

MRD 10-5-00

11-13-2000

FORM PTO-1594



U.S. DEPARTMENT OF COMMERCE  
Patent and Trademark Office

1-31-92

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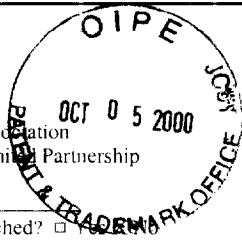
To the Honorable Commissioner of Patents and Trademarks: Please record the attached original documents or copy thereof.

1. Name of conveying party(ies):

DIAMONDDEPOT.COM, INC.

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

Additional name(s) of conveying party(ies) attached?



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

Name: ODIMO.COM, INC.

Address:  
14001 N.W. 4th Street  
Sunrise, Florida 33325

3. Nature of Conveyance:

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

Execution Date: February 8, 2000

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

If assignee is not domiciled in the United States, a domestic representative designation is attached  Yes  No  
(Designations must be a separate document from Assignment)

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

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

A. Trademark Application No.(s)

75/907,205      75/911,497  
75/907,204      75/907,203

B. Trademark registration No.(s)

Additional numbers attached?  Yes  No

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

Brian D. Anderson  
OBLON, SPIVAK, McCLELLAND, MAIER & NEUSTADT, P.C.  
Attorneys at Law  
Fourth Floor  
1755 Jefferson Davis Highway  
Arlington, Virginia 22202

OSMMN Ref: 10730/0006/13SD    BDA/cle

6. Total number of applications and registrations involved: 4

7. Total fee (37 CFR 3.41): . . . \$ 115.00

- Enclosed
- Authorized to be charged to deposit account

8. Deposit account number: 15-0030  
(Attach duplicate copy of this page if paying by deposit account)

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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.**

Brian D. Anderson  
Name of Person Signing

October 5, 2000  
Date

Total number of pages including cover sheet, attachments, and document: 17

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

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

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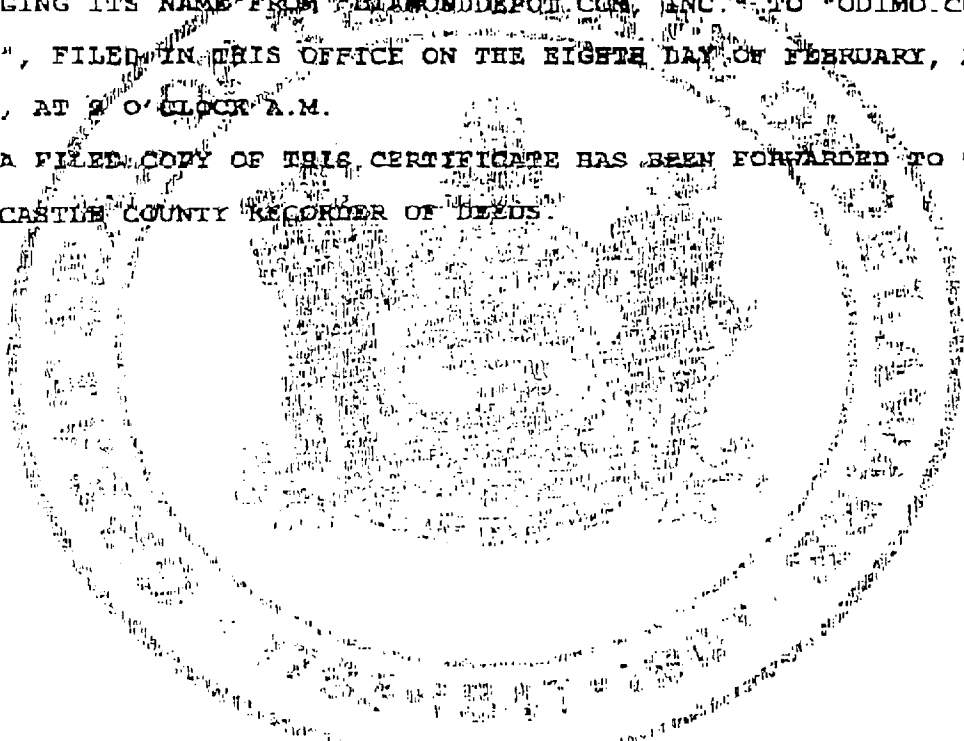
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*State of Delaware*  
*Office of the Secretary of State* PAGE 1

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 "DIAMONDDEPOT.COM, INC.", CHANGING ITS NAME FROM "DIAMONDDEPOT.COM, INC." TO "ODIMO.COM, INC.", FILED IN THIS OFFICE ON THE EIGHTE DAY OF FEBRUARY, A.D. 2000, AT 2 O'CLOCK A.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

AUTHENTICATION: 0246213

DATE: 02-09-00

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STATE OF DELAWARE  
SECRETARY OF STATE  
DIVISION OF CORPORATIONS  
FILED 09:00 AM 02/09/2000  
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AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF  
DIAMONDDEPOT.COM, INC.

The undersigned Alan Lipton hereby certifies that:

FIRST: He is the duly elected and acting President of said corporation.

SECOND: That said corporation was originally incorporated pursuant to the General Corporation Law on July 31, 1998 under the name diamondDepot.com, Inc.

THIRD: The Certificate of Incorporation of said corporation shall be amended and restated to read in full as follows:

ARTICLE I

The name of this corporation is Odimo.com, Inc.

ARTICLE II

The address of the registered office of this corporation in the State of Delaware is The Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, 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 is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

ARTICLE IV

A. Classes of Stock. The corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares that the corporation is authorized to issue is 82,512,623, of which 65,000,000 shares shall be Common Stock, par value \$0.001 per share, and 17,512,623 shares shall be Preferred Stock, par value \$0.001 per share.

B. Rights, Preferences and Restrictions of Preferred Stock. The Preferred Stock authorized by this Amended and Restated Certificate of Incorporation may be issued from time to time in one or more series. The rights, preferences, privileges, and restrictions granted to and imposed on the Series A Preferred Stock, which series shall consist of 4,666,567 shares (the

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"Series A Stock") and the Series B Preferred Stock, which series shall consist of 12,845,936 shares (the "Series B Stock") are as set forth below.

1. Dividend Provisions.

(a) The holders of Series B Stock shall be entitled to receive annual dividends, out of any assets legally available therefor, at a rate of 8% of the original Series B Issue Price prior to any dividend distributions being made by the corporation to any of its other stockholders, including holders of any other series of Preferred Stock (collectively, "Junior Stockholders"), payable when, as, and if declared by the Board of Directors. Such dividends shall be cumulative. The "Original Series B Issue Price" shall be \$2.8219 per share (subject to adjustment for stock splits, subdivisions, stock dividends, recapitalizations, reclassifications or similar events). The holders of Series B Stock shall also be entitled to receive any non-cash dividends declared by the Board of Directors on an as-converted basis.

(b) Subject to the prior rights of the holders of Series B Stock, the holders of Series A Stock shall be entitled to receive annual dividends, out of any assets legally available therefor, at a rate of 8% of the original Series A Issue Price (as defined below) prior to any dividend distributions being made by the corporation to any holders of Common Stock payable when, as, and if declared by the Board of Directors. Such dividends shall not be cumulative. The "Original Series A Issue Price" shall be \$1.4357141 per share (subject to adjustment for stock splits, subdivisions, stock dividends, recapitalizations, reclassifications or similar events).

2. Liquidation Preference.

(a) In the event of any liquidation, dissolution, winding up or upon any event which constitutes a Deemed Liquidation Event (as defined herein) (a "Liquidation"), either voluntary or involuntary, any payments or distributions to be received by the stockholders of the corporation shall be made in the order of priority as follows:

(i) The holders of Series B Stock shall be entitled to receive, prior and in preference to any distribution of any of the assets of the corporation to the Junior Stockholders, by reason of their ownership thereof, in cash, an amount per share equal to the Original Series B Issue Price, plus any accrued but unpaid dividends (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares, and as further subject to adjustment as set forth herein) (the "Series B Liquidation Amount"). If the assets are insufficient to permit payment of the Liquidation Amount in full to all holders of Series B Stock, the assets shall be distributed ratably to the holders of Series B Stock in proportion to the amount each such holder would otherwise be entitled to receive.

(ii) After payment of the Series B Liquidation Amount to the holders of Series B Stock, to the extent there are additional assets available for distribution to stockholders, the holders of Series A Stock shall be entitled to receive prior and in preference to any distribution of any of the assets of the corporation to holders of the Corporation's Common Stock, by reason of their ownership thereof, in cash, an amount per share equal to the Original Series A Issue Price, plus any accrued but unpaid dividends (as adjusted for any stock dividends,

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combinations, splits, recapitalizations and the like with respect to such shares, and as further subject to adjustment as set forth herein) (the "Series A Liquidation Amount").

(iii) After payment of the Series A Liquidation Amount to the holders of Series A Stock in accordance with Section 2(a)(ii) above, to the extent there are additional assets available for distribution to stockholders, any remaining proceeds shall be distributed to the holders of the Series A Stock (on an as-converted basis to Common Stock), the holders of Series B Stock (on an as-converted basis to Common Stock) and the holders of Common Stock pro rata based on the number of shares of Common Stock (on an as-converted basis) held by each holder.

(iv) Notwithstanding any of the above provisions contained in this Section 2(a), if the total Series B Liquidation Amount payable under this Section 2(a) to the holders of Series B Stock shall exceed three times the Series B Issue Price, the provisions of Section 2(a)(i), (ii) and (iii) shall be void and all assets available for distribution to stockholders shall be distributed to the holders of Series A Stock (on an as-converted basis to Common Stock), Series B Stock (on an as-converted basis to Common Stock) and the holders of Common Stock pro rata based on the number of shares of Common Stock (on an as-converted basis) held by each holder.

(b) A "Deemed Liquidation Event" shall mean any of the following events: (i) a merger or consolidation where the corporation is not a surviving entity and the survivor is not an affiliate of a stockholder at the time of merger or consolidation or where the corporation is a surviving entity but the majority of the stockholders of the merged company were not stockholders of the corporation prior to the merger or consolidation and the majority of stockholders of the merged company are not affiliates of stockholders of the Corporation at the time of the merger, (ii) a sale, lease or other disposal of all or substantially all of the corporation's securities or assets, or (iii) any similar transaction or series of transaction which causes either of the foregoing.

(c) If the distribution described in this Section 2, or a part thereof, is made in property or securities other than cash, the Board of Directors of the corporation shall determine the fair market value of the distribution in good faith and the holders of the Series A Stock, Series B Stock and Common Stock shall receive property or securities which represent the amount each holder is otherwise entitled pursuant to the preferences set forth above.

3. Conversion. The holders of the Series A and Series B Preferred Stock shall have conversion rights as follows (the "Conversion Rights"):

(a) Right to Convert. Each share of Series A and 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 obtained by multiplying the number of shares of Series A and Series B Preferred Stock so to be converted by a fraction, (A) the numerator of which is the Original Series A Issue Price or the Original Series B Issue Price, as the case may be, and (B) the denominator of which is the then applicable conversion price

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(such price, or such price as last adjusted, being referred to herein as the "Conversion Price"). The initial Conversion Price per share for the Series A Stock shall be \$0.2871428 and the initial Conversion Price per share for the Series B Stock shall be \$2.8219; provided, however, that the Conversion Price for the Series A and Series B Preferred Stock shall be subject to adjustment as set forth in this Section 3.

(b) Automatic Conversion. (i) Except as provided in Section 3(c), the outstanding shares of Series A Stock shall automatically convert (and the rights and preferences contained in this Amended and Restated Certificate of Incorporation shall terminate) into shares of Common Stock at the Conversion Price for the Series A Stock then in effect on or after the consummation by the corporation of a sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act of 1933 (the "1933 Act"), as amended, which results in net proceeds to the corporation of at least \$10 million (a "Series A Qualified IPO") (subject to the adjustments contained herein) and the value of the corporation immediately prior to such Series A Qualified IPO is at least \$100 million.

(ii) Except as provided in Section 3(c), the outstanding shares of Series B Stock shall automatically convert (and the rights and preferences contained in this Amended and Restated Certificate of Incorporation shall terminate) into shares of Common Stock at the Conversion Price for the Series B Stock then in effect on or after the consummation by the corporation of a sale of its Common Stock in a firm commitment underwritten public offering pursuant to a registration statement under the Securities Act of 1933 (the "1933 Act"), as amended, which results in gross proceeds to the corporation of at least \$50 million (a "Series B Qualified IPO") (subject to the adjustments contained herein).

(c) Mechanics of Conversion. Before any holder of Series A or Series B Preferred Stock shall be entitled to convert the same into shares of Common Stock, he or she shall surrender the certificate or certificates therefor, duly endorsed, at the office of the corporation or of any transfer agent for the Preferred Stock, and shall give written notice to the corporation at its principal corporate office, of the election to convert the same and shall state therein the name or names in which the certificate or certificates for shares of Common Stock are to be issued. The corporation shall, as soon as practicable thereafter, issue and deliver at such office to such holder of Preferred Stock, or to the nominee or nominees of such holder, a certificate or certificates for the number of shares of Common Stock to which such holder shall be entitled as aforesaid. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such 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 as of such date. If the conversion is in connection with a Series A or Series B Qualified IPO, as the case may be, the conversion may, at the option of any holder tendering 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 such 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.

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(d) For purposes of this Section 3(d), the following paragraphs (1) and (2) shall be applicable:

(1) Adjustment of Price Upon Issuance of Common Stock Below Conversion Price. Other than (i) upon conversion of the Series A or Series B Preferred Stock, (ii) the issuance of up to an aggregate of 6,050,002 shares of Common Stock pursuant to the exercise of options issued and issuable to employees, consultants or directors of the corporation under any agreement, arrangement or plan, where the primary purpose is not to raise additional equity capital, and which options are issued within the twelve months from the date on which the Series B Stock is issued (the "Original Series B Issue Date") or prior to the Original Series B Issue Date (iii) the issuance of any shares of Common Stock as direct consideration for the acquisition by the corporation of another business entity or the merger of any business entity with or into the corporation, (iv) the issuance of any shares of Common Stock in connection with a stock split or dividend, or a recapitalization or reorganization of the corporation, (v) the issuance of any shares of Common Stock in connection with the exercise or conversion of any options, warrants or other equity-based securities issued by the corporation prior to the issuance of the Preferred Stock, (vi) the issuance of Common Stock in connection with any agreement with a lending or leasing institution, approved by the corporation's Board of Directors, (vii) the issuance of Common Stock made in connection with a Series A or Series B Qualified IPO, or (viii) as provided for in another applicable paragraph of this Section 3, if and whenever the corporation shall issue or sell, or is, in accordance with Section 3(e)(1) through 3(e)(4), deemed to have issued or sold, any shares of Common Stock for a consideration per share less than the then-applicable Series A or Series B Conversion Price in effect immediately prior to the time of such issue or sale, then, forthwith upon such issue or sale, the Series A or Series B Conversion Price of the Preferred Stock, as the case may be, shall be reduced to the price determined by multiplying the then applicable Series A or Series B Conversion Price by a fraction, the numerator of which is (i) an amount equal to the sum of (a) the number of shares of Common Stock outstanding immediately prior to such issue or sale, plus (b) the total number of shares of Common Stock the consideration, if any, received by the corporation upon such issue or sale would purchase at the Series A or Series B Conversion Price in effect immediately prior to the issue or sale, and the denominator of which is (ii) the total number of shares of Common Stock outstanding immediately after such issue or sale.

(2) Adjustment of Series B Preferred Stock Conversion Price Upon Issuance of Excess Options. In the event the corporation, within twelve months of the Original Series B Issue Date, issues options to purchase Common Stock in excess of the 6,050,002 shares reserved as of the date hereof (the "Excess Shares") for issuance pursuant to any stock grant, option plan, purchase plan or other stock incentive program or arrangement approved by the Board of Directors, then at such time the Series B Conversion Price shall be adjusted to equal the product of (x) the Post Option Exercise Per Share, divided by the Original Series B Issues Price, multiplied by (y) the Conversion Price in effect prior to such adjustment. For purposes of this paragraph, the "Post Option Exercise Per Share" shall equal the quotient obtained by dividing 156,250,000 by the sum of (A) all issued and outstanding Common Stock (assuming the conversion of all Preferred Stock into Common Stock) as of the Original Series B Issue Date plus (B) the Excess Shares."

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To the extent that the issuance of options to purchase Excess Shares would cause an adjustment in the Conversion Price under both paragraphs (1) and (2) of this Section 3(d), the adjustment in paragraph (1) shall be applied first.

(e) For purposes of this Section 3(e), the following paragraphs (1) through (4) shall be applicable:

(1) Issuance of Rights or Options. In case at any time the corporation shall in any manner grant (whether directly or by assumption in a merger or otherwise) any warrants or other rights to subscribe for or to purchase, or any options for the purchase of, Common Stock or any stock or security convertible into or exchangeable for Common Stock (such warrants rights or options being called "Options" and such convertible or exchangeable stock or securities being called "Convertible Securities") whether or not such Options or the right to convert or exchange any such Convertible Securities are immediately exercisable, and the price per share for which Common Stock is issuable upon the exercise of such Options or upon the conversion or exchange of such Convertible Securities (determined by dividing (i) the total amount, if any, received or receivable by the corporation as consideration for the granting of such Options, plus the minimum aggregate amount of additional consideration payable to the corporation upon the exercise of all such Options, plus, in the case of such Options which relate to Convertible Securities, the minimum aggregate amount of additional consideration, if any, payable upon the issue or sale of such Convertible Securities and upon the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon the conversion or exchange of all such Convertible Securities issuable upon the exercise of such Options) shall be less than the Series A or Series B Conversion Price in effect immediately prior to the time of the granting of such Options, then the total maximum number of shares of Common Stock issuable upon the exercise of such Options or upon conversion or exchange of the total maximum amount of such Convertible Securities shall be deemed to have been issued for such price per share as of the date of granting of such Options or the issuance of such Convertible Securities and thereafter shall be deemed to be outstanding. Except as otherwise provided in paragraph (3) of this Section 3(e), no adjustment of such Series A or Series B Conversion Price shall be made upon the actual issue of such Common Stock or of such Convertible Securities upon exercise of such Options or upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities.

(2) Issuance of Convertible Securities. In case the corporation shall in any manner issue (whether directly or by assumption in a merger or otherwise) or sell any Convertible Securities, whether or not the rights to exchange or convert any such Convertible Securities are immediately exercisable, and the price per share for which Common Stock is issuable upon such conversion or exchange (determined by dividing (i) the total amount received or receivable by the corporation as consideration for the issue or sale of such Convertible Securities, plus the minimum aggregate amount of additional consideration, if any, payable to the corporation upon the conversion or exchange thereof, by (ii) the total maximum number of shares of Common Stock issuable upon the conversion or exchange of all such Convertible Securities) shall be less than the Series A or Series B Conversion Price in effect immediately prior to the time of such issue or sale, then the total maximum number of shares of Common Stock issuable upon conversion or exchange of all such Convertible Securities shall be deemed



to have been issued for such price per share as of the date of the issue or sale of such Convertible Securities and thereafter shall be deemed to be outstanding, *provided that* (a) except as otherwise provided in paragraph (3) of this Section 3(e), no adjustment of such Series A or Series B Conversion Price shall be made upon the actual issue of such Common Stock upon conversion or exchange of such Convertible Securities and (b) if any such issue or sale of such Convertible Securities is made upon exercise of any Options to purchase any such Convertible Securities for which adjustments of such Series A or Series B Conversion Price have been or are to be made pursuant to other provisions of this Section 3(d), no further adjustment of such Conversion Price shall be made by reason of such issue or sale.

(3) Change in Option Price or Conversion Rate. Upon the happening of any of the following events, namely, if the purchase price provided for in any Option referred to in paragraph (1) of this Section 3(d), the additional consideration, if any, payable upon the conversion or exchange of any Convertible Securities referred to in paragraph (1) or (2) of this Section 3(e), or the rate at which Convertible Securities referred to in paragraph (1) or (2) are convertible into or exchangeable for Common Stock shall change at any time (including, but not limited to, changes under or by reason of provisions designed to protect against dilution), the Series A or Series B Conversion Price in effect at the time of such event shall forthwith be readjusted to the Series A or Series B Conversion Price which would have been in effect at such time had such Options or Convertible Securities still outstanding provided for such changed purchase price, additional consideration or conversion rate, as the case may be, at the time initially granted, issued or sold, but only if as a result of such adjustment the Series A or Series B Conversion Price then in effect hereunder is thereby reduced, and on the termination of any such Option or any such right to convert or exchange such Convertible Securities, the Series A or Series B Conversion Price then in effect hereunder shall forthwith be increased to the Series A or Series B Conversion Price which would have been in effect at the time of such termination had such Option or Convertible Securities, to the extent remaining outstanding immediately prior to such termination, never been issued.

(4) Consideration for Stock. In case any shares of Common Stock, Options or Convertible Securities shall be issued or sold for cash, the consideration received therefor shall be deemed to be the amount received by the corporation therefor, without deduction therefrom of any expenses incurred or any underwriting commissions or concessions paid or allowed by the corporation in connection therewith. In case any shares of Common Stock, Options or Convertible Securities shall be issued or sold for a consideration other than cash, the amount of the consideration other than cash received by the corporation shall be deemed to be the fair value of such consideration as determined in good faith by the Board of Directors of the corporation, without deduction of any expenses incurred or any underwriting commissions or concessions paid or allowed by the corporation in connection therewith except where such consideration consists of securities, in which case the amount of consideration received by the corporation shall be the fair market value thereof as of the date of receipt. In case any Options shall be issued in connection with the issue and sale of other securities of the corporation, together comprising one integral transaction in which no specific consideration is allocated to such Options by the parties thereto, such Options shall be deemed to have been issued for such consideration as determined in good faith by the Board of Directors of the corporation.

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(f) Conversion Price Adjustments of Preferred Stock for Certain Splits and Combinations. In the event the corporation should, at any time or from time to time, fix a record date for the effectuation of a split or subdivision of the outstanding shares of Common Stock or the determination of holders of Common Stock entitled to receive a dividend or other distribution payable in additional shares of Common Stock or other securities or rights convertible into, or entitling the holder thereof to receive directly or indirectly, additional shares of Common Stock (hereinafter referred to as "Common Stock Equivalents") without payment of any consideration by such holder for the additional shares of Common Stock or the Common Stock Equivalents (including the additional shares of Common Stock issuable upon conversion or exercise thereof), then, as of such record date, the Series A and Series B Conversion Prices shall be appropriately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be the number of shares of Common Stock which would have been issued after the happening of any of the events described above had such conversion occurred immediately prior to the record date (or the date of such dividend distribution, split or subdivision if no record date is fixed). If the number of shares of Common Stock outstanding at any time after the issuance of the Series A and Series B Preferred Stock is decreased by a combination of the outstanding shares of Common Stock, then, following the record date of such combination (or the date of such combination if no such record date is fixed), the Series A and Series B Conversion Prices shall be appropriately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be the number of shares of Common Stock which would have been issued after the combination had such conversion occurred immediately prior to the record date (or the date of such combination if no such record date is fixed).

(g) Other Distributions. In the event the corporation shall declare a distribution payable in securities of other persons, evidences of indebtedness issued by the corporation or other persons, assets (excluding cash dividends) or options or rights not referred to in Section 3(e), then, in each such case for the purpose of this Section 3(e), the holders of the Series A and Series B Preferred Stock shall be entitled to a proportionate share of any such distribution as though they were the holders of the number of shares of Common Stock of the corporation into which their shares of Preferred Stock are convertible as of the record date fixed for the determination of the holders of Common Stock of the corporation entitled to receive such distribution.

(h) Recapitalizations, Reclassifications, Exchanges and Substitutions. If, at any time or from time to time, whether pursuant to a transaction with another entity or otherwise, there shall be a recapitalization, reclassification, exchange, substitution or other change of the Common Stock (other than pursuant to a subdivision, combination or merger or sale of assets transaction provided for elsewhere in Section 2 or this Section 3), provision shall be made so that the holders of the Series A and Series B Preferred Stock shall thereafter be entitled to receive upon conversion of the Series A and Series B Preferred Stock the kind and amount of stock or other securities or property to which a holder of the Common Stock deliverable upon conversion of the Series A and Series B Preferred Stock would have been entitled on the recapitalization, reclassification, exchange, substitution or other change. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 3 with respect to the rights of the holders of the Series A and Series B Preferred Stock after such recapitalization,

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reclassification, exchange, substitution or other change, to the end that the provisions of this Section 3 (including adjustment of the Series A and Series B Conversion Prices then in effect and the number of shares purchasable upon conversion of the Series A and Series B Preferred Stock) shall be applicable after that event as nearly equivalent as may be practicable.

(i) No Impairment. The corporation will not, by amendment of its Certificate of Incorporation or through any reorganization, recapitalization, 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 3 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 Series A and Series B Preferred Stock against impairment.

(j) No Fractional Shares and Certificate as to Adjustments. No fractional shares shall be issued upon conversion of any share or shares of the Series A and Series B Preferred Stock, and the number of shares of Common Stock to be issued shall be rounded to the nearest whole share with one-half being rounded upward. Whether or not fractional shares are issuable upon such conversion shall be determined on the basis of the total number of shares of Series A or Series B Preferred Stock the holder has at the time converting into Common Stock and the number of shares of Common Stock issuable upon such aggregate conversion. Upon the occurrence of each adjustment or readjustment of the Series A or Series B Conversion Prices pursuant to this Section 3, 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 Series A or Series B Preferred Stock, as the case may be, a certificate 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 Series A or Series B Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (A) such adjustment and readjustment, (B) the Series A or Series B Conversion Price for such series of Preferred Stock at the time in effect, and (C) 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 a share of the Series A or Series B Preferred Stock.

(k) Notice of Record Date. In the event of any taking by the corporation of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend (other than a cash dividend) or other distribution, any right to subscribe for, purchase or otherwise acquire any shares of stock of any class or any other securities or property, or to receive any other right, the corporation shall mail to each holder of Series A and Series B Preferred Stock, at least 20 days prior to the date specified therein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend, distribution or right, and the amount and character of such dividend, distribution or right.

(l) 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 the Series A and Series B Preferred Stock, such number of its shares of Common Stock as shall from time to time be

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sufficient to effect the conversion of all outstanding shares of the Series A and Series B 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 Series A and Series B Preferred Stock, in addition to such other remedies as shall be available to the holder of such 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 purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to these articles.

(m) Notices. Any notice required by the provisions of this Section 3 to be given to the holders of Series A and Series B Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid, and addressed to each holder of record at his or her address appearing on the books of the corporation.

#### 4. Voting Rights.

(a) The holder of each share of Series A and Series B Preferred Stock shall have the right to one vote for each share of Common Stock into which such Preferred Stock could then be converted, and with respect to such vote, such holder shall have full voting rights and powers equal to the voting rights and powers of the holders of Common Stock, and shall be entitled, notwithstanding any provision hereof, to notice of any stockholders' meeting in accordance with the bylaws of the corporation, and shall be entitled to vote, together with holders of Common Stock, with respect to any question upon which holders of Common Stock have the right to vote, except with respect to the rights of the holders of Series B Stock to elect directors, which shall be governed solely by Section 4(c) below, and as may be otherwise provided herein or by applicable law. Fractional votes shall not, however, be permitted and any fractional voting rights available on an as-converted basis (after aggregating all shares into which shares of Series A Preferred Stock and Series B Preferred Stock held by each holder could be converted) shall be rounded to be nearest whole number (with one-half being rounded upward).

(b) For so long as any shares of Series B Preferred Stock shall remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Series B Preferred Stock shall be necessary for effecting or validating the following actions:

(i) Any amendment, alteration, repeal or waiver of any provision of this Amended and Restated Certificate of Incorporation or the Bylaws of the corporation (including any filing of a Certificate of Designation) that alters or changes the voting or other powers, preferences or other special rights, privileges or restrictions of the Series B Stock;

(ii) Any increase or decrease in the authorized number of shares of Common Stock, or Preferred Stock or any series of Preferred Stock;

(iii) Any authorization or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities convertible into equity

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securities of the corporation ranking on a parity with or senior to the Series B Stock in right of redemption, liquidation preference, voting or dividends or any increase in the authorized or designated number of any such new class or series;

(iv) Any redemption, repurchase, payment of dividends or other distributions with respect to Common Stock (except for acquisitions of Common Stock by the corporation pursuant to agreements which permit the corporation to repurchase such shares upon termination of services to the corporation or in exercise of the corporation's right of first refusal upon a proposed transfer);

(v) Any transaction between the corporation and any founder, officer or director other than in the ordinary course of business on an arm's-length basis;

(vi) Any action that results in the payment or declaration of a dividend on any shares of Common Stock (other than a dividend payable solely in shares of the Common Stock);

(vii) Any approval of a transaction involving the sale, merger, liquidation or change of control of the corporation;

(viii) Any material change in the corporation's line of business; or

(ix) Any incurrence of debt in excess of the net worth of the corporation at the time of the proposed incurrence of debt.

(c) For so long as any shares of Series B Stock remains outstanding, the holders of Series B Stock, voting as a separate class, shall be entitled to elect such number of directors to the corporation's Board of Directors as is proportionate to its ownership of the corporation (based on the number of shares of Common Stock outstanding and issuable on conversion of outstanding shares of Preferred Stock), but in no event shall that number be less than one.

5. Status of Converted Stock. In the event any shares of Preferred Stock shall be converted pursuant to Section 3 hereof, the shares so converted shall be canceled and shall not be issuable by the corporation. The Certificate of Incorporation of the corporation shall be appropriately amended to effect the corresponding reduction in the corporation's authorized capital stock.

C. Common Stock. The rights, preferences, privileges and restrictions granted to and imposed on the Common Stock are as set forth below in this Article IV(C).

1. Dividend Rights. Subject to the prior rights of holders of all classes of stock at the time outstanding having prior rights as to dividends, the holders of the Common Stock shall be entitled to receive, when and as declared by the Board of Directors, out of any assets of the corporation legally available therefor, such dividends as may be declared from time to time by the Board of Directors.

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2. Liquidation Rights. Upon Liquidation, the assets of the corporation shall be distributed as provided in Section 2 of Division (B) of this Article IV.

3. Redemption. The Common Stock is not redeemable.

4. Voting Rights. The holder of each share of Common Stock shall have the right to one vote for each such share, and shall be entitled to notice of any stockholders' meeting in accordance with the Bylaws of the corporation, and shall be entitled to vote upon such matters and in such manner as may be provided by law.

ARTICLE V

Except as otherwise provided in this Amended and Restated Certificate of Incorporation, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, repeal, alter, amend and rescind any or all of the Bylaws of the corporation.

ARTICLE VI

The number of directors of the corporation shall be fixed from time to time by a Bylaw or amendment thereof duly adopted by the Board of Directors or by the stockholders.

ARTICLE VII

A director of the corporation shall, to the fullest extent permitted by the General Corporation Law as it now exists or as it may hereafter be amended, not be personally liable to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the General Corporation Law, or (iv) for any transaction from which the director derived any improper personal benefit. If the General Corporation Law is amended, after approval by the stockholders of this Article, to authorize action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law, as so amended.

Any amendment, repeal or modification of this Article VII, or the adoption of any provision of this Restated Certificate of Incorporation inconsistent with this Article VII, by the stockholders of the corporation shall not apply to or adversely affect any right or protection of a director of the corporation existing at the time of such amendment, repeal, modification or adoption.

ARTICLE VIII

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

ARTICLE IX

To the fullest extent permitted by applicable law, the corporation is authorized to provide indemnification of (and advancement of expenses to) agents of the corporation (and any other persons to which General Corporation Law permits the corporation to provide indemnification) through Bylaw provisions, agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the General Corporation Law, subject only to limits created by applicable General Corporation Law (statutory or non-statutory), with respect to actions for breach of duty to the corporation, its stockholders, and others.

Any amendment, repeal or modification of the foregoing provisions of this Article IX shall not adversely affect any right or protection of a director, officer, agent, or other person existing at the time of, or increase the liability of any director of the corporation with respect to any acts or omissions of such director, officer or agent occurring prior to, such amendment, repeal or modification.

FOURTH: The foregoing amendment and restatement was approved by the holders of the requisite number of shares of said corporation in accordance with Section 228 of the General Corporation Law.

FIFTH: That said amendment and restatement was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law.

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IN WITNESS WHEREOF, this Amended and Restated Certificate of  
Incorporation has been executed by the President of this Corporation on this 9th day of  
February, 2000.

  
\_\_\_\_\_  
Alan Lipton, President