

1 Dodge Anderson, Ltd.
2 3003 North Central Avenue, Suite 1800
3 Phoenix, Arizona 85012-2909
4 Telephone: (602) 277-3000
5 Facsimile: (602) 277-7478
6 Email: connie@azlawyers.com
7 **Connie J. Mableson, #010665**

8 Public Knowledge
9 1875 Connecticut Ave. NW, Suite 650
10 Washington, DC 20009
11 Telephone: (202) 518-0020
12 Facsimile: (202) 986-2539
13 Email: ssiy@publicknowledge.org
14 **Sherwin Siy**
15 **Jef Pearlman**

16 Attorneys for *Public Knowledge*

17 **IN THE UNITED STATES DISTRICT COURT**
18 **IN AND FOR THE DISTRICT OF ARIZONA**

<p>19 MDY INDUSTRIES, LLC,</p> <p>20 Plaintiff and Counterdefendant,</p> <p>21 vs.</p> <p>22 BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC.,</p> <p>23 Defendants and Counterclaimants,</p>	<p>24 Case No.: CV06-02555-PHX-DGC</p> <p>25 MOTION OF PUBLIC KNOWLEDGE FOR LEAVE TO FILE <i>AMICUS CURIAE</i> BRIEF IN SUPPORT OF NEITHER PARTY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT</p>
<p>26 BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC.,</p> <p>27 Third-Party Plaintiffs,</p> <p>28 vs.</p> <p>29 MICHAEL DONNELLY, an individual,</p> <p>30 Third-Party Defendant.</p>	

1 **MOTION OF PUBLIC KNOWLEDGE FOR LEAVE TO FILE *AMICUS***
2 ***CURIAE* BRIEF IN SUPPORT OF NEITHER PARTY ON CROSS-MOTIONS**
3 **FOR SUMMARY JUDGMENT**

4 Public Knowledge (“PK”) hereby moves for leave to file the attached *amicus*
5 *curiae* brief in the above-captioned case. PK is a Washington, D.C. based, non-profit
6 public interest group working to defend citizen rights in the emerging digital culture.
7 PK’s primary mission is to promote innovation, protect the legal rights of all users of
8 copyrighted works, and stop any legislation from passing that would slow technology
9 innovation, unduly burden free speech, shrink the public domain, or prevent fair use.

10 PK has been involved in a number of technology policy and copyright issues
11 over the past several years, including participation as a named plaintiff in *Am. Library*
12 *Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005). PK has also joined as *amicus curiae* in
13 a number of cases, several of which address important copyright issues. *See, e.g.*,
14 *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Twentieth Century Fox Film Corp. v.*
15 *Cablevision Sys.*, No. 07-1480-CV (2d Cir. *amicus* brief filed June 6, 2008);
16 *Explorologist, Ltd. v. Brian Sapien*, No. 2:07-CV-01848-LP (E.D. Pa. *amicus* brief
17 filed Jan. 11, 2008). *See also Victor Mosley v. V Secret Catalogue, Inc.*, No. 01-1015
18 (Supreme Court *cert. amicus* brief filed June 24, 2002) (trademark); *Medtronic*
19 *Vascular, Inc. v. Cordis Corp.* No. 03-963 (Supreme Court *cert. amicus* brief filed
20 Feb. 6, 2004) (patent).

21 Defendant's pending summary judgment motion is premised in part on a view
22 of the law which confuses copyright and contract in an attempt to gain the benefits of
23 both areas of law while being subject to the limitations of neither. Specifically, the
24 Motion for Summary Judgment argues that purchasers of World of Warcraft do not
25 own their copies of the software, but merely license them. As a result, Defendants

1 argue that users are not protected by 47 U.S.C. § 117, which allows owners to use the
2 software they lawfully purchased without fear of inadvertently violating the
3 underlying copyright on that software. The result suggested by Blizzard is that a
4 player who cheats in an online video game in violation of a license will immediately
5 become a copyright infringer subject to severe penalties, including *minimum* statutory
6 damages of \$750. *See* 47 U.S.C. § 504(c)(1).

7 If this argument succeeds, Defendants will be improperly turning what is an
8 alleged breach of contract into an alleged copyright violation, and will circumvent the
9 carefully crafted tradeoffs in both areas of law. This will allow them to leverage the
10 harsh penalties of copyright law while dodging copyright's carefully crafted consumer
11 protections. It will also permit them to gain the flexibility of a contract without the
12 associated limitations on remedies that contract law provides. This view of the law
13 would eviscerate the rights of lawful purchases of software, and should be soundly
14 rejected by this Court.

15 The parties have been informed of the filing of this *amicus* brief. Plaintiff has
16 consented to the filing of this brief. Counsel for Defendant has declined to consent to
17 the filing of this brief.

18 Dated this 2nd day of May, 2008.

19 DODGE ANDERSON, LTD.

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BY: /s/ Connie J. Mableson

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Connie J. Mableson, #010665

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3003 North Central Avenue, #1800

24

Phoenix, Arizona 85012

25

Tel: 602-277-3000

Fax: 602-277-7478

Counsel for Public Knowledge

1 I hereby certify that on May 2, 2008, I electronically transmitted the attached
2 document to the Clerk's Office using the CM/ECF system for filing and transmittal of
3 a Notice of Electronic Filing to the following CM/ECF registrants:

<u>Name</u>	<u>Email Address</u>
Lance C. Venable, Esq.	docketing@vclmlaw.com
Christian S. Genetski, Esq.	cgenetski@sonnenschein.com
Scott Jeremy Stein, Esq.	sstein@sonnenschein.com
Shane M. McGee, Esq.	smcgee@sonnenschein.com

9 I hereby certify that on May 2, 2008, I served the attached document by FIRST
10 CLASS MAIL on the following, who are not registered participants of the
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14 /s/ Connie J. Mableson