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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,

Case No.: CV06-02555-PHX-DGC

**Response To Defendants' Motion For
Summary Judgment by Plaintiff MDY
Industries, LLC And Third Party
Defendant Michael Donnelly With
Supporting Memorandum Of Points
And Authorities**

The Honorable David G. Campbell

**BLIZZARD ENTERTAINMENT, INC.,
and VIVENDI GAMES, INC.,**
Third-Party Plaintiffs,

vs.

MICHAEL DONNELLY, an individual
Third-Party Defendant.

Oral Argument Requested

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1 Plaintiff MDY Industries, LLC (“MDY”) and Third-Party Defendant, Michael
2 Donnelly (“Donnelly”) (collectively “MDY” or “plaintiffs”) respond to the defendants’
3 Blizzard Entertainment, Inc. (“Blizzard”) and Vivendi Games, Inc. (“Vivendi”)
4 (collectively, “Blizzard”) Motion for Summary Judgment. This response is supported by
5 the separate Statement of Disputed Facts (“MDY’s SDF”) filed with this brief and the
6 accompanying Memorandum of Points and Authorities.

8 MEMORANDUM OF POINTS AND AUTHORITIES

9 I. Legal Standard

10 In the context of summary judgment, the Court should view disputed evidence in
11 light most favorable to the nonmoving party.¹ The Court should deny Summary
12 judgment if “a reasonable jury could return a verdict for the nonmoving party.”²
13

14 II. Introduction/Background

15 At bottom, this is a contract case concerning how people who legally acquire and
16 install Blizzard's WoW game software make use of that software's functionality (which
17 gives a massive multiplayer video game experience). These users all have the legal right
18 to install the WoW software onto their computer hard drives.³ While on its face *MAI*
19 *Systems Corp. v. Peak Computer, Inc* says that such installation technically involves
20 copying the program from disks (or via permissible downloading from Blizzard), such
21 “copying” does not require a finding of copyright infringement.⁴

22 Blizzard contracts with its users, via Blizzard’s End User License Agreement
23

24 ¹ Fed.R.Civ.P. 56(c); *see, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

25 ² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

26 ³ 17 U.S.C. § 117.

27 ⁴ *See, e.g., Sony Computer Entertainment v. Connectix Corp.*, 203 F.3d 596, fn.9 (9th Cir.
28 2000)(noting that cases like *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511
(9th Cir. 1993) do not apply when the relevant facts involve “reverse engineering to gain
access to unprotected functional elements.”)

1 (“EULA”) and Terms of Use (“TOU”), in an attempt to regulate the way a person plays
2 the game - the relevant provision here is Blizzard's demand that WoW players not play
3 WoW with so-called "bot" programs that automate certain aspects of WoW's function.
4 Blizzard believes that enforcement of this condition is important to its business model.
5 As a matter of contract law, Blizzard may have an enforceable agreement with its users.
6 The issue, however, is whether Blizzard can use copyright to enforce this particular
7 aspect of Blizzard's business model.

8 The answer must be "No." Otherwise, copyright becomes the enforcer of every
9 agreement regulating the use of commodities containing software, from automobiles to
10 washing machines. Congress designed copyright laws to regulate the market for copies
11 and performances of copyright-protected works. Copyright is not designed and is ill-
12 equipped to serve as a general business regulation statute.⁵ Furthermore, Arizona
13 common law does not enable Blizzard to control a company's legitimate efforts to sell a
14 product on the open market under a tort theory of liability simply because Blizzard may
15 object to the product and its effect on Blizzard's business model.

16 **III. The Court should deny Blizzard's motion with respect to its copyright claims**
17 **because Blizzard relies exclusively on *Ticketmaster* – a case that cannot be**
18 **reconciled with the law of the Ninth and other Circuits.**

19 Blizzard contends that copyright infringement occurs every time one of its
20 customers breaches its EULA and the computer subsequently loads portions of Blizzard's
21 World of Warcraft (“WoW”) software into Random Access Memory (“RAM”) – even if
22 the EULA breach does not infringe an exclusive right granted by the Copyright Act.⁶
23 Blizzard is legally incorrect. Breaching a EULA term violates copyright only if the
24 breach also violates an exclusive right granted by the Copyright Act. Blizzard relies

25 ⁵ *Sony Computer Entertainment v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir.
26 2000)(copyright owners who want “a lawful monopoly on the functional concepts in its
27 software, [] must satisfy the more stringent standards of the patent laws.”)

28 ⁶ *See*, *Blizzard Ent., Inc. and Vivendi Games, Inc. Mot. For Sum. J. (“Blizzard's MSJ”)*,
at 5-7.

1 upon *Ticketmaster LLC v. RMG Technologies, Inc.*,⁷ which is not helpful because
2 *Ticketmaster* cannot be reconciled with the balance of federal case law, including
3 prevailing Ninth Circuit law.⁸

4 A. Federal case law, including the Ninth Circuit, consistently holds that a mere
5 breach of a copyright license violates copyright only when the breach
6 pertains to an exclusive right under 17 U.S.C. § 106.

7 The Ninth Circuit has consistently held that a “licensee infringes the owner’s
8 copyright if its use exceeds the scope of its license.”⁹ This statement does not mean that
9 every copyright license breach violates copyright as Blizzard suggests it does. Rather,
10 “[T]he critical question is not the existence but the license’s scope. The license must be
11 construed in accordance with the *purposes* underlying federal copyright law.”¹⁰ In
12 *S.O.S.*, the “use” the copyright owner complained about was the defendant’s “copying
13 and modification of the software.”¹¹ The Court held the act of breaching the parties’
14 license agreement led to copyright infringement because *the act itself* violated the
15 Copyright Act.

16 The Ninth Circuit is not alone. In fact, the Federal Circuit cited *S.O.S.* in its ruling
17 in *Storage Technology Corp. v. Custom Hardware Engineering and Consulting, Inc.*¹²
18 *Storage Tech* viewed the *S.O.S.* as standing for “the entirely unremarkable position that
19 ‘uses’ that violate a license agreement constitute copyright infringement only when those
20

21 _____
22 ⁷ *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F.Supp.2d 1096 (C.D. Cal. 2007).

23 ⁸ The District Court’s ruling in *Ticketmaster* is on appeal to the Ninth Circuit. Oral
24 argument is currently set for May 7, 2008.

25 ⁹ *See, e.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989).

26 ¹⁰ *Id.* at 1087-88 (emphasis added); *accord Sony v. Connectix*, 203 F.3d at fn.9 (9th Cir.
27 2000)(noting that cases like *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511
28 (9th Cir. 1993) must be construed within the greater context of copyright law and thus
cannot be applied blindly).

¹¹ *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d at 1085.

¹² *Storage Technology Corp. v. Custom Hardware Eng’g. and Consulting, Inc.*, 421 F.3d
1307 (Fed. Cir. 2005).

1 uses would infringe in the absence of any license agreement at all.”¹³ *Storage Tech*
2 explained why Blizzard’s view of copyright law is overbroad: ¹⁴

3 As an example, consider a license in which the copyright owner grants a
4 person the right to make one and only one copy of a book with the caveat
5 that the licensee may not read the last ten pages. Obviously, a licensee who
6 made a hundred copies of the book would be liable for copyright
7 infringement because the copying would violate the Copyright Act’s
8 prohibition on reproduction and would exceed the scope of the license.
9 Alternatively, if the licensee made a single copy of the book, but read the
10 last ten pages, the only cause of action would be for breach of contract,
11 *because reading a work does not violate any right protected by copyright*
12 *law.*

13 In this case, Blizzard alleges that its EULA grants the licensee the right to make
14 copies of its WoW software by having it loaded into the licensee’s RAM with the caveat
15 that the licensee will not use “bot” programs such as Glider. As in *Storage Tech*, mere
16 use of an independently-created aftermarket software program with WoW could not
17 possibly infringe Blizzard’s copyrights in WoW in the absence of Blizzard’s EULA.
18 Thus, when Blizzard’s licensees play WoW with Glider, they are no different from the
19 readers of “the last ten pages” in the *Storage Tech* example.

20 While the use of aftermarket third party software may exceed the EULA’s scope,
21 it does not violate Blizzard’s protected rights under the copyright laws. As a result, the
22 use of Glider does not facilitate a breach of Blizzard’s copyrights under the EULA.
23 Without primary copyright infringement, MDY can neither contributorily nor vicariously
24 infringe Blizzard’s copyrights as a matter of law.

25 B. Other than *Ticketmaster*, Blizzard has not cited to any case that supports
26 Blizzard’s claim that ANY breach of a copyright license equals copyright
27 infringement

28 Blizzard cites Ninth Circuit cases in support of its position, but none of them apply

¹³ *Id.* at 1316.

¹⁴ *Id.* (emphasis added).

1 to the present facts. For example, Blizzard cites *LGS Architects, Inc. v. Concordia*
2 *Homes*¹⁵ for the proposition that any copyright license breach is also a breach of contract.
3 Upon closer inspection, however, *LGS Architects, Inc.* does not stand for the broad
4 purpose that Blizzard cites it for. In *LGS Architects*, Plaintiff LGS was an architectural
5 firm, while the Defendant Concordia built homes.¹⁶ LGS and Concordia entered into a
6 licensing agreement that permitted Concordia to use certain of LGS's copyrighted
7 architectural plans for a specified building project.¹⁷ Concordia also used LGS's plans on
8 a second project, not covered by their agreement.¹⁸ The Court concluded that "Concordia
9 exceeded the scope of its license when it used the four architectural plans in the
10 construction" of the second project.¹⁹

11 In formulating its reasoning, the Ninth Circuit expressly stated that a "license *must*
12 *be construed in accordance with the purposes underlying federal copyright law.* Chief
13 among these purposes is the protection of the author's rights."²⁰ The Court explained that
14 "when a license is limited in scope, *exploitation of the copyrighted work* outside the
15 specified limits constitutes infringement."²¹ In *LGS*, Concordia's *copying* of the plans on
16 a project that exceeded the license's scope is what led to the infringement. As stated in
17 *Storage Tech*, Concordia's unauthorized copying comprised copyright infringement
18 because the unauthorized activity would have been infringing even in the absence of the
19 license agreement.²² Unlike in the present case, however, Concordia did not merely
20 breach a non-copyright related term in its license agreement. By copying the
21 architectural plans, Concordia exceeded the copyright license's scope, and violated an
22 exclusive right under 17 U.S.C. § 106.

23 ¹⁵ *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150 (9th Cir. 2006).

24 ¹⁶ *Id.* at 1151-52.

25 ¹⁷ *Id.*

26 ¹⁸ *Id.*

27 ¹⁹ *Id.* at 1157-58.

28 ²⁰ *Id.* at 1157 (emphasis added), *citing*, *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d at 1088).

²¹ *LGS Architects, Inc.*, 434 F.3d at 1156 (emphasis added).

²² *Storage Tech.*, 421 F.3d at 1316.

1 Blizzard also cites to *Perfect 10, Inc. v. Amazon.com, Inc.*²³; *A&M Records, Inc. v.*
2 *Napster, Inc.*²⁴; and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*²⁵ Because
3 none of those cases actually holds that any breach of a copyright license also violates the
4 Copyright Act, MDY can distinguish each of these cases with the present facts. In all of
5 those cases, *Perfect 10*,²⁶ *A&M Records*,²⁷ and *Metro-Goldwyn-Mayer Studios*,²⁸ the
6 accused directly violated an exclusive right under 17 U.S.C. § 106.

7 In this light, Blizzard’s desperately relies on *Ticketmaster*. If *Ticketmaster* were
8 the law, surely it would not be the only case to support Blizzard’s position. If anything,
9 these cases further support MDY’s position that a person commits copyright infringement
10 by exceeding a copyright license only if the act itself violates one of the exclusive rights
11 under 17 U.S.C. § 106. At a minimum, Ninth Circuit law cannot reconcile Blizzard’s
12 claim²⁹ that a licensee is liable for copyright infringement for breaching any license term.
13 *Ticketmaster* directly conflicts with every other federal circuit that has considered the
14 issue.

15 C. Blizzard’s view could not possibly be the law; otherwise, Blizzard could
16 assert punitive copyright remedies against its customers for ANY non-
17 copyright-related breach of contract.

18 Blizzard contends that it’s EULA “conditions users’ ability to copy WoW on their
19 doing so within the license’s scope of the license.”³⁰ Blizzard notes that the “first
20

21 ²³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007).

22 ²⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

23 ²⁵ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

24 ²⁶ In *Perfect 10*, the allegedly infringing act pertained to a search engine that facilitated
the *distribution* of copyrighted photos.

25 ²⁷ In *A&M Records*, the allegedly infringing act involved the use of a software program
whose sole purpose was to facilitate the *distribution* of copyrighted music.

26 ²⁸ In *Metro-Goldwyn-Mayer Studios*, the allegedly infringing act involved the use of a
peer-to-peer file sharing program facilitating the *distribution* of copyrighted music and
27 movies.

28 ²⁹ See Blizzard’s MSJ, at 5.

³⁰ Blizzard’s MSJ at 6.

1 paragraph of the EULA states: ‘IF YOU DO NOT AGREE TO THE TERMS OF THIS
2 AGREEMENT, YOU ARE NOT PERMITTED TO INSTALL, COPY, OR USE THE
3 GAME.’” The EULA further notes that ‘Any use, reproduction ... of the Game not
4 expressly authorized by the terms of this License Agreement is expressly prohibited.’”³¹

5 Under Blizzard’s reading of *Ticketmaster*, Blizzard’s EULA makes a breach of
6 ANY term in the agreement a predicate for copyright infringement. If true, Blizzard
7 could recover for copyright infringement for violating the EULA/TOU if the user plays
8 WoW after:

- 9 • Intentionally providing a false address or sharing the user’s login information
10 with a third party (Paragraph 3 of Blizzard’s current TOU)³²;
- 11 • Providing matchmaking services while playing the game (TOU - Paragraph
12 4(a));
- 13 • “Attempting” to disrupt the game server (TOU - Paragraph 4(c));
- 14 • Using a character name that impersonates a famous person (TOU - Paragraph
15 5(i));
- 16 • Using vulgar language in Wow’s chat feature (TOU - Paragraph 5(ii));
- 17 • Doing “anything that Blizzard considers contrary to ‘the essence’ of the
18 program” (TOU - Paragraph 5(iii));
- 19 • Selling, or even the mere “offering” to sell a user account to a third party (TOU
20 - Paragraph 8).

21 The Ninth Circuit cases described above, or other Circuit Court decisions like
22 *Storage Tech* do not support Blizzard’s position. This Court should reject Blizzard’s
23 argument that it can sue a user, much less a third party as in this case, for copyright
24 infringement simply by breaching or facilitating a breach of a non-copyright related term
25 in its EULA. The Court should deny Blizzard’s Motion for Summary Judgment on the
26 issues of contributory and vicarious copyright infringement against MDY.

27 ³¹ Blizzard’s Statement of Facts in Support of its Motion for Summary Judgment
28 (“Blizzard’s SOF”) ¶ 89-90.

³² MDY’s SDF – Exhibit T.

1 **IV. Even if Blizzard correctly relied upon *Ticketmaster*, admissible material facts**
2 **preclude summary judgment for Blizzard’s copyright claims.**

3 For example, the parties dispute whether Blizzard has ever terminated one of its
4 licenses pursuant to the EULA’s terms.³³ The parties dispute the EULA or TOU
5 precluded “bots.”³⁴ The parties dispute that terms Blizzard contends MDY’s customers
6 breached were within the reasonable expectations of MDY or its customers as required
7 under Arizona law.³⁵ Finally, a factual dispute exists regarding whether the “RAM
8 copying” Blizzard alleges here is the same as the RAM copying from *MAI* decision.³⁶

9 **V. Blizzard’s attempt to leverage its copyright beyond the exclusive rights**
10 **granted by the Copyright Act is copyright misuse and bars Blizzard from the**
11 **relief it seeks here.**

12 Copyright misuse occurs when a copyright owner attempts to leverage its
13 copyright in a manner that exceeds the Copyright Act’s statutory grant.³⁷ Here, Blizzard
14 misuses its copyrights by asserting copyright violations as the basis of all of its claims
15 against MDY. More specifically, Blizzard’s unilateral and restrictive licensing scheme,
16 i.e., its EULA and TOU, is a transparent attempt to bootstrap the Copyright Act’s
17 powerful remedies onto mere breaches of contract. While Blizzard attempts to justify its
18 actions under the guise of “protecting its business,” the manner in which Blizzard acts
19 here constitutes copyright misuse.³⁸ Moreover, under the facts presently before the

20 ³³ MDY’S Statement of Disputed Facts (“SDF”) ¶ 71.

21 ³⁴ MDY’S SDF ¶ 74.

22 ³⁵ MDY’S SDF ¶ 74-75; *see, Darner Motor Sales v. Universal Underwriters*, 140 Ariz.
23 383 (1984)(terms of adhesion contracts that are not within the reasonable expectations of
the non-drafter are not enforceable).

24 ³⁶ MDY’S SDF ¶ 142.

25 ³⁷ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001)(noting,
26 “The defense of copyright misuse forbids a copyright holder from “secur[ing] an
exclusive right or limited monopoly not granted by the Copyright Office.”

27 ³⁸ *See Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990) (expressly
28 rejecting Blizzard’s notion: “The need of [the first creator] to protect its investment does
not outweigh the public’s right under our system to expect competition and the benefits
that flow therefrom...”).

1 Court, MDY’s business, not Blizzard’s, is the business the law should protect.

2 The Fourth Circuit first expressly recognized Copyright misuse in *Lasercomb*
3 *America, Inc. v. Reynolds*.³⁹ Other Circuits, including the Ninth Circuit, have since
4 adopted *Lasercomb’s* misuse doctrine.⁴⁰ In *Lasercomb*, the plaintiff developed a
5 software program that assisted in the making of steel rule dies used to cut cardboard for
6 folding into boxes and cartons.⁴¹ After obtaining a copy of plaintiff’s software,
7 defendants created a competing program that "was almost entirely a direct copy of
8 [plaintiff’s program], and marketed it as its own CAD/CAM die-making software."⁴² The
9 trial court entered judgment for plaintiff and awarded damages to plaintiff – including
10 punitive damages -- for copyright infringement and fraud. Despite expressly noting that
11 “there is no question that defendants engaged in unauthorized copying, and the
12 purposefulness of their unlawful action is manifest from their deceptive practices,” the
13 Fourth Circuit reversed on the basis of plaintiff’s copyright misuse.⁴³

14 Because of the restrictive software license that plaintiff unilaterally tied to
15 plaintiff’s software, the Fourth Circuit reversed.⁴⁴ In pertinent part, the *Lasercomb*
16 license barred its licensees from writing, developing, producing or selling computer
17 assisted die making software.⁴⁵ In effect, the *Lasercomb* license restricted the
18 independent original creation of other software programs.⁴⁶ The court noted that terms in
19
20

21 ³⁹ 911 F.2d 970, 978 (4th Cir. 1990).

22 ⁴⁰ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026-27 (9th Cir. 2001); *Practice*
23 *Mgmt. Info. Corp. v. American Med, Assoc.*, 121 F.3d 516 (9th Cir. 1997); *see, also, DSC*
24 *Communications Corp, v. DGI Technologies, Inc.*, 81 F.3d 597, 600-01 (5th Cir. 1996);
Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191, 204 (3d Cir.
2003).

25 ⁴¹ *Lasercomb*, 911 F.2d at 971.

26 ⁴² *Id.*

27 ⁴³ *Id.* at 971, 979.

28 ⁴⁴ *Id.* at 973.

⁴⁵ *Id.*

⁴⁶ *Id.* at 978.

1 a licensing agreement designed to protect *copying* were permissible.⁴⁷ But going beyond
2 statutory copyrights to stifle the independent origination of different software
3 impermissibly violated public policy:

4 The misuse arises from Lasercomb's attempt to use its copyright in a
5 particular expression, the Interact software, to control competition in an
6 area outside the copyright, i.e., the idea of computer-assisted die
7 manufacture, regardless of whether such conduct amounts to an antitrust
8 violation.⁴⁸

8 The doctrine of copyright misuse arises from two foundational, yet divergent
9 policies: competition and innovation.⁴⁹ On one hand, promoting competition is the
10 foundation of our legal-economic system.⁵⁰ On the other hand, encouraging innovation is
11 the foundation of both our copyright and patent systems.⁵¹ To encourage innovation and
12 creativity, our copyright and patent systems grant limited statutory monopolies that
13 prevent direct competition for the statutory term of protection.⁵² The patent and
14 copyright systems not only permit indirect competition in the form of competing
15 inventions and works of authorship, the law encourages it.⁵³ The incentives of these
16 limited monopolies promote not only the creation of the first invention or work of
17 authorship, but subsequent ones as well. As a result, copyright misuse occurs once a
18 copyright owner seeks to impose contractual restrictions that impede or prevent a person

20 ⁴⁷ *Id.* (“Lasercomb undoubtedly has the right to protect against copying of the Interact
21 code.”)

22 ⁴⁸ *See id.* at at 979.

23 ⁴⁹ *See id.* at 977 (“A patent or copyright is often regarded as a limited monopoly – an
24 exception to the general public policy against restraints of trade.”)

25 ⁵⁰ *Id.*

26 ⁵¹ *See id.* at 974-975 (for the evolution of our copyright and patent laws); *see also, e.g.,*
27 *Video Pipeline*, 342 F.3d at 204 (“the underlying policy rationale for the misuse doctrine
28 set out in the Constitution's Copyright and Patent Clause: “to promote the Progress of
Science and useful Arts,” *quoting* U.S. Const. art. I, § 8, cl. 8.)

⁵² *See Lasercomb*, 911 F.2d at 975 (“To encourage such efforts, society grants authors
exclusive rights in their works for a limited time.”)

⁵³ *See e.g., Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992).

1 from creating and disseminating newer and non-infringing copyrighted works.⁵⁴

2 In this case, Blizzard complains that “bots” harm its business model.⁵⁵ To protect
3 its business model, Blizzard now requires that its licensees agree not to use bots. The
4 Copyright Act does not, however, grant Blizzard the right to control whether or not its
5 users can use bots,⁵⁶ any more than it gives book publishers the right to control where,
6 when, or with what owners of copies can read their books. As such, Blizzard misuses its
7 copyrights by attempting to control its licensees’ use of independently created and
8 noninfringing third party software.⁵⁷

9 Blizzard’s misuse here is not the first time Blizzard has misused its copyrights to
10 protect its business model.⁵⁸ From November, 2005 through January, 2005, Blizzard
11 unsuccessfully tried to use its EULA to misuse its copyright against a third-party who
12 tried to do nothing more than sell a book that detailed how to level a WoW character
13 from 1 to 70 in only eight days.⁵⁹

14 **VI. The Court should deny Blizzard’s motion with respect to its DMCA claims**
15 **because Blizzard relies exclusively on *Ticketmaster* – a case that cannot be**
16 **reconciled with the law of the Ninth and other Circuits and because**
17 ***Ticketmaster* is not a case involving piracy.**

18 Blizzard contends that mere circumvention of any software protection measure
19 violates the DMCA. Again, Blizzard overstates the law. Only circumvention *coupled*
20 *with* access to a protected work to facilitate a copyright violation creates liability under

21 _____
22 ⁵⁴ See *Lasercomb*, 911 F.2d at 979.

23 ⁵⁵ Whether or not Blizzard is actually being harmed is questionable. Admissible evidence
24 suggests that Blizzard actually benefits from Glider. MDY’S SDF ¶¶ 92, 121-31.

25 ⁵⁶ A “copyright protects originality rather than novelty or invention — conferring only
26 ‘the sole right of multiplying copies.’” *Mazer v. Stein*, 347 U.S. 201, 217 (1954); accord
27 17 U.S.C. § 106.

28 ⁵⁷ “Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is
given only to the expression of the idea — not the idea itself.” *Mazer v. Stein*, 347 U.S.
201, 217 (1954).

⁵⁸ See, MDY’s SDF ¶¶ 143-46.

⁵⁹ The details of Blizzard’s illegal acts are detailed in MDY’s SDF ¶¶ 143-46.

1 the DMCA. As before, although Blizzard's relies on *Ticketmaster LLC v. RMG*
2 *Technologies, Inc.*,⁶⁰ the balance of federal case law, including prevailing Ninth Circuit
3 law rejects *Ticketmaster's* holdings.

4
5 A. Because no reasonable relationship exists between access obtained by Glider's
6 avoidance of Warden or Scan.dll and copyright protection of Blizzard's WoW
7 game client, MDY cannot be liable under the DMCA.

8 As discussed in more detail in MDY's Motion for Summary Judgment, the DMCA
9 does not extend to *every* act of electronic circumvention.⁶¹ The DMCA extends only to
10 circumvention measures that enable access to a protected work for the purpose of illegal
11 copying, i.e., pirating works. In other words, the DMCA requires a nexus between
12 "access" and the "protection" offered by copyright. No nexus exists – and DMCA
13 liability does not attach – when efforts to circumvent technological protection *merely*
14 *enable rightful access* to a protected work for the purpose of using it without copying,
15 making derivative works, or distributing the work.⁶²

16 In addition to *Chamberlain Group v. Skylink Technologies*,⁶³ the Sixth Circuit in
17 *Lexmark* held that a person must have a "purpose" to facilitate the piracy of protected
18 content to violate the DMCA. The Court stated,

19 "Lexmark would have us read this statute in such a way that any time a
20 manufacturer intentionally circumvents any technological measure and
21 accesses a protected work it necessarily violates the statute regardless of its
22 "purpose." Such a reading would ignore the precise language — "for the
23 purpose of" — as well as the main point of the DMCA — *to prohibit the*
24 *pirating of copyright-protected works* such as movies, music, and
computer programs. If we were to adopt Lexmark's reading of the statute,
manufacturers could potentially create monopolies for replacement parts
simply by using similar, but more creative, lock-out codes. Automobile

25 ⁶⁰ *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F.Supp.2d 1096 (C.D. Cal. 2007).

26 ⁶¹ MDY's MSJ at 14-17.

27 ⁶² *See id.*; *see also, Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178, 1195
28 (Fed. Cir. 2004)(emphasis ours); *accord Nordstrom Consulting, Inc. v. M & S*
Technologies, at 16 (N.D.Ill. 3-4-2008)(following *Chamberlain* and *Storage Tech.*).

⁶³ *See* MDY's MSJ at 16-17 for a discussion of the *Chamberlain* case.

1 manufacturers, for example, could control the entire market of replacement
2 parts for their vehicles by including lock-out chips. Congress did not
3 intend to allow the DMCA to be used offensively in this manner, but rather
4 only sought to reach those who circumvented protective measures "for the
5 purpose" of pirating works protected by the copyright statute. ***Unless a
6 plaintiff can show that a defendant circumvented protective measures for
7 such a purpose, its claim should not be allowed to go forward.***⁶⁴

8 In this case, Blizzard cannot argue that Glider facilitates infringement of
9 Blizzard's exclusive rights under the Copyright Act for its WoW game client software.⁶⁵
10 Likewise, Blizzard cannot argue that its server software is easier to copy or distribute by
11 a player using Glider. Or, that its game client is more vulnerable to unauthorized copying
12 or distribution by players who use Glider. To the extent such dispute exists, such dispute
13 would preclude summary judgment.

14 B. Blizzard's Warden and Scan.dll programs are not "effective access control"
15 measures under 17 U.S.C. § 1201(a)(3)(b), so MDY cannot violate §
16 1201(a)(1) or § 1201(b)(1) as a matter of law.

17 17 U.S.C. § 1201(a)(2) requires that Blizzard's Warden and Scan.dll software
18 programs "effectively control access" to its WoW client software code or the Blizzard
19 server code. Recall, evading Warden does NOT give access to the server CODE but only
20 the code's functionality, as in *Chamberlain* and *Lexmark*.⁶⁶ Technological measures that
21 restrict one form of access, but leave another route wide do not "effectively control
22 access" and do not give rise to DMCA liability.⁶⁷ Likewise, when a technological
23 measure controls a third-party's ability to make use of a computer software code, but
24 does not control the third-party's ability to access the software code to read or copy the
25 code, the technological measure is not an effective access control measure, because it is
26 the *code*, not the code's functionality, that copyright protects.⁶⁸

27 ⁶⁴ *Lexmark*, 387 F.3d at 552 (emphasis added) (Merritt, J., concurring).

28 ⁶⁵ Affidavit of Michael M. Donnelly ("Donnelly Aff.") ¶ 36.

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

⁶⁷ *Lexmark*, 387 F.3d at 547.

⁶⁸ *See id.* at 546-47.

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

2 Blizzard asserts that it designed Warden to “prohibit WoW users who utilize
3 ‘cheats,’ ‘bots,’ and other unauthorized programs with WoW from accessing Blizzard’s
4 copyrighted WoW content.”⁶⁹ MDY disputes Blizzard’s assertion.⁷⁰ Warden does not
5 prohibit WoW users from accessing copyrighted WoW code. Blizzard limits Warden’s
6 utility to two functions: (1) Warden scans a licensee’s computer RAM to determine if the
7 licensee is playing WoW with third party software that Blizzard prohibits under its
8 EULA or TOU,⁷¹ and (2) if Warden detects an unauthorized software program, Warden
9 notifies Blizzard.⁷² Blizzard then reviews the data and decides whether it will close the
10 licensee’s WoW account.⁷³

11 Blizzard also asserts that once Warden detects an unauthorized program, Warden
12 can immediately “kick users out of the game” or “ban a user’s account so that the user
13 cannot log in.”⁷⁴ Even if Blizzard’s assertion was true, Blizzard’s statement is at least
14 misleading. Even if Warden does ban an account, or kick a user out of the game –
15 thereby depriving the user of access to the game’s *functionality*, Warden in no way
16 prevents the user from copying or distributing the copyright-protected *code*. Therefore,
17 Warden does not control access to the copyright-protected work.⁷⁵

18 Blizzard admits that Warden cannot prevent a person from copying, modifying,
19 distributing, or even examining copies of the WoW client software.⁷⁶ In other words,
20 even though Warden can prevent a user from *playing* the game, Warden cannot preclude
21 a user from *copying* the WoW software code either by copying WoW’s game CDs,
22 copying WoW’s software code installed on the user’s hard drive, or by loading the

23 _____
24 ⁶⁹ Blizzard’s MSJ at 11.

25 ⁷⁰ MDY’s SDF ¶ 132-35.

26 ⁷¹ MDY’s SDF ¶ 132-35.

27 ⁷² *Id.*

28 ⁷³ *Id.*

⁷⁴ Blizzard’s MSJ SOF ¶ 115-19.

⁷⁵ MDY’s SDF at ¶ 135.

⁷⁶ *Id.*

1 software code into RAM memory to examine it. As the Court in Lexmark analogized:

2 “Just as one would not say that a lock on the back door of a house ‘controls
3 access’ to a house whose front door does not contain a lock and just as one
4 would not say that a lock on any door of a house ‘controls access’ to the
5 house after its purchaser receives the key to the lock, it does not make sense
6 to say that this provision of the DMCA applies to otherwise-readily-
accessible copyrighted works.”

7 Warden does not “lock” any part of the WoW software code. Warden is a data
8 reporting computer software program that does not control access to any part of the WoW
9 game client software or the WoW server software. Consequently, Warden is not an
10 access control measure, let alone an effective access control measure, for any work
11 protected under 17 U.S.C. § 106 as defined under § 1201(a)(3)(B). Because Warden is
12 not an effective access control mechanism, MDY cannot violate the DMCA. Thus, the
13 Court should deny Blizzard’s Motion as a matter of law.

14 2. Scan.dll is not an effective access control measure

15
16 Blizzard also alleges that its Scan.dll software code prevents unauthorized copying
17 of WoW code by preventing a user from accessing the WoW game if Scan.dll detects an
18 unauthorized software program that violates its EULA. Blizzard argues that because
19 MDY’s Glider program is able to evade detection from Scan.dll, MDY violates the
20 DMCA’s anti-circumvention provision. Blizzard again overstates the law.

21 Blizzard’s Scan.dll software code is an even less effective attempt to control
22 access to the WoW software code than Warden. Scan.dll’s only function is to detect
23 third-party software when the user *first* loads WoW into RAM.⁷⁷ After a user loads the
24 WoW game code into RAM, Scan.dll stops functioning.⁷⁸ Although Scan.dll can control
25 whether a licensee can access the WoW game client software to *play* the WoW game
26 during the initial loading of the WoW game client, Scan.dll cannot control whether a

27 _____
28 ⁷⁷ MDY’s SDF ¶¶ 136-139.

⁷⁸ *Id.*

1 licensee can *access* the WoW game client software code for the purpose of examining,
2 copying, making derivative works or distributing copies of WoW.⁷⁹ In fact, Scan.dll
3 cannot prevent the licensee *from manually loading the game client into RAM*.⁸⁰ Even if
4 Scan.dll detects prohibited software code – it can only stop the licensee from *playing*, not
5 copying, the WoW software code.⁸¹

6 As discussed above pertaining to Warden, Blizzard’s Scan.dll software does not
7 protect access to Blizzard’s copyrights.⁸² Because Scan.dll cannot prevent a person from
8 (1) accessing or copying the WoW software code, and (2) a person can easily remove
9 Scan.dll from his computer by simply deleting the file in his directory, the Court cannot
10 consider it to be an *effective* access control measure for any work protected as defined
11 under § 1201(a)(3)(B). At a minimum, a question of fact exists as to whether Glider
12 circumvents Scan.dll at all.⁸³

13 Therefore, for all the reasons discussed above, neither Scan.dll nor Warden are
14 effective measures that control access to a copyright-protected work. Neither Warden
15 nor Scan.dll can prevent a person from copying, distributing, or making derivative works
16 based upon Blizzard’s WoW software code. Thus, as a matter of law, the Court should
17 deny Blizzard’s Motion on the issue of its DMCA claim.

18
19 C. MDY’s Glider program is not primarily designed and marketed as a
circumvention device, nor does Glider have a limited commercial purpose.

20 Blizzard argues that because Glider is designed and marketed as a circumvention
21 device, and that Glider has only a limited commercially significant purpose, MDY is
22 liable under the DMCA’s anti-trafficking provisions.⁸⁴ For the reasons set forth above,
23 MDY has not violated the DMCA by selling Glider, and thus cannot be liable under the
24

25 ⁷⁹ *Id.*

26 ⁸⁰ *Id.*

27 ⁸¹ *Id.*

28 ⁸² *Id.* ¶ 138.

⁸³ MDY’s SDF, at ¶ 136-38.

⁸⁴ Blizzard’s MSJ at 13.

1 anti-trafficking sections either. Thus, how MDY markets Glider, or whether Glider has a
2 limited commercial purpose, is not material to liability. Nonetheless, even if such facts
3 were material, the parties dispute them.

4 First, MDY did not design Glider to circumvent Warden and Scan.dll. Donnelly's
5 sole motive for designing Glider was to create a tool to assist him personally in
6 shortening the time it required to level his WoW game character to the highest level.⁸⁵ In
7 fact, MDY did not add code to Glider's software that enabled it to avoid detection by
8 Warden until *over four months* after MDY began commercially selling Glider.⁸⁶ MDY
9 added the code only after Blizzard first banned one of MDY's customer's accounts so
10 that MDY could protect its economic interest in the company that Donnelly had built
11 over the previous six months. MDY needed to continue selling Glider to do just that.⁸⁷

12 Second, MDY continuously updates Glider's ability to avoid detection from
13 Warden only as a countermeasure to Blizzard's detection efforts.⁸⁸ MDY does not
14 continue to update its code to avoid Warden so that MDY can pirate any software code
15 that Blizzard creates. MDY updates its Glider code solely to protect its business.

16 Finally, Glider has many commercial uses other than "to circumvent Warden."⁸⁹
17 MDY and Donnelly have marketed Glider since its beginning as an add-on software
18 program to assist WoW players in advancing their character's level faster than normal.⁹⁰
19 MDY has also made it known that physically handicapped players can use Glider to help
20 them play the game if they have trouble using a computer keyboard.⁹¹ Additionally,
21 since October, 2007, MDY has developed additional features in Glider's platform so that
22 MDY can sell Glider for use with several other computer games similar to WoW.⁹²

23 ⁸⁵ MDY SDF ¶ 44.

24 ⁸⁶ *Id.*

25 ⁸⁷ *Id.*

26 ⁸⁸ MDY SDF ¶ 140.

27 ⁸⁹ *Id.* ¶ 42.

28 ⁹⁰ *Id.* ¶ 44.

⁹¹ *Id.* ¶ 42

⁹² *Id.*

1 Clearly, Blizzard’s assertion that Glider has no commercial use other than to circumvent
2 Warden is false.

3 **VII. Because MDY has not acted improperly by creating, marketing and selling its**
4 **independently created aftermarket software to Blizzard’s WoW users, MDY**
5 **has not tortiously interfered with Blizzard’s contractual relations.**

6 In addition to all of MDY’s reasons cited in its opening brief for its Motion for
7 Summary Judgment, Blizzard’s copyright misuse also bars it from seeking equitable
8 relief arising from its copyrights. Thus, the Court cannot grant summary judgment to
9 Blizzard for its tortious interference with contract (“TIWC”) claim.⁹³ In addition,
10 regardless of Blizzard’s Copyright misuse, disputed material facts preclude the entry of
11 summary judgment. First, a reasonable jury could find that Blizzard’s EULA and TOU
12 violate public policy by restraining trade and because of the agreements’ anti-competitive
13 nature. Second, a reasonable jury could find that Blizzard cannot prove that MDY acted
14 improperly. Third, a reasonable jury could find that Blizzard cannot prove that MDY
15 *solely* acted with malice. Fourth, a reasonable jury could find that Blizzard cannot prove
16 that MDY intended to interfere with Blizzard’s contracts. Finally, a reasonable jury
17 could find that Blizzard cannot prove any damages.

18 A. Because Blizzard’s EULA and TOU are anti-competitive and restrain trade, a
19 reasonable jury could find that Blizzard’s agreements violate public policy

20 According to the Restatement (Second) of Torts § 774, an alleged interferer is not
21 liable for TIWC if the contract at issue effectively violates “an established public
22 policy:⁹⁴

23 One who by appropriate means causes the non-performance of an illegal
24 agreement or an agreement having a purpose or effect in violation of an
25 established public policy is not liable for pecuniary harm resulting from the
26 nonperformance.

27 _____
28 ⁹³ See, *infra*, section V.

⁹⁴ Restatement (Second) of Torts, § 774.

1 As a result, as long as the third-party contract's relevant provisions contract operate
2 adversely to public policy, courts will not find TIWC – even if the court finds all the
3 other TIWC elements.⁹⁵

4 By its own terms, §774 is not limited to situations where contracts are
5 unambiguously illegal. Anti-competitive provisions or provisions that restrain trade are
6 enough to bar TIWC liability. In fact, the comments to §774 expressly state that such
7 provisions are common provisions that bar a finding of TIWC.⁹⁶

8 A common type of contract regarded as contrary to public policy is a
9 contract tending to monopoly or undue restraint of trade (sic). In some
10 cases this result may be the avowed purpose of the agreement in question;
11 in others this may be the effect in view of the administration of the
agreement or other circumstances, whether or not it is the purpose.

12 ...
13 If, however, the restriction works prejudice to both interests by tending to
14 create a monopoly or by unduly restraining trade, it is regarded as in
violation of a clear public policy.

15 §774 expressly illustrates how an otherwise valid contact could not be used as a
16 basis for TIWC liability even when the contract breached expressly forbids the very
17 result that occurs.⁹⁷

18 A, a cinema exhibitor in the town of X has a contract with the chief cinema
19 producers that they will not permit any first-run pictures to be shown in X
20 except at his theatre. B builds a cinema theatre in X. He is not liable for
21 inducing one or more of the producers to license him for a first-run cinema
in breach of the contract with A, if he does not use wrongful means.

22 In this case, Blizzard contends that its EULA prohibits its licensees from using
23 independently created aftermarket software with WoW.⁹⁸ Like B in the example, MDY
24 cannot be liable for inducing a user to use MDY's Glider software even if such use
25

26 ⁹⁵ See *id.*, cmt. b.

27 ⁹⁶ *Id.*

28 ⁹⁷ *Id.*, Illustration 4.

⁹⁸ Blizzard's MSJ, Section V.

1 breaches Blizzard's contract because to do so would be anti-competitive and restrain
2 trade. Just like there is no law that prevents B from opening his theater, there is no law
3 that prevents MDY from selling its software. The Court should deny Blizzard's motion
4 for summary judgment as a matter of law.

5 B. A reasonable jury could find that MDY did not act improperly by advertising
6 and marketing its Glider software

7 To survive summary judgment, Blizzard must demonstrate that MDY's actions
8 were illegal – or at least inequitable – for the Court to consider the actions to be
9 tortious.⁹⁹ Actions that comply with the law, of course, will not be considered tortious.
10 The law has long permitted reverse engineering of copyrighted software for the purpose
11 of achieving interoperability between aftermarket software and copyrighted software.¹⁰⁰
12 The DMCA goes further by expressly permitting a person to circumvent technological
13 measures the purpose of achieving interoperability between aftermarket software and
14 copyrighted software.¹⁰¹ In this way, copyright law expressly authorizes the steps
15 needed to make, use and sell independently created aftermarket software – that is,
16 aftermarket software intended solely for use with another person's copyrighted game.¹⁰²
17 Moreover, copyright law's purpose is to encourage artists, writers and even computer
18 programmers to create new ideas artistic and literary works, including independently
19 created aftermarket software, which will reach the marketplace.¹⁰³

20 In stark contrast, Blizzard believes that it can use TIWC to achieve the opposite
21

22 ⁹⁹ See, MDY's MSJ, at 18–23 for a more detailed discussion of applicable law.

23 ¹⁰⁰ See, *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992); *Sony*
24 *Computer Entertainment v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

25 ¹⁰¹ See, Anti-Circumvention Rulemaking Hearing, at 44-56, at
26 <http://www.copyright.gov/1201/2003/hearings/transcript-may9.pdf> (testimony of
27 Professor Jane Ginsburg), attached to MDY's SDF as **Exhibit L**.

28 ¹⁰² *Id.*; see also, 17 U.S.C. § 1201(f)(3); *Lexmark Intern. v. Static Control Components*,
387 F.3d 522 (6th Cir. 2004).

¹⁰³ See, *Sony v. Connectix Corp.*, 203 F.3d 596, 605-08 (9th Cir. 2000)(the "ultimate aim"
of the Copyright Act is "to stimulate artistic creativity for the public good.")

1 result – i.e., to prevent independently created aftermarket software from reaching the
2 marketplace. In support of its position, Blizzard contends that TIWC applies because
3 Glider has “no utility” and it is not an “independent good.”¹⁰⁴ In addition to ignoring the
4 law of the previous paragraph, the law does not give Blizzard’s assertions weight.¹⁰⁵
5 Comparatively, the Court can only consider Glider “independently created software” –
6 much more so than the defendant’s software in *Lexmark*.¹⁰⁶

7 In support of its TIWC theory, Blizzard cites *Am. Airlines v. Platinum World*
8 *Travel*.¹⁰⁷ The central issue in *Am. Airlines* involved a promotional frequent flyer reward
9 program that plaintiff American Airlines offered its customers.¹⁰⁸ Before enrolling a
10 customer in the program, American Airlines required each customer to contractually
11 agree not to sell any reward to a third-party.¹⁰⁹ The defendants in the case operated a
12 business that brokered the frequent flyer rewards American Airlines issued.¹¹⁰ The
13 District Court entered summary judgment on the issue of TIWC and the decision was
14 upheld on appeal.¹¹¹

15 Even though some facts of *Am. Airlines* are analogous to the case at bar, it is not
16 particularly helpful. First, as opposed to the facts in *Lexmark*, Congress did not expressly
17 authorize the defendant’s acts. In fact, the court in *Am. Airlines* actually noted
18 defendant’s failure to point out any authority for its position.¹¹² Second, as an “air
19 carrier,” the court found that plaintiff American Airlines was statutorily exempt from the
20 federal and state unfair practices laws.¹¹³ Here, Blizzard enjoys no exemption from

21
22 ¹⁰⁴ Blizzard’s MSJ at 14.

23 ¹⁰⁵ *See, e.g.*, MDY’s SDF ¶¶ 42, 44, 140; MDY’s SOF ¶¶ 38-46.

24 ¹⁰⁶ *Lexmark*, 387 F.3d at 550 (mere checksum program to complete “handshake”
enough).

25 ¹⁰⁷ 769 F.Supp. at 1208, *aff’d* 967 F.2d 410 (10th Cir. 1992).

26 ¹⁰⁸ *Am. Airlines*, 769 F.Supp. at 1204.

27 ¹⁰⁹ *Id.*

28 ¹¹⁰ *Id.*

¹¹¹ *Id.* at 1208.

¹¹² *Id.* at 1207.

¹¹³ *Id.* at 1205.

1 unfair competition laws. Third, unlike plaintiff American Airlines, Blizzard has misused
2 its copyrights and has attempted to unilaterally extend the reach of copyright law through
3 contract in an anti-competitive manner. Fourth, the court *Am. Airlines* expressly decided
4 as a misappropriation case. In fact, the court stated that defendants’ acts went “far
5 beyond” mere misappropriation of information.¹¹⁴

6 The defendants business goes far beyond misappropriation of information.
7 Rather, the defendants are misappropriating the actual services of the
8 plaintiff.

9 Here, MDY has not misappropriated anything from Blizzard.¹¹⁵ Blizzard sells
10 WoW. MDY’s Glider does not permit users to play WoW without paying for it. MDY’s
11 Glider requires users to pay for, and log into a valid WoW account just like any other
12 WoW user. MDY’s Glider does not modify or change any WoW software or coding.
13 MDY independently created Glider as an aftermarket software application that permits its
14 users to play WoW on auto-pilot.¹¹⁶

15 Lastly, even though Glider avoids detection by Blizzard’s spyware (Warden),
16 MDY’s actions are not the same as the defendants’ actions in *Am. Airlines*. Unlike MDY
17 (whose actions Copyright law promotes), the defendants in *Am. Airlines* were the central
18 figures in “an elaborate system of deception enlisting the aid of plaintiff’s customers”,
19 which included “booking false reservations.”¹¹⁷

20 Blizzard may argue that, like the defendant in *Am. Airlines*, MDY deceives
21 Blizzard by actively avoiding detection from Warden. The Court should note that when
22 MDY started selling Glider, Glider did not originally avoid detection. MDY did not
23 include detection avoidance as a feature of Glider because Donnelly never believed that
24 the use of Glider with WoW would violate Blizzard’s EULA.¹¹⁸ MDY added this feature

25 ¹¹⁴ *Id.* at 1207 (emphasis ours).

26 ¹¹⁵ MDY’s SOF ¶¶ 34-45.

27 ¹¹⁶ MDY’s SDF ¶ 154.

28 ¹¹⁷ *Id.* at 1203.

¹¹⁸ MDY’s SDF ¶ 141.

1 to Glider solely as a countermeasure to Blizzard’s unilateral attempt to take away what
2 Donnelly believed was a rightful software business.¹¹⁹ Likewise, a reasonable jury could
3 find that Blizzard’s EULA permitted because Glider does not enable a user to do
4 anything more than a human can do. Glider simply automates keystrokes to permit the
5 Glider user to do something more productive.¹²⁰

6 C. A reasonable jury could find that Donnelly was not motivated by a malicious
7 intent to harm Blizzard or WoW

8 The question whether a desire to interfere with the plaintiff’s contractual relations
9 motivated the defendant is a major factor, if not the *most important factor* in determining
10 whether the interference is “improper.”¹²¹ As long as the actor’s motive is at least
11 partially supported by a proper purpose, the actor has not tortiously interfered.¹²² *Malice*
12 *must be the sole motivator* for the actor to interfere *tortiously*.¹²³ For example, “a
13 competitor does not act improperly if his purpose, at least in part, is to advance his own
14 economic interests.”¹²⁴

15 Blizzard submits statements that MDY made as evidence that malice was MDY’s
16 sole motivator.¹²⁵ MDY’s statements do not indicate a motive to maliciously harm
17 Blizzard. If anything, MDY’s statements demonstrate the lengths MDY had to go to
18 protect its economic interests in maintaining its business, not that MDY harbors ill will
19 toward Blizzard. Even if a reasonable jury could interpret MDY’s statements as hostile,
20 ill will is not enough by itself. Ill will coupled with proper motivation, like a viable

21 _____
22 ¹¹⁹ *Id.*

23 ¹²⁰ MDY’s SOF ¶¶ 38-45.

24 ¹²¹ Restatement 2d of Torts, § 767, cmt. d.

25 ¹²² *Bar J Bar Cattle v. Pace*, 158 Ariz. at 485 (“even if [defendant] had an improper
26 motive, that fact would not necessarily make him liable in tort. One who interferes with
27 the contractual rights of another for a legitimate competitive reason does not become a
28 tort-feasor simply because he may also bear ill will toward his competitor.”)

¹²³ *Id.*; *see also*, Restatement (Second) of Torts, § 767, cmt. d.

¹²⁴ *Bar J Bar Cattle*, 158 Ariz. at 485, *citing with approval*, Restatement (Second) of
Torts § 768(1)(d).

¹²⁵ Blizzard’s MSJ at 16-17.

1 business, defeats Blizzard's claim. At a minimum, the parties dispute whether MDY
2 maliciously sold Glider, which at a minimum, may be a question for a jury to decide.

3
4 D. A reasonable jury could find that MDY did not intend to interfere with
5 Blizzard's contracts

6 To obtain summary judgment, Blizzard must have irrefutable evidence that MDY
7 had the "specific intent" to cause the interference.¹²⁶ Even Blizzard agrees that it must
8 show that MDY "intended or knew" that a breach of contract was "substantially certain"
9 to occur as a result of Glider.¹²⁷

10 Blizzard's own motion implicitly admits that Blizzard cannot show that MDY
11 intended or knew that Glider use with WoW would breach the EULA/TOU when
12 Donnelly created Glider and when MDY began selling Glider in June, 2005.¹²⁸ Even
13 when viewing the facts in Blizzard's favor, Blizzard only evidence is statements MDY
14 made in its FAQ as early as September 2005 that Blizzard's EULA was overly broad and
15 a user could possibly breach the EULA by using Glider with WoW.

16 In addition, a reasonable jury could find that MDY did not have the "specific
17 intent" to cause the interference because Blizzard's agreements did not originally prohibit
18 "bots."¹²⁹ It was only after Donnelly filed this lawsuit that Blizzard unilaterally elected to
19 modify its TOU expressly to exclude bots.¹³⁰ Thus, at least until Blizzard changed its
20 contract, a reasonable jury could find that MDY lacked the specific intent to interfere
21 with Blizzard's agreements.

22 Furthermore, Blizzard has cited no case for the proposition that Blizzard can take

23
24 ¹²⁶ *Antwerp Diamond Exchange of America, Inc. v Better Business Bureau of Maricopa
County, Inc.*, 130 Ariz. 370 (1985).

25 ¹²⁷ Blizzard's MSJ at 15, lines 4-5.

26 ¹²⁸ Blizzard's MSJ at 15, lines 10-14 (noting only "at least September 2005").

27 ¹²⁹ MDY's SDF ¶ 67; *see also, Darner Motor Sales v. Universal Underwriters*, 140 Ariz.
383 (1984)(terms of adhesion contracts that are not within the reasonable expectations of
the non-drafter are not enforceable).

28 ¹³⁰ MDY's SDF ¶ 67; *see also, MDY's SOF ¶15-18.*

1 away a business that MDY lawfully started. In other words, Blizzard cannot on its own
2 whim, modify its EULA to unilaterally strip MDY of its software business, or any other
3 entity such as Brian Kopp of his unauthorized WoW guidebook business, when Glider
4 did not violate Blizzard’s EULA or TOU in the first instance.

5 E. A reasonable jury could find that MDY did not damage Blizzard

6
7 Blizzard bears the burden of showing that MDY’s alleged wrongful conduct was a
8 substantial factor in Blizzard’s loss.”¹³¹ While a jury usually determines the conduct
9 caused damage, the “mere possibility of causation is not enough” to defeat summary
10 judgment.¹³² Even if an inteferor’s conduct contributed "only a little" to the claimant’s
11 injury, the claimant still “must show at trial that the injury would not have occurred ‘but
12 for’ the [interferor’s] conduct.”¹³³

13 In this case, Blizzard cannot present evidence of any harm that Glider caused.¹³⁴
14 MDY’s expert has concluded that Blizzard’s calculations are speculative and unsupported
15 by any controlled economic study.¹³⁵ If anything, Glider has increased Blizzard’s
16 revenues.¹³⁶ Even if Blizzard has suffered damage as a result of “bots,” Blizzard cannot
17 attribute any damage explicitly to Glider – a program that is very different than the other
18 “bots.”¹³⁷ At a minimum, the parties dispute certain material facts that preclude the Court
19 from granting summary judgment.

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22 ¹³¹ See, MDY’s MSJ at 24; *Agilysys, Inc. v. Vipond* No. CV-04-2023-PHX-DGC, at 5 (D.
Ariz. September 13, 2006).

23 ¹³² *Grafitti-Valenzuela v. Phoenix*, 513 Ariz. Adv. Rep. 20, at 12 (Ariz.App. 9-27-2007)
24 citing *Badia v. City Of Casa Grande*, 195 Ariz. 349, 357 (App. 1999)(“Sheer speculation
25 is insufficient to establish the necessary element of proximate cause or to defeat summary
judgment.”)

26 ¹³³ *Grafitti-Valenzuela*, 513 Ariz. Adv. Rep. at 12.

27 ¹³⁴ MDY’s SDF ¶¶ 147-53

28 ¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

1 **VIII. CONCLUSION**

2 For the foregoing reasons, the Court should deny Blizzard's motion for summary
3 judgment on all counts.

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5 **Venable, Campillo, Logan & Meaney, P.C.**

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7
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CERTIFICATE OF SERVICE

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I hereby certify that on April 24, 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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