

Ninth Circuit Decides that Gamers' Use of 'Bots' Is Unlikely to Constitute Copyright Infringement, but Creator of Bot Still on Hook for Circumventing Protections

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On December 14, 2010, the Ninth Circuit continued its clarification of copyright law as it relates to the use of software. In an interesting follow-up to September's *Vernor v. Autodesk, Inc.* decision, the Court of Appeals decided, in *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, that although gamers' use of "bots" to manipulate game-play violated the users' license in the software, the violation was not so tied to copyright as to destroy the user's license and turn the RAM copies on his computer into infringements. As such, the bot's creator could not be liable for *contributory* infringement. However, the bot's use of mechanisms to evade detection and expulsion by the game did violate the anti-circumvention sections of the Copyright Act, and constituted violation of the Digital Millennium Copyright Act (DMCA) by the bot creator.

In *Vernor*, the same court was faced with the issue of whether copies of software are typically licensed or sold. There, Vernor bought used copies of software and tried to resell them on eBay. Like most software, the copies Vernor bought contained a license agreement stating that any purchaser was not actually buying a copy of the software, but was being given a nontransferable license to use the software within certain restrictions. So, in the most basic of terms, the court had to determine: when you go to a store, pay, and bring home some software, did you actually buy the copy of the software (which would enable you to resell it pursuant to the "first sale" exception in the Copyright Act), or did you just license it? The *Vernor* court held that you just licensed it, so you cannot then sell your used copies of software (or the nontransferable license) because that violates the copyright owner's exclusive distribution right.

In *Blizzard*, otherwise known as the *World of Warcraft* case, MDY created a "bot" for video game users to build up character experience, virtual money, and so on, without having to actually be at the computer playing the game. It also circumvented Blizzard's detection software put in place to stop bots from being used. In keeping with its *Vernor* decision, the court held that video game purchasers are licensees, not owners of the software.

Since the use of bots was against the World of Warcraft End User License Agreement ("EULA") and Terms of Use, Blizzard claimed that the users lost the rights granted by the license, turning copies created by their computer's RAM during game-play into infringements-and MDY into a contributory infringer. The Ninth Circuit disagreed. The license agreement was worded such that it made breach of the bot provision a "covenant" (*i.e.*, a contractual promise not to act in a certain way) as opposed to a "condition" (something that has to occur to have license rights at all or that limits a license's scope). The failure to abide by a covenant may create a contract breach, but it does not completely take away license rights. Additionally, the license provisions violated by the gamers in using bots were not grounded in Blizzard's copyright rights and had no real nexus to copyright. According to the court, if you kicked every license violation into copyright infringement, it would give software creators greater rights than Congress intended. Without a finding that users of the MDY bot committed copyright violations, MDY could not be liable for contributory infringement.

However, the court found MDY liable under the anti-circumvention provisions of the DMCA, 17 U.S.C. § 1201(a)(2), because the bot's anti-detection function circumvented a technological measure designed to control "access" to the copyrighted software. Therefore, even if playing World of Warcraft with a bot did not constitute infringement, circumventing access-control measures Blizzard put into the game was a copyright violation. Access is not a historical right included in the "bundle" of traditional copyright rights, but according to the Ninth Circuit, such a result must have been intended to give each section of the DMCA meaning since 1201(a)(2) specifically prohibits circumvention of technological measures used by a copyright owner to control access, while section 1201(b)(1)-which the court found was not violated by MDY's bot-regards circumvention of technological measures used to protect traditional copyright rights.

In sum, the use of programs that modify games in ways the video game creator or publisher did not intend (*e.g.*, hacks, bots, etc.) is questionable under the law. Such use may constitute copyright infringement depending upon how the EULA or other license is written-and software developers are certain to construct future licenses with the World of Warcraft case in mind. Furthermore, if any access-control measure is put into the game by the developer and that measure is circumvented by the bot, the circumvention is likely to be considered a DMCA violation committed by, at least, the bot's creators.



Additional commentary on this case and other legal and business developments affecting the videogame industry can be found at www.developingconcerns.com, a blog written and edited by Reed Smith's Video Games and Interactive Entertainment Team.

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