

02-05-1999

Docket No. 30/DBP/C715

RECOR



100959250

Box Assignment  
Commissioner of Patents and Trademarks  
Washington, D.C. 20231

Post Office Box 7068  
Pasadena, CA 91109-7068

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

2.1.99

<b>1. Name of conveying party(ies):</b> <b>Photonics Research Incorporated</b>  Additional name(s) of conveying party(ies) attached:		<b>2. Name and address of receiving party(ies):</b>  Name: <b>Vixel Corporation</b>  Street Address:  <b>325 Interlocken Parkway, Building A Broomfield, Colorado 80021</b>			
<b>3. Name of conveyance:</b>  <input type="checkbox"/> Assignment <input type="checkbox"/> Merger <input type="checkbox"/> Security Agreement <input type="checkbox"/> Change of Name <input checked="" type="checkbox"/> Other: <b>Rerecord to Correct Incorrect Execution Date</b>  Execution Date: <b>February 13, 1995</b>		Additional name(s) & address(es) attached? <b>NO</b>			
<b>4. Application number(s) or patent number(s):</b>  If this document is being filed together with a new application, the execution date of the application is:  <table border="0"><tr><td><b>A. Patent Application No.(s)</b>  08/018,943 (Now US Pat. 5,526,182)  08/194,019 (Now US Pat. 5,523,884)  08/239,827 (Now US Pat. 5,525,810)  02/04/1999 <b>NGUYEN 00000206 5526182</b>  01 FC1581                      <b>120.00 OP</b></td><td><b>B. Patent No.(s)</b></td></tr></table> Additional numbers attached? <b>NO</b>				<b>A. Patent Application No.(s)</b>  08/018,943 (Now US Pat. 5,526,182)  08/194,019 (Now US Pat. 5,523,884)  08/239,827 (Now US Pat. 5,525,810)  02/04/1999 <b>NGUYEN 00000206 5526182</b>  01 FC1581 <b>120.00 OP</b>	<b>B. Patent No.(s)</b>
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<b>5. Please return the recorded document and address all correspondence to:</b>  <b>CHRISTIE, PARKER &amp; HALE, LLP</b> P.O. Box 7068 Pasadena, CA 91109-7068  Attention: <b>D. Bruce Prout</b>		<b>6. Total number of applications and patents involved.....</b> <span style="border: 1px solid black; padding: 2px 10px;">3</span>  <b>7. <input checked="" type="checkbox"/> Total fee enclosed (37 CFR 3.41):                      \$ 120.00</b>  <b>8. <input checked="" type="checkbox"/> Any deficiency or overpayment of fees should be charged or credited to <b>Deposit Account No. 03-1728</b>, except for payment of issue fees required under 37 CFR § 1.18. Please show our docket number with any credit or charge to our Deposit Account.</b>			
<b>10. <input type="checkbox"/> Explanatory letter is enclosed.</b>					
<b>9. Statement and signature.</b> 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.  Date: January 27, 1999 I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING DEPOSITED WITH THE U.S. POSTAL SERVICE AS FIRST CLASS MAIL IN AN ENVELOPE ADDRESSED TO: COMMISSIONER OF PATENTS AND TRADEMARKS, WASHINGTON, D.C. 20231 ON 1-27-99  <u>Ceresa Weisbruck</u>  By <u>D. Bruce Prout</u> Name: D. Bruce Prout 626/795-9900  Total number of pages including cover sheet, attachments, and document: <span style="border: 1px solid black; padding: 2px 10px;">20</span>					

DBP/tmw

TMW PAS169446.1-\* 1/26/99 10:23 am

**PATENT**  
**REEL: 9731 FRAME: 0912**

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 CERTIFICATE OF OWNERSHIP, WHICH MERGES:

"PHOTONICS RESEARCH INCORPORATED", A COLORADO CORPORATION, WITH AND INTO "VIXEL CORPORATION" UNDER THE NAME OF "VIXEL CORPORATION", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE THE THIRTEENTH DAY OF FEBRUARY, A.D. 1995, AT 4:30 O'CLOCK P.M.



A handwritten signature in cursive script, reading "Edward J. Freel".

Edward J. Freel, Secretary of State

AUTHENTICATION:

DATE: 7778664

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PATENT 04-96  
REF: 7853 FRAM: 0913  
REEL: 9731 FRAME: 0913

**CERTIFICATE OF OWNERSHIP  
AND MERGER  
OF  
PHOTONICS RESEARCH INCORPORATED  
a Colorado corporation  
INTO  
VIXEL CORPORATION  
a Delaware corporation**

Photonics Research Incorporated, a Colorado corporation (the "Company"), DOES HEREBY CERTIFY as follows in accordance with Section 253 of the Delaware General Corporation Law:

**FIRST:** The Company owns 100% of the issued and outstanding stock of Vixel Corporation, Delaware corporation ("Vixel").

**SECOND:** That, an Action by Written Consent of the Board of Directors, dated December 29, 1994 of the Company adopted the following resolutions by unanimous written consent:

RESOLVED, that the Company shall be reincorporated as a Delaware corporation by effecting a merger (the "Merger") of the Company with and into Vixel, in which each outstanding share of the Company's Class A Voting Common Stock shall be converted into one (1) share of Vixel's Series A Preferred Stock having a par value of \$.001 per share and each outstanding share of the Company's Class B Non-Voting Stock shall be converted into one (1) share of Vixel's Series A Preferred Stock having a par value of \$.001 per share;

RESOLVED FURTHER, that an Agreement and Plan of Merger between the Company and Vixel providing for the Merger (the "Agreement and Plan of Merger") in substantially the form attached hereto as *Exhibit A* be, and such Agreement and Plan of Merger hereby is, adopted and approved as a plan of reorganization of the Company within the provisions of Section 368(a)(1)(F) of the Internal Revenue Code of 1986, as amended; and

RESOLVED FURTHER, that the President, the Chief Financial Officer or any Vice President and the Secretary or any Assistant Secretary of the Company be, and each of them hereby is, authorized and directed to execute and deliver the Agreement and Plan of Merger on behalf and in the name of the Company and to affix the corporate seal of the Company thereto and to attest the same, with such changes therein and additions thereto as may be approved by the officers of the Company executing the same, such approval to be evidenced conclusively by his or their execution thereof.

THIRD: The aforesaid merger and Agreement and Plan of Merger have been adopted and approved, adopted certified, executed and acknowledged and Articles of Merger have been adopted, executed, verified and filed in accordance with the laws of the State of Colorado.

FOURTH: The Certificate of Incorporation of Vixel is amended and restated to read in its entirety as set forth in full in Exhibit 1 attached to Exhibit A attached hereto and made a part hereof and shall be the Certificate of Incorporation of the surviving corporation.

FIFTH: The executed Agreement and Plan of Merger is on file at the principal place of business of the surviving corporation. The address of said principal place of business is 325 Interlocken Parkway, Broomfield, Colorado 80021.

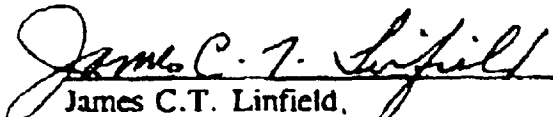
SIXTH: A copy of the Agreement and Plan of Merger will be furnished on request and without cost to any stockholder of any constituent corporation.


SEVENTH: The Effective Date of the Agreement and Plan of Merger and the filing of this Certificate of Ownership and Merger will be February 13, 1995.

Executed and verified this 13<sup>th</sup> day of February, 1995.

ATTEST:

PHOTONICS RESEARCH INCORPORATED  
A Colorado corporation

  
James C.T. Linfield,  
Assistant Secretary

By:   
Gregory R. Olbright  
Chairman of the Board, President and  
Chief Executive Officer

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## **EXHIBIT A**

### **AGREEMENT AND PLAN OF MERGER**

**THIS AGREEMENT AND PLAN OF MERGER** (the "Merger Agreement") is made as of February 13, 1995, by and between **PHOTONICS RESEARCH INCORPORATED**, a Colorado corporation ("PRI-Colorado"), and **Vixel Corporation**, a Delaware corporation ("Vixel"); (PRI-Colorado and Vixel, collectively, the "Constituent Corporations").

The authorized capital stock of PRI-Colorado consists of 10,000,000 shares of Class A Common Stock, no par value, and 10,000,000 shares of Class B Common Stock, no par value. The authorized capital stock of Vixel, upon effectuation of the transactions set forth in this Merger Agreement, will consist of 14,000,000 shares of Common Stock, \$0.001 par value per share and (ii) 10,000,000 shares of Preferred Stock, \$0.001 par value per share, of which 10,000,000 shares will be designated "Series A Preferred Stock."

The directors of the Constituent Corporations deem it advisable and to the advantage of the Constituent Corporations that PRI-Colorado merge with and into Vixel upon the terms and conditions provided herein.

**NOW, THEREFORE**, the parties do hereby adopt the plan of reorganization encompassed by this Merger Agreement and do hereby agree that PRI-Colorado shall merge with and into Vixel on the following terms, conditions and other provisions:

#### **I. TERMS AND CONDITIONS**

**1.1 Merger.** PRI-Colorado shall be merged with and into Vixel (the "Merger"), and Vixel shall be the surviving corporation (the "Surviving Corporation") effective February 13, 1995 (the "Effective Date").

**1.2 Succession.** On the Effective Date, Vixel shall continue its corporate existence under the laws of the State of Delaware, and the separate existence and corporate organization of PRI-Colorado, except insofar as it may be continued by operation of law, shall be terminated and cease.

**1.3 Transfer of Assets and Liabilities.** On the Effective Date, the rights, privileges, powers and franchises, both of a public as well as of a private nature, of each of the Constituent Corporations shall be vested in and possessed by the Surviving Corporation, subject to all of the disabilities, duties and restrictions of or upon each of the Constituent Corporations; and all and singular rights, privileges, powers and franchises of each of the Constituent Corporations, and all property, real, personal and mixed, of each of the Constituent Corporations, and all debts due to each of the Constituent Corporations on whatever account, and all things in action or belonging to each of the Constituent Corporations shall be transferred to and vested in the Surviving Corporation; and all property, rights, privileges, powers and franchises, and all and every other interest, thereafter shall be the property of the Surviving Corporation as they were

of the Constituent Corporations, and the title to any real estate vested by deed or otherwise in either of the Constituent Corporations shall not revert or be in any way impaired by reason of the Merger; provided, however, that the liabilities of the Constituent Corporations and of their stockholders, directors and officers shall not be affected and all rights of creditors and all liens upon any property of either of the Constituent Corporations shall be preserved unimpaired, and any claim existing or action or proceeding pending by or against either of the Constituent Corporations may be prosecuted to judgment as if the Merger had not been consummated, except as they may be modified with the consent of such creditors, and all debts, liabilities and duties of or upon each of the Constituent Corporations shall attach to the Surviving Corporation, and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it.

**1.4 Common Stock of PRI-Colorado and Vixel.** On the Effective Date, by virtue of the Merger and without any further action on the part of the Constituent Corporations or their respective stockholders, (i) (a) each share of Class A Common Stock of PRI-Colorado issued and outstanding immediately prior thereto shall be combined, changed and converted into one share of Series A Preferred Stock of Vixel, in each case fully paid and nonassessable, and (b) each share of Class B Common Stock of PRI-Colorado issued and outstanding immediately prior thereto shall be combined, changed and converted into one share of Series A Preferred Stock of Vixel, in each case fully paid and nonassessable, and (ii) each share of Common Stock of Vixel issued and outstanding immediately prior thereto shall be canceled and returned to the status of authorized but unissued shares.

**1.5 Stock Certificates.** On and after the Effective Date, all of the outstanding certificates that, prior to that time, represented shares of Common Stock of PRI-Colorado shall be deemed for all purposes to evidence ownership of and to represent the shares of Vixel into which the shares of PRI-Colorado represented by such certificates have been converted as herein provided and shall be so registered on the books and records of the Surviving Corporation or its transfer agents. The registered owner of any such outstanding stock certificate shall, until such certificate shall have been surrendered for transfer or conversion or otherwise accounted for to the Surviving Corporation or its transfer agent, have and be entitled to exercise any voting and other rights with respect to and to receive any dividend and other distribution upon the shares of Vixel evidenced by such outstanding certificate as above provided.

**1.6 Options.** On the Effective Date, if any options or rights granted under the 1993 Stock Option Plan of PRI-Colorado remain outstanding, then the Surviving Corporation will assume the outstanding and unexercised portions of such options shall be changed and converted into options to purchase Series A Preferred Stock of Vixel, such that an option to purchase one share of Class B Common Stock of PRI-Colorado shall be converted into an option to purchase, respectively, one share of Series A Preferred Stock of Vixel. No other changes in the terms and conditions of such options will occur.

**1.7 Warrants.** On the Effective Date, the Surviving Corporation will assume the outstanding warrants to purchase Class A Common Stock of PRI-Colorado, and the outstanding and unexercised portions of all outstanding warrants to purchase Class A Common Stock of PRI-Colorado shall be combined, changed and converted into warrants to purchase Series A Preferred Stock of Vixel such that a warrant to purchase one share of PRI-Colorado Class A Common Stock shall be converted into a warrant to purchase one share of the Series A Preferred Stock of Vixel. No other changes in the terms and conditions of such warrants will occur.

**1.8 Employee Benefit Plans.** On the Effective Date, the Surviving Corporation shall assume all obligations of PRI-Colorado under any and all employee benefit plans in effect as of such date with respect to which employee rights or accrued benefits are outstanding as of such date. On the Effective Date, the Surviving Corporation shall adopt and continue in effect all such employee benefit plans upon the same terms and conditions as were in effect immediately prior to the Merger.

## **II. CHARTER DOCUMENTS, DIRECTORS AND OFFICERS**

**2.1 Certificate of Incorporation and Bylaws.** From and after the Effective Date, the certificate of incorporation of Vixel shall read in its entirety as set forth in full in Exhibit 1 attached hereto and made a part hereof. The Bylaws of Vixel in effect on the Effective Date shall continue to be the Bylaws of the Surviving Corporation without change or amendment until further amended in accordance with the provisions thereof and applicable law.

**2.2 Directors.** The directors of Vixel immediately preceding the Effective Date shall become the directors of the Surviving Corporation on and after the Effective Date to serve until the expiration of their terms and until their successors are elected and qualified.

**2.3 Officers.** The officers of Vixel immediately preceding the Effective Date shall become the officers of the Surviving Corporation on and after the Effective Date to serve at the pleasure of its Board of Directors.

## **III. MISCELLANEOUS**

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

**3.2 Amendment.** At any time before or after approval by the stockholders of PRI-Colorado, this Merger Agreement may be amended in any manner (except that, after the

approval of the Merger Agreement by the stockholders of PRI-Colorado, the principal terms may not be amended without the further approval of the stockholders of PRI-Colorado) as may be determined in the judgment of the respective Board of Directors of Vixel and PRI-Colorado to be necessary, desirable, or expedient in order to clarify the intention of the parties hereto or to effect or facilitate the purpose and intent of this Merger Agreement.

**3.3 Conditions to Merger.** The obligation of the Constituent Corporations to effect the transactions contemplated hereby is subject to satisfaction of the following conditions (any or all of which may be waived by either of the Constituent Corporations in its sole discretion to the extent permitted by law):

(a) the Merger shall have been approved by the stockholders of PRI-Colorado in accordance with applicable provisions of the Business Corporation Act of the State of Colorado; and

(b) PRI-Colorado, as sole stockholder of Vixel, shall have approved the Merger in accordance with the General Corporation Law of the State of Delaware; and

(c) any and all consents, permits, authorizations, approvals, and orders deemed in the sole discretion of PRI-Colorado to be material to consummation of the Merger shall have been obtained.

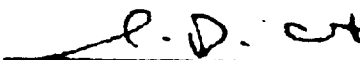
**3.4 Abandonment or Deferral.** Notwithstanding the approval of this Merger Agreement by the stockholders of PRI-Colorado or Vixel, at any time before the Effective Date, (a) this Merger Agreement may be terminated and the Merger may be abandoned by the Board of Directors of either PRI-Colorado or Vixel or both, including by reason of a determination, in the sole discretion of either Board of Directors, that holders of an unacceptable number of shares intend to exercise their statutory appraisal rights pursuant to Sections 7-113-101 through 7-113-302 of the Colorado Business Corporation Act, or (b) the consummation of the Merger may be deferred for a reasonable period of time if, in the opinion of the Boards of Directors of PRI-Colorado and Vixel, such action would be in the best interests of such corporations. In the event of termination of this Merger Agreement, this Merger Agreement shall become void and of no effect and there shall be no liability on the part of either Constituent Corporation or their respective Board of Directors or stockholders with respect thereto, except that PRI-Colorado shall pay all expenses incurred in connection with the Merger or in respect of this Merger Agreement or relating thereto.

**3.5 Counterparts.** In order to facilitate the filing and recording of this Merger Agreement, the same may be executed in any number of counterparts, each of which shall be deemed to be an original.

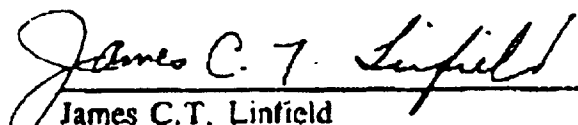


IN WITNESS WHEREOF, this Merger Agreement, having first been duly approved by the Board of Directors of PRI-Colorado and Vixel, hereby is executed on behalf of each such corporations and attested by their respective officers thereunto duly authorized.


PHOTONICS RESEARCH INCORPORATED,  
a Colorado Corporation

By:   
Gregory R. Olbright  
President and Chief Executive Officer

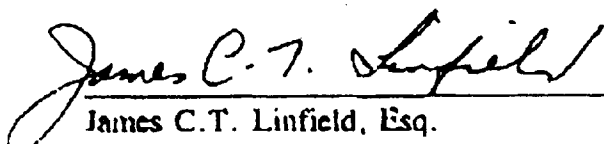
ATTEST:

  
James C.T. Linfield  
Assistant Secretary

Vixel Corporation  
A Delaware Corporation

By:   
Gregory R. Olbright  
President and Chief Executive Officer

ATTEST:

  
James C.T. Linfield, Esq.  
Secretary

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**EXHIBIT 1**

**RESTATED CERTIFICATE OF INCORPORATION  
OF  
VIXEL CORPORATION**

Vixel Corporation, a Delaware corporation, hereby certifies as follows:

1. The name of the corporation is Vixel Corporation. The original certificate of incorporation of the corporation was filed with the Delaware Secretary of State on February 13, 1995.
2. This Restated Certificate of Incorporation amends and restates the provisions of the certificate of incorporation of the corporation and has been duly adopted in accordance with Sections 242 and 245 of the General Corporation Law of the State of Delaware.
3. The text of the certificate of incorporation of the corporation is amended and restated to read in its entirety as follows:

**I.**

The name of this corporation is Vixel Corporation

**II.**

The address of the registered office of the Corporation in the State of Delaware is:

The Corporation Trust Company  
1209 Orange Street  
Wilmington, DE 19801  
County of New Castle

The name of the Corporation's registered agent at such address is The Corporation Trust Company.

**III.**

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of the State of Delaware.

**IV.**

This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares the corporation is authorized to issue is Twenty-four Million (24,000,000) shares, (i) Fourteen

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Million (14,000,000) shares of which shall be Common Stock (the "Common") and (ii) Ten Million (10,000,000) shares of which shall be Preferred Stock (the "Preferred Stock"). The Common Stock and the Preferred Stock shall have a par value of one-tenth of one cent (\$.001) per share.

The number of authorized shares of Common may be increased or decreased (but not below the number of shares of such stock then outstanding) by the affirmative vote of the holders of a majority of the voting stock of the Corporation.

**Preferred Stock.** The Preferred Stock may be issued from time to time in one or more series. Except as provided in this Article IV, the Board of Directors hereby is authorized, within the limitations and restrictions stated in this Certificate, to fix or alter the dividend rights, dividend rate, conversion rights, voting rights, rights and terms of redemption (including sinking fund provisions), the redemption price or prices, the liquidation preferences of any wholly unissued series of Preferred Stock, and the number of shares constituting any such series and the designation thereof, or any of them; and to increase or decrease the number of shares of any series subsequent to the issue of shares of that series, but not below the number of shares of such series then outstanding. In case the number of shares of any series shall be so decreased, the shares constituting such decrease shall resume the status they had prior to the adoption of the resolution originally fixing the number of shares of such series.

**A. Designation of Series A Preferred.** Ten Million (10,000,000) of the shares of Preferred Stock are designated as Series A Preferred Stock (the "Series A Preferred") with the rights preferences, privileges and restrictions specified herein.

(1) **Dividend Rights.** Holders of Series A Preferred Stock shall be entitled to receive cash dividends when, as and if declared by the Board of Directors, but only out of funds that are legally available therefor.

(2) **Voting Rights.** The holder of each share of Preferred Stock shall have the right to vote one vote for each share of Common Stock into which such share of 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 by-laws of this 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.

(3) **Liquidation Rights.** Upon any liquidation, dissolution, or winding up of the Corporation, whether voluntary or involuntary, before any distribution or payment shall be made to the holders of any other stock of the Corporation, the holders of Series A Preferred shall be entitled to be paid out of the assets of the Corporation an amount per share equal to One Dollar and Twenty-five Cents (\$1.25). If the assets and funds thus distributed to the holders of the Series A Preferred Stock shall be insufficient to permit payment to such holders of the full aforesaid preferential amounts, then the entire assets of the Corporation legally available for distribution shall be distributed pro rata to the holders of the Series A Preferred Stock based on the relative preferential amounts of the shares of the Series A Preferred Stock then held by them.



person entitled to receive the shares of Common issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common on such date.

(e) Adjustment for Stock Splits and Combinations. If the Corporation shall at any time or from time to time after the date the first share of Series A Preferred is issued (the "Series A Original Issue Date") effect a subdivision of the outstanding Common, the Series A Conversion Price in effect immediately before such subdivision shall be decreased proportionately. Conversely, if the Corporation shall at any time or from time to time after the Series A Original Issue Date combine the outstanding shares of Common into a smaller number of shares, the Series A Conversion Price in effect immediately before such combination shall be increased proportionately. Any adjustment under this Section A(4)(e) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) Adjustment for Common Dividends and Distributions. If the Corporation at any time or from time to time after the Series A Original Issue Date makes or fixes a record date for the determination of holders of Common entitled to receive a dividend or other distribution payable in additional shares of Common, in each such event the Series A Conversion Price then in effect shall be decreased as of the time of such issuance or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Series A Conversion Price then in effect by a fraction (1) the numerator of which is the total number of shares of Common issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and (2) the denominator of which is the total number of shares of Common issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common issuable in payment of such dividend or distribution; provided, however, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series A Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series A Conversion Price shall be adjusted pursuant to this Section A(4)(f) to reflect the actual payment of such dividend or distribution.

(g) Adjustments for Other Dividends and Distributions. If the Corporation at any time or from time to time after the Series A Original Issue Date makes, or fixes a record date for the determination of holders of Common entitled to receive, a dividend or other distribution payable in securities of the Corporation other than shares of Common, in each such event provision shall be made so that the holders of the Series A Preferred shall receive upon conversion thereof, in addition to the number of shares of Common receivable thereupon, the amount of other securities of the Corporation they would have received had their Series A Preferred been converted into Common on the date of such event and had they thereafter, during the period from the date of such event to and including the conversion date, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this Section A(4) with respect to the rights of the holders of the Series A Preferred or with respect to such other securities by their terms.

(h) Adjustment for Reclassification, Exchange and Substitution. If at any time or from time to time after the Series A Original Issue Date, the Common issuable upon the conversion of the Series A Preferred is changed into the same or a different number

of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section A(4)), in any such event each holder of Series A Preferred shall have the right thereafter to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Common into which such shares of Series A Preferred could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(i) Reorganizations, Mergers, Consolidations or Sales of Assets.

If at any time or from time to time after the Series A Original Issue Date, there is a capital reorganization of the Common (other than an Acquisition or Asset Transfer or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section A(4)), as a part of such capital reorganization, provision shall be made so that the holders of the Series A Preferred thereafter shall be entitled to receive upon conversion of the Series A Preferred the number of shares of stock or other securities or property of the Corporation to which a holder of the number of shares of Common deliverable upon conversion would have been entitled on such capital reorganization, subject to adjustment in respect of such stock or securities by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section A(4) with respect to the rights of the holders of Series A Preferred after the capital reorganization to the end that the provisions of this Section A(4) (including adjustment of the Series A Conversion Price, as applicable, then in effect and the number of shares issuable upon conversion of the Series A Preferred) shall be applicable after that event and be as nearly equivalent as practicable.

(j) Notices of Record Date. Upon (i) 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 or other distribution, or (ii) any Acquisition or other capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger or consolidation of the Corporation with or into any other corporation, or any Asset Transfer, or any voluntary or involuntary dissolution, liquidation or winding up of the Corporation, the Corporation shall mail to each holder of Preferred Stock at least twenty (20) days prior to the record date specified therein a notice specifying (1) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (2) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (3) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(k) Automatic Conversion.

ii) Upon the occurrence of an event specified in paragraph (a) above, the outstanding shares of Series A Preferred, as applicable, shall be converted without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; provided, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common issuable upon such conversion unless the certificates evidencing such shares of Series A Preferred, as applicable, either are delivered to the Corporation or its transfer agent as provided below, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. Upon the occurrence of such conversion of the Series A Preferred, the holders of Series A Preferred shall surrender the certificates representing such shares at the office of the Corporation or any transfer agent for the Preferred Stock. Thereupon, there shall be issued and delivered to such holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common into which the shares of Series A Preferred surrendered were convertible on the date on which such conversion occurred, and the Corporation promptly shall pay in cash or, at the option of the Corporation, Common (at the fair market value of the Common determined by the Board as of the date of such conversion), or both, together with all declared and unpaid dividends on the shares of such Series A Preferred being converted, to and including the date of such conversion.

(m) 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, solely for the purpose of effecting the conversion of the shares of the Series A Preferred, such number of its shares of Common as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series A Preferred. If at any time the number of authorized but unissued shares of Common shall not be sufficient to effect the conversion of all then outstanding shares of the Series A Preferred, 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 to such number of shares as shall be sufficient for such purpose.

(n) Notices. Any notice required by the provisions of this Section A shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed telex or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Corporation.

(o) Payment of Taxes. The Corporation will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common upon conversion of shares of Series A Preferred, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common in a name other than that in which the shares of Series A Preferred so converted were registered.

(p) No Dilution or Impairment. The Corporation shall not amend its Certificate of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Preferred Stock against dilution or other impairment.

(q) Notices of Record Date. Upon (i) 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 or other distribution, or (ii) any Acquisition or other capital reorganization of the Corporation, any reclassification or recapitalization of the capital stock of the Corporation, any merger or consolidation of the Corporation with or into any other corporation, or any Asset Transfer, or any voluntary or involuntary dissolution, liquidation or winding up of the Corporation, the Corporation shall mail to each holder of Preferred Stock at least ten (10) days prior to the record date specified therein a notice specifying (1) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (2) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective, and (3) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(r) Fractional Shares. No fractional shares of Common shall be issued upon conversion of Preferred Stock. All shares of Common (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 any fractional share, the Corporation, in lieu of issuing any fractional share, shall pay cash equal to the product of such fraction multiplied by the fair market value of the Common (as determined by the Board) on the date of conversion.

(s) **Reservation of Stock Issuable Upon Conversion.** The Corporation at all times shall reserve and keep available out of its authorized but unissued shares of Common, solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Preferred Stock. If at any time the number of authorized but unissued shares of Common 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 to such number of shares as shall be sufficient for such purpose.

(t) **Notices.** Any notice required by the provisions of this Section A shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed telex or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one (1) day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Corporation.

(u) **Payment of Taxes.** The Corporation will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common upon conversion of shares of Preferred Stock, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common in a name other than that in which the shares of Preferred Stock so converted were registered.

(v) **No Dilution or Impairment.** The Corporation shall not amend its Certificate of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Preferred Stock against dilution or other impairment.

(5) **No Reissuance of Preferred Stock.** No share or shares of Preferred Stock acquired by the Corporation by reason of redemption, purchase, conversion or otherwise shall be reissued.

## V.

A director of the corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for any 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 which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. If the Delaware General Corporation Law is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any repeal or modification of this Article V shall be prospective and shall not affect the rights under this Article V in effect at the time of the alleged occurrence of any act or omission to act giving rise to liability or indemnification.

## VI.

For the management of the business and for the conduct of the affairs of the Corporation, and in further definition, limitation and regulation of the powers of the Corporation, of its directors and of its stockholders or any class thereof, as the case may be, it is further provided that:

A. 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 shall constitute the whole Board of Directors shall be fixed by the Board of Directors in the manner provided in the Bylaws.

B. The Board of Directors may from time to time make, amend, supplement or repeal the Bylaws, provided, however, that the stockholders may change or repeal any Bylaw adopted by the Board of Directors by the affirmative vote of the holders of a majority of the voting power of all of the then outstanding shares of the Common and Series A Preferred voting together as a single class; and, provided further, that no amendment or supplement to the Bylaws adopted by the Board of Directors shall vary or conflict with any amendment or supplement thus adopted by the stockholders.

C. The directors of the Corporation need not be elected by written ballot unless the Bylaws so provide.

## VII.

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, and all rights conferred upon the stockholders herein are granted subject to this right.

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9.

PATENT

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SENT BY

PATENT

REEL: 9731 FRAME: 0929

27# 0100 429 200

IN WITNESS WHEREOF, the party hereto has fully executed this Certificate as of the date first written below.

Signed on February 13, 1995.

e. D. et  
Gregory R. Olbright  
President

10.

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RECORDED: 02/01/1999

REEL: 9731 FRAME: 0930