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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**MDY INDUSTRIES, LLC,**  
Plaintiff and Counterdefendant,

vs.

**BLIZZARD ENTERTAINMENT, INC.,  
and VIVENDI GAMES, INC.,**  
Defendants and Counterclaimants,

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

**MDY Industries, LLC and Michael  
Donnelly's Response to Blizzard  
Entertainment, Inc. and Vivendi Games,  
Inc.'s Motion for Permanent Injunction  
or in the Alternative to Amend the  
Judgment Entered July 14, 2008**

**BLIZZARD ENTERTAINMENT, INC.,  
and VIVENDI GAMES, INC.,**  
Third-Party Plaintiffs,

vs.

**MICHAEL DONNELLY, an individual**  
Third-Party Defendant.

**The Honorable David G. Campbell  
Oral Argument Requested**

**Preliminary Statement**

Blizzard has requested that the Court enter a permanent injunction against MDY and Michael Donnelly. Blizzard alleges that the Court issued the order against MDY and Michael Donnelly collectively. This is inaccurate. The Court did not find Michael Donnelly individually liable of any of Blizzard's claims. On page 2 of the Order, the

1 Court exclusively defines MDY Industries, LLC as “MDY” – not Michael Donnelly.  
2 And on page 26, the Order applies only to MDY as the Court defined it on page 2. Thus,  
3 the Court’s Order does not apply to Michael Donnelly.<sup>1</sup>

4 Additionally, by definition, a permanent injunction is an injunction granted after  
5 trial or a final judgment on all claims.<sup>2</sup> Because the parties have not tried the case, nor  
6 has the Court issued a final judgment, the Court must consider Blizzard’s request as one  
7 for a preliminary, not permanent injunction.

8 Within the context of MDY’s response, this distinction is important. If the Court  
9 analyzes Blizzard’s motion contextually as one for a permanent injunction, MDY would  
10 not argue that MDY would have some interest in continuing to distribute Glider after trial  
11 and after MDY has exhausted its appellate remedies. But within the context of a  
12 preliminary injunction, for the reasons discussed below, MDY opposes Blizzard’s  
13 position that the Court should enjoin MDY before MDY has exhausted its options.

14 Alternatively, if the Court does grant Blizzard’s motion for preliminary injunction,  
15 MDY requests that the Court immediately issue a final judgment under Rule 54(b) on  
16 Blizzard’s claims for secondary copyright infringement and tortious interference with  
17 contract.

### 18 **Issues to be Decided**

19 The issues facing this Court boil down to three straightforward questions  
20 regarding the equitable nature of injunctive relief:

- 21 1. The U.S. Supreme Court has held that a party must affirmatively  
22 demonstrate irreparable harm to obtain injunctive relief. Blizzard  
23 waited nearly 1.5 years before it filed suit and over three years before it  
24 sought an injunction. Also, during the three years of Glider’s sales,

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25 <sup>1</sup> MDY raises this point not to argue that the court could not include Donnelly as part of the  
26 injunction due to his relationship to MDY. But Blizzard never demonstrated in court, nor has it  
27 disclosed evidence in discovery that individually Donnelly has infringed Blizzard’s copyrights or  
28 tortiously interfered with Blizzard’s contracts. MDY will be filing a motion to dismiss Donnelly  
from this lawsuit.

<sup>2</sup> BLACK’S LAW DICTIONARY 788 (7<sup>th</sup> ed. 1999).

1 Blizzard's subscriptions to World of Warcraft soared from 3.5 Million  
2 to nearly 11 Million. Has Blizzard suffered irreparable harm?

3 2. The balance of hardships must favor the moving party seeking  
4 injunctive relief. If MDY's business shuts down, it will never recover -  
5 even if MDY prevails on appeal. And without its income, MDY could  
6 not exhaust its legal remedies. But if the Court maintains the status quo,  
7 Blizzard's subscription base will likely grow, and World of Warcraft  
8 will still generate well over \$67.5 Million dollars per month in revenue.  
9 Does the balance of hardships favor Blizzard?

10 3. A movant must establish that an adequate remedy at law would be  
11 insufficient. Blizzard has not proven that it has suffered damage to its  
12 reputation because of Glider, nor has Blizzard proven that MDY cannot  
13 satisfy a future monetary judgment. Has Blizzard demonstrated that it  
14 has no adequate remedy at law?

15 These are the questions pertaining to Blizzard's request for preliminary injunctive  
16 relief. In this response, MDY seeks to develop these issues and to treat the subissues as  
17 succinctly as possible.

### 18 **Argument**

19 **I. As the U.S. Supreme Court requires under the *eBay* factors, Blizzard has  
20 neither suffered irreparable harm, nor has it tipped the balance of hardships  
21 in its favor.**

22 **A. Because Blizzard has not demonstrated that it has suffered irreparable  
23 harm resulting from MDY's Glider sales, the Court must not grant a  
24 preliminary injunction against MDY.**

25 Blizzard argues that because this court ruled that MDY secondarily infringed  
26 Blizzard's copyright and tortiously interfered with Blizzard's contracts, Blizzard has  
27 suffered irreparable harm. Blizzard is wrong.

28 In its landmark decision of *eBay, Inc. v. MercExchange, LLC*, the Court rejected  
Blizzard's argument that a court must presume irreparable harm follows a showing of

1 liability.<sup>3</sup> The Court held that the traditional notion of granting injunctive relief based  
2 solely on liability and a by presuming irreparable harm was improper.<sup>4</sup> The Court now  
3 requires that a movant for permanent injunctive relief must demonstrate that:

- 4 • it has suffered irreparable harm;
- 5 • remedies available at law, such as monetary damages, do not adequately  
6 compensate for any harm suffered;
- 7 • when considering the balance of hardships between the plaintiff and  
8 defendant, a remedy in equity is warranted; and
- 9 • the public interest would not be disserved by a permanent injunction.<sup>5</sup>

10 Although *eBay* was a patent infringement case, several courts have interpreted the  
11 ruling to apply to all intellectual property cases. For instance, the Fourth Circuit has held  
12 that *eBay*'s holding applies to copyright infringement cases.<sup>6</sup> The Western District of  
13 Washington has also held that under *eBay*, a movant must establish all four equitable  
14 factors in a copyright infringement case to obtain an injunction.<sup>7</sup> Thus, Blizzard's  
15 citations to *MAI Sys. Corp. v. Peak Computer*<sup>8</sup> and *Graham v. Mary Kay, Inc.*<sup>9</sup> – all pre-  
16 *eBay* cases – have no bearing on this case.

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24 <sup>3</sup> *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

25 <sup>4</sup> *See id.*

26 <sup>5</sup> *Id.*

27 <sup>6</sup> *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4<sup>th</sup> Cir. 2007).

28 <sup>7</sup> *Propet USA, Inc. v. Shugart, Case No. 2007 WL 4376201*, 3 (W.D. Wash. 2007).

<sup>8</sup> *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511 (9<sup>th</sup> Cir. 1993).

<sup>9</sup> *Graham v. Mary Kay, Inc.*, 25 S.W.3d 749 (Tex.App. Houston 2000).

1           **B.     Blizzard’s three-year delay in requesting a preliminary injunction, and**  
2           **World of Warcraft’s overwhelming success despite 3.5 years of Glider**  
3           **sales, demonstrates Blizzard has not suffered irreparable harm.**

4           **1.   *Blizzard’s sixteen-month delay in filing suit and three year delay in***  
5           ***requesting injunctive relief militates against finding irreparable harm.***

6           The Court must consider when a party delays seeking a remedy an important  
7           factor bearing on the need for a preliminary injunction.<sup>10</sup> Absent a good explanation, a  
8           substantial delay militates against the Court issuing an injunction by demonstrating that  
9           the moving party sensed no apparent urgency to the request for injunctive relief.<sup>11</sup> For  
10          example, in one post-eBay ruling, the Eastern District of Michigan denied a permanent  
11          injunction to a successful plaintiff in a patent infringement suit due to an excessive delay  
12          in bringing suit.<sup>12</sup> The Court held that the delay was a significant factor in finding no  
13          irreparable harm.<sup>13</sup>

14          Many courts have offered guidance on the unreasonable delay issue. In *Le*  
15          *Sportsac, Inc. v. Dockside Research, Inc.*, the Southern District of New York denied a  
16          preliminary injunction in a trademark suit based on a plaintiff’s one-year delay in filing  
17          suit.<sup>14</sup> The Court reasoned that the one-year delay “undercuts the sense of urgency that  
18          ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact,  
19          no irreparable injury.”<sup>15</sup> In *High Tech Medical Instrumentation, Inc. v. New Image*  
20          *Industries, Inc.*, the Federal Circuit held that filing suit after a seventeen-month delay was  
21          evidence refuting irreparable harm.<sup>16</sup> In *Citibank, N.A. v. Citytrust*, the Second Circuit  
22          concluded that a nine-month delay in filing suit undercut the movant’s claim for

23          <sup>10</sup> See *High Tech Medical Instrumentation, Inc. v. New Image Industries, Inc.*, 49 F.3d 1551,  
24          1557 (Fed. Cir. 1995).

25          <sup>11</sup> *Id.*

26          <sup>12</sup> *Sundance, Inc. v. Demonte Fabricating Ltd.*, 2007 WL 37742, 3 (E.D. Mich. 2007).

27          <sup>13</sup> See *id.*

28          <sup>14</sup> *Le Sportsac, Inc. v. Dockside Research, Inc.*, 478 F.Supp. 602, 609 (S.D.N.Y. 1979).

<sup>15</sup> *Id.*

<sup>16</sup> See *High Tech Medical Instrumentation v. New Image*, 459 F.3d at 1557. (finding irreparable  
          harm on other grounds, the court still issued a permanent injunction).

1 irreparable harm.<sup>17</sup> And in *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, the  
2 Southern District of New York indicated that when the plaintiff delayed filing suit for  
3 over seven months, the plaintiff's "claimed need for immediate relief is undercut by the  
4 slow pace with which plaintiff has sought to obtain it."<sup>18</sup>

5 Blizzard cannot dispute that it knew MDY had been selling Glider as early as  
6 June, 2005. Yet Blizzard inexplicably waited until October 25, 2006 to threaten a lawsuit  
7 against MDY – nearly a year and a half later.<sup>19</sup>

8 Another significant sign of Blizzard's lax attitude toward MDY is that Blizzard  
9 never requested temporary or preliminary injunctive relief until now – over three years  
10 after it first knew MDY had been selling Glider. Since June, 2005, Blizzard had ample  
11 opportunities to seek an injunction, but it chose not to do so. Thus, in the three-year  
12 period since Blizzard first learned MDY sold Glider, Blizzard never acted with urgency  
13 to enjoin Glider sales, which indicates that MDY has never caused Blizzard irreparable  
14 harm.

15  
16 **2. *Blizzard's active World of Warcraft subscriptions and revenues have***  
17 ***steadily soared despite MDY having sold Glider for the past three plus***  
18 ***years.***

19 Since June, 2005, when MDY first began selling Glider, Blizzard's active World  
20 of Warcraft subscriptions have risen from roughly 3.5 Million to nearly 11 Million at  
21 present. Likewise, Blizzard's revenues from World of Warcraft have increased to well  
22 over \$100 Million dollars per month.<sup>20</sup> Whatever damage MDY has caused, it certainly  
23 has not affected World of Warcraft's popularity, subscription numbers, or revenues.

24 <sup>17</sup> *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

25 <sup>18</sup> *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278, 280 (S.D.N.Y. 1971).

26 <sup>19</sup> Technically, Blizzard never filed suit until March 15, 2007 when it filed its answer and  
counterclaims against MDY and Donnelly.

27 <sup>20</sup> See Exhibit D - *Blizzard Entertainment, Inc.*, <http://www.blizzard.com/us/press/080122.html/>,  
28 January 28, 2008. Last accessed August 14, 2008. (On January 22, 2008, Blizzard announced it  
had reached the 10 million subscriber milestone. Blizzard charges \$14.95 per month to its 4.5  
million North American and European Union customers. Thus, the \$67.5 Million dollar monthly

1 Further, MDY will present expert testimony at trial that Glider has had a  
2 negligible and even non-existent effect on Blizzard's subscriptions and revenues. In fact,  
3 MDY's expert will present credible evidence that Glider has given Blizzard a net  
4 *increase* in subscriptions and sales. Glider users purchasing multiple accounts and  
5 playing the game longer than non-Glider users once they reach Level 70 in the game  
6 fueled this increase. Thus, MDY has not irreparably harmed Blizzard's business.

7  
8 ***3. Blizzard has offered no credible evidence that its customers are  
9 abandoning World of Warcraft due to Glider.***

10 Blizzard will likely argue that it has received numerous customer complaints about  
11 players using bot programs while playing World of Warcraft. And that these complaints  
12 demonstrate that Glider damages Blizzard's reputation. But Blizzard can attribute few, if  
13 any, of these complaints to Glider customers.

14 Furthermore, whatever damage three years of Glider use has done to Blizzard's  
15 reputation, the damage has been done and Blizzard should have addressed the issue long  
16 ago. If MDY can continue to sell Glider for the next several months, Blizzard will not  
17 suffer any more irreparable harm than it has already suffered. More importantly,  
18 Blizzard can provide nothing more than speculative testimony from its expert that the  
19 complaints Blizzard received will lead to either its customers quitting the game, or  
20 potential customers not playing the game because Glider discourages them.

21 Moreover, Blizzard does not dispute that its customers use numerous bot software  
22 programs with World of Warcraft. These other bot programs directly compete with  
23 MDY's Glider program.<sup>21</sup> MDY does not dispute that some of Blizzard's customers do  
24 not favor bots, and in particular, Glider being used with World of Warcraft. But  
25 whatever distaste these customers may have for bot programs, Glider has had no

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26 income does not include the revenue Blizzard receives from its 5.5 million subscribers in Asia.  
27 MDY estimates that Blizzard's total worldwide revenue greatly exceeded \$100 Million. As of  
28 today, Blizzard's total-active subscribers are closer to 11 million).

<sup>21</sup> See Affidavit of Michael Donnelly ¶ 2 – attached as Exhibit A to this Response.

1 quantifiable effect on World of Warcraft’s popularity, subscription levels, or revenues.  
2 Thus, Glider use does not cause irreparable harm to Blizzard.

3  
4 ***C. If Blizzard has suffered any damage resulting from MDY’s liability for  
5 secondary copyright infringement, the damage is not irreparable.***

6 Blizzard does not dispute that a computer will transfer World of Warcraft code  
7 from a customer’s hard drive to RAM regardless whether the customer uses Glider.  
8 Additionally, regardless whether a World of Warcraft player uses Glider, World of  
9 Warcraft still functions and Blizzard’s customers still pay Blizzard \$14.95 per month to  
10 play the game. Although Blizzard may disapprove that its customer’s computers transfer  
11 World of Warcraft software from a hard drive to RAM, the transfer itself does not result  
12 in irreparable economic or reputational harm to Blizzard.

13  
14 ***D. Despite Blizzard’s claim it incurs harm from Glider users, Blizzard  
15 knowingly allows previously-banned Glider users to open new accounts to  
16 play World of Warcraft so that they can continue using Glider.***

17 Although Blizzard argues that MDY harms Blizzard by spending time and money  
18 to secure World of Warcraft from Glider users, Blizzard does not even do everything it  
19 can to stop Glider users from opening a new account once Blizzard bans their old  
20 accounts. Blizzard has successfully banned tens of thousands of Glider users’ accounts,  
21 which prevent them from playing World of Warcraft.<sup>22</sup> In fact, on May 20, 2008,  
22 Blizzard successfully detected and banned every account using Glider or InnerSpace over  
23 a one-week period – effectively wiping out tens of thousands of World of Warcraft  
24 accounts using Glider.<sup>23</sup> But once Blizzard bans the accounts, Blizzard allows the users  
25 to immediately sign up for a new account using the same identification and credit card  
26 information they used for the banned account.<sup>24</sup>

27 <sup>22</sup> *Id.* ¶ 3.

28 <sup>23</sup> *Id.*

<sup>24</sup> *Id.* ¶ 4.



1           Blizzard knows that many Glider users will open new accounts in this manner, but  
2           Blizzard does nothing to stop it.<sup>25</sup> For the last three years, Blizzard could have easily  
3           blacklisted previously banned Glider users by preventing them from reusing their  
4           identification and credit card information – yet Blizzard chose not to so. Blizzard’s  
5           choice not to take minimal, yet effective steps to exclude repeat Glider offenders from  
6           playing World of Warcraft further demonstrates Blizzard’s lack of irreparable harm.

7           Accordingly, Blizzard’s lack of urgency in filing suit and requesting injunctive  
8           relief, coupled with the undisputed fact that Blizzard’s World of Warcraft subscriptions  
9           and revenues have soared despite MDY selling Glider for over three years, suggests that  
10          MDY has not caused Blizzard irreparable harm.

11  
12          **II.     Because MDY can compensate Blizzard for any past or ongoing acts, Blizzard**  
13          **has adequate remedies at law**

14          In addition to demonstrating irreparable harm, a movant must also establish that it  
15          has no adequate remedy at law.<sup>26</sup>

16          MDY will provide credible evidence that Blizzard has experienced little if any  
17          actual damages resulting from MDY’s Glider sales. MDY’s expert will testify that, at  
18          best, Blizzard speculates what its monetary losses are resulting specifically from Glider  
19          use. In fact, Blizzard does not dispute that it cannot discern these losses from the  
20          numerous other bot programs used with World of Warcraft.<sup>27</sup> Further, MDY’s expert  
21          will testify that Glider use has actually resulted in a net income to Blizzard.

22          Blizzard may present evidence of time and costs associated with policing Glider  
23          use among World of Warcraft players. But regardless whether the Court enjoins MDY  
24          from selling Glider, for the near future Blizzard will continue incurring these costs to  
25          police other bot programs and related violations of its EULA. Blizzard can quantify the

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27          <sup>25</sup> See Deposition excerpt of Gregory Ashe at 253-55 – attached to this Response as Exhibit B.

28          <sup>26</sup> See *eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391.

<sup>27</sup> See Exhibit B at 181-83.

1 costs to police Glider and can include them as part of a judgment against MDY. Thus,  
2 Blizzard has adequate remedies at law to compensate it for any alleged harm.

3  
4 **III. Because an injunction precluding further Glider sales will likely put MDY  
5 out of business, the balance of hardships favors MDY.**

6 The Court must also balance the hardships facing each party to determine whether  
7 it should grant an injunction.<sup>28</sup> When an injunction would result in devastating effects to  
8 a defendant's business, but a lack of injunction would have a minimal effect on the  
9 plaintiff's business, the balance of hardships favors the defendant.<sup>29</sup> Further, when a  
10 plaintiff cannot attribute losses in revenues and business to the defendant because there  
11 are several competitors, the balance of hardships does not favor the plaintiff.<sup>30</sup>

12  
13 **A. A preliminary injunction will permanently shut down MDY's business.**

14 If the Court enjoins MDY from selling Glider, MDY will simply have no other  
15 basis to continue its business.<sup>31</sup> At present, MDY's sole business involves selling Glider  
16 software.<sup>32</sup> Without revenues from Glider sales, MDY will likely have to lay off its  
17 employees and shut down its business.<sup>33</sup> Once MDY loses its customer base, MDY's  
18 customers may use other software or may never return as an MDY customer if an  
19 injunction lasts for several months – even if the Court subsequently vacates the  
20 injunction.<sup>34</sup> More importantly, without revenues from Glider sales, MDY may not have  
21 the resources to prosecute its case through trial and appeal.<sup>35</sup>

22  
23 <sup>28</sup> See *eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391

24 <sup>29</sup> See *Sundance, Inc. v. Demonte Fabricating Ltd.*, at \*4-5; see also, *Geritrex Corp. v. Demarite  
Industries*, 910 F.Supp. 955, 965 (S.D.N.Y. 1996).

25 <sup>30</sup> See *Geritrex Corp. v. Demarite Industries*, at 965 (S.D.N.Y. 1996).

26 <sup>31</sup> Affidavit of Michael Donnelly ¶ 5.

27 <sup>32</sup> *Id.* ¶ 6.

28 <sup>33</sup> *Id.* ¶ 7.

<sup>34</sup> *Id.* ¶ 8.

<sup>35</sup> *Id.* ¶ 9.

1  
2 **B. If MDY continues to sell Glider for the next several months through**  
3 **trial and appeal, the impact on Blizzard will be minimal or negligible.**

4 If the Court maintains the status quo for the next several months, Blizzard will see  
5 little or no impact to its business. Over the past three plus years, while MDY sold over  
6 100,000 Glider accounts, active World of Warcraft subscriptions increased by nearly  
7 eight million and Blizzard's revenues increased by approximately tens of millions of  
8 dollars per month. And World of Warcraft's four-year history indicates that the steady  
9 increase in Blizzard's subscription numbers will not slow down in the near future.

10 Even if Blizzard has received thousands of complaints from its customers  
11 regarding World of Warcraft users who play the game with bot software, Blizzard cannot  
12 refute two things: (1) hardly any of these complaints identified Glider as the offending  
13 bot, and (2) an even fewer number of the total complaints ever claimed to have quit  
14 playing World of Warcraft because of bots. In short, the number of World of Warcraft  
15 players that have quit resulting from Glider and caused a billion-dollar-per-year company  
16 to lose money is infinitesimal.

17 Thus, regardless whether MDY sells Glider, Blizzard will continue to earn  
18 enormous profits and see its subscription numbers rise. But without Glider, MDY will  
19 have to shut down and will effectively close its doors for good. Clearly, the balance of  
20 hardships favors MDY.

21 **IV. The public interest would not be served by issuing a preliminary injunction**  
22 **against MDY.**

23  
24 Blizzard must also establish that the public interest would be served by issuing a  
25 preliminary injunction against MDY.<sup>36</sup> Although the public has an interest in redressing  
26 infringement, if the injunction would harm third parties, namely MDY's employees, and  
27 have a negligible effect on Blizzard's business, this factor does not weigh in Blizzard's

28 

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<sup>36</sup> See *eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391.

1 favor.<sup>37</sup> This is particularly true since Blizzard waited over three years to ask the Court  
2 to enjoin MDY.

3  
4 **V. If the Court does issue an injunction, the Court should limit its scope solely to  
5 prevent Glider sales and marketing.**

6 In copyright infringement matters, an injunction cannot serve a fundamentally  
7 punitive purpose.<sup>38</sup> A court must carefully craft an injunction's scope to be coterminous  
8 with the infringement.<sup>39</sup> Moreover, courts disfavor blanket injunctions to obey the law.<sup>40</sup>  
9 A court should narrowly tailor an injunction to fit specific legal violations.<sup>41</sup> Most  
10 importantly, a district court should only include injunctive terms that have a common  
11 sense relationship to specific case's needs, and the conduct for which the defendant has  
12 been held liable.<sup>42</sup>

13 If enjoined, MDY does not oppose restrictions on marketing or selling Glider, or  
14 maintaining its authentication server. But Blizzard requested several restrictions, which  
15 punish MDY rather than protect Blizzard from potential infringers. As discussed below,  
16 this court should reject Blizzard's proposed restraints as unrelated to marketing or  
17 distributing Glider, or maintaining MDY's authorization server.

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<sup>37</sup> See *Sundance, Inc. v. Demonte Fabricating Ltd*, at \*5.

24 <sup>38</sup> See *Bucklew v. Hawkins, Ash Baptie & Co.*, 329 F.3d 923, 931 (7<sup>th</sup> Cir. 2003)

25 <sup>39</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* 518 F.Supp.2d 1197, 1226 (C.D.  
26 Cal. 2007).

27 <sup>40</sup> *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 n.1 (8<sup>th</sup> Cir. 2004).

28 <sup>41</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, at 1226. (citing *Waldman Pub.  
Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994).

<sup>42</sup> See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, at 1226-27.

1 **A. Any restriction preventing MDY from developing or maintaining Glider is**  
2 **outside the scope of the Court's July 14 Order.**

3 Blizzard asks the Court to enjoin MDY from “developing or maintaining  
4 Glider.”<sup>43</sup> The Court’s Order found MDY liable for acts pertaining to Glider’s use with  
5 World of Warcraft only. Because Blizzard’s EULA and TOU do not prohibit MDY from  
6 developing or maintaining Glider on MDY’s computers if Glider does not interact with  
7 World of Warcraft, Blizzard’s request is outside the scope the Court’s Order.

8 Even if the Court enjoins MDY from selling, marketing or remotely activating  
9 Glider, enjoining MDY from developing or maintaining Glider on MDY’s own  
10 computers is cumulative and could not possibly violate Blizzard’s EULA or TOU. Thus,  
11 Blizzard’s proposed restriction does not narrowly address MDY’s liability under the  
12 Court’s July 14 Order. And the Court should deny Blizzard’s request to enjoin MDY  
13 from developing or maintaining Glider.

14 **B. Blizzard’s arguments that MDY must be enjoined from releasing its**  
15 **Glider source code to the public are meritless.**

16  
17 Blizzard further argues that it is concerned MDY may release its Glider software  
18 to third parties who may distribute Glider as a way to circumvent the Court’s judgment.<sup>44</sup>  
19 Blizzard cites statements Glider users made on MDY’s message boards encouraging  
20 MDY to release its software as a way “flout the efficacy of the judgment.”<sup>45</sup> Blizzard’s  
21 argument is speculative and completely without merit. Certainly, MDY has no control  
22 over what its customers may say on its message boards, but Blizzard is ridiculous to  
23 imply that message board posters’ suggestions would cause MDY to give up its most  
24 important asset.

25  
26  
27 <sup>43</sup> Blizzard’s Motion at 8.

28 <sup>44</sup> *Id* at 6.

<sup>45</sup> *Id*.

1           Simply stated, in the past MDY never threatened or implied that it would release  
2 its Glider software to third parties to harm Blizzard.<sup>46</sup> MDY has made it clear to Blizzard  
3 that it will likely appeal the Court’s July 14 ruling.<sup>47</sup> If MDY released Glider to the  
4 public as open source software, MDY’s only capital asset would become worthless and  
5 cause MDY to shut down its business.<sup>48</sup> Releasing Glider to the public would prevent  
6 MDY from generating income if this court’s ruling is reversed.

7           MDY, however, could conceivably want to sell Glider or its company to a third  
8 party. The Court’s July 14 order did not hold that Glider infringes Blizzard’s copyright  
9 or causes a breach of Blizzard’s contracts – only Glider’s use with World of Warcraft  
10 created liability. Third parties can use Glider’s underlying technology to develop other  
11 software, which is wholly unrelated to World of Warcraft. If the Court enjoins MDY  
12 from selling Glider under all circumstances, the injunction would be an overbroad view  
13 of the Court’s order.

14  
15           ***C. An injunction preventing MDY from consulting with third-parties on***  
16           ***issues pertaining to bot software would not relate to conduct that the***  
17           ***Court has found MDY liable.***

18           The Court’s July 14 order found MDY liable for copyright infringement and  
19 tortious interference with contract for selling Glider to third parties who used Glider with  
20 World of Warcraft. The ruling, however, did not hold MDY liable for consulting with, or  
21 providing advice to third parties on developing bot software that a court has never  
22 adjudicated to infringe or violate Blizzard’s contracts. Not only would Blizzard’s  
23 proposed language prohibiting MDY from consulting exceed the scope of the Court’s  
24 July 14 order, but an injunction prohibiting “giving advice” likely violates MDY’s First  
25 Amendment rights.

26  
27 <sup>46</sup> Affidavit of Michael Donnelly ¶ 10.

28 <sup>47</sup> See MDY’s letter of July 25, 2008 to Blizzard – attached as Exhibit C.

<sup>48</sup> Affidavit of Michael Donnelly ¶ 11.

1           Therefore, because Blizzard’s proposed language enjoining MDY from consulting  
2 or providing advice to third parties about bot programs is beyond the order’s scope, the  
3 Court should reject Blizzard’s proposal.

4  
5 **VI. Conclusion**

6           To summarize, Blizzard provides no support for the Court to issue a preliminary  
7 injunction. Blizzard cannot demonstrate irreparable harm because:

- 8           • Blizzard allowed MDY to sell Glider for sixteen months before filing suit  
9           and nearly two additional years before requesting a preliminary injunction;
- 10          • Blizzard’s subscriptions soared from approximately 3.5 million to nearly 11  
11          million despite MDY selling over 100,000 Glider accounts during a three-  
12          year time period;
- 13          • Blizzard’s approximate monthly revenues increased tens of millions of  
14          dollars while MDY sold over 100,000 Glider accounts during a three-year  
15          time period;
- 16          • any irreparable harm that three years of Glider sales has caused to  
17          Blizzard’s reputation has already occurred. If the Court allows MDY to  
18          sell Glider for the next several months, Blizzard will not experience  
19          additional irreparable harm; and
- 20          • only a relatively infinitesimal amount of World of Warcraft customers have  
21          ever quit playing the game resulting from their concern for botting software  
22          during the three years of Glider sales.

23           Also, Blizzard cannot demonstrate the balance of hardships tips in its favor. Even  
24 if MDY continued selling Glider through the appeal of this case, Glider sales would have  
25 little impact on World of Warcraft’s subscriptions and revenues. But if the Court enjoins  
26 MDY, it would essentially shut down MDY’s business with no hope of recovering its  
27 market if the injunction remained in place through MDY’s appeal.

28           Further, Blizzard provided no evidence that MDY could not compensate Blizzard

1 with money damages for any harm it has experienced, or that an injunction would serve  
2 the public interest by enjoining MDY until it has exhausted its appellate rights.

3 WHEREFORE, MDY requests that this court deny Blizzard’s motion in all  
4 respects. If the Court, however does enjoin MDY, the Court should enjoin MDY only to  
5 preclude MDY from marketing or selling Glider, operating its activation server with  
6 products that interoperate with World of Warcraft and nothing more. Specifically,  
7 Blizzard’s Proposed Order should be modified to include the following changes:

- 8 • Page 1, lines 18-19 should be amended to, “WHEREAS, this Court has  
9 found that MDY Industries, LLC (“MDY”) is liable to Blizzard  
10 Entertainment, Inc. and Vivendi Games, Inc. ...”
- 11 • Page 1, line 28 should be amended to “...other automation (a/k/a “bot”), or  
12 cheat software that may be used...” The words “circumvention software”  
13 should be stricken since the Court ruled in MDY’s favor on the anti-  
14 circumvention issues under the DMCA.
- 15 • Page 2 – subparagraphs “d,” “e,” and “f” should all be stricken for the  
16 reasons discussed above.
- 17 • Page 2, line 26, the word “Consent” should be stricken.



1 Dated this 14th day of August, 2008  
2  
3

4 **Venable, Campillo, Logan & Meaney, P.C.**  
5

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14<sup>th</sup>, 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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