

Media & Entertainment - USA

Use of 'bots' in game play questionable under copyright law

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January 20 2011

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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 *MDY Industries, LLC v Blizzard Entertainment, Inc* the court ruled that although gamers' use of 'bots' to manipulate game play violated the user licence in the software, the violation was not so tied to copyright as to destroy the user licence and turn the RAM copies on their computers 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 by the bot creator.

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 actually having to 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 earlier precedent in *Vernor v Autodesk, Inc*, the Ninth Circuit 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 licence agreement and terms of use, Blizzard claimed that the users lost the rights granted by the licence, turning copies created by their computer's RAM during game play into infringements - and MDY into a contributory infringer. The Ninth Circuit disagreed. The licence agreement was worded such that it made breach of the bot provision a 'covenant' (ie, a contractual promise not to act in a certain way), as opposed to a 'condition' (something that must occur to have licence rights at all or that limits a licence's scope). The failure to abide by a covenant may create a contract breach, but it does not completely take away licence rights. Additionally, the licence 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 licence 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 Digital Millennium Copyright Act, 17 USC § 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 Digital Millennium Copyright Act meaning, since Section 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 - concerns circumvention of technological measures used to protect traditional copyright rights.

In sum, the use of programs that modify games in ways that the video game creator or publisher did not intend (eg, hacks, bots) is questionable under the law. Such use may constitute copyright infringement, depending upon how the end user licence agreement or other licence is written - and software developers are certain to construct future licences 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 Digital Millennium Copyright Act violation committed by, at least, the bot's creators.

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