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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC,)
)
       Plaintiff and Counter-Claim)
       Defendant)
)
)
            vs.)
)
BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
       Defendants and)
       Counter-Claim Plaintiffs.)
_____)
BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
       Third-Party Plaintiffs,)
)
            vs.)
)
MICHAEL DONNELLY,)
)
       Third-Party Defendant.)
_____)

Case No.: CV06-02555-PHX-DGC

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Honorable David G. Campbell

The parties submit the following Proposed Findings of Fact and Conclusions of

Law on Blizzard Entertainment, Inc.'s counterclaims for violations of the Digital

Millennium Copyright Act, 17 U.S.C. § 1201, *et seq.* in connection with their Pretrial

Order to be considered at the Final Pretrial Conference set for September 24, 2008 at 4

p.m.

A. TRIAL COUNSEL FOR THE PARTIES

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B. STATEMENT OF JURISDICTION

1. Jurisdiction in this case is based on the existence of a federal question under 28

U.S.C. § 1331 and diversity of citizenship under 28 U.S.C. § 1332.

2. Jurisdiction is not disputed.

C. UNDISPUTED FINDINGS OF FACT

1. The following material facts are admitted by the parties and require no proof:

The Parties

1. Blizzard Entertainment, Inc. ("Blizzard") is a Delaware corporation, with its

principal place of business located in Irvine, CA. Vivendi Games, Inc., a Delaware

corporation having a principal place of business in Los Angeles, California, is Blizzard's

corporate parent.

2. Blizzard has been developing and selling computer games for 14 years, and more than 20 million accounts have been registered by individuals to play Blizzard's games online.

3. Defendant Donnelly is an Arizona resident residing at 4808 N. 24th Street, Apt. 1008, Phoenix, Arizona.

4. Defendant Donnelly is the only member of MDY Industries LLC, and MDY Industries LLC is an Arizona Limited Liability Company organized in December 2004, and registered at 2311 E. Shea Boulevard, Phoenix, Arizona.

5. Donnelly formed MDY prior to developing Glider, and for the purpose of keeping contract computer work separate from his personal finances.

6. MDY operates the website mmoglider.com (formerly wowglider.com), from which it promotes, sells and distributes the software program Glider (formerly WoWGlider).

World of Warcraft

7. In November 2004, Blizzard released World of Warcraft® (hereinafter "WoW"). WoW is a Massively Multiplayer Online Roleplaying Game ("MMORPG"), a genre of computer game in which large numbers of players interact with each other simultaneously in a virtual persistent online world.

8. Blizzard developed the WoW gaming environment by employing numerous game designers, artists, producers and programmers to conceive of and create an enticing gaming experience.

9. WoW allows players to experience the WARCRAFT universe, customizing their own experiences by participating in a variety of different activities alone or with others.

10. WoW allows players from around the globe to assume the roles of different character races (including humans, elves, dwarves, trolls and gnomes) and classes (including warlocks, warriors, druids and priests) as they explore, adventure and quest across WoW's universe.

11. Thousands of WoW players can play on any given WoW server simultaneously, and can communicate, cooperate with, fight and otherwise interact with other players on that server.

12. Methods of communication among WoW players include private chat, group chat, area chat (chat that can be seen by players near the speaker), channel chat (chat limited to people in a particular channel), direct voice communication, animations and gestures conveying emotions (emotes) and other methods.

13. There is no "single-player" mode in WoW.

14. A central objective for WoW players is to advance their characters through the various levels recognized in the game.

15. WoW players can gain experience and obtain levels by engaging in individual or group quests with a range of goals.

16. WoW players can also gain experience points and obtain levels by engaging in battles with monsters located throughout the WoW universe.

17. In order to play WoW, consumers must obtain and install the WoW game client on a personal computer.

18. The WoW game is periodically updated and enhanced. When updated, the portions of the game client code that are updated are delivered to and stored on the player's hard drive.

19. The largest update since WoW's launch came in the form of a large expansion pack called World of Warcraft: The Burning Crusade™. The game client code for The Burning Crusade is also stored on the player's hard drive.

The License Agreement

20. Players' usage of the game is governed by the terms of both the WoW End Use License Agreement ("EULA") and the WoW Terms of Use ("TOU").

21. To play WoW, users must view and demonstrate acceptance of the EULA at numerous times: before installing the software; upon running the software for the first time; and upon applying patches to the software when it is changed or upgraded by Blizzard.

22. To play WoW, users must view and demonstrate acceptance of the TOU at numerous times: when creating an account; when connecting to the service for the first time; and upon applying patches to the software when it is changed or upgraded by Blizzard.

23. Users must scroll through the entire EULA and TOU agreements, and then affirmatively indicate their assent by clicking the word Accept on each of the contracts, before they can access the game content.

24. Users are again required to scroll through and agree to the EULA and the TOU after each revision of the WoW game or the WoW EULA or TOU.

25. As the Court found in its July 14, 2008 ruling, the EULA and TOU condition users' right to copy into RAM and use WoW upon doing so only in conformity with the scope of the license, and use of bots or other unauthorized third-party programs in conjunction with WoW exceeds the scope of the license.

26. Donnelly understands that all WoW users must agree to the TOU and EULA.

Facts Pertaining to Blizzard's Claims Under the DMCA

27. The software code responsible for the creative elements forming the online world of the WoW gaming environment are copyrighted works owned by Blizzard. Blizzard has received copyright registrations in both the server and game client software code.

28. The Court held in its July 14 order that when users launch a copy of WoW from their hard drive in order to access the game servers and play the game, the user makes a copy of the WoW game client in RAM.

29. After the initial launch of the client from the hard drive into RAM, as a player moves through the game, additional copyrighted game content is loaded from the hard drive into RAM as the player reaches points in the game as needed, depending on the circumstances in the game.

30. The software code in the WoW game client consists of both the executable code in wow.exe, which contains game logic for spells, combat, LUA scripting and other features, and of additional elements that enable users to reproduce and display the game's nonliteral, multimedia elements and game resources, including graphics, sound effects, text and character animations. When users are connected to Blizzard's WoW game

servers, information relating to positions of other players and other non-static data is communicated to the user.

31. One of Blizzard's technical measures is referred to as Warden.

32. Warden consists of two components, the scan.dll component and the client-server, or resident component.

33. The scan.dll component scans for unauthorized programs before the user logs into the game. Scan.dll seeks to prevent access to WoW by examining certain portions of the user's RAM and WoW game data files for the presence of defined "code signatures," and if the information found in the specific code signatures is a "match" for code associated with an unauthorized program, scan.dll will prevent the user from entering the WoW game servers.

34. The client-server portion of Warden (the resident component) stays resident in WoW memory and sends requests asking for the user's game client to report back to Blizzard's servers the content of certain defined portions of WoW memory. If the client reports back information showing a "clean" segment of memory, then the resident component permits the user to continue playing the game. If the client reports back information showing the presence of defined patterns of code associated with unauthorized programs, such as Glider, then the resident component can immediately ban a user's account so that the user cannot log in to Blizzard's servers, effectively denying the user access to the game on Blizzard's servers.

35. The literal elements stored in the game client code may be copied or accessed on the user's own computer without being connected to the WoW game servers, and without successfully bypassing scan.dll or the resident component of Warden.

36. The literal elements of the WoW game client code are loaded into RAM at the authentication portion of user's connection to the WoW servers, prior to the user being subjected to a check by scan.dll and the Warden resident component.

37. Programming code makes up a very small percentage of the WoW game client in terms of volume.

38. The large majority of the WoW game client consists of digital multimedia content such as environmental graphics (mountains, lakes, oceans, trees, castles and other buildings, giant mushrooms that support entire cities, and even meteorological events such as rain, fog, pollution and meteor storms), sound effects (monsters roaring, rain falling, birds singing, battle cries, explosions, cries for healing, and the footsteps of invisible enemies), musical arrangements composed and recorded to complement different geographic areas in the game, and a large variety of character avatars, each of which can wear different collections of armor (players can choose from thousands of different armor pieces that can be worn on their head, neck, chest, waste, legs, feet, wrists hands and fingers) wield different weapons (there are thousands of weapons in the game, and even the same weapon can have various appearances based on how it is enchanted) and carry different equipment (players can carry shields, wands, bouquets of flowers, skulls, fishing poles and much more).

39. These non-literal elements are loaded into RAM after scan.dll has executed and the user has connected to Blizzard's game servers, and continue to be loaded into RAM by the game client after a user has successfully bypassed the resident component of Warden.

40. These non-literal elements are loaded into RAM continuously as a player experiences the online game and encounters new geography, new landmarks and structures, new treasures, new monsters and new players. For example, as a player travels through different geographic territories in the WoW universe, s/he will hear different musical arrangements, each loaded into RAM from the hard drive when designated by the WoW server to be played. As a player progresses through the game, s/he also hears different sound effects -- monsters roaring, rain falling, birds singing, battle cries, explosions, cries for healing, the footsteps of invisible enemies, and much more -- each of which is loaded from the hard drive into RAM when the server indicates that the sound is needed.

41. Among WoW's non-literal elements is the immersive, interactive environment that results from the combination of this content and the instructions received from the WoW server.

42. The WoW server determines when, where and how many of these elements are displayed (in the case of visual content) or played (in the case of aural content), and how the content interacts with the players. For example, the WoW server determines where each monster will "spawn," what type of monster will appear, the level and capabilities of that monster, and what treasure "drops" from a monster when it is defeated. The WoW server also determines the amount of damage inflicted by a blow from a monster or another player, and when a character dies. After making these determinations, the WoW server instructs the WoW client to copy the necessary elements from the user's hard drive into RAM so that the user may experience the content.

43. These individual non-literal elements cannot be viewed together in the context of the WoW game, or controlled or choreographed by Blizzard's WoW server, unless the user logs in and stays connected to that WoW server.

44. The resident component of Warden continues to check for unauthorized third party programs while new non-literal elements of the WoW content are being loaded into RAM as directed by the WoW game server.

45. Scan.dll and the resident component of Warden do not prevent these non-literal elements from being individually extracted from the game client and viewed using an unauthorized third party program, and the user of such a program can perceive individual non-literal elements in a detached, non-interactive environment whether or not they play WoW, encounter Warden, or connect to a WoW server.

46. Warden and scan.dll prevent a user from experiencing these non-literal elements in the WoW game environment – and prevent those elements from being copied into RAM in the context of the game – if they terminate a user's access to the WoW server.

47. Scan.dll only checks for unauthorized programs prior to a user logging into WoW servers and no circumvention of scan.dll occurs if a user launches Glider after that user has already logged into a game server. Such a user would only be subject to Warden's resident component check.

Glider

48. Glider is a software bot designed to automate user tasks in the World of Warcraft environment.

49. Glider is the most well-known bot associated with WoW.

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50. Glider collects information from WoW.

51. MDY agrees that Glider is not approved or authorized by Blizzard.

52. Glider contains functionality that "examines your configuration and then gives you recommendations on what you can do to minimize your risk of detection."

53. MDY sells and distributes the Glider software, formerly known as WoWGlider, through its website located at http://www.mmoglider.com, previously located at http://www.wowglider.com.

54. Thousands of Glider users' accounts have been banned for running Glider as a result of detection by Warden's resident component. Blizzard does not prevent persons whose accounts were banned from creating new accounts subject to the EULA.

55. At present, Glider's anti-detection features are able to circumvent both scan.dll and the resident component's ability to detect users running Glider in conjunction with WoW, and thus preclude Blizzard from preventing such user accounts from accessing WoW while running Glider.

56. Glider avoids automated detection by randomly renaming itself and using the shadow driver to remove its process object from the Windows task list via a rootkit-like technique commonly known as DKOM (Direct Kernel Object Manipulation).

57. Glider avoids direct attempts to examine it by using the shadow driver to hook several kernel functions, including NtOpenProcess, NtUserBuildHwndList, ZwQuerySystemInformation, GetForegroundWindow, and GetActiveWindow.

58. Glider avoids detection of its window titles by randomizing the title bar, including those of any "help windows" created by Glider.

59. Glider's shadow driver avoids detection by randomly renaming itself and removing itself from the list of loaded modules.

60. When Glider users load WoW into RAM, WoW is able to be both perceived and communicated to, including interacting with Glider itself.

61. Glider's viability arises from both its ability to evade detection by Warden and its ability to allow users to play WoW without human interaction.

62. MDY constantly updates Glider to ensure its continued success in evading Warden's evolving detection and access control technologies. Each time Blizzard devises a new method to detect Glider and block Glider users' access to WoW, MDY makes changes to Glider to avoid detection.

63. MDY acknowledged the value of the anti-detection features in refraining from charging extra fees for advanced anti-detection functionality, noting that Glider's anti-detection ability is as essential to Glider's success as seatbelts are to a car, and that Glider's value would be limited if it could not evade Blizzard's technological measures.

64. Donnelly reverse engineered Warden to learn how to make his program undetectable and thus more attractive to users.

D. CONTESTED ISSUES OF FACT AND LAW
1. The following are the material issues of fact to be tried and decided:

Blizzard's Proposed Findings of Fact

(A) Donnelly personally developed the Glider program, and remains primarily responsible for all software development and updates for Glider, regularly posts messages on the Glider website forums promoting the purchase and use of Glider, and benefits financially from Glider sales.

(B) By achieving new levels or completing other in-game objectives,

players can access new content in the WoW universe.

(C) The new content is extracted from the player's hard drive, loaded into RAM and then interacts with the WoW game server to create the interactive online gaming experience.

(D) The large majority of the WoW universe cannot be accessed by the lowest level characters, and much of the game's premium content is accessible only by those characters that have achieved the maximum level and acquired some of the most powerful armor and weapons.

(E) Many WoW players enjoy the social and role-playing aspects of the game. For these players, in-game chat and socialization in an immersive virtual universe is a primary draw to the game.

(F) WoW gives players the ability to buy and sell through in-game vendors; loot defeated enemies; buy, sell and barter directly with other players; and buy and sell goods using any of the auction houses placed throughout the WoW universe.

(G) Donnelly agreed to the TOU and EULA.

(H) Donnelly recalls seeing the EULA upon WoW launch, being required to scroll through the document and agree, seeing the EULA again upon being patched, and seeing and agreeing to the TOU.

(I) Blizzard employs several different technical measures to prohibit unauthorized access to and copying of WoW into RAM while a user is connected to the Blizzard game server and participating in the online game experience.

(**J**) Users copying the literal elements stored in the game client without

being connected to the WoW servers do not gain access to the WoW online gaming experience.

MDY's Proposed Findings of Fact

1. Blizzard owns two distinct copyrights − one for the client-side software and one for the server-side software.

2. Blizzard distributes its copyrighted WoW client-side software without any protection against copying or access.

3. Glider users never access or copy the server side software.

4. Glider users receive data output from Blizzard's server-side software. Blizzard's client-side software utilizes the data during operation of the client-side software.

5. While Blizzard employs several different technical measures to enforce its contracts (EULA and TOU), Blizzard's technological measures do not prohibit access or restrict copying of game client software. Blizzard's technological measures only limit access to Blizzard's servers.

6. Blizzard does not provide any of its own creative or artistic input from its servers. Blizzard's server provides data to the game client derived from keystrokes from WoW players and game rules. Blizzard does not choreograph the renderings that appear on a user's computer screen − it only renders objects or animations resulting from player input. The game rules are embedded within the server-side software code and are never transmitted, accessed or copied by Glider users.

7. Blizzard provides artistic and creative expression as to the in-game objects such as the landscape, buildings, monsters, clothing, and sound effects as part of its

game-client software. These elements are all present on a user's hard drive, are unprotected and freely reproducible – and are not delivered by Blizzard's server.

8. Blizzard's servers provide the conduit for remote players to exchange data regarding location of players and other movable objects, communication between remote players, and other similar data that gets interpreted and presented by each user's client side software. The data transmitted by Blizzard's server is input external to the client-side software copyright owned by Blizzard.

9. By using third party software, a holder of Blizzard's game client software has full and complete access (including the ability to copy) the literal code and non-literal elements generated by the code's execution. The user need not pass through Blizzard's security devices to gain access to the non-literal elements. The user can view or hear (and copy) the non-literal elements generated by the code's execution regardless of whether the user actually plays WoW or encounters Warden.

10. A user need not access a Blizzard server to "play" WoW. A user could play WoW on a third-party server.

11. Scan.dll and the resident software function by searching for the presence of bots and similar programs. The scan.dll component "finds" unauthorized programs, and the resident software "scans" for cheats and other unauthorized programs. Dkt. #40 ¶¶ 110-115. When Scan.dll and Warden scan RAM memory on a client computer neither the computer nor the user applies "information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." Scan.dll "scans the user's computer for unauthorized programs such as Glider before the user logs onto the WoW servers to

play the game." Dkt. #82 (Order) at 8, lines 1-6. "If Glider or similar programs are detected, scan.dll denies the user access to the game servers." *Id.*

12. Even if scan.dll were to detect Glider in its ordinary course, scan.dll does not restrict the user from making a copy. As before detection, a user is still free to copy the literal and non-literal elements of WoW into RAM using a model viewer or other third party software.

13. In addition, scan.dll only scans at start up. Thus, in the ordinary course of operation, no circumvention of scan.dll occurs if a user subsequently elects to launch Glider after a user has launched Blizzard's software.

14. The "`resident component' of Warden, runs periodically while a user plays WoW." Dkt. 82 (Order) at 8, lines, 1-6. "If the resident software detects the use of Glider or a similar program, Blizzard revokes access to the game." *Id.* Even if the resident component were to detect Glider, the resident component does nothing to prevent a user from copying the literal or non-literal elements of WoW into RAM using a model viewer or other third party software.

E. PROPOSED CONCLUSIONS OF LAW

1. The following conclusions of law are proposed by the parties, respectively:

Blizzard's Proposed Conclusions of Law

1. MDY's distribution of Glider violates the DMCA's bans on trafficking in technology that circumvents: 1) *access controls* to copyrighted works; and 2) *technological measures that protect the rights* of a copyright owner. 17 U.S.C. §§ 1201(a)(2), (b)(1).

2. Section 1201(a)(2) reads:

No person shall . . . offer to the public, provide, or otherwise

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traffic in any technology, product . . . that (A) is primarily designed or produced for the purpose of circumventing a technological measure that *effectively controls access to a work protected under this title*; (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively *controls access to a work protected under this title*; or (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that *effectively controls access to a work protected under this title*.

17 U.S.C. § 1201(a)(2)-(a)(2)(c)(emphasis added).

3. Section 1201(b)(1)(A) applies this same ban on products aimed at circumventing "protection afforded by a technological measure that *effectively protects a right of a copyright owner under this title in a work or a portion thereof*."

4. The DMCA states that "a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." 17 U.S.C.A. § 1201(a)(3)(B). Here, Blizzard's scan.dll and resident component of Warden are technological measures that effectively control access to the protected nonliteral elements of WoW by requiring in their ordinary course of operation that a user's WoW game client apply the correct information, namely a segment of WoW memory in which the code matches a "clean" version of WoW authorized by Blizzard (as opposed to one containing signatures for code associated with known unauthorized programs), in order to bypass Warden and gain access to the next segment of nonliteral, multimedia elements as they are loaded into RAM and displayed in the context of the interactive WoW game. 17 U.S.C. § 1201(a)(3)(B).

5. Similarly, "a technological measure 'effectively protects the rights of copyright owner under this title' if the measure, in the ordinary course of its operation, prevents,

restricts, or otherwise limits the exercise of a right of a right of a copyright owner under this title." 17 U.S.C.A. § 1201(b)(2)(B). Here, Blizzard's warden technologies are designed to prevent WoW users running Glider from copying from their hard drive into RAM the game content that, when combined with instruction from Blizzard's game servers, renders the protected nonliteral elements of Blizzard's program in the form of the WoW online environment.

6. There is no dispute that Glider is a product that successfully circumvents Blizzard's scan.dll and resident component protection measures.

7. Blizzard employs warden and scan.dll in an effort to restrict unauthorized access to certain aspects of its copyrighted WoW game, and to unauthorized copying of WoW, in connection with online play of WoW on Blizzard's game servers, the only context in which the full scope of Blizzard's protected work can be experienced. "In the essential setting where the DMCA applies, the copyright protection operates on two planes: in the literal code governing the work and in the video or audio manifestation generated by the code's execution." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 549 (6th Cir. 2004) (Noting that in video or computer games the nonliteral elements include the visual and audio manifestation rendered by the software's program commands); 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"); *MiTek Holdings*, 89 F.3d at 1555

n.15 (copyright protection "extends … to … nonliteral elements, including … structure, sequence, organization, user interface, screen displays and menu structures").

8. "[C]opyright 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).'" *DSMC, Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 81 (D.D.C. 2007) (quoting *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1555 n.15 (11th Cir. 1996) (footnote omitted)). "It is settled that computer programs are entitled to copyright protection. This protection extends not only to the 'literal' elements of computer software-the source code and object code-but also to a program's nonliteral elements, including its structure, sequence, organization, user interface, screen displays, and menu structures." *General Universal Systems, Inc. v. Lee*, 379 F.3d 131, 142 (5th Cir. 2004); *see also MiTek Holdings v. Arce Eng'g Co.*, 89 F.3d 1548, 1555 n. 15 (11th Cir. 1996) (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).")

9. Here, Blizzard's Warden technology does not prevent users of WoW from accessing and copying the executable software code -- the literal elements of the program resident on the client. Blizzard's copyright protection in WoW extends, however, to the nonliteral, multimedia elements of the WoW software, including game resources, graphics, sound effects, music scores, text, and character interactions, which can only be accessed and viewed in their complete, integrated form by WoW users when they are

connected to Blizzard's WoW game servers. WoW's nonliteral elements are formed by

the combination of graphics (landscapes, characters, items, and even weather), sound

(sound effects, music), text, and characters copied from the game client into RAM when

the game client receives instructions from Blizzard's game servers to load them. The

effect is to create from disparate elements a completely immersive online world in which

players interact and play the WoW game. The online world created by the presentation

of the combined nonliteral elements is the essence of what Blizzard's copyright protects.

Although individual elements may be reproduced and viewed by third-party applications

outside the context of Blizzard's game servers, the full combination of nonliteral

elements are only accessible when logged in to those servers.

       10. Because the Copyright Act and DMCA protect the nonliteral elements of

Blizzard's work to the same extent as the literal elements, and because those nonliteral

elements are only fully accessible *after* a user has connected to Blizzard's game servers

and successfully bypassed scan.dll and warden's resident component, Glider's

circumvention of the warden protection measures to enable Glider users' access to those

nonliteral elements violates section 1201(a)(1) of the DMCA.

       11. Additionally, as this Court's prior ruling on Summary Judgment makes clear,

copying of the WoW game client into RAM in violation of a license of limited scope

results in infringement of a copyright owner's right to copy under *MAI Sys. Corp. v. Peak

Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993). Order at 6, 16. In this case, Glider

use violates the scope of the license granted users by the WoW EULA and TOU. As

such, loading WoW into RAM in conjunction with Glider infringes Blizzard's copyright.

Blizzard, as the copyright owner, has the right to prohibit such unauthorized copying

through the use of technological protection measures like Warden. Circumvention of measures providing such protection violates Section 1201(b)(1) of the DMCA.

12. Significantly, copy protection measures under the DMCA do not have to protect all forms of copying—so long as they protect some form of protected content. As the Sixth Circuit stated in *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 545 (6th Cir. 2004), the DMCA, 17 U.S.C. § 1201(a)(1), "prohibits devices aimed at circumventing technological measures that allow some forms of 'access' but restrict other uses of the copyrighted work." *See also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001); *United States v. Elcom Ltd.*, 203 F.Supp.2d 1111, 1120 (N.D.Cal. 2002). As an example, the Sixth Circuit pointed to "streaming media, which permits users to view or watch a copyrighted work but prevents them from downloading a permanent copy of the work," *Id.* (citing *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *1-2 (W.D.Wash. Jan.18, 2000)).

13. In this case, Glider violates Section 1201(b)(1) by enabling users running Glider while connected to Blizzard's game servers to load additional copyrighted content -- the content loaded into RAM that is manifested as non-literal elements as a player proceeds in the game -- *after* bypassing scan.dll and warden's resident component. For purposes of Section 1201(b)(1), it matters not that these nonliteral elements can be individually displayed in third-party viewing programs without connecting to Blizzard's servers and bypassing warden. As the copyright owner, Blizzard has the right to prevent the infringing copying into RAM of the content forming the nonliteral elements of WoW's game universe. Glider's ability to circumvent warden and enable this unauthorized copying violates Section 1201(b)(1) of the DMCA. *Lexmark*, 387 F.3d at

548 (Noting that the DMCA's restrictions on "use" of a work mean restricting consumers from making use of the copyrightable expression in the work); *Sony Computer Entm't Am. Inc. v. Gamemasters*, 87 F.Supp.2d 976, 987 (N.D.Cal.1999) (holding that technological measure on PlayStation game console, which prevented unauthorized games from being played, effectively controlled access to copyrighted CD-ROM video games, without indicating whether games were encrypted or unencrypted).

14. Finally, MDY and Donnelly have plainly trafficked in Glider, and Glider is plainly offered with MDY and Donnelly's knowledge for use in circumventing warden. Making a program available for download from a website constitutes trafficking for purposes of the DMCA. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 637 (8th Cir. 2005). MDY does not dispute that Glider is *designed* to circumvent both components of Warden. In fact, MDY constantly updates Glider to ensure its continued success in cracking Warden's evolving detection and access control technologies. Glider is also *marketed* as a tool to circumvent Blizzard's anti-cheat technology. The MDY website's FAQ boasts that "Glider provides a number of features to help lower the risk of detection," and that the "current version of Glider…is not known to be detected by these methods." The site also offers a forum for users, including Donnelly, to share information on avoiding detection by Blizzard. Finally, Glider has only a limited commercially significant purpose other than to circumvent Warden. Glider's viability arises nearly entirely from its ability to evade detection, as MDY acknowledged in deciding not to charge extra fees for advanced circumvention functionality.

15. Thus, MDY and Donnelly provided and trafficked in Glider, a product primarily designed for, and with only limited commercially significant purpose other

than, circumventing Blizzard's warden protections. Moreover, the evidence makes plain

that MDY and Donnelly marketed and sold Glider with full knowledge of its use in

circumventing Blizzard's scan.dll and warden access control protections and protections

of Blizzard's rights as a copyright owner. 17 U.S.C. § 1201(a)(2)(A-C) and (b)(1)(A-C).

Michael Donnelly is Jointly and Severally Liable for Vicarious and Contributory Copyright Infringement, Tortious Interference with Contract and DMCA Violations

16. Michael Donnelly is jointly and severally liable with MDY because of his

direct personal participation in the infringement of Blizzard's copyrights, circumvention

of protection measures in violation of the DMCA, and tortious interference with contract.

In addition, as the president of MDY Industries, his status as the principal beneficiary of

the profits that MDY earns as a result of the infringement and breaches, and his

knowledge of and ability to direct the infringing activity, renders him personally liable

for all of MDY's acts.

17. Both Ninth Circuit and Arizona law clearly recognize that an officer or

director of a corporation is also personally liable for actions taken on behalf of the

corporation where the officer or director, like Donnelly here, directly participates in or

benefits from the unlawful activity at issue. "A corporate officer or director is, in

general, personally liable for all torts which he authorizes or directs or in which he

participates, notwithstanding that he acted as an agent of the corporation and not on his

own behalf." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th

Cir. 1985) (internal quotations omitted) (corporate officer found personally liable for the

corporation's unfair competition where his instrumental role in the tortious activity was

proven). Personal liability may also attach for intellectual property infringement,

including copyright infringement. *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d

814, 824 (9th Cir. 1996) (officers found personally liable for company's trademark infringement); *Coogan v. Avnet, Inc.*, No. CV040621PHXSRB, 2005 WL 2789311, at *7-8 (D. Ariz. 2005) (corporate officer can be held individually liable for copyright infringement where he has right and ability to supervise infringing activity and direct financial interest in the activity); *Sailor Music v. Mai Kai of Concord, Inc.*, 640 F. Supp. 629, 633 (D.N.H. 1986). Moreover, directors may also be held liable under Arizona law if they participate in the corporate affairs causing or contributing to injury. *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821, 826 (Ariz. App. 2001) (corporate officer status "does not shield [officers] from personal liability to those harmed as a result of intentionally harmful or fraudulent conduct"); *see also Bischofshausen, Vasbinder, and Luckie v. D.W. Jacquays Mining & Equip. Contractors Co.*, 700 P.2d 902, 908-09 (Ariz. Ct. App. 1985).

18. Here, there is no question that Donnelly personally performed nearly every significant act from which liability arose, including the development, support and marketing of Glider. Accordingly, the Court clarifies that its entry of summary judgment on its copyright infringement, tortious interference and DMCA claims extends to Michael Donnelly in his individual capacity, and Donnelly is jointly and severally liable for each claim.

MDY's Proposed Conclusions of Law

A. **Section 1201(a)(2)**

1. This section of the DMCA provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" that "is primarily designed or produced for the purpose of circumventing a technological measure that

effectively controls access to a work protected under this title[.]"[1] "[A]

technological measure 'effectively controls access to a work' if the measure, in the

ordinary course of its operation, requires the application of information, or a

process or a treatment, with the authority of the copyright owner, to gain access to

the work."[2] On the other hand, Section 1201(a)(2) does not apply when a "work"

can be freely accessed without passing through the asserted "technological

measure."[3]

2. In this case, the Court has already found that a holder of Blizzard's game client

software has full and complete access to Blizzard's software code.[4] The user need not

pass through Blizzard's security devices (scan.dll and the "resident software") to gain

access to the code.[5] As a result, the Court ruled that section 1201(a)(2) does not apply

and MDY's marketing of Glider with capabilities of evading scan.dll and the resident

software does not violate the statute.[6]

3. The same result applies to the non-literal elements generated by the code's

execution. By using third party software, a holder of Blizzard's game client software has

full and complete access to the non-literal elements generated by the code's execution.

The user need not pass through Blizzard's security devices to gain access to the non-

literal elements. The user can view or hear the non-literal elements generated by the

code's execution regardless of whether the user actually plays WoW or encounters

Warden.   As a result, section 1201(a)(2) does not apply and MDY's marketing of Glider

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[1] 17 U.S.C. § 1201(a)(2)(A).
[2] Id. § 1201(a)(3)(B).
[3] Dkt. 82 (Order) at 18-19, citing Lexmark Int'l, Inc. v Static Control Components, Inc., 387 F.3d 522, 547 (6th Cir. 2004).
[4] Dkt. 82 (Order) at 19, lines 15-23.
[5] Id.

with capabilities of evading scan.dll and the resident software does not violate the statute with respect to the non-literal elements generated by execution of the code.[7]

4. In addition, Blizzard's security devices do not qualify as "technological measures." As defined in 1201(a)(3)(B), a "technological measure" is one that, "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." Blizzard's scan.dll and resident software do not satisfy this description. Both software programs function by searching for the presence of bots and similar programs. As Blizzard explained in its statement of facts, the scan.dll component "finds" unauthorized programs, and the resident software "scans" for cheats and other unauthorized programs. Dkt. #40 ¶¶ 110-115. These programs do not require the application of information, or the application of a process or a treatment from anything – including the game user - before granting access to copyrighted information. When Scan.dll and Warden's scan RAM memory on a client computer neither the computer nor the user applies "information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." As a result, section 1201(a)(2) does not apply and MDY's marketing of Glider with capabilities of evading scan.dll and the resident software does not violate the statute.

B. Section 1201(b)(1)

5. While the focus of section 1201(a)(2) is "access" to a copyrighted work, the focus of Section 1201(b)(1) is "copying" of a copyrighted work. Specifically,

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[6] *Id.*
[7] *Id.*

§1201(b)(1) applies to "a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof[.]"[8]. A "'technological measure 'effectively protects the rights of a copyright owner under this title' if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title."[9] For example, some copyright owners permit access to a copyrighted work (like viewing streamed media) but employ a technological measure to prevent a viewer of the work from copying the work (by preventing a user from making a copy of the streamed media).[10] If one were to then circumvent the copying protection measures, a potential cause of action would exist under §1201(b), but not under §1201(a)(2).

6. In this case, in addition to providing free access to its copyrighted software, Blizzard has also left the copyrightable content of its work unprotected from copying. The technological measures at issue (scan.dll and the resident software) do not prevent, restrict, or otherwise limit copying of Blizzard's copyrighted work. As this Court previously found, scan.dll "scans the user's computer for unauthorized programs such as Glider before the user logs onto the WoW servers to play the game."[11] "If Glider or similar programs are detected, scan.dll denies the user <u>access to the game servers</u>."[12] In other words, even if scan.dll were to detect Glider in its ordinary course, scan.dll does not protect or restrict the user from making a copy of the literal or non-literal elements of the

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[8] 17 U.S.C. § 1201(b)(1)(A).
[9] 17 U.S.C. § 1201(b)(2)(B).
[10] *See, e.g., RealNetworks, Inc. v. Streambox, Inc.* No 2:99CV02070, 200 WL 127311, at *1-2 (W.D. Wash. Jan 18, 2000)(finding liability under §1201(b)(1) because even though plaintiff freely permitted access to copyrighted works, a user could not copy the work without circumventing a technological measure.)
[11] Dkt. 82 (Order) at 8, lines 1-6.
[12] *Id.* (emphasis ours)

WoW code. As before detection, a user is still free to copy both the literal and non-literal elements of WoW into RAM using a model viewer or other third party software.

7. In addition, in the ordinary course of its operation, scan.dll only scans at start up. Thus, in the ordinary course of operation, no circumvention of scan.dll occurs if a user subsequently elects to launch Glider after a user has launched Blizzard's software. A user's choice to launch Glider after the WoW program has been started does not constitute circumvention of a technological measure.

8. The resident component of Blizzard's technological protection does not protect or restrict copying either. As the Court previously found, the "`resident component' of Warden, runs periodically while a user plays WoW."[13] "If the resident software detects the use of Glider or a similar program, Blizzard <u>revokes access to the game</u>."[14] In other words, Blizzard's resident component merely prevents access to Blizzard's servers.   The resident component does not protect, prevent, restrict, or otherwise limit users from copying the literal and non-literal software code to RAM.   Even if the resident component were to detect Glider, the resident component does not protect or restrict copying. When operating in its ordinary course, the resident component does nothing to prevent a user from copying the literal or non-literal fixed WoW elements into RAM using a model viewer or other third party software. As a result, section 1201(b)(1) does not apply and MDY's marketing of Glider with capabilities of evading scan.dll and the resident software does not violate the statute.

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[13] *Id.*
[14] *Id.* (emphasis ours)

9. In order to shoehorn its unprotected free-to-copy software in into "protected" software in the eyes of the DMCA, Blizzard seeks a broad interpretation of §1201(b)(2)(b). Blizzard argues that by restricting access to its servers, its technological measures have the <u>effect</u> of preventing at least some copying into RAM. That is, even though Blizzard's technological measures do not prevent copying in the ordinary sense; they do "prevent" a RAM copy from being made – at least by Blizzard's own software. Blizzard's interpretation goes too far. As the court in *Lexmark* noted, the DMCA was not meant to attach when the copyrightable content is left unprotected,

> Nowhere in its deliberations over the DMCA did Congress express an interest in creating liability for the circumvention of technological measures designed to prevent consumers from using consumer goods while leaving the copyrightable content of a work unprotected.[15]

In this light, Blizzard's claim that by preventing access to its servers scan.dll and the resident component "restricts or otherwise limits" copying even though Blizzard distributes its software without any protection against copying requires a reading of §1201(b)(2)(b) that cannot be reconciled with its legislative history.

10. Furthermore, Blizzard owns two distinct copyrights – one for the client-side software and one for the server-side software. Glider users never access, nor copy the server side software. Glider users receive data output from Blizzard's server-side software and the Blizzard's client-side software utilizes the data during operation of the client-side software. This data is not protected by copyright.[16] Additionally, Blizzard does not protect its client-side software from being accessed or copied.

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[15] *Lexmark Intern. v. Static Control Components*, 387 F.3d 522 (6th Cir., 2004)
[16] When analyzing non-literal elements, the court must filter out unprotectable expression. *General Universal Systems, Inc. v. Lee*, 379 F.3d 131, 142-43 (5th Cir., 2004). "Copyright protection does not extend to … facts [and] elements required by factors external to the program itself…." *Id.*

11. In addition, Blizzard's technological measures do not protect any right Blizzard has as a copyright owner in its client side software. Blizzard provides artistic and creative expression as to the in-game objects such as the landscape, buildings, monsters, clothing, and sound effects. These elements are already present on a user's hard drive by virtue of the game client and are unprotected and freely reproducible.

12. To the extent that Blizzard claims protection to the constantly changing aspects of its game environment, movement of characters, player interactions, etc., these forms of expression are not protected by copyright law, for among other reasons, it is not Blizzard's authorship based upon original creative expression. For Blizzard to own a copyright in the audiovisual or artistic renderings that appear on a user's computer screen during game play, Blizzard must have authored the renderings.

13. Blizzard does not provide any creative or artistic input from its servers. Blizzard's server only provides data to the game client derived from keystrokes from WoW players and game rules. In this way, Blizzard does not choreograph the renderings that appear on a user's computer screen. The game rules are embedded within the server-side software code and are never transmitted, accessed or copied by Glider users. Because Blizzard does not provide any creative or artistic expression to the user's computer when the computer generates the renderings on the user's computer screen, Blizzard cannot claim to be an author. Thus, any data transmitted by Blizzard's servers is not copyright material owned by Blizzard.

14. In sum:

- by simply waiting until WoW is loaded, Scan.dll has no ability to protect Blizzard's copyright interests or restrict access to the WoW code;

- As for Warden, Warden does not lock the proverbial door that a person must walk through to play WoW – it merely notifies Blizzard that someone has entered;

- Neither Scan.dll nor Warden protect access or copying of Blizzard's client-side software;

- Glider users neither access, nor copy, Blizzard's server-side software.

Thus, Glider users violate neither § 1201(b)(1) nor 1201(a)(2) of the DMCA.

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