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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC,

Plaintiff and Counter-Claim Defendant

vs.

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

Defendants and Counter-Claim Plaintiffs.

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

Third-Party Plaintiffs,

vs.

MICHAEL DONNELLY,

Third-Party Defendant.

Case No.: CV06-02555-PHX-DGC

BLIZZARD ENTERTAINMENT, INC. AND VIVENDI GAMES, INC. RESPONSE TO MDY INDUSTRIES, LLC and MICHAEL DONNELLY'S MOTION FOR SUMMARY JUDGMENT

The Honorable David G. Campbell

Blizzard Entertainment, Inc. and Vivendi Games, Inc. (collectively, "Blizzard") submit the following memorandum in opposition to MDY Industries, LLC and Michael Donnelly's (collectively, "MDY") motion for summary judgment on Blizzard's claims for secondary copyright infringement, DMCA trafficking,

tortious interference with contractual relationships, and unjust enrichment. For the reasons stated herein, MDY's motion should be denied.

I. Introduction

As detailed in Blizzard's own motion for summary judgment and supporting papers, Blizzard is the creator, licensor, and operator of the online game World of Warcraft ("WoW"), in which players join together online to create characters, socialize and explore a rich virtual universe. (*See* Blizzard's Statement of Facts in Supp. of Their Mot. for Summ. J. ("SOF") ¶ 9-12, 25). Blizzard enforces its rights in and to the game through both the WoW End User License Agreement ("EULA") and Terms of Use ("TOU"), as well as technological measures designed to prevent users from accessing the copyrighted game content in an unauthorized manner. (SOF ¶ 84, 105-119). Blizzard demonstrated in its motion that MDY's promotion, sale and support of the Glider "bot" program has induced tens of thousands of third parties to infringe Blizzard's copyrights and breach its agreements, and in the process damaged the WoW gaming experience for other players and forced Blizzard to divert significant resources from game development and support to efforts to stop Glider. (SOF ¶ 238-42). MDY has also frustrated Blizzard's ability to enforce its rights against Glider users by enabling them to circumvent Blizzard's technological access controls and conceal their infringements from Blizzard.

Against this backdrop, MDY seeks summary judgment on Blizzard's claims for secondary copyright infringement, DMCA trafficking, tortious interference, and unjust enrichment, in each instance focusing only on isolated elements of those claims that MDY contends Blizzard has failed to establish as a matter of law.[1] In its motion, however, MDY misconstrues well established law defining the scope of copyright and DMCA claims; law that compels entry of judgment in favor of Blizzard.

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[1] Blizzard does not oppose MDY's motion as to Blizzard's common law unfair competition claim.

In support of its arguments on tortious interference and unjust enrichment, MDY blatantly ignores the inconvenient facts of record (set forth in Blizzard's own motion) that clearly demonstrate the impropriety of its conduct and resulting harm, and instead seeks summary judgment largely on the basis of a self-serving, uncorroborated affidavit from Michael Donnelly that attempts to retroactively transform the true nature of MDY's business and the Glider product. Donnelly's affidavit portrays MDY as a business that seeks only mutual success with Blizzard, claims that MDY has always steered Glider users from particularly exploitive uses like gold farming, and even disingenuously suggests one aim of Glider is to assist the disabled to play WoW. (See MDY SOF ¶ 41-43, 51-56).

The complete, corroborated facts of record, however, tell a much different story. MDY's own prior admissions, marketing efforts, business tactics, and disregard for the concerns of Blizzard and the WoW population at large make clear that neither MDY's intentions nor its practices are nearly so noble. (SOF ¶ 158-70, 177-97, 234-47). Rather, like the purveyors of file-sharing programs, MDY designed Glider to enable and profit from third-party infringements. Here, Glider is a parasite program through which its creator MDY, and Glider users, improperly exploit the intellectual property of a single host -- WoW -- for their own commercial gain.

As demonstrated herein, under the prevailing law and undisputed facts of record, Blizzard, not MDY, is entitled to summary judgment on its claims for copyright infringement, DMCA trafficking and tortious interference.

II. The Standard of Review on Summary Judgment

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. Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment.'" *Lemon v. Harlem Globetrotters Int'l.,*

Inc., 437 F. Supp. 2d 1089, 1093 (D. Ariz. 2006) (Campbell, J.) (alteration in original). Moreover, the Ninth Circuit has refused to find a "genuine issue" where the only evidence presented is "uncorroborated and self-serving" testimony. *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

III. Under Well Established Ninth Circuit Law and the Undisputed Facts of Record, Glider Users' Copying of WoW in Excess of the WoW EULA and TOU Constitutes Copyright Infringement.

MDY's sole ground for seeking summary judgment on Blizzard's secondary infringement claim is its assertion that Glider users do not directly infringe Blizzard's copyrights. MDY appears to concede, as it must, that Glider users' loading of WoW into RAM is "copying" under firmly established Ninth Circuit law.[2] MDY further acknowledges that the WoW EULA and TOU authorize WoW users to make the copy in RAM, *subject to the conditions in the license*. (MDY Mem. at 8-9) (emphasis added). One such condition is that users do not run WoW with unauthorized programs like Glider. (SOF ¶ 178). Thus, when Glider users load WoW into RAM in conjunction with Glider, there is no question that a copy is created, and that the copy breaches WoW's license restrictions.

MDY asserts, however, that Glider users' copying of WoW in excess of the EULA constitutes merely a breach of contract, and not copyright infringement. This assertion runs directly counter to well established Ninth Circuit law. In the Ninth Circuit, breaches of a license equate to infringement where, as in this case, the license that gives users the right to use the work also conditions that right on compliance with certain restrictions on how the work may be used.

A. Glider Users Make Unauthorized Copies of WoW by Loading the WoW Software into RAM in Conjunction with Glider.

There is no factual dispute that to run Glider with WoW, users must copy WoW from their hard drive into their computers' RAM. (SOF ¶ 50-52).

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[2] *MAI Sys. v. Peak Computer, Inc*. 991 F.2d 511, 519 (9th Cir. 1993).

Significantly, WoW is a dynamic game. When a user first launches WoW, the executable of the program is loaded into RAM, and as the user moves through the game, additional copyrighted game content is loaded from the hard drive into RAM when the player reaches points in the game with which that content is associated. (SOF ¶ 51).[3]

WoW players' authority to copy and use the WoW client is governed by the terms of the WoW EULA and TOU, which conditions users' ability to copy WoW on their doing so within the scope of the license. (SOF ¶ 89-95). Specifically, the EULA states the following:

- IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, YOU ARE NOT PERMITTED TO INSTALL, COPY, OR USE THE GAME. (SOF ¶ 89).
- The Game is distributed solely for use by authorized end users according to the terms of the License Agreement. *Any use, reproduction, modification or distribution of the Game not expressly authorized by the terms of the License Agreement is expressly prohibited*. (SOF ¶ 89, 94).
- 1. Grant of a Limited Use License. If you agree to this License Agreement, computer software (hereafter referred to as the "Game Client") will be installed onto your hardware. . . . *Subject to your agreement to and continuing compliance with this License Agreement, Blizzard hereby grants, and you hereby accept, a limited, non-exclusive license . . . All use of the Game Client is subject to this License Agreement and to the Terms of Use agreement, both of which you must accept before you can use your Account to play the Game*. (SOF Supp. ¶ 265).
- 3. Ownership. A. *All title, ownership rights and intellectual property rights in and to the Game and all copies thereof . . . are owned or licensed by Blizzard*. (SOF Supp. ¶ 265).
- 4. Responsibilities of End User. A. *Subject to the license granted hereunder, you may not, in whole or in part, copy . . .the Game*. Failure to comply with the restrictions and limitations contained in this Section 4 shall result in immediate,

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[3] The testimony in the record makes clear that in order to avoid easy detection and blocking of Glider by Blizzard's anti-cheat technology, Glider users have relied on Glider's "launch pad" to *initiate* the start up and loading of WoW into RAM. (SOF ¶ 135). However, even if a Glider user chooses to launch WoW first, without using the Glider launch pad, and then subsequently launches Glider to run with WoW, that user continues to load expressive game content from the user's hard drive into RAM as he progresses through the game, and the copying of that content occurs in conjunction with running Glider. (SOF ¶ 51).

> automatic termination of the license granted hereunder . . . . (SOF Supp. ¶ 265).[4]

As detailed in Blizzard's own motion for summary judgment, the WoW license restrictions clearly condition a user's right to copy WoW into RAM on his doing so via authorized connections and without running WoW in conjunction with bot programs like Glider. Accordingly, loading WoW with Glider plainly exceeds the scope of authorized copying under the EULA and TOU. (Blizzard Mem. at 6-7)(*citing* relevant EULA and TOU provisions and demonstrating how Glider violates them).

B. Glider Users' Copying of WoW in Excess of Their Rights Under the EULA and TOU Is Infringing.

In asserting that Glider users' unauthorized copying of WoW constitutes merely a breach of contract, and not copyright infringement, MDY fails to acknowledge the Ninth Circuit's well established recognition of a copyright owner's right to pursue claims for infringement where a licensee acts in excess of the license scope. MDY may wish as a "matter of public policy" that copyright "cannot be made to bear so much weight," but established case law amply supports Blizzard's claim for infringement. (MDY Mem. at 8).

In fact, it is MDY's argument for an exclusive contractual remedy that overstates the law. MDY contends that "by granting a nonexclusive license to use copyrighted material, the copyright owner waives *any* right to sue its licensee for infringing its copyright." (*Id*. 9)(emphasis added). MDY implies, falsely, that this is a hard and fast rule, and selectively cites cases involving *exclusive* and *compulsory* licenses, as opposed to nonexclusive licenses conditioned on authorized use.[5] The

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[4] Section 4 of the TOU, which prohibits the use of unauthorized third party programs such as Glider, similarly is entitled "Limitations on Your Use of the Service." (Ex. 18 to Blizzard's SOF).

[5] *See id*. at 9, nn. 16-17, citing *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338 (9th Cir. 1990)(addressing claim under the compulsory music license in Section 115 of the Copyright Act); and *United States Naval Inst. v. Charter Commc'ns, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991)(addressing an *exclusive* license).

Ninth Circuit has repeatedly affirmed, however, that when "a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement."[6] In determining whether a copyright owner may pursue a claim for infringement, the key inquiry is whether the license terms at issue are *limitations on the scope of the license*, in which case a breach equates to infringement, or merely contractual covenants independent from the use rights granted under the license, in which case the remedy sounds in contract. *Sun I*, 188 F.3d at 1121. The analysis employed in answering this inquiry compels the conclusion that Blizzard's license restrictions are the former.

For example, in *Sun Microsystems, Inc. v. Microsoft Corp.*,[7] the district court, at the specific direction of the Ninth Circuit on remand, analyzed whether a license term that required software the defendant developed with plaintiff's copyrighted software to be "compatible" with certain other software helped define the scope of the license. The court concluded that the "compatibility" provision was merely a separate contractual covenant, because the license said "nothing about the license grants being *subject to*, *conditional on*, or *limited by compliance* with the compatibility obligations," and did not give the licensor an unqualified right to terminate the license for failure to comply with the provision. *Id.* at 1032-33. By contrast, the WoW EULA contains the very provisions that were lacking in *Sun II*, and which evidence that Blizzard's prohibitions on impermissible uses of WoW help define the scope of the license. The WoW EULA clearly provides a "Grant of a Limited Use License," conditions licensees' rights to use and copy the program on

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[6] *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 11-22 (9th Cir. 1999); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085, 1087 (9th Cir.1989); and *LGS Architects, Inc. v. Concordia Homes,* 434 F. 3d 1150, 1156 (9th Cir. 2006).

[7] 81 F. Supp. 2d 1026, 1032 (N.D. Cal. 2000) ("*Sun II*")

continued compliance with the license,[8] and permits Blizzard to terminate the license in the event of non-compliance.[9]

Another recent district court decision is likewise instructive. In *Netbula, LLC v. Storage Technology Corp.*,[10] the court assessed whether two distinct licenses involving the same software ─ one defining the number of users permitted to use the software, the other restricting the operating systems that could be used in conjunction with the software ─ constituted limitations on the scope of the licenses. After surveying Ninth Circuit authority, the court held that the former provision was merely a secondary contractual covenant, while the latter limited the scope of the license itself. In deeming the limit on the number of users a separate contractual covenant, the court explained that "[t]his provision does not limit *how* the software may be used, but instead defines what the purchase of one license gives the buyer." *Id.* at *5 (emphasis in original). By contrast, the court found the limitation on operating systems that could be used with the software "[l]ike the license in *LGS* and *S.O.S.*" a restriction on "the way in which the licensed material may be used and [thus] part and parcel of the license grant itself." *Id.* Because the second license "restriction limit[ed] the breadth of the license," the court held the breach of that provision formed the grounds for an infringement claim. *Id.*

As in *Netbula*, the WoW license restrictions condition "*how* the [WoW] software may be used" (and specifically under what conditions users are authorized to load the software into RAM) and thus "*limi[t] the breadth* of the license." *Id*.

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[8] (*e.g.*, "*Subject to your agreement to and continuing compliance with this License Agreement, Blizzard hereby grants, and you hereby accept, a limited, non-exclusive license*"; "*Subject to the license granted hereunder, you may not, in whole or in part, copy . . .the game*)"(SOF Supp. ¶ 265).

[9] "*Failure to comply with the restrictions and limitations contained in this Section 4 shall result in immediate, automatic termination of the license granted hereunder*"). (SOF Supp. ¶ 265).

[10] No. C06-07391 MJJ, slip op., 2008 WL 228036 (N.D. Cal Jan. 18, 2008).

When the rights conferred by a license are subject to such limitations, the breach of that license is plainly grounds for infringement. *Id*.; *Sun II*, 81 F. Supp. 2d at 1032-33; *see also Ticketmaster, L.L.C. v. RMG Techs., Inc.* 507 F. Supp. 2d 1096, 1102-03, 1109-10 (C.D. Cal. 2007)(holding that using a bot program to access and download copies of copyrighted web pages into RAM in order to purchase large quantities of tickets ─ where the use of bots for this purpose was prohibited by the website's terms of use ─ infringed Ticketmaster's copyrights).

In lieu of this authority from within the Ninth Circuit, MDY relies heavily on the Federal Circuit case *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*[11] That case, however, is inapposite. First, the court's holding of non-infringement hinged on the fact that the StorageTek license at issue placed *no restriction* on the defendant's right to *copy* the maintenance code at issue (i.e., load the code into RAM), and thus the license authorized the copying of that code.[12] Moreover, the court's reasoning 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" actually compels a finding of infringement in this case. *Id*. at 1316. Here, there is no question that, in the absence of *any* license at all, users would have no right to copy WoW into RAM. By MDY's own admission, that right is *granted* to users in the WoW licenses. (MDY Mem. at 9). Absent the license, the use objected to here - copying into RAM - would infringe.

Accordingly, where the same license that confers the right to copy also conditions that right on continued compliance with certain restrictions, exceeding those restrictions is infringement. Indeed, the *Storage Technology Corp*. court recognized as much by distinguishing its facts from those at issue in *S.O.S., Inc.*,[13]

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[11] 421 F.3d 1307 (Fed. Cir. 2005).

[12] 421 F.3d at 1315-16.

[13] 886 F.2d 1081, 1087 (9th Cir. 1989).

where the use the copyright owner objected to included copying of its software. 421 F.3d at 1316. As in *S.O.S.*, *Netbula*, and *Ticketmaster*, and contrary to *Storage Technology Corp.*, the act complained of in this case is the *unauthorized copying* of WoW into RAM. The WoW license restrictions, unlike the agreement in *Storage Technology Corp.*, subject users' authorization to copy and use WoW to certain conditions. When a Glider user exceeds those restrictions, he infringes.

IV. Blizzard's Warden and Scan.dll are Technological Measures that Effectively Control Access to Blizzard's Copyrighted Work and Protect Blizzard's Rights as a Copyright Owner.

MDY does not, because it cannot, contest that it sells a program primarily designed to circumvent Blizzard's anti-cheat technologies. Rather, MDY seeks summary judgment on Blizzard's DMCA claims solely on the grounds that: 1) Blizzard's anti-cheat technologies do not qualify as "technological measure[s] that effectively *contro[l] access to* a [copyrighted] work" under the Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(2) and (a)(3)(b)(emphasis added); and 2) If Blizzard's anti-cheat technologies are such measures, MDY cannot be liable under Section 1201(a)(2) because no reasonable relationship exists between the access gained to WoW by Glider and consequential copyright infringement. The facts concerning how Blizzard's technologies work are undisputed, but MDY misapplies applicable precedent and neglects to address certain of Blizzard's grounds for DMCA liability.[14]

A. Blizzard's Anti-Cheat Technology Effectively Controls Access to and Protects Blizzard's Rights in WoW and Portions Thereof.

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[14] As discussed in Section III.A.2 and B. *infra*, MDY fails to address Blizzard's distinct claim under 17 U.S.C. § 1201(b)(1)(A) that Glider circumvents "technological measure[s] that effectively *protec[t] a right of a copyright owner . . . in a work or portion thereof*," *id*. (emphasis added) beyond including the statutory reference in its heading and topic sentence for its DMCA argument. As detailed *infra*, § 1201(b)(1)(A) protects a separate right of a copyright owner, in Blizzard's case its right to preclude WoW users from loading copyrighted WoW content into RAM in excess of their license.

In order to access the expressive, copyrighted WoW game content, a user must load the executable portion of the WoW client into her computer's RAM and connect to Blizzard's WoW servers, after which point substantial additional expressive content continues to be loaded into RAM as the user encounter new aspects of the WoW universe. (SOF ¶ 51). As detailed in Blizzard's own motion, Blizzard's "Warden" anti-cheat technology, comprised of two components -- scan.dll and the Warden resident component[15] -- is designed to safeguard access to this expressive content, and enforce the WoW license restrictions on copying and use of the program in conjunction with unauthorized programs. (Blizzard Mem. at 11-13).

1. Scan.dll and Warden are Effective Access Controls

The DMCA states that "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." 17 U.S.C. § 1201(a)(3)(B). Here, scan.dll loads immediately upon launching the game, scans the RAM of the user's computer to ensure the copy of WoW supplies only the authorized information ─ a clean copy of WoW free of unauthorized cheats ─ and denies a user access to the game servers and the expressive game content on the client if it detects a cheat. (SOF ¶ 108-114). If the user removes the cheat from memory, launches the game again and supplies the correct information to pass the check, scan.dll will then permit the user to log in and access the copyrighted content.

MDY contends that scan.dll, even if it is a DMCA access control, is not "effective," because a user can delete the file containing scan.dll from his hard drive to prevent its operation. This assertion is belied by the facts of record, however, and contrary to established case law. Identifying and locating the file containing scan.dll

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[15] Although the two components collectively comprise the "Warden" anti-cheat technology, Blizzard uses the term "Warden" herein to refer to the resident component.

that is installed along with the WoW client is hardly trivial, and there is no evidence in the record that WoW users have successfully disabled scan.dll by doing so. In fact, when scan.dll was successful in identifying and blocking access to WoW in conjunction with Glider, MDY did not merely demonstrate to his users how they could "easily" remove the scan.dll file to resume use of Glider. MDY instead invested the time and effort to analyze the process scan.dll ran to identify Glider, and modified the Glider code to conceal itself and circumvent that process. (SOF Supp. ¶ 274). Moreover, the mere fact that Glider circumvents this access measure does not render the control ineffective, because any claim under this section of the DMCA must arise from the circumvention of an access measure; reading successful circumvention as an indicator of the ineffectiveness of a control would eliminate all claims under the statute.[16] Here, the fact that scan.dll has, with the notable exception of Glider, been extremely successful in blocking access to users running unauthorized programs in conjunction with WoW, demonstrates that it is an "effective" access control. (SOF ¶ 114).

Warden provides a secondary access control after scan.dll permits initial access to the game, either because no cheat was running at the time or because the cheat successfully circumvented scan.dll. Warden continuously scans the computer's RAM while the user is connected to Blizzard's game server, and can automatically revoke a user's access to the game upon detection. (SOF ¶ 115-19). Warden has located cheats and revoked user access tens of thousands of times (including periodic success with Glider), proving it to be an effective measure against virtually every cheat Blizzard has encountered, save Glider. (SOF ¶ 114). MDY styles Warden as a "data reporting machine," and contends it cannot be an

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[16] *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317-18 (S.D.N.Y. 2000) (rejecting argument that "weak cipher" that was "trivial" to circumvent was not an effective access control), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

access control because while Warden runs a user is able to access the WoW content and play the game. This argument neglects to acknowledge, however, that once Warden detects and reports the presence of a cheat, Warden can then *revoke* a user's continued access to that game content. (SOF ¶ 116-17).

2. Scan.dll and Warden effectively protect Blizzard's rights in WoW and portions thereof

MDY fails to address Blizzard's distinct claim under Section 1201(b)(1)(A) that Scan.dll and Warden are "technological measure[s] that effectively protect[] a right of a copyright owner under this title in *a work or a portion thereof*." 17 U.S.C. §1201 12 (b)(1)(A) (emphasis added). Under Section 1201(b)(2)(B) of the DMCA, "a technological measure 'effectively protects a right of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the *exercise of a right of a copyright owner* under this title." *Id*. § 1201(b)(2)(B). Here, both Scan.dll and Warden protect Blizzard's well established right to prevent unauthorized copying of WoW in excess of the WoW license restrictions.

When scan.dll prohibits a user from accessing the game, it precludes any copyrighted game assets (beyond the initial authentication module) from being loaded into the user's RAM. (SOF ¶ 111). Similarly, when Warden detects a cheat, it prevents additional copyrighted portions of WoW from being copied into RAM without authorization. (SOF ¶ 116). Because loading a program into RAM constitutes copying for purposes of copyright law, loading WoW in excess of Blizzard's authorization under the WoW EULA and TOU (i.e., in conjunction with Glider) violates Blizzard's exclusive right to make copies of WoW.[17] Accordingly, because Scan.dll and Warden prevent a Glider user from copying substantial

[17] *MAI Systems*, 991 F.2d at 518-19.

additional portions of Blizzard's copyrighted work, they qualify as technological protection measures under § 1201(b)(2)(B).[18]

B. In Circumventing Scan.dll and Warden, Glider Enables Users to Make Unauthorized Use and Copies of WoW.

MDY contends that even if scan.dll and Warden are "effective access control measures," MDY has not violated § 1201(a)(2) of the DMCA because Glider's circumvention lacks a "reasonable relationship" to the protection of the copyrighted WoW work. Specifically, MDY argues that Glider's circumvention of scan.dll and Warden merely enables Glider users' "rightful access" to WoW, and does not enable them to make any use of WoW they would not otherwise have the ability, and the right, to make without Glider. In making this argument, MDY draws a flawed comparison between Glider and the universal garage door remote control at issue in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*[19]

In *Skylink*, the court rejected the plaintiff Chamberlain's DMCA claim because it found no nexus between the circumvention and Chamberlain's protection of its copyrighted work where Chamberlain made *no attempt to limit* its customers inherent right to use the product they purchased, and where Chamberlain could not allege that Skylink's device contributed to third-party copyright infringements. *Id*. at 1187, 1203-04. The facts here differ on these critical points. First, Chamberlain sold a product; it did not, as Blizzard does, license limited rights to use its software. Second, given the nature of the equipment at issue in *Skylink*, no "copies" were

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[18] *Ticketmaster* 507 F. Supp. 2d at 1112. (CAPTCHA program that prevented user from using bots to access copyrighted website content "both *control[led] access* to a protected work [under § 1201(a)(2)] because a user cannot proceed to copyright protected webpages without solving CAPTCHA, and *protect[ed] rights* of a copyright owner [under § 1201(b)(1)] because, by preventing automated access to the ticket purchase webpage, CAPTCHA prevents users from copying those pages [into RAM]."(emphasis added.)

[19] 381 F.3d 1178 (Fed Cir. 2004).

made, as no software was loaded into RAM in connection with its operation, and thus Chamberlain offered no evidence that users of Skylink's devices infringed.

In this case, however, Blizzard has pursued a contributory infringement claim, because Glider users do make unauthorized copies of WoW when they load it in RAM in connection with Glider. *Skylink* makes clear that had Chamberlain been able to proffer evidence of limitations on use that implicated its rights to protect a copyrighted work, as Blizzard has here, Chamberlain could have sustained its claim. *Id*. at 1204. Significantly, MDY appears to concede this distinction by addressing this argument solely to Blizzard's "access" claim under § 1201(a)(2), and not Blizzard's § 1201(b)(1) "protection" claim, which centers on Blizzard's right to prevent users from making unauthorized copies of WoW in excess of the EULA. Indeed, *Skylink* acknowledges it has no application to 1201(b)(1) claims.[20]

Accordingly, MDY's attempt to equate Glider with the Skylink device fails. As MDY notes, the Skylink 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*." (MDY Mem. at 16). The same does not hold true for Glider, as shown by a simple example of two hypothetical WoW users. All purchasers of WoW have the right to use the game, and load copies into RAM, consistent with the EULA and TOU limitations. User "A" loads WoW into RAM and runs the program without Glider or any other cheat. User "B" loads WoW into RAM in conjunction with Glider. Scan.dll and Warden are designed to check the information being supplied by the program and permit user A's *rightful* (i.e., consistent with the EULA

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[20] 381 F.3d at 1195 ("all defendants who traffic in devices that circumvent rights controls [under § 1201(b)(1)] necessarily facilitate infringement"). Moreover, *Skylink* does not foreclose liability under § 1201(a)(2) in this case even if the Court concludes that Glider facilitates merely a breach of contract, and not infringement. *Id.* at 1202 n.17 ("[i]t is not clear whether a consumer who circumvents a technological measure controlling access to a copyrighted work in a manner that enables uses permitted under the Copyright Act but prohibited by contract can be subject to liability under the DMCA").

and TOU) access to the game, while blocking user B's attempt to gain wrongful access to the game (i.e., in excess of the license restrictions). In other words, these measures enforce Blizzard's license restrictions on accessing and copying the content into RAM. Precisely because of Glider's ability to circumvent Scan.dll and Warden, however, user B is able to gain *unauthorized access* to and make *unauthorized copies* of WoW in RAM. In so doing, user B is *not* merely gaining the same "rightful access" as user A.[21] Unlike the Skylink device, then, Glider's circumvention ability clearly enhances the user's ability to load unauthorized copies of WoW it would otherwise be prevented from making, and thus is tied directly to Blizzard's interest in protecting its copyrighted work.

V. Blizzard Has Proffered Substantial Evidence that MDY's Promotion And Support of Glider Intentionally and Improperly Interferes With Blizzard's Contracts With WoW Users and Causes Blizzard Harm.

MDY contends that Blizzard has failed to present sufficient evidence on three elements of its tort claim: 1) MDY's improper purpose; 2) MDY's intent to interfere; and 3) resultant harm to Blizzard. In so arguing, MDY distorts the legal burden imposed on Blizzard and disregards significant evidence of record in favor of a self-serving affidavit by Michael Donnelly in which he, belatedly and implausibly, insists that MDY's motives and tactics are pure. MDY's actions and pre-litigation statements, however, overwhelmingly establish the impropriety and intentional nature of its interference, and the hundreds of thousands of complaints by WoW players and substantial expenditures incurred by Blizzard in combating Glider evidence the serious harm MDY has caused. (SOF ¶ 158-70, 177-97, 234-47).

A. MDY's Interference Was Improper.

[21] Only if user B ceases using Glider altogether does his access equate to user A's. Of course if Glider is not used, then no circumvention is necessary, and the point is moot.

Both parties agree that the Restatement test, which cites seven factors to consider in determining whether conduct is improper, is the applicable standard for assessing impropriety.

1. Nature of conduct

MDY asserts that Blizzard must show that MDY's conduct is either "illegal or inequitable" and then summarily proclaims that Blizzard has shown neither. The *Bar J Bar* case on which MDY relies, however, plainly states that inequitable conduct includes both acts constituting fraud and those counter to public policy.[22] Here, MDY's business offers no independent good - Glider simply enables users to cheat. Indeed, its sole aim is to encourage and enable a group of opportunistic cheaters to exploit the WoW game for their own benefit, to the dismay and frustration of not only Blizzard, but the rule-abiding players whose experience is sullied. (SOF ¶ 159-70). The public interest is hardly advanced by MDY's actions.[23]

Moreover, MDY's entire business model is premised on a fraud. MDY has acknowledged that the market for Glider is dependent upon MDY's ability to ensure users successfully defraud Blizzard by concealing their breaches. (SOF ¶ 145-48). Moreover, MDY's self-serving affidavit regarding Glider's "inefficiency" for use in gold farming notwithstanding, MDY's actions reveal that it knows the market for Glider is driven largely by those seeking to exploit WoW for their own profit. (SOF ¶ 188-97, 244-47). To sustain its business, MDY has also committed additional breaches of the WoW EULA and TOU, including reverse engineering WoW and sharing WoW accounts to test Glider surreptitiously. (SOF ¶ 234, 245).

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[22] *Bar J Bar Cattle Co. v. Pace*, 158 Ariz. 481, 484-85 (Ariz. Ct. App. 1988).

[23] *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 976 (9th Cir. 1981) (noting in copyright case that once the court finds infringement of plaintiff's rights, "the continued profitability of [defendants'] businesses is of secondary concern").

Against this evidence, MDY offers only the unsupported assertion that "[a]n accused tortfeasor cannot tortiously interfere with a plaintiff when the tortfeasor benefits from the plaintiff's well being." (MDY Mem. at 19). On the contrary, in *Am. Airlines, Inc. v. Platinum Worlds Travel*, the broker service held liable for tortious interference for its purchase and resale of frequent flyer vouchers depended on American Airlines continuing to award the vouchers and make the flights from which the defendant improperly profited.[24] Moreover, like the broker in *Am. Airlines*, although MDY's business is dependent upon Blizzard's continued viability, the key determinant of MDY's continued success is its ongoing ability to defraud Blizzard about Glider usage. (SOF ¶ 242).

2. MDY's motive

In addressing its motive, MDY relies exclusively on the *Bar J Bar* case, and grossly exaggerates the import of its holding, contending that "[m]alice must be the sole motivator for the actor to interfere tortiously." (MDY Mem. at 19). This statement finds no support in *Bar J Bar* or elsewhere. Under the Restatement, *motive* is but one of seven factors a court should consider in determining whether conduct is *improper*. *Malice* is not a factor at all, as an interferor's motive may be improper without being malicious.[25] In fact, *Bar J Bar* stands only for the inverse, and unremarkable, proposition that a tortfeasor's ill will toward the aggrieved party will not, standing alone, render him liable if his conduct is not otherwise improper.

MDY also cites *Bar J Bar* for the proposition that "[a] competitor does not act improperly if his purpose at least in part is to advance his own economic interests." (MDY Mem. at 19-20). This statement, however, emanates from the portion of the

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[24] 769 F. Supp. 1203, 1204 (D. Utah 1990), *affd sub nom. Am. Airlines v. Christensen*, 967, F. 2d 410 (10th Cir. 1992).

[25] For example, conduct in violation of a statute or contrary to public policy may render conduct improper regardless of the other factors. *Wells Fargo Bank*, 38 P.3d at 32-33.

Restatement addressing the situation where an interferor justifiably seeks a share of a competitor's market.[26] Here, MDY is *not* a competitor, and seeks no such thing. By its own admission, MDY does not attempt to "lure away Blizzard's customers." (MDY Mem. at 20). Rather, MDY attempts to lure cheaters into WoW - be it to farm gold, level accounts to sell, or level characters without the required time investment - with the assurance that their efforts to exploit the game will go undetected, and their investment in Glider will be rewarded. (SOF ¶ 182, 246-47). Glider is a parasite on WoW, but it does not compete for the game's market share. Likewise, no "social benefits" arise from Glider use. Most WoW players see their playing experience damaged by Glider use, as reflected by the thousands of complaints about Glider, and MDY's admission that other players seek to have Glider users banned. In fact, as detailed in Blizzard's motion, MDY's own words and deeds through the course of its operation betray its ill motive.[27] Accordingly, Blizzard has provided substantial evidence attesting to MDY's improper motive to negate the import of Donnelly's self-serving affidavit.

3. The interests of those interfered

MDY contends that because Glider users voluntarily elect to use the program, *their* interests are not adversely impacted. However, this factor hardly turns on Blizzard's ability to show that MDY coerced Glider users. In fact, the parties whose interests are relevant to this factor are Blizzard, whose contracts are being breached in a manner that prevents their enforcement, and the large population of WoW players who are parties to those contracts, whose contractual interest in having a game free of cheaters is undermined.

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[26] *See* Restatement (Second) of Torts § 768 (2007), comments on (1)(d) (if defendant's conduct is directed, at least in part, "to advance the actor's competitive interest and the supposed social benefits arising from it," motivation by other impulses is not alone sufficient to render interference improper).

[27] (Blizzard Mem. at 16-17; and SOF ¶ 79, 192-97, 208-09, 238-242).

4. The interests sought to be advanced by MDY

The interest MDY seeks to advance is its own; selling its cheat to boost MDY's revenues while driving up Blizzard's costs. (SOF ¶ 242). Nearly all interferors seek to advance their own interest, of course, but MDY advances no other interest. Moreover, MDY's contention that it is "not trying to harm Blizzard" is patently absurd given the facts of record. MDY may *wish* that it could exploit Blizzard's work in a manner that does Blizzard no harm, but its actions speak louder than words. By continuing to sell and support Glider when it is fully aware that hundreds of thousands of WoW players have protested its use, designing features and instructing users how to avoid detection and reporting by those players, and affirming its intent to drive up Blizzard's costs of enforcement to an intolerable level, MDY is in fact trying very hard to harm Blizzard. (SOF ¶ 208, 237-43).

5. The social interests in protecting the freedom of MDY and the contractual interests of Blizzard and its users

MDY's argument that social interests weigh in its favor rests entirely on the proposition, which it disavowed earlier in its brief, that MDY and Blizzard are fairly competing for the same business opportunities. That is clearly not the case here, and thus the authorities cited by MDY are inapposite.[28] In fact, the relevant social interests here favor Blizzard, because the pertinent "society" is the WoW gaming universe, and there is no question MDY is intentionally disrupting the bargained-for mores of that society. (SOF ¶ 226, 241-43).

6. The proximity of MDY's conduct to the interference

MDY's sale of Glider is clearly the but-for cause of the interference. MDY's sole ground for contesting this factor is that MDY cannot be charged with wrongful

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[28] MDY contends that Blizzard's allegation of unfair competition evidences a recognition that it and MDY are "competitors" in the sense that term is used in the context of the tortious interference cases it cites. (MDY Mem. at 22). On the contrary, Blizzard's unfair competition claim, like its Lanham Act claim, was premised on MDY's misleading use of Blizzard trademarks in promoting Glider (a practice MDY agreed to cease). Hence, that claim has no bearing on this issue.

conduct until after Blizzard updated its TOU to explicitly include the word "bot." (MDY Mem. at 22). This assertion is preposterous in light of MDY's multiple admissions that it understood, from nearly the outset of its business, that Blizzard considered use of Glider a violation of its EULA and TOU. Specifically, MDY admitted that it understood long before the change in terms that Blizzard objected to unauthorized third party programs, that it never sought nor received authorization for Glider, and that it knew Blizzard objected to Glider use because it detected and banned Glider users in September 2005. (SOF ¶ 177, 183, 187). Long before the inception of this litigation, MDY's own website FAQ informed Glider users that Blizzard considered Glider use a breach of the TOU. (SOF ¶ 182).

7. The relations of the parties

Here again, MDY relies exclusively on the argument, rejected by the court in *Am. Airlines*, that MDY cannot interfere with Blizzard's contracts when it seeks to have Blizzard perform those same contracts. MDY's argument, of course, overlooks the fact that Blizzard *does not want to perform* in the case of Glider users, but has no choice where MDY is assisting Blizzard's customers in concealing their breaches.

As demonstrated above, the evidence of record weighs in Blizzard's favor on each of the seven Restatement factors under the relevant authority. Moreover, the *Am. Airlines* court acknowledged that the cases analyzing the seven factors in the typical business competitor scenario (like those cited by MDY) fail to address

> "precisely the unusual circumstances . . . [where] the defendants do not want the plaintiff's customers to breach their contracts under circumstances in which the plaintiff also refuses to perform [but] [r]ather, the defendants' business depends upon their ability to induce the plaintiff's customers to breach their contractual obligations while the plaintiff continues to perform." 769 F. Supp. At 1206.

Those unusual circumstances are again precisely at issue here. And, like in *Am. Airlines*, MDY has accomplished its goal by "develop[ing] an elaborate system of deception enlisting the aid of the plaintiff's customers . . . it is difficult to see how the

defendants' interference in this case can be characterized as anything but improper."[29]

B. MDY Intentionally Induced Breaches of Blizzard's Contracts.

MDY's argument on this element rests solely on the premise that MDY should not be held accountable for sales of Glider prior to Blizzard's amendment of the TOU to include the specific word "bots". As demonstrated above, the record contains extensive evidence of MDY's knowledge that Glider violated the Blizzard EULA and TOU long before that amendment.[30] Moreover, MDY's argument has no bearing at this juncture, as Blizzard is seeking both damages and injunctive relief, and by MDY's own admission it had the requisite intent to interfere as of October 2006.

C. The Breaches of the EULA and TOU Harm Blizzard.

Finally, MDY contends "Blizzard cannot present any evidence that MDY has caused damage." (MDY Mem. at 23). On the contrary, the record is replete with evidence, which MDY cannot dispute, that MDY's sale and ongoing support of Glider have caused Blizzard immense reputational and economic harm. The only portion of this evidence acknowledged by MDY in its motion is Blizzard's undisputed evidence that is has been forced to incur nearly one million dollars per year in direct costs of its enforcement efforts against bots and responses to user complaints about bots.[31] In the face of this evidence, MDY claims that Blizzard cannot show that Glider was a "substantial factor" in driving these costs, nor even "only a little" responsible for them. (MDY Mem. at 24). The record, however,

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[29] *Id.* at 1206-07 (footnote omitted).

[30] *Wells Fargo Bank 201 Ariz. At 494*, ("[I]ntent is shown by proving that the interferor either intended or knew that '[a particular] result was substantially certain to be produced by its conduct'")(alteration in original).

[31] These costs are identified and explained in detail in Blizzard's motion for summary judgment and supporting statement of facts. (*See* Blizzard Mem., at 21-22, SOF ¶ 198-224, 248-252, and corresponding exhibits).

contains ample evidence demonstrating that Glider is the preeminent WoW bot, and is not only a substantial factor, but the primary one, in driving Blizzard's enforcement costs. Moreover, MDY cannot simply ignore the additional evidence of record that Glider has caused, and continues to cause, both severe harm to Blizzard's reputation and direct loss of revenue to Blizzard.[32]

1. Glider is a substantial factor in driving Blizzard's costs of bot enforcement and response to bot complaints

The record is unequivocal that Glider is a substantial factor in driving Blizzard's bot enforcement and response costs. William Galey, the head of Blizzard's customer service group, testified at his deposition that WoW users specifically mention Glider as a cause of dissatisfaction when they contact Blizzard's customer service personnel, and that "[i]t has become commonplace and acknowledged amongst our players that, yes, they are aware of Glider specifically." (SOF ¶ 226.) Greg Ashe, the head of Blizzard's bot enforcement group, similarly testified at his deposition, that Glider is the longest-standing cheat, that Glider consumes more Blizzard resources than any other cheat, and that Blizzard has to divert resources from game development specifically to combat Glider. (SOF ¶ 221-23). Ashe further testified that Glider alone has significantly increased Blizzard's costs because each time Blizzard has implemented automatic detection of Glider, MDY has revised Glider to combat these measures, whereas other bots have not required a similar resource commitment given Blizzard's success at quickly blocking their use. (SOF ¶ 224). In the face of this evidence, MDY cannot seriously ascribe any reasonable portion of the nearly $2.5 million in enforcement costs to bots other than Glider.[33]

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[32] Arizona law has recognized that harm, for purposes of tortious interference, may take a variety of forms including harm to reputation. *See Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1151 (D. Ariz. 2005).

[33] Indeed, MDY's rebuttal expert on damages set out to identify other bots that were being actively used in conjunction with WoW, and could identify only one, a bot called Innerspace. (SOF Supp. ¶ 268).

2. Glider is damaging Blizzard's reputation with users

In contending that MDY's dissemination of Glider has not harmed Blizzard, MDY simply ignores the overwhelming evidence of harm to Blizzard's reputation, evidenced most prominently by the several hundred thousand in-game user complaints about the destructive presence of bots in the game. Several thousand of those complaints specifically reference Glider by its brand name, reflecting Glider's status as the most well-known bot in the WoW universe. (SOF ¶ 83, 204, 226). Blizzard detailed the evidence of harm to its reputation in its own motion for summary judgment, and refers the court to those papers for more detail. (Blizzard Mem. at 19-21 and supporting SOF Exs.).[34]

3. Loss of Revenue

Finally, MDY likewise ignores Blizzard's evidence that it has also suffered approximately $10.5 million in lost subscription revenues resulting directly from Glider use. (SOF ¶ 260). The evidence establishing this loss of revenue is detailed in Blizzard's own motion for summary judgment and supporting statement of facts. (*See* Blizzard Mem. at 21-23; SOF ¶ 255-260).

VI. MDY Has Not Carried its Burden on Unjust Enrichment

Under Arizona law, there are five elements to an unjust enrichment claim, and Blizzard has pled and offered evidence in support of each: "(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of justification for the enrichment and the impoverishment and (5) an

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[34] Blizzard's economic expert, Dr. Edward Castronova, submitted a report projecting the long-term financial impact to Blizzard of this devaluing of its reputation, and, starting from a conservative estimate that a one percent increase in a cheating behavior such as botting results in a .05% decrease in demand for the game, concluded that Blizzard bears a loss of profit of $900,000 per 100,000 users, per year, or over $18 million per year from customer dissatisfaction alone. (SOF ¶ 263-64). Although MDY's rebuttal expert questioned this model in his report, the substitute numbers he offered still calculated a loss of $5 million per year, still evidencing significant harm. (SOF Supp. 288).

absence of a remedy provided by law."[35] Here, MDY has been enriched by millions of dollars in Glider sales that enable users to violate the WoW contracts, while Blizzard has been impoverished both through reputational harm and the costs associated with combating Glider use. (SOF ¶ 231-33, 248-64). MDY's ill-gotten gains and Blizzard's losses are directly connected, because as MDY acknowledges, its product could not exist but for WoW.[36] MDY offers no justification for its activities beyond the pursuit of a financial opportunity at Blizzard and WoW player's expense. Finally, although Blizzard has pursued other causes of action for MDY's unfair business activities, the court has yet to determine whether an alternate remedy is available at law. Against this evidence, MDY's unsupported assertion that "the defendants cannot establish all of the elements" is insufficient to warrant entry of summary judgment.

VII. Conclusion

As demonstrated herein, Blizzard has submitted ample evidence not only sufficient to defeat MDY's motion for summary judgment, but to support entry of summary judgment in favor of Blizzard on its copyright, DMCA and tort claims.

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Respectfully submitted,

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[35] *Cmty. Guardian Bank v. Hamlin*, 182, Ariz. 627, 631(Ariz. Ct. App. 1995).

[36] See Restatement (First) of Restitution § 1, cmt. e (2007) (benefit received need not be balanced by an exact corresponding loss).

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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