1705 N Street, NW • Washington, D.C. 20036
christian@zwillgen.com

ZWILLINGER GENETSKI LLP
KNOWLEDGE JUDGMENT VISION

July 28, 2010

Via Certified U.S. Mail

Ms. Molly Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: MDY Industries LLC et al. v. Blizzard Entertainment, Inc. et al.
Appeal Nos.: 09-15932 and 09-16044

Dear Ms. Dwyer:

We write on behalf of Appellee Blizzard Entertainment, Inc. in response to the letter submitted by Appellants pursuant to F.R.A.P. 28(j). In that letter, Appellants brought to this Court's attention the Fifth Circuit's decision in *MGE UPS Systems, Inc. v. GE Consumer & Industrial Inc., et al.*, No. 08-10521, __ F.3d __, 2010 WL 2820006 (5th Cir. July 20, 2010) ("*MGE*"), claiming that *MGE* rejected Blizzard's arguments and supports reversal on Blizzard's DMCA claims. Appellants overstate *MGE's* import, however, because *MGE's* flawed adoption of a DMCA test that requires a plaintiff to prove that circumvention "facilitates copying" has little bearing on the outcome in this case.

First, as explained Blizzard's and Amicus MPAA's briefs, the "facilitates copying" requirement imposed by *MGE* is neither present in the DMCA's text nor supported by Ninth Circuit precedent.[1] As further confirmation of its flawed reasoning, *MGE* conflicts with Library of Congress Copyright Office regulations providing exemptions to DMCA liability for parties "adversely affected" by 1201(a)(1)(A). Those regulations provide an exemption for users circumventing obsolete dongles, similar to those at issue in *MGE*, that protect access to computer programs. 37 C.F.R. § 201.40(5) (2010). If the Fifth Circuit's interpretation were correct, that exemption would be superfluous, as circumvention of a dongle that controls access but not copying would not violate the DMCA.

[1] Appellant's Brief at 48 n.18; Brief of Amicus Curiae MPAA at 6-22.

Second, imposition of the *MGE* test in this case does not compel reversal here. Indeed, Appellants fail to acknowledge that the District Court below applied the *same* test as the *MGE* court and ruled in Blizzard's favor. (ER E10). Specifically, the District Court found that "Warden clearly constitutes a technological measure that prevents such copying, and Glider, by circumventing that technological measure, *facilitates such copying*. Nothing more is required for a violation of section 1201(a)(2)." ER E11 at n.2 (emphasis added). Thus, the District Court held that this case differed on the *facts* from the *Lexmark* and *Chamberlain* cases on which Appellants rely, as it does from *MGE*, because here Appellants' software does circumvent Blizzard's security to permit unlawful copying.

Sincerely,

Christian S. Genetski

cc: Lance C. Venable, Esq. (lancev@vclmlaw.com)
Venable Campillo Logan and Meaney, PC
1938 East Osborn Road
Phoenix, AZ 85016