

IN THE UNITED STATES DISTRICT COURT
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EASTERN DISTRICT
OF MISSOURI

COPY

DAVIDSON & ASSOCIATES, INC., D.B.A.
BLIZZARD ENTERTAINMENT, and
VIVENDI UNIVERSAL GAMES, INC.,

Plaintiffs,

v.

INTERNET GATEWAY, INC., TIM JUNG,
an individual, ROSS COMBS, an individual,
and JOHN DOES 1-50,

Defendants.

Case No. 4:02CV498 CAS

**FIRST AMENDED COMPLAINT FOR FEDERAL COPYRIGHT
INFRINGEMENT; FEDERAL TRADEMARK INFRINGEMENT, DILUTION
AND FALSE DESIGNATION OF ORIGIN; COMMON LAW TRADEMARK
INFRINGEMENT AND UNFAIR COMPETITION; AND BREACH OF END USER
LICENSE AGREEMENTS; 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., Tim Jung, Ross Combs, and John Does 1-50 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. §

NTD



1125(c); for common law trademark infringement and unfair competition; and for breach of contract under the laws of Missouri and other states.

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.

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, the owner of the BNETD domain, and the system administrator of the www.bnetd.org website.

7. On information and belief, Defendant Ross Combs is an individual residing at 9801 Stonelake Blvd., Apartment 1733, Austin, Texas 78759. Mr. Combs is a co-developer of the BNETD program.

8. On information and belief, John Does 1-50 are unnamed co-developers, distributors, hosts, programmers, or other persons or entities involved in the creation, use, and dissemination of the BNETD program.

BLIZZARD'S COMPUTER GAMES AND BATTLE.NET WEBSITE

9. 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: BATTLE.NET EDITION, 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.

10. 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. To install

a legal copy of a Blizzard computer game on a user's computer, the user is prompted to enter a CD Key, which typically is printed on a sticker attached to a CD ROM case containing the game software. The computer game performs a First CD Key check to determine whether the CD Key is valid. If the CD Key is valid, the installation of the game is completed and the CD Key is stored on the user's computer. To illegally play pirated versions of Blizzard's games, some users obtain unauthorized CD Keys, which are capable of passing the First CD Key check. It is believed that these unauthorized CD Keys are illicitly copied from legitimately purchased copies of a Blizzard game, or from illegal software programs developed to generate unauthorized CD Keys.

11. Before installation of the Blizzard computer game, the user is presented, via a software interface, with an End User License Agreement ("EULA") governing use of the Blizzard computer game. If the user finds the terms of the EULA acceptable, the user may enter into the agreement by clicking "I AGREE," "OK," or the like. The EULAs for DIABLO II, WARCRAFT II: BATTLE.NET EDITION, STARCRAFT, and STARCRAFT: BROODWAR are attached as Exhibit E. Among other provisions, each EULA prohibits the user from (a) reverse engineering the Blizzard computer game software to which it applies, and (b) hosting or providing matchmaking services for the game or emulating or redirecting the communication protocols used by Blizzard in the network feature of the game.

12. Blizzard's Battle.net game network 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.

13. To access Battle.net, users are prompted to create an account on the Battle.net server and to login using a username and password. Specialized username/password authentication

software distributed with Blizzard's games encrypts and forwards the username and password, along with the CD Key to the Battle.net server.

14. 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

15. Blizzard owns several registered copyrights for its games, as listed in the table 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

16. Blizzard's registered copyrights cover its proprietary username/password authentication software, discussed above, which is distributed on CD/DVD ROM along with Blizzard's game programs.

17. Blizzard's username/password authentication software was distributed to users in product releases containing a bug, i.e., a programming error. With the bug, the username/password authentication software is still able to perform the function for which it was designed, but the implementation of the bug causes the software to produce a distinctive and unusual result, and is easily identified. The bug causes the username/password authentication software to produce results that would be impossible to identify or replicate, including, but not limited to, through the analysis of the network traffic between a Blizzard game and Battle.net.

BLIZZARD'S TRADEMARKS

18. 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.

19. Blizzard's BATTLE.NET trademark is known by more than 10 million active users around the world, and countless others who are familiar with the service, and is registered as a trademark in 16 different countries for use in connection with on-line gaming services.

20. Blizzard's BATTLE.NET trademark is inherently distinctive or has acquired distinctiveness through substantial advertising, promotion, and consumer use.

21. Blizzard's BATTLE.NET trademark is famous in the minds of computer game players.

22. Blizzard's BATTLE.NET trademark is often referred to by users as BNET, in shorthand.

DEFENDANTS' ACTIVITIES

23. On information and belief, Defendants Tim Jung, Ross Combs, and John Does 1-50 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.

24. Until recently, the BNETD server program could be accessed through the BNETD website (www.bnetd.org), representative copies of which are attached as Exhibit C. Now, the BNETD server program has been temporarily taken down by Defendants due to notification of infringement from Plaintiffs. But, Defendants have indicated that they intend to re-post the BNETD server.

25. 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 server, a Diablo II server, a Warcraft server and a Starcraft/Broodwar server, among others (collectively referred to herein as “the BNETD server”).

26. 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 copies of Blizzard game programs to subscribe to Defendants’ ISP services, in order to use Defendants’ verification-free BNETD servers. Defendants are also believed to have distributed the BNETD server code to third parties via the Internet.

27. On information and belief, Defendants purchased copies of Blizzard computer games, including DIABLO II, STARCRAFT, STARCRAFT: BROOD WAR, and/or WARCRAFT II: BATTLE.NET EDITION, and installed these games on a computer.

28. On information and belief, Defendants indicated their assent to and entered into the EULAs attached as Exhibit E for each of the games in the preceding paragraph by clicking OK or I AGREE or the like after being presented with the agreement during installation of the game.

29. 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.

30. One instance of Defendants’ copying is found by examining the BNETD source code, which is available to the public at SourceForge.net. On information and belief, Defendants copied Blizzard’s username/password authentication software and incorporated it into the BNETD

server program, in an effort to enable the BNETD server program to support usernames and passwords. The BNETD server uses the copied username/password authentication software to negotiate the encryption and transfer between the user's computer and the BNETD server of usernames, passwords, and the user's CD Key. But, unlike the Battle.net service, the BNETD server ignores the CD Key received from the user's game program, thus enabling users of pirated copies of Blizzard games with unauthorized CD Keys to engage in on-line gaming using the BNETD server. 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.

31. On information and belief, Defendants illegally copied other portions of copyrighted code from Blizzard games and incorporated these portions into the BNETD server programs.

32. On information and belief, Defendants have illegally utilized visual elements from screens of Blizzard's computer games and/or Battle.net service.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. Defendants' illegal copying was not authorized by Blizzard, and was performed without Blizzard's knowledge.

40. Defendants' copying was willful.

41. Defendants' copying was for Defendants' financial gain.

42. Defendants' copying was for Defendants' personal notoriety and reputation within the on-line gaming community.

43. Defendants' activities constitute a breach of the EULAs entered into by the Defendants for each of Blizzard's games, including DIABLO II, STARCRAFT, STARCRAFT: BROOD WAR, and/or WARCRAFT II: BATTLE.NET EDITION.

44. Defendants' copying was in violation of the anti-reverse engineering clauses, Paragraphs 2(A) or 3(A), of each of the EULAs entered into by the Defendants for Blizzard's games, including DIABLO II, STARCRAFT, STARCRAFT: BROOD WAR, and/or WARCRAFT II: BATTLE.NET EDITION.

45. Defendants' hosting of the BNETD server was in violation of the no-hosting clauses, Paragraph 2(C)(iii) or 3(C)(iv), of each of the EULAs entered into by the Defendants for Blizzard's games, including DIABLO II, STARCRAFT, STARCRAFT: BROOD WAR, and/or WARCRAFT II: BATTLE.NET EDITION.

46. Defendants' commercial exploitation of the BNETD server was in violation of the no-commercial exploitation clauses, Paragraph 2(C)(ii) or 3(C)(ii), of each of the EULAs entered into by the Defendants for Blizzard's games, including DIABLO II, STARCRAFT, STARCRAFT: BROOD WAR, and/or WARCRAFT II: BATTLE.NET EDITION.

47. 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 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."

48. 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.

49. On information and belief, Defendants adopted the BNETD name without Blizzard's knowledge.

50. On information and belief, Defendants adopted the BNETD name without Blizzard's authorization.

51. On information and belief, Defendants' BNETD name is nearly identical in meaning and overall commercial impression to Blizzard's BATTLE.NET mark.

52. 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.

53. 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.

54. On information and belief, Blizzard's computer games and online gaming service are offered in similar channels of trade as Defendants' online gaming services, for example, via the Internet.

55. 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 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.

56. If allowed to continue, Defendants' actions will severely impair the value of the BATTLE.NET mark.

57. Defendants' infringement and dilution of the BATTLE.NET mark is willful.

58. Blizzard has no adequate remedy at law.

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

59. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

60. 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.

61. 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).

62. The aforesaid acts of Defendants constitute a direct infringement of Blizzard's right to prepare derivate works based upon the copyrighted works, as defined under 17 U.S.C. §106(2).

63. 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).

64. 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.

65. The aforesaid acts of Defendants constitute contributory copyright infringement of Blizzard's copyrights as defined under 17 U.S.C. §106.

66. The aforesaid acts of Defendants constitute vicarious infringement of Blizzard's copyrights as defined under 17 U.S.C. §106.

67. 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)**

68. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

69. 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)**

70. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

71. 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)**

72. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

73. 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**

74. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

75. 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.

COUNT VI – BREACH OF END USER LICENSE AGREEMENTS

76. Blizzard repeats and realleges the allegations set forth in each of the above paragraphs.

77. The aforesaid acts of Defendants constitute breach of the End User License Agreements entered into by Defendants for each of Blizzard's computer games in violation of the laws 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 and 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, whether at the BNETD.NET domain hosted by the Internet Gateway ISP, or at any other domain, address, location, or ISP within the jurisdiction of this Court.

C. An order restraining Tim Jung, Ross Combs, and John Does 1-50 from engaging in infringing activity relating to the infringing BNETD server on Internet Gateway's service provider service.

D. Ordering Defendants to deliver to Blizzard all copies of materials that infringe Blizzard's copyrights or trademark.

E. Ordering Defendants to provide Blizzard with an accounting of any and all sales of products or services that infringe Blizzard's copyrights or trademark.

F. Awarding Blizzard monetary relief including damages sustained by Blizzard in an amount not yet determined.

G. Awarding Blizzard treble damages pursuant to 15 U.S.C. § 1117.

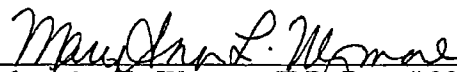
H. Awarding Blizzard its costs and attorneys' fees in this action pursuant to 15 U.S.C. § 1117, 18 U.S.C. § 1964, and 17 U.S.C. § 505 and other applicable laws.

I. Awarding Blizzard actual or statutory damages for infringement and willful infringement under 17 U.S.C. § 504, as appropriate.

J. Awarding such other relief as the Court may deem appropriate.

Dated: April 16, 2002

Respectfully submitted,

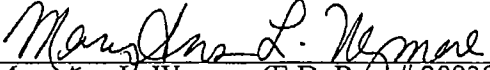

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.


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