

WoW: Humans and Elves Dodge A Copyright Bullet:

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Those of you who are interested in United States copyright law should read this week's decision by the Ninth Circuit Court of Appeals in the "World of Warcraft" (or "WoW") case, <http://bit.ly/gGa3D8>. No, it has nothing to do with either Orson Welles or H.G. Wells. It concerns a virtual universe many of us never enter.

The basic facts of the case are this: The defendant Blizzard created an on-line game ("World of Warcraft") that millions of end-users enjoy playing. Like many games, it involves various levels of difficulty. As one proceeds from one round to the next, the degree of difficulty gets more exacting:

WoW players roleplay different characters, such as humans, elves, and dwarves. A player's central objective is to advance the character through the game's 70 levels by participating in quests and engaging in battles with monsters. As a player advances, the character collects rewards such as in-game currency, weapons, and armor. WoW's virtual world has its own economy, in which characters use their virtual currency to buy and sell items directly from each other, through vendors, or using auction houses. Some players also utilize WoW's chat capabilities to interact with others.

Op'n at Part I (A), page 5.

Plaintiff MDY created a "bot" ("Glider") that can stand in for real-live players during early rounds of play . . . permitting users to attend to other things during these rounds and advance more quickly to advanced levels. When Blizzard detected the "bot," it created software ("Warden") that prevented bot-users from connecting to its server. Plaintiff then created a program to circumvent Warden and permit Glider-users to continue to play. MDY sued for a declaration that it was not infringing Blizzard's right and Blizzard counter-claimed.

The District Court found that MDY committed a variety of torts. It found that it was secondarily liable for direct copyright infringement. It found that it had violated two of the DMCA's anti-circumvention provisions. And, it found that it had committed the state tort of interference with contractual relations. (The relations interfered with were those between Blizzard and its non-bot players).

The Ninth Circuit reversed in substantial respects. Three aspects of the decision are particularly worth noting:

First, perhaps, the Ninth Circuit found that although the use of the bot (Glider) may have been in violation of Blizzard's amended "Terms of Use," it only violated a "contractual covenant" and not a "copyright condition." That meant that the players using Glider did ***not*** commit copyright infringement, and MDY was not secondarily liable for any infringement. This aspect of the ruling may well have reverberations far beyond the bounds of the case ***if*** it serves as a template for eliminating copyright remedies (and penalties) for some "Terms of Use" violations.

Second, Ninth Circuit found that even though circumvention of Warden's defenses did not enable there to be an infringement, the defendant had a cause of action against MDY for violating § 1201(a)(2) of the DMCA. In this respect, the Ninth Circuit parted ways with the Federal Circuit which has held that there cannot be any DMCA violation absent an infringement of copyright. Now that there is a Circuit-split on this issue, the issue may well end up before the United States Supreme Court. On this issue, in my view, the Ninth Circuit has the better legal argument.

Third, the Ninth Circuit sent the state-law tortious interference claim back to the District Court for trial, finding that there was a material issue of fact in dispute. It specifically held that the state law claim was ***not*** preempted by the Copyright Act. The preemption issue is an issue about which there has been substantial debate.