Lance C. Venable
Michael F. Campillo
A. David Logan, Ph.D.
Joseph R. Meaney
Carey B. Anthony
John C. Mascari *

* Licensed in AZ, NY & CT

VENABLE
CAMPILLO
LOGAN AND
MEANEY, PC

INTELLECTUAL PROPERTY ATTORNEYS
WWW.VCLMLAW.COM

1938 East Osborn Rd.
Phoenix, AZ 85016

Voice: (602) 631-9100
Fax: (602) 631-4529

lancev@vclmlaw.com

October 21, 2010

VIA CERTIFIED US 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 et al.
Case Nos. 09-15932 and 09-16044
Our File No: PHLV1110-001

Dear Ms. Dwyer:

We represent the Appellants, MDY Industries, LLC and Michael Donnelly ("MDY"), in the above-referenced matter, which was argued before the Ninth Circuit on June 7, 2010. Under F.R.A.P. 28(j), I am responding to Appellee Blizzard Entertainment's ("Blizzard") letter to this court dated October 6, 2010 regarding a reissue of a Fifth Circuit opinion in the case of *MGE UPS Systems, Inc. v. GE Consumer and Industrial Inc. et al.*, 612 F.3d 760 (5th Cir. 2010). The reissued case number is No. 08-10521, ___ F.3d ____, 2010 WL 3769210 (5th Cir. September 29, 2010) ("MGE II").

Blizzard argued in its October 6 letter that the reissued opinion no longer supports MDY's argument that requires "plaintiffs to prove that a technological measure not only prevents access to, but also copying of a protected work" under 17 U.S.C. § 1201(a)(2). Blizzard misconstrues MDY's argument. MDY argued in its July 22, 2010 letter that the *MGE* case supported MDY's position that the DMCA does not apply where the protection measure – as in the case of Blizzard's Warden program – does not prevent copying of software for access has already been provided.

As the reissued case clearly states, "[B]ecause § 1201(a)(1) is targeted at circumvention, it does not apply to the use of copyrighted works *after* the technological measure has been circumvented." *MGE II*, at 5 (emphasis theirs) (citing *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 443 (2d Cir. 2001). The *MGE II* opinion still supports MDY's argument that since Blizzard gives a password to every one of its customers that provides unfettered access to all of Blizzard's copyrighted software, § 1201(a)(2) cannot apply. Because Blizzard provides access to its World of Warcraft software to its customers with a password, any use of the software after Blizzard's customers have access to the software could not fall under § 1201(a)(2). While MDY acknowledges

that it may avoid detection of Warden, it only does so after Blizzard has granted full access to the software from its password. Thus, MGE II still supports this position.

Regardless of the MGE II decision, MDY's arguments regarding 17 U.S.C. § 1201(a)(2) are still firmly supported by both the *Lexmark Int'l, Inc. v. Static Control Systems* and *Chamberlain Group, Inc. v. Skylink Techs, Inc.* cases. MDY maintains that if the Ninth Circuit rejects the rulings in these cases and rules in Blizzard's favor, it will create a split within the circuit courts on the DMCA issue.

Sincerely,

VENABLE, CAMPILLO, LOGAN & MEANEY, P.C.

Lance C. Venable
For the Firm

LCV/roc

cc: Christian Genetski, Esq. – Counsel for Appellees by email