In summary

– US video game developer Blizzard's Warcraft series has enjoyed huge success, and it has vigorously defended its IP

– Blizzard's most recent action is against MDY Industries, which independently developed add-on software, or a 'bot', which makes it easier for players to progress through the game

– The court's rulings on *Blizzard v MDY* have far-reaching implications for the software industry. A further claim on anti-circumvention is yet to be heard. It will be one of the first of its kind and closely watched by copyright professionals

The war over World of Warcraft

Outcome of Blizzard case will have major implications for copyright

Cydney A. Tune and Christopher R. Lockard, of Pillsbury Winthrop Shaw Pittman, track Blizzard's litigious trail

Video game developer Blizzard Entertainment, Inc. has established itself as a master of virtual battles. The *World of Warcraft* creator is proving to be adept at courtroom battles too.

Since releasing the video game *Warcraft: Orcs & Humans* in 1994, Blizzard has become one of the world's most successful developers of fantasy and science fiction strategy and role-playing games. Its Battle.net online gaming service, launched in 1997, draws millions of gamers from across the globe to play Blizzard's *Warcraft*, *Diablo* and *Starcraft* games. The groundbreaking platform allows users to play together or against each other, and hosts community features such as online chats.

However, Blizzard is also no stranger to real world legal battles. Unsurprisingly, the popularity of Blizzard's games, particularly the *Warcraft* series, has spawned numerous attempts by others to capitalize on Blizzard's success. Time and time again, Blizzard has filed suit for copyright infringement, trademark infringement or breach of contract, usually coming away victorious. Now, a victory in its most recent battle, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, (D. Ariz., CV06-02555-PHX-DGC) is turning heads in the copyright world for its potential implications.

Worlds of war

Blizzard, founded in 1991 and acquired by Vivendi Universal in 1998, now operates as a division of Activison Blizzard. In addition to the widely-popular *Warcraft* series, Blizzard has found great success with its *Diablo* series and its *Starcraft* series, which have sold more than 18.5 million and 9.5 million copies worldwide, respectively.

But it is the *Warcraft* series that has brought Blizzard its greatest success. The series has earned countless awards for its design, sound and overall experience, spawned board games, trading cards, a book series and an upcoming movie, and made Blizzard into a billion dollar company. Launched in 2004, the much-anticipated follow-on series *World of Warcraft* (*"WoW"*), a so-called massively multiplayer online role-playing game ("MMORPG") because thousands of users can play the game at once, currently boasts more than 10 million monthly subscribers and is considered the world's most popular MMORPG game, estimated to hold more than 60% of the MMORPG market.

WoW allows players, through their avatar, to fight monsters, explore virtual worlds, build skills, acquire assets, compete with or against other players and complete quests. As successful players acquire experience, power and assets, they advance in skill level. This leads some players to purchase assets or even avatars for real-world money outside the game, or to use automated programs, or "bots," to play for them.

WoW software consists of two components: the "game client" software and the "game server" software." The user plays

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WoW by loading the game client software (purchased at a retail store or downloaded from the *WoW* website) on his personal computer and then accessing the game server software through an online account that charges a monthly fee.

The warrior

Blizzard has always been vigilant about monitoring usage of its games. In 1998, Blizzard was sued for unlawful business practices for scanning *Starcraft* users' computers to determine whether players were accessing Battle.net with pirated software. Although Blizzard promised to change it practices, Blizzard continues similar activities today with software called the "Warden", which scans players' computers to verify compliance with end user licence agreements ("EULA") and terms of use ("TOU").

Blizzard also went on the offensive that year, suing Microstar Software for violating *Starcraft's* EULA by selling an unauthorized add-on product called Stellar Forces. Microstar eventually paid Blizzard undisclosed damages, agreed to destroy all copies of *Stellar Forces*, and publicly apologized to Blizzard.

In 2002, Blizzard sued three software programmers under the Digital Millennium Copyright Act ("DMCA") for reverse engineering Battle.net to create emulation software called bnetd, which allowed users to play Blizzard games on servers other than Battle.net. Blizzard argued that the programmers violated Battle.net's EULA provisions preventing reverse engineering, as well as the DMCA's anti-circumvention provisions. The Eighth Circuit found that the reverse engineering and emulating of the Blizzard software was prohibited by the DMCA.

Blizzard's attacks have even spread beyond the software world, as Blizzard tried to force eBay to stop selling copies of an online strategy guide, "The Ultimate World of Warcraft Leveling & Gold Guide," by using DMCA take-down notices stating that the book infringed Blizzard's copyrights. Blizzard backed down after the book's author sued.

Collision with the glider

The stakes in Blizzard's prior cases, however, pale in comparison to the implications of its current battle. MDY Industries, LLC and its founder, Michael Donnelly, created a software program known as the Glider, a bot that plays WoW for users while they are away from their computers and circumvents the Warden. The Glider, which allows users to advance more rapidly within the game, has sold more than 100,000 copies since its launch in 2005.

The dispute between MDY and Blizzard went public on October 25, 2006, when a Vivendi executive, attorney and private investigator reportedly appeared at Donnelly's home demanding that he stop selling the Glider. That afternoon, MDY filed for a declaratory judgment that the Glider did not infringe Blizzard's rights. In February 2007, lawyers for Blizzard and Vivendi answered the complaint and filed a counterclaim and a third party complaint against Donnelly, asserting seven claims: tortious interference with contract, contributory copyright infringement, vicarious copyright infringement, violation of the DMCA, trademark infringement, unfair competition, and unjust enrichment.

Settlement negotiations were unsuccessful, and on March 21, 2008, both Blizzard and MDY filed motions for summary judgment. In May, Public Knowledge, a public interest group focused on consumer rights with respect to digital technology innovation, filed an amicus brief arguing that *WoW* users are owners of the *WoW* software they purchased and therefore their use of the Glider does not infringe Blizzard's copyrights. On July 14, Judge Campbell ruled on Blizzard's motion for summary judgment on its claims for contributory and vicarious copyright infringement, violation of the DMCA and tortious interference with contract and on MDY's motion for summary judgment on all claims except trademark infringement.

Contributory and vicarious copyright infringement

In deciding both the contributory and vicarious copyright infringement claims, the Court addressed: (i) whether copying the game client software to RAM was "copying" under Section 106 of the Copyright Act; (ii) whether violations of the TOU and the EULA constitute copyright infringement or breach of contract and (iii) whether Section 117 of the Copyright Act provides an exception to what would otherwise be copyright infringement.

The Court granted summary judgment in favor of Blizzard with respect to its contributory and vicarious copyright infringement claims, finding that, through the TOU and EULA, Blizzard grants *WoW* players only a limited licence to use *WoW* software and the use of Glider falls outside the scope of that licence. Necessary to the Court's ruling was a finding that launching *WoW* using Glider causes an infringing copy of the game client software to be copied from the computer's hard drive to its random access memory ("RAM") within the meaning of the Section 106. The Court relied upon *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993), for the proposition that copying software to RAM constitutes "copying" within the meaning of Section 106. Thus, one who is not authorized by the copyright holder (through a licence) or by law (through Section 117) to copy software to RAM is liable for copyright infringement.

Breach of contract defence to copyright claims

MDY defended the copyright claims by arguing that Glider users' violation of Blizzard's TOU and EULA constitutes breach of contract and not copyright infringement. The court rejected this defence, finding that the portions of the TOU and EULA that are violated by use of Glider are limitations on the scope of that licence, not separate contractual covenants.

Specifically, the court held that the TOU establishes limitations on the scope of the licence because it makes clear that, although users are licensed to play *WoW* and to use the game client software while playing, they are not licensed to exercise other rights belonging exclusively to Blizzard such as copying, distributing, or modifying the work. Conversely, the court held that Section 5 of the TOU, a section that regulates matters such as use of celebrity names within the game, establishes game rules as independent contract terms and thus, violations of Section 5 must be addressed, if at all, by contract law and not copyright law. This difference is significant, as breach of contract damages are generally limited to the value of the actual loss caused by the breach while copyright damages include the copyright owner's actual damages and any additional profits of the infringer, or statutory damages if the infringed work was timely registered.

The court rejected MDY's assertion, for which MDY cited to the Federal Circuit's decision in *Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005), that to constitute copyright infringement the act that takes one outside the scope of the licence and the act that constitutes infringement must be one and the same. The court further said that the use of Glider to play *WoW* both infringed the user's limited licence and necessarily included copying the game client software to RAM and thus the act that exceeded the scope of the licence and the act that violated Blizzard's copyright were, in this instance, the same.

Section 117 defence

MDY also asserted a copyright misuse defence and an ownership defence under Section 117. The court dismissed the

copyright misuse defence as there was no evidence that Blizzard sought to bar third parties from developing competing games. MDY's ownership defence rested on Section 117's provision permitting the "owner" of a copy of a computer program to copy the program to RAM if the copy is created as an essential step in using the program. However, the Court cited to *MAI, Triad Sys. Corp. v. S.E. Express Co.*, 64 F.3d 1330 (9th Cir. 1995), and *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 785 (9th Cir. 2006), for the proposition that licensees of a computer program do not "own" their copy of the program and thus are not entitled to a Section 117 defence. *Wall Data's* two-part test established that if the copyright holder (i) makes clear that it is granting a licence to the software copy, and (ii) imposes significant restrictions on the use or transfer of the copy, then the transaction is a licence, not a sale, and the purchaser of the copy is a licensee, not an "owner" within the meaning of Section 117.

MDY urged the Court to adopt the approach in *Vernor v. Autodesk, Inc.*, 555 F.Supp.2d 1164 (W.D. Wash. 2008). In *Vernor*, the court declined to follow *MAI*, *Triad*, and *Wall Data* and instead relied on *United States v. Wise*, 550 F.2d 1180 (9th Cir. 1977), to hold that, for the purposes of Section 106, whether a software user owned a copy of software or merely licensed it hinged on whether the user was entitled to keep the copy or obligated to return it. Under *Vernor*, users of *WoW* would be owners of their copies, as they are under no obligation to return the software to Blizzard.

Nevertheless, the Court held that it was bound by *Wall Data*, and that Blizzard met both parts of the *Wall Data* test. Because use of Glider violated the WoW TOU and EULA, and because users of WoW are licensees, the Court held that Gilder users violate Blizzard's copyrights and granted summary judgment in favour of Blizzard on the contributory and vicarious copyright infringement claims.

DMCA Claims

The Court denied Blizzard's summary judgment motion and granted a portion of MDY's summary judgment motion with respect to liability under the DMCA, while reserving Blizzard's remaining DMCA claims for trial.

Section 1201(a)(2) of the DMCA provides that "[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof" that "is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title[.]" Blizzard alleged that the Glider was designed to circumvent its anti-cheating technology, Warden. Relying on *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004), the Court held that Warden was not an access control measure of the type that the DMCA intended to target. In *Lexmark*, the Sixth Circuit held that in order to receive protection under the DMCA, an access control measure must control access to the program code itself, and not just disable the code's functioning. The Court held that a user of *WoW* has full access to the client software; Warden regulates only the execution of the game, not access to the copyrighted code at its base.

Section 1201(b)(1) of the DMCA is similar to Section 1201(a)(2), except that 1201(b)(1) applies to technological measures that protect the copyright holder's rights, rather than controlling access to software. A determination hinges on whether Warden controls access to the non-literal aspects of *WoW* and, accordingly, the court denied Blizzard's motion and reserved the issue for trial.

Interim Liability

Blizzard alleged that MDY was liable for tortious interference with contract because MDY intended to induce *WoW* users to purchase and use Glider in breach of the terms of *WoW*'s EULA and TOU. MDY contested whether the interference was improper and what damages occurred. The court found that Blizzard had put forward uncontroverted evidence that Glider damaged its sales. In granting summary judgment for Blizzard on the tortious interference claim, the court further held that MDY knowingly aided Glider users in breaching their Blizzard contracts, enabled players to violate Blizzard's TOU, and assisted Glider users in avoiding detection, and given MDY's profit-based motives, MDY's interference was improper.

On July 23, 2008, Blizzard moved for a permanent injunction to shut down the Glider, but the court denied it. On September 29, 2008, the court entered a stipulated judgment awarding Blizzard $6,000,000 in monetary damages for its copyright infringement and tortious interference claims. The trademark infringement and unjust enrichment claims were dismissed, and a trial is scheduled for January 2009 on the DMCA claim and the issue of whether Donnelly would be personally liable for the damages.

A changing world

Judge Campbell's ruling that MDY Industries committed copyright infringement set off a flurry of controversy in the copyright and gaming worlds regarding its implication for future software disputes. Groups advocating copyright reform were quick to criticize the ruling, arguing that software users must necessarily be considered owners of their copies of software or Section 117 would be mere surplusage. The Electronic Frontier Foundation noted that under this ruling, a user who violates an EULA or TOU by simply "cheating" could be subjected to statutory damages rather than minor damages under contract law. William Patry, author of the *Patry on Copyright* treatise, also criticized the ruling, writing that the decision not to follow *Vernor* would lead a "chilling extension of control by copyright owners of software over copies of programs they have sold".

Others, however, counter that this ruling simply followed a line of well-established precedent in holding that software users are licensees and not owners. After all, Glider had no tangible use other than being used in violation of *WoW*'s EULA and TOU. Some distinguish *Vernor* as involving static, isolated software that is incomparable to the interactive and evolving *WoW* environment. Many fans of *WoW* also supported the ruling, stating that bots like Glider diminish their playing experience.

The decision draws parallels with a recent open source case, *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008). In *Jacobsen*, the developer of open source software called DecorderPro brought suit against a rival who had included portions of DecorderPro in its software, DecorderCommander. The plaintiff argued that DecorderCommander infringed its copyrights because the open source licence was breached when DecorderCommander did not include required information about DecorderPro like the authors' names and copyright notices. The Federal Circuit held that the provisions set forth in the licence were conditions to the authorized use of DecorderPro (as opposed to simply a covenant) so any violation of the provisions resulted in copyright infringement.

However, the aspect of the case that could potentially have the most significant impact on copyright law is the piece that has yet to be decided. The trial over Blizzard's anti-circumvention claim under Section 1201(b)(1) of the DMCA will be one of the first of its kind and will be watched closely by copyright professionals everywhere. A decision in favour of Blizzard could have wide-ranging implications for software users and developers.