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02-22-2000



U.S. DEPARTMENT OF COMMERCE
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To the Honorable Commissioner of Patents and

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il documents or copy thereof.

Name of conveying party(ies):

The Music Connection

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

3. Nature of conveyance:

- ☐ Assignment ☐ Merger
☐ Security Agreement ☒ Change of Name
☐ Other

Execution Date:

Name and address of receiving party(ies):

Name: musicmaker.com, Inc.

Internal Address:

Street Address: 1831 Wiehle Ave., Suite 128

City: Reston State or Country: VA Zip: 20190

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

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

If this document is being filed together with a new application, the execution date of the application is:

A. Patent Application No.(s)

CENTRAL CASE OF LAWING

I hereby certify that this paper and every
paper in this case, if any, is enclosed
is being deposited with the U.S. Postal Service
as first class mail, postage prepaid, to
an envelope addressed to the Commissioner of
Patents & Trademarks, Washington DC 20231,

on January 26, 2000
Date Name

B. Patent No.(s)

Patent No.: 5,959,944
Issued: 9/28/99

Patent No. 5,479,004
Issued: October 26, 1999

Patent No. 6,011,758
Issued: January 4, 2000

Additional numbers attached? ☐ Yes ☒ No

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

Name: Darby & Darby P.C.

Internal Address: Derrick W. Reed, Esq.

Street Address: 805 Third Avenue, 27th Floor

City: New York State: New York Zip: 10022-7513

6. Total number of applications and patents involved:

1

7. Total fee (37 CFR 3.41):.....\$ 120.00
☐ Enclosed

☒ Authorized to be charged to deposit account

8. Deposit account number:

04-0100

(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.

Mitchell S. Feller, Reg. 42,530
Name of Person Signing

Signature

January 26, 2000
Date

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

21

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

Commissioner of Patents & Trademarks, Box Assignments
Washington, D.C. 20231

File No.: 2004/0E244, 1E244-US1 & US2

PATENT
REEL: 010547 FRAME: 0741

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**Restated Certificate of Incorporation
of
The Music Connection Corporation**

The Music Connection Corporation, a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware (the "Corporation"),

DOES HEREBY CERTIFY THAT:

1. "The Music Connection Corporation" is the name under which the Corporation was originally incorporated, and the date of filing of the original Certificate of Incorporation of the Corporation with the Secretary of State of the State of Delaware is April 23, 1996. The Corporation is changing its name to "musicmaker.com, Inc." pursuant to an amendment to its Certificate of Incorporation detailed herein.

2. The Certificate of Incorporation of the Corporation is hereby amended by (i) increasing the number of authorized shares of Common Stock; (ii) more clearly defining the Board of Directors' power to issue preferred stock; (iii) amending the current indemnification provision; (iv) changing the Corporation's name to musicmaker.com, Inc.; (v) adding newly created Article Ninth to the Corporation's Charter regarding compromises and arrangements between the Corporation and its stockholders and creditors; and (vi) making certain other clarifying changes and modifications to the Certificate of Incorporation which are hereinafter set forth

3. The provisions of the Certificate of Incorporation of the Corporation, as herein amended, are hereby restated and integrated into the single instrument that is hereinafter set forth, and that is entitled "Restated Certificate of Incorporation of musicmaker.com, Inc." without any further amendments other than the amendments herein certified and without any discrepancy between the provisions of the Certificate of Incorporation as heretofore amended and supplemented and the provisions of the said single instrument hereinafter set forth.

4. The amendments and the restatement of the Restated Certificate of Incorporation herein certified have been advised by the Board of Directors and duly adopted by the stockholders of the Corporation in accordance with the provisions of Sections 228, 242 and 245 of the General Corporation Law of the State of Delaware.

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AMENDED AND RESTATED CERTIFICATE OF INCORPORATION**OF****MUSICMAKER.COM, INC.**

FIRST: The name of the corporation is musicmaker.com, Inc. (the "Corporation").

SECOND: The address of the Corporation's registered office in the State of Delaware is 1300 Delaware Trust Building, 902 Market Street, in the city of Wilmington, County of New Castle. The name of its registered agent at such address is The Delaware Corporation Agency, Inc.

THIRD: 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.

FOURTH: The Corporation shall have authority to issue two (2) classes of shares to be designated respectively "Preferred Stock" and "Common Stock." The total number of shares of Common Stock that the Corporation shall have authority to issue is Sixty-Million (60,000,000) shares, par value \$.01 per share. The total number of shares of Preferred Stock that the Corporation shall have authority to issue is Five Million Nine Hundred Fifty-Nine Thousand Five Hundred Nine (5,959,509) shares, par value \$.01.

The Board of Directors is authorized, subject to limitations prescribed by law and within the limitations and restrictions stated in this Restated Certificate of Incorporation, to provide for the issuance of the shares of Preferred Stock in series, and by filing a certificate pursuant to the applicable law of the State of Delaware, to establish from time to time the number of shares to be included in each such series, and to fix the designation, powers, preferences, and rights of the shares of each such series and the qualifications, limitations or restrictions thereof. The authority of the Board of Directors with respect to each series shall include, but not be limited to, determination of the following:

(1) The number of shares constituting that series and the distinctive designation of that series;

(2) The dividend rate, if any, on the shares of that series, whether dividends shall be cumulative, and, if so, from which date or dates, and the relative rights of priority, if any, of payment of dividends on shares of that series;

(3) Whether that series shall have voting rights, in addition to the voting rights provided by law, and, if so, the terms of such voting rights;

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(4) Whether that series shall have conversion obligations or privileges, and, if so, the terms and conditions of such conversion, including provision for adjustment of the conversion rate in such events as the Board of Directors shall determine;

(5) Whether or not the shares of that series shall be redeemable, and, if so, the terms and conditions of such redemption, including the date or dates upon or after which they shall be redeemable, and the amount per share payable in case of redemption, which amount may vary under different conditions and at different redemption dates;

(6) Whether that series shall have a sinking fund for the redemption or purchases of shares of that series, and, if so, the terms and amount of such sinking fund;

(7) The rights of the shares of that series in the event of voluntary or involuntary liquidation, dissolution or winding up of the Corporation, and the relative rights of priority, if any, of payment of shares of that series; and

(8) Any other relative rights, preferences and limitations of that series.

FIFTH: One Million Seven Hundred Fifty Thousand (1,750,000) shares of the Preferred Stock are hereby constituted as Convertible Preferred Stock, Series A ("Series A Preferred Stock"); Three Million Three Hundred Thirty-Three Thousand Three Hundred Thirty-Three (3,333,333) shares of the Preferred Stock are hereby constituted as Convertible Preferred Stock, Series B ("Series B Preferred Stock"); and Eight Hundred Seventy-Six Thousand One Hundred Seventy-Six (876,176) shares of the Preferred Stock are hereby constituted as Convertible Preferred Stock, Series C ("Series C Preferred Stock"). The Series A Preferred Stock, the Series B Preferred Stock and the Series C Preferred Stock are hereinafter sometimes collectively referred to as the "Designated Preferred Stock." The relative preferences, powers, rights, qualifications, limitations and restrictions in respect of the Common Stock and the Designated Preferred Stock are as follows:

(a) Voting Rights.

(i) Each holder of shares of Designated Preferred Stock shall be entitled to vote on all matters and, except as otherwise expressly provided herein, shall be entitled to the number of votes equal to the largest whole number of shares of Common Stock into which such shares of Designated Preferred Stock could be converted, pursuant to the provisions of paragraph (d) hereof, on the record date for the determination of the stockholders entitled to vote on such matters or, if no such record date is established, in accordance with Delaware law.

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(ii) Each holder of shares of Common Stock shall be entitled to one vote for each share thereof held. Except as otherwise expressly provided herein or as required by law, the holders of Designated Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(iii) The holders of a majority in voting power of the Series A Preferred Stock, voting separately as one class, shall have the exclusive and special right at all times to elect two directors to the Board of Directors of the Corporation. In any election of directors pursuant to this subparagraph (iii), each holder of shares of Series A Preferred Stock shall be entitled to one vote for each share of Series A Preferred Stock held and no holder of Series A Preferred Stock shall be entitled to cumulate its votes by giving one candidate more than one vote per share. This special and exclusive voting right of the holders of the Series A Preferred Stock, voting separately as one class, contained in this subparagraph (iii) may be exercised either at a special meeting of the holders of Series A Preferred Stock called as provided below, or at any annual or special meeting of the stockholders of the Corporation, or by written consent of such holders in lieu of a meeting. The directors to be elected by the holders of Series A Preferred Stock, voting separately as one class, pursuant to this subparagraph (iii), shall serve for a term extending from the date of this election and qualification until the time of the next succeeding annual meeting of stockholders and until their successors have been duly elected and qualified. If at any time any directorship to be filled by the holders of Series A Preferred Stock, voting separately as one class, pursuant to this subparagraph (iii) becomes vacant, the Secretary of the Corporation shall, upon the written request of the holders of record of shares representing at least 25% of the voting power of the Series A Preferred Stock then outstanding, call a special meeting of the holders of Series A Preferred Stock for the purpose of electing a director to fill such vacancy. Such meeting shall be held at the earliest practicable date at such place as is specified in the Bylaws of the Corporation. If such meeting shall not be called by the Secretary of the Corporation within ten days after personal service of said written request by him or her, then the holders of record of shares representing at least 25 % of the voting power of the Series A Preferred Stock then outstanding may designate in writing one of their number to call such meeting at the expense of the Corporation, and such meeting may be called by such persons so designated upon the notice required for annual meeting of stockholders and shall be held at such specified place. Any holder of the Series A Preferred Stock so designated shall have access to the stock books of the Corporation for the purpose of calling a meeting of the stockholders pursuant to these provisions.

At any meeting held for the purpose of electing directors at which the holders of Series A Preferred Stock shall have the special and exclusive right, voting separately as one class, to elect directors as provided in this subparagraph (iii), the presence, in person or by proxy, of the holders of record of shares representing a majority of the voting power of the Series A Preferred Stock then outstanding shall be required to constitute a quorum of the Series A Preferred Stock for such election. In the absence of such a quorum, the holders of record of shares of the Series A Preferred Stock representing a majority of the voting power of the Series A Preferred Stock present, in person or by proxy, shall have the power to adjourn the meeting for the election of

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directors which the holders of Series A Preferred Stock have the special and exclusive right, voting separately as one class, to elect from time to time, or through notice other than announcement at the meeting.

A vacancy in any directorship to be elected by the holders of the Series A Preferred Stock, voting separately as one class, pursuant to this subparagraph (iii), may be filled only by (a) vote of the holders of a majority in voting power of the Series A Preferred Stock, acting separately as one class or (b) written consent in lieu of a meeting of the holders of a majority in voting power of the Series A Preferred Stock, acting separately as one class.

Any director elected pursuant to this subparagraph (iii) may be removed during the aforesaid term of office, either with or without cause, by, and only by, the affirmative vote of the holders of Series A Preferred Stock, given either at a special meeting of such stockholders duly called for that purpose or pursuant to a written consent of such stockholders.

(iv) In the event that the Corporation is unable to redeem the Designated Preferred Stock in a timely manner in accordance with the provisions of paragraph (e) hereof (a "Default"), the holders of Series A Preferred Stock shall have the exclusive right, voting separately as one class, shall have the exclusive and special right at all times during the continuance of such Default, to elect that number of directors to the Board of Directors of the Corporation as constitutes a majority of the then authorized Board of Directors. In such event, the directors to be elected by the holders of Series A Preferred Stock shall be elected in accordance with the provisions of paragraph (a)(iii) above. Upon a Default, two existing members of the Board of Directors (other than members who have been elected in accordance with paragraph (a) (iii) above) shall resign, and shall be replaced by two additional directors elected under this paragraph (a)(iv).

During the continuance of a Default, the Board of Directors shall take all actions necessary or advisable to enable the Corporation to redeem the Designated Preferred Stock in accordance with paragraph (e) hereof as promptly as practicable, including without limitation exploring the possibility of a sale of the Corporation.

(b) Dividend Rights. The holders of Designated Preferred Stock shall be entitled to share in any dividends that may be declared and paid upon or set aside for shares of Common Stock, pro rata in accordance with the number of shares of Common Stock into which such shares of Designated Preferred Stock are then convertible in accordance with paragraph (d). No dividends shall be declared and paid upon or set aside for the Common Stock unless they shall have all been paid, or declared and set aside for payment, on account of all shares of Designated Preferred Stock then issued and outstanding.

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(c) Liquidation Rights. (i) In the event of a voluntary or involuntary liquidation, dissolution, or winding up of the Corporation (a "Liquidation"), the holders of record of shares of Designated Preferred Stock shall be entitled to receive, prior and in preference to any distribution of any assets of the Corporation to the holders of the Common stock by reason of their ownership thereof, out of the assets of the Corporation legally available therefor, an amount per share equal to:

(A) in the case of the Series A Preferred Stock, the sum of (1) One Dollar (\$1.00) per share of Series A Preferred Stock (the "Original Series A Issue Price"), plus (2) a further amount per share equal to dividends, if any, then declared and unpaid on account of Series A Preferred Stock;

(B) in the case of the Series B Preferred Stock, the sum of (1) One Dollar and Twenty Cents (\$1.20) per share of Series B Preferred Stock (the "Original Series B Issue Price"), plus (2) a further amount per share equal to dividends, if any, then declared and unpaid on account of Series B Preferred Stock; and

(C) in the case of the Series C Preferred Stock, the sum of (1) One Dollar and Fifty Cents (\$1.50) per share of Series C Preferred Stock (the "Original Series C Issue Price"), plus (2) a further amount per share equal to dividends, if any, then declared and unpaid on account of Series C Preferred Stock, before any payment shall be made or any assets distributed to the holders of shares of Common Stock. If, upon any Liquidation, the assets available for distribution among the holders of the Designated Preferred Stock shall be insufficient to permit payment to such holders of the full preferential amounts aforesaid, then such assets shall be distributed ratably among the holders of Designated Preferred Stock (x) such that the ratio of assets distributed per share of Series A Preferred Stock to the Original Series A Issue Price, as adjusted for Recapitalization Events (the "Series A Adjusted Issue Price"), is equivalent to the ratio of assets being distributed per share of Series B Preferred Stock to the Original Series B Issue Price, as adjusted for Recapitalization Events (the "Series B Adjusted Issue Price"), and is equivalent to the ratio of assets being distributed per share of Series C Preferred Stock to the Original Series C Issue Price, as adjusted for Recapitalization Events (the "Series C Adjusted Issue Price"), and (y) as among the holders of each series of Designated Preferred Stock based on the number of shares of such series so held.

(ii) After payment to the holders of record of the shares of the Designated Preferred Stock of the amounts set forth in subparagraph (c)(i) above and of the amount required by any Certificate of Determination or Designation or any Restated Certificate of Incorporation or amendment thereto, the remaining assets of the Corporation shall be distributed in like amounts per share to the holders of record of the

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Corporation's stock, each share of Designated Preferred Stock being treated as the number of shares of Common Stock (giving effect to fractional shares) into which it could then be converted for such purpose. The liquidation preference provided for in subparagraph (c)(i) above shall be equitably adjusted for Recapitalization Events.

(iii) A consolidation or merger of the Corporation with or into any other corporation or corporations except where the Corporation is the surviving entity, or a sale of all or substantially all of the assets of the Corporation, shall each be deemed, unless at least fifty and one tenth percent (50.1%) of the holders of record of the shares of Preferred Stock vote otherwise, to be a Liquidation within the meaning of this paragraph (c) and shall entitle the holders of the Corporation's stock to receive at the closing in cash, securities or other property, valued at the fair market value of such securities or other property as determined in good faith by the Board of Directors, amounts as specified in subparagraphs (c)(i) and (c)(ii) above.

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

(i) Right to Convert. Each holder of record of shares of Designated Preferred Stock may, at any time, upon surrender to the Corporation of the certificates therefor at the principal office of the Corporation or at such other place as the Corporation shall designate, convert all or any part of such holder's shares of Designated Preferred Stock into such number of fully paid and non-assessable shares of Common Stock of the Corporation (as such Common Stock shall then be constituted) equal to the product of (A) the number of shares of Designated Preferred Stock which such holder shall then surrender to the Corporation, multiplied by (B) the number determined by dividing the (1) Original Series A Issue Price in the case of the Series A Preferred Stock, (2) the Original Series B Issue Price in the case of the Series B Preferred Stock, and (3) the Original Series C Issue Price in the case of Series C Preferred Stock, by the Conversion Price (as hereinafter defined) per share for such series of Designated Preferred Stock in effect at the time of conversion. Promptly following surrender of such certificates, the holder shall be entitled to receive certificates evidencing the number of shares of Common Stock into which such shares of Designated Preferred Stock are converted.

(ii) Automatic Conversion.

(A) All outstanding shares of Designated Preferred Stock shall be deemed automatically converted into such number of shares of Common Stock as are determined in accordance with subparagraph (d)(i) hereof upon (A) the consummation of a firm commitment underwritten public offering of the securities of the Corporation pursuant to a registration statement filed with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended, where (x) the aggregate proceeds to the Corporation resulting from the sale of such securities (before deduction of underwriting discounts and expenses of sale) is not less than \$15,000,000 and (y) the valuation of the Corporation immediately prior to such public offering is at least

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\$50,000,000, or (B) the affirmative vote of the holders of record of fifty and one-tenth percent (50.1%) in interest of the outstanding shares of Designated Preferred Stock, voting together as a class to that effect (either such event being hereinafter referred to as an "Automatic Conversion Event").

(B) On or after the date of occurrence of an Automatic Conversion Event, and in any event within 10 days after receipt of notice, by mail, postage prepaid from the Corporation of the occurrence of such Event, each holder of record of shares of Designated Preferred Stock shall surrender such holder's certificates evidencing such holder's shares of Designated Preferred Stock at the principal office of the Corporation or at such other place as the Corporation shall designate, and shall thereupon be entitled to receive certificates evidencing the number of shares of Common Stock into which such shares of Designated Preferred Stock are converted. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Designated Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Designated Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Designated Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

(iii) For purposes of this Certificate of Incorporation:

"Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to this paragraph (d), deemed to be issued) by the Corporation, other than shares of Common Stock issued or issuable:

(AA) upon conversion of shares of Designated Preferred Stock;

(BB) to officers, directors, or employees of, or consultants to, the Corporation pursuant to a stock grant or sale or option plan or other employee stock incentive program approved by the Compensation Committee of the Board of Directors;

(CC) in connection with an acquisition or joint venture by the Corporation, or to consultants, vendors, lenders, equipment lessors, or customers of the Corporation, in each case as approved by the Board of Directors;

(DD) as a dividend or distribution on Preferred Stock; or

(EE) for which adjustment of the Conversion Price is made pursuant to subparagraph (d)(iv).

"Conversion Price" shall mean the price at which shares of the Common Stock shall be deliverable upon conversion of the Designated Preferred Stock as adjusted from time to time as herein provided. The Conversion Price shall initially be

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(1) the Original Series A Issue Price in the case of the Series A Preferred Stock, (2) the Original Series B Issue Price in the case of the Series B Preferred Stock, and (3) the Original Series C Issue Price in the case of the Series C Preferred Stock. The Conversion Price of each series of Designated Preferred Stock shall be subject to adjustment as herein provided.

"Conversion Shares Outstanding" includes all Common Stock issued or issuable upon conversion of (i) all outstanding shares of all series of Designated Preferred Stock issued on the applicable Issuance Date for such series of Designated Preferred Stock and (ii) all Additional Shares of Common Stock issued after such Issuance Date.

"Convertible Securities" shall mean any evidences of indebtedness, shares or securities, in each case convertible into or exchangeable for or giving the holder thereof the right to purchase Additional Shares of Common Stock.

"Effective Price" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold by the Corporation under subparagraph (d)(iv)(A), into the aggregate consideration received or deemed to have been received by the Corporation for such issue under subparagraph (d)(iv)(A).

"Issuance Date" shall mean the actual initial date of issuance of the Series A Preferred Stock.

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

(iv) Adjustments to Conversion Price for Diluting Issues.

(A) Sale of Shares Below Conversion Price.

(1) If at any time or from time to time after the Issuance Date, the Corporation issues or sells, or is deemed by the express provisions of this subparagraph (d)(iv)(A) to have issued or sold, Additional Shares of Common Stock, for an Effective Price less than the applicable Conversion Price for any series of Designated Preferred Stock (in each case as adjusted for Recapitalization Events), then and in each such case the then existing Conversion Price for such series of Designated Preferred Stock shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Conversion Price for such applicable series of Designated Preferred Stock by a fraction (a) the numerator of which shall be (A) the number of shares of Conversion Shares Outstanding immediately prior to such issue or sale plus (B) the number of shares of Common Stock which the aggregate consideration received (or by express provision hereof deemed to have been received) by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at such Conversion Price for such series of Designated Preferred Stock and (b) the denominator

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of which shall be the number of shares of Conversion Shares Outstanding at the close of business on the date of such issue after giving effect to such issue of Additional Shares of Common Stock.

(2) For the purpose of making any adjustment required under this subparagraph (d)(iv)(A), the consideration received by the Corporation for any issue or sale of securities shall (a) to the extent it consists of cash be computed at the gross amount of cash received by the Corporation before deduction of any expenses payable by the Corporation and any underwriting or similar commissions, compensation or concessions paid or allowed by the Corporation in connection with such issue or sale, (b) to the extent it consists of property other than cash, be computed at the fair market value of that property as determined in good faith by the Board of Directors and (c) if Additional Shares of Common Stock, Convertible Securities or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Corporation for a consideration which covers both, be computed (as provided in clauses (a) and (b) above) as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(3) For the purpose of the adjustment required under this subparagraph (d)(iv)(A), if at any time or from time to time after the Issuance Date, the Corporation issues or sells any Options or Convertible Securities (other than options or rights exercisable for or convertible into shares of Common Stock referred to in clause (BB) of the definition of Additional Shares of Common Stock), then in each case the Corporation shall be deemed to have issued at the time of the issuance of such Options or Convertible Securities the maximum number of Additional Shares of Common Stock (as set forth in the instruments relating thereto, giving effect to any provision contained therein for a subsequent upward adjustment of such number) issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Corporation for the issuance of such Options or Convertible Securities plus, in the case of such Options, the minimum amounts of consideration, if any (as set forth in the instruments relating thereto, giving effect to any provision contained therein for a subsequent downward adjustment of such consideration), payable to the Corporation upon the exercise of such Options and, in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Corporation (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities which were deemed to have been received by the Corporation on issuance of such Convertible Securities) on the conversion of such Convertible Securities. No further adjustment of the Conversion Price for Designated Preferred Stock, adjusted upon the issuance of such Options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock on the exercise of any such Options or the conversion of any such Convertible Securities; provided, however, that if any such Options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, or are exercised for a lesser number of Additional

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Shares of Common Stock or with a greater consideration paid to the Corporation than was previously deemed to be issued or received by the Corporation, the Conversion Price for Designated Preferred Stock adjusted upon the issuance of such Options or Convertible Securities shall be readjusted to the Conversion Price for Designated Preferred Stock which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common Stock, if any, actually issued or sold on the exercise of such Options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Corporation upon such exercise, plus the consideration, if any, actually received by the Corporation for the granting of all such Options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted plus the consideration, if any, actually received by the Corporation (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities which were deemed to have been received by the Corporation on issuance of such Convertible Securities) on the conversion of such Convertible Securities and provided further, however, that if any such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase or decrease in the consideration payable to the Corporation, or decrease or increase in the number of shares of Common Stock or Convertible Securities issuable, upon the exercise, conversion or exchange thereof, the Conversion Price for the Designated Preferred Stock computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto), and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities (provided, however, that no such adjustment of the Conversion Price for Designated Preferred Stock shall affect Common Stock previously issued upon conversion of the Designated Preferred Stock).

(4) In each case of an adjustment or readjustment of the Conversion Price for any series of Designated Preferred Stock or the number of shares of Common Stock or other securities issuable upon conversion of any series of Designated Preferred Stock, the Corporation, at its expense, shall cause the chief financial officer of the Corporation to compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage, prepaid, to each registered holder of Designated Preferred Stock at the holder's address as shown in the Corporation's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based including a statement of (a) the consideration received or deemed to be received by the Corporation for any Additional Shares of Common Stock issued or sold or deemed to have been issued or sold, (b) the Conversion Price for the applicable series of Designated Preferred Stock at the time in effect, (c) the number of Additional Shares of Common Stock and (d) the type and amount, if any, of other property which at the time would be received upon conversion of such series of Designated Preferred Stock.

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(5) Except as expressly provided herein, no adjustment in the Conversion Price of any series of Designated Preferred Stock shall be made in respect of the issue of Additional Shares of Common Stock unless the consideration per share for such Additional Shares of Common Stock issued or deemed to be issued by the Corporation is less than the Conversion Price in effect on the date of, and immediately prior to, such issue, for the Series A Preferred Stock in effect on the date of, and immediately prior to, such issue.

(B) Adjustment for Stock Splits and Combinations. If the Corporation at any time or from time to time after the Issuance Date effects a subdivision of the outstanding Common Stock, the Conversion Price for each series of Designated Preferred Stock then in effect immediately before that subdivision shall be proportionately decreased, and conversely, if the Corporation at any time or from time to time after the Issuance Date combines the outstanding shares of Common Stock, the Conversion Price for each series of Designated Preferred Stock then in effect immediately before the combination shall be proportionately increased. Any adjustment under this subparagraph (d)(iv)(B) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(C) Adjustment for Certain Dividends and Distributions. In the event the Corporation at any time, or from time to time after the Issuance Date makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in Additional Shares of Common Stock or in any right to acquire Common Stock for no consideration, then and in each such event the Conversion Price for each series of Designated Preferred Stock then in effect shall be decreased as of the time of such issuance or, in the event such a record date is fixed, as of the close of business on such record date, by multiplying the Conversion Price for such series of Designated Preferred Stock then in effect by a fraction (a) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and (b) the denominator of which shall be the total number of shares of Common Stock 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 Stock 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 dated fixed thereof, the Conversion Price for such series of Designated Preferred Stock shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Price for such series of Designated Preferred Stock shall be adjusted pursuant to this subparagraph (d)(iv)(C) as of the time of actual payment of such dividends or distributions.

(D) Adjustments for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Issuance Date makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation other than shares of Common Stock, then in each such event provision shall be made so that

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the holders of each series of Designated Preferred Stock shall receive upon conversion thereof, in addition to the number of shares of Common Stock receivable thereupon, the amount of securities of the Corporation which they would have received had their series of Designated Preferred Stock been converted into Common Stock on the date of such event and had they thereafter, during the period from the date of such event to and including the date of conversion, retained such securities receivable by them as aforesaid during such period, subject to all other adjustments called for during such period under this paragraph (d) with respect to the rights of the holders of the Designated Preferred Stock.

(E) Adjustment for Reclassification, Exchange and Substitution. If the Common Stock issuable upon the conversion of Designated Preferred Stock is changed into the same or a different number of shares of any other class or classes of stock, whether by recapitalization, reclassification or otherwise (other than a subdivision or combination of shares of stock dividend or a recapitalization, provided for elsewhere in this paragraph (d)), then and in any such event each holder of Designated Preferred Stock 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 number of shares of Common Stock into which such shares of Designated Preferred Stock might have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein.

(F) Reorganizations. If at any time or from time to time there is a capital reorganization of the Common Stock (other than a recapitalization, subdivision, combination, reclassification or exchange of shares provided for elsewhere in this paragraph (d)), then, as a part of such reorganization, provision shall be made so that the holders of each series of Designated Preferred Stock shall thereafter be entitled to receive upon conversion of such series of Designated Preferred Stock, the number of shares of stock or other securities or property of the Corporation, to which a holder of Common Stock deliverable upon conversion would have been entitled on such capital reorganization. In any such case, appropriate adjustment shall be made in the application of the provisions of this paragraph (d) with respect to the rights of holders of each series of Designated Preferred Stock after the reorganization to the end that the provisions of this paragraph (d) (including adjustment of the Conversion Price for each series of Designated Preferred Stock then in effect and number of shares purchasable upon conversion of such series of Designated Preferred Stock) shall be applicable after that event and be as nearly equivalent to the provisions hereof as may be practicable.

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

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of the holders of the Designated Preferred Stock against dilution or other impairment. The Corporation shall at all times reserve and keep available out of its authorized but unissued Common Stock the full number of shares of Common Stock deliverable upon the conversion of all the then outstanding shares of Designated Preferred Stock and shall take all such action and obtain all such permits or orders as may be necessary to enable the Corporation lawfully to issue such Common Stock upon the conversion of Designated Preferred Stock.

(vi) Notices 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 which is the same as cash dividends paid in previous quarters) or other distribution, the Corporation shall mail to each holder of Designated Preferred Stock at least twenty (20) days prior to the date specified herein, a notice specifying the date on which any such record is to be taken for the purpose of such dividend or distribution.

(e) Redemption. The Designated Preferred Stock shall, at the election of the holders of the Designated Preferred Stock, be redeemed by the Corporation in two equal installments in accordance with the following provisions:

(i) Election to Redeem. The Corporation shall redeem the Designated Preferred Stock at the times, and pursuant to the terms, set forth below, if the Corporation receives written certification (the "Redemption Certificate") that holders of no less than fifty and one-tenth percent (50.1%) of the then outstanding Designated Preferred Stock (the "Electing Holders") have elected in favor of redemption (the "Redemption Election"). The Redemption Certificate shall be signed by the Electing Holders and shall be delivered to the Corporation at its principal office, on or before October 8, 2002.

(ii) Redemption Price. The Designated Preferred Stock shall be redeemed by the Corporation paying in cash, out of funds legally available therefor, an amount equal to (A) (1) the Original Series A Issue Price in the case of the Series A Preferred Stock, (2) the Original Series B Issue Price in the case of the Series B Preferred Stock, and (3) the Original Series C Issue Price in the case of the Series C Preferred Stock (in each case as adjusted for any Recapitalization Events with respect to such shares), plus (B) a further amount per share equal to dividends, if any, then declared and unpaid on account of Designated Preferred Stock to and including the date fixed for redemption (the "Redemption Price").

(iii) Mandatory Redemption: Two Installments. The Redemption Election constitutes an election in favor of a mandatory redemption of all shares of Designated Preferred Stock. The Designated Preferred Stock shall be redeemed in two equal installments, with the Corporation redeeming 50% of each holder's shares of Designated Preferred Stock in the first installment and the remaining Designated Preferred Stock in the second installment. Subject to the Corporation having funds legally

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available, the closing of the first installment shall occur on or about December 8, 2002 (the "First Redemption Date") and the closing of the second installment shall take place on or about December 8, 2003 (the "Second Redemption Date"). If the Corporation shall not have sufficient funds legally available for redeeming the Designated Preferred Stock at the First Redemption Date or the Second Redemption Date, respectively, the Corporation shall apply the available funds to redeem the Designated Preferred Stock on a ratable basis (i) such that the ratio of available funds distributed per share of Series A Preferred Stock to the Series A Adjusted Issue Price is equivalent to the ratio of available funds being distributed per share of Series B Preferred Stock to the Series B Adjusted Issue Price and is equivalent to the ratio of assets being distributed per share of Series C Preferred Stock to the Series C Adjusted Issue Price and (ii) as among the holders of each series of Designated Preferred Stock based on the number of shares of such series so held. The Corporation shall redeem the remaining shares to have been redeemed in such installment as soon as practicable after the Corporation has funds legally available therefor.

(iv) Redemption Notice. If the Redemption Election has been received the Corporation shall mail, postage prepaid, not less than 30 days nor more than 60 days prior to the First and Second Redemption Dates, written notice thereof (the "Redemption Notice"), to each holder of record of the Designated Preferred Stock, at its post office address last shown on the records of the Corporation. Each such Redemption Notice shall state:

(A) The number of shares of Designated Preferred Stock held by the holder that the Corporation shall redeem on the Redemption Date specified in the Redemption Notice;

(B) The Redemption Date and Redemption Price;

(C) The date upon which the holder's conversion rights (as set forth in paragraph (d) above) as to such shares terminate, which termination shall be five days before the Redemption Date; and

(D) That the holder is to surrender to the Corporation, in the manner and at the place designated, its certificate or certificates representing the shares of Designated Preferred Stock to be redeemed.

(v) Surrender of Certificates; Payment. On or before each Redemption Date, each holder of shares of Designated Preferred Stock to be redeemed on such Redemption Date, unless such holder has exercised its right to convert the shares as provided in paragraph (d) hereof, shall surrender the certificate or certificates representing such shares to the Corporation, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price for such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof, and each surrendered certificate shall be cancelled and retired. In

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the event that fewer than all of the shares represented by such certificate are redeemed, a new certificate representing the unredeemed shares shall be issued forthwith.

(vi) Rights Subsequent to Redemption. If the Redemption Notice shall have been duly given, and if on each Redemption Date the Redemption Price therefor is either paid or made available for payment through the deposit arrangement specified in subparagraph (vii) below, then notwithstanding that the certificates evidencing any of the shares of Designated Preferred Stock so called for redemption shall not have been surrendered, the dividends with respect to such shares shall cease to accrue after the Redemption Date and all rights with respect to such shares shall forthwith terminate after the Redemption Date, except only the right of the holders to receive the Redemption Price without interest upon surrender of their certificate or certificates therefor.

(vii) Deposit of Funds. On or prior to each Redemption Date, the Corporation shall deposit as a trust fund with any bank or trust company, having a capital and surplus of at least \$100,000,000, a sum equal to the aggregate Redemption Price of all shares of Designated Preferred Stock called for redemption on such Redemption Date and not yet redeemed or converted, with irrevocable instructions and authority to the bank or trust company to pay, on and after each such Redemption Date, the Redemption Price to the respective holders upon the surrender of their share certificates. From and after the date of such deposit (but not prior to each Redemption Date), the shares so called for redemption on such Redemption Date shall be redeemed. The deposit shall constitute full payment of the shares of their holders, and from and after each Redemption Date the shares redeemed on such Redemption Date shall be deemed to be no longer outstanding, and the holders thereof shall cease to be stockholders with respect to such shares and shall have no rights with respect thereto except the rights to receive, from the bank or trust company, payment of the Redemption Price of the shares, without interest, upon surrender of their certificates therefor. Any funds so deposited and unclaimed at the end of one year from the Second Redemption Date shall be released or repaid to the Corporation, after which the holders of shares called for redemption shall be entitled to receive payment of the Redemption Price only from the Corporation.

(f) Protective Provisions. So long as any shares of Designated Preferred Stock are outstanding and subject to any additional voting rights required by applicable law, the Corporation shall not, without the affirmative vote of the holders of record of a majority of the outstanding shares of Designated Preferred Stock voting as a class:

(i) amend, repeal or modify any provision of, or add any provision to, this Restated Certificate of Incorporation or By-laws if such action would alter or change the rights, preferences, privileges or powers of, or the restrictions provided for the benefit of, any series of the Designated Preferred Stock;

(ii) amend this Restated Certificate of Incorporation;

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(iii) authorize, create or issue shares of any class or series of stock having (x) any preference or priority as to dividends, liquidation, redemption or assets superior to any such preference or priority of any series of Designated Preferred Stock or (y) an original issue price less than the original issue price of the capital stock issued by the Corporation in its equity offering immediately preceding the proposed authorization, creation or issuance of shares hereunder, or authorize, create or issue shares of any class or series or any bonds, debentures, notes or other obligations convertible into or exchangeable for, or having optional rights to purchase, any shares of capital stock of the Corporation having any such preference or priority or lower original issue price;

(iv) reclassify the shares of Common Stock or any other shares of stock hereafter created junior to the Designated Preferred Stock as to dividends, liquidation, redemption or assets into shares of Designated Preferred Stock or into shares having any preference or priority as to dividends or assets superior to that of the Preferred Stock;

(v) declare or pay any dividends or make any other distributions on shares of the Corporation's capital stock;

(vi) repurchase or redeem any shares of Designated Preferred Stock or Common Stock (other than Employee Stock (as defined in the Purchase Agreement) or redemptions effected upon the terms contained in this Restated Certificate of Incorporation);

(vii) make, or permit any corporation, firm or entity under its control (a "Controlled Entity") to make, any loans or advances (other than to the Corporation, a wholly-owned subsidiary of the Corporation or to their respective employees in the ordinary course of business as advances against salary, as travel advances or to enable such employees to either purchase Employee Stock or exercise options for Common Stock issued to them pursuant to stock option plans by giving a promissory note therefor);

(viii) make, or permit any Controlled Entity to make, any guaranty, other than in the ordinary course of business or on behalf of the Corporation or a wholly-owned subsidiary of the Corporation;

(ix) merge with or consolidate into any corporation, firm or entity, or sell, lease or otherwise dispose of all or substantially all of its assets unless the Corporation is the surviving or acquiring entity;

(x) mortgage or pledge, or create a security interest in, or permit any Controlled Entity to mortgage, pledge or create a security interest in, all or substantially all of the property of the Corporation or such Controlled Entity, unless unanimously approved by the entire Board of Directors of the Corporation;

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(xi) incur any indebtedness individually or in the aggregate in excess of \$100,000; or

(xii) own, or permit any Controlled Entity to own, any stock or other securities of any Controlled Entity or other corporation, partnership or entity unless it is wholly owned by the Corporation, except certificates of deposit, high quality commercial paper, United States government securities and other short-term, high quality liquid investment grade securities.

SIXTH: The following provisions are inserted for purposes of the management of the business and conduct of the affairs of the Corporation and for creating defining, limiting and regulating the powers of the Corporation and its directors and stockholders:

(a) The number of directors of the Corporation shall be fixed and may be altered from time to time in the manner provided in the Bylaws and that certain Securities Purchase Agreement, dated as of December 8, 1997, among the Corporation and the parties listed therein as investors (the "Purchase Agreement"), and vacancies in the Board of Directors and newly created directorships resulting from any increase in the authorized number of directors may be filled, and directors may be removed, as provided in the Bylaws, the Purchase Agreement and this Restated Certificate of Incorporation.

(b) The election of directors may be conducted in any manner approved by the stockholders or as required by law at the time when the election is held and need not be by ballot.

(c) All corporate power and authority of the Corporation (except as at the time otherwise provided by law, by this Certificate of Incorporation or by the Bylaws) shall be vested in and exercised by the Board of Directors.

SEVENTH: To the fullest extent permitted by the Delaware General Corporation Law, no director of the Corporation shall have personal liability to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that nothing in this article shall eliminate or limit the liability of a director (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 §174 of the Delaware General Corporation Law, or (iv) for any transaction from which the director derived an improper personal benefit. In the event the Delaware General Corporation Law is amended after the date hereof so as to authorize corporate action further eliminating or limiting the liability of directors of the Corporation, the liability of the directors shall thereupon be eliminated or limited to the maximum extent permitted by the Delaware General Corporation Law, as so amended from time to time.

EIGHTH: The Corporation shall indemnify, and advance expenses to, its directors, officers, employees and agents, and all persons who at any time served as

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directors, officers, employees or agents of the Corporation, to the extent permitted, and in the manner provided by, Section 145 of the Delaware General Corporation Law, as amended, or any successor provisions, and shall have power to make any other or further indemnity permitted under the laws of the State of Delaware.

NINTH: Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under the provisions of section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of section 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation. Nothing contained herein shall affect or impair the Corporation's ability to avail itself of any other state or federal law concerning insolvency and/or reorganization, including but not limited to Title 11 of the U.S. Code.

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IN WITNESS WHEREOF, musicmaker.com, Inc. has caused this certificate to be signed by Robert P. Bernardi, the Chairman of the Board of Directors and Co-Chief Executive Officer of the Corporation, on this the 17 day of February, 1999.

By: 

Robert P. Bernardi
Chief Executive Officer

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RECORDED: 01/31/2000

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