to pursue
6 the would-be Glider customers.

7 But the evidence of record is that Glider is the bot
8 that causes Blizzard's problems because that's the bot that's
9 undetected. If an injunction is not entered and this case were
11:01:19 10 to go to appeal, it sends a message to the Glider-user
11 community, which will be communicated rapidly, I'm sure, that
12 they now have another 9- to 12-month run with Glider in which
13 they can continue to exploit the Blizzard game to the
14 resentment of Blizzard's legitimate users. Blizzard will be
11:01:38 15 forced to continue to incur those expenses. And the folks
16 using Glider know that they have a good period of time to
17 acquire virtual property, sell it, level up, secondary
18 characters, and beat Blizzard at its game.

19 The third factor is balance of hardships. The
11:01:57 20 evidence has shown that Glider has no demonstrated use beyond
21 cheating in World of Warcraft. And that its operation has
22 really no utility and certainly no commercial utility beyond
23 facilitating infringements and contractual breaches.

24 We cited cases in the proposed conclusions of law that
11:02:19 25 make clear, even in the context of a preliminary injunction and

11:02:22 1 not a permanent injunction, that the claim by someone who's
2 found to be an infringer or a tortious actor that an injunction
3 will force them to stop that tortious activity and their
4 infringing activity and put them out of business is not a valid
11:02:38 5 claim of hardship.

6 The hardship to Blizzard is clear, as I spoke of on
7 the irreparable harm points. It will continue suffering
8 reputational harm, its costs will continue to be suffered in
9 fighting Glider, and the devaluation of its goodwill with
11:02:59 10 customers will continue as they see and draw the conclusion
11 that Blizzard is unable, either technically and now legally, to
12 stop the flood of bots in its game.

13 Mr. Donnelly would have the Court believe that had he
14 simply received a demand letter in 2006 it would have caused
11:03:16 15 him to stop selling Glider. But the proof on this is in the
16 pudding, Your Honor. He didn't stop when Blizzard asserted its
17 legal claims in this case after it felt that it had exhausted
18 all technical efforts to that point to stop Glider. Instead,
19 Mr. Donnelly redoubled those efforts.

11:03:34 20 His sales continue to grow as the litigation wore on
21 and he became more determined to continue his activity. We
22 certainly don't begrudge MDY's or Mr. Donnelly's right to
23 contest the claims. But they have now lost. We've reached the
24 stages of final judgment and the judgment having been rendered
11:03:53 25 now is the time to halt Glider. By Mr. Donnelly's own

11:03:56 1 admissions, he rejects the Court's conclusions and he's not
2 going to stop running his Glider business unless he's expressly
3 ordered to do so by this Court.

4 Finally, the fourth factor, the public interest
11:04:07 5 clearly supports enjoining a product that the Court has deemed
6 purely exploitative. And a more relevant narrow public here,
7 the players of World of Warcraft have made their voices heard
8 loud and clear. The overwhelming majority of players don't
9 want bots in the game.

11:04:26 10 MR. VENABLE: Objection, Your Honor, that's not in the
11 record. There's no evidence of that in the record.

12 THE COURT: I understand that objection.

13 MR. GENETSKI: Mr. Ashe testified that Blizzard feels
14 compelled to spend the money it does fighting bots in the game
11:04:40 15 because it feels that's what its users demand.

16 And that user population dwarfs the user population
17 of Glider users who seek to exploit the game. And the test
18 for public interest is whether the public interest would be
19 disserved by enjoining MDY from the sale of an infringing and
11:05:02 20 tortious product. And it's clear that no public interest
21 would be disserved by stopping them.

22 So, Your Honor, we believe that Blizzard has carried
23 its burden in this case on the DMCA claims as to
24 Mr. Donnelly's liability and as to the propriety of the entry
11:05:25 25 of a permanent injunction.

11:05:26 1 Unless Your Honor has questions, I'll step down.

2 THE COURT: Thanks.

3 Mr. Venable.

4 MR. VENABLE: Good morning, Your Honor. I'll address
11:05:54 5 the issues pertaining to the DMCA first and then when I'm done
6 I will hand this off to my partner Joe Meaney to speak about
7 the personal liability and I'll come back to speak about the
8 injunctive relief issue.

9 I would go in the same order that Mr. Genetski did on
11:06:12 10 the DMCA issue just to address those issues. Your Honor, with
11 regard to the (b)(1) claim, I think Mr. Genetski is -- made
12 the point that we were essentially trying to conflate the
13 issue with access in the (a)(2) claim with issues involving
14 the limitations of rights in the (b)(1) claim.

11:06:40 15 I would offer to Your Honor that I don't believe that
16 is true. I think that what Mr. Genetski was doing is he's
17 conflating the question of whether something was in violation
18 of the copyright law with whether or not something is in
19 violation of the DMCA. And what we have presented into
11:06:57 20 evidence to establish that there's no (b)(1) liability is very
21 simple, Your Honor.

22 The issue of whether or not the literal elements that
23 are residing on the hard drive of a user who plays World of
24 Warcraft, we do not dispute that in playing World of Warcraft
11:07:18 25 those elements are indeed copied. And certainly what the

11:07:22 1 Court has said in this case is that that in and of itself is a
2 violation of the copyright law. But the DMCA requires more
3 than just a copy from the hard drive to RAM of a particular
4 file. We've heard that the WoW.exe file is certainly loaded
11:07:45 5 into RAM, and it's loaded into RAM when the WoW.exe file is
6 executed.

7 And of course there are the nonliteral elements,
8 which I guess we would say the literal elements of the
9 nonliteral element files that are sitting on the hard drive
11:08:01 10 that also get loaded after that. We don't dispute that.

11 But what we do dispute is that under the DMCA there
12 is a requirement under (b)(1) that it be protected, and that
13 those additional files must in fact be protected. Which I
14 think raises the question here, and I think this is really at
11:08:20 15 the heart of the (b)(1) claim, is what in fact is that
16 protected right? If the protected right is under 106, I
17 believe it is (a), 106(a)(1), that Blizzard's right to its
18 copyright in the files that are sitting on your hard drive are
19 being moved from the hard drive to the RAM, that right has
11:08:48 20 been violated under copyright law.

21 But the measures, the technological measures that
22 they use to protect those files, which would be the Warden and
23 the scan.dll program. I'm not going to worry about addressing
24 scan.dll because we feel that we have addressed that issue in
11:09:06 25 our briefing to the Court with summary judgment, that scan.dll

11:09:10 1 is not a measure that Warden -- that Glider tries to avoid
2 because you can simply wait until after it's there. So in
3 other words, if I load World of Warcraft first and I simply
4 decide to load my program after scan.dll, I'm not really sure
11:09:27 5 that that would under any definition of the word qualify as a
6 measure that's protecting the work that's allegedly claimed is
7 a protected right under the law.

8 But Warden itself, the resident program which resides
9 on the user's hard drive -- or in the RAM, it's working, it's
11:09:47 10 working to check to see if there are other programs that are
11 out there that are available. Under no circumstances is
12 Warden able to protect, under any circumstances, the loading
13 of that -- those files from the hard drive to RAM. So the
14 right to copy those files that Blizzard has is not being
11:10:09 15 protected.

16 Now, Blizzard would have you think, well, yes, they
17 are protected in the order that they are loaded into RAM
18 because there's some, as they use the word, symphony that is
19 going on here. We have this symphony that is guiding which
11:10:24 20 files are being loaded in which order because that's the way
21 you ultimately perceive what is on the screen. But as I asked
22 Mr. Ashe yesterday, and he certainly could not provide me the
23 answer to this, I asked him where is this symphony. Because
24 what they're essentially trying to conflate here is the right
11:10:44 25 to their service with the right to whether actually sitting

11:10:46 1 there on the hard drive unprotected.

2 And in order to have a protected right to anything
3 under the copyright law, this is basic copyright law, it must
4 be in some form that you can actually say I have a right to
11:10:58 5 it. In other words, where am I going to go to the copyright
6 office and say, I have a protected right on a symphony that
7 has never existed and it's at best fleeting?

8 The director who looks at a piece of sheet music and
9 is playing and is directing the instruments in the orchestra
11:11:16 10 to play the music is looking at a piece of sheet music that is
11 fixed. But this symphony that they refer to is certainly not
12 fixed. It is not even created. And in fact Mr. Ashe admitted
13 on the stand that it is never the same twice.

14 So how does one define what is the protected right?
11:11:37 15 Is there a protected right in the order in which it is
16 displayed? Well, then I say how is that -- how is that order
17 created? We've seen that not only Mr. Ashe but Mr. Donnelly
18 and to a certain extent what Mr. Calandrino said yesterday, is
19 that that symphony is certainly not created by Blizzard. To
11:11:59 20 the extent that the order in which those files are loaded from
21 the hard drive into RAM, it's being done by the player, the
22 player moves his character, the player hits a key, moves
23 something on the screen. And what it does is it directs --
24 the user directs Blizzard's server to put something on the
11:12:19 25 paper so that the server, the conductor, says move this file

11:12:25 1 into RAM so that we can see what is on the screen.

2 Certainly other users are involved in this. If there
3 are other characters that play the game, their characters, the
4 way they look, even the user who's playing, the way they look
11:12:41 5 are all determined. The selection and arrangement of how my
6 character looks is ultimately determined by me. Blizzard may
7 provide the underlying elements, but those elements are still
8 sitting on my hard drive.

9 And as Mr. Donnelly was readily able to do yesterday,
11:12:54 10 we can generate those. We can generate those and create a
11 character how we want it to look. No differently than we can
12 create it using the WorldofWarcraft.exe file, which is just a
13 tool for doing exactly what all these other programs could do.

14 So in the sense that this symphony that they refer to
11:13:13 15 is being created, it's not being created by anything that
16 Blizzard is in fact doing.

17 In fact, they argue, well, let's say that it really
18 is because they have things that they have created, things
19 that they have -- their monsters that appear in certain
11:13:30 20 locations. But let's not forget, Your Honor, they themselves
21 even said that you cannot even see those monsters that they
22 have created until the user decides that they want to get
23 close enough so that what is on their screen is actually
24 protected. So then I ask myself, well, are they referring to
11:13:51 25 what ultimately appears on the screen, the audiovisual works,

11:13:54 1 is that what they're saying is actually the protected right,
2 that Blizzard is somehow protected?

3 Well, there's a case that's directly on point in
4 this, Your Honor. And I believe -- it is a Ninth Circuit
11:14:06 5 case. It's *Lewis Galoob Toys versus Nintendo of America*. And
6 I would just like to read one section of this because this
7 goes directly to what they're saying in this case about the
8 audiovisual works.

9 THE COURT: Would you give me the cite, please?

11:14:19 10 MR. VENABLE: Yes, it's 964 F.2d 965. Ninth Circuit
11 1992. And this case was obviously before the DMCA. So this is
12 not a question of whether there's a circumvention of rights.
13 But it does address the question of what constitutes the
14 protected rights that they may be arguing here, because I think
11:14:42 15 that has really been the problem with what we've been trying to
16 figure out here is, what is the protected right? It is clear
17 that under (b)(1) you have to have a protected right before you
18 can even have something to protect.

19 And under the *Galoob* case, this was a case where
11:14:57 20 Nintendo put -- Nintendo creates a game program -- a game
21 system. And of course, if you recall, this is in the early
22 '90s, you would use cartridges to play. You would use
23 cartridges to have to play the games and they would put
24 various images up on the screen. Just like Mr. Genetski
11:15:17 25 referred to the break-out case.

11:15:19 1 Well, there was a gentleman that came along, a
2 company that came along, who developed something called the
3 Game Genie. It's an add-on program much in the same way that
4 Mr. Donnelly has created -- has created Glider. And of course
11:15:36 5 what this program did was, it didn't just act as a bot, it
6 wasn't just sort of like some thing that's running in the
7 background that's just allowing your player to bot through the
8 program.

9 This actually went above and beyond that. It
11:15:48 10 actually gave your character more strength. It made you much
11 stronger within the game. Something that Glider clearly did
12 not do. It may do a lot of things that Blizzard doesn't like,
13 but it doesn't give you any added advantage other than the
14 ability to play when you're not sitting at the computer.

11:16:06 15 Of course, Nintendo didn't want this to happen. They
16 sued the maker of the Game Genie for the very same reason that
17 they're saying this is wrong, you can't do this, you have to
18 have our permission to do it.

19 And what Nintendo argued was that they thought that
11:16:23 20 the audiovisual works that appeared on the screen were in fact
21 their protected right. What they said here was, in the court,
22 that Nintendo also argues that our analysis should focus
23 exclusively on the audiovisual displays --

24 THE COURT: A little slower, please.

11:16:37 25 MR. VENABLE: I'm sorry.

11:16:38 1 -- created by the Game Genie. I.e., that we should
2 compare the altered displays to Nintendo's original displays.
3 Nintendo emphasizes that audiovisual works are works that
4 consist of a series of related images regardless -- regardless
11:16:53 5 of the nature of the material objects in which the works are
6 embodied.

7 The Copyright Act's definition of audiovisual works,
8 however, is inapposite. The only question before us is
9 whether the audiovisual displayed works created by the Game
11:17:08 10 Genie are derivative works. And I think that in fact that's
11 really what they're saying here is, is this thing that appears
12 on the screen something that we're copying? No, it is
13 something that's being derived. It is a derivative work if
14 anything.

11:17:23 15 And the act does not provide similar to that, a work
16 can be a derivative work regardless of the nature of the
17 material objects in which the work is embodied.

18 Nintendo relied heavily on a Seventh Circuit case
19 that was called *Midway Manufacturing Company versus Arctic*,
11:17:37 20 which said, in a nutshell, that the output of what a computer
21 video game puts up on the screen can be considered a work that
22 is protected. But the Ninth Circuit distinguished this. It
23 said that *Midway* can be distinguished.

24 The defendant in *Midway*, Arctic International,
11:17:56 25 marketed a computer chip that could be inserted into a

11:18:01 1 Galaxian video game to speed up the rate of play. The Seventh
2 Circuit held that the speeded-up version of Galaxian was a
3 derivative work and that Arctic's chip substantially copied
4 and replaced the chip that was purchased by Midway.

11:18:16 5 Purchasers of the Arctic chip also benefited economically by
6 offering the altered game for use by general public.

7 The Game Genie does not physically incorporate a
8 portion of a copyrighted work, nor does it supplant the demand
9 for the component of the work. The Court in *Midway*
11:18:37 10 acknowledged that the Copyright Act's definition of derivative
11 work must be stretched to accommodate speeding up video games.
12 Stretching that definition, and this is important, would
13 further chill innovation and fail to protect societies'
14 competing interest in the free flow of ideas, information and
11:18:55 15 commerce.

16 It went on to say that it would not allow these
17 audiovisual works to be treated as anything that's considered
18 a protected right. And the primary reason was because the
19 work itself that appears on the screen is not in a permanent
11:19:09 20 or concrete form.

21 That is important, Your Honor, because this is
22 exactly what we're talking about when it comes to this
23 symphony. There is nothing that Blizzard can show, there's no
24 evidence in the record, that what ultimately they're claiming
11:19:22 25 a right to, which is the -- it is essentially the order in

11:19:25 1 which these files get directed into the random access memory,
2 that is the protected right here. Because if they're just
3 claiming it's the right to move the files from the hard drive
4 into RAM, it's not being protected. It may be a protected
11:19:41 5 right but it's not being protected. And the DMCA under (b)(1)
6 requires that much in order to be able to claim it is a
7 violation of (b)(1).

8 So again, to the extent that Blizzard claims that
9 they have a protected right, we still don't even know what
11:19:56 10 that is here, other than the right to copy, which the Court
11 has already said is illegal. And if that's what we're talking
12 about here, that's already been addressed by the Court.

13 So to the extent that we have anything under (b)(1),
14 Your Honor, we -- we strenuously dispute that.

11:20:13 15 And that also applies to the issues of the literal
16 code and the nonliteral code, Your Honor, because it doesn't
17 matter which one we're referring to. Glider was designed to
18 assist botting. It was not designed to deal with whether
19 there's loading of software from hard drive into RAM. And in
11:20:37 20 fact, whether there is -- whether there's a presentation
21 ultimately that appears nonliterally, Your Honor, it -- again,
22 it's just not fixed. There's no -- it's basic copyright law.
23 It has to be -- there has to be something to say that we're
24 violating here. We don't copy this. We don't take what's on
11:20:57 25 the screen or we don't take what's in RAM and make copies of

11:21:01 1 it. Glider has nothing to do with that.

2 Your Honor, with regard to the (a)(2) claim --

3 THE COURT: Let's pause for a minute.

4 MR. VENABLE: Sure.

11:21:13 5 THE COURT: Yesterday Blizzard showed a video of the
6 battle and death of Illidan.

7 MR. VENABLE: Yes.

8 THE COURT: Is that copyrightable?

9 MR. VENABLE: Yes, it is because it's in a fixed form.

11:21:41 10 THE COURT: If it wasn't on that video but the game
11 had the ability to reproduce the battle and death of Illidan,
12 which is probably going on now somewhere on some Blizzard
13 server with some people in the world fighting him, is that
14 copyrightable?

11:21:59 15 MR. VENABLE: If the battle itself was in the same --
16 fixed in the same way that, say, a movie is on a DVD, because
17 then it is actually in a fixed form. But even Mr. Ashe
18 acknowledged that that bottle is never the same battle twice.

19 THE COURT: So your contention is that the rendering,
11:22:21 20 the dynamic rendering of events in World of Warcraft that can
21 be perceived on computer screens all over the world is not
22 copyrighted?

23 MR. VENABLE: The dynamic portion of it yes, because
24 it's never the same experience. In fact Blizzard advertises
11:22:39 25 its game on the many different reasons why people can play

11:22:44 1 World of Warcraft. One may be they just want to walk around
2 and see different things or they participate in different
3 battles or whatever, but it's never the same.

4 THE COURT: I understand that point, and I don't think
11:22:56 5 anybody is disputing that it's dynamic. What you just read to
6 me from the *Lewis* case did not say that Nintendo's display,
7 visual display, of the playing of the game was not
8 copyrightable. It said the Game Genie was not a derivative
9 work.

11:23:16 10 Is there law for the proposition that the dynamic
11 display of a video game is not copyrightable because it's not
12 fixed?

13 MR. VENABLE: I don't believe -- I'll have to check,
14 Your Honor. To ask me off the top of my head, I haven't really
11:23:37 15 seen anything directly.

16 THE COURT: That's a pretty fundamental issue.

17 MR. VENABLE: But I think the converse is also true.
18 I'm not really sure there is anything that says it is. I
19 believe --

11:23:47 20 THE COURT: Isn't it the nonliteral aspect of anybody
21 who's using computer code? I mean, if I use Microsoft Word, as
22 I'm using it, it's me who's controlling what it's doing. As
23 I'm using it to write a letter, I may be using it in a way that
24 it's never been used before. It maybe completely different
11:24:08 25 from what you've ever used it to write. But isn't the, not

11:24:15 1 only the code but the nonliteral representation of the code
2 copyrightable?

3 MR. VENABLE: Using the Microsoft Word example, Your
4 Honor, let's say Microsoft Word was sitting behind a server
11:24:27 5 somewhere, okay, and I am -- I have a license to access this,
6 this code or this program, and I want to type in ABC. If there
7 is a macro that is built within Microsoft Word that every time
8 I type ABC I see DEF, or every time I type GHI there is another
9 user who's using another Microsoft Word program on the server
11:25:01 10 that gets told to send over a HIJ and have it appear on my
11 screen, that's what's going on in the World of Warcraft, Your
12 Honor. I would ask you, then, what appears on the screen,
13 who's the author of that? Who directed what appears on the
14 screen?

11:25:20 15 THE COURT: Well, I understand that argument. What
16 I'm -- what I'm pausing on is the notion that has been argued,
17 I think, for the first time in the last day and a half that the
18 nonliteral aspects of World of Warcraft, other than the static
19 character or landscape or sound that you can look at with
11:25:44 20 something like Model Viewer is not copyrightable because it's
21 not static, it's not fixed.

22 I guess I had assumed -- I'm not expert on copyright
23 law, but I had assumed coming into this trial that the
24 nonliteral aspects of World of Warcraft included not only, you
11:26:04 25 know, the specific code on the hard drive that gets copied to

11:26:08 1 RAM, but also the game experience that somebody watches and
2 hears as they're sitting at their computer screen playing the
3 game. And you're saying, no, that's not copyrightable.

4 MR. VENABLE: I'm saying that it's not fixed. If I'm
11:26:24 5 saying it's not fixed, I would say that I would cite to the
6 statute as my basis for saying it can't be considered
7 copyrightable because it's never changed.

8 THE COURT: This has to be an issue that's been
9 decided in the case law, isn't it? We've had computer games
11:26:39 10 now for 20 years.

11 MR. VENABLE: But to the extent, Your Honor, that
12 these nonliteral elements are embodied in the codes that are
13 sitting on the hard drive, they're not being protected --

14 THE COURT: I understand that. I understand that.
11:26:50 15 We're going to get to that in a minute. I understand your
16 point that you've got the nonliteral code which are the actual
17 script and you've got -- the literal code, and you've got the
18 nonliteral image of Illidan that you can call up on Model
19 Viewer and make him run and make him die, as we did yesterday.
11:27:09 20 And you're agreeing that that nonliteral code is copyrightable.
21 But what you're saying is the symphony isn't. When you put
22 them all together in the game and it's dynamic and they're
23 working together with players and servers around the world,
24 that's not copyrightable because that's not fixed? Correct?

11:27:29 25 MR. VENABLE: Yes, I'm saying that is exactly the case

11:27:30 1 because World of Warcraft, if anything, is a very unique piece
2 of software. There are literally infinite number of ways that
3 the, quote, unquote, symphony can be displayed.

4 THE COURT: Well, but that's true for lots of video
11:27:42 5 games, right? I mean, when my son plays with his brother,
6 who's out of state, Call of Duty 4 and they're fighting other
7 guys and marching around the countryside, that's a dynamic
8 game --

9 MR. VENABLE: It is dynamic.

11:27:56 10 THE COURT: -- just like World of Warcraft, right?

11 MR. VENABLE: Yes, it is. It is. But I would also
12 say that to the extent that these nonliteral elements are
13 sitting on the hard drive, if we're simply saying the protected
14 right is to protect the right to copy those into RAM, yes, they
11:28:12 15 do have a right to protect that. What I'm saying is they
16 don't.

17 THE COURT: I understand that point. Now -- but I'm
18 going to stick with this for a minute because I want to make
19 sure I understand this. Let's jump to (a)(2) for a minute
11:28:26 20 where it talks about -- and I asked Mr. Genetski this question.
21 It talks about the work protected under this title.

22 If I understand your position, you would say -- I
23 want to ask you about three different things. You would say,
24 number one, the literal code written in the hard drive can be
11:28:47 25 a work protected under the title. You would say, number two,

11:28:52 1 that the nonliteral manifestation of that code to the extent
2 it's fixed, such as the image of Illidan that you can make run
3 or die, is copyrightable. But you would say the dynamic
4 expression of the game when all of those are brought together
11:29:09 5 is not a work protected by this act. Agreed?

6 MR. VENABLE: Yes. Yes.

7 THE COURT: And it's because it's not a work protected
8 by this act that Warden doesn't protect some right of
9 Blizzard's because Blizzard doesn't have a right to protect the
11:29:28 10 dynamic expression of the game.

11 That's your contention on (b)(1). Part of it.

12 MR. VENABLE: Yes. Part of it, yes.

13 THE COURT: Okay. All right. I understand it.

14 I am going to be interested to hear what Blizzard
11:29:43 15 says about the state of law and I may need some additional
16 briefing on this question of whether the dynamic portions of
17 the computer game constitute a copyrightable work, but let me
18 go to the other part of (b)(1) for a minute.

19 The other part of (b)(1) I understand you to be
11:29:58 20 arguing is when it comes to the first two things, the things
21 you agree are copyrightable, the literal code and the static
22 nonliteral illustration of the code, your argument is that
23 (b)(1) isn't violated because the copying of the literal code
24 into RAM that occurs after you evade Warden -- well, let me
11:30:25 25 state it differently. By preventing you from copying after --

11:30:29 1 let me start over.

2 If Warden prevents from you copying to RAM as you
3 play the game forward, that doesn't really come within (b)(1)
4 because Blizzard otherwise doesn't restrict the copying. You
11:30:43 5 can do it even after Warden shuts you out of the game. You
6 can load up a different program and copy it to your heart's
7 content. That's your point, right?

8 MR. VENABLE: That's correct.

9 THE COURT: Okay. Here's the issue I want to ask you
11:30:53 10 about. Do you have (b)(1) in front of you?

11 MR. VENABLE: I do, Your Honor.

12 THE COURT: If you look at (b) -- actually, let's look
13 at (b)(2)(B) which says, "A technological measure effectively
14 protects a right of a copyright owner under this title if the
11:31:15 15 measure in the ordinary course of its operation prevents,
16 restricts, or otherwise limits the exercise of a right."

17 For your argument to be correct, wouldn't you have to
18 eliminate the words "restricts or otherwise limits" from the
19 statute? So that the statute says that it's effective if it
11:31:41 20 prevents copying?

21 MR. VENABLE: Your Honor, if we read the right of a
22 copyright owner as you had stated before, to mean that it
23 protects the -- essentially the symphony, I don't have any
24 response to that, Your Honor. I will concede that they are
11:32:02 25 probably -- under that definition they would win.

11:32:05 1 THE COURT: If the symphony is protected, you're
2 saying?

3 MR. VENABLE: I'm saying it is a question of what
4 constitutes the protected right.

11:32:11 5 THE COURT: Okay. Let's say the right -- let's set
6 the symphony issue aside for a minute. I understand your point
7 on that. Let's say the right we're talking about is simply
8 copying literal code into RAM.

9 MR. VENABLE: Yes.

11:32:25 10 THE COURT: Now, under the Ninth Circuit law that I
11 know you and your client disagree with, that copying to RAM is
12 copying for purposes of the Copyright Act. It is a right of
13 the copyright holder.

14 MR. VENABLE: Yes.

11:32:37 15 THE COURT: Warden doesn't prevent it because you can
16 still do it. But doesn't it limit it?

17 MR. VENABLE: How so?

18 THE COURT: It limits the player's ability to copy to
19 RAM post Warden. It shuts you out so you can't copy to RAM as
11:32:53 20 you go on to play the game. And in that respect, it limits
21 your ability to copy to RAM.

22 MR. VENABLE: If we're talking about that the
23 unauthorized copy being the copy that is being loaded into RAM
24 during game play, I think that's what you're saying, it still
11:33:12 25 goes back to me, Your Honor. There's two other -- there's two

11:33:15 1 issues related to that. One is there's a presumption, then,
2 that this symphony that's being used to create and move this
3 stuff that you would have access to, is somehow being authored
4 by Blizzard. And what we contest is that that is not the case.
11:33:33 5 That the symphony, the order, it seems to me like you're saying
6 limits us from being able to move the blocks of RAM -- blocks
7 of hard drive into the RAM in the order in which Blizzard is
8 telling us to.

9 THE COURT: No. Forget the symphony, forget the
11:33:49 10 order.

11 MR. VENABLE: Okay.

12 THE COURT: Blizzard wrote the code that's on the hard
13 drive.

14 MR. VENABLE: Yes.

11:33:52 15 THE COURT: Blizzard has the right to control the
16 copying of that code. If you evade Warden and some of that
17 code is copied to RAM, under the Ninth Circuit that's a copying
18 right --

19 MR. VENABLE: Absolutely. Absolutely.

11:34:04 20 THE COURT: -- doesn't Blizzard limit your ability to
21 do that if it shuts you out of the game? Because you can --

22 MR. VENABLE: No, it --

23 THE COURT: -- you can then no longer copy to RAM as
24 you play the game. And maybe we're splitting hairs. I know
11:34:17 25 you can copy elsewhere, but doesn't have to just prevent you,

11:34:20 1 all it has to do is limit you to be within (b)(1).

2 MR. VENABLE: But is the limitation the limit to be
3 able to copy or the limit to be able to control how it is
4 copied?

11:34:31 5 THE COURT: I guess it's the limit to copy as you go
6 on playing the game. It says we're limiting you. You can no
7 longer copy to RAM once Warden shuts you down.

8 MR. VENABLE: I will concede if that is how the Court
9 interprets it, we have problems. But I will say if there
11:34:47 10 are -- if you look at the way the statute says, it doesn't
11 say -- there is no limitation, quote, unquote, on the issue of
12 the copy. The copy can still be loaded. Even though you're
13 saying it can be limited, it's limited within the course of the
14 game. But that doesn't say -- the statute doesn't say only one
11:35:13 15 particular type of copy. It says the right of the -- the right
16 that the copyright owner has which is the right to stop the
17 copying from being -- from taking place.

18 What I say is that if I read the statute, it does not
19 limit me from being able to move the blocks of code from the
11:35:31 20 hard drive into RAM. It doesn't. There's no -- there's
21 nothing -- even if I stop playing the game, cut me off from
22 the server, the literal reading of what that says, even using
23 the word "limit," the block -- the block of code does not get
24 limited.

11:35:48 25 And if you look at -- if you look at let's say the

11:35:52 1 Lexmark case, the Lexmark case was a true limitation because
2 the code was actually sitting there and it literally prevented
3 you from being able to load it. You could not load it.

4 That -- I think there is no -- there is nothing in the
11:36:08 5 definition of 1201(b)(2)(B) that says that the limit has to be
6 for a particular copy that's happening. It does not say that.

7 I will concede, Your Honor, if you don't find it that
8 way, I'm not really sure we have a response to that.

9 THE COURT: Well, if I understand your argument -- and
11:36:28 10 I'm going to be interested, Mr. Genetski, in your response to
11 this -- what you're saying is if Warden works and it shuts a
12 user out of the game, that user can copy code to RAM to his
13 heart's content. Now, he may not be able to do it for purposes
14 of continuing to play the game, but he can do it to view it
11:36:51 15 through Model Viewer or MPQ or any other number of purposes.
16 He can freely copy to RAM and therefore Warden really hasn't
17 limited his exercise of the copying right. It's simply
18 prevented him from continuing to play the game.

19 MR. VENABLE: If the code were on the server side,
11:37:09 20 Your Honor, we would be dead in the water. We would have no
21 response. But the code is not. Because Warden does not
22 protect the code. And to the extent anything is coming down
23 from the server, it's just factual information which is not
24 copyrightable. And there are any number of cases that we have
11:37:26 25 to support that argument, that what is coming down from the

11:37:29 1 server is not protected.

2 And so to the extent we are -- and that's also what's
3 interesting is they never actually said that what's coming
4 down from the server is what they're claiming is being
11:37:40 5 violated here under the copyright laws. What we are talking
6 about here is what's sitting on the hard drive.

7 THE COURT: Okay. Let me ask you one last question on
8 (b)(1).

9 If I conclude as a matter of law that the symphony is
11:37:58 10 copyrightable, that it's part of the work, evading Warden,
11 Blizzard argues, gives user the ability to copy that work by
12 screen shots, by making videos of it, by whatever means. Once
13 he's allowed to go on playing the game, he can copy it.
14 Whereas if Warden shuts him out, he never gets to copy that
11:38:25 15 because the symphony never gets played. What's your response
16 to that?

17 MR. VENABLE: I would say that that's not Glider's
18 problem. Glider doesn't facilitate that copy. If there was --

19 If there was a program that was sitting on your hard
11:38:39 20 drive that was taking screen shots of the software as it was
21 being played, and then --

22 THE COURT: I'm going to interrupt you here for a
23 minute. The focus of (b)(1) isn't on Glider, it's on Warden.

24 MR. VENABLE: Right.

11:38:54 25 THE COURT: The question is whether Warden is a

11:38:56 1 technological measure within the meaning of (b)(1). Does
2 Warden effectively prevent somebody from copying the symphony
3 if it shuts them out?

4 MR. VENABLE: From copying the symphony that appears
11:39:10 5 on the screen you mean?

6 THE COURT: Yeah. I mean by recording, you know, the
7 next hour of playing World of Warcraft.

8 MR. VENABLE: I would say, no, I don't think there's
9 anything that would stop somebody from being able to take all
11:39:24 10 the screen shots they want.

11 THE COURT: Well, they can't. They can't play the
12 game. Warden stops them.

13 MR. VENABLE: That is true, but I don't believe that
14 has ever been an issue in the case, about whether or not it's
11:39:33 15 stopping you from being able to make copies of what's on the
16 screen. Effectively, if you can get to that point, you're
17 already done back at the -- at the hard drive level, I would
18 assume. But, like I said, if it's moving it into RAM, well,
19 you can make a copy from RAM, I suppose. I suppose you could
11:39:50 20 make a copy from the hard drive. I mean there's -- it's just
21 another level which you're already at, again.

22 My contention is, is that that protection has to be
23 at the beginning. It's not -- it's not after it's already
24 happened. The symphony, if you say that that's protected, no,
11:40:08 25 I will concede there's really nothing we can do to stop it

11:40:12 1 from making copies. But, again, that's -- that's not to say
2 that the -- again, the underlying files, that can you see --
3 that become rendered on the screen are still not protected by
4 Warden.

11:40:29 5 THE COURT: Okay. We've been going an hour and 40
6 minutes, we need give Tricia a break. I think what I'd like to
7 do, unless it creates problems, is just forge ahead, even
8 though it will take us past noon, and get the closings done.
9 Is that all right with you all?

11:40:47 10 MR. VENABLE: It's okay as long as it's okay with
11 them.

12 MR. GENETSKI: That's fine with us, Your Honor.

13 THE COURT: All right. Why don't we come back, then,
14 in 15 minutes. Five minutes to the hour.

11:40:55 15 (Recess taken.)

16 THE COURT: Thank you. Please be seated. Go ahead,
17 Mr. Venable.

18 MR. VENABLE: Was there anything else that Your Honor
19 wanted to ask me, or should I continue speaking?

11:57:46 20 THE COURT: Why don't we go to 1201(a). I think I had
21 stopped you from going there.

22 MR. VENABLE: I was just going to make one final point
23 regarding (b)(1), Your Honor. I don't know if this will
24 clarify the position or help me in whatever way I try to
11:58:03 25 present it, but the issue of the symphony, one of the things I

11:58:07 1 was going to say was that the analogy of the symphony is really
2 the World of Warcraft, the universe, the experience, is really
3 more akin to something like the Second Life program. I don't
4 know if you're familiar with Second Life.

11:58:25 5 THE COURT: Vaguely. But, yeah, I know what Second
6 Life is very generally.

7 MR. VENABLE: Okay. Well, in general, as you probably
8 know, it's a virtual world that people develop. They create
9 characters, they walk around, they do many different things
11:58:38 10 within it. And, again, I'm not really sure that the authors of
11 Second Life would ever claim they would have a copyright to the
12 Second Life experience.

13 The Second Life experience, because, again, it can be
14 virtually anything, an infinite number of possible things that
11:59:00 15 ultimately appear on your screen and graphics that get loaded
16 into your -- from your hard drive and your RAM, that because
17 that itself cannot be fixed, it cannot be considered a right
18 that would be protected under the copyright law.

19 And I realize that if what you say, that really
11:59:19 20 doesn't matter ultimately if it's about preventing what
21 ultimately appears on the screen as the protected right,
22 that's about as, I think, as far as we can go with that.

23 THE COURT: Well, this may not be helpful, but let me
24 give you a hypothetical that I was thinking about on the break.

11:59:39 25 I'm making this up. It may be full of flaws, but I

11:59:43 1 was trying to think of an analogy.

2 Let's assume there's an artist who creates a work of
3 art and this work of art is a small art museum. It has eight
4 rooms in it, and in each room is a different painting,
11:59:57 5 different colors, different shapes. And when you come to the
6 museum, what the artist does is he opens it at night. People
7 come. As they come in the door he gives you a blue
8 flashlight, a red flashlight, an ultraviolet flashlight and
9 says have at it. You can walk through his work of art using
12:00:17 10 any of the colors in any combinations you choose. You might
11 go into three rooms, you might go into eight. You can go in
12 different orders. Is that work of art copyrightable?

13 MR. VENABLE: The work of art where?

14 THE COURT: Well, let me ask this way. Let's assume
12:00:32 15 he gets every copyright right he can with respect to that work.

16 MR. VENABLE: I'm sorry, which work are we talking
17 about here?

18 THE COURT: The whole thing. The experience.

19 MR. VENABLE: The experience.

12:00:41 20 THE COURT: Walking through it with the lights. Let's
21 assume he says, "I've copyrighted everything here," and I show
22 up with a video camera and I say "I want to go through it but I
23 want to videotape it." He says, "No, you can't because this is
24 a copyrighted work." Is he right? Can I videotape his work as
12:00:57 25 I go through the rooms in my order with my colors -- well,

12:01:01 1 choosing from among the options he's given me.

12:01:17 2 MR. VENABLE: If you're saying -- if you're saying
3 that let's say part of the experience is seeing a painting on a
4 wall or something and you want to be able to videotape the
5 painting?

6 THE COURT: Right.

12:01:29 7 MR. VENABLE: If he owned the right to the painting,
8 that in and of itself would prohibit you from being able to
9 videotape the painting because that would be an unauthorized
10 copy of the painting which that artist probably has a copyright
11 to. I'm not sure in terms of the experience itself. I guess
12 if you're assuming the experience is copyrightable, I would
13 say, again, I'm not really sure how you define what the
14 experience is. The experience is what you make of it, I guess.

12:01:50 15 I mean, I don't really know how you classify it any
16 other way. If I say the experience is what you make of it,
17 well, then, I'm not sure how Blizzard gets to own the
18 copyright to that experience which I'm creating. I just
19 don't.

12:02:05 20 I mean, I don't -- I realize this is all new
21 territory. This is a very -- I understand this is a very
22 difficult case, that's why there's so many hypotheticals here.
23 We're trying to get our finger on what the real issue is here,
24 and what I'm trying to figure out here -- and I can tell you
12:02:21 25 this conversation has taken place many times in my office over

12:02:26 1 the last couple weeks. We're trying to figure out exactly
2 what this is. But I don't believe -- I can tell you what I
3 certainly don't believe.

4 I certainly don't believe this is what the DMCA was
12:02:36 5 designed to protect. I think copyright law was protect this
6 sort of thing that Blizzard is trying to say that they want to
7 stop. And to the extent they have -- to the extent they made
8 their case to the Court and won on the issue of copyright law,
9 I think they have established that. But I don't think the
12:02:58 10 DMCA certainly not looking at the legislative history and
11 looking at what other cases have spoken of, using a Warden
12 program to prevent what you see in a video game, if it's not
13 being protected, if that's what it really is trying to
14 protect.

12:03:15 15 And I realize I may be wrong, but -- I'm willing to
16 concede that. But I just don't believe that what we have here
17 is a (b)(1) violation.

18 THE COURT: Okay.

19 MR. VENABLE: Your Honor, real briefly with regard to
12:03:29 20 (a)(2). I think that we have made our argument, to a certain
21 extent, in our summary judgment briefing that we are well aware
22 that the code that is both literal and nonliteral elements that
23 are sitting on the hard drive are indeed not protected in the
24 form of being able to prevent access to these things.

12:03:52 25 To the extent there is anything is that accessible,

12:03:55 1 Warden doesn't protect it. And to the extent that Warden,
2 under the definition under (a)(3)(B) is a technological
3 measure, I don't believe that Warden qualifies as a
4 technological measure, and I believe that Mr. Genetski, when
12:04:11 5 he was up here arguing his points about this, he was referring
6 to the fact that this whole process of what Blizzard's Warden
7 program does by going and scanning the memory sitting on the
8 hard drive -- or sitting in the client computer and checking
9 that back with something that is on the server to see if
12:04:33 10 there's something there, it is undisputed, Your Honor, that
11 Warden -- that Glider does not participate in that process.

12 Glider, by making itself invisible, there's no -- we
13 don't dispute it makes itself invisible, but it certainly
14 doesn't provide anything to the -- to the ability of Warden's
12:04:57 15 mechanism and how it detects what is sitting on your hard
16 drive.

17 THE COURT: Well, that might be true, but it seems to
18 me again that the focus in (a)(3)(B) is not on Glider, it's on
19 Warden. (a)(3)(B) is a definition of the technological
12:05:15 20 measure that is evaded. So in this case, it's Warden.

21 And the question, then, is whether Warden is a
22 measure that requires the application of information to gain
23 access to the work. And Blizzard says it does; it requires
24 the application of the information that's in the memory and
12:05:34 25 comparing that information to these hashes to gain access to

12:05:40 1 the work. What's wrong with that argument?

2 MR. VENABLE: Well, I think that what's wrong with
3 that argument is for the same reason that in the case of *IMS*
4 *versus Inquiry Management Systems* -- I'm sorry. *Inquiry*
12:05:53 5 *Management Systems versus Berkshire Information Systems*, which
6 is 307 F. Supp 2d 521, there is -- that was a case that
7 involved the use of a password protection. A password
8 protection scheme. That prevented you from being able to
9 access something that I believe was on a user's -- or on a
12:06:16 10 software on a server.

11 And what was happening was in order to gain
12 unauthorized access to whatever it is they were -- the -- in
13 order to gain unauthorized access to whatever it is that the
14 plaintiff was protecting, the user who was trying to
12:06:40 15 circumvent access was simply using an active password, a good
16 password. Not a bad password. And the -- they tried to
17 argue, well, but we've already said this is what constitutes
18 something being unauthorized. When you use this other -- when
19 you're using this other mechanism to gain access, you use that
12:07:02 20 unauthorized access to gain that password.

21 They actually, I think, got ahold of the password
22 illegally. But the password itself was a legitimate password.
23 And what the Court said in that case was that the application
24 of the information that was being used in that case was not a
12:07:20 25 violation of the DMCA even though they acquired the password

12:07:24 1 illegally.

2 And I think there's a similar case that can be made
3 here, is that there does have to be something that is applied.
4 These cases, I believe, deal with the DMCA, the history of the
12:07:38 5 DMCA, deals with these types of mechanisms that are -- that
6 require something more than just I'm scanning looking for
7 memory. There has to be something more. You know, there's
8 like in the case of the DVD encryption, that there is
9 encryption there. You have to do something to circumvent the
12:08:00 10 encryption in order to be able to gain access to what is
11 ultimately protected, which would be, say, a movie or a song.

12 I'm not really sure that that's the case here with
13 what -- with what -- with what Warden is doing. It doesn't
14 require -- I don't mean this process they're referring to. I
12:08:15 15 think the Court noted that in its ruling on summary judgment,
16 that there's -- that there is a problem here. This process is
17 just simply -- it's just scanning. It could scan -- just by
18 scanning memory, does that make it -- does that make it? I
19 would say no.

12:08:36 20 THE COURT: Well, it sounds as though your
21 understanding of (a)(3)(B) could be more clearly stated if it
22 was rewritten to say -- if (a)(3)(B) was rewritten to say that
23 it is a measure in the ordinary course of operation that
24 requires user application of information or user application of
12:09:02 25 a process or a treatment with the authority of the owner to

12:09:07 1 gain access to the work.

2 And your point is users don't have to apply to get
3 access, they don't have to initiate a process to get access,
4 it's all done by Warden. Am I understanding your argument
12:09:24 5 correctly?

6 MR. VENABLE: Well, I think, yes, but I believe what
7 leads me to believe that is the language in the statute that
8 says it has to happen with the authority of the copyright
9 owner. I'm not really sure how that plays into this, Your
12:09:38 10 Honor, because without the authority of the copyright owner we
11 don't do anything to stop -- they have full authority to search
12 our memory. They certainly do. I don't really know exactly
13 how we are in violation of (3)(B).

14 It just -- the -- in the ordinary course of its
12:09:59 15 operation requires the application of information or a
16 processor or treatment with the authority of the copyright
17 owner. I'm not sure how that plays in there, Your Honor.

18 But I don't even think we have to go there because
19 we've already argued that to the extent that they leave these
12:10:16 20 elements unprotected, freely copyable, even the nonliteral
21 portion because they can be viewed in Model Viewer. That's
22 clearly shown during the testimony yesterday. And to the
23 extent that there's anything on the server side that's being
24 protected, what is being protect is this dynamic database at
12:10:40 25 best. And the dynamic database, again, contains the factual

12:10:43 1 information as to where the characters are.

2 But, again, Your Honor, facts are not protectable.
3 And we are not looking at trying to gain access to something
4 that is -- that is protected. These elements that are sitting
12:10:59 5 on the server that get sent down are just simply factual
6 information. It would be no different than if I was saying,
7 you know, look at these facts that are sitting on my page, I'd
8 like you to be able to look at them. They're not protected.
9 They're simply -- facts by themselves are not protected and
12:11:17 10 can't be protected under copyright laws.

11 THE COURT: Well, it seems to me I've already ruled in
12 your favor on the literal code because clearly I concluded
13 before at least clearly Warden doesn't control access to the
14 literal code; it's right there on the user's hard drive.

12:11:36 15 And I think that that would be correct as well if
16 we're talking about the nonliteral static illustration of
17 Illidan running or things you demonstrated yesterday.

18 But, again, it seems to me this raises the question
19 of whether the symphony is a work protected. Because if the
12:11:54 20 symphony is protected, clearly Warden controls access to the
21 symphony.

22 MR. VENABLE: Agreed, Your Honor.

23 THE COURT: So it comes back to the same issue we
24 talked about before.

12:12:06 25 MR. VENABLE: Yes. I don't really know again -- I

12:12:08 1 wish I could stand here and, you know, provide you some magical
2 argument that would be able to convey the issue better, but I
3 don't believe that anything we have looked at would support the
4 symphony is protected and can be because it's not fixed.

12:12:28 5 THE COURT: Okay. I understand your argument on that.

6 MR. VENABLE: With that, Your Honor, unless there's
7 any other questions, I'll turn it over to my partner, Joseph
8 Meaney.

9 THE COURT: Okay.

12:13:17 10 Okay, go ahead, Mr. Meaney.

11 MR. MEANEY: Thank you, Your Honor. With respect to
12 personal liability, we agree with the analysis as set forth by
13 Blizzard to the extent they set it forth. Our position here is
14 very simple, is that they haven't gone far enough to show
15 personal liability attaches to Mike Donnelly in this particular
16 instance. We agree that *Transgo* is the law of the Ninth
17 Circuit. We agree that the statement that they have pulled out
18 of *Transgo* --

19 THE COURT: I'm sorry, what's *Transgo*?

12:13:51 20 MR. MEANEY: *Transgo* is the first case that they cite
21 in their proposed findings of law and fact.

22 THE COURT: Okay. The first one I see cited is *eBay*.

23 MR. MEANEY: Oh. Under personal liability.

24 THE COURT: Oh, I'm sorry. You're right. Yeah.

12:14:05 25 MR. MEANEY: Think that's a different section.

12:14:06 1 THE COURT: Yeah, I'm in a different section. Go
2 ahead.

3 MR. MEANEY: Okay. So *Transgo* -- what *Transgo* says,
4 and this is a quote from the case *Murphy Tugboat*, what *Transgo*
12:14:17 5 says is, a corporate officer or a director is, and here's the
6 words that we'd like focus on, in general, person liable for
7 all torts he authorizes or directs, participates, et cetera, et
8 cetera. And that's where we think they failed to meet their
9 burden to prove personal liability attaches.

12:14:35 10 What they have done is basically set forth a case
11 that says personal liability automatically attaches when an
12 officer or director performs the acts or ratifies the acts or
13 participates or benefits that ultimately get constituted or
14 determined to be a tort.

12:15:00 15 Now, *Transgo* isn't particularly helpful because
16 *Transgo* doesn't give any more elaboration on the law than the
17 simple quote that they have pulled out. *Transgo* is a case
18 that is very easy to decide as far as -- well, let me back up.
19 While *Transgo* doesn't go into very much of analysis, the case
12:15:25 20 that *Transgo* relied upon, *Murphy Tugboat*, does. *Murphy*
21 *Tugboat* gives this Court the legal framework in which it can
22 find that Michael Donnelly is not personally liable, and
23 shouldn't have a potentially nondischargeable \$6 million
24 judgment hanging around his neck for the foreseeable future.

12:15:43 25 THE COURT: Why do you say "nondischargeable"?

12:15:46 1 MR. MEANEY: I think there's an issue whether you can
2 discharge in bankruptcy copyright violation.

3 THE COURT: Okay.

4 MR. MEANEY: I'm not sure that it's always
12:15:58 5 dischargeable or always not dischargeable, but I think some of
6 the facts that separate whether it is dischargeable or not are
7 some of the same facts that we're going to be discussing here.

8 THE COURT: All right.

9 MR. MEANEY: Now, *Transgo* was a pretty simple case. I
12:16:12 10 guess -- let me back up again. So *Murphy Tugboat* gives you the
11 analysis and the reason -- *Murphy Tugboat* was a case, it's an
12 antitrust case. And in that case the jury found that the
13 company committed acts which constitute an antitrust violation
14 under section 2. In addition, the jury found that the
12:16:37 15 president who was -- either participated or ratified all the
16 acts that gave -- ultimately gave rise to the liability, was
17 personally liable. The judge entered his ruling, not
18 withstanding the jury's verdict, and said, no, you can't in
19 this case. He --

12:16:57 20 THE COURT: You can't hold the individual liable?

21 MR. MEANEY: Under these set of facts. He said what's
22 missing is inherently unlawful conduct. That's the element
23 of -- that they're missing in their case for personal liability
24 against Mr. Donnelly, is inherently unlawful conduct.

12:17:19 25 In fact, the relevant language -- they do a nice

12:17:22 1 analysis. They start with the general -- I'm talking about
2 *Murphy Tugboat*. The analysis there is helpful because they
3 start with the general proposition that you're ordinarily
4 liable and then they go into the situation in this case,
12:17:35 5 antitrust, where it is not always clear whether the acts that
6 constitute a tort are inherently unlawful or not. And it's
7 these particular instances of commercial torts where we don't
8 really want to chill activity. If it's not inherently
9 unlawful, we shouldn't, then, impose liability personally.

12:17:58 10 THE COURT: Do you have a cite for *Murphy Tugboat*?

11 MR. MEANEY: Sure. 467 F. Supp 841. It was affirmed
12 by the Ninth Circuit I believe on other grounds and then denied
13 Supreme Court, sir.

14 THE COURT: You're saying that the Ninth Circuit's
15 decision in *Transgo* relies upon this District Court opinion?

16 MR. MEANEY: Yes, Your Honor. What it does is it --
17 the quote that's in there, that they take from -- that they --
18 the quote that Blizzard relies on from *Transgo* is a quote from
19 *Murphy Tugboat*. I would like it if the Ninth Circuit actually
12:18:38 20 elaborated on the analysis, but the quote is taken from *Murphy*.
21 The Ninth Circuit takes the quote from *Murphy Tugboat*. So we
22 would submit, Your Honor, that the Ninth Circuit is saying
23 *Murphy Tugboat* is the law here, but all we need in this case is
24 the general rule. And --

12:18:57 25 THE COURT: This may be jumping ahead in your argument

12:18:59 1 but let me ask this question while it's on my mind. I can see
2 some sense in the law saying that if we're dealing with a
3 commercial tort where the law isn't always clear, like
4 antitrust or the copyright violations, we're not going to make
12:19:14 5 individuals liable unless they knew they were breaking the law.

6 MR. MEANEY: Okay.

7 THE COURT: What about tortious interference where
8 it's more of a traditional tort. Where somebody's
9 intentionally interfering with a contract between two other
12:19:29 10 parties. Do you think the same --

11 MR. MEANEY: That's a good question, Your Honor. I
12 haven't been able to find cases that address the specific issue
13 under the facts that we have here today. But I have reviewed
14 *Fletcher's*, and *Fletcher's* has encyclopedia on this section,
12:19:46 15 and they say in general that wouldn't apply as long as the
16 actor is acting within the course and scope of his duty, which
17 raises a whole other raft of issues because I guess if you're
18 committing a tort you're outside of your duty.

19 But they conclude in general, I think one of the
12:20:02 20 cases -- there's also a similar line of reasoning in the
21 Federal Circuit. And the Federal Circuit, of course, is where
22 all the patent cases go. Patent cases also lend themselves to
23 this type of analysis because in the outset you may willfully
24 make a product, sell a product, and you may actually know that
12:20:21 25 there's a patent that's relevant, so you would constitute the

12:20:26 1 actual willful patent infringement, but yet wouldn't rise to
2 culpability of personal liability.

3 And so there's a whole raft -- there's two cases in
4 particular that are worth looking at. The original case is
12:20:39 5 *Hoover. Hoover Group versus Custom Metalcraft.* 84 F.3d 1408.
6 Where sort of the framework of the rule comes out.

7 Then there's another particularly interesting case
8 that came out in 2007. Now, this is just at the district
9 court level -- actually, excuse me, it's the federal circuit.
12:20:58 10 It is *Wechsler versus Macke Intern.* 486 F.3d 1286. That is a
11 very interesting case because they take the rule and flesh it
12 out a little bit more. In that case the jury found no
13 personal liability. They also found willful infringement by
14 the corporation. And the corporation itself was solely a
12:21:23 15 one-man show. You know, president, sole shareholder,
16 employee.

17 And the judge said, wait a minute, wait a minute.
18 You can't reconcile those two things. And so he gave a
19 judgment notwithstanding the verdict, and imposed personal
12:21:39 20 liability. When it went up on appeal to the Federal Circuit,
21 the Federal Circuit said no, it's not necessarily the case, a
22 lot of times it's going to be the case, but it's not
23 necessarily the case because the standards are different.

24 So those give some additional analysis. They don't
12:21:52 25 use the inherently unlawful conduct rule, they use a different

12:21:56 1 rule, but to me it is the flip-side of the same thing. They
2 go at it differently.

3 In Federal Circuit they say when a person in a
4 control position causes the corporation to commit a civil
12:22:05 5 wrong, imposition of personal liability requires consideration
6 of, one, the nature of the wrong.

7 So let's look at it. Is this a simple easy wrong or
8 is this a -- like in *Transgo* it was an easy case, these guys
9 were tricking people into thinking that they were buying
12:22:23 10 someone else's product when they were really buying the
11 defendant's product. You know, basically a palming-off case
12 or affirmative misrepresentation case.

13 The second prong under the Federal Circuit is the
14 culpability of the act. So they want to look at the
12:22:38 15 culpability of the actor and see whether it rises to a certain
16 level.

17 And three, whether the person acted in his or her
18 personal interest or that of the corporation. And the Federal
19 Circuit seems to want to find haven for a president. If he's
12:22:52 20 acting in a way that any other president under those
21 circumstances would act. If he's grossly negligent, reckless,
22 things like that, then you're not going to find shelter here.

23 But I think the facts of this case, you know, if you
24 heard them yesterday, it's hard to expect Mr. Donnelly to have
12:23:11 25 done anything else, to have been a clairvoyant. We spent --

12:23:15 1 Mr. Genetski said just a few moments ago that -- we've always
2 agreed on the facts. This has always been about the law. And
3 perhaps after hours and hours of legal analysis and opinion,
4 we can ultimately conclude that this was a copyright
12:23:28 5 violation.

6 It seems to me a little bit unfair to hold
7 Mr. Donnelly or anyone who is writing software to know these
8 litany of steps that have to occur. You to have go to MAI,
9 then we have to look at the contract. And not just look at
12:23:42 10 the contract, we have to parse the contract. We to have
11 cross-rough both contracts and find out whether it's going to
12 be a condition precedent or whether it's not going to be a
13 condition precedent. Does 117 apply? All these steps have to
14 occur before we can decide whether we're going to decide
12:23:56 15 whether we have copyright violation in this instance.

16 So the Federal Circuit also has similar law. There's
17 also law in the Seventh Circuit that's been there for a while
18 that goes the same way.

19 Now, trying to get back to your question about the
12:24:12 20 tortious. I don't have a great answer for that. I haven't
21 been able to find a case on point. I found a case out of
22 Delaware. In general, I know the Federal Circuit, I believe
23 it's in the *Hoover* case, they say that, in general, tortious
24 interference when you review -- when *Fletcher's* reviews it as
12:24:34 25 a whole, it says in general tortious interference is not

12:24:38 1 something that would ordinarily give rise to liability unless
2 you're acting outside the course and scope of your duty.

3 When I look at those cases, though, Your Honor, I see
4 a lot of -- I think the cases I read sort of take that general
12:24:53 5 proposition from cases where if I were the president of the
6 corporation and then I -- you know, some people try to make
7 the argument that the president should be tortiously liable
8 for sort of inducing his own company to breach a contract.
9 Which I don't think really necessarily applies to the facts
10 here, because the way the courts handle that they say the
11 president -- there has to be a third party there.

12 So I guess the upshot of it is, I don't have a case
13 on that, other than this case out of Delaware, which I don't
14 have the cite for right now. But there certainly are a lot of
12:25:35 15 cases that say tortious -- you don't treat tortious
16 interference with contract any differently than you would any
17 other tort.

18 Before I, just briefly, go on to the facts of this
19 case, we certainly wouldn't dispute that there are a litany of
12:26:00 20 cases that simply state the general proposition. And there's
21 no further analysis in all those cases. But again, those
22 cases don't need to go to the second step of inherently
23 unlawful conduct, because like *Transgo*, they're just
24 intentionally tricking other people into thinking they're
12:26:18 25 buying that corporation, or it's a conversion case, or DVD --

12:26:21 1 or where you're just copying DVDs, or perhaps file sharing
2 after *Napster*. But not file sharing before *Napster*. So that
3 even though there are a lot -- we may be in a small minority
4 of cases, but it's a small legitimate minority recognized by
12:26:39 5 *Murphy Tugboat* and recognized by the Federal Circuit and the
6 Seventh Circuit. And I'm not saying it is not recognized in
7 the other ones, but that's where I have cases, Your Honor.

8 For example, if you -- *Transgo* is the first case that
9 they cite -- excuse me, that *Blizzard* cites in its statement
12:27:02 10 of facts. The next case that they cite after that is called
11 *Commission for Idaho's High Desert*. In that case, of course,
12 said the general rule, but that case is factually
13 distinguishable. In that case -- the defendants in that case
14 opportunistically seized the name of like an environmental
12:27:22 15 group because the environmental group let their corporation
16 lapse. And so they jumped in and said, oh, we'll be that
17 environmental group now. And then they went off and held
18 themselves out in public forums as that environmental group
19 even though their views were diametrically opposed to that
12:27:40 20 group. So in other words misrepresenting. That Court had an
21 easy time finding that the personal liability attaches to
22 those -- the officers in that case.

23 And the other cases cited, we don't disagree with the
24 propositions that they're citing there, we just disagree that
12:27:56 25 they have taken it far enough.

12:27:59 1 So at least our position is that under *Murphy Tugboat*
2 the law of the Ninth Circuit is that in order to give rise to
3 personal liability the acts would have to be inherently
4 unlawful. And in this case they haven't met their burden.

12:28:11 5 The fact -- the facts aren't inherently unlawful. In this
6 case Mike -- Mr. Donnelly wrote his own software, didn't copy
7 anything. He didn't mislead anybody when he was selling
8 Glider. In fact, he warned everybody that Blizzard doesn't
9 like it and Blizzard may ban your account. Never tried to
12:28:31 10 trick anybody. In addition, he didn't stick his head in the
11 sand.

12 He testified yesterday that before he went to start
13 selling the product, he reviewed the EULA. He reviewed the
14 TOU. He reviewed some other, I can't remember exactly what
12:28:51 15 it's called, but some sort of other server rules. And he
16 satisfied himself that his conduct didn't apply. And that
17 seems to me to be reasonable when they clearly know what bots
18 are.

19 But it doesn't -- at the time neither the TOU, the
12:29:07 20 EULA, or anything else expressly prohibited bots. It
21 prohibited cheats, which is subjective. It is arguably, maybe
22 perhaps in hindsight, that they can say it is a cheat. In the
23 outset you couldn't necessary say it's a cheat.

24 Certainly it's not a hack. Doesn't modify any code.
12:29:26 25 Doesn't give the user the right to do anything else that they

12:29:28 1 couldn't do. Just gives them the right to, I guess, visit
2 with their girlfriend instead of playing the game.

3 And it's not a mod. Nowhere in the agreement does it
4 say you're going to be liable for copyright infringement if
12:29:45 5 you sell a third-party application. Nor does it say you're
6 going to tortiously interfere with our contract if you do.
7 Nor does it even mention the DMCA, that I'm aware of. But it
8 certainly doesn't say if you make your own software that
9 happens to interoperate with our product you're going to be
12:29:58 10 liable for these.

11 In addition, at least from Mr. Donnelly's point of
12 view, Blizzard's acts further strengthened his belief that
13 while they might not like it and might want to stop it and
14 perhaps even they view it as a breach of a contract, by then
12:30:22 15 there's silence. They certainly could have sent him a letter.
16 They could have done something. They have a legal engine. He
17 knows that they have sued people before. They never even
18 asserted, mentioned, or otherwise told him that they had some
19 problem with this or what the basis was.

12:30:39 20 From the period of September 2005 to October, to the
21 knock and talk, never once did Blizzard say anything that his
22 acts were violated -- were copyright violations, copyright
23 infringement, or tortiously interfering or anything. However,
24 they did send him a letter. They sent him a letter prior to
12:30:57 25 the knock and talk saying that he had pictures on his website

12:31:01 1 that they thought were his intellectual property. So they
2 were aware of him. They knew how to send a letter. What was
3 Mr. Donnelly's response? He took them down.

4 There was another issue. Again, there was no
12:31:12 5 accusation that Glider was infringing anybody's copyrights or
6 tortious interference. But there was some other issue and he
7 responded and said, hey, could you provide me some
8 information. So he wasn't ignoring their requests. He was
9 following through the way a reasonable president of a software
12:31:32 10 company would -- the way we would want somebody to follow
11 through.

12 Likewise, the first time he heard -- he understood
13 that Blizzard had a problem with his trademarks, he originally
14 I think wanted the name WoW Glider, was when there was -- the
12:31:56 15 amended counterclaims or the counterclaims were filed in this
16 case. Within days he changed his name.

17 So I guess the point being, when the issues were
18 clear, Mike Donnelly is not a guy who snubs his nose at the
19 law. But he's also not a guy that's going to just get bullied
12:32:16 20 if he thinks he has a legal ground to stand on. And there's a
21 big difference there, Your Honor.

22 So from all positions, at all times Mike's acted the
23 way that we would expect a reasonable person to act in his
24 shoes.

12:32:39 25 If you ultimately conclude that his actions after all

12:32:42 1 of this legal scrutiny, and we ask the Ninth Circuit what they
2 say constitute a commercial tort, shouldn't then -- then have
3 him wear a \$6 million judgment that is potentially
4 nondischargeable for acts that we would expect a copyright --
12:32:59 5 the author of copyright software and president of software
6 companies to take.

7 For me, I wonder if anyone in this courtroom can
8 honestly say when they took a look at these facts, did they
9 say, "Whoa, that is copyright infringement right there. I've
12:33:20 10 seen those before and that is copyright. Oh, no, wait a
11 minute, that's a DMCA violation, too"?

12 No, this is a case that requires steps of legal
13 analysis. In fact, I think Mr. Genetski used the word we
14 "struggled" to sort it out. He was just saying that. With
12:33:37 15 respect to DMCA, we're struggling to sort it out. It's never
16 been about the facts. It's always been about the law.

17 Just a couple points. The Ninth Circuit's
18 consistently said that we should be very cautious when we're
19 dealing with facts that fall in the outer limits of copyright.
12:33:58 20 Copyright, the whole purpose of copyright is to promote
21 additional arts. We don't want -- we want to be very careful
22 when we are sort of perceiving the areas that aren't
23 well-founded because the risk is that you may chill further
24 development of additional software.

12:34:14 25 In addition to that, Judge, it is also judicially

12:34:17 1 recognized, I think even in that *Galooob* case, that the
2 software progresses through add-on software. This is how this
3 market -- there's other ways of progressing, but add-on
4 software is a significant way that the software industry
12:34:32 5 progresses. I mean, you look no further than, say, Microsoft,
6 the operating system, Microsoft, pick any one. Didn't
7 originally get shipped with a browser. And I don't think
8 Microsoft -- anyone argued that Microsoft was on the forefront
9 of browser technology. No. Other entities, Netscape, they
12:34:51 10 came up with a browser technology and add-on to the operating
11 system and now that's been assimilated to all operating
12 systems. It is just standard operating procedure.

13 The Ninth Circuit has recognized that we need to
14 protect this. This is a legitimate commercial practice that
12:35:06 15 we should be very careful before we chill any progress in that
16 area.

17 So based on all the above, we just -- if nothing
18 else, we urge Your Honor to use extreme caution before we pin
19 it -- a judgment on Mr. Donnelly that he potentially can't
12:35:29 20 discharge and will hang around him for acts that we really
21 couldn't expect him to do anything differently.

22 THE COURT: All right. Thank you.

23 We have one more point on the injunction.

24 MR. VENABLE: Your Honor, just finally with regard to
12:35:57 25 the issue of whether or not an injunction is appropriate.

12:36:07 1 Your Honor, what stood out most yesterday in
2 discussions with Mr. Ashe while he was on the stand was, while
3 he talked very extensively about what is going on in the
4 confines of Blizzard's offices with regard to how they deal
12:36:23 5 with bots and people like Mr. Donnelly in terms of how to stop
6 it, one thing that was painfully clear to me was that whatever
7 he said did not in my mind represent what would amount to the
8 legal definition of irreparable harm.

9 To me it's one of these old adage, the acts speak
12:36:49 10 louder than words sort of thing. That if everything that
11 Mr. Ashe was saying while he was on the stand was so
12 detrimental to what was happening with Blizzard, that it
13 was -- it's killing them, doing all these horrific things to
14 them, it is undisputed that Blizzard for over a year did
12:37:16 15 nothing whatsoever to put any notification in Mr. Donnelly's
16 lap to say you need to stop this. They didn't explain why.
17 They did certain things that even led him to believe that they
18 thought it was okay, like the Rick roll, the joke.

19 Certainly one who believes that what Mr. Donnelly was
12:37:37 20 doing was so detrimental to their business, Your Honor, would
21 not send someone a joke. Because this isn't anything to joke
22 about. If you're going to sue someone for copyright
23 infringement, if this was something that was so horrifically
24 bad, everyone knows the legal engine that Blizzard can
12:37:56 25 generate when it wants to. Where was the cease and desist

12:38:00 1 letter immediately? Where was the demand? Where was the
2 knock and talk? Where was all of this right away? It never
3 happened, Your Honor. It didn't happen until over a year
4 later.

12:38:14 5 There have been injunctions -- and I understand that
6 preliminary level is more so the case, where there have been
7 injunctions that were denied when you wait seven, eight
8 months. Sometimes even ten weeks. The lawsuit is filed. Did
9 they ask the Court then, oh, we're being so irreparably harmed
10 that we need to have the Court stop what Mr. Donnelly is
11 doing? No, they didn't. And they, again, didn't ask for that
12 for several months -- actually almost two years nearly.

13 So in other words there's a three-year time period in
14 which there was no action and there was nothing that was being
15 done to try to stop this horrific behavior, as they put it.
16 And all the while that this is going on, Blizzard goes from
17 5 million customers to 11 and a half million customers, even
18 through today.

19 And I understand -- we don't have any evidence to
12:39:11 20 dispute that Mr. Ashe's department probably spends resources
21 to deal with Mr. Donnelly. But they also spend, I'm sure,
22 resources to deal with a lot of things that Blizzard doesn't
23 like. One of them certainly being bots. And he is not the
24 only bot. I'm sure that there was -- there was testimony or
12:39:32 25 discussions in the summary judgment motions about how there

12:39:34 1 are literally thousands of bots out there that Blizzard has to
2 deal with. I'm not saying this makes him any better than
3 those other bots, but he shouldn't be singled out. It's sort
4 of like the cop who drives along and picks you out for
12:39:49 5 speeding while everyone else is speeding. I understand that.

6 But if Blizzard is allowing this to happen without
7 going on, it is a completely disingenuous argument for them to
8 make that this is something that must be stopped or they are
9 basically going to circle the drain as a company. And I think
12:40:09 10 that's the -- in the light that they're trying to deliver that
11 argument to the Court.

12 What we are simply asking here for is that if they
13 can wait over three years to ask this Court for the first
14 time, knowing that even if they get the injunction the
12:40:29 15 behavior's not going to stop from botting, people will still
16 bot, they will still have this problem. But what won't happen
17 is you're not going to see their sales decline as a result of
18 that decision -- or their sales increase as a result of that
19 decision. What you're going to see is that they will still
12:40:46 20 continue to have a viable business. They will have people
21 that will still play despite the presence of bots.

22 But yet if the injunction occurs, Mr. Donnelly is not
23 so fortunate, his company is dead in the water. And if we go
24 up on appeal and by some chance we get this overturned, which
12:41:06 25 is very possible, not to disrespect Your Honor's ruling, but

12:41:12 1 there are, again, numerous people who have written about this
2 case who say that this is -- this is a case of first
3 impression, Your Honor. We're on the frontier here. And, you
4 know, to the extent that Mr. Donnelly has a right to do what
12:41:25 5 he wants to do, he should at least be given the opportunity to
6 save his business should the Ninth Circuit ultimately decide
7 that this is not something that is a violation of the
8 copyright law or that it's a tortious interference with
9 contract or even a DMCA violation. Because if that does
12:41:43 10 happen, there's going to be nothing left.

11 THE COURT: Mr. Venable, two questions. Irreparable
12 harm does not have to be fatal harm.

13 MR. VENABLE: I understand that.

14 THE COURT: Right?

12:41:56 15 MR. VENABLE: I understand that.

16 THE COURT: What I have to ask with respect to whether
17 they've satisfied the first prong of the eBay test is whether
18 they're being injured in some ways that they'll never really be
19 able to be compensated for. Not whether it's going to cause a
12:42:11 20 decline in business or they're going to be severely damaged.
21 Do you agree with that?

22 MR. VENABLE: Yes, I do, Your Honor.

23 THE COURT: On the second issue, your argument that an
24 injunction will be a death knell to MDY, is that an argument
12:42:29 25 against an injunction or is that an argument in favor of

12:42:32 1 staying an injunction?

2 MR. VENABLE: Well, it kind of goes hand in hand, Your
3 Honor. The practical matter is, is that if the Court grants an
4 injunction but also, let's say that you would issue a stay or
12:42:44 5 the Ninth Circuit would issue a stay, we still have to post a
6 supersedeas bond. And I'm guessing that Blizzard is not going
7 to say that that bond is going to be a small figure. It's
8 going to be a rather large figure, which Mr. Donnelly is not
9 going to be able to put up. And it will have the same effect.
12:43:01 10 It will have -- it's going to have the same outcome no matter
11 what. We may not ultimately be able to stay it just from the
12 practical purpose -- practical reasons for not being able to
13 post the bond.

14 THE COURT: Well, I have a question about that in a
12:43:18 15 moment, but let me, before we leave this question of whether
16 there should be stay at all. If I conclude that the eBay
17 elements are satisfied, and I don't know if I will, I just
18 haven't satisfied myself yet on that issue. If I conclude that
19 the eBay elements are satisfied, and that if my ruling is
12:43:41 20 affirmed by the Ninth Circuit and the Supreme Court denies
21 cert, then there should be an injunction in place.

22 What's the basis for denying the permanent injunction
23 here? If I've denied it, I denied it. If the Supreme -- if
24 the Ninth Circuit affirms, there's no injunction.

12:43:58 25 It seems to me that if I conclude an injunction is

12:44:02 1 warranted if I'm right, that at a minimum I have to enter it
2 so that when it gets affirmed it takes effect, even if I stay
3 it in the interim. Denying it, to me, isn't the right answer
4 if an injunction ultimately will some day be warranted.

12:44:20 5 MR. VENABLE: Perhaps the issue maybe is to the issue
6 of the breadth of the injunction. Perhaps there are other ways
7 that we can deal with the concerns about what Blizzard's issues
8 are, which would be -- for instance, let's say there was a
9 mandatory royalty payment that could be significant for each of
12:44:43 10 the sales that Glider has made. That can be used as a way to
11 try to deal with a bond issue. That in case it is affirmed
12 that that money doesn't remain in the hands of Mr. Donnelly but
13 it remains in an escrow account that would be payable to
14 Blizzard. What I'm concerned is, is that, you know, something
12:45:04 15 short of something like that I'm not sure how we could craft
16 the injunction because --

17 THE COURT: Well, I've not thought about the bond
18 issue until you just raised it. But thinking off the top of my
19 head, which is always hazardous, Blizzard has said that they're
12:45:23 20 incurring about a million dollars a year in costs, a little bit
21 less than that, and that they quantify their other damages.

22 If we assumed hypothetically that the Ninth Circuit
23 was going to take a year to rule, therefore that they would
24 incur just under another million dollars in damages, wouldn't
12:45:42 25 the bond amount have to be at a million, which would require a

12:45:45 1 ten percent payment of \$100,000? Isn't that --

2 MR. VENABLE: I --

3 THE COURT: -- sort of a practical reality for a bond?

4 MR. VENABLE: I think that's how it works, Your Honor.

12:45:56 5 I don't do this a whole lot so I don't actually have any
6 experience in dealing with bond issues -- with injunction
7 issues. That's possible.

8 What we would argue to that is to the extent there
9 really has been only Mr. Ashe's testimony, we never really had
12:46:14 10 a hearing on whether or not they're actually having a million
11 dollars in damages. Because like I said, although Mr. Ashe
12 said, gee, if we weren't doing what he was doing -- if we
13 weren't doing something to try to stop Mr. Donnelly, we'd
14 reallocate these resources and so on and so forth. There's
12:46:31 15 been no evidence and we've never been able to -- anything
16 other than an expert report that was written by Mr. Ed
17 Castronova that talked about this, and we adamantly disputed
18 that. So we never really discussed that.

19 THE COURT: Let me ask a different question. The
12:46:48 20 stipulated judgment that I've entered in this case establishes
21 a damages number. Does that damages number only run through
22 September of 2008? Or would it include damages that might be
23 incurred by Blizzard while on appeal?

24 MR. VENABLE: I think when Mr. Genetski and I spoke it
12:47:08 25 was just dealing with that it went up to the agreement and --

12:47:14 1 MR. GENETSKI: Your Honor, through September -- I
2 believe in September we filed. It was through the date we
3 filed.

4 THE COURT: Okay. All right. Go ahead.

12:47:25 5 MR. VENABLE: In making the argument as far as the
6 irreparable harm goes, it carries over to the issue of
7 balancing, which I think that was the conversation we were just
8 having here, is to be able to say that if in reality
9 Mr. Donnelly is allowed to continue for an additional 8 to 12
12:47:40 10 months -- granted, I know Your Honor's issue about whether
11 there can even be an injunction then if there is no injunction
12 granted now permanently.

13 The issue here still is that if Blizzard's gone three
14 years and this happened, another 8 to 12 months is not going
12:48:02 15 to kill them, it's not going to hurt them to the point that it
16 has harmed them thus far. And I know you'll get conflicting
17 answers from them.

18 THE COURT: Well, here's the problem I have with that.
19 I understand your argument. I fully understand why MDY
12:48:19 20 believes it's in the wrong here. This is not an easy area of
21 the law. But if I'm right and the Ninth Circuit says I'm
22 right, then that means during this year that it's been on
23 appeal there has been an infringer and a tortious interferer
24 allowed to continue in business. And I think the analysis
12:48:39 25 under *eBay* is, when I balance the hardships don't I have to

12:48:42 1 look at them as an infringer and tortious interferer and ask,
2 in effect, is putting one of them out of business a greater
3 hardship than allowing the infringed party to avoid further
4 injury? That's the way the cases talk about it.

12:49:01 5 MR. VENABLE: I understand, Your Honor.

6 THE COURT: So again, it seems to me if I'm asking
7 should an injunction be entered if I'm right, even if that's
8 not determined until the Ninth Circuit rules, well, if I'm
9 right, then that balance of hardships, it seems to me, weighs
12:49:14 10 in Blizzard's favor because MDY is infringing.

11 So, again, I come back to the same point, that if I'm
12 deciding today whether a permanent injunction should be in
13 effect after the Ninth Circuit affirms, it seems to me I can't
14 deny an injunction just because it will be hard on them if
12:49:38 15 they're put out of business now.

16 It may be what you're really asking me to do is to
17 say if the stay problem -- or the bond problem prevents a stay
18 is to say, I'm not going to decide the injunction today, I'm
19 going to decide the damages issue and enter an order on that
12:49:58 20 and a liability issue on DMCA. And I'm going to certify to
21 the Ninth Circuit those issues, if I can. So they decide
22 those. And then I'll decide the injunction after the Ninth
23 Circuit affirms. That's really sort of what you're asking,
24 isn't it?

12:50:13 25 MR. VENABLE: Or a smaller bond.

12:50:16 1 THE COURT: Well, I've never addressed the bond.

2 MR. VENABLE: Yes. I don't really know -- other than
3 what I've said today, those are our arguments, Your Honor. We
4 really -- we're completely sympathetic to the dilemma here.
12:50:30 5 We're sympathetic to Blizzard's position. I hope that after
6 hearing Mr. Donnelly, you know, on the stand for the last day
7 that he's not -- he's not -- he's not a hacker. He's just an
8 entrepreneur. He's trying to run a business. He has
9 employees. It's a tough economy. It's hard.

12:50:51 10 I have become a good friend of his over the last
11 couple years. And it's -- it would be hard to see him lose
12 that. And I know this isn't about my feelings about him, but
13 it's -- it is important to understand that that is what we're
14 looking at here. This is a guy who thinks what he's doing is
12:51:15 15 right. Always thought what he's doing -- what he's done is
16 right.

17 And if there is going to be an injunction, all I
18 would say is, you know, it be crafted in such a way that we
19 can still maintain our ability to have our business for MDY.
12:51:34 20 And if the Ninth Circuit ultimately decides that we're wrong
21 and you're right, then he will, at my order, not do this any
22 more. He will stop, he will do whatever it is, within reason,
23 that Blizzard asks him to do. Which certainly would mean to
24 stop selling the software, shut his business down, whatever.
12:52:00 25 But this is really the dilemma that we're facing.

12:52:06 1 THE COURT: All right. I understand your position.

2 MR. VENABLE: Okay.

3 THE COURT: Thanks, Mr. Venable.

4 Mr. Genetski.

12:52:26 5 MR. GENETSKI: Your Honor, I might go out of the order
6 we've been going in, as we just left the permanent injunction
7 point, and the DMCA point may take a little longer.

8 Respectfully, Your Honor, as to the hardships on the
9 injunction, I had written in my notes the same thing Your
12:52:44 10 Honor brought up, which is irreparable harm is not
11 horrifically bad or raining down on Blizzard. It's something
12 that can't be put right. Our position, as testified to by
13 Greg Ashe, is that we cannot be put right while Glider is
14 still out there operating.

12:53:09 15 I hear the arguments, and respectfully it's been a
16 difficult case, particularly on the IP issues, but the
17 tortious interference issues, in Mr. Donnelly's own words from
18 a couple years ago, he clearly understood them. He chose to
19 proceed. He made that choice. He's chosen in this case after
12:53:27 20 the entry of the summary judgment order to forgo a jury trial
21 on damages and to enter into a stipulated damages amount.

22 Presumably looking at the amount of damages that
23 could potentially be awarded by a jury if he was deemed a
24 willful infringer, attorney's fees awards and that kind of
12:53:44 25 like, and settled on a number. He agreed to that judgment.

12:53:47 1 He testified on cross-examination to the amount of revenues
2 he's generated. And said that while he hasn't set aside a
3 reserve to pay the judgment that he's -- I think the words he
4 used was not squandered the money and he's kept in mind the
12:54:03 5 fact that the judgment exists.

6 The law requires him, if he is enjoined and wants to
7 stay the injunction to stay in business and keep generating
8 revenue, once he's lost on final judgment to post an
9 appropriate bond. And generally ten percent is the minimum.

12:54:17 10 We would submit, if we got to that point, that the stipulated
11 judgment is the right figure from which to determine the
12 amount of the bond. And perhaps he has to use the money that
13 he's held back or set aside to eventually satisfy a judgment
14 to pay his portion of a bond. That's what the law requires.

12:54:38 15 THE COURT: Well, does the stipulated judgment say
16 anything about bonding following appeal?

17 MR. GENETSKI: I don't believe it addresses it
18 directly, Your Honor.

19 THE COURT: So even if I were to deny an injunction,
12:54:48 20 it will be your position that once a final judgment is entered
21 there is a \$6 million judgment that needs to be bonded?

22 MR. GENETSKI: Yes, Your Honor, and they could seek to
23 stay that.

24 THE COURT: Okay.

12:55:04 25 MR. GENETSKI: Your Honor, I don't have any more

12:55:05 1 argument to add on the individual liability point unless Your
2 Honor has questions.

3 THE COURT: Well, I was reading as I was listening to
4 Mr. Meaney the *Murphy Tugboat* case. It's talking about the
12:55:24 5 Antitrust Act, but it does say that the -- I'm now reading from
6 the opinion, it's a Judge Schwarzer opinion from San Francisco.
7 The generality of the Antitrust Act's prohibition, the often
8 uncertain line between proper and improper conduct, and the
9 social interests in not deterring economically useful conduct
12:55:48 10 by the imposition of excessive risks make it appropriate to
11 limit personal liability to cases of participation in
12 inherently wrongful conduct.

13 Why would that analysis not apply to the copyright
14 and DMCA claims in this case?

12:56:10 15 MR. GENETSKI: Well, Your Honor, going off the
16 snippet, I haven't read the full case. I have read a number of
17 cases on this issue from Arizona, the Ninth Circuit and
18 elsewhere. My impression from those cases is that the standard
19 that's generally been applied, in the copyright infringement
12:56:30 20 context specifically, is that if the person engages in the
21 copyright infringement personally, then they're liable.

22 In those cases the inherently wrongful requirement or
23 additional element was not present. However, our position
24 would be that -- *MAI systems* is a case that has been out
12:56:55 25 there, it's discussed in the blogs and the commentary that

12:56:59 1 Mr. Donnelly apparently has become familiar with since the
2 onset of this case. There is disagreement about whether or
3 not people think that *MAI* was a good case. Mr. Calandrino had
4 testified in his deposition that as a technical matter he
12:57:18 5 didn't think that that should be copied. But there's been no
6 dispute that that's the law of the Ninth Circuit. I don't
7 think it is fair to hold Mr. Donnelly to the level of
8 knowledge of an IP copyright lawyer. But there's not -- I
9 don't believe that it's an ignorance of the law protects here
12:57:36 10 to personal liability when you contribute them. And
11 certainly -- I guess your question was limited to copyright
12 and DMCA. I was going to address tortious interference.

13 Oh, and, Your Honor, if I could make one more point?

14 THE COURT: Before you leave that. I can understand
12:57:51 15 why copyright cases might come down that way for, as
16 Mr. Donnelly said, somebody who is pressing CDs in the back of
17 his truck. Clearly knowingly violating copyrights.

18 MR. GENETSKI: Sure.

19 THE COURT: I think that the plaintiff makes a fair
12:58:07 20 point in saying that a software writer may well not have
21 foreseen the fact that add-on software was a copyright
22 violation when that software writer didn't use one line of
23 Blizzard's software in writing his code. And that to me in
24 this kind of a case makes this thought from *Murphy Tugboat*
12:58:31 25 relevant.

12:58:32 1 I'm just saying that to invite any responses you have
2 to make sure I understand your position.

3 MR. GENETSKI: Sure. The response -- I don't -- I
4 don't dispute or disagree with that point as formulated by Your
12:58:44 5 Honor. I think -- two thoughts. First, as of July 17th, or I
6 forget the exact date, June 17th, the date of the summary
7 judgment order in this case, the question has been answered
8 unless and until reversed on the copyright infringement. And
9 Mr. Donnelly has testified candidly he disagrees, he believes
12:59:11 10 that his position is still the correct one, and he doesn't
11 believe he should stop. I realize that is part and parcel of
12 our other issue, the permanent injunctive issue. But it's
13 pretty clear and has been pretty clear since then.

14 THE COURT: Well, but if I were to go down that line
12:59:26 15 of thinking, then, he would only be personally liable for
16 damages after June of 1988 -- excuse me, 2008. Right?

17 MR. GENETSKI: Yes, Your Honor, on the copyright
18 claim.

19 And my second point, at a minimum the copyright claim
12:59:39 20 from that point forward has been -- we can't -- I don't
21 believe there's any question about the inherent unlawfulness
22 from that point forward on the copyright. I believe that from
23 the inception of his business and the first time he looked at
24 whether or not Blizzard would object to this, and at a last
12:59:58 25 minimum, from September 2005 when Blizzard first banned

13:00:03 1 Warden, Mr. Donnelly should be charged with knowledge of his
2 tortious interference. He posted on his own website a FAQ
3 making it clear. He wants credit for that, for alerting his
4 users that they're engaging in a risk that Blizzard objects to
13:00:19 5 that. But as the Court found in summary judgment, it's
6 knowledge. It is knowledge of the TOU. It's knowledge that
7 this is a breach of the TOU. And he's continued to do it.

8 We've heard a lot of talk about the hardships that
9 he'll suffer if his business is shut down. And I understand
13:00:36 10 that those are real. But he's been able to continue. He's
11 run this business that's now been deemed unlawful and
12 infringing as a matter of law on tortious interference. Not
13 particularly a close case.

14 He's been running that business for three years, as
13:00:54 15 Mr. Venable has suggested. We believe that Mr. Donnelly's
16 been well aware during that time. And the enticement of the
17 revenues he was generating was certainly enough of a
18 motivation to continue. We understand. And as I stated in my
19 closing, we don't dispute his right to have his day in court.

13:01:17 20 But you're not retroactively pardoned for conduct
21 that was clear the entire time on the tortious interference in
22 which you engaged in all the acts. I believe in many of the
23 tort cases, and I've got others here where -- there are ones
24 where corporate officers who knew something was going on and
13:01:41 25 didn't stop it are held personally liable for tortious

13:01:44 1 activity.

2 THE COURT: All right. Let me ask one final question
3 on this. I'm assuming from what you've put in your proposed
4 findings that it's your view that Mr. Donnelly's personal
13:01:59 5 liability on the tortious interference claim is governed by
6 Arizona law.

7 MR. GENETSKI: Yes, Your Honor.

8 THE COURT: Do you agree with that, Mr. Meaney,
9 Mr. Venable?

13:02:09 10 MR. VENABLE: I'm sorry?

11 THE COURT: That the question of personal liability on
12 the tortious interference claim is a matter of Arizona law.

13 MR. VENABLE: Yes.

14 THE COURT: Okay. I assumed you did. Okay. Go
15 ahead.

16 MR. GENETSKI: Your Honor, if I may move now back to
17 the DMCA claims. And specifically under the 1201(a)(2) claim.
18 And I believe it was within that context you asked me the
19 question of whether work is defined in the Copyright Act. And
13:02:40 20 I know Mr. Venable off the top of his head answered that
21 question. I just want to confirm -- I think I misspoke and
22 said it was section 101(a) of the Copyright Act; it is 102(a).

23 It defines work as any one of a number of protected
24 works of authorship, and among those are literary work and
13:02:58 25 audiovisual work. Which is what we're -- what are at issue

13:03:03 1 with the World of Warcraft software.

2 THE COURT: Well, but the phrase "audiovisual work" is
3 itself defined in 101, right?

4 MR. GENETSKI: Yes. Right.

13:03:15 5 THE COURT: So notwithstanding its reference in 102,
6 do you agree I have to go by the definition in 101?

7 MR. GENETSKI: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. GENETSKI: Listening carefully to your discussion
13:03:31 10 with Mr. Venable about his argument that -- I believe he's
11 arguing that -- I would characterize his argument that Blizzard
12 cannot have copyright protection in what *Lexmark* calls the
13 nonliteral elements. He's saying the expressions that you see
14 on the monitor as you play the game is not protectable by
15 copyright --

16 THE COURT: I think he's made a bit more of a
17 distinction. I think he would say that Blizzard can have a
18 copyright protection for the nonliteral elements that are
19 static or fixed, that you can see, for example, through model
13:04:11 20 viewer when you call up the imaginability. But not for the
21 dynamic multi-participant presentation that occurs while the
22 game is being played.

23 MR. GENETSKI: On that point, Your Honor, there are
24 cases in the video game context that speak to this issue. I
13:04:33 25 mean, beginning with the definition of copyright law is that

13:04:38 1 for work to be protectable it has to be fixed in a tangible
2 medium of expression. Which is -- and fixed is defined as able
3 to be perceived. And we all sat in the courtroom --

4 THE COURT: What are you referring to?

13:04:55 5 MR. GENETSKI: Exact cite.

6 (Counsel conferring.)

7 MR. GENETSKI: I apologize, Your Honor, I don't have
8 the Copyright Act in front of me.

9 THE COURT: Oh, this is the statutory definition?

13:05:12 10 MR. GENETSKI: I believe the -- I'll proceed to the
11 case cite which is --

12 THE COURT: I think Mr. McGee may have it.

13 MR. MCGEE: It's a definition in section 102, Your
14 Honor. It --

13:05:29 15 THE COURT: Okay. That's okay.

16 MR. MCGEE: -- definition of fixed, work is fixed and
17 a tangible meaning of expression -- I'm sorry, 101.

18 THE COURT: Okay. Where in 101? I've got 101 in
19 front of me.

13:05:53 20 MR. MCGEE: Right below the definition of the term
21 "financial gain."

22 THE COURT: Okay, let me get there.

23 This definition doesn't seem to help you. This is
24 what it says in full, the paragraph. It says: A work is

13:06:44 25 fixed in a tangible medium of expression when its embodiment

13:06:49 1 in a copy or phonorecord by or under the authority of the
2 author is sufficiently permanent or stable to permit it to be
3 perceived, reproduced, or otherwise communicated for a period
4 of more than transitory duration. A work consisting of
13:07:13 5 sounds, images, or both, that are being transmitted is fixed
6 for purposes of this title if a fixation of the work is being
7 made simultaneously with its transmission.

8 MR. GENETSKI: Yes, Your Honor.

9 THE COURT: That seems to support MDY's argument.

13:07:29 10 MR. GENETSKI: I respectfully disagree based on the
11 way the case law has interpreted that.

12 THE COURT: Okay. Go ahead and tell me about the case
13 law.

14 MR. GENETSKI: I read briefly from the *Atari Games*
13:07:38 15 case during my closing before this issue was illuminated a bit
16 more. And that cite is 888 F.2d 878.

17 THE COURT: 888 F.2d 878?

18 MR. GENETSKI: Yes, Your Honor.

19 THE COURT: Okay.

13:07:58 20 MR. GENETSKI: I believe it is 878. I'm having
21 trouble reading my handwriting. It's a D.C. Circuit case.

22 THE COURT: It's a Judge Ginsburg decision?

23 MR. GENETSKI: Yes, Your Honor. And here the issue
24 was whether or not a copyright should have been granted by the
13:08:14 25 copyright office. And it's in an Atari video game. And what

13:08:22 1 Justice Ginsburg says is: Even if -- I'll try to go slow --

2 THE COURT: I'm going to read the case. You don't
3 need to read any lengthy quotes.

4 MR. GENETSKI: It's short and I think it speaks
13:08:34 5 directly to the point. "Even if initially concentrated or
6 discrete parts ultimately should be on the audiovisual work as
7 a whole" -- I'm sorry, let me start -- the key part of the
8 quote is "the total sequence of images displayed as the game is
9 played constitute the work."

13:08:57 10 So it's the sequence of images that are displayed.
11 And the case also quotes legislative history from the
12 Copyright Act that says the fact that some or all of the
13 individual images in the group would also constitute separate
14 works does not prevent the group of images from being an
15 audiovisual work.

16 THE COURT: Okay. I'll look at *Atari*.

17 MR. GENETSKI: I also have an Understanding Copyright
18 Law treatise here, Your Honor, that has a video games cases
19 section in it which it speaks again to the interpretation of
13:09:30 20 the definition that Your Honor just read. And curiously, this
21 snippet speaks to two issues raised by Mr. Venable, the one
22 we're discussing now and also the notion that the players of
23 World of Warcraft are the authors of any expression that's
24 generated in the game because they make the choices. What this
13:09:49 25 says is the most recent analysis of the fixation requirement is

13:09:52 1 involved actions --

2 THE COURT: Slower please.

3 MR. GENETSKI: I'll read a truncated portion.

4 "When the game is not being played, the images are
13:10:05 5 repetitive. But during play they're subject to variation by
6 human intervention. Players playing the game. The defendants
7 in several cases have claimed that they were free to copy the
8 plaintiff's games because the games were not fixed in a
9 tangible medium of expression but were rather ephemeral
13:10:26 10 projections on a cathode ray tube. In addition, the
11 variations of image patterns due to the different skills of
12 those playing the games prevented a sufficiently consistent
13 pattern to constitute a fixation of the work." See, it's
14 different than the other case. "The case law has universally
15 renounced this reasoning."

16 It goes on to cite *Stern Electronic v Kaufman*, Second
17 Circuit case.

18 THE COURT: What's the cite for that?

19 MR. GENETSKI: 669 F.2d 852. The *Atari* case is cited
13:11:04 20 here as well. Two different *Atari* cases, actually.

21 THE COURT: All right.

22 MR. GENETSKI: So, Your Honor, our view is that
23 copyright law has -- the copyright cases have answered this
24 question and they said you do have protection in the nonliteral
13:11:33 25 elements. They're able to be perceived on the screen, the fact

13:11:37 1 that they're fixed enough sufficiently to be able to be
2 perceived.

3 And we also heard from Mr. Ashe and also from
4 Mr. Calandrino that as the particular nonliteral elements that
13:11:50 5 we all watched, we all perceived in the courtroom yesterday,
6 are generated. The code that is generating them is fixed in
7 RAM at the same time. And that code -- the code that
8 generates those expressive elements, you can't get those
9 expressive elements without -- if you're -- without being
13:12:11 10 connected to the server and without bypassing Warden. And the
11 fixation is also at the RAM level in the code. The image
12 itself is fixed in the video RAM or video card, but the
13 underlying code is fixed in RAM simultaneous to the image
14 being perceived.

13:12:28 15 We believe the authorities support our position, Your
16 Honor, that we do have protection in those nonliteral
17 elements.

18 As to the -- those -- what I just read touched also a
19 bit on the users of games are not the authors, and we believe
13:12:43 20 that question was answered definitively in the early 1980s as
21 well.

22 I have a *Williams Electronics v Artic International*
23 case, 685 F.2d 870. I won't read the quote, Your Honor. But
24 this case and others like it stand for the proposition that
13:13:08 25 although users have some degree of selection and input into a

13:13:14 1 video game, or here a computer game, the stories are all
2 prewritten by the author. They were in these cases and they
3 are here. Blizzard has written all the lore, all the quests.
4 It defined which characters can be in the game and where they
13:13:31 5 can be. The effect the user has is similar to when you get a
6 DVD. When I pull up the menu selection from a DVD, I'm
7 allowed, in most cases these days, to jump through any number
8 of 25 different scenes on the DVD.

9 Just because a user decides to watch the climactic
13:13:53 10 scene at the end of the movie first doesn't mean the user
11 becomes the author of that work because they watched it out of
12 order.

13 One of the courts actually uses the analogy of
14 comparing it to someone changing the channels, which I think
13:14:07 15 is a similar analogy. So we don't think there's any basis for
16 the position that the users are the authors of the work.

17 I believe that's everything I have, Your Honor.

18 THE COURT: Okay. All right. Thanks.

19 MR. VENABLE: Your Honor, may I make just one very
13:14:27 20 quick point?

21 THE COURT: You can. Last point.

22 MR. VENABLE: Yes.

23 Mr. Genetski's last discussion about the issue of
24 authorship. I think the case that he was actually referring
13:14:40 25 to about the -- the case he was referring to about the video

13:14:44 1 game cases, those are not being transmitted. And to the
2 extent that they are, they're being shown simultaneously as
3 they've already been fixed.

4 In this case it's the server that is providing
13:14:57 5 information down to the hard drive. And at the point which it
6 is then being copied from the hard drive into RAM, it is being
7 fixed. And it is not -- so under the definition that you were
8 reading from in terms of what constitutes being fixed, it
9 would not fall under that definition and would be
13:15:15 10 distinguished from those cases that he cited to.

11 The last point was regarding authorship by users.
12 There's the explicit case that talks about -- this is a
13 Seventh Circuit case, the *Midway versus Artic* case. I do have
14 a cite for you and I can get it for you. But the case said
13:15:33 15 that the reason why -- this was a case involving Galaxia, the
16 game Galaxia, which was a '80s game where the user who played
17 the game was simply moving from -- had very limited movements
18 in what the player could do. And the defendant in that case
19 was trying to argue that the -- that he had some -- that he
13:15:55 20 had some contribution that was being made to the game because
21 of his movements. And the court rejected that argument
22 because they said his movements were very limited. He
23 actually provided no creative expression in the game. And
24 they said that that type of movement was not creative
13:16:12 25 expression.

13:16:13 1 But that's not the case here in the World of Warcraft
2 game. It is much broader. The users have far more control.
3 It's certainly not limited in terms of just moving from left
4 to right. You pick your characters -- you understand.

13:16:25 5 THE COURT: I understand.

6 MR. VENABLE: Okay. Thank you, Your Honor.

7 THE COURT: Okay. Well, thank you for helpful and
8 very excellent presentations. I now have the hard task of
9 trying to figure out who's right. And I will go work on that.
10 I will try to get you a decision sometime next week, if I can.

11 (The Court and the courtroom deputy confer.)

12 THE COURT: Okay.

13 MR. VENABLE: Your Honor, that citation to *Midway* is
14 704 F.2d 1009.

13:17:13 15 THE COURT: Okay.

16 MR. VENABLE: I'll send that over to you today.

17 THE COURT: Thanks very much.

18 (End of transcript.)

19 * * * * *

20
21
22
23
24
25

C E R T I F I C A T E

1
2
3 I, PATRICIA LYONS, do hereby certify that I am duly
4 appointed and qualified to act as Official Court Reporter for
5 the United States District Court for the District of Arizona.

6
7 I FURTHER CERTIFY that the foregoing pages constitute
8 a full, true, and accurate transcript of all of that portion
9 of the proceedings contained herein, had in the above-entitled
10 cause on the date specified therein, and that said transcript
11 was prepared under my direction and control, and to the best
12 of my ability.

13
14 DATED at Phoenix, Arizona, this 5th day of May, 2009.

15
16
17
18
19 s/ Patricia Lyons, RPR, CRR
20 Official Court Reporter
21
22
23
24
25