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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

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

The Honorable David G. Campbell

I. Introduction

In their Response, MDY Industries, LLC and Michael Donnelly (collectively, “MDY”) acknowledge, as they must, that if Blizzard seeks permanent injunctive relief, then MDY cannot argue that it has a legitimate interest in continuing to distribute Glider. Accordingly, MDY seeks to avoid being enjoined by recasting Blizzard’s motion for a

1 *permanent* injunction as a motion for a *preliminary* injunction, then spending the bulk of
2 their response arguing why a preliminary injunction should not be granted. In so doing,
3 MDY misstates the law governing this Court’s authority to grant permanent injunctive
4 relief following entry of summary judgment on Blizzard’s copyright and tortious
5 interference claims.

6 A preliminary injunction is no longer necessary once a plaintiff’s claims have been
7 fully adjudicated on the merits. “The basic function of a preliminary injunction is to
8 preserve the *status quo* pending a determination of the action on the merits.” *Chalk v.*
9 *U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). In its Order dated
10 July 14, 2008, this Court reached a final adjudication on the merits with regard to
11 Blizzard’s tortious interference and copyright claims. Having done so, the law of this
12 Circuit is clear that *permanent* injunctive relief is appropriate: “[t]here is nothing novel
13 about a permanent injunction issued on summary judgment rather than after trial.”
14 *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994)
15 (issuing permanent injunction after entry of summary judgment on liability but prior to
16 trial on damages, and where no existing preliminary injunction was in place). Similarly,
17 a court can issue such injunctive relief prior to adjudicating damage claims, or when the
18 claims at issue have been adjudicated while others remain open.¹ Here, where summary
19 judgment has been entered in Blizzard’s favor, this Court clearly has the authority to

21 ¹ See generally, *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)
22 (permanent injunction entered after summary judgment granted only to some
23 claims), *cert. dismissed*, 510 U.S. 1033 (1994); *New W. Corp. v. NYM Co. of Cal.,*
24 *Inc.*, 595 F.2d 1194, 1198 (9th Cir. 1979). (“Based upon its findings and conclusions,
25 the district court entered a partial summary judgment in which it incorporated its
26 conclusions, entered a permanent injunction preventing appellant from using the
27 trade name or trade-mark ‘New West’ or ‘New West Magazine’ and granted
28 appellee's counterclaim against appellant for such an amount of money damages as
might be awarded in a subsequent trial, together with costs and reasonable attorney
fees as it might later establish at a hearing on that issue.”); *Lands Council v. Vaught*,
198 F. Supp. 2d 1211, 1254 (E.D. Wash. 2002) (after indicating that because
“[p]laintiffs have prevailed on summary judgment on at least one of their claims, the
Court now determines if a permanent injunction is warranted,” court enters
permanent injunction).

1 grant the *permanent* injunctive relief that Blizzard seeks. Thus, MDY’s arguments that
2 entry of *preliminary* injunctive relief is unwarranted have no bearing on Blizzard’s
3 motion.

4 **II. Michael Donnelly’s Individual Liability**

5 As an initial matter, MDY contests the applicability of the Court’s entry of
6 summary judgment to Michael Donnelly in his individual capacity. As noted in its
7 opening brief, Blizzard understood the Court’s Order to apply to both MDY Industries,
8 LLC and to Michael Donnelly, given that both are named as defendants, that Blizzard
9 sought entry of summary judgment against both defendants, and that the Court did not
10 distinguish in its Order between the evidence proffered against MDY Industries, LLC and
11 that against Donnelly. Indeed, the evidence offered in support of summary judgment
12 showed that Donnelly was the singular presence driving MDY’s business and nearly
13 exclusively concerned conduct – development and marketing of Glider, encouragement
14 of its use, concessions that it violated the World of Warcraft (“WoW”) Terms of Use
15 (“TOU”) – in which Mr. Donnelly personally engaged. (Blizzard SOF ¶¶ 125, 181-83,
16 235, 239, 246-47.) Both Ninth Circuit and Arizona law clearly recognize that an officer
17 or director of a corporation is also personally liable for actions taken on behalf of the
18 corporation where the officer or director, like Donnelly here, directly participates in
19 and/or benefits from the unlawful activity at issue. “A corporate officer or director is, in
20 general, personally liable for all torts which he authorizes or directs or in which he
21 participates, notwithstanding that he acted as an agent of the corporation and not on his
22 own behalf.”² Here, there is no evidence or testimony that anyone *but* Donnelly has

24 ² *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir.
25 1985) (internal quotations omitted) (corporate officer found personally liable for the
26 corporation's unfair competition where his instrumental role in the tortious activity
27 was proven). Personal liability may also attach for intellectual property
28 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);

1 performed any of the acts from which liability arose.³ Accordingly, Blizzard respectfully
2 requests that the Court clarify that its entry of summary judgment on its copyright
3 infringement and tortious interference claims extends to Michael Donnelly in his
4 individual capacity.

5 **III. Blizzard Has Satisfied eBay’s Four-Factor Test Warranting a Permanent
6 Injunction.**

7 A. *Blizzard Has Suffered Irreparable Harm.*

8 Under Ninth Circuit law, irreparable harm is presumed on a successful showing of
9 copyright infringement. *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d
10 1150, 1155 (9th Cir. 2006). MDY’s suggestion that the Supreme Court’s *eBay* decision
11 denies that presumption is misguided – *eBay* was a patent case, not a copyright case, and
12 the Ninth Circuit has not extended *eBay* to the copyright context. In fact, an August 2008
13 Federal Circuit decision, on appeal from the Northern District of California and applying
14 Ninth Circuit law, presumed irreparable harm after a showing of copyright infringement,
15 in contravention of MDY’s argument. *Jacobsen v. Katzer*, --- F.3d ---, No. 2008-1001,
16 2008 WL 3395772, at *3 (Fed. Cir. Aug. 13, 2008). Similarly, a district court in this
17 Circuit noted that the *eBay* case arose:

18 in the context of certain recent developments in the patent
19 field that are wholly inapplicable to this lawsuit. For
example, this is simply not a case in which the copyright

20 *Sailor Music v. Mai Kai of Concord, Inc.*, 640 F. Supp. 629, 633 (D.N.H. 1986)
21 (“[T]here is no dispute that Mr. Yee, as sole shareholder, president, treasurer and
22 director of the Mai Kai was the dominant influence in the corporation and developed
23 the policy for provision of live musical entertainment resulting in the copyright
24 infringement. In addition, he certainly had the right and ability to supervise the
musical performances, and he certainly profited financially from the musical
performances. The performances generated income for the Mai Kai from which he
received a monthly salary. Accordingly, Mr. Yee, personally is jointly liable with
Mai Kai for the copyright infringement.”).

25 ³ Directors may also be held liable under Arizona law if they participate in the
26 corporate affairs causing or contributing to injury. *Albers v. Edelson Tech. Partners*
27 *L.P.*, 31 P.3d 821, 826 (Ariz. App. 2001) (corporate officer status "does not shield
28 [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).

1 infringement represents ‘but a small component of the
2 product the companies seek to produce,’ such that ‘legal
3 damages may well be sufficient to compensate for the
4 infringement.’ As this Court previously held, StreamCast's
5 entire business was built around the fundamental premise that
6 Morpheus would be utilized to infringe copyrights, including
7 those owned by Plaintiffs.

8 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1216 (C.D.
9 Cal. 2007) (citation omitted). Like the defendants in those cases, MDY has developed an
10 entire business model centered on one product, Glider, that this Court has determined is
11 useful only in enabling copyright infringement. Under such facts, the historical
12 presumption that injunctive relief is warranted is appropriate.

13 Even in the absence of a presumption, Blizzard plainly will suffer irreparable harm
14 in the absence of injunctive relief. As previously shown, Blizzard offered evidence of
15 monetary damages due to costs of combating Glider and losses of subscription revenue,
16 as well as reputational and goodwill damage caused by customer dissatisfaction with
17 Glider use. *See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944
18 F.2d 597, 603 (9th Cir. 1991) (intangible injuries and damage to goodwill qualify as
19 irreparable harm). MDY offers several arguments why the substantial harm suffered by
20 Blizzard is not “irreparable,” but as shown below, each is unavailing.

21 *1. Blizzard Did Not Delay In Seeking Injunctive Relief*

22 Despite acknowledging that Blizzard has spent many months and significant
23 resources to combat Glider technologically, MDY nonetheless suggests that, in seeking a
24 remedy outside the court before instituting legal proceedings, Blizzard unreasonably
25 delayed taking action against MDY. Beyond the spurious nature of its assertion, the
26 cases MDY cites in support are also inapposite. None of the cases apply Ninth Circuit
27 law, and all but one discuss the *preliminary* injunction standard, and not the permanent
28 injunction standard.⁴ In the only decision MDY cites in the permanent injunction

⁴ *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (noting that
delay sufficient to bar a preliminary injunction “may not rise to the level of laches

1 context, the plaintiff waited five years after filing suit to seek injunctive relief, and the
2 delay was only one factor in the court's decision-making.⁵

3 Regardless, Blizzard provided ample evidence in connection with its summary
4 judgment motion that it took repeated measures to combat Glider, and Donnelly admitted
5 that he took action with the specific intent of countering those measures. (Blizzard SOF
6 ¶¶ 145-47; Aug. 14, 2008 Order at 22.) Far from constituting delay, Blizzard's efforts
7 represent an appropriate attempt to resolve the issue without involving the courts. In
8 short, Blizzard has consistently, and actively, defended its rights, and has not delayed in
9 seeking relief from MDY's illicit activities; meanwhile, MDY continues to flout the
10 Court's order by selling and maintaining Glider, resulting in increasing harm to Blizzard
11 as Glider gains in popularity.⁶

12 2. *WoW's Popularity Does Not Preclude Blizzard From*
13 *Showing Irreparable Harm*

14 MDY suggests, without offering any support, that the success of WoW somehow
15 precludes a showing of irreparable harm. Injunctive relief, however, is not limited only
16 to plaintiffs whose businesses fail as a result of defendants' wrongful acts. Here,
17 Blizzard has provided undisputed evidence that hundreds of thousands of customers have
18 complained, and that its efforts to combat Glider technologically have proven
19 unavailing.⁷ Donnelly himself has conceded that bots harm WoW's reputation among

20
21 and thereby bar a permanent injunction").

22 ⁵ See *Sundance, Inc. v. DeMonte Fabricating Ltd.*, No. 02-73543, 2007 WL 37742 at
23 *2 (court also notes that lost revenues could be attributed to other competitors'
actions, and not necessarily defendant's patent infringement).

24 ⁶ Indeed, as MDY's sales figures demonstrate, Glider use has steadily increased
25 during the pendency of this litigation. (Blizzard SOF ¶¶ 231-33.)

26 ⁷ MDY's assertion that Blizzard's failure to permanently blacklist users found
27 employing Glider demonstrates a lack of irreparable harm simply misses the mark.
28 Blizzard is entitled to assume that licensees will abide by the terms of the End User
License Agreement without taking preemptive measures, and in fact many users
frustrated by loss of an account due to Glider use may in fact abide by those terms in
the future. (Blizzard Resp. to MDY SOF ¶ 24.)

1 users: “[t]he downside of [botting] is the impact on non-botters in the long-term: if the
2 botting population becomes too big, other players become more aware of them and think
3 badly about the game.” (Blizzard SOF ¶¶ 241, 208-09.) MDY cannot seriously contend
4 that granting it the right to continue inducing infringements and breaches unchecked will
5 not sully Blizzard’s goodwill with WoW players.⁸

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

8 MDY cannot avoid injunctive relief simply because an injunction on Glider sales
9 would require it to “shut down its business.” (MDY Resp. to Blizzard Mot. for
10 Permanent Inj. (“Resp.”) at 10.) Under Ninth Circuit law, “a defendant who knowingly
11 infringes another’s copyright cannot complain of the harm that will befall it when
12 properly forced to desist from its infringing activities.” *Cadence Design Sys., Inc. v.*
13 *Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997) (internal quotation marks and citation
14 omitted). MDY is entitled to no equitable consideration where this Court has already
15 found infringement, and that MDY knowingly built a business founded solely on
16 exploiting breaches of Blizzard’s contracts with its customers.

17 MDY also confuses public interest with self-interest, suggesting that the public
18 interest does not favor injunctive relief because an injunction would harm MDY’s
19 employees. (Resp. at 11-12.) To the contrary, the public interest served by an injunction
20 would be that of the universe of WoW players who would be able to enjoy a game free of
21 the damaging effects of Glider.

22 *C. Damages Alone Are Not an Adequate Remedy*

23 Here again, although Blizzard is entitled to monetary damages as a result of
24 MDY’s infringement and tortious interference, and will demonstrate such damages at
25 trial, MDY overlooks the fact that the full extent of harm to Blizzard’s reputation and
26 goodwill is not quantifiable. Moreover, MDY’s contention that an injunction might

27 ⁸ Resp. at 7; *see MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305 (C.D. Cal.
28 2007) (“Harm to business goodwill and reputation is unquantifiable and considered
irreparable.”)

1 preclude it from continuing to defend the case suggests that MDY may not have the
2 litigation reserves necessary to satisfy a judgment and therefore that a monetary remedy
3 may prove inadequate even for those harms that are quantifiable.

4 **IV. Scope Of Injunction**

5 Blizzard's requests regarding the form of the injunction constitute only those
6 measures necessary to ensure that the Glider software is not used by MDY, Donnelly, or
7 any third parties to infringe Blizzard's rights. MDY suggests that it should be allowed to
8 continue to develop and maintain Glider "if Glider does not interact with World of
9 Warcraft." (Resp. at 13.) MDY offers no explanation, however, of the need or use for
10 such development and maintenance given that, by Donnelly's own admission, Glider's
11 only current viable use is in conjunction with WoW. Glider serves no identified purpose
12 outside of its interaction with WoW, and as such, any continued development or
13 maintenance can serve only to facilitate infringement.

14 MDY also requests that the Court allow it to transfer the Glider code to third
15 parties, ostensibly so that those "parties can use Glider's underlying technology to
16 develop other software, which is wholly unrelated to World of Warcraft." (Resp. at 14.)
17 Neither Donnelly nor MDY has offered any testimony that Glider's "underlying
18 technology" is useful in combination with any other product, particularly as Donnelly has
19 spent three years adapting Glider to the unique detection mechanisms employed by
20 Blizzard specifically to combat Glider. On the other hand, MDY could, in the absence of
21 injunctive relief, sell or give Glider to a third party or third parties whose purpose would
22 be to continue enabling Glider use with WoW, requiring Blizzard to investigate and bring
23 suits against those parties to enforce the rights already established here. The value of
24 Donnelly's "substantial asset" is far higher to entities that would seek to employ it in
25 conjunction with WoW than to individuals who might hypothetically attempt to use it
26 with some other product. Accordingly, the evidence of record suggests that any
27 distribution of the Glider code would contribute to infringement, and thus should be
28 enjoined.

1 MDY also argues that Donnelly should be able to advise others in their
2 development of their own bots.⁹ Here again, Donnelly offers no evidence of how his
3 Glider knowledge would be useful for anything other than enabling bot usage in WoW
4 without detection. Of course, that knowledge would be valuable to other entities seeking
5 to develop and maintain bots that operate in conjunction with WoW in violation of the
6 TOU (which precludes *all* bots). Again, Donnelly should not be granted the opportunity
7 to continue to damage Blizzard's interests by monetizing the knowledge he has gained in
8 developing his infringing product and exploiting Blizzard.

9 **CONCLUSION**

10 For the foregoing reasons, Blizzard requests that the court grant injunctive relief as
11 sought in Blizzard's Motion For a Permanent Injunction.

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13 Dated: August 25, 2008

Respectfully submitted,

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26 ⁹ MDY suggests, without support, that an injunction preventing Donnelly from
27 advising others on bot development, might violate its First Amendment rights.
28 (Resp. at 14.) However, a narrowly tailored injunction, targeting only commercial
speech such as Donnelly's professional advice, would not infringe those rights. *See,*
e.g., United States v. Smith, 657 F. Supp. 646, 659 (W.D. La. 1986) (granting
injunction against deceptive advice inviting users to break law for financial gain),
aff'd, 814 F.2d 1086 (5th Cir. 1987).

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 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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