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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF ARIZONA**

9 MDY INDUSTRIES, LLC, )  
10 )  
11 Plaintiff and Counter-Claim )  
12 Defendant )  
13 vs. )  
14 BLIZZARD ENTERTAINMENT, INC., )  
15 and VIVENDI GAMES, INC. )  
16 Defendants and )  
17 Counter-Claim Plaintiffs. )  
18 BLIZZARD ENTERTAINMENT, INC., )  
19 and VIVENDI GAMES, INC. )  
20 Third-Party Plaintiffs, )  
21 vs. )  
22 MICHAEL DONNELLY, )  
23 Third-Party Defendant. )  
24 )

**Case No.:** CV06-02555-PHX-DGC

**JOINT SUPPLEMENTAL PROPOSED  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
REGARDING INJUNCTIVE  
RELIEF**

The Honorable David G. Campbell

25 Pursuant to this court's Order Setting Trial dated September 29th, 2008 the  
26 parties hereby file the following supplemental findings of fact and conclusions of  
27 law addressing permanent injunctive relief.  
28

1 **I. PROPOSED FINDINGS OF FACT**

2 **A. Undisputed Findings of Fact**

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

- 4 1. Glider consumes more Blizzard resources than any other bot. In order to  
5 combat Glider use, Blizzard diverts resources from game development to  
6 combat Glider.
- 7 2. The proliferation of Glider has resulted in increased direct costs for  
8 Blizzard because it responds to Glider's use by third parties by  
9 developing and deploying software, policies and processes; investigating  
10 and responding to customer complaints; and locating and disciplining  
11 Glider users to combat its effects on WoW and its legitimate users.
- 12 3. Blizzard devotes significant resources to mechanisms to stop Glider use  
13 that would instead be used to improve the product and the overall game-  
14 play experience.
- 15 4. Blizzard devotes programming resources to automatic detection of  
16 Glider use - a cost that has increased each time MDY has revised the  
17 Glider code to combat these measures.
- 18 5. Blizzard spends at least \$970,939.60 annually in direct costs addressing  
19 the problem of bots in WoW.
- 20 6. Blizzard employs a staff of customer service representatives, including in-  
21 game "Game Masters" who respond to and assist players with in-game  
22 problems and complaints.
- 23 7. Blizzard employs the Game Masters to review and respond to the ever-  
24 increasing numbers of user complaints relating to use of bots.
- 25 8. Blizzard employs its Game Masters, who act as in-game moderators to  
26 answer customer questions and ensure a fair gaming experience, in the  
27 remedial task of attempting to manually detect Glider Use.

- 1 9. Between December 22, 2004 and March 18, 2008, Blizzard received more  
2 than 465,000 in-game petitions from users complaining about bots.
- 3 10. In this same time period, WoW had in excess of 11 million active players.
- 4 11. Several thousand of the in-game petitions specifically mention Glider by  
5 name, reflecting its status as the most popular and widely used bot in  
6 WoW.
- 7 12. Of the petitions that mentioned Glider by name, none of the petitioners  
8 could know with certainty that Glider was in fact the culprit or basis of their  
9 specific in-game complaint.
- 10 13. The petitions from players complaining about bots include only those  
11 specifically referencing bots, as opposed to complaints about [the]  
12 secondary effects of bots, such as over-farmed areas, in-games sales, and  
13 game economy imbalances.
- 14 14. Through their complaints, customers have made clear that botting impacts  
15 their WoW experience and they do not want other players to be able to use  
16 bots.
- 17 15. Following the entry of this Court's order finding that MDY's sale,  
18 marketing, and support of Glider products constituted secondary  
19 copyright infringement and tortious interference, MDY has continued its  
20 activities unabated. Specifically, MDY refused to honor Blizzard's  
21 demand to cease and desist selling and updating Glider.
- 22 16. MDY has continued to release updates for its software designed to  
23 circumvent Blizzard's latest detection methods.
- 24 17. MDY and its employees have made public statements expressing their  
25 intent to continue selling and supporting Glider.
- 26 18. MDY is still offering MMO Glider for sale on its website,  
27 www.mmoglider.com, has continued updating the Glider software, and  
28 continues to provide support to users.

- 1 19. When Glider runs, it first authenticates with the MDY server at  
2 www.mmoglider.com by negotiating a key exchange to create a secure  
3 channel.
- 4 20. Once a secure channel is determined, Glider sends the game version,  
5 Glider version, and product key to the MDY server at  
6 www.mmoglider.com for validation.
- 7 21. If the authentication fails, the MDY server at www.mmoglider.com will  
8 not provide Glider with the memory locations of game data—which are  
9 necessary to allow Glider to circumvent Blizzard’s security measures—  
10 and Glider will not run.
- 11 22. MDY maintains control of all purchased Glider programs by requiring  
12 that they connect to the MDY server at www.mmoglider.com before  
13 running.
- 14 23. MDY has the ability to disable any copy or all copies of WoW Glider at  
15 any time.
- 16 24. Each time Blizzard devises a new method to detect Glider and block  
17 Glider users’ access to WoW, MDY makes changes to Glider to avoid  
18 detection.
- 19 25. MDY encrypts and protects Glider source code so that competitors  
20 cannot create their own version of Glider.
- 21 26. Blizzard continues to expend resources trying to prevent Glider use.

22  
23 **B. Contested Issues of Fact**

24 The following are the material issues of fact to be tried and decided:

- 25 27. Whether Michael Donnelly personally participates in and/or directs the  
26 ongoing development, marketing and sale of Glider.
- 27 28. Whether continued sale and support of Glider, as well as statements on  
28 Glider forums to current and potential customers that Glider will

1 continue to be supported, continue the conduct this Court has found  
2 improper.

3 29. Whether MDY's ongoing acts of selling Glider has resulted in injuries  
4 that include difficult to measure harm to Blizzard's reputation and  
5 goodwill caused by Glider use.

6 30. Whether as a result of Glider use, Blizzard has received hundreds of  
7 thousands of customer complaints that reflect the deterioration of  
8 goodwill from those users that expect Blizzard to prevent cheating and  
9 hacking in WoW.

10 31. Whether at most, several thousand out of the over 11 million active users  
11 specifically mentioned Glider by name as a cause of dissatisfaction.

12 32. Whether the total number of users who have ever played WoW greatly  
13 exceeds 11 million.

14 33. Whether Glider serves no identified purpose outside of its interaction  
15 with WoW, and as such, any continued development or maintenance can  
16 serve only to facilitate infringement.

17 34. Whether if MDY is allowed to distribute freely the source code, Blizzard  
18 will be faced with the possibility that numerous parties around the world  
19 would begin infringing its copyright—and doing so without a revenue  
20 stream with which to compensate it for damage to WoW.

21 35. Whether numerous other individuals around the world, many of whom  
22 may be difficult to sue in United States courts, would likely be interested  
23 in picking up Glider's mantel and continuing to provide an equally  
24 successful bot for use in WoW, something that has thus far proved  
25 beyond the ability of anyone other than MDY.

26 **II. PROPOSED CONCLUSIONS OF LAW**

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

28 **A. Blizzard's Proposed Conclusions of Law**

- 1            1. Under “§ 502(a) of the Copyright Act,” a court may “grant temporary  
2            and final injunctions on such terms as it may deem reasonable to prevent  
3            or restrain infringement of a copyright.” MAI Sys. Corp. v. Peak  
4            Computer, 991 F.2d 511, 520 (9th Cir. 1993) (quoting 17 U.S.C. §  
5            502(a)). Similarly, “[i]njunctive relief is an appropriate remedy when a  
6            claim of tortious interference is involved.” Graham v. Mary Kay, Inc., 25  
7            S.W.3d 749, 755 (Tex.-App. Houston 2000).
- 8            2. “[A]ccording to well-established principles of equity, a plaintiff seeking  
9            a permanent injunction must satisfy a four-factor test before a court may  
10           grant such relief.” eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388,  
11           391 (2006). “A plaintiff must demonstrate: (1) that it has suffered an  
12           irreparable injury; (2) that remedies available at law, such as monetary  
13           damages, are inadequate to compensate for that injury; (3) that,  
14           considering the balance of hardships between the plaintiff and defendant,  
15           a remedy in equity is warranted; and (4) that the public interest would  
16           not be disserved by a permanent injunction.” Id.
- 17           3. Courts have routinely granted permanent injunctive relief when liability  
18           has been established and there is a threat of continuing violations. MAI  
19           Sys. Corp., 991 F.2d at 520; see also A & M Records, Inc. v. Napster,  
20           Inc., 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000) (same) reversed in part  
21           on other grounds, (citing Micro Star v. Formgen Inc., 154 F.3d 1107,  
22           1109 (9th Cir. 1998)). In copyright cases, courts have traditionally held  
23           that irreparable harm is presumed on a showing of success on the merits.  
24           LGS Architects, Inc. v. Concordia Homes, 434 F.3d 1150, 1155 (9th Cir.  
25           2006); Micro Star, 154 F.3d at 1109; Sony Music Entertainment v.  
26           Global Arts Productions, 45 F. Supp. 2d 1345, 1347 (S.D. Fla. 1999);  
27           see also Princeton Univ. Press v. Michigan Document Servs., 99 F.3d  
28           1381, 1392-93 (6th Cir. 1996) (holding the weight of authority supports

1 the extension of injunctive relief to future work). Similarly, “irreparable  
2 injury is presumed in cases involving tortious interference with business  
3 relationships.” Special Purpose Accounts Receivable Coop Corp. v.  
4 Prime One Capital Co., 125 F. Supp. 2d 1093, 1105 (S.D. Fla. 2000).  
5 Thus, a showing of copyright infringement liability or improper  
6 interference with contract and the threat of future violations generally is  
7 sufficient to warrant a permanent injunction. Sega Enters. Ltd. v.  
8 MAPHIA, 948 F. Supp. 923, 940 (N.D. Cal. 1996) (quoting 17 U.S.C. §  
9 502) (finding access to equipment that allowed defendant to continue to  
10 illegally download and distribute game programs constituted a threat of  
11 continued violation); see also, MAI, 991 F.2d at 520; Twentieth Century  
12 Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065, 1073 (D. Ariz. 2006)  
13 (granting a permanent injunction upon entry of default judgment against  
14 defendant in a copyright infringement action).

- 15 4. This Court has conclusively established liability under the DMCA, the  
16 Copyright Act, and for tortious interference with contract based on  
17 MDY’s marketing, sale, and support of Glider.
- 18 5. The threat of continued violation of the DMCA, copyright infringement  
19 and tortious interference is also clearly established given that MDY has  
20 publicly stated that, unless the court issues a permanent injunction, it  
21 will continue to sell and support Glider.
- 22 6. Damages to reputation and goodwill for any cause of action are generally  
23 irreparable injuries that support the issuance of an injunction. See Rent-  
24 A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d  
25 597, 603 (9th Cir. 1991) (“intangible injuries, such as damage to ongoing  
26 recruitment efforts and goodwill, qualify as irreparable harm.”);  
27 MySpace, Inc. v. Wallace, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007)  
28 (“Harm to business goodwill and reputation is unquantifiable and

1 considered irreparable.”)

- 2 7. Blizzard offered evidence of monetary damages attributable to costs of  
3 combating Glider and losses of subscription revenue, as well as  
4 reputational and goodwill damage caused by customer dissatisfaction  
5 with Glider use. See Rent-A-Center, Inc. v. Canyon Television &  
6 Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) (intangible  
7 injuries and damage to goodwill qualify as irreparable harm).
- 8 8. A permanent injunction is necessary to prevent further collaboration,  
9 tortious interference, and infringement with other parties that may not  
10 have the means to pay an eventual judgment. See Rosen Entm't Sys. v.  
11 Vision, 343 F. Supp. 2d 908, 920 (C.D. Cal. 2004) (“lack of evidence of  
12 [defendant’s] ability to pay a judgment, favors a finding of irreparable  
13 harm.”)
- 14 9. “In issuing an injunction, the court must balance the equities between the  
15 parties and give due regard to the public interest.” High Sierra Hikers  
16 Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004).
- 17 10. Here, the balance of equities weigh in Blizzard’s favor. MDY’s only  
18 interest is in the ability to continue producing and selling a product that  
19 infringes on Blizzard’s copyrights and tortiously interferes with its  
20 contracts. See e.g. Triad Sys. Corp. v. Southeastern Express Co., 64  
21 F.3d 1330, 1338 (9th Cir. 1995) (“Where the only hardship that the  
22 defendant will suffer is lost profits from an activity which has been  
23 shown likely to be infringing, such an argument in defense ‘merits little  
24 equitable consideration [on an appeal from a preliminary injunction].’”  
25 (quoting Concrete Machinery Co. v. Classic Lawn Ornaments, Inc., 843  
26 F.2d 600, 612 (1st Cir. 1988)); accord Apple Computer, Inc. v. Franklin  
27 Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983) (in motion for  
28 preliminary injunction, district court should not consider the



1 “devastating effect” of the injunction on the infringer's business).  
2 Blizzard, on the other hand, must defend its reputation and the quality of  
3 its on-line gaming experience by expending thousands of dollars and  
4 hours updating its security devices to combat MDY, all the while risking  
5 that it will harm innocent users.

6 11. Under Ninth Circuit law, “a defendant who knowingly infringes  
7 another’s copyright cannot complain of the harm that will befall it when  
8 properly forced to desist from its infringing activities.” *Cadence Design*  
9 *Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997) (internal  
10 quotation marks and citation omitted). MDY is entitled to no equitable  
11 consideration where this Court has already found infringement, and  
12 MDY knowingly built a business founded solely on exploiting breaches  
13 of Blizzard’s contracts with its customers.

14 12. The public interest likewise favors the entry of an injunction barring  
15 MDY from continuing to market, sell, and support Glider. As this Court  
16 found at summary judgment, none of the seven factors Arizona courts  
17 apply when determining propriety of conduct for tortious interference  
18 with contract weigh in MDY’s favor because MDY exploits Blizzard’s  
19 contracts at the expense of Blizzard and its users. Order at 23.

20 13. Most of the relevant public, namely the more than 10 million WoW  
21 players that do not use Glider, are damaged by this improper conduct and  
22 Glider use because MDY assists the players in gaining an advantage over  
23 other WoW players; MDY enables players to mine the game for their  
24 own financial benefit and in direct violation of the TOU; assists players  
25 in avoiding detection by Blizzard, and does so in a way designed to place  
26 Blizzard at risk. In fact, MDY’s own stated goal is to harm the public  
27 interest by making it a “‘bad idea’ for Blizzard to try to detect Glider” in  
28 fear of the “banning or crashing innocent customers.” *Id.* at 24 (internal

1 quotations omitted.)

2 14. MDY's only interest is providing users with a means to breach their  
3 contracts with Blizzard while avoiding detection, while Blizzard's  
4 interest is in maintaining a fair and enjoyable game for all of its users.  
5 As MDY itself admits, Glider use is a breach of the EULA and TOU  
6 currently in place. An interest in concealing clear breaches of contract  
7 and copyright infringement that harm other WoW users is not sufficient  
8 to balance out the public interest in preventing disadvantaging and  
9 injuring Blizzard and the vast majority of WoW's more than 10 million  
10 players.

11 15. The attached permanent injunction is therefore entered as requested.

12 **B. MDY and Michael Donnelly's Proposed Conclusions of Law**

13 1. MDY and Donnelly ("MDY") do not dispute Blizzard's Proposed  
14 Conclusions of Law as to paragraphs 1 and 2. MDY does, however, dispute the  
15 content of the remaining paragraphs 3 through 15.

16 2. MDY affirmatively states that according to the Supreme Court's  
17 decision in *Ebay v. MercExchange*, Blizzard must establish all four equitable  
18 factors in order to obtain a permanent injunction against MDY. The Supreme  
19 Court flatly rejected the notion that a presumption of any of the four factors can be  
20 made under any circumstances and that all four factors must be proven by the  
21 moving party. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

22 3. To the extent necessary to rebut Blizzard's proposed conclusions of law  
23 in detail, MDY incorporates by reference its Response to Blizzard's Motion for  
24 Permanent Injunction filed on August 14, 2008.

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**CONCLUSION**

The parties respectfully request that this Court supplement the pre-trial order to include the above stated findings of fact and conclusions of law addressing permanent injunctive relief

Dated: October 20, 2008

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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