

SONNENSCHN NATH & ROSENTHAL LLP

Scott Stein (AZ Bar No. 022709)
Shaun Klein (AZ Bar No. 018443)
2398 East Camelback Road, Suite 1060
Phoenix, AZ 85016-9009
Facsimile (602) 508-3914
Telephone (602) 508-3900

Christian S. Genetski (*Pro Hac Vice*)
Shane M. McGee (*Pro Hac Vice*)
1301 K Street, NW, Suite 600-East Tower
Washington, DC 20005
Facsimile (202) 408-6399
Telephone (202) 408-6400

Attorneys for Defendants Vivendi Games, Inc.
and Blizzard Entertainment, Inc.

**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.)

Case No.: CV06-02555-PHX-DGC

**BLIZZARD ENTERTAINMENT,
INC. AND VIVENDI GAMES,
INC. MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT**

The Honorable David G. Campbell

BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
Third-Party Plaintiffs,)
vs.)
MICHAEL DONNELLY,)
)
Third-Party Defendant.)

Blizzard Entertainment, Inc. and Vivendi Games, Inc. (collectively,
“Blizzard”) hereby move, pursuant to Fed. R. Civ. P. Rule 56, for a grant of summary
judgment, in the form of injunctive relief, monetary damages, and attorneys’ fees,
against MDY Industries, LLC and Michael Donnelly (collectively, “MDY”) on their

1 claims for secondary copyright infringement, DMCA trafficking, and tortious
2 interference with contractual relationships, and present the following memorandum
3 of points and authorities, statement of facts and exhibits in support.

4 **I. Introduction**

5 Blizzard is the creator and operator of World of Warcraft (“WoW”), the
6 world’s most popular massively multiplayer online role playing game in which over
7 10 million players join together online to create characters, socialize and explore a
8 rich virtual universe. (Statement of Facts (“SOF”) ¶ 9, 25).¹ One of the foundations
9 of Blizzard’s success is its unsurpassed recognition of and response to the desires of
10 its players. (SOF ¶ 10, 30). Blizzard has invested significant resources to create and
11 maintain a massive online world whose rules and rewards are carefully calibrated to
12 ensure the optimum playing experience for all players. (SOF ¶ 10, 30). To play the
13 game, users must purchase a license to use the copyrighted WoW software client -
14 the software that resides on the user’s computer - and pay monthly subscription fees
15 for access to the WoW game servers. (SOF ¶ 16-18). Blizzard enforces its rights in
16 and to the game through both the World of Warcraft End User License Agreement
17 (“EULA”) and Terms of Use (“TOU”), as well as technological measures designed
18 to prevent users from accessing the copyrighted game content in an unauthorized
19 manner. (SOF ¶ 84, 105-119).

20 MDY has maliciously encouraged WoW players to exceed the scope of their
21 licenses under the EULA and TOU by developing, promoting and supporting Glider,
22 a “bot” program designed specifically to exploit WoW and “play” characters,
23 increase their “level” in the game to access more advanced game content, and
24 acquire valuable in-game currency, all without actual human participation. (SOF ¶
25 8, 53-54, 56, 114, 171-74). While legitimate players eat, sleep, and attend school or
26 work, MDY’s customers use Glider to shortcut the advancement of their in-game

27
28 ¹ For a more detailed description of WoW, *see* SOF ¶ 9-48.

1 characters and loot scarce game assets. As shown herein, Glider use severely harms
2 the WoW gaming experience for other players by altering the balance of play,
3 disrupting the social and immersive aspects of the game, and undermining the in-
4 game economy. (SOF. ¶ 58-63, 156-70).

5 Perhaps most significantly, MDY invests great effort to prevent Blizzard from
6 enforcing its rights against Glider users by enabling them to circumvent Blizzard's
7 technological access controls and conceal their infringements from Blizzard and
8 other players determined to report them. MDY has willfully persisted in this
9 endeavor despite knowing that the overwhelming majority of WoW players despise
10 the presence of Glider bots in WoW, and that Blizzard is being forced to divert
11 significant human and financial resources from game development and support to
12 efforts to stop Glider. (SOF ¶ 238-42). Indeed, MDY's stated goal is to drive up
13 Blizzard's cost of combating Glider to the point it ultimately abandons efforts to
14 block it, an option that Blizzard's rule-abiding customers, who have filed *over*
15 *465,000 formal complaints* and voiced their continued displeasure with Glider on
16 Blizzard's forums, have made clear is unacceptable. (SOF ¶ 83, 159-70, 242-43).

17 The threat that Glider poses to WoW is real. The dismay among legitimate
18 WoW gamers over the effects of economic exploitation of WoW on the game
19 experience has spawned an unprecedented player class action lawsuit against a
20 prominent internet virtual property exchange, a site where professional "botters" sell,
21 for real money, the virtual goods that Glider enables them to collect in their sleep.
22 (SOF ¶ 79). Absent intervention by this Court, MDY and the opportunistic cheaters
23 it enables will remain free to devalue the gaming experience of Blizzard's loyal and
24 rule-abiding customers and undermine the integrity of the online gaming industry's
25 premier franchise. MDY's brazen unlawful conduct must be enjoined, and its illicit
26 profits disgorged.

27
28

1 **II. The Standard of Review on Summary Judgment**

2 Summary judgment is appropriate if the evidence, viewed in the light most
3 favorable to the nonmoving party, “‘show[s] that there is no genuine issue as to any
4 material fact and that the moving party is entitled to judgment as a matter of law.’”
5 *Lemon v. Harlem Globetrotters Int’l, Inc.*, 437 F. Supp. 2d 1089, 1093 (D. Ariz.
6 2006) (Campbell, J.) (alteration in original) (citation omitted). “‘only disputes over
7 facts that might affect the outcome of the suit . . . will properly preclude the entry of
8 summary judgment.’” *Id.* The “court need not, [however,] draw all possible
9 inferences in [the non-movant’s] favor, but only all reasonable ones.” *Villiarimo v.*
10 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002).

11 **III. MDY’s Sale and Support of Glider, a Program Designed Specifically**
12 **to Enable Users to Infringe Blizzard’s Copyrighted WoW Software,**
13 **Renders MDY Contributorily and Vicariously Liable for the**
14 **Infringements of Glider Users.**

15 MDY knowingly promotes and supports using Glider to make unauthorized
16 copies of WoW in contravention of the EULA and the Copyright Act §501. Under
17 well settled Ninth Circuit law and the undisputed facts of record, MDY’s actions
18 constitute willful contributory and vicarious copyright infringement warranting entry
19 of summary judgment for Blizzard.

20 **A. Glider Users Directly Infringe Blizzard’s Copyrights by**
21 **Copying the WoW Software into Random Access Memory**
22 **Beyond the Scope of the EULA.**

23 **1. The Ninth Circuit Direct Infringement Standard.**

24 In order to establish a claim of direct copyright infringement, a plaintiff must
25 prove: 1) ownership of a copyright; and 2) a “ ‘copying’ of protectable expression. . .
26 beyond the scope of [a] license.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085
27 (9th Cir.1989) (citation omitted); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d
28 1004, 1019 (9th Cir. 2001). In this case, Blizzard has secured copyright registrations
in both the WoW server and WoW game client software code. (SOF ¶ 49). These
certificates of registration raise a presumption of the validity of Blizzard's copyrights

1 in its software, and there is no evidence of record to dispute that validity. 17 U.S.C. §
2 410(c).

3 In this Circuit, the “copying” element may be proved in software cases by
4 showing an unauthorized reproduction of a copyrighted software program in the
5 computer user’s Random Access Memory (“RAM”). The Ninth Circuit has
6 recognized that “the loading of software into the RAM creates a copy under the
7 Copyright Act.” *MAI Sys. v. Peak Computer, Inc.*, 991 F.2d 511, 519 (9th Cir.
8 1993), cert. dismissed 510 U.S. 1033 (1994); *Triad Sys. Corp. v. Se. Express Co.*, 64
9 F.3d 1330, 1334 (9th Cir. 1995); *see also Twentieth Century Fox Film Corp. v.*
10 *Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 621 (S.D.N.Y. 2007) (agreeing with
11 the “numerous courts [that] have held that the transmission of information through a
12 computer’s random access memory or RAM . . . creates a ‘copy’ for purposes of the
13 Copyright Act,” and citing cases.) When such a copy is made in excess of a license,
14 the copier is liable for copyright infringement. *Ticketmaster LLC v. RMG Techs.,*
15 *Inc.*, 507 F. Supp. 2d 1096, 1107 (C.D. Cal. 2007) (“When a licensee exceeds the
16 scope of the license granted by the copyright holder, the licensee is liable for
17 infringement.”) (citation omitted)).

18 **2. Glider Users Make Copies of WoW by Loading the** 19 **WoW Software into RAM.**

20 There is no dispute that to run Glider with WoW, users must load WoW from
21 their hard drive into their computers’ RAM, at which point WoW is able to be both
22 perceived and communicated, including interaction with Glider itself. (SOF ¶¶ 50-
23 52). When a user first launches WoW, the executable of the program is loaded into
24 RAM, and as they move through the game, additional copyrighted game content is
25 loaded from the hard drive into RAM as the player reaches points in the game with
26 which that content is associated. (SOF ¶ 51). In order to avoid easy detection and
27 blocking of Glider by Blizzard’s anti-cheat technology, Glider users rely on Glider’s
28 “launch pad” to initiate the start up and loading of WoW into RAM. (SOF ¶ 135).

1 Thus, Glider users are running Glider in conjunction with WoW from the initial
2 copying of WoW into RAM.² Clearly, Glider users' loading of WoW into RAM
3 creates a copy for purposes of the Copyright Act. *Mai Systems*, 991 F.2d at 519
4 (“since we find that the copy created in the RAM can be ‘perceived, reproduced, or
5 otherwise communicated,’ we hold that the loading of software into the RAM creates
6 a copy under the Copyright Act.” (citation omitted)).

7 **3. Copying WoW in Conjunction with Glider Exceeds the** 8 **Scope of Authorized Use Under the EULA.**

9 WoW players' authority to use the WoW client is governed by the terms of
10 the WoW EULA. In order to play WoW, users must read and assent to the terms of
11 both the EULA and the Terms of Use (“TOU”). (SOF ¶ 84-88). The EULA clearly
12 conditions users' ability to copy WoW on their doing so within the scope of the
13 license. (SOF ¶ 89-95). Copying WoW into RAM in conjunction with Glider
14 plainly exceeds the scope of the EULA and TOU, which conditions authorized
15 copying as follows:

- 16 • Section 4.B(iv) of the EULA prohibits users from “facilitat[ing], creat[ing] or
17 maintain[ing] any unauthorized connection to the Game or the Service. . . All
18 connections to the Game and/or the Service, whether created by the Game
19 Client or by other tools and utilities, may only be made through methods and
20 means expressly approved by Blizzard. (SOF ¶ 98)
- 21 • Section 4.B(ii) of the EULA prohibits “exploit[ing] the Game or any of its
22 parts, including without limitation the Game Client, for any commercial
23 purpose . . . ” (SOF ¶ 101)
- 24 • Section 4.B (ii) of the TOU provides that users agree not to “create or use
25 cheats, bots, ‘mods,’ and/or hacks, or any other third-party software designed to
26 modify the World of Warcraft experience;” (SOF ¶ 101)
- 27 • Section 4.B (iii) of the TOU requires users to refrain from any “use [of] any
28 third-party software that intercepts, ‘mines,’ or otherwise collects information

25 ² Even if a Glider user chooses to launch WoW first, without using the Glider
26 launch pad, and then subsequently launches Glider to run with WoW, that user still
27 loads copyrighted WoW content into RAM in conjunction with Glider. In this
28 scenario, the initial WoW executable will have loaded into RAM absent Glider, but
WoW continues to load expressive game content from the user's hard drive into
RAM as a player progresses through the game, and the copying of that content
would be in conjunction with running Glider. (SOF ¶ 51).

1 from or through the Program or the Service;” (SOF ¶ 101)

- 2 • Section 5.B.(6) prohibits “us[ing] bots or other automated techniques to collect
3 information from the Program . . . ;” (SOF ¶ 102)
- 4 • Section 5.B.(8) prohibits “cheat[ing] or utiliz[ing] ‘exploits’ while playing the
5 Program in any way” (SOF ¶ 102)

6 The following undisputed facts leave no doubt that running Glider with WoW
7 exceeds the scope of authorized copying under the EULA and TOU. Specifically,
8 the evidence shows:

- 9 • Both Blizzard and MDY agree that Blizzard has not granted MDY, Michael
10 Donnelly, or any third party authorization to use Glider in conjunction with
11 WoW and MDY’s FAQ on the Glider website acknowledged, and informed
12 Glider users, that Glider violated the WoW TOU. (SOF ¶ 177-78, 182)
- 13 • MDY concedes that Glider is a “bot” and a “cheat” program designed to
14 automate tasks in the WoW game environment, to garner game assets without
15 actually playing the game, to mine information from WoW and to create an
16 unauthorized connection to WoW. (SOF ¶ 132-36, 171-73)
- 17 • Glider users relied on the program to exploit WoW for commercial purposes,
18 namely the “farming” of in-game assets for the purpose of selling the assets in
19 real money transactions outside the game. (SOF ¶ 125, 188-97).

20 The Glider users’ copying of WoW in circumstances exceeding their license
21 is copyright infringement. *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.
22 3d at 1150, 1156 (9th Cir. 2006). For example, in *Ticketmaster*, the court held that
23 using a bot program to access and download copies of copyrighted web pages into
24 RAM in order to purchase large quantities of tickets — where the use of bots for this
25 purpose was prohibited by the website’s terms of use — infringed Ticketmaster’s
26 copyrights. *Id.* at 1102-03, 1109-10. Here, WoW players similarly have agreed not
27 to use third-party applications to launch WoW, not to run bot programs in
28 conjunction with WoW, not to exploit WoW for commercial use, nor to mine
information from WoW gaming environment. Thus, when users copy WoW with
Glider, they exceed the scope of their license, and infringe Blizzard’s copyrights.

1 **B. MDY is Secondarily Liable for its Contributory and Vicarious**
2 **Infringement of WoW.**

3 **1. MDY is contributorily liable for Glider users'**
4 **infringements.**

5 Under the traditional test for contributory copyright infringement, a party is
6 liable where it had “knowledge of the infringing activity and induce[d], cause[d], or
7 materially contribute[d] to the [activity].” *Perfect 10, Inc. v. Amazon.com, Inc.*, 487
8 F.3d 701, 727 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004,
9 1019 (9th Cir. 2001). In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the
10 Supreme Court held that a software distributor also induces infringement where its
11 product is used to infringe copyrights “if the product is not capable of ‘substantial’ or
12 ‘commercially significant’ noninfringing uses.” 545 U.S. 913, 942 (2005) (citation
13 omitted). Under either of these formulations, MDY plainly is liable for Glider users’
14 repeated infringements.

15 First, MDY’s awareness of the EULA and TOU terms and ongoing support of
16 Glider infringements evidences knowledge of the infringing conduct. (SOF ¶ 174-
17 83). Second, MDY’s contribution to the infringement is not merely material, it is
18 essential. But for MDY, Glider users would be unable to run the bot and exceed the
19 EULA. MDY wrote the Glider bot, created the launch pad component to enable
20 Glider to load WoW into RAM, input settings to aid commercially exploitive gold
21 farming and in-game property transfers, and provides ongoing support to Glider
22 users to enable repeated infringements. (SOF ¶ 8, 120-21, 124-25, 135-37). Finally,
23 even absent MDY’s ongoing contributions, under the alternate *Grokster* test Glider is
24 incapable of commercially significant noninfringing uses. (*See infra* Sec. IV.B.).
25 Accordingly, MDY’s enabling of and aid to Glider users’ infringements clearly
26 confer contributory liability. *Grokster, Ltd.*, 545 U.S. at 915 (“active steps taken to
27 encourage direct infringement, such as advertising an infringing use or instructing
28 how to engage in an infringing use, show an affirmative intent that the product be
29 used to infringe”); *Napster*, 239 F.3d at 1022 (“[w]ithout the support services

1 defendant provides, Napster users could not find and download the music they want
2 with the ease of which defendant boasts”” (alteration in original) (citation omitted)).

3 **2. MDY is vicariously liable for Glider users’**
4 **infringements.**

5 A party is vicariously liable for the infringement of another if it has a right
6 and ability to control the infringing activity and derives a direct financial benefit
7 from that activity. *Grokster*, 545 U.S. at 931 n.9; *Napster*, 239 F.3d at 1023. Here,
8 MDY concedes that it maintains control over all existing Glider programs, even after
9 they are sold, and has the right and ability to control the infringement by disabling
10 the “key” that enables Glider to function at MDY’s discretion. (SOF ¶155); *Napster*,
11 239 F.3d at 1023 (“Napster’s ability to block infringers’ access to a particular
12 environment for any reason whatsoever is evidence of the right and ability to
13 supervise”). MDY likewise concedes that it receives a direct financial benefit from
14 the infringements, as Glider’s enablement of infringement is its only draw, and MDY
15 has profited generously from sales of the program. (SOF ¶ 155); *Napster*, 239 F.3d
16 at 1023 (financial benefit exists where ability to infringe increases draw of service).

17 **C. Blizzard is Entitled to Injunctive Relief and Recovery of**
18 **MDY’s Profits for MDY’s Secondary Infringements.**

19 A victorious copyright owner is entitled to injunctive relief and recovery of its
20 actual damages plus any profits of the infringer attributable to the infringement and
21 not taken into account in actual damages. 17 U.S.C. §§ 502(a), 504(b). “In
22 establishing the infringer’s profits, the copyright owner is required to present proof
23 only of the infringer’s gross revenue, and the infringer is required to prove his or her
24 deductible expenses and the elements of profit attributable to factors other than the
25 copyrighted work.” 17 U.S.C. 504(b). MDY’s gross revenues from Glider sales are
26 \$2.8 million. (SOF ¶ 233). Thus, in addition to its own damages discussed at p. 21-
27 22 *infra*, , Blizzard is entitled to a judgment of \$2.8 million, minus any deductible
28

1 expenses MDY can prove.³ And, to stop Glider users continued infringements,
2 MDY's further distribution of Glider and enabling of existing Glider programs
3 should be enjoined.

4 **IV. MDY's Marketing and Distribution of Glider, a Program Designed to**
5 **Enable WoW Players to Circumvent Blizzard's Technological**
6 **Measures that Control Access to and Protect Blizzard's Copyrighted**
7 **Software, Violates Sections 1201(a)(2) and 1201(b)(1) of the DMCA.**

8 MDY's distribution of Glider violates the DMCA's bans on trafficking in
9 technology that circumvents: 1) *access controls* to copyrighted works; and 2)
10 *technological measures that protect the rights* of a copyright owner. 17 U.S.C. §§
11 1201(a)(2), (b)(1). Section 1201(a)(2) reads:

12 No person shall . . . offer to the public, provide, or otherwise traffic in any
13 technology, product . . . that (A) is primarily designed or produced for the
14 purpose of circumventing a technological measure that *effectively controls*
15 *access to a work protected under this title*; (B) has only limited
16 commercially significant purpose or use other than to circumvent a
17 technological measure that *effectively controls access to a work protected*
18 *under this title*; or (C) is marketed by that person or another acting in
19 concert with that person with that person's knowledge for use in
20 circumventing a technological measure that *effectively controls access to a*
21 *work protected under this title*.

22 17 U.S.C. § 1201(a)(2)-(a)(2)(c)(emphasis added). Section 1201(b)(1)(A) applies
23 this same ban on products aimed at circumventing "protection afforded by a
24 technological measure that *effectively protects a right of a copyright owner under*
25 *this title in a work or a portion thereof*."

26 ³ Blizzard also seeks attorneys' fees and costs, which a court may award,
27 particularly where the infringement is willful. 17 U.S.C. § 505. Here, given MDY's
28 confessed knowledge from the near inception of its business that Blizzard objected to
and attempted to prohibit use of Glider MDY's conduct is clearly willful. *Microsoft Corp. v. McGee*, 490 F. Supp. 2d 874, 880 (S.D. Ohio 2007) (defendant willfully infringed where plaintiff sent letters explaining that the activities were unlawful and defendant continued to distribute the infringing software).

1 **A. Blizzard’s Anti-Cheat Technology Effectively Controls Access**
2 **to and Protects Blizzard’s Rights in WoW.**

3 Blizzard’s anti-cheat technology is designed to prohibit WoW users running
4 “cheats,” “bots,” and other unauthorized programs in conjunction with WoW from
5 accessing Blizzard’s copyrighted WoW content. This anti-cheat technology –
6 sometimes referred to collectively as “Warden” – is composed of two different
7 software components. (SOF ¶ 108-19). One component of Warden – “scan.dll” –
8 scans for unauthorized programs *before* a user logs into the game and denies that
9 user access to the game content, and prevents the user from copying WoW into
10 RAM, if such a program is detected. (SOF ¶ 108-14). The second, resident
11 component of Warden runs periodically while a user plays WoW, patrolling the
12 computer memory for signatures – telltale fingerprints – associated with known
13 cheats, and revokes access to the game, and protects additional copyrighted portions
14 from being copied into RAM, upon detection. (SOF ¶ 115-19).

15 Both components of Warden effectively control access to WoW. The DMCA
16 states that “a technological measure ‘effectively controls access to a work’ if the
17 measure, in the ordinary course of its operation, requires the application of
18 information, or a process or a treatment, with the authority of the copyright owner, to
19 gain access to the work.” 17 U.S.C.A. § 1201(a)(3)(B). Here, the scan.dll
20 component loads immediately upon launching the game, scans the user computer’s
21 RAM to ensure the copy of WoW applies only the authorized information – a clean
22 copy of WoW free of unauthorized cheats – and denies a user access to the game if
23 it detects a cheat. (SOF ¶ 108-114). If the user removes the cheat from memory,
24 launches the game again and supplies the correct information to pass the check,
25 scan.dll will then permit the user to log in and access the copyrighted content. With
26 the notable exception of Glider, against which scan.dll has enjoined only periodic
27 and fleeting periods of detection, scan.dll has been extremely successful in blocking
28

1 access to users running unauthorized programs in conjunction with WoW.⁴ (SOF ¶
2 114).

3 Blizzard's technological measures also protect Blizzard's right to prevent
4 unauthorized copying of WoW. When scan.dll prohibits a user from accessing the
5 game, Blizzard prevents any copyrighted game assets from being loaded into the
6 user's RAM. (SOF ¶ 111). Similarly, when the resident component detects a cheat,
7 it prevents additional copyrighted portions of WoW from being copied into RAM
8 without authorization. (SOF ¶ 116). Because loading a program into RAM
9 constitutes copying for purposes of copyright law, loading WoW in excess of
10 Blizzard's authorization under the WoW EULA violates Blizzard's exclusive right to
11 make copies of WoW. *See Mai Systems*, 991 F.2d at 518-19.

12 The court in *Ticketmaster* recognized that a computer program called a
13 CAPTCHA, which required inputting a series of randomly generated characters to
14 prevent users from running bots to access Ticketmaster's otherwise publicly
15 available website (and copy the content into their computers' RAM in a manner that
16 violated its Terms of Use), "both *control[led] access* to a protected work [under §
17 1201(a)(2)] because a user cannot proceed to copyright protected webpages without
18 solving CAPTCHA, and *protect[ed] rights* of a copyright owner [under §
19 1201(b)(1)] because, by preventing automated access to the ticket purchase webpage,
20 CAPTCHA prevents users from copying those pages." 507 F. Supp. 2d 1096, 1112
21 (C.D. Cal. 2007). Here, Warden performs the near identical function to protect users
22 from accessing WoW in a similarly unauthorized manner. Thus, Blizzard's
23

24 ⁴ The resident component of Warden provides a secondary access control after
25 scan.dll permits access to the game, either because no cheat was running at the time
26 or the cheat successfully circumvented scan.dll. The resident component
27 continuously scans the computer's RAM while the user is connected to Blizzard's
28 game server, and it can automatically revoke a user's access to the game upon
detection. (SOF ¶ 115-19). The resident component of Warden has located cheats
and revoked user access tens of thousands of times (including periodic success with
Glider), proving it to be an effective measure against virtually every cheat Blizzard
has encountered, save Glider. (SOF ¶ 114).

1 technological measures likewise effectively protect both access under Section
2 12(a)(2) and its exclusive rights – in this case the right to make copies – under
3 section 1201(b)(1).

4 **B. MDY Traffics in Software, Glider, that is Primarily Designed**
5 **and Marketed as a Circumvention Device, and has only an**
6 **Otherwise Limited Commercially Significant Purpose.**

7 From its website, MDY has sold and distributed over 100,000 copies of
8 Glider. (SOF ¶ 232). Making a program available for download from a website
9 constitutes trafficking for purposes of the DMCA. *Davidson & Assocs. v. Jung*, 422
10 F.3d 630, 637 (8th Cir. 2005). MDY does not dispute that Glider is *designed* to
11 circumvent both components of Warden. (SOF ¶ 126). In fact, MDY constantly
12 updates Glider to ensure its continued success in cracking Warden’s evolving
13 detection and access control technologies. (SOF ¶ 146). Glider is also *marketed* as a
14 tool to circumvent Blizzard’s anti-cheat technology. (SOF ¶ 246-47). The MDY
15 website’s FAQ boasts that “Glider provides a number of features to help lower the
16 risk of detection,” and that the “current version of Glider...is not known to be
17 detected by these methods.” (SOF ¶ 182). The site also offers a forum for users,
18 including Donnelly, to share information on avoiding detection by Blizzard. (SOF ¶
19 125). Finally, Glider has only a limited commercially significant purpose other than
20 to circumvent Warden. Glider’s viability arises nearly entirely from its ability to
21 evade detection, as MDY acknowledged in deciding not to charge extra fees for
22 advanced circumvention functionality. (SOF ¶ 145-48). Blizzard is entitled to
23 summary on its DMCA trafficking claims.⁵ *Ticketmaster*, 507 F.Supp.2d at 111-12

24
25 ⁵ “At any time before final judgment is entered, a complaining party may elect to
26 recover an award of statutory damages for each violation of section 1201 in the sum
27 of not less than \$200 or more than \$2,500 per act of circumvention, device, product,
28 component, offer, or performance of service, as the court considers just.” 17 U.S.C.
§ 1203(c)(3)(A). Here, for recovery on its DMCA claim, Blizzard seeks an award of
statutory damages based on MDY’s sale of 100,000 Glider programs, which
provides a minimum award of \$20,000,000.

1 (bot software marketed for ability to spoof IP address and circumvent CAPTCHA
2 violated trafficking provision of DMCA).

3 **V. MDY Tortiously Interfered With Blizzard's Contracts With WoW**
4 **Players By Intentionally Promoting And Enabling Their Use Of**
5 **Software That Violates The WoW TOU And Helping Them Conceal**
6 **The Breaches From Blizzard.**

7 Arizona follows the Restatement (Second) of Torts, under which the elements
8 of a claim for tortious interference with contract are: (i) a valid contractual
9 relationship, (ii) knowledge of the relationship by the interfering party, (iii)
10 intentional interference with the relationship, (iv) improper motive or means with
11 regard to the interference, and (v) harm resulting from the breach. *Wagenseller v.*
12 *Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1041 (Ariz. 1985); Restatement (Second)
13 Torts § 766 (2007).

14 **A. There Is A Valid Contractual Relationship Between Blizzard**
15 **and World of Warcraft Players of Which MDY Had**
16 **Knowledge.**

17 All WoW players, without exception, enter into a valid and enforceable
18 contractual relationship with Blizzard by agreeing to Blizzard's EULA and TOU.
19 To play WoW, users must view and demonstrate acceptance of the EULA and TOU
20 at numerous times. (SOF ¶ 84-88). Such "click-wrap agreements" are readily
21 recognized as enforceable contracts. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d
22 1079, 1092 (9th Cir. 2005) (software license agreements are valid contracts for
23 purposes of a tortious interference claim); *Davidson & Assocs. v. Jung*, 422 F.3d at
24 639 (enforcing Blizzard's clickwrap terms for its online gaming offerings). MDY
25 was aware of these contracts, as Michael Donnelly personally assented to them in the
26 creation of his own WoW accounts, concedes that he understood that all WoW users
27 must agree to the EULA and TOU, and evidenced MDY's knowledge of the terms
28 repeatedly in information it posted on the Glider website. (SOF ¶179-81).

1 **B. MDY Intentionally Induced Breaches of Blizzard’s Contracts.**

2 MDY’s intent to interfere with the contracts between Blizzard and World of
3 Warcraft users is plainly evident. “[I]ntent is shown by proving that the interferor
4 either intended or knew that “[a particular] result was substantially certain to be
5 produced by its conduct.” *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement*
6 *Masons Local No. 395 Pension Trust*, 38 P.3d 12, 32 (Ariz. 2002), (citation omitted).
7 Here, MDY offers no products or services other than Glider, which he concedes has
8 no viable use other than with WoW. (SOF ¶ 123). As described previously herein,
9 use of Glider in conjunction with WoW violates multiple provisions of both the
10 EULA and the TOU. *See* Section III.A.3, *supra*. Indeed, MDY admits that from at
11 least September 2005, it knew Blizzard considered Glider use a breach, and MDY
12 agreed it was proper for Glider users to be banned upon detection of their breach.
13 (SOF ¶ 177, 183, 187). MDY conveyed this understanding to Glider customers in
14 his FAQ, but aggressively promoted Glider use nonetheless. (SOF ¶ 182).

15 **C. MDY’s Interference Was Improper.**

16 Arizona employs the Restatement test, which cites seven factors to consider in
17 determining whether conduct is improper:⁶ “(a) the nature of [MDY’s] conduct; (b)
18 [MDY’s] motive; (c) the interests of [Blizzard and users of WoW] with which
19 [MDY’s] conduct interferes; (d) the interests sought to be advanced by [MDY]; (e)
20 the social interests in protecting the freedom of [MDY] and the contractual interests
21 of [Blizzard and its users]; (f) the proximity or remoteness of [MDY’s] conduct to
22 the interference; and (g) the relations between the parties.” *Wagenseller*, 710 P.2d at
23 1042; Restatement (Second) of Torts § 767 (2007). Arizona courts “give the greatest
24

25 ⁶ Notably, if the Court determines that MDY’s distribution of Glider violates the
26 Copyright Act or the DMCA, that finding alone, is sufficient to establish that his
27 conduct was improper. “Conduct specifically in violation of statutory provisions or
28 contrary to public policy may for that reason make an interference improper.” *Wells*
Fargo Bank, 38 P.3d at 32-33 (holding that bank’s false financial statements,
potentially in violation of federal banking rules, could render the bank’s interference
with a third-party contract improper).

1 weight to the first two factors, the nature of the defendant's conduct and the
2 defendant's motive." *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1027 (Ariz.
3 2005). The undisputed facts of record clearly establish that MDY's interference was
4 improper.

5 First, the nature of MDY's conduct plainly demonstrates impropriety.
6 MDY's business has no utility. It offers no independent good. Rather, its sole aim is
7 to encourage and enable a group of opportunistic cheaters to exploit the WoW game,
8 to the dismay and frustration of not only Blizzard, but the rule-abiding players whose
9 experience is sullied. (SOF ¶ 159-70). Moreover, MDY's actions show it knows the
10 market for Glider is driven by those seeking to exploit WoW for their own profit, as
11 MDY's marketing efforts, affiliates and moderators are all closely tied to such
12 endeavors. (SOF ¶ 188-97, 244-47). MDY has also committed numerous additional
13 breaches of the WoW EULA and TOU, including reverse engineering WoW and
14 sharing WoW accounts to test Glider surreptitiously, in the conduct of its affairs.
15 (SOF ¶ 234, 245).

16 MDY's own words and deeds likewise betray its ill motive. Donnelly's email
17 communications reveal that "[MDY] want[s] to make it bad business" for Blizzard to
18 detect Glider, by making such detection as difficult and time-consuming as possible.
19 (SOF ¶ 242). MDY has acknowledged that botting has a negative effect on
20 Blizzard's goodwill with its users — "if the botting population becomes too big, other
21 players become more aware of them and think badly about the game" — yet
22 continued to push sales. (SOF ¶ 241). MDY has also encouraged using Glider for
23 gold farming and related activities that threaten the integrity of WoW to the point
24 that rule-abiding players have filed a class action seeking to enjoin them. (SOF ¶ 79,
25 192-97). Perhaps most tellingly, Donnelly concedes not only defeating Blizzard's
26 software detection,⁷ but also designing features and providing instruction to assist
27

28 ⁷ MDY's determination to frustrate Blizzard's enforcement efforts is evidenced by
MDY's \$18,000 payment to a third-party for the know how to update Glider in

1 Glider users in avoiding being spotted by *other WoW players*. The reason --
2 Donnelly takes it as given that most WoW players detest Gliders and would report
3 them to Blizzard. (SOF ¶ 208-09, 238-41). In sum, despite knowing that Glider use
4 is disliked by WoW players and Blizzard, MDY has nevertheless worked diligently
5 to ensure Glider users can conceal their breaches from Blizzard and other players
6 who might report them, thereby preventing Blizzard from enforcing its contracts and
7 ridding its game of this destructive menace.

8 The remaining factors also weigh heavily toward a finding of impropriety. In
9 weighing the third and fourth factors, the interests of Blizzard and, in particular,
10 legitimate and innocent users of WoW, far outstrip those sought to be advanced by
11 MDY. Given Blizzard's rule-abiding players' strong objections to Glider, Blizzard
12 must divert resources to stop activity that is clearly prohibited under the terms of its
13 user agreements. (SOF ¶ 200). By contrast, MDY's only interest is to encourage
14 users to cheat and boost MDY's revenues while driving up Blizzard's costs. (SOF ¶
15 242).

16 The fifth factor, social interests, also favors Blizzard as here the pertinent
17 society is the WoW gaming universe, and there is no question MDY is intentionally
18 disrupting the bargained-for mores of that society. (SOF ¶ 226, 241-43). The
19 proximity of MDY's conduct to the breach -- its marketing and sale of Glider is the
20 direct and but-for cause -- renders the sixth factor particularly important: "One who
21 induces a third person not to perform his contract with another interferes directly
22 with the other's contractual relation. *The interference is an immediate consequence*
23 *of the conduct, and the other factors need not play as important a role in the*
24 *determination that the actor's interference was improper."* Restatement (Second)
25 Torts § 767 cmt. h (emphasis added). Finally, the relation of the parties also favors a
26

27
28 November of 2006 when it could not solve a particularly effective Blizzard
detection. (SOF ¶ 148).

1 finding of improper conduct, as each and every case of interference and breach
2 occurs where Blizzard had a pre-existing contractual relationship with the user, and
3 MDY interfered with that relationship. *See id.* cmt. i, j (interferor’s conduct more
4 likely to be improper where actual, rather than prospective, contractual relationship
5 is in place).

6 In a case applying the Restatement test, a federal district court in Utah
7 recognized that conduct closely analogous to MDY’s in nature — encouraging
8 breaches by the parties’ mutual customers and instructing them how to conceal those
9 breaches so that the plaintiff continued to perform — constituted improper
10 interference. In *Am. Airlines, Inc. v. Platinum Worlds Travel*, an airline whose
11 contractual agreement with its frequent flyers provided that award tickets could not
12 be sold or exchanged for consideration, sued a broker service that purchased and
13 resold such tickets from the flyers. 769 F. Supp. 1203, 1204 (D. Utah 1990), *affd*
14 *sub nom. Am. Airlines v. Christensen*, 967, F. 2d 410 (10th Cir. 1992). Knowing that
15 such purchase and resale violated the terms of the frequent flyers’ contracts, and that
16 if the airline learned of the transfer it could cancel the award tickets, the broker
17 employed deception in the reservation process to conceal its activities from the
18 airline. *Id.* at 1206.

19 In applying the seven Restatement factors, the court made the following
20 analysis, particularly applicable here:

21 “Unfortunately, none of these factors address precisely the unusual
22 circumstances in the present case. The type of interference before the court
23 does not involve a classic interference with performance of contract
24 problem. This is not a case in which the defendants are competing with the
25 plaintiff. The defendants’ interference is not a by product of the defendants’
26 attempts to lure away the plaintiff’s customers so that the defendants may
27 provide air transportation for the customers. This case is unusual because
28 the defendants do not want the plaintiff’s customers to breach their
contracts under circumstances in which the plaintiff also refuses to perform.
Rather, *the defendants’ business depends upon their ability to induce the
plaintiff’s customers to breach their contractual obligations while the
plaintiff continues to perform.* In order to accomplish this the defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

have developed an elaborate system of deception enlisting the aid of the plaintiff's customers and the purchasers of the brokered tickets.”

Id. (emphasis added). The court concluded that, under these facts, “it [was] difficult to see how the defendants’ interference in this case can be characterized as anything but improper.” *Id.* at 1207.

Similarly, in the case at hand, MDY’s entire business depends upon its ability to induce WoW users to breach the EULA and TOU *while Blizzard continues to allow those users to play*. If Blizzard revokes the Gliders’ right to play WoW, their ability to exploit the game using Glider ceases. Indeed, Donnelly concedes Blizzard’s right to ban users for running Glider, yet sets out to frustrate that right by making detection of Glider exceedingly difficult. (SOF ¶ 240-43). Just like the broker in *American Airlines*, MDY has “developed an elaborate system of deception,” with repeated implementation and revision of anti-detection software, and instruction to users about steps to conceal their activity from Blizzard. As such, MDY’s brazen and deceptive interference cannot be fairly characterized “as anything but improper.”

D. The Breaches of the EULA and TOU Harmed Blizzard.

Arizona law has recognized that harm, for purposes of tortious interference, may take a variety of forms. *See Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1151 (D. Ariz. 2005) (damage to reputation a compensable harm under the Restatement); *Campbell v. Westdahl*, 715 p. 2d 288, 294 (Ariz. 1986) (plaintiff that loses profits as a result of breach is harmed); Restatement (Second) Torts § 774A(1)(b) (consequential costs associated with interference represent compensable harm). Here, there can be no genuine dispute that MDY’s tortious interference has caused and continues to cause substantial reputational and economic harm to Blizzard.

1 **1. Loss of customer goodwill**

2 Blizzard has built an unparalleled reputation among gamers by striving to
3 provide a gaming experience responsive to player demands, including their
4 frustration with the presence of bots. These bots, left unchecked, sully the game
5 experience in multiple ways, including destabilization of the in-game economy
6 because Gliders devalue in-game items by accumulating them faster than game
7 designers intended, and frustration of WoW’s immersive, interactive role-playing
8 aspects by replacing human players with bots that do not converse or work with
9 other players. (SOF ¶ 58-68). When WoW players encounter these effects,
10 Blizzard’s hard earned goodwill among its customers is undermined.

11 This harm is not speculative. On the contrary, WoW players have voiced
12 their opinion on Glider loud and clear. Blizzard has received over 465,000 in-game
13 petition reports from users citing bots in their complaints.⁸ (SOF ¶ 204). The
14 extreme frustration Glider use causes WoW Players, and the negative impact on
15 Blizzard’s reputation, are evident from the tenor of the complaints, as the following
16 examples demonstrate:

- 17 • A player indicated s/he could not complete an in-game quest due to the
18 presence of two bots and demanded “DO SOMETHING ABOUT
19 WOWGLIDER !!!!!!!!!!!!!” (SOF ¶ 160).
- 20 • A user noted four “auto-farmers clearly using Glider” making it impossible for
21 the user to play, and suggested s/he would quit the game if Blizzard could not
22 stop players from using Glider. (SOF ¶ 163).
- 23 • Another user notified Blizzard s/he had cancelled his/her account out of
24 frustration with players using Glider to “clear[] a quest area 3 DAYS NON-
25 STOP,” making it impossible to complete in-game quests. (SOF ¶ 164).
- 26 • A WoW forum user commented on Glider’s destructive impact on group play,
27 noting that “Everyone keeps asking for BG's [Battle Grounds] to suck less.
28 There's a very simple solution: track down and delete Gliders.” The user
29 concluded his post by saying “Seriously. Crack down on the botters. They ruin
30 the BG's. If I want to play with bots I'll load up something like Battlefieldd

31 ⁸ While not all complaints specifically reference Glider, several thousand do,
32 reflecting Glider’s status as the most well-known bot in the WoW universe. (SOF ¶
33 226).

1 1942 and play a bot match. Instead AV has turned into the 6 humans + 34
2 Gliders vs the same on other team” (SOF ¶ 170).

3 Moreover, the number of disenchanting users is surely far higher, as only those
4 exhibiting the strongest displeasure will discontinue their play to take the time and
5 effort to file a written complaint. (SOF ¶ 205-07). Indeed, many players take the
6 easier route of posting complaints on Blizzard’s own WoW forums.⁹ (SOF ¶ 168-70,
7 210). Additionally, many users complaining about the secondary effects (scarcity of
8 goods, inflation) may not specifically tie those to the root cause -- bots. (SOF ¶
9 205).

10 **2. Economic Harm**

11 Blizzard has also suffered, and continues to suffer substantial economic harm
12 from the distribution and use of Glider in multiple forms.¹⁰ First, the undisputed
13 evidence of record establishes that Blizzard has suffered \$970,000 in loss per year as
14 the result of the direct costs of bot enforcement and responding to user complaints
15 about bots, and \$2,425,000 in the two and a half years since MDY began selling
16 Glider. (SOF 198-99, 248-52). Blizzard has also suffered approximately \$10.5
17 million in lost subscription revenues resulting directly from Glider use. (SOF ¶ 260).

18 **a) Direct costs**

19 The proliferation of Glider has resulted in substantial direct costs for Blizzard
20 to combat its destructive effects on WoW and its legitimate users. First, Blizzard
21 must employ its Game Masters, who act as in-game moderators to answer customer
22 questions and ensure a fair gaming experience, in the remedial task of attempting to

24 ⁹ For example, on WoW’s European internet forum, users flocked to a customer
25 complaint thread regarding botting, making the thread the longest in the forum’s for
26 example, history and fingering Glider as the primary culprit. (SOF ¶ 219).

27 ¹⁰ Blizzard’s economic expert submitted a report containing additional models for
28 measuring the consequential damages of unchecked Glider use in WoW, which are
detailed in Blizzard’s Statement of Facts. (SOF ¶ 254-64). Should the Court seek
additional briefing on alternate damage calculations after entering judgment on
liability, Blizzard can provide supplemental briefing to the Court.

1 manually detect Glider Use. (SOF ¶ 202). This additional, unplanned responsibility
2 requires Blizzard to increase the quantity of Game Masters, or else face diminished
3 capability of those Game Masters to perform their ordinary job functions. (SOF ¶
4 200, 251). Game Masters also must review and respond to the ever-increasing
5 numbers of user complaints relating to cheating. (SOF ¶ 203).

6 Second, Blizzard must devote programming resources to automatic detection
7 of Glider use, a cost that has increased each time MDY has revised the Glider code
8 to combat these measures. (SOF ¶ 221-24). Donnelly admits to playing a game of
9 cat and mouse with Blizzard programmers, writing that “[t]he trick here is that
10 Blizzard has a finite amount of development and test resources, so we want to make
11 it bad business to spend that much time altering their detection code to find Glider.”
12 (SOF ¶ 242). Third, as a result of MDY’s strategy, and Glider’s sophisticated
13 circumvention measures, Glider consumes more Blizzard resources than any other
14 third-party cheats. (SOF ¶ 221). In fact, Blizzard has, by necessity, diverted
15 resources from game development specifically to combat Glider. (SOF ¶ 223).
16 Blizzard has submitted a detailed calculation of these significant, direct losses
17 attributable to Glider (SOF ¶ 250).

18 **b) Lost Subscription Revenue**

19 WoW players pay Blizzard around a \$15 monthly subscription fee. (SOF ¶
20 254). As detailed in Blizzard’s expert report, by automating their characters’
21 progress through the WoW “leveling” process, Glider users compress the time period
22 required to reach the higher levels of WoW. (SOF ¶ 255-56). A study of WoW play
23 estimated that an average user needs approximately 480 hours of play to reach the
24 maximum character level. Whereas a typical human player averaging two hours a
25 day would thus need eight months to reach the highest level, a Glider user can run
26 the bot and achieve the same level in less than one month. (SOF ¶ 257-59). Thus,
27 Glider users can “skip ahead” to the advanced levels without having to pay the
28 additional seven months of subscription fees required of a legitimate human player,

1 and thereby avoid paying up to \$105 in subscription revenue Blizzard would
2 otherwise receive. Multiplying this \$105 savings times the 100,000 Glider programs
3 sold alone demonstrates lost revenue to Blizzard of \$10.5 million. (SOF ¶ 260).
4 Clearly, Glider use causes significant revenue loss to Blizzard.

5 **VI. Conclusion**

6 As demonstrated herein, MDY's creation, promotion, and support of Glider
7 encourages and enables a significant community of cheaters to infringe Blizzard's
8 copyrights, breach their contracts, and conceal their harmful acts from Blizzard, all
9 to the detriment of rule-abiding players and Blizzard's premier product and good
10 name. For the reasons stated herein, Blizzard respectfully requests this Court enter
11 summary judgment on Blizzard's copyright, DMCA and tort claims.

12
13 Dated: March 21, 2008

Respectfully submitted,

14
15 Shaun Klein
16 SONNENSCHN NATH &
17 ROSENTHAL LLP
2398 East Camelback Road, Ste 1060
18 Phoenix, AZ 85106-9009
Telephone: (602) 508-3900
Facsimile: (602) 508-3914

/s/ Christian S. Genetski
Christian S. Genetski
Shane M. McGee
1301 K Street, NW, Ste 600E
Washington, DC 20005
Facsimile (202) 408-6399
Telephone (202) 408-6400

19 Attorneys for Defendants Blizzard Entertainment, Inc. and Vivendi Games, Inc.
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 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:

Name	Email Address
Lance C. Venable	docketing@vclmlaw.com
Joseph Richard Meaney	docketing@vclmlaw.com jmeaney@vclmlaw.com

/s/ Christian S. Genetski