

06-10-2002

Form PTO-1594 (Rev. 03/01) OMB No. 0651-0027 (exp. 5/31/2002) Tab settings



U.S. DEPARTMENT OF COMMERCE U.S. Patent and Trademark Office

102116667

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

1. Name of conveying party(ies): eCreativeSearch, Inc., 6-3-02 a Delaware corporation

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

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

3. Nature of conveyance: Assignment Merger Security Agreement Change of Name Other

Execution Date: November 21, 2002

2. Name and address of receiving party(ies) Name: FastChannel Network, Inc.

Internal Address: Street Address: 2 Brighton Street City: Belmont State: MA

- 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 (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) 76/116830 75/927328 B. Trademark Registration No.(s)

Additional number(s) attached Yes No

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

Name: MELISSA A. VALLONE, ESQ.

Internal Address: BARNES & THORNBURG

Street Address: 10 South LaSalle Street

2600 Chase Plaza

City: Chicago State: IL Zip: 60603

6. Total number of applications and registrations involved: 2

7. Total fee (37 CFR 3.41) \$ 65.00

- Enclosed If additional fees are required, Authorized to be charged to deposit account

8. Deposit account number: 10-0435 (Attorney Ref: 32323-100)

(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.

Melissa A. Vallone

Signature

6/3/02

Name of Person Signing

Signature

Date

Total number of pages including cover sheet, attachments, and document: 14

Mail documents to be recorded with required cover sheet information to: Commissioner of Patent & Trademarks, Box Assignments Washington, D.C. 20231

ANNEX A**WRITTEN CONSENT OF STOCKHOLDERS
IN LIEU OF SPECIAL MEETING OF STOCKHOLDERS****OF****FASTCHANNEL NETWORK, INC.****November 21, 2001**

The undersigned stockholders of FastChannel Network, Inc., a Delaware corporation (the "Corporation") being at least (i) a majority in interest of the holders of the outstanding shares of capital stock of the Corporation and (ii) a majority in interest of the holders of the outstanding shares of Series B Preferred Stock and Series C Preferred Stock voting together as a class, do hereby take, pursuant to Section 228 of the General Corporation Law of the State of Delaware and the Corporation's By-laws, the following actions by written consent and without a meeting, which actions shall have the same force and effect as if duly adopted at a meeting:

Approval of Merger Agreement

- RESOLVED:** That the Agreement and Plan of Reorganization (the "Merger Agreement") by and among the Corporation, eCreativeSearch, Inc., a Delaware corporation, eCreative Acquisition Company, a Delaware corporation and a wholly-owned subsidiary of the Corporation, Nancy Bernstein and Karen Kovach in substantially the form attached hereto as Exhibit A is hereby approved in all respects.
- RESOLVED:** That any and all actions, whether previously or subsequently taken by the Directors of the Corporation, which are consistent with the intent and purposes of the foregoing resolution, shall be and hereby are, in all respects, ratified, approved and confirmed.
- RESOLVED:** That the appropriate officers of the Corporation be, and each of them acting singly hereby is, authorized in the name and on behalf of the Corporation and under its corporate seal, if desired, attested by an appropriate officer, if desired, to execute, make oath to, acknowledge and deliver the Merger Agreement and all such additional documents, waivers, consents, agreements, certificates and other instruments, make all such payments, make all such filings and otherwise (and any such filings heretofore made are hereby ratified), and do all such other acts and things

as in their opinion, or in the opinion of any of them, that may be necessary or advisable in order to effectuate the transactions contemplated by the foregoing resolutions.

Approval of the Certificate of Amendment to the Amended and Restated Certificate of Incorporation

- RESOLVED:** That the Certificate of Amendment to the Amended and Restated Certificate of Incorporation of the Corporation (the "Certificate") in substantially the form attached hereto as Exhibit B is hereby approved in all respects.
- RESOLVED:** That the officers of the Corporation are hereby authorized and directed to file with the Secretary of State of the State of Delaware the Certificate, which Certificate shall amend and restate Article IV of such Certificate.
- RESOLVED:** That any and all actions, whether previously or subsequently taken by the Directors of the Corporation, which are consistent with the intent and purposes of the foregoing resolutions, shall be and hereby are, in all respects, ratified, approved and confirmed.
- RESOLVED:** That the appropriate officers of the Corporation be, and each of them acting singly hereby is, authorized in the name and on behalf of the Corporation and under its corporate seal, if desired, attested by an appropriate officer, if desired, to execute, make oath to, acknowledge and deliver such additional documents, waivers, consents, agreements, certificates and other instruments, make all such payments, make all such filings and otherwise (and any such filings heretofore made are hereby ratified), and do all such other acts and things as in their opinion, or in the opinion of any of them, that may be necessary or advisable in order to effectuate the transactions contemplated by the foregoing resolutions.

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Approval of Amendment to Corporation's 2000 Stock Option Plan

RESOLVED: That an Amendment to the Corporation's 2000 Stock Option and Incentive Plan (the "2000 Plan") in the form attached hereto as Exhibit C, pursuant to which the aggregate number of shares of Common Stock that the Corporation may issue is increased from 900,000 shares to 1,500,000 shares, such number of shares of Common Stock subject to further future adjustment in accordance with the terms of the 2000 Plan is, hereby, ratified, confirmed and approved in all respects.

RESOLVED: That the proper officers of the Corporation are each, acting alone, hereby authorized from time to time, in the name and on behalf of the Corporation, and under its corporate seal, if desired, to execute, make oath to, acknowledge and deliver any and all such orders, directions, certificates and other instruments and papers, and to do or cause to be done any and all such other acts and things, as may, in his, her or their judgment, be necessary, desirable, appropriate or convenient in connection with the consummation of the transactions contemplated by the foregoing resolution.

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- (k) any amendment of any outstanding security of Company;
- (l) any making of any loan, advance or capital contributions to or investment in any Person;
- (m) any change in the business or operations or in the manner of conducting the business or operations of Company other than changes in ordinary course of business;
- (n) except as reflected on the Balance Sheet, any mortgage, pledge or subjection of any properties or assets to any claim, Lien or liability, except claims, Liens or liabilities for taxes not yet due;
- (o) any write-down of the value of any inventory, or write-off of any notes or accounts receivable or any portion thereof as uncollectible, other than valuation reserves established for inventory and receivables;
- (p) any cancellation or release of any other debts or claims, or waivers of any rights;
- (q) any sale, transfer or conveyance of any property or assets, except in the ordinary course of business consistent with past practice;
- (r) any disposition of, or lapse, or other failure to preserve the exclusive rights of the Company to any Proprietary Rights;
- (s) any payments, loans or advances of any amount to or in respect of, or sale, transfer or lease of any properties or assets to, or the entering into of any agreement, arrangement or transaction with any of the Stockholders, officers or directors of Company, any Affiliate or associate of any of the Stockholders, Company or any officer or director of Company, or any business or entity in which any of the Stockholders or Company, or any Affiliate or associate of any such person, has any direct or material indirect interest;
- (t) any lease of real or personal property; or
- (u) any agreement, whether in writing or otherwise, to take any action described in this Section 3.08.

3.09. Right to Domain Name and Content. Schedule 3.09 sets forth a complete list of all domain names registered by Company with any administrative bodies (the "Company Domain Names"). Except as set forth on Schedule 3.09(b), Company has duly registered with all required authorities all of the Company Domain Names, and is the sole and exclusive owner of and possesses all rights necessary to use the Company Domain Names. All such Company Domain Name registrations are set forth on Schedule 3.09 attached hereto and are current, active and fully paid. Listed on Schedule 3.09 is the expiration date of each such Company Domain Name registration. Except as disclosed in Schedule 3.09(a), Company has the sole and exclusive right

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to operate Company Websites and to reproduce, use, perform, operate, market, develop, sell, license, display, distribute, publish, transmit and create derivative works of all information, Content, software and other materials available at the Company Websites, subject to the rights of third parties as disclosed in Schedule 3.09.

3.10. Right and Title to Company Software; Performance.

(a) The Company Software consists of the software listed on Schedule 3.10 (the "Company Software"), which constitutes all computer software programs (including, without limitation, all machine-readable code, source code, program listings and documentation in whatever form) used by Company on the Company Websites, other than Third Party Rights (as defined in Section 3.14). With respect to Company Software set forth on Schedule 3.10, Company has sole and exclusive right to develop, perform, use, create derivative works of, operate, reproduce, market, sell, license, display, distribute, publish and transmit the Company Software and the Company Websites. The operation of the Company Software and Company Websites does not infringe upon, violate or constitute a misappropriation of any copyrights, patents, trademarks, trade secrets or any other intellectual property or other right of any other Person or of any applicable law or regulation. Company warrants that, except for the Third Party Rights, it has all right, title and interest to the Company Software and Company Websites and that no other Person has any interest in, or right or claim to, the Company Software or Company Websites or any part thereof. Upon the Closing, the Surviving Company will have sole and exclusive right, title and interest in the Company Software and Company Websites (other than Third Party Rights), such that Parent shall thereafter have sole and exclusive rights (other than Third Party Rights) to perform, reproduce, create derivative works of, develop, use, operate, market, sell, license, display, publish, transmit and distribute the Company Software and Company Websites, free of all encumbrances or claims of infringement of the rights of any Person.

(b) With regard to the Third Party Rights, Company has all necessary rights and licenses to use such software and rights as they are currently used by Company, and, except as otherwise disclosed herein (including Schedules hereto), has all necessary rights to transfer such rights and licenses to Parent hereunder for use on Company Websites and on Parent's websites, subject to any restrictions explicitly noted herein (including Schedules hereto) which limit the use of any of the Company Software to specified machines at specified locations.

3.11. Website Content. Schedule 3.11 sets forth a comprehensive list of third parties which have included Content on the Company Websites and any license or other agreement relating to Company's use of such Content. Except as set forth on Schedule 3.11(b), upon the Closing, the surviving Company will have all rights which Company now holds to use such Content. Furthermore, Company currently has all necessary rights and licenses to continue the business of Company as it has been conducted in the past twelve months on substantially the same terms. Upon the Closing, the surviving Company will own all such rights so that Parent can continue the business of Company as now conducted.

3.12 Registered Users. As of October 31, 2001, the total number of companies which are registered as users with Company and which have active passwords to access the Company

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Websites was at least 600. Company knows of no existing or anticipated reason that could be reasonably anticipated to cause a future material decrease in such number of registered users.

3.13. Licenses and Permits. Schedule 3.13 correctly identifies each license, franchise, permit or other similar authorization affecting, or relating in any way to, Company, together with the name of the Person, government agency or entity issuing such license or permit, if applicable (collectively, the "Permits"). Such Permits are valid and in full force and effect and, assuming the related Required Consents have been obtained prior to the Closing Date, will not be terminated or impaired or become terminable as a result of the transactions contemplated hereby. Upon consummation of the transactions contemplated herein, Parent or the Surviving Company will, assuming the related Required Consents have been obtained prior to the Closing Date, have all of the right, title and interest in all the Permits.

3.14. Proprietary Rights.

(a) Schedule 3.14(a) contains a list of all of the following that are included in Company's Proprietary Rights: (i) patents and patent applications; (ii) trademarks, tradenames and service marks and registrations thereof and applications therefor; (iii) registered copyrights and applications for copyright registration; and (iv) URLs and domain names, and registrations thereof and applications therefor; as well as licenses relating to any of the foregoing. Schedule 3.14 identifies the owner of each item listed thereon and, in the case of registrations and applications, the application or registration number and date.

(b) Except as set forth on Schedule 3.14(e), Company is the sole and exclusive owner or licensee of all of Company's Proprietary Rights. Except as set forth on Schedule 3.14(e), upon execution and delivery by Company to Parent of this Agreement, all of Company's Proprietary Rights will be owned or available for use by Parent and to Surviving Company on terms and conditions immediately following the Closing identical to the terms and conditions pertaining to Company immediately prior to the Closing. Company has taken reasonable measures to protect the proprietary nature of Company's Proprietary Rights and to maintain in confidence the trade secrets and confidential information that it owns or uses. No other Person has any rights to any item of Company's Proprietary Rights or has any rights to any of the Company's Proprietary Rights, except that the items of Company's Proprietary Rights identified on Schedule 3.14(e) as licensed to Company are owned by the respective owners identified on Schedule 3.14(e), and, to Company's Knowledge, no other Person is infringing, violating or misappropriating any of Company's Proprietary Rights.

(c) None of the activities or business presently conducted by Company or conducted by the Company at any time since the formation of Company infringes or violates, or constitutes a misappropriation of, any Proprietary Rights of any other person or entity. Neither Company nor any Stockholder or Affiliate of Company has received any complaint, claim or notice alleging any such infringement, violation or misappropriation.

(d) With respect to each item of Company's Proprietary Rights:

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(i) Company possesses all right, title and interest in and to such item, except for any Third Party Rights;

(ii) such item is not subject to any outstanding judgment, order, decree, stipulation or injunction; and

(iii) Company has not agreed, except in the ordinary course of business consistent with past practices in conjunction with product or service sales or licenses, to indemnify any person or entity for or against any infringement, misappropriation or other conflict with respect to such item.

(e) Schedule 3.14(e) identifies each item of Company's Proprietary Rights that is owned by a party other than Company ("Third Party Rights"), and all licenses or other agreements pursuant to which Company uses such items are listed on Schedule 3.14(e). With respect to each such item:

(i) the license or other agreement, covering such item is legal, valid, binding, enforceable and in full force and effect with respect to Company and to the Company's knowledge, with respect to every other party thereto;

(ii) each such license or other agreement, including licenses to all third-party software listed in Schedule 3.10 other than generally commercially available software, to which Company is a party, is assignable by Company without the consent or approval of, or any payment to, any party except as set forth on Schedule 3.14, and all such licenses and other agreements will continue to be legal, valid, binding, enforceable and in full force and effect immediately following the Closing in accordance with the terms thereof as in effect immediately prior to the Closing, and the consummation of the transactions contemplated herein will not conflict with, result in a violation or breach of or constitute a default under (or would result in a violation, breach or default with the giving of notice or the passage of time or both) any such license or other agreement;

(iii) neither Company nor, to Company's knowledge, any other party is in breach or default under any such license or other agreement, and no event has occurred which, with notice and/or lapse of time, would constitute such a breach or default or permit termination, modification or acceleration thereunder;

(iv) any underlying item of Company's Proprietary Rights is not subject to any outstanding judgment, order, decree, stipulation or injunction; and

(v) Company has not agreed, except in the ordinary course of business consistent with past practices in conjunction with product sales or licenses, to indemnify any Person for or against any interference, infringement, misappropriation or other conflict with respect to such item.

Sent By: THE BURR GROUP;

203 972 6008;

Nov-13-01 12:03PM;

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**COUNTERPART SIGNATURE PAGE TO WRITTEN
CONSENT OF STOCKHOLDERS IN LIEU OF MEETING OF STOCKHOLDERS**

The Written Consent may be signed in two or more counterparts, each of which shall be deemed an original but all of which shall together be considered one and the same instrument.

[If Corporation]

By (Signature): _____
Name (Print): _____
Title: _____
Date: November __, 2001
Number of Shares _____
Series/Class of Stock _____

[If Individual]

Signature: Eugene P. Converse II
Name (Print): Eugene P. Converse II
Date: November 21, 2001
Number of Shares 75,000, 750,000
Series/Class of Stock Series A, Series B

Sent By: THE BURR GROUP;

203 972 6008;

Nov-13-01 12:03PM;

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**COUNTERPART SIGNATURE PAGE TO WRITTEN
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[If Corporation]

By (Signature): Eugene P. Corvato, Jr. signing for EPC Grantor Trust
Name (Print): Eugene P. Corvato Jr., for EPC Grantor Trust
Title: General Manager
Date: November 21, 2001
Number of Shares 21,967
Series/Class of Stock Series C

[If Individual]

Signature: _____
Name (Print): _____
Date: November __, 2001
Number of Shares _____
Series/Class of Stock _____

Sent By: ELDER, GAFFEY & PAINE;

508 485 6169;

Nov-16-01 17:37;

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**COUNTERPART SIGNATURE PAGE TO WRITTEN
CONSENT OF STOCKHOLDERS IN LIEU OF MEETING OF STOCKHOLDERS**

The Written Consent may be signed in two or more counterparts, each of which shall be deemed an original but all of which shall together be considered one and the same instrument.

[If Corporation]

Ernie Investments, Ltd

By (Signature): [Signature]

Name (Print): R. J. GAFFEY

Title: Vice President

Date: November 21, 2001

Number of Shares 16,442 and 110,000

Series/Class of Stock Common and Series A Preferred

[If Individual]

Signature: _____

Name (Print): _____

Date: November __, 2001

Number of Shares _____

Series/Class of Stock _____

11/14/2001 4:17PM

BOSTON CAPITAL

NO. 586

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**COUNTERPART SIGNATURE PAGE TO WRITTEN
CONSENT OF STOCKHOLDERS IN LIEU OF MEETING OF STOCKHOLDERS**

The Written Consent may be signed in two or more counterparts, each of which shall be deemed an original but all of which shall together be considered one and the same instrument.

[If Corporation]

BOSTON CAPITAL VENTURES III L.P.

By (Signature): H. J. V. Goltz

Name (Print): H. J. VON DER GOLTZ

Title: GENERAL PARTNER

Date: November 21, 2001

Number of Shares 14,302,773,485 ; 250,000

Series/Class of Stock Common Series A ; Series B

[If Individual]

Signature: _____

Name (Print): _____

Date: November __, 2001

Number of Shares _____


Series/Class of Stock _____

**COUNTERPART SIGNATURE PAGE TO WRITTEN
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[If Corporation]

Coqui Capital Partners, LP

By (Signature): 

Name (Print): Jeffrey Davidson

Title: Partner

Date: November 21, 2001

Number of Shares 1.265.476

Series/Class of Stock Series B & C Preferred

[If Individual]

Signature: _____

Name (Print): _____

Date: November __, 2001

Number of Shares _____

Series/Class of Stock _____

-14-2001 2:49PM FROM

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**COUNTERPART SIGNATURE PAGE TO WRITTEN
CONSENT OF STOCKHOLDERS IN LIEU OF MEETING OF STOCKHOLDERS**

The Written Consent may be signed in two or more counterparts, each of which shall be deemed an original but all of which shall together be considered one and the same instrument.

[If Corporation]

By (Signature): _____
Name (Print): _____
Title: _____
Date: November __, 2001
Number of Shares _____
Series/Class of Stock _____

[If Individual]

Signature: Patrick B. Flavin
Name (Print): PATRICK B. FLAVIN
Date: November 21, 2001
Number of Shares 14,297 ; 10,209
Series/Class of Stock S.S.S.A ; Series B