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Blizzard Wins Virtual World Battle Against MDY—CEO Found Personally Liable

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On January 28, 2009, after the close of a bench trial, a U.S. District Court in Arizona found for Blizzard Entertainment and against its long time opponent MDY Industries. As we previously reported, the same court granted summary judgment in favor of Blizzard, finding that MDY was liable for copyright infringement, not simply for breach of contract, for distributing its flagship “Glider” product. This week, the court ruled for Blizzard on all three remaining issues: (1) Blizzard’s claims under the Digital Millennium Copyright Act (“DMCA”), (2) whether MDY’s CEO is personally liable to Blizzard, and (3) whether Blizzard is entitled to injunctive relief.

In August, the court ruled that the use of Glider, a program which allows users of Blizzard’s “World of Warcraft” (“WoW”) massively multiplayer online role-playing game (“MMORPG”) to automate their characters’ actions in order to gain experience or levels quickly, violated WoW’s End User License Agreement (“EULA”) and Terms of Use (“ToU”). The court held that the EULA and ToU were drafted in such a way that MDY’s violation constituted copyright infringement and not just breach of contract. This opened the door to the enhanced remedies for copyright infringement as compared to those for breach of contract. These remedies include steeper damages and injunctive relief. For a detailed discussion of the copyright issues decided on summary judgment, please see our earlier Advisory, “Automated Program for Playing Virtual World Game Deemed Copyright Infringement” dated August 14, 2008 (the “Prior Advisory”).

Launched in 2004, World of Warcraft is immensely popular. With over 11.5 million monthly subscribers, WoW is considered the world’s most popular MMORPG. Users control virtual characters, or avatars, in an interactive virtual world created by Blizzard. Users can interact with each other, fight monsters, explore virtual worlds, build skills, acquire assets, compete with or against other players and complete quests, all with the goal of gaining additional experience levels for their characters.

MDY’s Glider automates user activity that accelerates the leveling process. Created in 2005 by Michael Donnelly, MDY’s founder and CEO, Glider works by taking control of its user’s avatar while he or she

is away from the computer, automatically playing the game in order to gain levels for the character. Blizzard and many of its subscribers consider the use of such programs cheating. Blizzard prohibits their use in WoW's EULA and ToU. Additionally, Blizzard added a software agent called "Warden" to WoW in order to detect the use of unauthorized programs and allow it to enforce the EULA and ToU. Glider, of course, was written to evade Warden. To date, Glider has sold more than 100,000 copies.

In 2006, MDY sued Blizzard for declaratory relief. Blizzard counterclaimed alleging, among other things, that Glider constituted contributory and vicarious copyright infringement, that Glider was designed to circumvent a technological measure designed to protect a copyright holder's rights in violation of the DMCA, and that Donnelly was personally liable for tortious interference with contract and the DMCA violations. Blizzard succeeded on the copyright infringement claims on summary judgment (see the Prior Advisory), but the DMCA and tortious interference causes of action went to trial.

Section 1201(a)(2) of the DMCA prohibits the sale of products designed to circumvent a technological measure that controls access to copyrighted software. Section 1201(b)(1) is similar but prohibits the sale of products designed to circumvent measures that protect the rights of the copyright owner. At trial, the court found for Blizzard on both DMCA claims. Glider violates section 1201(a)(2), the court held, because Glider was designed to circumvent Warden, Blizzard's technology to control access to the copyrighted WoW software. As to section 1201(b)(1), the court held that because Warden was designed to limit when the WoW software could run, it effectively protected the rights of Blizzard, the copyright owner.¹

Blizzard succeeded at trial on the issue of Donnelly's personal liability as well. Blizzard had already won on the tortious interference claim against MDY on summary judgment, at trial it needed to prove that Donnelly was personally aware of MDY's actions and that Donnelly knew that MDY's interference with Blizzard's contracts with its customers was improper. As MDY was a three-person business, and Donnelly was involved in every aspect of its management, Blizzard's task was relatively simple and it prevailed at trial. Similarly, personal liability on the DMCA claims requires only that the officer has the right to supervise the infringing activity and a financial interest in such activity. The court held that Donnelly satisfied both elements and was personally liable for MDY's DMCA violations.

Finally, the court granted Blizzard's request for a permanent injunction against the sale distribution and servicing of Glider. However, the court recognized the high likelihood that Donnelly and MDY would appeal to the Ninth Circuit and asked for briefing on whether the injunction should be stayed pending appeal.

Conclusions

One important aspect of the basis for the decisions in this case was that the EULA and ToU were well drafted. Had these agreements not been drafted the way they were, aspects of this decision may have been different. It is important to ensure that you have a carefully drafted customer agreements that take into account the particular circumstances relevant to your virtual world or video game offering. A cookie-cutter approach can lead to problems. It is suggested that you consult with an attorney knowledgeable about virtual worlds and video games to ensure that your agreements are right for your circumstances.

Another important aspect of this case, and it is part of a trend, is the finding of personal liability against the founder/CEO. There are a number of recent cases where officers/directors have been found personally



¹ This argument hinges on the fact that launching a software program necessarily creates a copy in the user's RAM. Because the Warden limits when the program can run, and hence when the user can create copies in RAM, it protects the rights of the copyright holder. See the Prior Advisory for a detailed discussion of this issue.

liable for IP-related issues. This includes personal liability in civil actions as well as SEC enforcement actions. If you are an officer or director and your company does not have solid IP policies and procedures and does not seek IP counsel on potential infringement issues, you and the company may be at risk. This type of liability can often be minimized by working with experienced IP counsel to develop such policies and procedures and to assess potential infringement issues.

Live Link

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