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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC,

Plaintiff and Counterdefendant,

vs.

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

Defendants and Counterclaimants,

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

Third-Party Plaintiffs,

vs.

MICHAEL DONNELLY, an individual

Third-Party Defendant.

Case No.: CV06-02555-PHX-DGC

MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF MDY INDUSTRIES, LLC, AND THIRD PARTY DEFENDANT MICHAEL DONNELLY WITH SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

The Honorable David G. Campbell

Oral Argument Requested

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Plaintiff MDY Industries, LLC ("MDY") and Third-Party Defendant, Michael Donnelly ("Donnelly") (collectively "MDY" or "plaintiffs") move for summary judgment against defendants Blizzard Entertainment, Inc. ("Blizzard") and Vivendi Games, Inc. ("Vivendi") (collectively, "the defendants") on the claims alleged in MDY's complaint and the defendants' counter-claim/third-party complaint. This motion is fully supported by the separate Statement of Facts filed with this brief and the accompanying Memorandum of Points and Authorities.

I. BACKGROUND FACTS[1]

A. World of Warcraft

On November 23, 2004, Blizzard released the computer game World of Warcraft ("WoW"). WoW is a massive multi-player online roll playing game (MMORPG). Blizzard distributes the WoW game client through retail purchase of compact discs, or a person can freely download a copy of the game client from Blizzard's website to a computer. Since its initial release, Blizzard has steadily increased the number of active subscriptions of its game. On average, Blizzard has issued approximately one million new WoW game accounts every three to four months. On January 22, 2008, Blizzard announced its WoW subscriber base reached ten million active accounts. Each active subscription account requires that a user pay a monthly fee to play the game. In the U.S., the monthly cost is fifteen dollars per month.

B. Game Play

In the WoW game, a person controls a character avatar within a persistent game world, exploring the landscape, fighting monsters, performing quests, building skills, and interacting with computer-generated characters, as well as other players. The game rewards success with in-game currency (gold), items, experience and reputation, which in turn allow players to improve their skill and power. A player begins the game at level 1. Players can raise their characters from level one to level 60 without an expansion module,

[1] *See generally* attached Statement of Facts.

and level 70 if they have purchased an expansion module of the World of Warcraft game entitled, "The Burning Crusade." Additionally, players may opt to take part in battles against other players of an enemy faction, in player vs. player battlegrounds or in normal world zones subject to the rules in place on the particular server. Duels can also be fought between members of the same or opposing factions, although these do not provide rewards. Many players also choose to join guilds. Players can form short term parties and raid groups to conduct raids against enemy territories.

C. Blizzard's World of Warcraft End User License Agreement ("EULA") and Terms of Use Agreement ("TOU")

Prior to installing the game on a computer hard drive, the account holder must agree to the terms of Blizzard's EULA and TOU. Generally, the agreements grant the end user a non-exclusive license to operate the WoW game client software to play WoW by installing it on an unlimited number of computers that the user owns, as well as the right to make one archival copy of the compact discs containing the game client software. In its EULA and TOU, Blizzard prohibits the use of certain "unauthorized third-party software" with the WoW game client, including "bots".[2] A "bot" in this context is a software program that enables a person to run another software program on auto-pilot with minimal assistance from the person.

D. Blizzard's Software Detection Systems - Warden and Scan.dll

Blizzard does not utilize any access or copy protection measures to prevent the copying of its WoW game client software in either its compact disc or downloaded form. Blizzard's WoW game client, however, does include two unauthorized software detection mechanisms called Warden and Scan.dll.

Warden detects whether a licensee is using unauthorized third-party software with the WoW game client that violates Blizzard's EULA or TOU. When a licensee is running the WoW game client, Warden detects changes to the licensee's computer

[2] Blizzard did not explicitly prohibit "bots" until it modified its EULA on December 11, 2006. *See*, SOF at ¶¶ 16-18.

memory (RAM) and reports any changes back to Blizzard. Blizzard then compares the changes in the licensee's RAM for known patterns of code that indicate that the licensee is using an unauthorized third-party software program. Once Blizzard confirms the licensee's use of an "unauthorized" third-party program, Blizzard decides whether it will ban the licensee's account. Blizzard does not ban, nor has it ever banned, the licensee personally.

Scan.dll is the second element of Warden's unauthorized software detection system. Scan.dll is a dynamic link library file that is part of the WoW game client. After the computer loads the WoW game client into a licensee's RAM, the computer executes the Scan.dll file. The file scans the inside of the licensee's RAM and WoW game data files and checks for changes or modifications to the WoW game client code and game files to determine whether the licensee has loaded any "unauthorized" third-party programs. If Scan.dll detects an unauthorized program, the WoW game client will present an error message and will not allow the licensee to log onto WoW server to play WoW. A person can easily remove Scan.dll from his hard drive by locating the file on his computer and pressing the "Delete" key.

Neither Warden nor Scan.dll control access to the WoW game client (the code the user has purchased on disks or downloaded from Blizzard), because they cannot restrict a person from:

1) accessing the WoW game client software code;
2) copying the WoW game client software from an existing installation, a compact disc or DVD to another form of storage medium;
3) copying a downloaded version of the WoW game client obtained from Blizzard's server to another form of storage medium;
4) distributing copies of the WoW game client software; or
5) making derivative works of the WoW game client software.

E. MDY Industries, LLC and Michael Donnelly

Michael Donnelly is a highly skilled computer software developer and specialist. Michael Donnelly founded MDY Industries, LLC, an Arizona Limited Liability Company on December 6, 2004, for the purpose of separating his computer consulting

business from his personal assets. Donnelly is the sole member of MDY.

1. MDY's Glider Software - Background

When Blizzard released WoW in late 2004, Donnelly became an avid player of WoW. Like many others who play WoW, Donnelly became frustrated with the amount of time it took to advance his character in WoW. Inspired by his desire to advance his character's level to the same level several of his friends had reached, Donnelly searched online for any available programs that would help him speed up the time it took to level his character up to where his friends were. After searching and being unsuccessful in locating a software program to meet his needs, Donnelly decided to write software code to assist him in catching up with his friends in the game without having to be physically playing WoW. Between March 2005 and May, 2005, Donnelly developed a software program that became known as WoWGlider ("Glider").

2. How Glider Functions

Generally, Glider allows a person to play a piece of software on autopilot by automating the necessary keystrokes to play the game. A Glider user must be an active, paying customer of Blizzard to use the Glider program with WoW. Under certain conditions, Glider can help a WoW player raise the level of his character to level 60 or 70 by playing the character when the customer is idle or absent from his computer. Once a player reaches the highest level in the game, Glider does not allow the player to accumulate any more experience points in the game, and Glider's utility is drastically reduced. Glider can also assist handicapped persons with limited use of their limbs by minimizing the need to use the keyboard to play WoW.

A player can load Glider either before or after he loads WoW into the computer's RAM memory. Glider works[3] by reading the player's state information (character health, nearby monsters, nearby chests and mines, the character's spells) from the user's RAM

[3] MDY has since developed several current and potential uses for Glider with other software programs. SOF, at ¶¶ 38-46. However, for the purpose of this motion, the description of how Glider works is limited to its use with the WoW game client software.

memory. It then sends keystrokes into the WoW client software on behalf of the user to try to kill the monsters and do other repetitive tasks such as collecting loot from killed monsters and harvestable objects. Glider is inefficient as a gold farming tool, and many other programs are available that do a much better job at gold farming than Glider does or can. Under no circumstances can Glider:

a. alter the WoW client game software in anyway;
b. give the WoW player the ability to do anything that a human player could not already do;
c. give the WoW player additional power, wealth, or in-game advantage over any player other than allowing the player not to be present when playing the game;
d. give the WoW player the ability to make any copies of, make derivative works of, or publicly distribute copies of the WoW client software.

3. Glider's Release to the Market

Based upon Donnelly's personal success using Glider, Donnelly decided to see if he could sell the Glider software for profit. In June, 2005 Donnelly began selling the Glider software through MDY. Since its release, MDY has made the program available solely by downloading it from MDY's website located at www.mmoglider.com at a cost of $15.00 per license. Moreover, MDY has increased its sales from approximately twenty in the first month, to over 100,000 as of February, 2008.

MDY utilizes Google AdWords to draw traffic to its website and to advertise the availability of the program. MDY also markets the program using an affiliate structure whereby third-parties can post ads for the Glider program on their website and are compensated if a Glider sale originates from the advertisement. MDY has only marketed the game as an alternate method to reduce the time it takes to level a character to 60 or 70. Although a person can use Glider (inefficiently) as a tool to help WoW licensees to "farm gold" within the WoW game, MDY has never marketed the program for that purpose and actively discourages persons from using Glider as a gold farming tool.

4. Glider's Detection Avoidance Development

Prior to September, 2005, Donnelly did not know that Blizzard would object to

anyone using Glider with WoW. Donnelly did not become aware that Blizzard was attempting to detect the use of Glider until September, 2005 when Blizzard banned certain Glider customers' accounts. Prior to that time, Donnelly had not developed any software component that avoided Blizzard's ability to detect software.

Donnelly responded to Blizzard's efforts to detect and ban Glider users by developing software counter-measures to avoid being detected by either Blizzard's Warden or Scan.dll programs. In late September, 2005, Glider began avoiding Warden and Scan.dll[4] so that Blizzard's licensees could use Glider with the WoW game client software without Blizzard interfering with Glider. Glider, however, cannot circumvent Warden or Scan.dll for the purpose of allowing a person to:

1) make an unauthorized copy of the WoW game client software;
2) make an unauthorized derivative work of the WoW game client software; or
3) make an unauthorized distribution of the WoW game client software.

Although Blizzard's acts of detecting Glider and banning Glider users' accounts led Donnelly to believe that Blizzard considered Glider an unauthorized third-party software program under its EULA and TOU, Donnelly did not agree with how Blizzard interpreted its agreements. Donnelly believed that Blizzard had no right to control MDY's efforts to sell Glider because he had no contractual relationship with Blizzard. In addition, Blizzard's EULA did not originally prohibit "bots."[5]

F. Blizzard visits Donnelly and the Present Suit

MDY continued to sell Glider for several months. On the early morning of October 25, 2006 and without any prior notice, the defendants' counsel Shane McGee, an officer of Vivendi Games Fritz Kryman, and an unidentified private investigator appeared at Donnelly's home. When they arrived, they presented Donnelly with a copy of a complaint that they indicated would be filed the next day in the U.S. District Court for the

[4] All Glider users must do to avoid detection by Scan.dll is to launch the Glider program after the user loads the WoW client software.
[5] SOF, at ¶¶ 16-18.

Central District of California if Donnelly did not immediately agree to stop selling Glider and return all profits that he made from Glider sales. Blizzard's audacious threats offended Donnelly. Donnelly immediately contacted counsel and filed the present action. The defendants filed counterclaims against Donnelly and MDY for contributory and vicarious copyright infringement, violation of the Digital Millennium Copyright Act (17 U.S.C. §§ 1201(a)(2) and (b)(1)) and tortious interference with Blizzard's contractual relations with its licensees.

MEMORANDUM OF POINTS AND AUTHORITIES

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party," show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[6] "Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment."[7] The disputed evidence must be "such that a reasonable jury could return a verdict for the nonmoving party."[8] A court may enter summary judgment against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[9]

III. MDY CANNOT BE SECONDARILY LIABLE FOR COPYRIGHT INFRINGEMENT BECAUSE BLIZZARD CANNOT SHOW THAT ANY THIRD PARTY HAS INFRINGED BLIZZARD'S COPYRIGHTS

Blizzard asserts that MDY has infringed its copyright both contributorily and vicariously by selling the Glider software to Blizzard's customers.[10] As a threshold

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[6] Fed.R.Civ.P. 56(c); *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).
[7] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[8] *Id.* at 248.
[9] *Celotex*, 477 U.S. at 322.
[10] Counterclaims, at Counts II and III.

matter, a party cannot be secondarily liable for copyright infringement without a third party first directly infringing the copyright.[11] As a result, Blizzard must present at least some evidence that third parties have infringed its copyrights to avoid summary judgment. Blizzard cannot make such a showing as a matter of law.

A claimant seeking to establish copyright infringement must prove (1) ownership of a valid copyright and (2) engaging in one of the exclusive rights the Copyright Act affords the copyright owner (hereinafter referred to as "copying").[12] In this case, Blizzard cannot establish a third party infringed its copyright because Blizzard cannot demonstrate that anyone has made a "copy" of its WOW game client software and violated the Copyright Act. Even if Blizzard can establish that MDY's customers have breached Blizzard's EULA or TOU, the mere breach of contract is not enough to invoke the punitive remedies of the Copyright Act – nor should it be as a matter of public policy. To hold otherwise would turn every breach of a "license agreement" concerning the use of a product containing software (including automobiles and home appliances) into copyright infringement.

Copyright is not designed for, and cannot be made to bear, so much weight; nor can the remedies of copyright be invoked solely through artful contract drafting purporting to condition the copyright license on compliance with a vast array of non-copyright-related terms. Where a given business model envisions a customer act outside of the exclusive rights of copyright, contract and not copyright is the way to enforce such business model.

A. Since Blizzard's EULA grants its licensees the right to use the WoW game client software, Blizzard's licensees cannot infringe Blizzard's copyright simply by breaching a separate term in Blizzard's EULA/TOU

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[11] *Perfect 10, Inc. v. Amazon.com*, 06-55405, at 15474-76 (9th Cir. 2007) (stating that "As a threshold matter, before we examine [plaintiff's] claims that [defendant] is secondarily liable, [plaintiff] must establish that there has been direct infringement by third parties.")

[12] *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

that is unrelated to one of the five exclusive rights under 17 USC § 106.

Copyright law "has never accorded the copyright owner complete control over all possible uses of his work."[13] Rather, copyright law grants a limited bundle of exclusive rights to copyright owners. Specifically, the owner of a software copyright has the exclusive right to do and to authorize any of the following acts:[14]

1. to reproduce the copyrighted work in copies;
2. to prepare derivative works based on the copyrighted work; or
3. to publicly distribute copies of the copyrighted work by sale or other transfer of ownership, or by rental, lease, or lending.

Anyone who violates even one of these exclusive rights is a copyright infringer.[15] On the other hand, "anyone who is authorized by the copyright owner to *use* the copyrighted work … is not an infringer of the copyright with respect to such use."[16] In other words, by granting a nonexclusive license to use copyrighted material, the copyright owner waives any right to sue its licensee for infringing its copyright.[17]

Blizzard permits its licensees to load the WoW game client software into RAM to play WoW.[18] As such, Blizzard's licensees cannot violate Blizzard's exclusive rights under the Copyright Act to make copies simply by loading a copy of the program into RAM to play WoW. While the agreement purports to make the license conditional on the

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[13] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

[14] 17 U.S.C. § 106 (the remaining exclusive rights of public performance and public display would not apply to Blizzard's WoW client software).

[15] *Sony Corp.*, 464 U.S. at 433.

[16] *Peer Intern. Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338 (9th Cir. 1990) (emphasis ours).

[17] *Graham v. James*, 144 F.3d 229 (2nd Cir. 1998); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338-39 (9th Cir. 1990); *United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991) (holding that "[A]n exclusive licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it.")

[18] *See, e.g., MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993) (holding that non-licensed users violated the Copyright Act by making a copy of software into RAM).

licensee continuing to abide with all of its terms, the following section demonstrates that the drafter of an adhesion form contract cannot convert copyright-unrelated breaches of that contract into copyright infringement.

B. Blizzard cannot unilaterally extend the statutory reach of the Copyright Act; Blizzard's remedy for unauthorized use of third party software with WoW by licensed users lies exclusively in contract.

Even if a licensee violated Blizzard's EULA or TOU by using Glider while playing WoW, that licensee does not infringe Blizzard's copyright in its WoW client software.[19] Unauthorized use of a protected work infringes a copyright only when the unauthorized use "conflicts with one of the specific exclusive rights conferred by the copyright statute."[20] In other words, acts that breach a contract (such as Blizzard's EULA or TOU) infringe a copyright only when such acts would infringe the copyright without the contract.[21]

The Federal Circuit in *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.* is directly on point. In *Storage Tech*, the plaintiff manufactured certain data libraries and owned copyrights in a certain software package that accessed the data libraries. The software package contained two intertwined parts: (1) functional code and (2) maintenance code.[22] The plaintiff licensed the functional code to its customers, but not the maintenance code.[23] Nonetheless, the plaintiff provided a copy of the entire software package (functional code and maintenance code integrated together) to its customers. Both parts of the code were automatically loaded

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[19] *See, Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. at 447 ("Even unauthorized uses of a copyrighted work are not necessarily infringing.")

[20] *Id.* at 447.

[21] *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307, 1316 (Fed. Cir. 2005)(holding that "uses" that violate a license agreement constitute copyright infringement only when those uses would infringe in the absence of any license agreement at all).

[22] *Id*. at 1309-10.

[23] *Id*. at 1310.

into the RAM upon startup, and copying of the entire code was necessary to activate and run the program. The defendant was an independent contractor that repaired the data libraries that the plaintiff manufactured. In repairing the data libraries, the defendant copied and used the maintenance code. The plaintiff asserted that the defendant infringed its copyright because "the license agreement specifically excluded the use of the maintenance code."[24]

The *Storage Tech* court expressly rejected Plaintiff's attempt to bootstrap copyright infringement upon breaches of terms in a copyright license that did not involve one of the exclusive rights under the copyright act.[25] In doing so, the court noted that the potential reach of a contract is vast compared to the statutorily tailored reach of copyright law. Given the differing policies underlying contract and copyright, if courts allowed punitive remedies of the Copyright Act to be extended by mere contract, such a policy would create inappropriate results.[26] As one example, the court stated:

> "… [c]onsider a license in which the copyright owner grants a person the right to make one and only one copy of a book with the caveat that the licensee may not read the last ten pages. Obviously, a licensee who made a hundred copies of the book would be liable for copyright infringement because the copying would violate the Copyright Act's prohibition on reproduction and would exceed the scope of the license. Alternatively, if the licensee made a single copy of the book, but read the last ten pages, the only cause of action would be for breach of contract, because reading a work *does not violate any right protected by copyright law.*"[27] (emphasis ours).

Given that *Storage Tech's* license permitted copying of the maintenance code in order to use the program, the defendant's unauthorized use was "not forbidden by

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[24] *Id*. at 1311.
[25] *Id*. at 1316-17.
[26] *Id*.
[27] *Id*., *citing United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991) (holding "[a] licensee of any of the rights comprised in the copyright, though it is capable of breaching the contractual obligations imposed on it by the license, cannot be liable for infringing the copyright rights conveyed to it").

copyright law and cannot give rise to an action for copyright infringement" – even if its use might have breached the license.[28] Similarly, even if a WoW licensee breaches Blizzard's EULA or TOU by using Glider while playing WoW, the use of Glider cannot rise to the level of a copyright infringement.

Without any primary infringement, MDY cannot be a contributory infringer.

IV. MDY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE BLIZZARD CANNOT SUPPORT A *PRIMA FACIE* CASE UNDER EITHER 17 U.S.C. §§ 1201(A)(2) OR 17 U.S.C. § 1201(B)(1) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT ("DMCA").

In their counterclaims, the defendants allege that by circumventing Blizzard's two unauthorized software detection programs, Warden and Scan.dll, MDY is liable to Blizzard for violating 17 U.S.C. §§ 1201(a)(2) and (b)(1) of the DMCA. Even assuming all facts in the light most favorable to the defendants, MDY and Donnelly are entitled to summary judgment on Count IV of Blizzard's counterclaims.

A. Blizzard's Warden and Scan.dll programs are not "access control" measures under 17 U.S.C. § 1201(a)(3)(b), so MDY cannot violate § 1201(a)(1) or § 1201(b)(1) as a matter of law.

For Blizzard to prevail on its claim under § 1201(a)(2), Blizzard must first meet the threshold requirement that Blizzard's Warden and Scan.dll software programs "effectively controls access" to its WoW client software code:[29]

> (a) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—
>
> (2) is primarily designed or produced for the purpose of circumventing a technological measure that effectively *controls access* to a work protected under this title;

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[28] *Id*. (stating that "[L]ikewise, in this case, the copying of the maintenance code is permitted by the license. The use of the code may violate the license agreement, but it is not forbidden by copyright law and cannot give rise to an action for copyright infringement.")

[29] 17 U.S.C. § 1201(a)(2) and (a)(3)(b)(emphasis ours).

(3)(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

1. Warden is a data reporting machine, not an access control measure.

Blizzard limits Warden's utility to two functions: (1) Warden scans a licensee's computer RAM to determine if the licensee is playing WoW with third party software that Blizzard prohibits under its EULA or TOU,[30] and (2) if Warden detects an unauthorized software program, Warden notifies Blizzard.[31] Blizzard then reviews the data and decides whether it will close the licensee's WoW account.[32]

Under no circumstances does Warden control or prevent the licensee, or any third party, from "gaining access" to what the Copyright Act protects - Blizzard's WoW game client software.[33] Blizzard admits that Warden cannot prevent a person from copying, modifying, distributing, or even examining copies of the WoW client software code.[34] Moreover, even while Warden operates, a licensee can: (1) access all of the features of the WoW client software code; (2) play WoW game client; and (3) examine, copy, modify, or distribute copies of the WoW client software code to exactly the same extent he could if Warden was not operating.[35] Warden is a data reporting machine that does not control access to any part of the WoW game client software or the WoW server software. Consequently, Warden is not an access control measure, let alone an effective access control measure, for any work protected under 17 U.S.C. § 106 as defined under § 120a(a)(3)(B). Thus, MDY is entitled to summary judgment on the portion of Defendants' Count IV pertaining to 17 U.S.C. § 1201(a)(2).

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[30] SOF, at ¶22-25.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

2. Scan.dll is not an access control measure

Blizzard's Scan.dll software code also functions solely as a way to detect third-party software.[36] Although Scan.dll can control whether a licensee can access the WoW game client software to *play* the WoW game, similar to Warden, Scan.dll cannot control whether a licensee can access the WoW game client software to examine, copy, make derivative works or distribute copies of it.[37] In fact, Scan.dll cannot prevent the licensee *from loading the game client into RAM*. Even if Scan.dll detects prohibited software code – it can only stop the licensee from playing WoW.[38] However, loading the game into RAM is the *only* potential copyright infringement involved, for it is that step alone that even potentially involves the making of a "copy" of the game client software.

Blizzard apparently designed Scan.dll, like Warden, as a tool to help Blizzard enforce the terms of its EULA and TOU. Copyright law, however, does not govern these contracts. Blizzard's Scan.dll software does not protect access to Blizzard's copyrights. Even if Scan.dll did protect access, the Court cannot consider it to be an *effective* access control measure for any work protected as defined under § 1201(a)(3)(B), because a person can easily remove Scan.dll from his computer by simply locating the file in his directory and typing the "Delete" key. Thus, MDY is entitled to summary judgment on the portion of Defendants' Count IV pertaining to 17 U.S.C. § 1201(a)(2).

B. No reasonable relationship exists between access obtained by Glider avoiding Warden or Scan.dll and Blizzard's copyrighted WoW game client, so MDY cannot be liable under 17 U.S.C. § 1201(a)(2).

Even if the Court considers Warden and Scan.dll to be "effective access control measures" under 17 U.S.C. § 1201(a)(3)(B), MDY is still not liable to the defendants for violating § 1201(a)(2).

The DMCA creates liability for a person who *facilitates copyright infringement* by

[36] SOF, at ¶¶ 26-28.
[37] *Id.*
[38] Scan.dll cannot even start working until the WoW game client has been loaded from the licensee's hard drive into RAM. *Id.*

circumventing a technological protection measure - even if that person does not actually infringe any copyright.[39] Congress recognized that in the Digital Age, copyright owners needed additional protection to prevent people from distributing digitized works such as music CDs and DVD movies in a massive and uncontrolled fashion through the internet.[40] Congress enacted the DMCA "to help copyright owners protect their works from piracy behind a digital wall," such as encryption techniques or password schemes. [41] Congress did not enact the DMCA as a way for businesses to use the copyright laws to enforce their business models or license agreements.[42]

For example, under the DMCA, a person who distributes software for decrypting copyrighted movies incurs liability without need to prove actual copyright infringement because software for decrypting copyright-protected movies *facilitates* copyright infringement.[43] In this example, movie decryption software provides a "key" whereby a third party can wrongfully gain access to a protected work – i.e., commit a "digital trespass."[44] Thus, the DMCA "create(s) liability and consequent damages for making, using, or selling a "key" that enables a *trespass* upon intellectual property []."[45]

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[39] *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178, 1197 (Fed. Cir. 2004)(emphasis ours); *Id.* at 1195-96("Prior to the DMCA, a copyright owner would have had no cause of action against anyone who circumvented any sort of technological control, but did not infringe.")

[40] *Id.* at 1197.

[41] *Id.* at 1197 (emphasis in original).

[42] *See generally, Chamberlain*, 381 F.3d at 1201 (expressly rejecting "proposed construction [that] would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial "encryption" scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products.")

[43] *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000).

[44] *Chamberlain Group*, 381 F.3d at 1198.

[45] *Id.*

The DMCA, however, does not extend to *every* act of electronic circumvention.[46] The DMCA extends only to efforts to circumvent measures that enable access to a forbidden place and thereby facilitate "digital trespass".[47] In other words, there must be a nexus between "access" and the "protection" offered by copyright. No nexus exists – and DMCA liability does not attach -- when efforts to circumvent technological protection ***merely enables rightful access*** to a protected work for the purpose of using it for its intended purpose (without copying, making derivative works, or distributing the work).[48]

Chamberlain Group v. Skylink Technologies is the seminal case on this issue and factually analogous to the case at bar. In *Chamberlain*, the plaintiff manufactured remote controlled garage door systems ("GDOs") and the defendant sold universal remotes that worked with multiple GDOs, including systems manufactured by the plaintiff. In order for its remotes to work with plaintiff's systems, defendant circumvented the plaintiff's technological protection to access the functionality of plaintiff's GDO software. The plaintiff asserted that the defendant *per se* violated the DMCA because defendant circumvented technological protection to access the plaintiff's software. The Federal Circuit discussed the DMCA in detail and rejected the concept of a *per se* DMCA violation. Instead, the Federal Circuit found the acts did not violate the DMCA because there was no reasonable relationship between "access" and "protection." Circumventing the limitation on *use* of the software only facilitated the user/owner's ability to use the device to open his garage door, which he had every right to do after purchasing the software. The defendant's device did not enhance the user's ability to copy or distribute the software over anything the user could have done without the defendant's device. Indeed, the actual program was available for direct electronic readout even without the defendant's device. Therefore, the defendant's act did not violate the DMCA, because

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[46] *Id.* at 1195 ("defendants whose circumvention devices do not facilitate infringement are not subject to § 1201 liability" and "Congress could not have intended such a broad reading of the DMCA").

[47] *Id.* at 1196.

[48] *Id.* at 1195.

there was no connection between its use and any digital trespass that violated any copyright.[49]

Thus, according to *Chamberlain*, even if Warden and Scan.dll could be effective access control measures (which they are not), the defendants can never prove that Glider facilitates infringement of Blizzard's exclusive rights under the Copyright Act for its WoW game client software. As discussed above, Warden does not even limit the licensee's *use* of the game client software (and the user engages in only trivial activity to require the same statement to be true of Scan.dll, i.e., loading the WoW game client software before Glider or deleting Scan.dll). More to the point, neither Warden nor Scan.dll controls whether the licensee can make copies or otherwise infringe Blizzard's copyright in WoW. Therefore, MDY is entitled to summary judgment on Count IV of Blizzard's counterclaim pertaining to § 1201(a)(2).

V. MERELY DEVELOPING A SOFTWARE PROGRAM THAT WORKS ALONGSIDE BLIZZARD'S WoW GAME CLIENT SOFTWARE DOES NOT TORTIOUSLY INTERFERE WITH BLIZZARD'S CONTRACTUAL RELATIONSHIPS.

Blizzard alleges that MDY knew that the use of its Glider software with Blizzard's WoW game client violated Blizzard's EULA and TOU. Blizzard further alleges that because MDY knew Glider's use with WoW breached Blizzard's EULA and TOU, MDY's acts of offering its Glider software for sale to Blizzard's licensees tortiously interfered with the contracts ("TIWC") between Blizzard and its licensees. Even assuming Blizzard's allegations to be true, Blizzard cannot legally establish a claim for tortious interference.

Arizona has adopted the Restatement 2d of Torts and its five factors in analyzing whether a party is liable for TIWC. However, Blizzard does not have requisite evidence to support three of the five elements, namely that:

1. MDY acted improperly as to motive or means;

[49] *Id.* at 1202-03.

2. MDY intentionally interfered by causing a breach; and,
3. MDY's actually caused damage to Blizzard[50]

MDY admits that it knew Blizzard's EULA and TOU governed the relationship between Blizzard and its licensees, but Blizzard lacks evidence to establish these three required elements of the tort.

A. Blizzard's TWIC claim legally fails because no reasonable jury could find MDY's acts to be "improper"

Interference with contract is not *per se* tortious.[51] Interference with a contract is tortious only when the interference is "improper."[52] In this case, Blizzard cannot establish key facts needed to support its claim that MDY acted "improperly." Unless Blizzard can offer facts upon which a reasonable jury could find that MDY "acted improperly as to motive or means," Blizzard's tortious interference claim fails.[53] To evaluate whether MDY acted improperly, the Court must consider the following seven factors:[54]

a. the nature of the actor's conduct,
b. the actor's motive,
c. the interests of the other party with which the actor's conduct interferes,
d. the interests sought to be advanced by the actor,
e. the social interests in protecting the actor's freedom of action and the interests of the other party to the contract,
f. the proximity or remoteness of the actor's conduct to the interference and
g. the relations between the parties.

1. Nature of Conduct: MDY's actions were neither illegal nor inequitable

Actions that lead to a breach of contract are not always tortious. To survive summary judgment, Blizzard must demonstrate that MDY's actions were illegal – or at

[50] *Wagenseller v. Scottsdale Memorial Hosp*., 147 Ariz. 370, 386 (1985).
[51] *Id.* at 388 ("We find nothing inherently wrongful in 'interference' itself.")
[52] *Id.* ("If the interferer is to be held liable for committing a wrong, his liability must be based on more than the act of interference alone. Thus, there is ordinarily no liability absent a showing that defendant's actions were improper as to motive or means.")
[53] *Id.* at 387.
[54] *Id.* at 388.

least inequitable – for the Court to consider the actions to be tortious.[55] For example, using physical or criminal violence to induce a breach of contract would be tortious.[56] Using fraud, duress or abuse of economic power would ordinarily be considered tortious.[57] Moreover, courts have considered actions that violate public policy tortious.[58] Actions that comply with the law, however, will not be considered tortious – even if those actions induce a third party to breach a contract.

Here, Blizzard can offer no evidence to support finding anything illegal or inequitable about MDY's actions. Moreover, it would be completely illogical for Donnelly to tortiously harm the very company he depends upon to be successful. An accused tortfeasor cannot tortiously interfere with a plaintiff when the tortfeasor benefits from the plaintiff's well being. Without some evidence, no reasonable jury could find for Blizzard on this issue.

2. Actor's Motive: Because Blizzard has no evidence that malice was the sole motivator, Blizzard's TWIC claim legally fails

The question whether a desire to interfere with the plaintiff's contractual relations motivated the defendant is a major factor, if not the *most important factor* in determining whether the interference is "improper."[59] As long as the actor's motive is at least partially supported by a proper purpose, the actor has not tortiously interfered.[60] *Malice must be the sole motivator* for the actor to interfere *tortiously*.[61] For example, "a

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[55] *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 484 (App. 1988)("To survive summary judgment, [plaintiff has] to offer evidence that [defendant] acted illegally or inequitably, as for example, committing fraud, duress or abusing economic power.")
[56] *See, generally*, Restatement (Second) of Torts, § 767.
[57] *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. at 484.
[58] *See, e.g., Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370 (1985).
[59] Restatement 2d of Torts, § 767, cmt. d.
[60] *Bar J Bar Cattle v. Pace*, 158 Ariz. at 485("even if [defendant] had an improper motive, that fact would not necessarily make him liable in tort. One who interferes with the contractual rights of another for a legitimate competitive reason does not become a tort-feasor simply because he may also bear ill will toward his competitor.")
[61] *Id.; see also*, Restatement (Second) of Torts, § 767, cmt. d.

competitor does not act improperly if his purpose at least in part is to advance his own economic interests."[62]

Here, the Court should grant summary judgment because Blizzard cannot dispute that MDY acted, at least partially, with a proper purpose. As stated above, MDY had no malicious intent to harm Blizzard, especially since MDY benefits from Blizzard's continued success.[63] MDY does not lure away Blizzard's customers by selling Glider software licenses.[64] Most importantly, Blizzard's licensees cannot use Glider unless they are paying customers of Blizzard.[65] It would not be reasonable to believe that Donnelly had malicious motive to harm the very company that supports MDY's existence.[66] A profitable business motivated Donnelly, not a desire to harm Blizzard. Summary judgment is appropriate on this factor alone because Blizzard can never show that a malicious intent solely motivated MDY or Donnelly.

3. The Interest of the Other to Which the Actor Interferes

In many cases, the interference advances the interest of the induced party. If the party did not advance his interests, the interferer could not induce him to breach the contract. In this case, each purchaser of Glider makes a conscious choice to use Glider without coercion from MDY. MDY even puts a potential Glider customer on notice that Blizzard objects to its licensees using Glider. Thus, this factor favors MDY and Donnelly.

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[62] *Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. at 485, *citing with approval*, Restatement (Second) of Torts § 768(1)(d).

[63] SOF, at ¶¶ 34-37, 47-48.

[64] SOF, at ¶39.

[65] *Id.* While Blizzard may believe that it will fare better under a business model that disallows the use of bots, that belief has nothing to do with MDY's motivation in offering a different way of enjoying the game.

[66] SOF, at ¶50. MDY also increased its price from $15.00 to $25.00 for each Glider license. If MDY was trying to harm Blizzard, it would seem logical that MDY would *lower* its price, not raise it.

4. Interest advanced: MDY has advanced a business interest; Blizzard has no evidence to support that MDY advanced an interest in harming Blizzard

In many cases the interferer's interest will be to protect its own right(s). If the interferer acts in order to protect some financial or economic interest of his own, and does not use improper means, then the law will greatly protect his interest and may defeat recovery altogether.[67]

In this case, MDY is advancing its own self interest to run a successful business and earn profit. MDY is not trying to harm Blizzard. In fact, as discussed herein, MDY has no interest in harming Blizzard. MDY desires that Blizzard keep increasing its subscription totals so that its customers are more likely to purchase the Glider software.[68] Thus, this factor heavily favors MDY and Donnelly.

5. The Social Interests in Protecting the Freedom of Action of the Actor and the Contractual Interests of the Other favor MDY

Courts consider this factor most often in competitive situations involving business expectancies and contracts terminable at will. The law applies the tort to purely competitive interferences with business expectancies or at-will economic relationships, actually restrains competition and frustrates the freedom of contract.[69] It prevents competitors from pursuing business opportunities for fear that pursuing such opportunities may expose them to liability.[70] If one competitor is permitted to acquire a prospective business relation, so should the other.[71] The Courts will weigh the social interest to freely compete in favor of the interferer where the interference is alleged to involve business expectancies or at will relationships.[72] In certain circumstances, the

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[67] See, *Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 763 P.2d 545 (App. 1988); *see also,* Restatement (Second) of Torts, § 768.
[68] *See,* SOF, at ¶39.
[69] *See*, *Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 485 (App. 1988)("The tort of unlawful interference operates as a restraint on competition and freedom of contract").
[70] *Id*.
[71] *Id.*
[72] *Id.*

society's legitimate interest in vigorous competition may defeat recovery altogether.[73]

In this case, Blizzard's licensees can terminate Blizzard's EULA or TOU at will.[74] By alleging a claim of Unfair Competition in its counterclaims, Blizzard recognizes that the parties are competitors. Thus, as competitors, any attempt by Blizzard to restrain MDY's efforts to sell Glider acts as a restraint on trade. Therefore, this factor favors MDY, especially since Blizzard's licensees can terminate the EULA or TOU at will.

6. Proximity or Remoteness of the Actor's Conduct to Interference

As set forth in more detail in the statement of facts, Blizzard's agreements did not originally prohibit "bots."[75] It was only after Donnelly filed this lawsuit that Blizzard unilaterally elected to modify its TOU to exclude bots.[76] Thus, at least until Blizzard changed its contract, no reasonable jury could find that MDY interfered with Blizzard's agreements.

7. Relationship between the Parties

Where the plaintiff and the defendant are competitors, the defendant may properly induce the third party to breach its agreement with the plaintiff.[77] In this case, although MDY is doing business with WoW users, MDY does compete for the exclusive right to do business with WoW users. In fact, since a WoW user can be both Blizzard's customer and MDY's customer, this factor further supports MDY's position that it could not possibly interfere with a contract that does not cause Blizzard to lose business.

In sum, when this Court weighs all of the factors, it should conclude that no reasonable jury could find in favor of Blizzard. Neither MDY nor Donnelly have committed an improper act by selling Glider software. While Donnelly eventually learned that Blizzard objected to its Glider sales, Blizzard's objections do not render

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[73] *See* Restatement (Second) of Torts, § 768.
[74] SOF, Exhibit E, ¶6.
[75] SOF, at ¶16-18.
[76] SOF, at ¶16.
[77] *See* Restatement (Second) of Torts, § 768.

Donnelly's conduct "improper." The parties do not dispute any material fact related to this issue. Thus, the Court should dispose of this issue on summary judgment.

B. Since Blizzard did not prohibit the use of "bots" in its EULA or TOU when MDY launched Glider, Blizzard cannot establish that MDY intentionally interfered with its contracts.

To defeat summary judgment, the Blizzard must have some evidence that MDY had the "specific intent" to cause the interference.[78] As set forth in more detail in the statement of facts, Blizzard's agreements did not originally prohibit "bots."[79] It was only after Donnelly filed this lawsuit that Blizzard unilaterally elected to modify its TOU to exclude bots. [80] Thus, at least until Blizzard changed its contract, no reasonable jury could find that MDY had the specific intent to interfere with Blizzard's agreements.

C. No reasonable jury could find that MDY's acts caused injury to Blizzard

One express element of tortious interference is "resultant damage to the party whose relationship or expectancy has been disrupted."[81] With respect to this element, Blizzard cannot present any evidence that MDY has caused any damage.

An alleged interferor is liable only for damage he causes by *improperly* interfering with a plaintiff.[82] Whether a tortious act legally causes an element of damage requires a two-pronged analysis.[83] First, "the tort must be 'a substantial factor in bringing about the harm.'"[84] Second, "even if the tort is a substantial cause of the harm, the legal system may nonetheless 'relieve a [tortfeasor] from liability because of the manner in which his

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[78] *Antwerp Diamond Exchange of America, Inc. v Better Business Bureau of Maricopa County, Inc.*, 130 Ariz. 370 (1985).
[79] SOF, at ¶16-18.
[80] SOF, at ¶16.
[81] *Wagenseller v. Scottsdale Memorial Hosp*., 147 Ariz. at 386.
[82] *Thompson v. Better-Bilt Aluminum Prod*., 171 Ariz. 550, 554 (1992).
[83] *Id.* at 554; *see also, Agilysys, Inc. v. Vipond* No. CV-04-2023-PHX-DGC, at 5 (D. Ariz. September 13, 2006)
[84] *Thompson v. Better-Bilt Aluminum Prod*., 171 Ariz. at 554.

[tortious act] produces it.'"[85] One of the considerations for determining whether an act is a "substantial factor" is whether the act is the sole cause of the harm or whether other factors exist that contribute to the harm.[86]

In this case, Blizzard cannot present evidence of any harm caused by MDY. At best, Blizzard can only claim that it spends a million dollars each year to globally identify and prevent "botting."[87] Blizzard admits that MDY is only one of many "botters."[88] Yet Blizzard claims that MDY is liable to Blizzard for all of Blizzard's cost to prevent "botting."[89] This position is analogous to claiming that a person who steals a candy bar from a store should be liable to that store for all of its expenses to identify and prevent theft in general; a position that is insufficient to avoid summary judgment.

Blizzard has "the burden of showing that [MDY's] alleged wrongful conduct was a substantial factor in [Blizzard's] loss."[90] While a jury usually determines the conduct caused damage, the "mere possibility of causation is not enough" to defeat summary judgment.[91] Even if an inteferor's conduct contributed "only a little" to the claimant's injury, the claimant still "must show at trial that the injury would not have occurred 'but for' the [interferor's] conduct."[92]

Here, Blizzard's generalized claim that "bots" have damaged the WoW game experience is not enough to survive summary judgment. Blizzard has no evidence that MDY's acts were a substantial factor causing injury to Blizzard. Likewise, Blizzard has

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[85] *Id.*
[86] *Id*. at fn. 6. ("the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it").
[87] SOF, at ¶68-73.
[88] SOF, at ¶74.
[89] SOF, at ¶72.
[90] *Agilysys, Inc. v. Vipond* No. CV-04-2023-PHX-DGC, at 5 (D. Ariz. September 13, 2006).
[91] *Grafitti-Valenzuela v. Phoenix*, 513 Ariz. Adv. Rep. 20, at 12 (Ariz.App. 9-27-2007) citing *Badia v. City Of Casa Grande*, 195 Ariz. 349, 357 (App. 1999)("Sheer speculation is insufficient to establish the necessary element of proximate cause or to defeat summary judgment.")
[92] *Grafitti-Valenzuela v. Phoenix*, 513 Ariz. Adv. Rep. 20, at 12 (Ariz.App. 9-27-2007).

no evidence that its injuries would not have occurred "but for" the actions of MDY. Thus, no reasonable jury could find that MDY's acts caused injury to Blizzard.

VI. BY SELLING GLIDER SOFTWARE TO BLIZZARD'S LICENSEES, NEITHER MDY NOR DONNELLY HAVE UNFAIRLY COMPETED WITH THE DEFENDANTS.

For all the reasons stated above, MDY sold its Glider software with a legitimate purpose and for profit motive. Nothing MDY has done by selling Glider arises to the level of unfair competition under Arizona law. Even when viewing all of the facts in the light most favorable to Blizzard, the defendants cannot establish all of the elements of its unfair competition claim. Thus, the Court should grant plaintiff's motion for summary judgment on Count VI of the defendants' counterclaims.

VII. BY SELLING GLIDER SOFTWARE TO BLIZZARD'S LICENSEES, NEITHER MDY NOR DONNELLY HAVE BEEN UNJUSTLY ENRICHED.

For all the reasons stated above, MDY sold its Glider software with a legitimate purpose and for profit motive. Nothing MDY has done by selling Glider arises to the level of unjust enrichment under Arizona law. Even when viewing all of the facts in the light most favorable to Blizzard, the defendants cannot establish all of the elements of its common law unjust enrichment claim. Thus, the Court should grant plaintiff's motion for summary judgment on Count VII of the defendants' counterclaims.

VIII. CONCLUSION

For the foregoing reasons, even when viewing all of the facts in the light most favorable to Blizzard, summary judgment is appropriate because cannot make a sufficient showing with respect to essential elements of its claims, and on which Blizzard will bear the burden of proof at trial. As a result, no a reasonable jury could return a verdict for in Blizzard's favor. MDY is entitled to summary judgment as a matter of law on all counts.

Wherefore, MDY and Donnelly request that:

- Grant the instant Motion for Summary Judgment on all issues;
- Issue a judgment in favor of the MDY and Donnelly for all counts in its declaratory judgment action filed in this Court on October 25, 2006;
- Dismiss all claims filed by the defendants Blizzard Entertainment, Inc. and Vivendi Games, Inc. against MDY and Donnelly;
- Award attorneys fees to MDY and Donnelly under 17 U.S.C. § 505 and other common law.
- Award any further relief the Court deems proper.

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