

10-26-1999

10/19/99



To the Honorable Commissioner of Patents and Trademarks

101185031

Assignments or copy thereof.

1. Name of conveying party(ies): NetIQ Corporation

- Individual(s)
- General Partnership
- Corporation-State California
- Other \_\_\_\_\_
- Association
- Limited Partnership

Additional name(s) of conveying party(ies) attached?  Yes  No

2. Name and address of receiving party(ies):

19

Name: NetIQ Corporation

Internal Address: \_\_\_\_\_

Street Address: 5410 Betsy Ross Drive

City Santa Clara State CA ZIP 95054

- Individual(s) citizenship \_\_\_\_\_
- Association \_\_\_\_\_
- General Partnership \_\_\_\_\_
- Limited Partnership \_\_\_\_\_
- Corporation-State Delaware
- Other \_\_\_\_\_

If assignee is not domiciled in the United States, a domestic representative designation is attached:

Yes  No

(Designation must be a separate document from Assignment)

Additional name(s) & address(es) attached?  Yes  No

3. Nature of Conveyance:

- Assignment
- Security Agreement
- Other \_\_\_\_\_
- Merger
- Change of Name

Execution Date: July 22, 1999

4. Application number(s) or registration number(s):

A. Trademark Application No.(s) 75/739077

B. Trademark Registration No.(s)

Additional numbers attached?  Yes  No

5. Name and address of party to whom correspondence concerning document should be mailed:

Name: Alexandra J. Horne

Internal Address: SKJERVEN, MORRILL, MacPHERSON,

FRANKLIN & FRIEL LLP

Street Address: 25 METRO DRIVE, SUITE 700

City SAN JOSE State CA ZIP 95110

6. Total number of applications and registrations involved: 1

7. Total fee (37 CFR 3.41): .....\$ 40.00

- Enclosed
- Authorized to be charged to deposit account

8. Deposit account number: 19-2386

(Attach duplicate copy of this page if paying by deposit account)

DO NOT USE THIS SPACE

9. Statement and signature.

*To the best of my knowledge and belief, the foregoing information is true and correct and any attached copy is a true copy of the original document.*

Alexandra J. Horne  
Name of Person Signing

Alexandra J. Horne  
Signature

10-19-99  
Date

Total number of pages comprising cover sheet: 1

OMB No. 0651-0011 (exp. 4/94)

Do not detach this portion

Mail documents to be recorded with required cover sheet information to:

10/25/1999 DMGUYEN 00000179 192386 75739077 Commissioner of Patents and Trademarks  
Box Assignments  
Washington, D.C. 20231

01 FC-481 40.00 CH

Public burden reporting for this sample cover sheet is estimated to average about 30 minutes per document to be recorded, including time for reviewing the document and gathering the data needed, and completing and reviewing the sample cover sheet. Send comments regarding this burden estimate to the U.S. Patent and Trademark Office, Office of Information Systems, PK2-1000C, Washington, D.C. 20231, and to the Office of Management and Information Technology, Paperwork Reduction Project, (0651-011), Washington, D.C. 20231.

TRADEMARK

REEL: 001979 FRAME: 0231

The express or implied liability of the inventor or assignee for the document and all enclosures referred to herein is EL030589271US.

# State of California



## SECRETARY OF STATE

I, *BILL JONES*, Secretary of State of the State of California, hereby certify:

That the attached transcript of   29   page(s) was prepared by and in this office from the record on file, of which it purports to be a copy, and that it is full, true and correct.

*IN WITNESS WHEREOF*, I execute this certificate and affix the Great Seal of the State of California this day of



OCT 12 1999

*Bill Jones*

Secretary of State

1942262 OUT

AGREEMENT AND PLAN OF MERGER OF  
 NETIQ CORPORATION  
 (a Delaware corporation)  
 AND  
 NETIQ CORPORATION  
 (a California corporation)

FILED

In the office of the Secretary of State  
of the State of California

JUL 22 1999

  
 BILL JONES, Secretary of State

THIS AGREEMENT AND PLAN OF MERGER dated as of July 21, 1999 (the "Agreement") is between NetIQ Corporation, a Delaware corporation ("NetIQ-Delaware"), and NetIQ Corporation, a California corporation ("NetIQ-California"). NetIQ-Delaware and NetIQ-California are sometimes referred to herein as the "Constituent Corporations."

## RECITALS

A. NetIQ-Delaware is a corporation duly organized and existing under the laws of the State of Delaware and has an authorized capital of 41,100,000 shares, \$0.001 par value, 30,000,000 of which are designated as "Common Stock" and 11,100,000 of which are designated as "Preferred Stock." Of the 11,100,000 authorized shares of Preferred Stock, 7,000,000 shares are designated as "Series A Preferred Stock" and 4,100,000 shares are designated as "Series B Preferred Stock." As of July 21, 1999, 1,000 shares of Common Stock were issued and outstanding, all of which are held by NetIQ-California and no shares of Preferred Stock were outstanding.

B. NetIQ-California is a corporation duly organized and existing under the laws of the State of California and has an authorized capital of 41,100,000 shares, no par value, 30,000,000 of which are designated as "Common Stock" and 11,100,000 of which are designated as "Preferred Stock." Of the 11,100,000 authorized shares of Preferred Stock, 7,000,000 shares are designated as "Series A Preferred Stock" and 4,100,000 shares are designated as "Series B Preferred Stock." As of July 21, 1999, 6,232,797 shares of Common Stock were issued and outstanding, 7,000,000 shares of Series A Preferred Stock were issued and outstanding and 4,100,000 shares of Series B Preferred Stock were issued and outstanding.

C. The Board of Directors of NetIQ-California has determined that, for the purpose of effecting the reincorporation of NetIQ-California in the State of Delaware, it is advisable and in the best interests of NetIQ-California and its shareholders that NetIQ-California merge with and into NetIQ-Delaware upon the terms and conditions herein provided.

D. The respective Boards of Directors of NetIQ-Delaware and NetIQ-California, the shareholders of NetIQ-California and the sole stockholder of NetIQ-Delaware have approved this Agreement and have directed that this Agreement be executed by the undersigned officers.

NOW, THEREFORE, in consideration of the mutual agreements and covenants set forth herein, NetIQ-Delaware and NetIQ-California hereby agree, subject to the terms and conditions hereinafter set forth, as follows:

## 1. MERGER

(a) Merger. In accordance with the provisions of this Agreement, the Delaware General Corporation Law and the California General Corporation Law, NetIQ-California shall be merged with and into NetIQ-Delaware (the "Merger"), the separate existence of NetIQ-California shall cease and NetIQ-Delaware shall be, and is herein sometimes referred to as, the "Surviving Corporation," and the name of the Surviving Corporation shall be NetIQ Corporation.

(b) Filing and Effectiveness. The Merger shall become effective when the following actions shall have been completed:

(i) An executed Certificate of Merger or an executed counterpart of this Agreement meeting the requirements of the Delaware General Corporation Law shall have been filed with the Secretary of State of the State of Delaware; and

(ii) An executed Certificate of Merger or an executed counterpart of this Agreement meeting the requirements of the California General Corporation Law shall have been filed with the Secretary of State of the State of California.

The date and time when the Merger shall become effective, as aforesaid, is herein called the "Effective Date of the Merger."

(c) Effect of the Merger. Upon the Effective Date of the Merger, the separate existence of NetIQ-California shall cease and NetIQ-Delaware, as the Surviving Corporation, (i) shall continue to possess all of its assets, rights, powers and property as constituted immediately prior to the Effective Date of the Merger, (ii) shall be subject to all actions previously taken by its and NetIQ-California's Boards of Directors, (iii) shall succeed, without other transfer, to all of the assets, rights, powers and property of NetIQ-California in the manner as more fully set forth in Section 259 of the Delaware General Corporation Law, (iv) shall continue to be subject to all of its debts, liabilities and obligations as constituted immediately prior to the Effective Date of the Merger, and (v) shall succeed, without other transfer, to all of the debts, liabilities and obligations of NetIQ-California in the same manner as if NetIQ-Delaware had itself incurred them, all as more fully provided under the applicable provisions of the Delaware General Corporation Law and the California General Corporation Law.

## 2. CHARTER DOCUMENTS DIRECTORS AND OFFICERS

(a) Certificate of Incorporation. The Certificate of Incorporation of NetIQ-Delaware in the form attached hereto as Exhibit A (the "Certificate of Incorporation") shall be the Certificate of Incorporation of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

(b) Bylaws. The Bylaws of NetIQ-Delaware as in effect immediately prior to the Effective Date of the Merger shall continue in full force and effect as the Bylaws of the Surviving Corporation until duly amended in accordance with the provisions thereof and applicable law.

(c) Directors and Officers. The directors and officers of NetIQ-Delaware immediately prior to the Effective Date of the Merger shall be the directors and officers of the Surviving Corporation until their successors shall have been duly elected and qualified or until as otherwise provided by law, the Certificate of Incorporation of the Surviving Corporation or the Bylaws of the Surviving Corporation.

### 3. MANNER OF CONVERSION OF STOCK

(a) NetIQ-California Common Stock. Upon the Effective Date of the Merger, each share of Common Stock of NetIQ-California issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for one share of fully paid and nonassessable Common Stock, \$0.001 par value, of the Surviving Corporation.

(b) NetIQ-Delaware Common Stock. Upon the Effective Date of the Merger, each share of Common Stock, \$0.001 par value, of NetIQ-Delaware issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by NetIQ-Delaware, the holder of such shares or any other person, be canceled and extinguished.

(c) NetIQ-California Series A Preferred Stock and Series B Preferred Stock. Upon the Effective Date of the Merger, each share of Series A Preferred Stock and Series B Preferred Stock of NetIQ-California issued and outstanding immediately prior thereto shall, by virtue of the Merger and without any action by the Constituent Corporations, the holder of such shares or any other person, be converted into and exchanged for one share of fully paid and nonassessable Series A Preferred Stock or Series B Preferred Stock, respectively, \$0.001 par value, of the Surviving Corporation.

(d) Warrant to Purchase Common Stock. A warrant to purchase up to 408,672 shares of NetIQ-California Common Stock is currently issued and outstanding. On the Effective Date of the Merger, the Surviving Corporation will assume the warrant which will become a warrant to purchase NetIQ-Delaware Common Stock on the basis of one share of NetIQ-Delaware Common Stock for each share of NetIQ-California Common Stock purchasable under such warrant. The exercise price per share of the warrant so assumed shall be equal to the per share exercise price prior to the Merger.

(e) Stock Options. At the Effective Date of the Merger, the NetIQ-California Amended and Restated 1995 Stock Plan (the "1995 Plan") and all options and stock purchase rights relating to Common Stock (each a "NetIQ Option") then outstanding under such plan, or otherwise, shall be assumed by NetIQ-Delaware in accordance with provisions described below.

(i) Each NetIQ Option so assumed by NetIQ-Delaware under this Agreement shall continue to have, and be subject to, the same terms and conditions set forth in the 1995 Plan and/or as provided in the respective option agreements governing such NetIQ Option immediately prior to the Effective Date of the Merger.

(ii) It is the intention of the parties that the NetIQ Options assumed by NetIQ-Delaware qualify following the Effective Date of the Merger as incentive stock options as defined in Section 422 of the Internal Revenue Code of 1986, as amended (the "Code"), to the extent the NetIQ Options qualified as incentive stock options immediately prior to the Effective Date of the Merger.

(iii) Promptly following the Effective Date of the Merger, NetIQ-Delaware will issue to each holder of an outstanding NetIQ Option a document evidencing the foregoing assumption of such NetIQ Option by NetIQ-Delaware.

(iv) At the Effective Date of the Merger, NetIQ-California shall assign to NetIQ-Delaware any and all rights of repurchase pertaining to shares of NetIQ-California Common Stock issued upon exercise of stock options, pursuant to stock purchase agreements or otherwise.

(f) Exchange of Certificates. After the Effective Date of the Merger, each holder of an outstanding certificate representing shares of Common Stock, Series A Preferred Stock or Series B Preferred Stock of NetIQ-California may, at such stockholder's option, surrender the same for cancellation to such institution as NetIQ-Delaware shall appoint at the time to act as exchange agent (the "Exchange Agent"), and each such holder shall be entitled to receive in exchange therefor a certificate or certificates representing the number of shares of the Surviving Corporation's Common Stock, Series A Preferred Stock or Series B Preferred Stock, respectively, into which the surrendered shares were converted as herein provided. Until so surrendered, each outstanding certificate theretofore representing shares of Common Stock, Series A Preferred Stock or Series B Preferred Stock of NetIQ-California shall be deemed for all purposes to represent the number of whole shares of the Surviving Corporation's Common Stock, Series A Preferred Stock or Series B Preferred Stock into which such shares of Common Stock, Series A Preferred Stock or Series B Preferred Stock of NetIQ-California were converted in the Merger.

The registered owner on the books and records of the Surviving Corporation or the Exchange Agent of any such outstanding certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or the Exchange Agent, have and be entitled to exercise any voting and other rights with respect to and to receive dividends and other distributions upon the shares of Common Stock, Series A Preferred Stock and Series B Preferred Stock of the Surviving Corporation represented by such outstanding certificate as provided above.

Each certificate representing Common Stock, Series A Preferred Stock or Series B Preferred Stock of the Surviving Corporation so issued in the Merger shall bear the same legends, if any, with respect to the restrictions on transferability as the certificates of NetIQ-California so converted and given in exchange therefor, unless otherwise determined by the Board of Directors of the Surviving Corporation in compliance with applicable laws.

If any certificate for shares of the Surviving Corporation's Common Stock, Series A Preferred Stock or Series B Preferred Stock is to be issued in a name other than that in which the certificate so surrendered in exchange therefor is registered, it shall be a condition of issuance thereof that the certificate so surrendered shall be properly endorsed and otherwise in proper form for

transfer, that such transfer otherwise be proper and that the person requesting such transfer pay to the Exchange Agent any transfer or other taxes payable by reason of the issuance of such new certificate in a name other than that of the registered holder of the certificate surrendered or establish to the satisfaction of the Surviving Corporation that such tax has been paid or is not payable.

#### 4. GENERAL

(a) Covenants of NetIQ-Delaware. NetIQ-Delaware covenants and agrees that it will, on or before the Effective Date of the Merger:

(i) Qualify to do business as a foreign corporation in the State of California and in connection therewith irrevocably appoint an agent for service of process as required under the provisions of Section 2105 of the California General Corporation Law;

(ii) File any and all documents with the appropriate tax authority of the State of California necessary for the assumption by NetIQ-Delaware of all of the corporate and/or franchise tax liabilities of NetIQ-California; and

(iii) Take such other actions as may be required by the California General Corporation Law.

(b) Further Assurances. From time to time, as and when required by NetIQ-Delaware or by its successors or assigns, there shall be executed and delivered on behalf of NetIQ-California such deeds and other instruments, and there shall be taken or caused to be taken by NetIQ-Delaware and NetIQ-California such further and other actions, as shall be appropriate or necessary in order to vest or perfect in or conform of record or otherwise by NetIQ-Delaware the title to and possession of all the property, interests, assets, rights, privileges, immunities, powers, franchises and authority of NetIQ-California and otherwise to carry out the purposes of this Agreement, and the officers and directors of NetIQ-Delaware are fully authorized in the name and on behalf of NetIQ-California or otherwise to take any and all such action and to execute and deliver any and all such deeds and other instruments.

(c) Abandonment. At any time before the Effective Date of the Merger, this Agreement may be terminated and the Merger may be abandoned for any reason whatsoever by the Board of Directors of either NetIQ-California or NetIQ-Delaware, or both, notwithstanding the approval of this Agreement by the shareholders of NetIQ-California or by the sole stockholder of NetIQ-Delaware, or by both.

(d) Amendment. The Boards of Directors of the Constituent Corporations may amend this Agreement any time prior to the filing of this Agreement (or certificate in lieu thereof) with the Secretaries of State of the States of California and Delaware, provided that subsequent to the adoption of this Agreement by the shareholders of either Constituent Corporation, this Agreement shall not be amended except in compliance with the requirements of the California General Corporation Law and the Delaware General Corporation Law.

(e) Registered Office. The registered office of the Surviving Corporation in the State of Delaware is located at 1209 Orange Street, in the city of Wilmington, County of New Castle, and The Corporation Trust Company is the registered agent of the Surviving Corporation at such address.

(f) Agreement. Executed copies of this Agreement will be on file at the principal place of business of the Surviving Corporation at 5410 Betsy Ross Drive, Santa Clara, California 95054 and copies thereof will be furnished to any shareholder of either Constituent Corporation, upon request and without cost.

(g) Governing Law. This Agreement shall in all respects be construed, interpreted and enforced in accordance with and governed by the laws of the State of Delaware and the provisions of the California General Corporation Law.

(h) Counterparts. In order to facilitate the filing and recording of this Agreement, the same may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

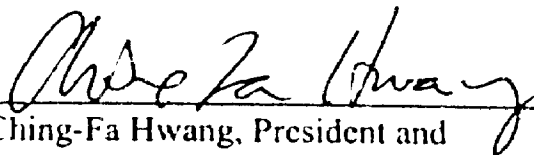
*[Remainder of Page Left Blank Intentionally]*




IN WITNESS WHEREOF, this Agreement, having first been approved by resolutions of the Boards of Directors of NetIQ-Delaware and NetIQ-California, is hereby executed on behalf of each of such two corporations and attested by their respective officers thereunto duly authorized.

**NETIQ CORPORATION**

a Delaware corporation

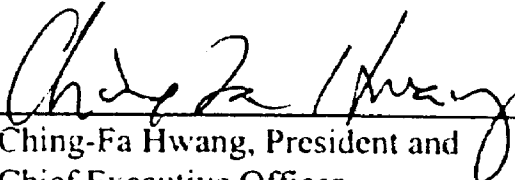
By:   
Ching-Fa Hwang, President and  
Chief Executive Officer

ATTEST:


  
James A. Barth, Vice President,  
Finance, Chief Financial Officer  
and Secretary

**NETIQ CORPORATION**

a California corporation

By:   
Ching-Fa Hwang, President and  
Chief Executive Officer

ATTEST:

  
James A. Barth, Vice President,  
Finance, Chief Financial Officer  
and Secretary

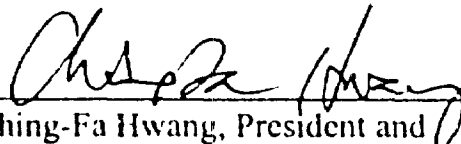
NETIQ CORPORATION  
(a California corporation)

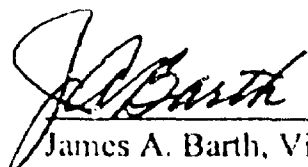
OFFICERS' CERTIFICATE

Ching-Fa Hwang and James A. Barth certify that:

1. They are the President and the Secretary, respectively, of NetIQ Corporation, a corporation organized under the laws of the State of California.
2. The corporation has two authorized classes of stock, designated "Common Stock" and "Preferred Stock." There are authorized 30,000,000 shares of Common Stock and 11,100,000 shares of Preferred Stock. Of the authorized shares of Preferred Stock, 7,000,000 shares are designated as "Series A Preferred Stock" and 4,100,000 shares are designated as "Series B Preferred Stock."
3. There were 6,232,797 shares of Common Stock issued and outstanding, 7,000,000 shares of Series A Preferred Stock issued and outstanding and 4,100,000 shares of Series B Preferred Stock issued and outstanding as of the record date of the shareholders' approval of the Agreement and Plan of Merger attached hereto (the "Merger Agreement").
4. The principal terms of the Merger Agreement were approved by the Board of Directors and by the vote of a number of shares of each class of stock which equaled or exceeded the vote required.
5. The percentage vote required was more than 50% of the votes entitled to be cast by holders of outstanding shares of the Common Stock and more than 50% of the votes entitled to be cast by holders of outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting as a single class.
6. The undersigned further declare under penalty of perjury under the laws of the State of California that each has read the foregoing certificate and knows the contents thereof and that the same is true of their own knowledge.

Executed in Santa Clara, California on July 21, 1999.

  
Ching-Fa Hwang, President and  
Chief Executive Officer

  
James A. Barth, Vice President, Finance  
Chief Financial Officer and Secretary

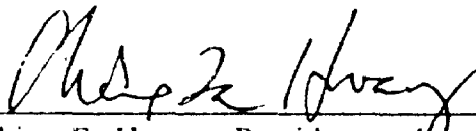
NETIQ CORPORATION  
(a Delaware Corporation)  
(Surviving Corporation)

OFFICERS' CERTIFICATE

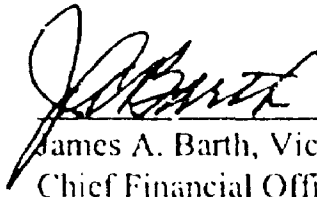
Ching-Fa Hwang and James A. Barth certify that:

1. They are the President and the Secretary, respectively, of NetIQ Corporation, a corporation organized under the laws of the State of Delaware.
2. The corporation has two authorized classes of stock, designated "Common Stock" and "Preferred Stock." There are authorized 30,000,000 shares of Common Stock and 11,100,000 shares of Preferred Stock. Of the authorized shares of Preferred Stock, 7,000,000 shares are designated as "Series A Preferred Stock" and 4,100,000 shares are designated as "Series B Preferred Stock."
3. There are 1,000 shares of Common Stock issued and outstanding and entitled to vote on the Agreement and Plan of Merger attached hereto (the "Merger Agreement"). There are no shares of Preferred Stock outstanding.
4. The principal terms of the Merger Agreement were approved by the Board of Directors and by the vote of a number of shares of each class of stock which equaled or exceeded the vote required.
5. The percentage vote required was more than 50% of the votes entitled to be cast by the sole stockholder of all outstanding shares of Common Stock.
6. The undersigned further declare under penalty of perjury under the laws of the State of California that each has read the foregoing certificate and knows the contents thereof and that the same is true of their own knowledge.

Executed in Santa Clara, California on July 21, 1999.



Ching-Fa Hwang, President and  
Chief Executive Officer



James A. Barth, Vice President, Finance  
Chief Financial Officer and Secretary

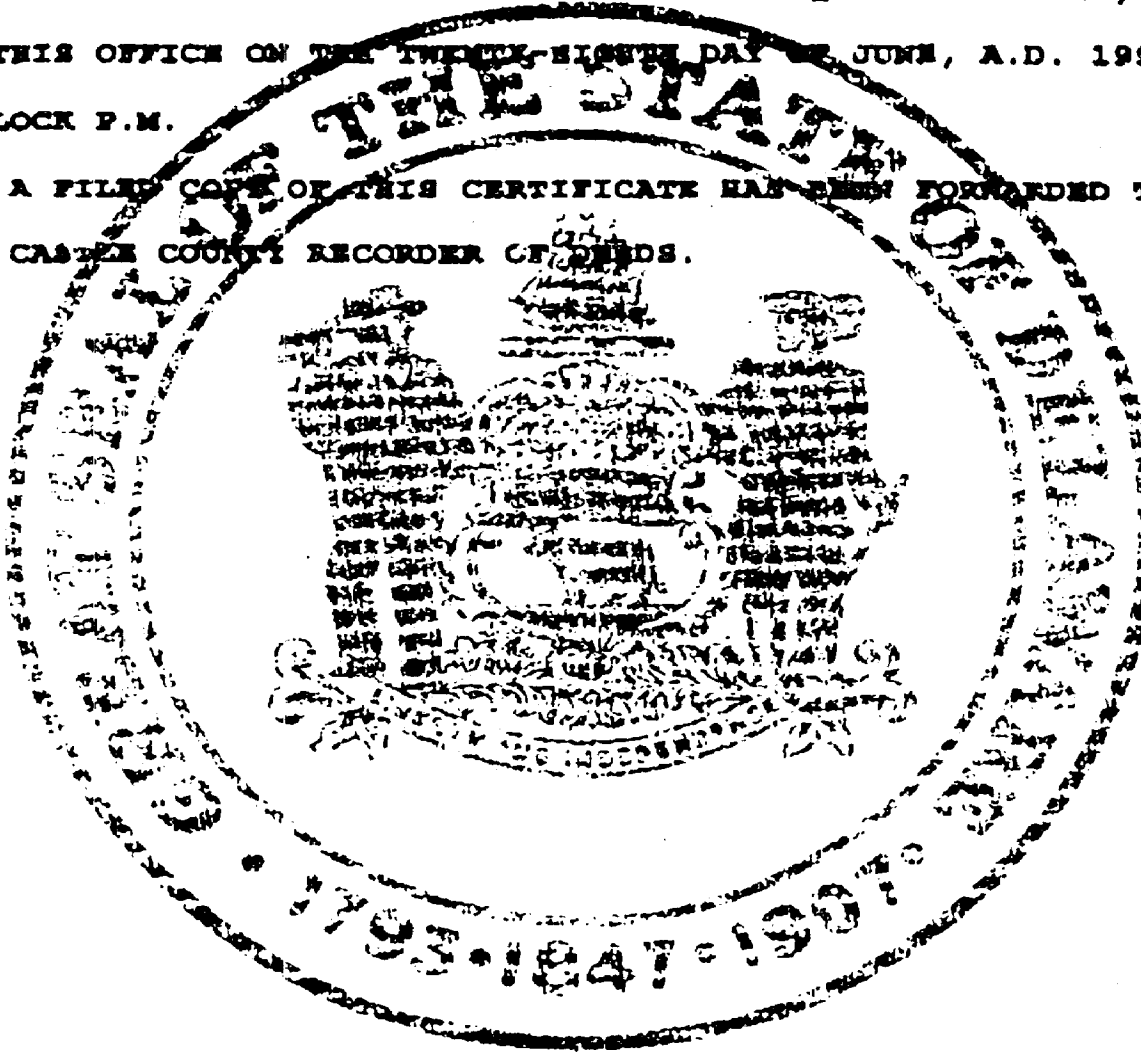
**EXHIBIT A**

**Certificate of Incorporation of  
NetIQ Corporation, a Delaware Corporation**

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "KETIQ CORPORATION", FILED IN THIS OFFICE ON THE TWENTY-EIGHTH DAY OF JUNE, A.D. 1999, AT 2 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.



*Edward J. Freel*

Edward J. Freel, Secretary of State

3044521 8100

991264494

AUTHENTICATION:

5838944

TRADEMARK

REEL: 001979 FRAME: 0243

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION**  
**OF**  
**NETIQ CORPORATION**

NetIQ Corporation, a corporation organized and existing under the laws of the State of Delaware, hereby certifies as follows:

- A. The name of the corporation is NetIQ Corporation. The corporation was originally incorporated under the same name and the original Certificate of Incorporation of the corporation was filed with the Secretary of State of the State of Delaware on May 26, 1999.
- B. This Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of the General Corporation Law of the State of Delaware by the Board of Directors and the stockholder of this corporation.
- C. Pursuant to Sections 242 and 245 of the General Corporation Law of the State of Delaware, this Amended and Restated Certificate of Incorporation restates and integrates and further amends the provisions of the Certificate of Incorporation of this corporation.
- D. The text of the Certificate of Incorporation is hereby amended and restated in its entirety to read as follows:

Article I.

The name of the corporation is NetIQ Corporation (the "Corporation").

Article II.

The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, in the City of Wilmington, Delaware 19801, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

Article III.

The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

#### Article IV.

1. **Authorized Capital.** This Corporation is authorized to issue 41,100,000 shares of its capital stock, \$0.001 par value per share, which shall be divided into two classes known as Common Stock and Preferred Stock, respectively.

The total number of shares of Common Stock which this Corporation is authorized to issue is 30,000,000. The total number of shares of Preferred Stock which this Corporation is authorized to issue is 11,100,000. This Corporation is authorized to issue two series of its Preferred Stock which shall be known as its Series A Preferred Stock (the "Series A Preferred Stock"), consisting of 7,000,000 shares, and its Series B Preferred Stock (the "Series B Preferred Stock"), consisting of 4,100,000 shares. Except as specifically set forth herein, references hereafter to "Preferred Stock" shall mean the Series A Preferred Stock or the Series B Preferred Stock.

2. **Authorized Capital Following Automatic Conversion Event.** Upon the automatic conversion of all outstanding shares of Preferred in accordance with the provisions of Article V, Section 5.2 of this Certificate of Incorporation (the "Automatic Conversion Event"), the Company shall immediately thereafter be authorized to issue two classes of stock to be designated, respectively, Common Stock and Preferred Stock. Immediately following any Automatic Conversion Event, the total number of shares of Common Stock which the Company shall have the authority to issue shall be 150,000,000, \$0.001 par value, and the total number of shares of Preferred Stock the Company shall have the authority to issue shall be 5,000,000, \$0.001 par value. Immediately following any Automatic Conversion Event, the Preferred Stock may be issued from time to time in one or more series pursuant to a resolution or resolutions providing for such issue duly adopted by the Board of Directors (authority to do so being hereby expressly vested in the Board). The Board of Directors is further authorized to determine or alter the rights, preferences, privileges and restrictions granted to or imposed upon any wholly unissued series of Preferred Stock and to fix the number of shares of any series of Preferred Stock and the designation of any such series of Preferred Stock. The Board of Directors, within the limits and restrictions stated in any resolution or resolutions of the Board of Directors originally fixing the number of shares constituting any series, may increase or decrease (but not below the number of shares in any such series then outstanding), the number of shares of any series subsequent to the issue of shares of that series.

3. **Restatement of Certificate of Incorporation.** Immediately following any Automatic Conversion Event, the Board of Directors of the Company is authorized, without the further consent or approval of the stockholders of the Company to amend and restate this Certificate of Incorporation to show the authorized classes of capital stock as set forth in the preceding paragraph and to eliminate all references in this Certificate of Incorporation to the rights, preferences, privileges and restrictions of the series of Preferred Stock including those set forth in Article IV above and Article V below (and, in connection with any such amendment and restatement, to renumber the remaining Articles).

## Article V.

The rights, preferences, privileges and restrictions granted to or imposed upon the respective classes of shares or the holders thereof are as follows:

1. Dividend Rights. The holders of the Series A Preferred Stock and Series B Preferred Stock shall be entitled to receive, out of any funds legally available therefor, when and as declared by the Board of Directors, dividends at the rate of \$.04 and \$.16 per annum, respectively, on each outstanding share of Preferred Stock held by them. Such dividends shall be paid prior and in preference to any payment of any dividend on or any other distribution with respect to any shares of Common Stock. The right to such dividends on the Preferred Stock shall not be cumulative, and no right shall accrue to holders of Preferred Stock by reason of the fact that dividends on such shares are not declared or paid in any prior year. There shall be no preference to any payment of dividend as between the Series A Preferred Stock and the Series B Preferred Stock.

2. Liquidation Rights. In the event of any liquidation, dissolution or winding up of the Corporation (a "Liquidation Event"), whether voluntary or not, the assets of the Corporation legally available for distribution to its shareholders shall be distributed as follows: (i) the holders of Preferred Stock shall be entitled to receive, before any amount shall be paid to holders of Common Stock or of any other stock ranking junior to the Preferred Stock on liquidation, an amount equal to \$0.40 per share of Series A Preferred Stock and \$2.00 per share of Series B Preferred Stock (as adjusted for stock splits, combinations or similar events) plus all declared and unpaid dividends, if any, to which the holders of outstanding shares of Preferred Stock are entitled; provided, however, that (A) if, upon any Liquidation Event, the amounts payable with respect to the Preferred Stock and any other stock ranking as to any such distribution on parity with the Preferred Stock are not paid in full, the holders of the Preferred Stock and such other stock shall share any distribution of assets at a rate proportional to the liquidation preference to which such shares of Preferred Stock or other stock are entitled; (ii) the remaining assets shall be distributed to the holders of Common Stock and Preferred Stock on a pro rata, as converted to Common Stock basis until the Series A Preferred Stock and Series B Preferred Stock holders have received inclusive of the amount stipulated in D.2.(i) above, \$1.00 for the Series A Preferred Stock and \$5.00 for the Series B Preferred Stock; and (iii) any remaining assets thereafter shall be distributed to the holders of Common Stock and the Preferred Stock on a pro rata, as converted to Common Stock basis; provided, however, that if the holders of Common Stock would receive more than holders of a series of Preferred Stock would receive under clauses (i) and (ii) herein, then holders of such Preferred Stock shall not be entitled to any distribution under clause (i) or (ii) herein and shall instead be entitled to receive their ratable share of any distribution under clause (iii) above as though the holders of such Preferred Stock were holders of shares of Common Stock into which such shares of Preferred Stock would be convertible.

A Liquidation Event shall specifically include: (i) a consolidation or merger of the Corporation with or into any other corporation, or any other entity or person, or the exchange of substantially all of the outstanding stock of the Corporation for shares of another entity or other property, in which, after any such transaction, the prior shareholders of the Corporation hold less than fifty percent (50%) of the voting shares of the continuing or surviving entity; or (ii) a sale of all or substantially all of the assets of the Corporation.



3. Voting Rights. Except as otherwise required by law, the holders of Preferred Stock and the holders of Common Stock shall be entitled to notice of any shareholders' meeting and to vote upon any matter submitted to the shareholders for a vote, as follows: (i) the holders of Series A Preferred Stock shall have one (1) vote for each full share of Common Stock into which their respective shares of Preferred Stock are convertible on the record date for the vote, (ii) the holders of Series B Preferred Stock shall have one (1) vote for each full share of Common Stock into which their respective shares of Preferred Stock are convertible on the record date for the vote, and (iii) the holders of Common Stock shall have one (1) vote per share of Common Stock.

4. Certain Taxes. The Corporation shall pay any and all issuance and other taxes (excluding any federal or state income taxes) that may be payable in respect of any issuance or delivery of shares of Common Stock on conversion of Preferred Stock. The Corporation shall not, however, be required to pay any tax that may be payable in respect of any transfer involved in the issuance and delivery of shares of Common Stock in a name other than that in which the shares of Preferred Stock to which such issuance relates were registered, and no such issuance or delivery shall be made unless and until the person requesting such issuance has paid to the Corporation the amount of any such tax, or it is established to the satisfaction of the Corporation that such tax has been paid.

5. Conversion. The holders of Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

5.1 Right to Convert. Each share of Series A Preferred Stock or Series B Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share, at the office of the Corporation or any transfer agent for such stock, into such number of fully paid and nonassessable shares of Common Stock as is determined by dividing \$0.40 by the Series A Conversion Price or by dividing \$2.00 by the Series B Conversion Price as applicable to such series, determined as hereinafter provided, in effect on the date the certificate is surrendered for conversion. The price at which shares of Common Stock shall be deliverable upon conversion (the "Series A Conversion Price" or the "Series B Conversion Price," as applicable) shall initially be \$0.40 for the Series A Preferred Stock and \$2.00 for the Series B Preferred Stock.

5.2 Automatic Conversion. Each share of the Series A Preferred Stock shall automatically be converted into shares of Common Stock at the then-effective Series A Conversion Price (i) upon the date specified by the affirmative vote, written consent or agreement of holders of at least 66 2/3% of the shares of the Series A Preferred Stock then outstanding, (ii) upon the closing of the sale of the Corporation's Common Stock in an underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act"), other than a registration relating solely to a transaction under Rule 145 under such Act (or any successor thereto) or relating to an employee benefit plan of the Corporation, at a public offering wherein the Common Stock is sold for not less than \$1.60 per share and the aggregate proceeds to the Corporation and/or any selling shareholders (prior to deductions for underwriters' discounts and expenses relating to the issuance, including without limitation fees of the Corporation's counsel) is not less than \$7,500,000, or (iii) if fewer than 1,666,667 shares of Series A Preferred Stock are outstanding, as adjusted.

Each share of the Series B Preferred Stock shall automatically be converted into shares of Common Stock at the then-effective Series B Conversion Price (i) upon the date specified by an affirmative vote, written consent or agreement of holders of at least a majority of the shares of the Series B Preferred Stock then outstanding, (ii) upon the Closing of the sale of the Corporation's Common Stock in an underwritten public offering registered under the Securities Act of 1933, as amended (the "Securities Act"), other than a registration relating solely to a transaction under Rule 145 under such Act (or any successor thereto) or to an employee benefit plan of the Corporation, where the Common Stock is sold for not less than \$4.00 per share and the aggregate proceeds to the Corporation and/or any selling shareholders (prior to deductions for underwriter's discounts and expenses relating to the issuance, including without limitation fees of the Corporation's counsel) is not less than \$7,500,000, or (iii) if fewer than 900,000 shares of Series B Preferred Stock are outstanding, as adjusted.

### 5.3 Mechanics of Conversion.

5.3.1 Before any holder of Preferred Stock shall be entitled voluntarily to convert the same into shares of Common Stock, he shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for such stock, and shall give written notice to the Corporation at such office that he elects to convert the same and shall state therein the number of shares of Preferred Stock being converted and the name or names in which he wishes the certificate or certificates for shares of Common Stock to be issued. The Corporation shall as soon as practicable thereafter issue and deliver at such office to such holder of Preferred Stock a certificate or certificate for the number of shares of Common Stock to which he shall be entitled. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of surrender of the shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date.

5.3.2 If the conversion is in connection with an underwritten offering of securities pursuant to the Securities Act, the conversion may, at the option of any holder tendering shares of Preferred Stock for conversion, be conditioned upon the closing with the underwriters of the sale of securities pursuant to such offering, in which event the person(s) entitled to receive the Common Stock upon conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such sale of securities.

### 5.4 Adjustments to Conversion Price for Certain Diluting Issues.

5.4.1 Special Definitions. For purposes of this Section 5, the following definitions apply:

(a) "Options" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities.

(b) "Original Issue Date" shall mean the date on which a share of Series B Preferred Stock was first issued.

(c) The term "Conversion Price" shall mean the Series A Conversion Price and the Series B Conversion Price, as applicable.

(d) "Convertible Securities" shall mean any evidences of indebtedness, shares or other securities convertible into or exchangeable for Common Stock.

(e) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section 5.4.3 deemed to be issued) by the Corporation after the Original Issue Date, other than shares of Common Stock issued or issuable:

- (1) upon conversion of shares of the then outstanding Preferred Stock;
- (2) up to 8,000,000 shares issued to officers, directors or employees of, or consultants to, the Corporation pursuant to stock option or stock purchase plans or agreements on terms approved by the Board of Directors;
- (3) as a dividend or distribution on Preferred Stock;
- (4) for which adjustment of the Preferred Stock Conversion Price is made pursuant to Section 5.5;
- (5) securities issued to lending or leasing institutions or individuals in connection with bank debt, equipment leases or non-equity interim financing, on terms approved by the Board of Directors;
- (6) securities issued or issuable in an acquisition or merger upon terms approved by a majority of the Board of Directors; or
- (7) securities issued in stock splits, recapitalizations and similar transactions.

**5.4.2 No Adjustment of Conversion Price.** No adjustment in the Conversion Price of a series of Preferred Stock pursuant to this Section 5.4 shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share (determined pursuant to Section 5.4.5 hereof) for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is less than the Conversion Price for such series of Preferred Stock in effect on the date of, and immediately prior to, such issue.

**5.4.3 Deemed Issue of Additional Shares of Common.** Except as otherwise provided in Section 5.4 hereof, in the event the Corporation at any time or from time to time after the Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities then entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the

instrument relating thereto without regard to any provisions contained therein designed to protect against dilution) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock, issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(a) no further adjustments in the Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(b) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase or decrease in the consideration payable to the Corporation, or decrease or increase in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities (provided, however, that no such adjustment of the Conversion Price shall affect Common Stock previously issued upon conversion of the Preferred Stock);

(c) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon such expiration, be recomputed as if:

(1) in the case of Convertible Securities or Options for Common Stock the only Additional Shares of Common Stock issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration actually received by the Corporation upon such exercise, or for the issue of all such Convertible Securities which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(2) in the case of Options for Convertible Securities only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Corporation for the Additional Shares of Common Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of all such Options, whether or not exercised, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 5.4.5 upon the issuance of the Convertible Securities with respect to which such Options were actually exercised);

(d) no readjustment pursuant to clause (b) or (c) above shall have the effect of increasing a Conversion Price to an amount which exceeds the lower of (a) such Conversion Price on the original adjustment date, or (b) such Conversion Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(e) in the case of any Options which expire by their terms not more than sixty (60) days after the date of issue thereof, no adjustment of a Conversion Price shall be made until the expiration or exercise of all such Options, whereupon such adjustment shall be made in the same manner provided above.

**5.4.4 Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock.** In the event the Corporation, at any time after the Original Issue Date, shall issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 5.4.3) without consideration or for a consideration per share less than the Conversion Price for a series of Preferred Stock in effect on the date of and immediately prior to such issue, then and in such event:

(1) the Conversion Price for such Preferred Stock shall be reduced, concurrently with such issue, to a Conversion Price (calculated to the hundredth of a cent) determined by multiplying the existing Conversion Price of such series by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance plus the number of shares of Common Stock which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at the Conversion Price in effect immediately prior to such issuance, and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issuance plus the number of such Additional Shares of Common Stock so issued.

(2) For the purpose of the above calculation, the number of shares of Common Stock outstanding immediately prior to such issuance shall be calculated as if all shares of Preferred Stock and all Convertible Securities had been fully converted into shares of Common Stock immediately prior to such issuance of Additional Shares of Common, but not including in such calculation any additional shares of Common Stock issuable with respect to shares of Preferred Stock, or Convertible Securities, solely as a result of the adjustment of the respective Conversion Prices (or other conversion ratios) resulting from the issuance of Additional Shares of Common Stock causing such adjustment.

**5.4.5 Determination of Consideration.** For purposes of this Section 5.4, the consideration received by the Corporation for the issue of any Additional Shares of Common Stock shall be computed as follows:

(a) Cash and Property. Such consideration shall:

(1) insofar as it consists of cash, be computed at the aggregate gross amount of cash received by the Corporation excluding amounts paid or payable for accrued interest or accrued dividends;

(2) insofar as it consists of property other than cash, be computed at the fair market value thereof at time of such issue, as determined in good faith by the Board of Directors; and

(3) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (s)(1) and (s)(2) above, as determined in good faith by the Board of Directors.

(b) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 5.4.3 relating to Options and Convertible Securities shall be determined by dividing:

(1) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(2) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein designed to protect against dilution) issuable upon the exercise of such Options or conversion or exchange of such Convertible Securities.

**5.5 Adjustment to Conversion Prices for Stock Dividends and for Combinations or Subdivisions of Common Stock.** In the event that the Corporation at any time or from time to time after the Original Issue Date shall declare or pay, without consideration, any dividend on the Common Stock payable in Common Stock or in any right to acquire Common Stock for no consideration, or shall effect a subdivision of the outstanding shares of Common Stock (by stock split, reclassification or otherwise than by payment of a dividend in Common Stock or in any right to acquire Common Stock), or in the event the outstanding shares of Common Stock shall be combined or consolidated, by reclassification or otherwise, into a lesser number of shares of Common Stock, then the Conversion Price for any series of Preferred Stock in effect immediately prior to such event shall, concurrently with the effectiveness of such event, be proportionately decreased or increased, as appropriate. In the event that the Corporation shall declare or pay, without consideration, any dividend on the Common Stock payable in any right to acquire Common Stock for no consideration, then the Corporation shall be deemed to have made a dividend payable in Common Stock in an amount of shares equal to the maximum number of shares issuable upon exercise of such rights to acquire Common Stock.

**5.6 Adjustments for Reclassification and Reorganization.** If the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or

otherwise (other than a subdivision or combination of shares provided for in Section 5.5) the Conversion Prices then in effect shall, concurrently with the effectiveness of such reorganization or reclassification, be proportionately adjusted so that each series of Preferred Stock shall be convertible into, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, a number of shares of such other class or classes of stock equivalent to the number of shares of Common Stock that would have been subject to receipt by the holders upon conversion of the Preferred Stock immediately before that change.

**5.7 No Impairment.** The Corporation will not, by amendment of this Certificate of Incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of the Preferred Stock against impairment.

**5.8 Certificates as to Adjustments.** Upon the occurrence of each adjustment or readjustment of any Conversion Price pursuant to this Section 5, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and prepare and furnish to each holder of Preferred Stock a certificate executed by the Corporation's President or Chief Financial Officer setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price for such series of Preferred Stock at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of such series of Preferred Stock.

**5.9 Reservation of Stock Issuable Upon Conversion.** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose, including, without limitation, engaging in best efforts to obtain the requisite shareholder approval of any necessary amendment to this Certificate of Incorporation.

**5.10 Fractional Shares.** No fractional share shall be issued upon the conversion of any share or shares of Preferred Stock. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Preferred Stock by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the

issuance of a fraction of a share of Common Stock, the Corporation shall, in lieu of issuing any fractional share, pay the holder otherwise entitled to such fraction a sum in cash equal to the fair market value of such fraction on the date of conversion (as determined in good faith by the Board of Directors).

5.11 Notices. Any notice required by the provisions of this Section 5 to be given to the holders of shares of the Preferred Stock shall be deemed given when personally delivered to such holder (including delivery by courier service) or five (5) business days after the same has been deposited in the United States mail, certified or registered mail, return receipt requested, postage prepaid, and addressed to each holder of record at its address appearing on the books of the Corporation.

6. Covenants. In addition to any other rights provided by law the following covenants shall apply:

6.1 The Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of each class of Preferred Stock each voting as a separate class:

(a) amend or repeal any provision of, or add any provision to, the Corporation's Certificate of Incorporation or by-laws if such action would alter or change the preferences, rights, privileges or powers of, or the restrictions provided for the benefit of, such class of the Preferred Stock;

(b) increase or decrease the number of shares of such class of Preferred Stock authorized hereby;

(c) authorize or issue shares of any class or series of stock not authorized herein having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of such class of Preferred Stock; authorize or issue shares of stock of any class or series of any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having option rights to purchase, any shares of stock of this Corporation having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of such class of Preferred Stock; or

(d) reclassify any class or series of any Common Stock into shares having any preference or priority as to dividends or assets superior to or on a parity with any such preference or priority of such class of Preferred Stock;

provided, however, that this Section 6.1 shall only be effective as to the Series A Preferred Stock, while at least 1,666,667 share of Series A Preferred are outstanding, and as to the Series B Preferred Stock while at least 900,000 share of Series B Preferred Stock are outstanding.

6.2 The Corporation shall not, without first obtaining the affirmative vote or written consent of the holders of not less than a majority of the outstanding shares of all of the Preferred Stock voting as one class:



- (a) consolidate or merge the Corporation with or into any other corporation, or any entity or person, or exchange substantially all of the outstanding stock of the Corporation for shares of another entity or property, in which, after any such transaction, the prior shareholders of the Corporation hold less than fifty percent (50%) of the voting shares of the continuing or surviving entity;
- (b) sell all or substantially all of the assets of the Corporation; or
- (c) pay or declare any dividend on or other distribution with respect to any Common Stock (except dividends payable solely in shares of Common stock), or apply any of its assets to the redemption, retirement, purchase or acquisition, directly or indirectly, through subsidiaries or otherwise, of any Common Stock, except from employees, directors, and consultants of this corporation pursuant to the terms of restrictive stock agreements or as otherwise approved by the Board of Directors; provided, however, that this Section 6.2 shall only be effective while at least 2,566,667 share of Preferred Stock are outstanding.

7. Election of Directors. Notwithstanding provisions other than in this section 7, upon the first issuance by the Company of its Series B Preferred Stock, the following provisions shall determine the election of directors of the Company:

7.1 Number of Directors. The authorized number of directors shall be six (6).

7.2 Election of Directors.

(a) The holders of the Series B Preferred Stock, voting as a separate class, shall be entitled to elect two (2) of the directors of the Corporation.

(b) The holders of the Series A Preferred Stock (on an as converted to Common Stock basis) and the Common Stock, voting together as a single class, shall be entitled to elect all other directors of the Corporation.

#### Article VI.

The name and mailing address of the incorporator are as follows:

Mark Baudler, Esq.  
c/o Wilson Sonsini Goodrich & Rosati  
650 Page Mill Road  
Palo Alto, CA 94304-1050

#### Article VII.

The Corporation is to have perpetual existence.

### Article VIII.

Elections of directors need not be by written ballot unless a stockholder demands election by written ballot at the meeting and before voting begins or unless the Bylaws of the Corporation shall so provide.

### Article IX.

1. The management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors. The number of directors which constitute the whole Board of Directors of the corporation shall be designated in the Bylaws of the corporation.

2. At such time as the Company closes an underwritten public offering of the Company's common stock pursuant to an effective registration statement filed under the Securities Act of 1933, as amended, the Board of Directors shall be divided into three classes designated as Class I, Class II and Class III, respectively. Directors shall be assigned to each class in accordance with a resolution or resolutions adopted by the Board of Directors. At the first annual meeting of stockholders following such closing of an underwritten public offering, the term of office of the Class I directors shall expire and Class I directors shall be elected for a full term of three years. At the second annual meeting of stockholders following such closing of an underwritten public offering, the term of office of the Class II directors shall expire and Class II directors shall be elected for a full term of three years. At the third annual meeting of stockholders following such closing of an underwritten public offering, the term of office of the Class III directors shall expire and Class III directors shall be elected for a full term of three years. At each succeeding annual meeting of stockholders, directors shall be elected for a full term of three years to succeed the directors of the class whose terms expire at such annual meeting.

3. Notwithstanding the foregoing provisions of this Article, each director shall serve until his or her successor is duly elected and qualified or until his or her death, resignation or removal. No decrease in the number of directors constituting the Board of Directors shall shorten the term of any incumbent director.

4. Any vacancies on the Board of Directors resulting from death, resignation, disqualification, removal, or other causes shall be filled by either (i) the affirmative vote of the holders of a majority of the voting power of the then-outstanding shares of voting stock of the corporation entitled to vote generally in the election of directors ("Voting Stock") voting together as a single class; or (ii) by the affirmative vote of a majority of the remaining directors then in office, even though less than a quorum of the Board of Directors. Newly created directorships resulting from any increase in the number of directors shall, unless the Board of Directors determines by resolution that any such newly created directorship shall be filled by the stockholders, be filled only by the affirmative vote of the directors then in office, even though less than a quorum of the Board of Directors. Any director elected in accordance with the preceding sentence shall hold office for the remainder of the full term of the class of directors in which the

new directorship was created or the vacancy occurred and until such director's successor shall have been elected and qualified.

5. The affirmative vote of sixty-six and two-thirds percent (66-2/3%) of the voting power of the then outstanding shares of Voting Stock, voting together as a single class, shall be required for the adoption, amendment or repeal of the following sections of the corporation's Bylaws by the stockholders of this corporation: 2.2 (Annual Meeting) and 2.3 (Special Meeting).

6. No action shall be taken by the stockholders of the corporation except in accordance with the Bylaws.

7. Any director, or the entire Board of Directors, may be removed from office at any time (i) with cause by the affirmative vote of the holders of at least a majority of the voting power of all of the then-outstanding shares of the Voting Stock, voting together as a single class; or (ii) without cause by the affirmative vote of the holders of at least sixty-six and two-thirds percent (66-2/3%) of the voting power of all of the then-outstanding shares of the Voting Stock

#### Article X.

Notwithstanding any other provisions of this Certificate of Incorporation or any provision of law which might otherwise permit a lesser vote or no vote, but in addition to any affirmative vote of the holders of any particular class or series of the Voting Stock required by law, this Certificate of Incorporation or any Preferred Stock Designation, the affirmative vote of the holders of at least sixty-six and two-thirds percent (66-2/3%) of the voting power of all of the then-outstanding shares of the Voting Stock, voting together as a single class, shall be required to alter, amend or repeal Article IX or this Article X.

#### Article XI.

The corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, except as provided in Article X of this Certificate, and all rights conferred upon the stockholders herein are granted subject to this right.

#### Article XII.

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the Corporation.

### Article XIII.

1. To the fullest extent permitted by the Delaware General Corporation Law as the same exists or as may hereafter be amended, a director of the Corporation shall be indemnified by the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

2. The Corporation shall indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he, his testator or intestate is or was a director, officer or employee of the Corporation or any predecessor of the Corporation or serves or served at any other enterprise as a director, officer or employee at the request of the Corporation or any predecessor to the Corporation.

3. Neither any amendment nor repeal of this Article XIII, nor the adoption of any provision of this Corporation's Certificate of Incorporation inconsistent with this Article XIII, shall eliminate or reduce the effect of this Article XIII, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article XIII, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

### Article XIV.

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside of the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

### Article XV.

Advance notice of new business and stockholder nominations for the election of directors shall be given in the manner and to the extent provided in the Bylaws of the Corporation.

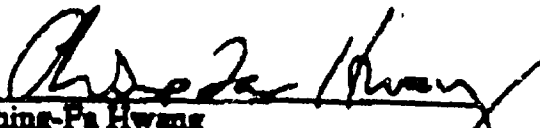
### Article XVI.

Until the Company closes an underwritten public offering of the Company's common stock pursuant to an effective registration statement filed under the Securities Act of 1933, as amended, stockholders shall be entitled to cumulative voting rights as set forth in this Article XVI and the Bylaws of the Corporation. At all elections of directors of the Corporation, each holder of stock or of any class or classes or of a series or series thereof shall be entitled to as many votes as shall equal the number of votes which (except for this provision as to cumulative voting) such stockholder would be entitled to cast for the election of directors with respect to such stockholder's shares of stock multiplied by the number of directors to be elected, and such stockholder may cast all of such votes for a single director or may distribute them among the number of directors to be voted for, or for any two or more of them as such stockholder may see fit. As of the date the Company closes an

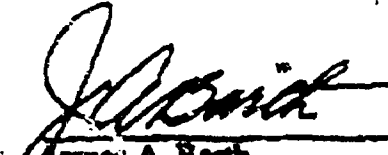
**underwritten public offering of the Company's common stock pursuant to an effective registration statement filed under the Securities Act of 1933, as amended, this Article XVI shall no longer be effective and may be deleted herefrom upon any restatement of this Certificate of Incorporation.**

IN WITNESS WHEREOF, the Company has caused this Amended and Restated Certificate of Incorporation to be signed by Ching-Fa Hwang, its President and Chief Executive Officer, effective as of June 22 1999.

NETIQ CORPORATION

  
\_\_\_\_\_  
Ching-Fa Hwang  
President and Chief Executive Officer

Attest:

  
\_\_\_\_\_  
James A. Barth  
Vice President and Chief Financial Officer



STATE OF CALIFORNIA  
FRANCHISE TAX BOARD  
PO BOX 1468  
SACRAMENTO CA 95812-1468

# TAX CLEARANCE CERTIFICATE

EXPIRATION DATE: September 15, 1999

June 24, 1999

WILLIAM S GREGORY  
COURT PLAZA BLDG  
901 H ST STE 400  
SACRAMENTO CA 95814

ISSUED TO : NETIQ CORPORATION  
ENTITY ID : 1942262

This is to certify that all taxes imposed under the Bank and Corporation Tax Law on this corporation have been paid, assumed, or are secured by other means.

If a final return has not been filed, one should be filed within two months and 15 days after the close of the month in which the dissolution or withdrawal takes place. If the corporation was inactive, a statement to that effect should be attached to the tax forms. All returns remain subject to audit until the expiration of the normal statutory period. Failure to file required returns may result in additional assessments.

A copy of this Tax Clearance Certificate has been sent to the Office of the the Secretary of State. This original Tax Clearance Certificate may be retained in the files of the corporation.

By the Expiration Date noted above, this corporation must have filed the documents required by the Secretary of State to dissolve, withdraw or merge. Requests for the appropriate documents must be directed to: Office of the Secretary of State at 1500 11th Street, 3rd Floor, Sacramento CA. 95814, or by telephone, (916) 657-5448.

NOTE: If the required documents are not filed with the Secretary of State prior to the Expiration Date noted above, the corporation will remain subject to the filing requirements of the Bank and Corporation Tax Law.

By H. Hermansen  
Tax Clearance Unit  
Special Audit Section  
Telephone (916) 845-4124



RECORDED: 10/19/1999

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REEL: 001979 FRAME: 0261