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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC,

Plaintiff and Counterdefendant,

vs.

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

Defendants and Counterclaimants,

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

Third-Party Plaintiffs,

vs.

MICHAEL DONNELLY, an individual

Third-Party Defendant.

Case No.: CV06-02555-PHX-DGC

Reply in Support of Motion For Summary Judgment by Plaintiff MDY Industries, LLC And Third Party Defendant Michael Donnelly

The Honorable David G. Campbell

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I. Overview

This case turns on whether a user violates copyright law when playing World of Warcraft ("WoW") while allegedly in breach of a non-copyright-related term of Blizzard's End User License Agreement ("EULA"). This is a new issue and will have far-reaching implications for the marketing of a vast range of consumer products. If the Court upholds Blizzard's position, the maker of any product containing software that requires a temporary RAM copy before it can be used can then license that software conditioned on *any* specific use the manufacturer desires.

Congress designed Copyright to protect the rights of creative authors whose works could, without copyright protection, be copied and distributed at a price that would undercut the copyright owner's opportunity to a fair reward for his creativity. Congress did **not** design Copyright to regulate the market for all consumer products, which today predominantly make use of software for reasons of technological efficiency.[1] If such products "copy" code parts from one memory unit to another during operation, that "copying" is purely a technological artifact that has nothing to do with the acts that copyright is designed to control – the right to reproduce and distribute copies of the work.

In the end, artful contract drafting should not be the linchpin for copyright/DMCA issues – particularly, in an adhesion setting.[2]

II. Blizzard's Copyright Claims Fail as a Matter of Law

A. Because Blizzard's "license to use" clause does not refer to copyright use, MDY is entitled to summary judgment

A license may not be interpreted in such a way that it interferes with federal

[1] *See, e.g.,* 17 U.S.C. §102(b)(copyright does not extend to "methods of operation"). In the context of software, method of use "refers to the means by which a person operates … a computer." *Lotus Development Corp. v. Borland Int'l, Inc*., 49 F.3d 807, 815 (1st Cir. 1995), *aff'd without opinion by an evenly divided Court*, 116 S.Ct. 804 (1996).

[2] *See also, Sony Corp. v. Universal City Studios, Inc*., 464 U.S. 417, 431 (1984) (noting that "[t]he judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme" in copyright jurisprudence).

copyright policy.[3] The exclusive rights of copyright under §106 do not give Blizzard the right to control how owners of purchased copies use WoW software. If Blizzard wanted to control use of its software, Blizzard should have secured patent protection.[4]

Instead, Blizzard relies on *Sun v. Microsoft*[5], and *Netbula v. Storage Technology*.[6] Both cases, however, involved sophisticated parties negotiating arms-length copyright licenses. Neither involved a mass-marketed software product licensed under an adhesive shrink-wrap agreement purporting to limit the "license" to use the software with a computer (its only use) on a range of non-copyright-related "conditions." Here, 17 U.S.C. §117(a) precludes Blizzard from suing its users for copyright infringement as the WoW software code merely loads into RAM as a necessary step to play WoW.[7]

Additionally, Blizzard cites *Sun* to argue that simply adding terms like "subject to" or "conditional on" to a "use" clause automatically turns a breach of such "use" clause – regardless whether such use derives from §106 – into copyright infringement. Contrary to Blizzard's expansive view, *Sun* stands for the principle that when a person exceeds the license's scope in a manner that would otherwise constitute copyright infringement (like making a derivative work), the person cannot file suit for copyright infringement unless the parties specifically negotiated copyright as a remedy.[8] Thus, when a negotiated contract governs the relationship between two sophisticated parties, the remedy lies exclusively in contract unless the parties unambiguously agreed otherwise.

Not every "use" clause refers to protected copyright use. In some instances, "use"

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[3] *S.O.S., Inc. v. Payday, Inc*., 886 F.2d 1081, 1088 (9th Cir. 1989).

[4] *See,* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.18[A] (Rel. 70 - 2006)(patent, not copyright, gives the owner the right to control use.)

[5] *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1117 (9th Cir. 1999)("Sun I"); 81 F. Supp.2d 1026 (N.D.Cal. 2000)("Sun II").

[6] *Netbula, LLC v. Storage Technology Corporation* (N.D.Cal. 1-17-2008).

[7] *See Amicus Brief*, submitted by Public Knowledge (Document 54), which is incorporated herein by reference with respect to its §117 arguments.

[8] *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1117 (9th Cir. 1999) (plaintiff claimed "Microsoft had exceeded the scope of its license…"); *Jacobsen v. Katzer*, No. C 06-1905 at 10-11 (N.D.Cal 8-17-2007).

may refer to copyright use (i.e., derivative use cases or performance rights cases). In other instances, "use" may not refer to copyright use. In *S.O.S*, the court noted:

> In the context of the parties' entire agreement, it is clear that the "right to use" was not intended to refer to *copyright use*. The contract does not refer explicitly to copyright or any of the copyright owner's exclusive rights. Payday clearly was concerned solely with obtaining output in the form of processing payroll information for its customers.[9]

Further, "were this a license between S.O.S. and another software writer, 'right to use' might be more properly construed to include uses, such as modifying the software, otherwise reserved to the copyright holder."[10] The licensee exceeded the license's scope because the licensee "copied and prepared a modified version of the programs without S.O.S.'s permission."[11] Both acts violated the exclusive copyrights to make copies and derivative works. The *S.O.S.* court never suggested that merely "using" the programs by loading them into RAM exceeded the license's scope. In fact, *S.O.S.* noted that a party to such a clause "may well have assumed" that the "right to use" would include the licensee's right to run the software on its own machines.[12]

Here, Blizzard's EULA demonstrates that Blizzard's conditions on "use" do not refer to copyright use. First, in the EULA's opening paragraph, Blizzard states:

> Any and all uses of the Game are governed by the terms in this [EULA]. The Game may only be played by obtaining from Blizzard access to the [WoW] massively multi-player on-line role-playing game service (the "Service"), which is subject to a separate Terms of Use agreement ("TOU").[13]

In this paragraph, Blizzard conditions whether the user can play the game on the TOU; it does not purport to grant an exclusive right under §106. The entire EULA mentions a license grant in Paragraph 1 only. In Paragraph 1, Blizzard refers to the Game

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[9] *S.O.S., Inc. v. Payday, Inc*., 886 F.2d at 1088 (emphasis ours).
[10] *Id.*, fn 8.
[11] *Id*. at 1089.
[12] *Id.* at 1088.
[13] *See, e.g.,* Blizzard's EULA, Exhibit D to MDY's SOF.

Client as computer software that enables the user to play the game:

> "Subject to your agreement to and continuing compliance with [the EULA], Blizzard hereby grants, and you hereby accept, a limited, non-exclusive license to (a) install the Game Client on one or more computers owned by you or under your legitimate control, and (b) *use the Game Client* in conjunction with the Service for your non-commercial entertainment purposes only. *All use of the Game Client* is subject to this [EULA] and to the [TOU], both of which you must accept *before you can use your Account to play the Game*.[14]

The terms: "[U]se the Game Client," "All use of the Game Client," and "use your Account to play the game" refer to Blizzard's conditioning whether the user can play the game on agreeing to the EULA and TOU -- not on any exclusive right under §106.

Contrast Blizzard's language in the EULA's opening paragraph and paragraph 1 with the language in paragraph 4(A). In paragraph 4 entitled "Responsibilities of End User," part A states,

> Subject to the license granted hereunder, you may not, in whole or in part, *copy*, *photocopy*, *reproduce*, translate, reverse engineer, *derive source code* from, *modify*, disassemble, decompile, or *create derivative works* based on the Game…[15]

The italicized words are all §106 exclusive rights that refer to the exclusive rights to copy and make derivative works from the protected software code. Within the EULA's four corners, Blizzard intended to separate the right to "use" the software (play WoW) from certain other rights, including §106 exclusive copyrights. Importantly, the rights in part 4(A) are *subordinate* to the right to "use" the game in paragraph 1. Thus, Blizzard distinguishes the right to use (play WoW) from the right to copy or make derivative works of the WoW software code.

B. Even if Paragraph 1 of the EULA relates to copyright, Blizzard cannot construe it as a condition precedent; no reasonable person could read Blizzard's EULA and determine that Blizzard intended to assert copyright

[14] *Id.* (emphasis ours).
[15] *Id*. at 2 (emphasis ours).

infringement claims against Glider users.

Courts must construe adhesion contracts to include the parties' reasonable expectations.[16] Blizzard's EULA never states that Blizzard can sue a user for copyright infringement for playing WoW with unauthorized software (or for using prohibited vulgar language while playing). Even in an arms-length negotiated setting like *Sun v. Microsoft*, failure to include copyright as a remedy can be outcome determinative.[17] In Blizzard's "equitable remedies" section of the EULA, Blizzard never uses the term "copyright."[18] No reasonable user would equate "equitable remedy" with copyright infringement. At most, a user would expect to lose his accounts.[19]

C. §117(a) renders *Ticketmaster* inapplicable to the present case.

In *Ticketmaster*,[20] plaintiff accused defendant of infringing Ticketmaster's copyright by loading Ticketmaster's software code for its web pages from Ticketmaster's servers.[21] Here, no one copies anything from Blizzard's servers. Unlike *Ticketmaster*, the users here *own the copies of WoW on their hard drives and they have a right to use those copies under §117(a). Therefore, they have the right to allow their computers to load pieces of WoW into RAM as necessary for play*. In *Ticketmaster*, although the user's computer must load the web pages into RAM, the end users do not *own* copies of Ticketmaster's copyrighted web pages. Thus, in addition to all the reasons previously stated in MDY's Response to Blizzard's MSJ, Ticketmaster does not apply here.

III. Blizzard's DMCA Claims Fail as a Matter of Law

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[16] See, *Huff v. Bekins Moving & Storage Co*., 145 Ariz. 496, 498 (App. 1985).
[17] *Sun II*, 81 F.Supp.2d 1026, 1032-33, fn. 12 (N.D. Cal. 2000).
[18] *See*, EULA Section 12 (Equitable Remedies), Exhibit D to MDY's SOF.
[19] Blizzard does not terminate a license for unauthorized use. Blizzard bans the user's account. Blizzard allows the banned user to sign up with his same name and credit card information. *See* MDY's SDF at ¶ 104, 134, Exhibit Y.
[20] *Ticketmaster LLC v. RMG Techs., Inc*., 507 F.Supp.2d 1096, pg. 7 (C.D. Cal. 2007).
[21] *Id*. at 7.

A. Software detection is not equivalent to software protection under the DMCA

The DMCA applies only to technological devices whose primary purpose is to prevent copying.[22] Here, Blizzard admits that the primary purpose of both Scan.dll and Warden is to detect whether unauthorized software exists in RAM, not to prevent copying.[23] Blizzard's claim that Scan.dll prevents a user from playing WoW when the user first logs into WoW is irrelevant.[24] Any person who has loaded a copy of the WoW code to a hard drive can make an infinite number of copies of the code from the hard drive whether or not Scan.dll or Warden is active. The user can copy the WoW code to another part of his hard drive, a different hard drive, a flash disk, a CD or DVD, and most importantly even to his RAM. The user can copy the WoW code to RAM by simply opening it with any file viewer (e.g., Notepad or Wordpad). Even in the light most favorable to Blizzard, Scan.dll and Warden prevent users from playing WoW, but neither can never prevent copying. Even if Scan.dll detects Glider, it does nothing to prevent a user from being able to copy the code from the user's hard drive into RAM. Thus, neither Scan.dll nor Warden effectively control access to the WoW code.

B. Warden and Scan.dll do not protect against access to a work under §1201(a) or infringement under §1201(b).

The DMCA has two prongs: one protects access to a work protected by copyright, §1201(a), the other protects against a person infringing a copyright owner's rights §1201(b). With respect to the first prong, MDY has argued that the Copyright Act does not protect the WoW software from unauthorized use, i.e. playing WoW – contract law does.[25] With respect to the second prong, because Glider does not enable a user to make

[22] *See* MDY's MSJ, Section IV(B); MDY's Response to Blizzard's MSJ, Section VI(B).
[23] *See* Blizzard's MSJ at 11; Blizzard's Response to SOF at 11-16.
[24] Even still, if a user can avoid Scan.dll by simply waiting until after WoW is running, Scan.dll, by definition, is not an effective access control measure.
[25] *See* Section I *infra;* MDY's MSJ at Sections III-IV; MDY's Response to Blizzard's MSJ at Sections III-VI.[25]

it any easier to copy the WoW code more easily than if the user did not own Glider. As *Chamberlain* emphasized, Congress intended the DMCA to help copyright owners prevent people from mass copying and distributing digital works, not as a way to control how a person uses software.[26]

Warden and Scan.dll help enforce clauses in Blizzard's EULA and TOU sections governing unauthorized software. The DMCA, however, cannot enforce Blizzard's efforts to control legal and independently created aftermarket software. For all of these reasons, MDY is entitled to summary judgment on Blizzard's claims that MDY violates the DMCA.

IV. Blizzard's Tortious Interference with Contract ("TIWC") Claims Fail

A. Even in light most favorable to Blizzard, Blizzard has provided no evidence that MDY "improperly" induced a breach

MDY asserts that Blizzard has offered no evidence that MDY acted "improperly."[27] In the context of a TIWC claim, "improper" applies to the motive or means how a person induces a breach, not the manner in which the breach occurs. Thus, Blizzard's claims that Glider avoids detection or evades Warden, etc. are not material facts because they relate to the manner of breach, not the manner of inducement. If anything, the material facts relating to the manner of inducement (or lack thereof), represent "honest persuasion."[28]

TIWC requires "intentional interference inducing or causing a breach or termination of the relationship or expectancy."[29] The comments to the Restatement show that "inducing a breach" refers to the manner in which A causes B to decide to breach the

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[26] *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178, 1197 (Fed. Cir. 2004).
[27] MDY's MSJ at 17-19.
[28] *See,* Blizzard's Response at 17-18 (MDY's Nature of Conduct and Motive); SOF Improper Motive section, ¶¶ 234-45.
[29] *Wagenseller v. Scottsdale Memorial Hosp*., 147 Ariz. 370, 386 (1985) (element 3).

contract – not to the manner in which B breaches the contract.[30] As noted by the comments to the Restatement "[i]nducement operates on the mind of the person induced:"[31]

> The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the promise of a benefit to the third person if he will refrain from dealing with the other.[32]

As such, a TIWC claim fails for lack of inducement when a party to Contract A approaches a non-party to Contract A to act in a way that breaches Contract A even if the non-party knows a breach of Contract A will certainly occur:[33]

> For instance, B is under contract to sell certain goods to C. He offers to sell them to A, who knows of the contract. A accepts the offer and receives the goods. A has not induced the breach and is not subject to liability under the rule stated in this Section.[34]

Furthermore, even if the non-party did not initiate the contact, "the Restatement recognizes that [the non-party] still might not be guilty of tortious inference unless the solicitation proceeds beyond the normal and regular course of [the third party's] business

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[30] The phrase "otherwise causing" is not relevant here. "Otherwise causing" refers to physically preventing performance (i.e., imprisonment, destroying goods, etc.). Restatement (Second) of Torts, §766, cmt. h.

[31] *Id.*, cmt. h.

[32] *Id.*, cmt. k.

[33] *Id.*, cmt. n ("One does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person).

[34] *Id.; see also Bar J Bar Cattle Co., Inc. v. Pace*, 158 Ariz. 481, 482 (App. 1988)("the weight of authority holds that it is a tort to *improperly* cause the cancellation" as opposed to whether a breach occurs)(emphasis in original).

solicitations."[35] Finally, as the Arizona Supreme Court has stated, it "is difficult to see anything defensible, in a free society, in a rule that would impose liability on one who **honestly persuades** another to alter a contractual relationship."[36]

Because Blizzard has not provided any evidence that MDY acted improperly with respect to inducing Blizzard's customers to purchase Glider, MDY can obtain Summary judgment against Blizzard.[37] Moreover, Blizzard admits that MDY warned potential Glider purchasers that Blizzard views use of Glider as a breach of Blizzard's EULA.[38] In addition, Blizzard has not presented any evidence that MDY has induced even one of Blizzard's customers.[39] Potential Glider purchasers seek out MDY, not the other way around. Every Glider purchaser independently decides to purchase and install Glider without any coercion from MDY, which Arizona law sanctions as "honest persuasion."

B. Even if "improper" can relate to the manner of breach, summary judgment is still appropriate

Blizzard offers no legal support for its theory that circumvention and reverse engineering are "improper" when they only relate to the manner of breach - not the motive or means of inducing the breach. Even if Blizzard's theory is true, the Court should still grant summary judgment. As discussed more fully in MDY's Response to Blizzard's MSJ, Glider did not originally avoid detection.[40] MDY added detection avoidance after Blizzard unilaterally tried to stop Glider users. Blizzard's copyright misuse, §774 of the Restatement, and the DMCA's "interoperability" section all operate to bar Blizzard's TIWC claim as a matter of law.[41]

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[35] *See Middleton v. Wallichs Music & Entertainment Co*., 24 Ariz. App. 180 (1975).
[36] *Wagenseller v. Scottsdale Memorial Hosp*., 147 Ariz. 370, 388 (1985)(emphasis ours).
[37] *See*, Blizzard's Response at 17-18 (MDY's Nature of Conduct and Motive); SOF Improper Motive section, ¶¶ 234-45.
[38] *See*, Blizzard's SOF, Exhibit 39 at 3.
[39] Any evidence Blizzard has offered relates to general advertising not direct solicitation of Blizzard customers. *Id.*
[40] *See*, Blizzard's Response to SOF, ¶ 58.
[41] *See*, 8 (copyright misuse), at 18 (§774) and at 20 (interoperability).

C. Blizzard misapplies the law of intent

MDY asserts that Blizzard must have some evidence that MDY had the specific intent to cause the interference.[42] Blizzard responds by claiming that the "record contains extensive evidence of MDY's knowledge that Glider violated the Blizzard's EULA and TOU long before the amendment."[43] Blizzard also responds by asserting that MDY has admitted that it had the intent to interfere.[44] Both responses are insufficient and do not prevent the Court from granting summary judgment for MDY.

The comments to the Restatement indicate that a person can demonstrate intent in two ways: (1) actual intent to interfere, or (2) knowledge that a breach is "substantially certain."[45] While Blizzard nominally agrees with this statement of law,[46] Blizzard fails to recognize that that the ensuing analysis differs depending on which method is applied.

"Intent to interfere" refers to "motive to injure another or to vent one's ill will on him."[47] In an "intent to interfere" case, courts require nothing more to satisfy the intent element.[48] On the other hand, in a "substantial certainty" case, courts require more. Even if a person is substantially certain that his conduct will cause a breach, a person is not liable under TIWC absent criminal, fraudulent, or other independently wrongful act:

> If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.[49]

Thus, in cases where a plaintiff can provide no evidence of ill will or intent to injure

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[42] MDY's MSJ at 23.
[43] Blizzard's Response to MDY's MSJ at 22.
[44] *Id.*
[45] Restatement (Second) of Torts, §766, cmt. j.
[46] Blizzard's Response to MDY's MSJ, fn. 30.
[47] *See Strojnik v Gen. Ins. Co. of America*, 201 Ariz. 430, 437 (App. 2001).
[48] Restatement (Second) of Torts, §767, cmt. d.
[49] *Id.*, cmt. d.

summary judgment is appropriate unless the plaintiff can produce admissible evidence of an independently wrongful means to induce a breach.[50]

Here, even if Blizzard's claim that MDY was reasonably certain that a user who played WoW with Glider would breach Blizzard's EULA, the intent element requires a wrongful act.[51] Likewise, even if Blizzard's claim that MDY admitted it intended to interfere was true, Blizzard has confused "motive" with "objective."[52] Without evidence of ill will or improper means, Blizzard lacks evidence to support "intent" as a matter of law.

D. Because it is not substantially certain whether Glider use actually breaches the EULA, the court can still grant summary judgment to MDY

Even assuming that Blizzard only has to prove intent with evidence of a "substantially certain" breach, Blizzard's argument still fails. In this case, Section 2C of the TOU does not preclude Glider; Section 2C precludes "cheats", "mods", "hacks", etc.[53] Despite Blizzard's inflammatory label as a cheat, Blizzard has provided no evidence to dispute MDY's evidence that Glider is essentially a programmable macro.[54] Blizzard does not suggest that Glider hacks or modifies code. Glider mimics keystrokes and mouse movements according to the user's preferences and its own logic – in the same way a human user would. In this light, no reasonable jury could conclude that Glider use would breach the EULA with substantial certainty.

Likewise, even after MDY recognized that ***Blizzard believed*** Glider use breached Blizzard's EULA, MDY's belief is not equivalent to knowing that an actual breach was substantially certain to occur. Moreover, MDY's advertising on websites where potential customers might be looking for a WoW cheat does not mean that Glider is a cheat.

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[50] *Neonatology Associates v. PPA*, 216 Ariz. 185, 190 (App. 2007).
[51] *See, infra,* Section IV(A)(no evidence that MDY employed wrongful means to induce).
[52] *See Strojnik v Gen. Ins. Co. of America*, 201 Ariz. App. at 437 (recognizing a difference between motive and objective in applying TIWC).
[53] *See,* MDY's SDF ¶67.
[54] *See,* MDY's SOF ¶¶ 38, 45.

V. CONCLUSION

For the foregoing reasons, the Court should grant MDY's motion for summary judgment on all counts.

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