

**JURY TRIAL DEMANDED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

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

Plaintiffs and Counter-Defendants,

v.

INTERNET GATEWAY, INC., TIM  
JUNG, an Individual, ROSS COMBS, an  
Individual, ROB CRITTENDEN, an  
Individual, YI WANG, an individual, and  
JOHN DOES 1-50,

Defendants and Counter-Plaintiffs.

Case No. 4:02CV498CAS

**DEFENDANTS AMENDED ANSWER AND  
COUNTERCLAIMS TO PLAINTIFFS'  
SECOND AMENDED COMPLAINT**

**DEFENDANTS AMENDED ANSWER AND COUNTERCLAIMS TO  
PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendants Internet Gateway, Inc., Tim Jung, Ross Combs, and Rob Crittenden hereby collectively referred to as (the "Defendants"), state for their Amended Answer and Counterclaims to the Second Amended Complaint of Plaintiffs Davidson & Associates, Inc., DBA Blizzard Entertainment, and Vivendi Universal Games, Inc. (collectively, "Blizzard"), as follows:

1. Defendants admit that Blizzard considers this to be 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 direct and indirect circumvention of copyright protection systems in violation of the Copyright Act, as amended, 17 U.S.C. § 1201(a)(1)(A), and for trafficking in technology

designed for the purpose of circumventing copyright protection systems in violation of the Copyright Act, as amended, 17 U.S.C. § 1201(a)(2); 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); for common law trademark infringement and unfair competition; and for breach of contract under the laws of Missouri and other states. Defendants deny or lack sufficient information to admit or deny the remaining allegations of paragraph 1 as phrased.

2. Defendants admit that this Court has subject matter jurisdiction over this action. Defendants lack sufficient knowledge to admit or deny the remaining allegations of paragraph 2 and on that basis deny the allegations.

3. Defendants admit the allegations in paragraph 3.

4. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 4 and on that basis deny the allegations.

5. Defendants admit the allegations in paragraph 5 that Internet Gateway, Inc. (“Internet Gateway”) is an Internet Service Provider (“ISP”) with a place of business at 1345 Triad Center, PMB No. 415, St. Peters, Missouri, 63376, that it is operating and doing business in this judicial district, that it has failed to file an annual report with the State of Missouri, that the website with the URL [www.bnetd.org](http://www.bnetd.org) resides on its servers, and that at one time, the BNETD server program was accessible from that website. Defendants also admit that Internet Gateway advertises its ISP services in the greater St. Louis area. Defendants deny or lack knowledge regarding the remaining allegations in paragraph 5.

6. Defendants admit that Tim Jung (“Mr. Jung”) resides at 611 Oregon Trail Drive, St. Charles, Missouri, 63304. Defendants also admit that Mr. Jung is the president of Internet Gateway and that Mr. Jung is the registered owner and administrative contact for www.bnetd.org. Defendants deny or lack sufficient knowledge to admit or deny the allegations of paragraph 6 and on that basis deny the allegations.

7. Defendants admit that Ross Combs (“Mr. Combs”) is an individual residing at 9801 Stonelake Blvd., Apartment 1733, Austin, Texas, 78759, and that he is a co-developer of the BNETD server program. Defendants deny or lack sufficient knowledge to admit or deny the rest of the allegations of paragraph 7.

8. Defendants admit that Robert Crittenden (“Mr. Crittenden”) is an individual residing at 500 Darlene Avenue, Linthicum, Maryland, 21090, and that he is a co-developer of the BNETD server program. Defendants deny or lack sufficient knowledge to admit or deny the rest of the allegations of paragraph 8.

9. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 9 and on that basis deny the allegations.

10. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 10 and on that basis deny the allegations.

11. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 11 and on that basis deny the allegations.

12. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 12 and on that basis deny the allegations.

13. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 13 and on that basis deny the allegations.

14. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 14 and on that basis deny the allegations.

15. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 15 and on that basis deny the allegations.

16. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 16 and on that basis deny the allegations.

17. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 17 and on that basis deny the allegations.

18. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 18 and on that basis deny the allegations.

19. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 19 and on that basis deny the allegations.

20. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 20 and on that basis deny the allegations.

21. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 21 and on that basis deny the allegations.

22. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 22 and on that basis deny the allegations.

23. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 23 and on that basis deny the allegations.

24. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 24 and on that basis deny the allegations.

25. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 25 and on that basis deny the allegations.

26. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 26 and on that basis deny the allegations.

27. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 27 and on that basis deny the allegations.

28. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 28 and on that basis deny the allegations.

29. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 29 and on that basis deny the allegations.

30. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 30 and on that basis deny the allegations.

31. Defendants admit that Exhibit D appears to be a trademark registration for “battle.net”. Defendants lack sufficient knowledge to admit or deny the remaining allegations of paragraph 31 and on that basis deny the allegations.

32. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 32 and on that basis deny the allegations.

33. Defendants deny the allegations of paragraph 33.

34. Defendants deny the allegations of paragraph 34.

35. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 35 and on that basis deny the allegations.

36. Defendants admit that Exhibit E appears to be a collection of various Blizzard EULAs. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 36 and on that basis deny the allegations.

37. Defendants admit that Exhibit E appears to be a collection of various Blizzard EULAs. The legal rights granted by those EULAs are a matter of legal interpretation and therefore, on that basis, Defendants cannot admit or deny the truth of their existence. For the foregoing reason, Defendants deny the remaining allegations of paragraph 37.

38. Defendants admit that Exhibit E appears to be a collection of various Blizzard EULAs. The legal rights granted by those EULAs are a matter of legal interpretation and therefore, on that basis, Defendants cannot admit or deny the truth of their existence. For the foregoing reason, Defendants deny the remaining allegations of paragraph 38.

39. Defendants do not understand what Blizzard means by the phrase “commercially reasonable contractual protection” and therefore cannot admit or deny its truth. On that basis, Defendants deny the allegations in paragraph 39.

40. Defendants admit that Exhibit F appears to be a version of the Terms of Use for [www.battle.net](http://www.battle.net). Defendants lack sufficient knowledge to admit or deny the remaining allegations of paragraph 40 and on that basis deny the allegations.

41. Defendants admit that Exhibit F appears to be a version of the Terms of Use for [www.battle.net](http://www.battle.net). The legal rights granted by this document are a matter of legal interpretation and therefore, on that basis, Defendants cannot admit or deny the truth of their existence. For the foregoing reasons, Defendants deny the remaining allegations of paragraph 41.

42. Defendants do not understand what Blizzard means by the phrase “commercially reasonable contractual protection” and therefore cannot admit or deny its truth. On that basis, Defendants deny the allegations in paragraph 42.

43. Defendants admit that the BNETD server program matches players for remote, multiplayer play of Blizzard games over the Internet. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 43 and on that basis deny the allegations.

44. Defendants admit that the BNETD server program does not verify the validity or uniqueness of CD Keys. Defendants deny the remaining allegations of paragraph 44.

45. Defendants deny the allegations of paragraph 45.

46. Defendants admit that Mr. Combs, Mr. Crittenden, and various other people co-developed the BNETD server program, that Internet Gateway hosted the program, and that game players could at one time access the BNETD server program from the website [www.bnetd.org](http://www.bnetd.org), which was hosted by Internet Gateway. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 46 and on that basis deny the allegations.

47. Defendants admit that Mr. Jung, Mr. Combs, or Mr. Crittenden have at some time purchased or otherwise obtained copies of various Blizzard computer games. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 47 and on that basis deny the allegations.

48. Defendants admit that Mr. Jung, Mr. Combs, or Mr. Crittenden have at some time installed a Blizzard game on a computer. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 48 and on that basis deny the allegations.

49. Defendants admit that Mr. Jung, Mr. Combs, or Mr. Crittenden have at some time used a Blizzard game to log onto www.battle.net. Defendants also admit that various co-developers of the BNETD server program examined information they received from www.battle.net as well as information transmitted from their personal computers to www.battle.net. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 49 and on that basis deny the allegations.

50. Defendants admit that various co-developers of the BNETD server program at some point reverse engineered the functional workings and conceptual aspects of the communication between www.battle.net and their personal computers. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 49 and on that basis deny the allegations.

51. Defendants deny the allegations of paragraph 51.

52. Defendants deny the allegations of paragraph 52.

53. Defendants admit that the BNETD server program does not verify the validity or uniqueness of CD Keys. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 53 and on that basis deny the allegations.

54. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 54 and on that basis deny the allegations.

55. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 55 and on that basis deny the allegations.

56. Defendants deny the allegations of paragraph 56.

57. Defendants lack sufficient knowledge to admit or deny the remaining allegations in paragraph 57 and on that basis deny the allegations.



58. Defendants admit that game players could at one time access the BNETD server program from the website [www.bnetd.org](http://www.bnetd.org), hosted by Internet Gateway, and that at one point the source code for the BNETD server program was available at [www.sourceforge.net](http://www.sourceforge.net). Defendants admit that Exhibit G appears to be printouts from [www.bnetd.org](http://www.bnetd.org). Defendants deny the remaining allegations in paragraph 58.

59. Defendants admit that when the BNETD server program was available from [www.bnetd.org](http://www.bnetd.org), the public could download it for free. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 59 and on that basis deny the allegations.

60. Defendants admit that Mr. Combs contributed code to a software utility called BNS and that Exhibit H and B appear to be various "Gateway Selection" pages. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 60 and on that basis deny the allegations.

61. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 61 and on that basis deny the allegations.

62. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 62 and on that basis deny the allegations.

63. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 63 and on that basis deny the allegations.

64. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 64 and on that basis deny the allegations.

65. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 65 and on that basis deny the allegations.

66. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 66 and on that basis deny the allegations.

67. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 67 and on that basis deny the allegations.

68. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 68 and on that basis deny the allegations.

69. Defendants deny the allegations of paragraph 69.

70. Defendants admit that the public could at one time access various game server programs hosted on Internet Gateway. Defendants deny or lack sufficient knowledge to admit or deny the remaining allegations in paragraph 70 and on that basis deny the allegations.

71. Defendants admit that Exhibit I appears to be a printout of two separate pages from its website at [www.igateway.net](http://www.igateway.net). Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 71 and on that basis deny the allegations.

72. Defendants deny the allegations in paragraph 72.

73. Defendants deny the allegations in paragraph 73.

74. Defendants deny the allegations in paragraph 74.

75. Defendants admit that a daemon is a computer program that is not invoked explicitly, but lies dormant waiting for some condition to occur. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 71 and on that basis deny the allegations.

76. Defendants deny the allegations of paragraph 76.

77. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 77 and on that basis deny the allegations.

78. Defendants deny the allegations of paragraph 78.

79. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 79 and on that basis deny the allegations.

80. Defendants deny the allegations in paragraph 80 and on that basis deny the allegations.

81. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 81 and on that basis deny the allegations.

82. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 82 and on that basis deny the allegations.

83. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 83 and on that basis deny the allegations.

84. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 84 and on that basis deny the allegations.

85. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 85 and on that basis deny the allegations.

86. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 86 and on that basis deny the allegations.

87. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 87 and on that basis deny the allegations.

88. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 88 and on that basis deny the allegations.

89. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 89 and on that basis deny the allegations.

90. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 90 and on that basis deny the allegations.

91. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 91 and on that basis deny the allegations.

92. Defendants deny or lack sufficient knowledge to admit or deny the allegations in paragraph 92 and on that basis deny the allegations.

93. Defendants repeat their answers to the allegations set forth in each of the above paragraphs.

94. Defendants deny the allegation in paragraph 94.

95. Defendants deny the allegations in paragraph 95.

96. Defendants deny the allegations in paragraph 96.

97. Defendants deny the allegations in paragraph 97.

98. Defendants deny the allegations in paragraph 98.

99. Defendants deny the allegations in paragraph 99.

100. Defendants deny the allegations in paragraph 100.

101. Defendants deny the allegations in paragraph 101.

102. Defendants repeat their responses to the individual allegations in the preceding paragraphs.

103. Defendants deny the allegations in paragraph 103.

104. Defendants deny the allegations in paragraph 104.

105. Defendants deny the allegations in paragraph 105.

106. Defendants deny the allegations in paragraph 106.

107. Defendants deny the allegations in paragraph 107.

108. Defendants deny the allegations in paragraph 108.
109. Defendants deny the allegations in paragraph 109.
110. Defendants repeat their responses to the individual allegations in the preceding paragraphs.
111. Defendants deny the allegations in paragraph 111.
112. Defendants deny the allegations in paragraph 112.
113. Defendants repeat their responses to the individual allegations in the preceding paragraphs.
114. Defendants deny the allegations in paragraph 114.
115. Defendants deny the allegations in paragraph 115.
116. Defendants repeat their responses to the individual allegations in the preceding paragraphs.
117. Defendants deny the allegations in paragraph 117.
118. Defendants deny the allegations in paragraph 118.
119. Defendants repeat their responses to the individual allegations in the preceding paragraphs.
120. Defendants deny the allegations in paragraph 120.
121. Defendants repeat their responses to the individual allegations in the preceding paragraphs.
122. Defendants deny the allegations in paragraph 122.

#### **AFFIRMATIVE DEFENSES**

Defendants hereby assert the following Affirmative Defenses in this case:

### **FIRST AFFIRMATIVE DEFENSE**

123. The Second Amended Complaint fails to state a claim upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

124. Plaintiffs' state law contract causes of action are preempted by the Copyright Act of 1976.

### **THIRD AFFIRMATIVE DEFENSE**

125. Plaintiffs' state law unfair competition causes of action are preempted by the Copyright Act of 1976.

### **FOURTH AFFIRMATIVE DEFENSE**

126. Any copying of Plaintiffs' copyrighted material by Defendants constituted fair use under section 107 of the Copyright Act of 1976, including, but not limited to, use in reverse engineering.

### **FIFTH AFFIRMATIVE DEFENSE**

127. By and through this suit, Plaintiffs are attempting to illegally expand the legitimate scope of any copyright they own in their game products. Such actions constitute copyright misuse, thereby rendering any and all asserted copyrights unenforceable.

### **SIXTH AFFIRMATIVE DEFENSE**

128. Plaintiffs are estopped from enforcing any applicable copyrights based on their conduct, representations and omissions, which reasonably led Defendants to believe that they would not be sued for copyright infringement based on the activities of the BNETD project and on which Defendants relied to their detriment.

**SEVENTH AFFIRMATIVE DEFENSE**

129. Plaintiffs' copyright claims are barred by acquiescence, laches, implied consent and/or waiver.

**EIGHTH AFFIRMATIVE DEFENSE**

130. Plaintiffs' contributory and vicarious copyright claims are barred to the extent any person, based on whose behavior Plaintiffs seek to hold Defendants liable, are innocent infringers.

**NINTH AFFIRMATIVE DEFENSE**

131. Plaintiffs' copyright claims are barred by safe harbor provisions of the Digital Millennium Copyright Act of 1998.

**TENTH AFFIRMATIVE DEFENSE**

132. Any use in whole or part of Plaintiffs' trademarks or trade dress is good faith, non-trademark, descriptive or functional use.

**ELEVENTH AFFIRMATIVE DEFENSE**

133. Plaintiffs' trademark claims are barred by acquiescence, implied consent, estoppel and/or waiver.

**TWELFTH AFFIRMATIVE DEFENSE**

134. Plaintiffs' trademark claims are barred because of the doctrine of laches.

**THIRTEENTH AFFIRMATIVE DEFENSE**

135. Defendants actions are lawful under Title 17, Section 1201(c) and/or 1201(f).

## FOURTEENTH AFFIRMATIVE DEFENSE

136. Defendants actions are lawful because Title 17, Section 1201(a) is unconstitutional on its face and as applied under the First Amendment and/or the Copyright Clause of the United States Constitution and because passing Section 1201(a) is not a valid exercise of Congress' enumerated powers.

## COUNTERCLAIMS

Defendants Internet Gateway, Inc., Tim Jung, Ross Combs, and Rob Crittenden hereby collectively referred to as (“Defendants” or “Counterclaim-Plaintiffs”), assert the following counterclaims against Plaintiffs Davidson & Associates, Inc., DBA Blizzard Entertainment, and Vivendi Universal Games, Inc. (collectively, “Blizzard” or “Counterclaim-Defendants”):

### Parties

137. Counterclaim-Plaintiff Internet Gateway is a Missouri corporation with its principal place of business at 1345 Triad Center, PMB No. 415, St. Peters, Missouri, 63376. Counterclaim-Plaintiff Mr. Jung is an individual residing at 611 Oregon Trail Drive, St. Charles, Missouri, 63304. Counterclaim-Plaintiff Mr. Combs is an individual residing at 9801 Stonelake Blvd., Apartment 1733, Austin, Texas, 78759. Counterclaim-Plaintiff Mr. Crittenden is an individual residing at 500 Darlene Avenue, Linthicum, Maryland, 21090.

138. On information and belief, Counterclaim-Defendant Davidson & Associates, Inc. (“Davidson & Associates”) is a corporation organized and existing under the laws of the state of California, with its 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 131 Theory, Irvine, CA 92612. Counterclaim-Defendant Vivendi Universal Games, Inc., (“Vivendi”) is the parent corporation of Davidson & Associates.



Vivendi is a Delaware corporation, which has its principal place of business at 6080 Center Drive, Los Angeles, California, 90045.

**Jurisdiction**

139. These counterclaims arise under the copyright laws of the United States as enacted under Title 17 of the United States Code, the trademark laws of the United States as enacted under Title 15 of the United States Code and the provisions of the Federal Declaratory Judgment Act, as well as the laws of the State of Missouri. The jurisdiction of this Court is proper under 17 U.S.C. §§ 101 et seq., 15 U.S.C. §§ 1051 et seq., and 28 U.S.C. §§ 1331, 1332, 1338, and 2201-02.

**Venue**

140. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

**Count I: Declaratory Relief Regarding Non-Infringement**

141. Based on Blizzard's filing of this suit and Counterclaim-Plaintiffs' Affirmative Defenses, an actual controversy has arisen and now exists between Counterclaim-Plaintiffs and Blizzard as to whether Counterclaim-Plaintiffs infringe Blizzard's copyrights and trademarks.

142. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., Counterclaim-Plaintiffs request the declaration of the Court that they do not infringe and have not infringed any copyright or trademark of Blizzard.

**Count II: Declaratory Relief Regarding Non-Circumvention**

143. Based on Blizzard's filing of this suit and Counterclaim-Plaintiffs' Affirmative Defenses, an actual controversy has arisen and now exists between Counterclaim-Plaintiffs and Blizzard as to whether Counterclaim-Plaintiffs have violated Title 17, Section 1201(a).

144. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., Counterclaim-Plaintiffs request the declaration of the Court that they do not and have not violated Section 1201(a).

**Count III: Declaratory Relief Regarding Unconstitutionality of 17 U.S.C. § 1201(a)**

145. Based on Blizzard's filing of this suit and Counterclaim-Plaintiffs' Affirmative Defenses, an actual controversy has arisen and now exists as to whether Counterclaim-Plaintiffs have violated Title 17, Section 1201(a).

146. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., Counterclaim-Plaintiffs request the declaration of the Court that Title 17, Section 1201(a) is unconstitutional on its face and as applied under the First Amendment and/or the Copyright Clause of the United States Constitution and that Section 1201 is not a valid exercise of Congress's enumerated powers.

**Count IV: Declaratory Relief Regarding Unenforceability of Contract**

147. Based on Blizzard's filing of this suit and Counterclaim-Plaintiffs' Affirmative Defenses, an actual controversy has arisen and now exists between Counterclaim-Plaintiffs and Blizzard as to whether Counterclaim-Plaintiffs have breached Blizzard's End User License Agreement(s) ("EULAs") and Terms Of Use ("TOU") and whether such EULAs and TOU are enforceable against Counterclaim-Plaintiffs.

148. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq., Counterclaim-Plaintiffs request the declaration of the Court that Counterclaim-Plaintiffs have not breached any of the EULAs of TOU detailed in Plaintiffs' First Amended Complaint and that those EULAs and TOU are unenforceable.

## **PRAYER FOR RELIEF**

WHEREFORE, as to the Plaintiffs' Second Amended Complaint, Defendants pray for relief as follows:

A declaration that Defendants do not infringe and have not infringed the Blizzard copyrights or trademarks detailed in Plaintiffs' Second Amended Complaint.

A declaration that Defendants do not and have not violated Title 17, Section 1201(a).

A declaration that 17 U.S.C. § 1201(a) is unconstitutional.

A declaration that Defendants are not breaching and have not breached any Blizzard EULA or TOC detailed in Plaintiffs' Second Amended Complaint.

A declaration that all Blizzard EULAs or TOU detailed in Plaintiffs' Second Amended Complaint are unenforceable.

That Plaintiffs take nothing by way of their Second Amended Complaint;

That Defendants be awarded judgment in their favor and against Plaintiffs;

That Defendants be awarded reasonable attorney's fees, expert fees, costs and expenses as permitted by law with respect to this action; and

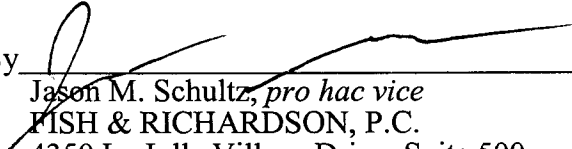
For such other and further relief as the Court may deem just and proper.

## **DEMAND FOR JURY TRIAL**

In accordance with F.R.C.P. 38(b), Defendants demand a trial by jury on all issues triable for a jury.

Dated: December 4, 2002

FISH & RICHARDSON, P.C.

By   
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of December, 2002 a true and correct copy of  
**DEFENDANTS AMENDED ANSWER AND COUNTERCLAIMS TO PLAINTIFFS'**  
**SECOND AMENDED COMPLAINT** was served upon the following via facsimile and first  
class mail, postage prepaid:

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M. Angelina Kapsokavadis  
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