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RECEIVED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI 5 09 PH 107 EASTERN DIVISION FILED EASTER DAVIDSON & ASSOCIATES, INC., D.B.A. BLIZZARD ENTERTAINMENT, and VIVENDI UNIVERSAL GAMES, INC., U. S. DISTRICT COURT EASTERN DISTRICT OF MO ST. LOUIS **Plaintiffs** Case No. ٧. 4:02C V 00498CAS INTERNET GATEWAY, INC., and TIM UNG, AN INDIVIDUAL Defendants

COMPLAINT FOR FEDERAL COPYRIGHT INFRINGEMENT; FEDERAL TRADEMARK INFRINGEMENT, DILUTION AND FALSE DESIGNATION OF ORIGIN; AND COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION; AND DEMAND FOR JURY TRIAL

Plaintiffs Davidson & Associates, Inc., d.b.a. Blizzard Entertainment, and Vivendi Universal Games, Inc., (collectively "Blizzard"), hereby allege as follows against Defendants Internet Gateway, Inc., and Tim Jung, based upon actual knowledge with respect to Plaintiffs and Plaintiffs' acts, and on upon information and belief as to all other matters.

NATURE OF THE CASE

1. This is an action for direct and indirect infringement of a registered copyright in violation of the Copyright Act, as amended, 17 U.S.C. § 501; for infringement of a registered trademark in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1); for false designation of origin in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); for trademark dilution in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c); and for common law trademark infringement and unfair competition.

JURISDICTION AND VENUE

- 2. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331, 1332, and 1338. The parties are citizens of diverse states, and the matter in controversy, exclusive of interest and costs, exceeds in value the sum specified by 28 U.S.C. § 1332.
 - 3. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391.

THE PARTIES

- 4. Plaintiff Davidson & Associates is a corporation organized and existing under the laws of the state of California, with a principal place of business at 6080 Center Drive, Los Angeles, California 90045. A division of Davidson & Associates does business as Blizzard Entertainment, which has a principal place of business at Irvine, CA 92612. Plaintiff Vivendi Universal Games, Inc., is the parent corporation of Davidson & Associates. Vivendi Universal Games, Inc., is a Delaware Corporation having a principal place of business at 6080 Center Drive, Los Angeles, California 90045.
- 5. On information and belief, Defendant Internet Gateway, Inc. is an Internet Service Provider (ISP) operating and doing business in St. Charles, Missouri. According to the Missouri Secretary of State's Office, Internet Gateway, Inc. (Charter No. 00419806) has been administratively dissolved for failure to file an annual report. Nonetheless, on information and belief, Defendant Internet Gateway, Inc., continues to operate as a business within this judicial district, by, among other activities, advertising its services as an ISP in the greater St. Louis area, and hosting the website www.bnetd.org, which features the BNETD server program. BNETD is a server program that enables remote multiplayer Internet play of Blizzard games, without requiring players to provide a CD Key to verify that they are using an authorized copy of the Blizzard game.

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6. On information and belief, Tim Jung is an individual residing at 611 Oregon Trail Drive, St. Charles, Missouri 63304. Mr. Jung is the president of Internet Gateway, Inc., as well as a co-developer of the BNETD program and the system administrator of the www.bnetd.org website.

BLIZZARD'S COMPUTER GAMES AND BATTLE.NET WEBSITE

- 7. Blizzard Entertainment is one of the preeminent entertainment software companies in the world. Blizzard is known for its high-quality computer games, such as DIABLO, DIABLO II, STARCRAFT, WARCRAFT, and WARCRAFT II, as well as its online gaming service, BATTLE.NET (www.battle.net), which allows remote multiplayer play of these games via the Internet. Blizzard's games are tremendously popular, having generated sales well in excess of 190 million dollars since 1997 in the U.S. alone. Gamers from around the world now use Blizzard's Battle.net service, with active users numbering over 10 million.
- 8. Blizzard's computer games are PC-type games sold for use on personal computers.

 The games may be played in a single player or multiplayer mode, across local or remote networks, provided that each end user has a legal copy of the game installed on his or her computer.
- 9. Blizzard's Battle.net website provides a forum in which owners of legal copies of Blizzard's games may play the games in a multiplayer mode, remotely across the Internet, and against other gamers from around the world. The Battle.net service is free, but users must have a legal copy of a Blizzard game and a valid CD Key to engage in multiplayer play using the site.
- 10. To access Battle.net, users are prompted to create an account on the Battle.net server, to login using a password, and to furnish the server with a CD Key unique to the each legitimate copy of a Blizzard game. The CD Key is provided in a sticker affixed to the Blizzard game at the time of purchase. The same CD Key is also required to install the Blizzard game on the user's computer.

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To validate a user's CD Key, client-side key check software stored on the client computer performs a First CD Key Check. If the CD Key entered by the user passes this First CD Key Check, it is forwarded to the server. Once the CD Key is passed to the Battle.net server, server-side key check software executed by the Battle.net server performs a Second CD Key Check. If the second check is successful, software on the Battle.net server also detects whether any other user currently logged on to Battle.net is using the same CD Key. If no duplicate CD Key is found, the user is authenticated and allowed access to the site.

BLIZZARD'S COPYRIGHTS

below. These registrations are in full force and effect, and copies of each are attached together as Exhibit A. These copyrights cover nearly all aspects of Blizzard's games as they are distributed in the marketplace, including, without limitation, (a) all of the source code and object code and any other data distributed on CD/DVD ROM with each game, (b) all graphical and textual elements of the screens that appear in each game when the game is executed on a personal computer, (c) all graphical and textual elements of manuals and other documents distributed with the games, and (d) all motion picture and sound recordings, and other audio visual elements distributed with the games.

Title	Number	Registration Date
DIABLO	PA 815-402	11/25/96
DIABLO II	PA 974-041	06/29/00
DIABLO II: LORD OF DESTRUCTION	PA 1-039-239	07/05/01
STARCRAFT	PA 822-523	03/31/98
STARCRAFT: BROODWAR	PA 875-327	12/21/98
WARCRAFT II: TIDES OF DARKNESS	PA 795-742	01/30/96

WARCRAFT II EXPANSION SET: BEYOND THE DARK PORTAL	TX 4-420-784	08/30/96
WARCRAFT II BATTLE.NET EDITION	PA 983-532	11/18/99
WARCRAFT II BATTLE.NET EDITION	PA 960-074	06/15/00

- 13. Blizzard's registered copyrights cover its proprietary client-side key check software, which is distributed on CD/DVD ROM along with Blizzard's game programs. The client-side key check software conducts the First CD Key check discussed above, both when the user attempts to install the game program on his or her personal computer, and also when the user attempts to log in to Battle.net.
- 14. Blizzard's client-side key check software was distributed to users in product releases containing a bug, i.e., a programming error. With the bug, the client-side key check software is still able to perform the key check function for which it was designed, but the bug causes the software to produce an unusual result that enables it to be easily identified.

BLIZZARD'S TRADEMARKS

- 15. Blizzard owns U.S. Trademark Reg. No. 2,324,717 for BATTLE.NET for use in connection with entertainment services, namely, providing on-line computer games, and featuring tips and strategies for computer games. A record of this registration is attached as Exhibit B. Blizzard has used the mark in commerce continuously since at least as early as November, 1996, well before Defendants' infringing activities began.
- 16. Blizzard's BATTLE.NET trademark is inherently distinctive or has acquired distinctiveness through substantial advertising and promotion.

- 17. Blizzard's BATTLE.NET trademark is famous in the minds of computer game players.
- 18. Blizzard's BATTLE.NET trademark is often referred to by users as BNET, in shorthand.

DEFENDANTS' ACTIVITIES

- 19. On information and belief, Defendant Tim Jung co-developed the BNETD server program. BNETD is a server program that emulates Blizzard's Battle.net service and enables remote, multiplayer Internet play of Blizzard games, with one key difference: BNETD does not require players to provide a CD Key to verify that they are using a legitimate copy.
- 20. The BNETD server program can be accessed through the BNETD website (www.bnetd.org), representative copies of which are attached as Exhibit C.
- 21. On information and belief, Defendant Internet Gateway, Inc. is an Internet Service Provider that hosts the bnetd.org website and BNETD server programs. Tim Jung is the president of Internet Gateway, Inc. While play on the BNETD servers is free, Internet Gateway, Inc., advertises that Internet Gateway users who are "serious gamers" may access any number of game server programs provided by Internet Gateway, Inc., including a Diablo I and II server, a Warcraft I and II server and a Starcraft/Broodwar server, among others (collectively referred to herein as "the BNETD server").
- 22. Attached as Exhibit D is a printout of two separate pages from Defendant Internet Gateway, Inc.'s website (www.igateway.net). On information and belief, these web pages advertise Internet Gateway's BNETD game servers as an inducement for users to subscribe to Internet Gateway, Inc.'s ISP. Defendants are unjustly profiting by luring illegitimate users of unauthorized

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copies of Blizzard game programs to subscribe to Defendants' ISP services, in order to use Defendants' verification-free BNETD servers.

- 23. On information and belief, Defendants illegally copied portions of the code from Blizzard's copyrighted game programs, and incorporated these copied portions into their own BNETD server code.
- One instance of Defendants' copying is found by examining the BNETD source code, which is available to the public at Sourceforge.com. On information and belief, in order to provide unfettered access to the BNETD servers for illegitimate users of unauthorized copies of Blizzard programs, Defendants reproduced and incorporated into the BNETD server program the code for Blizzard's proprietary client-side key check software that executes certain login functionality including the First CD Key Check, described above, altering it so as not to perform any CD Key check function. Defendants' copying was so blatant that Defendants included the programming bug described above in the BNETD code. The duplication of such a unique bug in the BNETD code shows wholesale, deliberate and willful copying on Defendants' part.
- 25. On information and belief, Defendants illegally copied other portions of copyrighted code from Blizzard games and incorporated these portions into the BNETD server programs.
- 26. On information and belief, Defendants have illegally copied visual elements from screens of Blizzard's computer games and included these elements in the BNETD.ORG website.
- 27. On information and belief, Defendants' website and BNETD server program contain copied material that is substantially similar to portions of Blizzard's protected computer code and screens.
- 28. On information and belief, Defendants, through the BNETD.ORG website and BNETD server, have engaged in unauthorized public performance of Blizzard computer games by

receiving and retransmitting portions of the unauthorized public performances of Blizzard computer games by end users.

- 29. On information and belief, Defendants, through their BNETD servers and BNETD.ORG website, have induced end users to illegally reproduce and publicly perform Blizzard computer games, by providing an online service that does not check for a valid CD Key.
- 30. On information and belief, Defendants, through their BNETD servers and BNETD.ORG website, have committed contributory copyright infringement by providing an online, verification-free forum by which end users have made unauthorized public performances of illegally copied Blizzard computer games, through which Defendants' receive financial gain.
- 31. Defendants, through their BNETD servers and BNETD.ORG website, are vicariously liable for copyright infringements of end users because they obtained a direct financial benefit from the BNETD gaming service.
- 32. Defendants' aforesaid acts constitute a direct infringement of Blizzard's copyrights because they contribute so substantially to the end users' actions that Defendants are liable for the end users' infringing activity directly.
- 33. Defendants' illegal copying was not authorized by Blizzard, and was performed without Blizzard's knowledge.
 - 34. Defendants' copying was willful.
 - 35. Defendants' copying was for Defendants' financial gain.
- 36. On information and belief, Defendants adopted the name BNETD for the server program and domain name because BNETD is a shorthand expression for BATTLE.NET DAEMON. A daemon is a type of program that runs continuously and exists for the purpose of handling periodic service requests that a computer system expects to receive. It is common

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software industry practice to name server programs with names that end in "D," for example, one of the most popular web servers is named "HTTPD."

- 37. On information and belief, Defendants adopted the BNETD name in 1999, well after Blizzard had first used its trademark BATTLE.NET, and after that trademark had become famous in the minds of consumers.
- 38. On information and belief, Defendants adopted the BNETD name without Blizzard's knowledge.
- 39. On information and belief, Defendants adopted the BNETD name without Blizzard's authorization.
- 40. On information and belief, Defendants' BNETD name is nearly identical in meaning and overall commercial impression to Blizzard's BATTLE.NET mark.
- 41. On information and belief, Defendants' online gaming services offered in connection with the BNETD name are nearly identical to Blizzard's BATTLE.NET online gaming services.
- 42. On information and belief, consumers who select, purchase and/or use Blizzard's computer games and online gaming service are the same type of consumers who use Defendants' BNETD online gaming service.
- 43. On information and belief, Blizzard's computer games and online gaming service are sold in similar channels of trade as Defendants' online gaming services, for example, via the Internet.
- 44. Defendants' use of BNETD as a server program name, and BNETD.ORG as a domain name at which online gaming services are offered is likely to cause consumer confusion

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as to whether Defendants' server program and online gaming services originate from Blizzard, or are affiliated with the Blizzard's Battle.net servers and online gaming services.

- 45. If allowed to continue, Defendants' actions will severely impair the value of the BATTLE.NET mark.
 - 46. Defendants' infringement and dilution of the BATTLE.NET mark is willful.
 - 47. Blizzard has no adequate remedy at law.

COUNT I – COPYRIGHT INFRINGEMENT UNDER THE COPYRIGHT ACT §501(a)

- 48. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.
- 49. The aforesaid acts of Defendants constitute copyright infringement arising under the Copyright Act, as amended, 17 U.S.C. § 101 *et seq.* and particularly § 501(a) thereof.
- 50. The aforesaid acts of Defendants constitute a direct infringement of Blizzard's right to reproduce the copyrighted works, as defined under 17 U.S.C. §106(1).
- 51. The aforesaid acts of Defendants constitute a direct infringement of Blizzard's right to prepare derivative works based upon the copyrighted works, as defined under 17 U.S.C. §106(2).
- 52. The aforesaid acts of Defendants constitute a direct infringement of Blizzard's right to public performance of the copyrighted works, as defined under 17 U.S.C. §106(4).
- 53. The aforesaid acts of Defendants constitute a direct infringement of Blizzard's copyrights as defined under 17 U.S.C. §106 by contributing to the infringing activity of end-users so substantially as to be directly liable for the end-users' infringing activity.
- 54. The aforesaid acts of Defendants constitute contributory copyright infringement of Blizzard's copyrights as defined under 17 U.S.C. §106.

- 55. The aforesaid acts of Defendants constitute vicarious infringement of Blizzard's copyrights as defined under 17 U.S.C. §106.
- 56. The aforesaid acts of Defendants constitute active inducement of infringement of Blizzard's copyrights as defined under 17 U.S.C. §106.

COUNT II – FEDERAL TRADEMARK INFRINGEMENT UNDER LANHAM ACT SECTION 32(1)

- 57. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.
- 58. The aforesaid acts of Defendants constitute infringement of Blizzard's federally registered trademark in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1), and the willfulness of such acts entitles Plaintiffs to treble damages and attorney fees under 15 U.S.C. § 1117.

COUNT III – FEDERAL FALSE DESIGNATION OF ORIGIN UNDER LANHAM ACT SECTION 43(A)

- 59. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.
- 60. The aforesaid acts of Defendants constitute false designation of origin, in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), and the willfulness of such acts entitle Plaintiffs to treble damages and attorney fees under 15 U.S.C. § 1117.

COUNT IV – FEDERAL TRADEMARK DILUTION UNDER LANHAM ACT SECTION 43(c)

- 61. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.
- 62. The aforesaid acts of Defendants constitute dilution of Blizzard's famous BATTLE.NET trademark in violation of Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), and

the willfulness of such acts entitle Plaintiffs to treble damages and attorney fees under 15 U.S.C. § 1117.

COUNT V – COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

- 63. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.
- 64. The aforesaid acts of Defendants constitute common law trademark infringement, misappropriation of Blizzard's goodwill, and unfair competition in this District, Missouri, and in other states, and is a violation of the common law of Missouri, and of other states, by reason of which Blizzard has suffered and will continue to suffer irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Blizzard prays that this Court enter judgment in its favor on each an every claim for relief set forth above and award it relief including, but not limited to, the following.

- A. A preliminary and permanent injunction enjoining Defendants, their officers, employees, agents, subsidiaries, representatives, distributors, dealers, and all persons active in concert or participation with any of them from infringing Blizzard's copyrights listed above and infringing Blizzard's BATTLE.NET trademark.
- B. Ordering Defendants to shut down the infringing BNETD server program preliminarily and permanently.
- C. Ordering Defendants to deliver to Blizzard all copies of materials that infringe Blizzard's copyrights or trademark.
- D. Ordering Defendants to provide Blizzard with an accounting of any and all sales of products or services that infringe Blizzard's copyrights or trademark.

- E. Awarding Blizzard monetary relief including damages sustained by Blizzard in an amount not yet determined.
 - F. Awarding Blizzard treble damages pursuant to 15 U.S.C. § 1117.
- G. Awarding Blizzard its costs and attorneys' fees in this action pursuant to 15 U.S.C. § 1117, 18 U.S.C. § 1964, and 17 U.S.C. § 505 and other applicable laws.
- H. Awarding Blizzard actual or statutory damages for infringement and willful infringement under 17 U.S.C. § 504, as appropriate.
 - I. Awarding such other relief as the Court may deem appropriate.

Dated: April 5, 2002

Respectfully submitted,

Mary Annyl. Wymore (E.D. Reg. # 28939) GREENSFELDER, HEMKER & GALE, P.C.

10 S. Broadway, Suite 2000 St. Louis, Missouri 63102 Telephone: (314) 241-9090 Facsimile: (314) 241-9743

Peter E. Heuser (upon *pro hac vice* application) Mark D. Alleman (upon *pro hac vice* application) KOLISCH, HARTWELL, DICKINSON

McCORMACK & HEUSER 520 S.W. Yamhill Street, Suite 200 Portland, Oregon 97204

Telephone: (503) 224-6655 Facsimile: (503) 295-6679

Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

Bv:

of Attorneys for Plaintiffs



This Cartificate issued under the seal of the Copyright of Work of the Performing Arts Office in accordance with title 17. United States Code, attests that registration has been made for the work identific fled below. The information on this certificate has been made a part of the Copyright Office records.



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REGISTER OF COPYRIGHTS

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Additional Cartificate (17 U.S.C. 706) CERTIFICATE OF REGISTRATION



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

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Prior U.S. Cls.: 100, 101, and 107

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SN 75-104,667, FILED 5-15-1996.

WILLIAM P. SHANAHAN, EXAMINING ATTORNEY

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The BNETD Project :: Building the game servers of tomorrow

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The BNETD Project Building the game servers of tomorrow

Project Page :: Mai

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The BNETD Project

The bnetd project is a collaboration focusing on development of a server that attempts to emulate Blizzard's Battle.net gaming server. The bnetd project is run by volunteers and is neither supported by nor affiliated with Bibzard Entertainment.

A major part of the effort is supporting most of the battle net competible games. Currently it supports Diablo 1, Starcraft, Warcraft 2 BNE, and some of the Diablo 2 connections. The server may eventually support some non-Blizzard clients as well, but no work is currently being done in that area. Certain software in addition to the briefly server should also be considered part of the bnetd project. This includes BNS (BNetd Selector), bnchat (a textbased chat client), the BNI utilities, and bntrackd (BNetd TRACKing Daemon). All the software is licensed under the GNU GPL. The briefd team also produces documentation for these programs and the battle net protocol.

You will still need your original copy of a Blizzard game in order to connect to the bnetd server. The bneld project does not condone the use of illegally duplicated games being used to play on bnetd servers.

You can find the latest news, mailing lists, discussion forums, server lists and current file releases at this site.

-BNETD Project Members

Donat

Make a BNETD by click logo be

Legal Update Posted by: Tim Jung on Wednesday, March 27, 2002 - 12:57 PM CST

We heard back from Vivendi last week. It seems that they are also pushing-👫 🌊 copyright infringment issues as well as "circumvention technology" issues under the DMCA. So we sent them back another set of letters.

(4453 Reads)

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Login

Web Site Updates Posted by: Tim Jung on Monday, Merch 25, 2002 - 07:19 PM CST

Welcome to the new web site. We haven't finished all the changes that we want to make yet, but we are getting there. We hope that everything, including file downloads, should be back online sometime around the first few weeks of April.

We are aware how slow the site runs. We are in the process of upgrading the server, which hasn't been done in over 2 years, We hope to have the upgrades done in the next week or so.

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doing things.

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Posted by: Ijung on Friday, March 22, 2002 - 05:55 PM CST

Valve has officially announced Steam, a content delivery system that works automatically over the internet. It is mainly targeted at broadband users, but

Valve Announces "Steam"

brings some pretty incredible ideas and concepts to the market. It allows Valve, or any other licensed developer, to sell, deliver, update, and authenticate their software via the internet.

The trick is how users, other developers, and retailers will react to this new way of

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http://www.bnetd.org/

The BNETD Project :: Building the game servers of tomorrow

Myth Game Server Open Source Posted by: Tim Jung on Monday, March 18, 2002 - 03:19 AM CST

Posted by: Tim Jung on Monday, March 18, 2002 - 12:11 AM CST

gotten a copy.



Nothing in this world is permanent, and this must also be said of gaming servers. Over the past five years many of you have enjoyed the thrill of playing the Myth games online, as well as experienced the pains of a downed server or a rank reset. Ahl Memories! The time has come, however, to bid farewell to the old and fired Myth II game server.

Bungle is finally and officially closing the doors on the Myth gaming servers for all time. Myth II online's last day will be Friday, February 15.

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Web Site Updates

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We now have the "Donation" and the "Petitions" pages updated also. So if you are looking for a way to donate to the bnetd defense fund, you can now do so. We have added a few more links to "News Links" page as well.

We have a new press release about the Blizzard/Vivendi case that has been

issued by EFF. We recommend anyone that has not yet seen it or read it do so.

You can read it in the Press Releases section of the web site. Please feel free

to forward a copy of the press release to any relevant web sites that have not

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Report Bugs

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For the serious game fanalic, users may try any of a number of game server programs that we provide.

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Internet Gateway offers many garning services to our cutstomers and users of the internet In general. Below you will find links to some of the garning services that we currently offer. If you don't see something you want please feel free to contact us about adding that garning service to our list of services.

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BBS Games	Board Games	Card Games
Dark Reign	Descent 3	Diablo
Civilization: Call to Power	Computers (Java Emulation)	Fighter Squadron
Heavy Gear 1	Heavy Gear 2	Interstate '76
Interstate '82	Party Voice Chat	RC Chat
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Multi-User Dungeon	NetStorm	Palace Chat
Queke	Quake 2	Quakeworld
Role Playing Games	Shanghai	Shoge: Mobil Armor Division
Starcraft/Broodwars	Stellar Conquest	Subspace
Ultima Online	Unreal Tournament	Warcraft

Server Status

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