

Appeals Court: World of Warcraft “Bots” Do Not Infringe Developer’s Copyright

Blizzard, creator of the popular online game World of Warcraft (WoW),¹ suffered a setback in its litigation against MDY Industries, which sells Glider – a software “bot” that automatically plays some of the early levels of the game. In *MDY Industries, LLC v. Blizzard Entertainment, Inc and Vivendi Games, Inc.*, the Ninth Circuit reversed a \$6.5 million judgment for Blizzard, finding no liability for secondary copyright infringement.² A party may be liable for secondary infringement if it either (1) intentionally induced another person’s direct infringement (known as “contributory infringement”) or (2) had the right and ability to control another’s infringing activities and derived a financial benefit from those activities (known as “vicarious infringement”). In either case, direct infringement must be established before secondary liability can attach.

To establish secondary infringement against MDY, Blizzard had to show that Glider users infringed Blizzard’s copyright by violating a Terms of Use (ToU) provision that prohibits the use of “cheats, bots, ‘mods,’ and/or hacks.” The appeals court held that WoW players who used Glider in violation of the ToU did not infringe Blizzard’s copyright. Thus, MDY could not be secondarily liable for infringement.

The decision was a mixed bag of good news and bad news for the parties – as well as their customers. Although the court exonerated MDY for copyright infringement, it found the “bot” maker liable for violations of the Digital Millennium Copyright Act (DMCA). In addition, the court ordered a trial on Blizzard’s claim that MDY tortiously interfered with Blizzard’s user agreements. While WoW players may be happy with the ruling that license and ToU violations do not necessarily constitute copyright infringement, they might be surprised to learn they do not actually own their copies of the WoW software program, according to the court’s decision.

WoW Users Do Not “Own” Their Software:

Before determining whether Glider users committed copyright infringement, the court had to ascertain whether they were “owners” or “licensees” of the WoW software. To answer this question, the court turned to its decision in *Vernor v. Autodesk, Inc.*, a significant software licensing case.³ As discussed in *Vernor*, in order to run any software program, a user’s computer must create a copy of the program in the computer’s random access memory (“RAM”), which may infringe the seller’s copyright.

¹ http://en.wikipedia.org/wiki/World_of_Warcraft

² http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000011049

³ <http://www.ca9.uscourts.gov/datastore/opinions/2010/09/10/09-35969.pdf>

Under *Vernor*, users who “own” a copy of the software program may invoke the “essential step” defense to copyright infringement, because copying the program into the computer’s RAM is essential to running the program. However, users who license a software program are not protected by the “essential step” defense and, therefore, their use of the program must comply with the seller’s license agreement and terms of use. Applying *Vernor*’s analytical framework, the court concluded that purchasers of WoW are licensees, rather than owners of the software. Thus, when their computers copy WoW software into RAM, users may infringe Blizzard’s copyright, unless their use complies with Blizzard’s license and ToU.

Glider Users Are Not Infringers:

Having determined that WoW players are licensees and not owners, the central issue facing the court was whether Glider users who violated Blizzard’s prohibition against “bots” committed copyright infringement or merely breached their license agreements. The answer turned on a somewhat arcane distinction between a license “condition” (which limits the scope of a license) and a “covenant” (which is merely a contractual promise). According to the court, if the prohibition against bots was a “condition,” Glider users committed copyright infringement, making MDY liable for secondary infringement. If, on the other hand, the prohibition was a “covenant,” Glider users merely breached their license agreements.

Examples of license “conditions” might include restrictions against distributing copies of the software program or creating derivative works. By contrast, a prohibition against harassing other gamers online constitutes a “covenant” because it does not implicate Blizzard’s “exclusive rights of copyright.” The court held that Blizzard’s prohibition against using “bots” was a covenant, not a condition, because it did not implicate Blizzard’s “exclusive rights of copyright.” Thus, Glider users who violated this prohibition did not commit copyright infringement and, by extension, MDY could not be held liable for secondary copyright infringement.

MDY Violated the Digital Millennium Copyright Act (DMCA):

To combat Glider and similar unauthorized programs, Blizzard developed a technology called Warden, which is able to detect and ban players who use such programs. In response, MDY modified Glider to include anti-detection features and sold a subscription service, Glider Elite, which offered additional protections against Warden.

The appeals court held that MDY’s anti-detection technology violated Section 1201(a)(2) of the DMCA, which prohibits trafficking in products that circumvent technologies designed to control access to copyright protected works. In reaching this conclusion, the court rejected the Federal Circuit’s seminal ruling in *Chamberlain Group, Inc. v. Skylink Techs., Inc.* holding that circumvention technologies which do not facilitate copyright infringement do not trigger liability

under Section 1201(a)(2) of the DMCA.⁴ Thus, even though – as discussed above – the court ruled that Glider did not facilitate copyright infringement, MDY could still be liable under the DMCA for circumventing Warden’s detection features.

What the Decision Means:

This decision could have significant implications for another lawsuit filed by Blizzard against three alleged hackers who created “cheats” for StarCraft II, another popular Blizzard game.⁵ Blizzard has alleged similar claims of secondary copyright infringement against the defendants in that case. This decision may lead to dismissal of those copyright claims, although the defendants may still be liable for tortious interference with Blizzard’s contracts.

The decision also creates a conflict between the Federal Circuit and the Ninth Circuit on an important question of federal statutory interpretation – whether a plaintiff seeking to hold a defendant liable under the DMCA for selling a technology-circumventing device must prove that the device facilitates copyright infringement. This conflict may call, ultimately, for Supreme Court resolution.

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⁴ http://en.wikipedia.org/wiki/The_Chamberlain_Group,_Inc._v._Skylink_Technologies,_Inc.

⁵ <http://arstechnica.com/gaming/2010/10/blizzard-sues-group-selling-starcraft-2-hacks/>