MDY Industries, LLC v. Blizzard Entertainment, Inc. et al Doc. 71 Att. 2

SONNENSCHEIN NATH & ROSENTHAL LLP
Scott Stein (AZ Bar No. 022709)
Shaun Klein (AZ Bar No. 018443)
2398 East Camelback Road, Suite 1060
Phoenix, AZ 85016-9009
Facsimile (602) 508-3914
Telephone (602) 508-3900

Christian S. Genetski (*Pro Hac Vice*)
Shane M. McGee (*Pro Hac Vice*)
1301 K Street, NW, Suite 600-East Tower
Washington, DC 20005
Facsimile (202) 408-6399
Telephone (202) 408-6400

Attorneys for Defendants Vivendi Games, Inc. and Blizzard Entertainment, Inc.

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. REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

The Honorable David G. Campbell

I. Introduction

In seeking to justify their improper exploitation of Blizzard's copyrighted World of Warcraft ("WoW") software, MDY asserts in its response that Glider is merely independent aftermarket software that Copyright law traditionally protects. It is not. Glider bears no meaningful resemblance to functional products like universal garage door remotes or print toner cartridges that spur lawful competition and

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expand consumer choice. Glider serves one purpose - enabling WoW users to cheat in Blizzard's expressive online gaming experience. Those users have no right to cheat, and in fact expressly forfeit that right as a condition of their software license. MDY likewise has no right to enable them.

In order to reap the benefits of the expressive, interactive gaming experience Blizzard has created, WoW players depend on a balanced allocation of in-game resources, a level playing field for advancement, and an uncorrupted environment in which to enjoy social immersion and interaction. SOF ¶ 27-30. The display of Blizzard's graphics and interactive multi-media content in the context of the online game, and the manner in which its software code allocates resources and game attributes, are the essence of its copyrighted work. Glider undermines this essence. SOF ¶ 156-58. As such, MDY's comparison of the WoW license restrictions on injecting bots into WoW to a book publisher forbidding a licensee from reading the last ten pages of a book is inapt. Rather, Blizzard's creation is more akin to putting on a richly detailed interactive play, and it seeks only to prevent Glider bots from taking the stage, disrupting the performance, and altering the experience to deprive the audience from enjoying the show it paid to see.

In short, Glider is not an "independent aftermarket product" that makes WoW better for users. It is a WoW-specific cheat that has a ruinous effect on the game and the experience of everyone actually playing it. Of MDY's many admissions, perhaps none is more telling than his concession that the presence of too many bots in WoW will ultimately ruin the game. MDY DSOF ¶ 116. It has never been the will of Congress or the courts to promote the creation of software designed solely to induce infringements that undermine the integrity and enjoyment of another's copyrighted expression. On the contrary, copyright doctrine exists precisely to protect the rights of legitimate creators like Blizzard.

II. Glider User's Copying of WoW in Excess of the WoW License Restrictions Constitutes Copyright Infringement.

Although MDY acknowledges that *MAI Systems Corp. v. Peak Computer, Inc.*[1] "on its face" holds that loading of protected software into a computer's RAM is "technically" copying for purposes of the Copyright Act, it premises its entire defense to Blizzard's copyright claims on the argument that WoW users running Glider do not implicate the Copyright Act. MDY cannot, however, escape the import of *MAI* and its progeny. Under Ninth Circuit law, the loading of WoW into RAM *is copying*, and Blizzard may lawfully restrict the right to that copying by license. MDY's contention that Glider users "could not possibly infringe Blizzard's copyrights in WoW in the absence of Blizzard's EULA" reflects a misunderstanding of a basic precept of copyright law. If loading WoW into RAM is copying, then users must obtain a license before loading WoW into RAM to avoid infringing Blizzard's exclusive right.[2] That Blizzard may condition that right is undisputed, thus the only question here is whether the WoW license restrictions prohibiting Glider use condition how WoW users may lawfully copy the game into RAM.[3] As demonstrated in full in Blizzard's Response to MDY's Motion at 6-10, under the relevant Ninth Circuit standard, they do, and thus Glider use infringes.[4]

MDY's assertion that a hypothetical attempt by Blizzard to enforce via copyright other TOU restrictions not at issue in this case somehow negates its

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[1] MDY Resp. at 2-3; 991 F.2d 511, 519 (9th Cir. 1993).

[2] MDY admits that Blizzard *grants* that right to users in the WoW licenses. MDY Mem. at 9.

[3] MDY's contention that it disputes whether the "RAM copying" here mirrors *MAI* is nothing more than its questioning the validity of Ninth Circuit law. At his deposition, MDY's expert testified that the basis for his opinion that no "copying for purposes of the Copyright Act" occurs when WoW is loaded into RAM was based on his disagreement with a *verbatim recitation of the holding in MAI*. SOF 2nd Supp. ¶ 316, Ex. 61. MDY cannot create an "issue of fact" from its expert's rejection of Ninth Circuit precedent.

[4] *Ticketmaster LLC v. RMG Techs., Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007), contrary to MDY's claims, faithfully applies the Ninth Circuit's recognition that exceeding license terms that *limit the scope* of the license, including the right to make copies in RAM, equates to infringement. *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999).

legitimate right to enforce the provisions actually at issue is a red herring. The provisions that Glider violates are contained in paragraphs 4 of the EULA and TOU, respectively. These conditions prohibit users from engaging in acts - making unauthorized connections to WoW, running cheats/bots, exploiting the game content, mining and collecting information from the WoW program - that are inexorably intertwined with Blizzard's delivery of its copyrighted expression in the online gaming experience, and thus undermine Blizzard's core rights to control the manner in which its expressive content is displayed and copied. SOF ¶ 97-104.

Unlike the TOU's secondary restrictions on actions taken outside the game to which MDY refers - e.g., providing false name or address information to Blizzard in registering an account, or sharing or selling WoW accounts in third-party transactions - the provisions at issue are linked to WoW's expressive content and limit the manner in which users may load that content into RAM. Blizzard does not seek to enforce its copyright against MDY's contribution to the unauthorized sale of WoW accounts rapidly "leveled" with Glider on its affiliates website because those breaches are distinct from WoW licensees' loading of WoW content into RAM. Blizzard seeks only to enforce its legitimate and well established right as a copyright owner to protect the manner in which the graphic, nonliteral elements of its software are copied and used.[5]

Finally, MDY wrongly invokes the limited copyright misuse defense in circumstances where it clearly does not apply.[6] Simply put, MDY cannot assert

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[5] U.S. Copyright Office, Circular 61, *Copyright Registration for Computer Programs* (2006) ("Copyright protection extends to all the copyrightable expression embodied in the computer program); *Gen. Universal Sys., Inc. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004)(finding that copyright protection of a computer program "extends … to … nonliteral elements, including … structure, sequence, organization, user interface, screen displays, and menu structures").

[6] Raymond T. Nimmer, Law of Computer Technology § 7:37 (2008) ("Hopefully the [copyright misuse] doctrine will remain in the backwater, unused except for clear abuse"); ("[t]here is a simple and direct business and creative interest in not allowing one's work product to be used to attack that same work product under a contractual

copyright misuse where the license at issue controls only how Blizzard's own work may be used, and does not bar third-parties from developing or marketing a competing product. For example, in *Triad Systems Corp. v. Southeastern Express Co.*, the Ninth Circuit rejected the defendants' copyright misuse defense to an infringement claim involving unauthorized copying in RAM, recognizing that though the license at issue prevented defendants from using plaintiff's service software, it "did not attempt to prohibit [defendants] or any other ISO from developing its own service software to compete with Triad."[7] In doing so, the court explicitly contrasted *Lasercomb*, on which MDY mistakenly relies, where the developer's license "agreement forbid[] the licensee to develop or assist in developing *any* kind of [competing] software."[8] Here, the WoW EULA is limited to prohibiting uses of WoW detrimental to other WoW users, and places no restraint on competitors developing their own MMORPG to compete with WoW.

III. MDY's Distribution of Glider Violates Both Anti-Trafficking Prohibitions of the DMCA.

Contrary to MDY's mischaracterizations, Blizzard neither seeks nor needs the DMCA to extend to the circumvention of *any* software protection measure to prevail here, because as Blizzard detailed in its prior pleadings, Warden and scan.dll are specifically designed to control access to WoW content as displayed in the context of the online gaming experience, and to protect Blizzard's right to control when users

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arrangement"). MDY's citation of Blizzard's dispute with Brian Kopp is irrelevant, and fails to mention that Kopp's cheat guide included direct links to download a cheat software program; links that were removed from the guide after settlement of the case. SOF 2nd Supp. ¶ 308-313.

[7] 64 F.3d 1330, 1337 (9th Cir. 2005); s*ee also Advanced Comp. Servs. of Mich., Inc. v. MAI Sys. Corp.*, 845 F. Supp. 356, 367 (E.D. Va. 1994) (no copyright misuse where licenses do not prevent alleged infringer from developing competing software); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1316-17 (C.D. Cal. 1992) (no copyright misuse where "Microsoft's License Agreements do not prohibit defendants from independently implementing programs similar to MS-DOS and WINDOWS").

[8] *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990).

are permitted to load that copyrighted content into RAM.[9] Similarly, *Ticketmaster* is hardly the outlier that MDY depicts. On the contrary, *Ticketmaster* merely applies established Ninth Circuit law on the DMCA and copyright in the context where the circumvention enables infringement by means of making unauthorized copies in RAM, as opposed to making unauthorized copies via software download or by manually copying DVDs. MDY may wish that the DMCA applied only to "pirating works" via these other means, but it contains no such limitation.[10] The DMCA prohibits circumvention of measures that protect a copyright owner's valid rights, including the right to prohibit copying software into RAM defined in *MAI*.[11] *Ticketmaster* is unique, then, only in its ability to provide guidance in this specific case, where the protection measures at issue likewise seek to prevent the unauthorized copying into RAM that *MAI* and its progeny prohibit.

In its response, MDY concedes that Warden and scan.dll, but for Glider's ability to circumvent, prohibit Glider users from accessing the WoW content in the WoW online game experience. MDY asserts, however, that Glider does not violate the DMCA because Warden and scan.dll do not prohibit users from copying the static object code resident in the WoW client and, it contends, "it is the code, not the code's functionality, that copyright protects." MDY Resp. at 13-15. MDY misconstrues the nature of copyright protection for computer programs.

In support of its argument, MDY relies exclusively on the concurring opinion in *Lexmark*. Judge Merritt's concurring opinion, however, was intended only to "make clear that in the future companies like Lexmark cannot use the DMCA in

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[9] Blizzard Mem. at 11-12; Blizzard Resp. at 10-13.

[10] Even Judge Merritt's concurring opinion in *Lexmark Int'l, Inc. v. Static Control Components*, 387 F.3d 522, 547 (6th Cir. 2005), on which MDY chiefly relies, only uses the term "piracy" as illustrative. *Lexmark*, unlike *Ticketmaster* and the present case, did not involve circumvention that enabled users to make unauthorized copies in RAM and thus has no bearing on this case.

[11] 17 U.S.C. § 1201(b)(1)(A) (Prohibiting trafficking in devices that circumvent "technological measure[s] that effectively protect[] a right of a copyright owner

conjunction with copyright law to create monopolies of manufactured goods for themselves just by tweaking the facts of this case….".[12] In other words, the *dicta* from *Lexmark* addresses attempts to "lock out" competitors from the ability to market legitimate consumer products in circumstances where no expressive copyrighted content is at issue. Clearly, those concerns do not apply here, where Blizzard's measures are focused precisely on blocking access to the nonliteral, expressive attributes of its game software.

The law is clear that Blizzard's copyright protection for its WoW software is not limited, as MDY suggests, to the object code resident on the WoW client. Rather, copyright protection "extends to all the copyrightable expression *embodied in* the computer program."[13] Specifically, "copyright protection extends not only to the literal elements of a computer program - source code and object code - but also to the program's nonliteral elements, which are 'the products that are generated by the code's interaction with the computer hardware and operating program(s).'"[14] Here, the nonliteral and graphical elements - the multi-media presentation of the WoW universe and character interactions - of the WoW software are *only* able to be displayed when a user is connected to the WoW game servers and the client code interacts with the server code as it is loaded into RAM. Thus, copyright protection extends to the manner in which WoW's expressive content is displayed in the online gaming experience via the carefully choreographed assembly and presentation all of its various elements.[15] Accordingly, Glider's circumvention of Warden and scan.dll, which enables Glider users to access and copy into RAM these expressive, nonliteral

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under this title in *a work or a portion thereof*."); *MAI*, 991 F.2d at 519.

[12] *Lexmark*, 387 F.3d at 551.

[13] *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 81 (D.D.C. 2007) (quoting U.S. Copyright Office, Circular 61, *Copyright Registration for Computer Programs*).

[14] *DSMC, Inc.* 479 F. Supp. at 81 (quoting *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1555 n.15 (11th Cir. 1996) (footnote omitted).

[15] *MiTek Holdings*, 89 F.3d at 1555 n.15 (copyright protection "extends … to … nonliteral elements, including … structure, sequence, organization, user interface,

elements of WoW that would otherwise remain out of reach, is the very conduct the DMCA is designed to prohibit.

Finally, MDY cannot seriously dispute that Glider's circumvention functionality is part and parcel of its commercial appeal. MDY's assertions that it only added Glider's functionality when necessary, and that it "updates its Glider code solely to protect its business" are like a thief admitting he did not have to wear a mask until after the first time he got caught. They establish liability.[16]

IV. MDY is Tortiously Interfering With Blizzard's Contracts.

MDY erroneously conflates the relationship between copyright and tort law. First, MDY defends its actions against Blizzard's copyright and DMCA claims by arguing that Glider's development and use is a contractual, and not copyright, issue. MDY then does an about face and claims that Blizzard's alleged inability to establish MDY as an infringer negates its ability to show that MDY tortiously induced contractual breaches. MDY cannot have it both ways. Although the contractual and tort remedies are not mutually exclusive, MDY cannot evade liability under both doctrines by using each as the defense to the other.

A. Blizzard's EULA and TOU do not Restrain Trade.

MDY's attempt to mischaracterize Blizzard's WoW EULA and TOU as anti-competitive restraints on trade that violate public policy is plainly unavailing. Blizzard creates proprietary online computer games. There is not a single fact in the record to suggest that it seeks to monopolize that market, nor can MDY cite any provision in the EULA or the TOU that serves to bar entry to that market. On the contrary, the WoW EULA and TOU, to which users must view and demonstrate acceptance before playing the game and at numerous other times, are readily

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screen displays and menu structures").

[16] *See* Blizzard Mem. at 13. MDY's alleged post-suit development of other uses for Glider provides no defense, as MDY continues to sell the version of Glider designed specifically to evade only Warden and scan.dll.

recognized as valid and enforceable contracts.[17] The EULA and TOU protect only Blizzard's rights in its own software and the rules of its game, and users are free to reject these conditions, receive a refund, and opt to play other games.[18]

The Restatement example of anti-competitive restraints MDY cites is inapposite. In the example, cinema operator A seeks to use a licensing agreement with a third party to exclude B from operating a *competing cinema* in the same area. Blizzard's license does not, however, restrict MDY's ability to develop a competing game, nor even to develop bots for use in other games. The more appropriate analogy to the present case would be if B were offering A's patrons the ability to alter their tickets after entering the theater to trick A's cinema into allowing them to see additional movies and hoard the best seats from other paying customers, in breach of their contract with A limiting their attendance to the film for which they paid the price of admission. In that example, B's right to enforce the rules of its own theater would clearly be enforceable.

B. MDY's Interference is Improper.

Rather than address the relevant seven Restatement factors, MDY instead argues that Congress "expressly authorized" the reverse engineering of software to achieve interoperability and gave MDY the unfettered ability to induce and conceal contractual breaches through the sale and support of its cheat program. The inapplicability of this argument is transparent, as MDY has invoked neither the limited right to reverse engineering nor a fair use defense to Blizzard's *actual* copyright and DMCA claims. Neither do these defenses justify his tortious interference.

First, the DMCA's reverse engineering defense only allows circumvention of

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[17] SOF ¶ 84-88; *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1092 (9th Cir. 2005) (software license agreements are valid contracts for purposes of a tortious interference claim); *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (enforcing Blizzard's clickwrap terms for its online gaming offerings).

[18] SOF ¶ 80, 90, 84-104.

protection measures to *enable* interoperability, and does not permit distributing a program that enables circumvention in order to evade detection.[19] Second, MDY ignores the law's clear recognition that reverse engineering rights can be waived via contract, as they are in the WoW EULA and TOU.[20] Here, Donnelly conceded his assent to the WoW EULA and TOU, and thus, setting aside MDY's ongoing inducement of breaches, cannot recast even the original development of Glider as "expressly authorized by Congress."

MDY's feeble attempt to distinguish the one tort case offered by either party that closely parallels the facts in this case, *Am. Airlines v. Platinum World Travel*, similarly fails.[21] First, the Ninth Circuit has flatly rejected MDY's unsupported suggestion that Blizzard's alleged copyright misuse bars relief for tortious interference.[22] Second, MDY incorrectly suggests that Glider does not misappropriate Blizzard's services. Blizzard has made it clear, through its contracts and its expenditure of resources combating Glider, that it does not want Glider bots in WoW. Every minute that Blizzard's WoW servers are forced to accommodate the presence of a Glider bot against Blizzard's will is a misappropriation of those resources.[23] Finally, the fact that MDY only assisted users in concealing their breaches after Blizzard began to detect them hardly absolves its conduct. More significantly, from that moment forward, MDY has doggedly pursued Donnelly's stated goal of making the cost of detection prohibitive for Blizzard. SOF ¶ 242.

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[19] 17 U.S.C. § 1201(f)(3). Moreover, MDY did not reverse engineer the Warden portion of WoW *for purposes of interoperability with WoW*, but rather for purposes of figuring out how to avoid Warden detection.

[20] SOF ¶ 97-101; *Davidson & Associates*, 422 F.3d at 638-39 (finding in case involving Blizzard EULA and TOU that fair use defense does not preempt enforcement of contract term precluding reverse engineering); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1337 (Fed. Cir. 2003) (fair use does not limit enforcement of contract precluding reverse engineering).

[21] 769 F. Supp. 1203 (D. Utah 1990), *aff'd*, 967, F. 2d 410 (10th Cir. 1992).

[22] *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079 (9th Cir. 2005).

[23] Worse, Glider bots consume far more resources than Blizzard calibrates its servers

C. MDY's Interference is Intentional.

MDY contends it lacks intent because MDY's first public admission of intent occurred in September 2005, three months after Glider's initial release, and because Blizzard did not add the specific word "bot" in its TOU until October 2006. MDY Resp. at 24. In addition to Blizzard's showing in prior pleadings, MDY's argument regarding the insertion of the term "bot" in the TOU is also rendered meaningless by the fact that the TOU explicitly prevented "cheats" from its inception, and MDY conceded it has always employed two key terms in his search engine advertising - "World of Warcraft bot" and "World of Warcraft c*heat*." SOF ¶ 246.

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

MDY's only response to Blizzard's significant evidence that Glider has caused Blizzard severe reputational harm, forced Blizzard to incur substantial costs in enforcement and response to Glider complaints, and resulted in lost revenues and reduced long-term demand for WoW is to ignore it or dismiss it as speculative. However, MDY's expert's disagreement with the conclusions Blizzard's expert reached with regard to the full quantifiable impact of MDY's interference, and the methods used to reach them, does not call into question the *evidence* of harm submitted by Blizzard - e.g., the detailed reporting of actual costs committed to bot enforcement and testimony from Blizzard that Glider is their primary driver, and the hundreds of thousands of bot complaints and thousands specifically referencing Glider.[24] SOF ¶ 198-230. This evidence leaves no doubt that MDY's conduct has severely harmed Blizzard, and even if MDY may be able to dispute the proper amount of a damages award, it cannot defeat entry of summary judgment on liability.

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to expect based on average human play. SOF ¶ 58-63.

[24] Moreover, MDY's expert did not present any rebuttal to Blizzard's detailed breakdown of its enforcement costs in his supplemental report. MDY DSOF, Ex. K.

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Respectfully submitted,

Shaun Klein
SONNENSCHEIN NATH & ROSENTHAL LLP
2398 East Camelback Road, Ste 1060
Phoenix, AZ 85106-9009
Telephone: (602) 508-3900
Facsimile: (602) 508-3914

/s/ Christian S. Genetski
Christian S. Genetski
Shane M. McGee
1301 K Street, NW, Ste 600E
Washington, DC 20005
Facsimile (202) 408-6399
Telephone (202) 408-6400

Attorneys for Defendants Blizzard Entertainment, Inc. and Vivendi Games, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 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:

Name	Email Address
Lance C. Venable	docketing@vclmlaw.com
Joseph Richard Meaney	docketing@vclmlaw.com jmeaney@vclmlaw.com

/s/ Christian S. Genetski