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

8 MDY INDUSTRIES, LLC,)

9 Plaintiff and Counter-Claim)

10 Defendant)

11 vs.)

12)
13 BLIZZARD ENTERTAINMENT, INC.,)
14 and VIVENDI GAMES, INC.)

15 Defendants and)

16 Counter-Claim Plaintiffs.)

17)
18 BLIZZARD ENTERTAINMENT, INC.,)
19 and VIVENDI GAMES, INC.)

20 Third-Party Plaintiffs,)

21 vs.)

22 MICHAEL DONNELLY,)

23 Third-Party Defendant.)

Case No.: CV06-02555-PHX-DGC

**BLIZZARD ENTERTAINMENT,
INC. AND VIVENDI GAMES,
INC. MOTION FOR A PERMANENT
INJUNCTION OR IN THE
ALTERNATIVE TO AMEND THE
JUDGMENT ENTERED JULY 14,
2008**

The Honorable David G. Campbell

24 Defendant/Cross-Plaintiffs Blizzard Entertainment, Inc. and Vivendi Games, Inc.

25 (collectively "Blizzard") hereby move for a permanent injunction, or in the alternative
26 pursuant to Federal Rule of Civil Procedure 59(e) to amend the judgment entered by this

27 Court on July 14, 2008, in which it found MDY Industries, LLC and Michael Donnelly

28 (collectively "MDY") liable for secondary copyright infringement and tortious interference

with contract, to include a permanent injunction barring MDY from selling, supporting,

marketing, or distributing the MMO Glider Software package or any similar software

1 (“Glider”).

2 **I. Facts and Procedural History**

3 In its motion for summary judgment, Blizzard moved for “injunctive relief, monetary
4 damages, and attorneys’ fees against MDY Industries, LLC and Michael Donnelly . . . on
5 their claims for secondary copyright infringement, DMCA trafficking, and tortious
6 interference with contractual relationships.” Blizzard Entertainment, Inc. & Vivendi Games
7 Inc. Mot. for Summary J. & Mem. of Points & Authorities in Supp. at 1-2 (“Blizzard Sum.
8 J. Mot.”). This Court, in its order filed July 14, 2008 (“Order”), granted summary judgment
9 in favor of Blizzard with respect to MDY’s liability for tortious interference (Count I) and
10 contributory and vicarious copyright infringement (Counts II-III). Order at 27. In doing so,
11 the Court found that MDY had damaged Blizzard, because “Glider consumes more Blizzard
12 resources than any other bot . . .,” “that Blizzard must divert resources from game
13 development to combat Glider,” and “Blizzard has presented evidence that use of Glider has
14 caused Blizzard to lose subscription fees from WoW players.” *Id.* at 23. The Court further
15 noted that the parties would proceed to trial to determine the amount of damages to which
16 Blizzard is entitled and to resolve liability as to Blizzard’s DMCA and Unjust Enrichment
17 claims. *Id.* The Court, however, made no ruling on Blizzard’s request that a permanent
18 injunction be entered if it prevailed on its copyright and tortious interference claims.
19 Blizzard hereby respectfully requests modification of the judgment to include a ruling
20 granting its motion for a permanent injunction, which Blizzard believes is necessary to
21 protect Blizzard’s copyright in the World of Warcraft (“WoW”) Game Client and its
22 contractual relationships with WoW users.

23 Following the entry of the Court’s order finding that MDY’s sale, marketing, and
24 support of Glider products constituted secondary copyright infringement and tortious
25 interference, MDY has continued its activities unabated. Specifically, MDY has refused to
26 honor Blizzard’s demand to cease and desist selling and updating Glider. Ex. A, Ltr. fr. C.
27 Genetski to L. Venable, dated July 18, 2008 & Ex. B, Ltr. from L. Venable to C. Genetski
28 dated July 25, 2008. MDY has continued to release updates for its software designed to

1 circumvent Blizzard's latest detection methods. Ex. C, Declaration of Russell M. Shumway
2 "Shumway Decl." at Ex. 2. MDY and its employees have also made public statements
3 expressing their intent to continue infringing on Blizzard's copyrights and interfering with
4 its contractual relations. For example, MDY employee Jason Beatty, posting under the
5 screen name Hamut informed the Glider user forms on July 18, 2008 at 3:31 pm, that "Yes
6 – we will certainly appeal and keep doing what we do best – Glider." Ex. C, Shumway
7 Decl. at Ex. 3. True to its word, MDY is still offering MMO Glider for sale on its website,
8 www.mmoglider.com, has continued updating the Glider software, and continues to provide
9 support to users. Ex. C, Shumway Decl. at Exs. 1 & 2; Ex. D, Affidavit of Greg Ashe
10 ("Ashe Aff.") ¶¶ 3-7. The continued sale and support of Glider, as well as statements on
11 Glider forums to current and potential customers that Glider will continue to be supported,
12 only serve to continue the exploitive conduct this Court found to be improper. As a result,
13 Blizzard continues to expend resources trying to prevent Glider use and prevent
14 infringement of its copyrights and tortious interference with its contractual relations. Ex. D,
15 Ashe Aff. ¶¶ 3-7.

16 **II. Finding that MDY is Liable for Secondary Copyright Infringement and Tortious**
17 **Interference With Contract Supports Entry of a Permanent Injunction.**

18 Under "§ 502(a) of the Copyright Act," a court may "grant temporary and final
19 injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a
20 copyright." MAI Sys. Corp. v. Peak Computer, 991 F.2d 511, 520 (9th Cir. 1993) (quoting
21 17 U.S.C. § 502(a)). Similarly, "[i]njunctive relief is an appropriate remedy when a claim
22 of tortious interference is involved." Graham v. Mary Kay, Inc., 25 S.W.3d 749, 755 (Tex.-
23 App. Houston 2000). "[A]ccording to well-established principles of equity, a plaintiff
24 seeking a permanent injunction must satisfy a four-factor test before a court may grant such
25 relief." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). "A plaintiff must
26 demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law,
27 such as monetary damages, are inadequate to compensate for that injury; (3) that,
28 considering the balance of hardships between the plaintiff and defendant, a remedy in equity

1 is warranted; and (4) that the public interest would not be disserved by a permanent
2 injunction.” Id.

3 *A. MDY’s Ongoing Sale and Support of Glider Impermissibly Harms Blizzard and*
4 *Money Damages will Not Adequately Compensate for that Harm.*

5 “As a general rule, a permanent injunction will be granted when liability has been
6 established and there is a threat of continuing violations.” MAI Sys. Corp., 991 F.2d at 520.
7 see also A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000)
8 (same) reversed in part on other grounds, (citing Micro Star v. Formgen Inc., 154 F.3d
9 1107, 1109 (9th Cir. 1998)). When seeking a permanent injunction in copyright cases,
10 irreparable harm is presumed on a showing of success on the merits. LGS Architects, Inc. v.
11 Concordia Homes, 434 F.3d 1150, 1155 (9th Cir. 2006); Micro Star, 154 F.3d at 1109; Sony
12 Music Entertainment v. Global Arts Productions, 45 F. Supp. 2d 1345, 1347 (S.D. Fla.
13 1999); see also Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381, 1392-93
14 (6th Cir. 1996) (holding the weight of authority supports the extension of injunctive relief to
15 future work). Similarly, “irreparable injury is presumed in cases involving tortious
16 interference with business relationships.” Special Purpose Accounts Receivable Coop
17 Corp. v. Prime One Capital Co., 125 F. Supp. 2d 1093, 1105 (S.D. Fla. 2000). Thus, a
18 showing of copyright infringement liability or improper interference with contract and the
19 threat of future violations generally is sufficient to warrant a permanent injunction. Sega
20 Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 940 (N.D. Cal. 1996) (quoting 17 U.S.C. § 502)
21 (finding access to equipment that allowed defendant to continue to illegally download and
22 distribute game programs constituted a threat of continued violation); see also, MAI, 991
23 F.2d at 520; Twentieth Century Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065, 1073 (D.
24 Ariz. 2006) (granting a permanent injunction upon entry of default judgment against
25 defendant in a copyright infringement action).

26 Here, this Court’s order on summary judgment conclusively established liability under
27 the Copyright Act and for tortious interference with contract based on MDY’s marketing,
28 sale, and support of Glider. Order at 27. Moreover, as demonstrated above, the threat of

1 continued infringement and tortious interference is also clearly established. Indeed, MDY's
2 counsel has confirmed that MDY does not intend to cease supporting, marketing, creating,
3 or selling Glider unless enjoined by the Court. Ex. B.

4 Even if the Court does not apply a presumption of irreparable harm, Blizzard has
5 established such harm in this case. While Blizzard can, and will, prove ascertainable and
6 recoverable damages related to Blizzard's costs in combating Glider use, reduced subscriber
7 fees paid by individuals that "level" more quickly, and customer terminations and overall
8 weakening demand for the game because of Glider, recovering those damages without a
9 corresponding injunction will not provide redress for all of Blizzard's harm.¹ Ongoing
10 infringement and interference will also result in injuries that include difficult to measure
11 harm to Blizzard's reputation and goodwill caused by Glider use. Blizzard SoF ¶¶ 205, 220,
12 225, 226.² As a result of Glider use, Blizzard has received hundreds of thousands of
13 customer complaints that reflect the deterioration of goodwill from those users that expect
14 Blizzard to prevent cheating and hacking in WoW. Id.; see also Ex. D, Ashe Aff. at ¶¶ 3-4.
15 Damages to reputation and goodwill for any cause of action are generally irreparable
16 injuries that support the issuance of an injunction. See Rent-A-Center, Inc. v. Canyon
17 Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) ("intangible
18 injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable
19 harm."); MySpace, Inc. v. Wallace, 498 F. Supp. 2d 1293, 1305 (C.D. Cal. 2007) ("Harm to
20 business goodwill and reputation is unquantifiable and considered irreparable.")

21 In addition, unless enjoined from doing so MDY may provide or sell the Glider source
22

23 ¹ In addition, Blizzard will seek damages for willful infringement of its copyrights.
24 Specifically, MDY's continuing violations after this Court's July 14th order, as a matter of
25 law should constitute willful violations. Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d
26 1332, 1335 n. 3 (9th Cir. 1990). (Willful, within the meaning of 17 U.S.C. § 504(c)(2),
27 means "with knowledge that the defendant's conduct constitutes copyright infringement.");
28 Danjaq LLC v. Sony Corp., 263 F.3d 942, 957 (9th Cir. 2001) ("the term 'willful' refers to
conduct that occurs 'with knowledge that the defendant's conduct constitutes copyright
infringement.'")

² All citations to Blizzard's Statement of Facts in Support of its Motion for Summary
Judgment ("Blizzard SoF") contained herein are to facts not in dispute.

1 code to other individuals, therefore enabling their distribution of the Glider software. MDY
2 and other individuals engaged in continually updating Glider could become judgment proof
3 and provide Blizzard with no adequate remedy to prevent further infringement and
4 interference with their contractual relations. Indeed, several Glider users have encouraged
5 MDY to take such action to flout the efficacy of the judgment. See e.g. Ex. C, Shumway
6 Decl. at Ex. 4. As such, a permanent injunction is necessary to prevent further
7 collaboration, tortious interference, and infringement with other parties that may not have
8 the means to pay an eventual judgment. See Rosen Entm't Sys. v. Vision, 343 F. Supp. 2d
9 908, 920 (C.D. Cal. 2004) (“lack of evidence of [defendant’s] ability to pay a judgment,
10 favors a finding of irreparable harm.”)

11 *B. The Balance of Hardships and Public Interest Favor Injunctive Relief*

12 “In issuing an injunction, the court must balance the equities between the parties and
13 give due regard to the public interest.” High Sierra Hikers Ass'n v. Blackwell, 390 F.3d
14 630, 642 (9th Cir. 2004). Here, the balance of equities clearly weigh in Blizzard’s favor.
15 MDY’s only interest is in the ability to continue producing and selling a product that
16 infringes on Blizzard’s copyrights and tortiously interferes with its contracts. See e.g. Triad
17 Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1338 (9th Cir. 1995) (“Where the
18 only hardship that the defendant will suffer is lost profits from an activity which has been
19 shown likely to be infringing, such an argument in defense ‘merits little equitable
20 consideration [on an appeal from a preliminary injunction].’” (quoting Concrete Machinery
21 Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 612 (1st Cir. 1988)); accord Apple
22 Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983) (in motion
23 for preliminary injunction, district court should not consider the “devastating effect” of the
24 injunction on the infringer's business). Blizzard, on the other hand, must defend its
25 reputation and the quality of its on-line gaming experience by expending thousands of
26 dollars and hours updating its security devices to combat MDY, all the while risking that it
27 will harm innocent users.

28 The public interest likewise favors the entry of an injunction barring MDY from

1 continuing to market, sell, and support Glider. As this Court noted in its order, MDY's
2 actions are improper, with none of the seven factors Arizona courts apply when determining
3 propriety weighing in its favor because MDY exploits Blizzard's contracts at the expense of
4 Blizzard and its users. Order at 23. Most of the relevant public, namely the more than 10
5 million WoW players that do not use Glider, are damaged by this improper conduct and
6 Glider use because "MDY assists the players in gaining an advantage over other WoW
7 players; MDY enables players to mine the game for their own financial benefit and in direct
8 violation of the TOU; MDY assists players in avoiding detection by Blizzard, and does so in
9 a way designed to place Blizzard at risk." *Id.* MDY's own stated goal is to harm the public
10 interest by making it a "'bad idea' for Blizzard to try to detect Glider" in fear of the
11 "banning or crashing innocent customers." *Id.* at 24 (internal quotations omitted.) MDY's
12 only interest is providing users with a means to breach their contracts with Blizzard while
13 avoiding detection, while Blizzard's interest is in maintaining a fair and enjoyable game for
14 all of its users. As MDY itself admits, Glider use is a breach of the EULA and TOU
15 currently in place. An interest in concealing clear breaches of contract and copyright
16 infringement that harm other WoW users is not sufficient to balance out the public interest
17 in preventing disadvantaging and injuring Blizzard and the vast majority of WoW's more
18 than 10 million players.

19 **III. The Form of the Injunction**

20 Blizzard respectfully requests that the injunction preclude MDY, Michael Donnelly,
21 all employees and agents of MDY, and any person acting in concert with them from
22 marketing, selling, supporting, or developing Glider or similar software for use with WoW.
23 To ensure that MDY cannot circumvent the injunction and to provide redress for Blizzard's
24 injuries, Blizzard requests that the following specific prohibitions also be included.

25 First, the injunction should specifically enjoin MDY from continuing to operate its
26 authentication server. When Glider runs, it first authenticates with the MDY server at
27 www.mmoglider.com by negotiating a key exchange to create a secure channel. (Blizzard
28 SoF ¶ 149). Once a secure channel is determined, Glider sends the game version, Glider

1 version, and product key to the MDY server at www.mmoglider.com for validation.
2 (Blizzard SoF ¶ 150). If the authentication fails, the MDY server at www.mmoglider.com
3 will not provide Glider with the memory locations of game data—which are necessary to
4 allow Glider to circumvent Blizzard’s security measures—and Glider will not run.
5 (Blizzard SoF ¶¶ 132, 152). MDY maintains control of all purchased Glider programs by
6 requiring that they connect to the MDY server at www.mmoglider.com before running.
7 Thus, MDY has the ability to disable any copy or all copies of WoW Glider at any time.
8 (Blizzard SoF ¶ 153). MDY, by maintaining a central server of software keys for paying
9 Glider users, has the right and ability to terminate the use of Glider at any time, and MDY
10 receives a direct financial benefit from Glider sales. (Blizzard SoF ¶ 154). Enjoining MDY
11 from continued operation of the authentication servers would have the effect of rendering all
12 existing copies of Glider useless, and would effectively protect Blizzard’s rights under this
13 Court’s summary judgment order.

14 Second, in order to prevent MDY from circumventing this prohibition and to prevent
15 further infringement of copyright and interference with Blizzard’s contractual relations,
16 Blizzard respectfully requests that MDY be enjoined from developing or maintaining
17 Glider. MDY constantly updates Glider to ensure its continued success in cracking
18 Warden’s evolving detection and access control technologies. Each time Blizzard devises a
19 new method to detect Glider and block Glider users’ access to WoW, Donnelly makes
20 changes to Glider to avoid detection. (Blizzard SoF ¶ 146; Ashe Aff. at ¶ 5). An injunction
21 preventing updates to Glider will prevent MDY, or any company or individual acting with
22 MDY’s assistance, from creating a version of Glider that works without authentication from
23 the Glider servers, and thus prevents circumvention of the first portion of this injunction.
24 Additionally, enjoining further development of Glider prevents MDY from updating Glider
25 to address Blizzard’s new security measures. If the injunction prevents those updates, it
26 will reduce the harm to Blizzard by allowing it to forego constant security updates caused
27 by Glider use.

28 Third, the injunction should preclude MDY from releasing the Glider source code to

1 third parties, especially those located abroad and over whom it may be difficult or
2 impossible to gain jurisdiction in the United States. As Mr. Donnelly testified in his
3 deposition, he encrypts and protects Glider source code so that competitors cannot create
4 their own version of Glider. Deposition of Michael M. Donnelly, Sept. 25, 2007 at 188;
5 attached as Ex. 5 to Blizzard & Vivendi's Stmt. of Facts in Supp. of Their Mot. for
6 Summary J. Some Glider users have suggested on internet forums that MDY provide the
7 Glider source code as "open source" software—free for use. Ex. C, Shumway Decl. at Ex
8 4. If MDY is allowed to distribute the source code, Blizzard will be faced with numerous
9 parties around the world infringing its copyright—and possibly doing so without a revenue
10 stream with which to compensate it for damage to WoW. Preventing this sort of irreparable
11 harm is one of the purposes of an injunction, and thus such a provision should be included
12 in the injunction here in order to protect Blizzard's rights.

13 Finally, the injunction should specifically enjoin MDY from providing assistance to
14 third parties in developing their own botting software for use with WoW. While Glider is
15 far and away the most popular botting software used in WoW, other bots do exist. Blizzard
16 SoF ¶ 218. Numerous other individuals around the world, many of whom may be difficult
17 to sue in United States courts, would undoubtedly be interested in picking up Glider's
18 mantel and continuing to provide an equally successful bot for use in WoW, something that
19 has thus far proved beyond the ability of anyone other than MDY. Preventing MDY from
20 not only releasing the source code, but providing advice to those individuals creating their
21 own bots would prevent the irreparable injury that could result from the creating of botting
22 software by disparate individuals and companies from whom a judgment might be difficult
23 or impossible to collect.

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CONCLUSION

For the reasons stated herein, Blizzard respectfully requests that this Court amend the judgment entered on July 14, 2008 to include a permanent injunction as described in the attached proposed order.

Dated: July 23, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 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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