

The DMCA's Teeth: Court Awards Massive Statutory Damages for Access Control Circumvention Online

The Copyright Act, 17 U.S.C. §§ 101-1332, offers copyright owners powerful remedies against infringers, permitting injunctive, compensatory, and potentially massive statutory damages, as well as attorney's fees and the impounding of infringing items. In certain circumstances, statutory damages for online copyright infringements may be increased under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§ 1201-05. In a recent DMCA case, *Blizzard Entertainment, Inc. v. Alyson Reeves, d/b/a Scapegaming*, No. 09-7621, slip op. (C.D. Cal. Aug. 10, 2010), the United States District Court for the Central District of California awarded nearly \$89 million in damages. This article draws attention to the DMCA's statutory damages provisions as a powerful mechanism for enforcement.

The DMCA's Anti-Circumvention Provisions

The DMCA prohibits: (1) the circumvention of access controls, 17 U.S.C. § 1201(a)(1)(A); (2) trafficking in access control circumvention devices or methods, 17 U.S.C. § 1201(a)(2); and (3) trafficking in devices that prevent copy controls, 17 U.S.C. § 1201(b)(1)(A).

Blizzard v. Scapegaming and the Court's DMCA Statutory Damages Award

Blizzard Entertainment, Inc. ("Blizzard"), created and offers the copyrighted computer game World of Warcraft ("WoW"), a Massively Multiplayer Online Role-Playing Game ("MMO") in which a large number of users play simultaneously, interacting with one another in a persistent online world. Players advance in the game by completing missions therein, which opens access to new levels and content in the virtual world.

WoW users purchase authorized copies of WoW software from Blizzard and pay monthly subscription fees to access and advance in Blizzard's online world. The software contains the content for the WoW game and resides on each player's individual computer (the "game client"). Blizzard's servers then operate like a switchboard, unlocking appropriate content for players and enabling them to interact with one another in the online world. Players are only authorized to use the online WoW MMO when accessing Blizzard's servers through authorized game clients and legitimate subscription accounts. Blizzard uses a number of technological mechanisms to prevent unauthorized access to its game server or to block unauthorized servers from running the WoW program.

The defendant, Alyson Reeves, d/b/a Scapegaming ("Scapegaming"), operated what Blizzard called "rogue" servers, allowing players to use their WoW game clients to access and play the WoW MMO on Scapegaming's own unauthorized game servers. Scapegaming "emulated," or mimicked, its own WoW online world by directing its servers to unlock elements of the game residing on players' computers.

Blizzard sued, arguing that Scapegaming's bypassing of Blizzard's subscription and authentication mechanisms violated the DMCA's anti-circumvention provisions. Blizzard also alleged copyright infringement based on Scapegaming's copying of the protected WoW software and online world environment, as well as various state law claims.

Scapegaming defaulted, and the court entered default judgment on Blizzard's copyright infringement and DMCA claims. *Blizzard Entertainment, Inc. v. Alyson Reeves, d/b/a Scapegaming*, No. 09-7621,

slip op. (C.D. Cal. July 22, 2010). In a subsequent order, the court granted nearly \$89 million in total damages. *Blizzard*, slip op. at 7-8 (Aug. 10, 2010). Pursuant to Section 504(b) of the Copyright Act, 17 U.S.C. § 504(b), the court ordered Scapegaming to disgorge \$3 million it received in "donations" from its users, finding that these revenues constituted Scapegaming's profits from copyright infringement. The court also awarded \$63,600 in attorney's fees under Section 505, 17 U.S.C. § 505.

In considering statutory damages under the DMCA, the court relied on Section 1203, which states:

At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than \$200 or more than \$2,500 *per act of circumvention*, device, product, component, offer, or performance of service, as the court considers just.

17 U.S.C. § 1203(c)(3) (emphasis added). The court reasoned that Scapegaming must have offered each of its users anti-circumvention products or services on at least one occasion. *Id.* at 6. Accordingly, the court calculated Scapegaming's "acts of circumvention" based on the number of its users—427,393. Multiplying this figure by the minimum statutory damages amount of \$200 for each act of circumvention yielded \$85,478,600 in statutory damages.

Lessons Learned

The DMCA's statutory damages provision can be immensely powerful. Where a defendant offers its anti-circumvention products or services to a large number of users, Section 1203 opens the door for significant damages awards—even where only a single work has been infringed—because damages are calculated "per act of circumvention." This is especially possible in the online context, where, as in *Blizzard v. Scapegaming*, a defendant offers its anti-circumvention products or services to an immense number of users.

Calculating statutory damages "per act of circumvention" differs from the "per work infringed" calculation applied in standard copyright infringement claims. See 17 U.S.C. § 504(c). The dollar amounts available under Section 504(c) for each work infringed are far greater—\$750 to \$30,000 per work infringed, and as high as \$150,000 per work willfully infringed, versus \$250 to \$2,500 per act of circumvention. Yet *Blizzard v. Scapegaming* shows that a large number of acts of circumvention can result in substantial DMCA statutory damages awards.

Moreover, anti-circumvention and copyright infringement damages are not mutually exclusive. Indeed, the *Blizzard* court ordered Scapegaming to disgorge over \$3 million in profits earned from infringement, in addition to the DMCA statutory damages.

Between the "per act of circumvention" calculation of statutory damages for anti-circumvention violations and permitting plaintiffs to also recover standard copyright infringement damages, the DMCA offers copyright owners a potent tool for redressing infringements of their protected works. Although some courts might hesitate to issue such colossal awards, as Judge Wilson explained in *Blizzard v. Scapegaming*, this was precisely Congress's intent in passing the DMCA: "To the extent that this figure appears unreasonably large, Congress has mandated this approach and the Court is unable to deviate from it." Slip op. at 7.

— Ian J. Block and J. Michael Monahan

FIRM UPDATES & ANNOUNCEMENTS

APPOINTMENTS

Thad Chaloeintiarana has been appointed the Chair of the Cyber Law and Data Privacy Committee of the Chicago Bar Association. **Thad** also became the Vice-Chair for Division II - Trademarks & Unfair Competition for the Intellectual Property Law Section of the American Bar Association in August 2010.

Jonathan S. Jennings was appointed to serve on the Chicago Bar Association's Finance Committee. **Jonathan** also was appointed to serve on the ABA IPL Section's Membership Board.

Janet A. Marvel has been asked to serve as the 2011 Chair of the Intellectual Property Law Association of Chicago Trademark Committee. **Janet** also served as the 2009-2010 Chair of the U.S. and International Trademark Committee of the Intellectual Property Law Association of Chicago.

Alexis E. Payne has been asked to be a Vice Chair of the American Bar Association Special Committee on Promotion and Marketing Law for 2010-2011.

Belinda J. Scrimenti has been appointed a Co-Chair of the Women's Bar Association of Illinois (WBAI) Joint Professional Dinner, one of the WBAI's two premier annual events, to be held on November 4, 2010. At the dinner, the WBAI will present its annual "Women with Vision" Awards, which honor and recognize women in law, medicine, academia, public office, business, entrepreneurship, trade, labor, journalism, community, and/or religious service who have demonstrated visionary approaches in their professional endeavors and who have made a contribution to the well-being and empowerment of women. **Belinda**, a newly elected Director of WBAI, also serves as Co-Chair of the association's Corporate Counsel Committee and Programming Committee.

Teresa D. Tambolas has been appointed Vice Chair of the American Bar Association Industrial Design Committee (in the Intellectual Property Law section) for the upcoming bar year.

PRESENTATIONS

Thad Chaloeintiarana moderated and spoke at an Intellectual Property Law Section CLE Roundtable entitled "Legal Strategies for Dealing with Anonymous Internet Infringers" at the American Bar Association Annual Meeting in San Francisco, California on August 6, 2010.

Alexis E. Payne has been asked to serve on a main session panel at the PMA's 32nd Annual Promotion Marketing Law Conference on "How Far Can/Should You Go With Your Promotion," in Chicago, Illinois, on November 19, 2010. Other panel members include Marla Tepper, General Counsel, NYC Dept. of Consumer Affairs, and Susan B. Myers, Senior Corporate Counsel, Kia Motors America.

Dale E. Qualls co-presented "Cost Effective Solutions for Web Filtering and Monitoring" at the International Legal Technology Association 2010 Annual Technology Conference in Las Vegas, Nevada, on August 24, 2010. **Dale** also taught an ILTA University interactive session, entitled "Securing Your Network with pfSense."

PUBLICATIONS

Brett A. August and **Andrew N. Downer** authored "Equitable Exceptions to the Rule Against Perpetual Contracts," which was published in *Intellectual Property Litigation*, Volume 21, No. 4 (Summer 2010) (published by the Intellectual Property Litigation Committee of the American Bar Association Section of Litigation).

Joseph N. Welch II authored a chapter on the "Use of Experts in TTAB Proceedings" for the American Bar Association's book entitled *A Legal Strategist's Guide to Trademark Trial and Appeal Board Practice*, published by the ABA in August 2010. **Joe's** chapter provides insights into the unique issues that forum raise with regard to the presentation of expert testimony.

HONORS

The July 2010 issue of *Leading Lawyers Magazine, Business Edition*, recognized **Brett A. August, Raymond I. Geraldson, Jr., David C. Hilliard, Jonathan S. Jennings, Robert M. Newbury, Robert W. Sacoff,** and **Joseph N. Welch II** as top business lawyers in intellectual property law in Illinois. **Raymond I. Geraldson, Jr.** continues to serve on the Leading Lawyers advisory board in 2010.

Bradley Cohn and **Janet A. Marvel** were recognized by the publishers of Super Lawyers as Illinois Super Lawyers in Intellectual Property in the July/August 2010 Corporate Counsel Edition magazine.

The International Who's Who of Trademark Lawyers 2010 selected **Raymond I. Geraldson, Jr., David C. Hilliard, Jeremiah D. McAuliffe, Robert W. Sacoff,** and **Joseph N. Welch II** as being among the world's leading Trademark lawyers.

The 2010 edition of *Chicago's Best Lawyers* named **Raymond I. Geraldson, Jr., David C. Hilliard,** and **Robert M. Newbury** as Chicago's best lawyers in intellectual property law.

Jonathan S. Jennings received a plaque on August 5, 2010, at the ABA Annual Meeting in San Francisco, California, in appreciation of his "contribution to the advancement of intellectual property law" as a Council member of the ABA's IPL Section from 2006-2010.

Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP was recognized by *The Legal 500 United States* as having "an excellent cadre of experienced trial litigators" and for having strengths in brand protection that "spring from the team's willingness to take a long-term view in client needs, whilst taking an assertive and professional stance in trial litigation."

AWARDS

At the Chicago Bar Association Young Lawyers Section Annual Meeting on June 3, 2010, **Ashly Iacullo** was presented with the David C. Hilliard Award for Outstanding Committee Chair. **Ashly's** hard work and dedication have resulted in a fantastic bar year for the Chicago Bar Association Young Lawyers Section Intellectual Property Committee, and, under her guidance, the Intellectual Property Committee has become known as one of the "star" Chicago Bar Association Young Lawyers Section Committees.

NOTEWORTHY

Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP was featured in the IP Supplement to *The American Lawyer*, in an article entitled "Open for Business," as an example of a top-flight intellectual property boutique. The article addressed the "expertise," "close client relationships," "lower costs," and "significant results" firms like Pattishall offer their clients. **Robert M. Newbury** and **Jonathan S. Jennings** were quoted for the article, which also mentioned **Phillip Barengolts**, in a discussion about the firm's "resounding win" in its recent representation of Johnny Carson's estate before the Trademark Trial and Appeal Board.

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