

**FIFTH AMENDED AND RESTATED  
CERTIFICATE OF INCORPORATION OF ATTENSITY CORPORATION**

Attensity Corporation, a corporation organized and existing under the laws of the State of Delaware (the "**Company**"), certifies that:

- A. The name of the Company is Attensity Corporation. The Company's original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on September 4, 2002, and has been amended by (i) the Company's Amended and Restated Certificate of Incorporation filed on December 5, 2002; (ii) the Company's Amended and Restated Certificate of Incorporation filed on April 15, 2003; (iii) the Company's Amended and Restated Certificate of Incorporation filed on September 25, 2003; and (iv) the Company's Fourth Amended and Restated Certificate of Incorporation (the "**Fourth Restated Certificate**") filed on April 7, 2005 (collectively, the "**Certificate of Incorporation**").
- B. This Fifth Amended and Restated Certificate of Incorporation (the "**Restated Certificate**") was (i) duly adopted by the Board of Directors of the Company (the "**Board of Directors**") in accordance with the provisions of Section 245 of the General Corporation Law of the State of Delaware (the "**DGCL**"), (ii) declared by the Board of Directors to be advisable and in the best interests of the Company and was directed by the Board of Directors to be submitted to and be considered by the stockholders of the Company entitled to vote thereon for approval by the affirmative vote of such stockholders in accordance with Section 242 of the DGCL, and (iii) was duly adopted by a stockholder consent in lieu of a meeting of the stockholders, with (x) the holders of a majority of the outstanding shares of the Company's capital stock entitled to vote thereon and (y) the holders of a majority of the outstanding shares of Series A Preferred Stock and Series B Preferred Stock, voting together as a separate class), consenting to the adoption of this Certificate of Incorporation in writing in accordance with the provisions of Sections 228 and 242 of the DGCL and the terms of the Fourth Certificate of Incorporation.
- C. This Fifth Amended and Restated Certificate of Incorporation of the Company restates, integrates and further amends the Certificate of Incorporation of the Company. The text of the Certificate of Incorporation is hereby amended and restated to read in full as set forth in **Exhibit A** attached hereto.

State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 07:02 PM 10/20/2006  
FILED 06:46 PM 10/20/2006  
SRV 060967588 - 3556163 FILE

IN WITNESS WHEREOF, Attensity Corporation has caused this Fifth Amended and Restated Certificate of Incorporation to be signed by a duly authorized officer of the Company on October 20, 2006.

/s/ Craig D. Norris

Craig D. Norris

Chief Executive Officer

**EXHIBIT A**

**FIFTH AMENDED AND RESTATED**

**CERTIFICATE OF INCORPORATION OF**

**ATTENSITY CORPORATION**

**ARTICLE I**

The name of the corporation is Attensity Corporation (the "*Company*").

**ARTICLE IIA**

The purpose of the Company is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law (the "*DGCL*").

**ARTICLE IIB**

The address of the Company's registered office in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, 19801. The name of the registered agent at such address is The Corporation Trust Company.

**ARTICLE III**

**3.1 Capitalization.**

(a) *Classes of Stock.* The Company is authorized to issue two classes of stock, which shall be designated, respectively, as "*Common Stock*" and "*Preferred Stock*," each with a par value of \$0.0001 per share. The total number of shares that this Company shall have authority to issue is 93,972,773. The total number of shares of Common Stock authorized to be issued is 55,000,000. The total number of shares of Preferred Stock authorized to be issued is 38,972,773, of which 653,246 shares are designated as "*Series A Preferred Stock*;" 27,187,302 shares are designated as "*Series B Preferred Stock*;" and 11,132,225 shares are designated as "*Series C Preferred Stock*". The Series A Preferred Stock, the Series B Preferred Stock, and the Series C Preferred Stock are sometimes referred to collectively hereinafter as the "*Preferred Stock*" and the Series A Preferred Stock and the Series B Preferred Stock are sometimes referred to collectively hereinafter as the "*Junior Preferred*."

(b) *Rights, Preferences and Restrictions of Preferred Stock.* The rights, preferences, privileges, and restrictions granted to and imposed on the Preferred Stock are as set forth below in this Article III.

(c) **Definitions.** For purposes of this Article III, the following definitions shall apply:

(i) **"Conversion Price"** shall mean \$5.85 per share for the Series A Preferred Stock; \$0.666 per share for the Series B Preferred Stock; and \$0.8983 per share for the Series C Preferred Stock (each subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein).

(ii) **"Convertible Securities"** shall mean any evidences of indebtedness, shares or other securities convertible into or exchangeable for Preferred Stock or Common Stock. The term includes shares of the Preferred Stock, options, warrants or other rights to subscribe for or purchase Common Stock or to subscribe for or purchase Preferred Stock or obligations that are, directly or indirectly, convertible into or exchangeable for Common Stock.

(iii) **"Distribution"** shall mean the transfer of cash or other property without consideration whether by way of dividend or otherwise, payable other than in Common Stock, or the purchase or redemption of shares of the Company for cash or property other than: (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Company or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Company or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, (iii) repurchases of capital stock of the Company in connection with the settlement of a dispute with a stockholder of the Company provided that such repurchase is approved by the Board of Directors of the Company (the **"Board of Directors"**), which approval shall include at least two of the Preferred Directors (as defined in Section 3.5(d)(ii) herein) or (iv) any other repurchase or redemption of capital stock of the Company approved by the holders of a majority of the outstanding shares of Common Stock and Preferred Stock of the Company, voting as separate classes.

(iv) **"Dividend Rate"** for the Series A Preferred Stock, the Dividend Rate shall be a fixed dividend of \$0.468 per share; for the Series B Preferred Stock, the Dividend Rate shall be a fixed dividend of \$0.05328 per share; and for the Series C Preferred Stock, the Dividend Rate shall be a fixed dividend of \$0.07186 per share (each subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein).

(v) **"Junior Securities"** means any of the Company's Common Stock and all other issued and outstanding Convertible Securities of the Company other than the Series C Preferred Stock.

(vi) **"Liquidation Preference"** shall mean \$5.85 per share for the Series A Preferred Stock; \$0.666 per share for the Series B Preferred Stock; and \$0.8983 per share for the Series C Preferred Stock (each subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein).

(vii) **"Merger or Consolidation"** shall mean an acquisition of the Company by another entity, an acquisition by the Company of another entity or any other merger of the

Company with or into another entity by means of any transaction or series of related transactions (including, without limitation, any stock acquisition, reorganization, merger or consolidation but excluding any sale of stock for capital raising purposes) other than a transaction or series of transactions in which the holders of the voting securities of the Company outstanding immediately prior to such transaction continue to retain (either by such voting securities remaining outstanding or by such voting securities being converted into voting securities of the surviving entity), as a result of shares in the Company held by such holders prior to such transaction, at least fifty percent (50%) of the total voting power represented by the voting securities of the Company or such surviving entity outstanding immediately after such transaction or series of transactions.

(viii) “**Options**” shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(ix) “**Original Issue Date**” shall mean for the Series A Preferred Stock, the date upon which the first share of Series A Preferred Stock was issued; for the Series B Preferred Stock, the date upon which the first share of Series B Preferred Stock was issued; and for the Series C Preferred Stock, the date upon which the first share of Series C Preferred Stock was issued.

(x) “**Original Issue Price**” shall mean \$5.85 per share for the Series A Preferred Stock; \$0.666 per share for the Series B Preferred Stock; and \$0.8983 per share for the Series C Preferred Stock (each subject to adjustment from time to time for any Recapitalization as set forth elsewhere herein).

(xi) “**Preferred Stock**” shall mean the Series A Preferred Stock, the Series B Preferred Stock, and the Series C Preferred Stock.

(xii) “**Qualified Public Offering**” shall mean a firmly underwritten public offering of the Company pursuant to an effective registration statement filed under the Securities Act covering the offer and sale of Common Stock for the account of the Company with aggregate offering proceeds (net of underwriting discounts and commissions and offering expenses) to the Company of not less than \$40,000,000, *provided that* the offering price per share is not less than \$3.5932 (as adjusted for Recapitalizations).

(xiii) “**Recapitalization**” shall mean any stock dividend, stock split, combination of shares, reorganization, recapitalization, reclassification or other similar event.

(xiv) “**Securities Act**” shall mean the Securities Act of 1933, as amended.

(d) **No Reissuance of Preferred Stock.** No share or shares of Preferred Stock acquired by the Company by reason of redemption, purchase or otherwise shall be reissued, and all such shares shall be canceled, retired and eliminated from the shares that the Company shall be authorized to issue.

### 3.2 **Dividends.**

(a) **Preferred Stock.** The holders of outstanding shares of Preferred Stock shall be entitled to receive cash or stock dividends, when and as declared by the Board of Directors, out of

any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Common Stock of the Company. No Distributions shall be made with respect to the Common Stock until all declared dividends on the Preferred Stock have been paid or set aside for payment to the holders of the Preferred Stock. Payment of any dividends to the holders of the Preferred Stock shall be on a pro-rata, pari passu basis in proportion to the Dividend Rates for each series of Preferred Stock. The right to receive dividends on shares of Preferred Stock shall not be cumulative, and no right to such dividends shall accrue to holders of Preferred Stock by reason of the fact that dividends on said shares are not declared or paid in any year.

(b) *Additional Dividends.* After the payment or setting aside for payment of the dividends as described in Sections 3.2(a) any additional dividends (other than dividends payable solely in Common Stock) declared or paid in any fiscal year shall be declared or paid among the holders of the Preferred Stock and Common Stock then outstanding in proportion to the greatest whole number of shares of Common Stock which would be held by each such holder if all shares of Preferred Stock were converted at the then-effective Conversion Rate (as defined in Section 3.4 hereof).

(c) *Non-Cash Distributions.* Whenever a Distribution provided for in this Section 3.2 shall be payable in property other than cash, the value of such Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board of Directors.

### 3.3 *Liquidation Rights.*

(a) *Liquidation Preference.* In the event of any liquidation, dissolution or winding up of the Company, either voluntary or involuntary (a "*Liquidation Event*"):

(i) Each holder of Series C Preferred Stock shall be entitled to receive with respect to each share of Series C Preferred Stock out of the assets of the Company available for distribution to stockholders, whether such assets are capital, surplus or earnings, prior and in preference to, and before any amount shall be paid or distributed on account of or with respect to any Junior Securities, an amount equal to the sum of (x) Liquidation Preference specified for such share of Series C Preferred Stock and (y) all declared and unpaid dividends on such share of Series C Preferred Stock (such sum being referred to as the "*Series C Preferred Liquidation Preference*"). If, upon any Liquidation Event, the assets of the Company distributable among the holders of all outstanding Series C Preferred Stock shall be insufficient to permit the payment of all of the Series C Preferred Liquidation Preference in full, then the entire distributable assets of the Company, shall be distributed among the holders of the Series C Preferred Stock ratably in proportion to their relative holdings of Series C Preferred Stock; and

(ii) After the payment in full of the Series C Preferred Liquidation Preference to each holder of shares of Series C Preferred Stock, each holder of Junior Preferred Stock shall be entitled to be paid with respect to each share of Junior Preferred Stock out of the assets of the Company available for distribution to stockholders, whether such assets are capital, surplus or earnings, prior and in preference to, and before any amount shall be paid or distributed on

account of any Common Stock, any amount equal to the sum of (x) Liquidation Preference specified for such share of Junior Preferred Stock and (y) all declared but unpaid dividends (if any) on such share of Junior Preferred Stock, if any (such amount being referred to as the "**Junior Preferred Liquidation Preference**"). If, upon any Liquidation Event, the assets of the Company distributable among the holders of all outstanding Junior Preferred Stock after the distribution set forth in Section 3.3(a)(i) above shall be insufficient to permit the payment of the Junior Preferred Liquidation Preference in full, then the entire assets of the Company after the distribution set forth in Section 3.3(a)(i) above shall be distributed among the holders of the Junior Preferred Stock ratably in proportion to the amounts to which they would otherwise have been entitled.

(b) *Remaining Assets.* After the payment in full of the Series C Preferred Liquidation Preference and the Junior Preferred Liquidation Preference, the entire remaining funds and assets of the Company legally available for distribution by the Company shall be distributed with equal priority and pro rata among the holders of Preferred Stock and Common Stock then outstanding in proportion to the greatest whole number of shares of Common Stock which would be held by each holder if all of the shares of Preferred Stock were converted at the then-effective Conversion Rate.

(c) *Reorganization.* For purposes of this Section 3.3, a Liquidation Event shall be deemed to be occasioned by, or to include, (i) a Merger or Consolidation; (ii) a sale, lease or other conveyance of all or substantially all of the assets of the Company; or (iii) any liquidation, dissolution or winding up of the Company, whether voluntary or involuntary.

(d) *Valuation of Non-Cash Consideration.* If any assets of the Company distributed to stockholders in connection with any liquidation, dissolution, or winding up of the Company are other than cash, then the value of such assets shall be their fair market value as determined in good faith by the Board of Directors, *except that* any publicly-traded securities to be distributed to stockholders in a liquidation, dissolution, or winding up of the Company shall be valued as follows:

(i) If the securities are then traded on a national securities exchange or the Nasdaq Stock Market (or a similar national quotation system), then the value of the securities shall be deemed to be to the average of the closing prices of the securities on such exchange or system over the 10 trading day period ending 5 trading days prior to the Distribution; and

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the 10 trading day period ending 5 trading days prior to the Distribution.

In the event of a merger or other acquisition of the Company by another entity, the Distribution date shall be deemed to be the date such transaction closes.

**3.4 Conversion.** The holders of the Preferred Stock shall have conversion rights as follows (the "**Conversion Rights**");

(a) *Right to Convert.* Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Company or any transfer agent for the Preferred Stock, into that number of fully-paid, nonassessable shares of Common Stock determined by dividing the Original Issue Price for the relevant series by the Conversion Price for such series in effect at the time of conversion. (The number of shares of Common Stock into which each share of Preferred Stock of a series may be converted is hereinafter referred to as the "**Conversion Rate**" for each such series.) Upon any decrease or increase in the Conversion Price for any series of Preferred Stock, as described in this Section 3.4, the Conversion Rate for such series shall be appropriately increased or decreased.

(b) *Automatic Conversion.* Each share of Preferred Stock shall automatically be converted into fully-paid, nonassessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a Qualified Public Offering or (ii) upon the receipt by the Company of a written request for such conversion from the holders of at least 60% of the Preferred Stock then outstanding, or, if later, the effective date for conversion specified in such requests (each of the events referred to in (i) and (ii) are referred to herein as an "**Automatic Conversion Event**").

(c) *Mechanics of Conversion.* No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Company shall pay cash equal to such fraction multiplied by the then fair market value of a share of Common Stock as determined in good faith by the Board of Directors. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, such holder shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or of any transfer agent for the Preferred Stock, and shall give written notice to the Company at such office that such holder elects to convert the same; *provided*, however, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock shall be converted automatically, without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; *provided further*, however, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon a conversion unless either the certificates evidencing such shares of Preferred Stock are delivered to the Company or its transfer agent as provided above, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of 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 Preferred Stock shall not have been surrendered at the office of the Company, that notice from the Company shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.



(d) *Adjustments to Conversion Price for Diluting Issues.*

(i) *Special Definition.* For purposes of this Section 3.4(d), "***Additional Shares of Common***" shall mean all shares of Common Stock issued (or, pursuant to Section 3.4(d)(iii), deemed to be issued) by the Company after the Original Issue Date *other than*:

(1) shares of Common Stock issued or issuable upon conversion of shares of Preferred Stock;

(2) shares of Common Stock issued or issuable to employees, consultants or directors for compensatory purposes and in accordance with stock plans approved by the Board of Directors (which approval, as to any increase of shares reserved under any stock plan or adoption of any new plan after the date of the filing of this Restated Certificate, shall include at least two of the Preferred Directors (as defined in Section 3.5(d)(iii) herein)) or upon exercise of options or warrants granted to such parties pursuant to any such plans;

(3) shares of Common Stock issued upon the exercise, exchange, adjustment or conversion of Options or Convertible Securities outstanding as of the date of the filing of this Restated Certificate;

(4) shares of Common Stock issued or issuable as a dividend or distribution on Preferred Stock or pursuant to any event for which adjustment is made pursuant to Sections 3.4(e), (f) or (g) hereof;

(5) shares of Common Stock issued in a Qualified Public Offering;

(6) shares of Common Stock issued or issuable pursuant to the acquisition of another corporation by the Company by merger, purchase of substantially all of the assets or other reorganization approved by the Board of Directors, which approval shall include at least two of the Preferred Directors;

(7) shares of Common Stock issued or issuable to banks, equipment lessors or other financial institutions pursuant to a bona fide commercial leasing, real estate leasing or debt financing transaction approved by the Board of Directors, which approval shall include at least two of the Preferred Directors;

(8) shares of Common Stock issued or issuable in connection with sponsored research, collaboration, technology license, development, OEM, marketing or other similar agreements or strategic relationships approved by the Board of Directors, which approval shall include at least two of the Preferred Directors;

(9) shares of Common Stock issued or issuable to suppliers or third party service providers in connection with the provision of goods or services pursuant to a bona fide transaction approved by the Board of Directors, which approval shall include at least two of the Preferred Directors; and

(10) shares of Common Stock which the holders of at least 70% of the then outstanding Preferred Stock agree in writing shall not constitute Additional Shares of Common.

(ii) *No Adjustment of Conversion Price.* Except as set forth in Section 3.4(d)(iv)(1), no adjustment in the Conversion Price for Preferred Stock shall be made in respect of the issuance of Additional Shares of Common unless the consideration per share (as determined pursuant to Section 3.4(d)(v)) for an Additional Share of Common issued or deemed to be issued by the Company is less than the Conversion Price in effect on the date of, and immediately prior to such issue, for shares of the applicable series of Preferred Stock; *provided, however,* that with respect to the Series A Preferred Stock, no adjustment shall be made to the Conversion Price for Series A Preferred Stock (the "**Series A Conversion Price**") unless the issuance of Additional Shares of Common is at a price less than the then applicable Conversion Price for Series B Preferred Stock (the "**Series B Conversion Price**").

(iii) *Deemed Issue of Additional Shares of Common.* In the event the Company at any time or from time to time after the Original Issue Date of the Series C Preferred Stock shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that in any such case in which shares are deemed to be issued:

(1) no further adjustment in the Conversion Price of the Preferred Stock shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock in connection with the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any increase in the consideration payable to the Company, or decrease in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof, the Conversion Price of the 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;

(3) no readjustment pursuant to clause (2) above shall have the effect of increasing the Conversion Price of the Preferred Stock to an amount which exceeds the lower of (i) the Conversion Price of the Preferred Stock on the original adjustment date, or (ii) the

Conversion Price of the Preferred Stock that would have resulted from any issuance of Additional Shares of Common between the original adjustment date and such readjustment date;

(4) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price 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 such expiration, be recomputed as if:

a) in the case of Convertible Securities or Options for Common Stock, the only Additional Shares of Common issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Company for the issue of such exercised Options plus the consideration actually received by the Company upon such exercise or for the issue of all such Convertible Securities which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Company upon such conversion or exchange, and

b) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Company for the Additional Shares of Common deemed to have been then issued was the consideration actually received by the Company for the issue of such exercised Options, plus the consideration deemed to have been received by the Company (determined pursuant to Section 3.4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

(5) if such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefor, the adjustment previously made in the Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this Section 3.4(d)(iii) as of the actual date of their issuance.

(iv) *Adjustment of Conversion Price Upon Issuance of Additional Shares.*  
In the event the Company shall issue Additional Shares of Common after the date of this Restated Certificate of Incorporation (including Additional Shares of Common deemed to be issued pursuant to Section 3.4(d)(iii)) without consideration or for a consideration per share less than the applicable Conversion Price in effect on the date of and immediately prior to such issue (provided, however, that for purposes of determining whether an adjustment is to be made, no adjustment shall be made to the Series A Conversion Price unless the deemed issuance is at a price below the then in effect Series B Conversion Price), then the Conversion Price of each series of Preferred Stock shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares which the aggregate consideration received by the Company for the total number of Additional Shares of Common so issued would purchase at the applicable Conversion Price (which shall be deemed to be the Series B Conversion Price for the Series A and Series B Preferred Stock and the

Series C Conversion Price for the Series C Preferred Stock), and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common so issued. Notwithstanding the foregoing, the Conversion Price shall not be reduced at such time if the amount of such reduction would be less than \$0.01, but any such amount shall be carried forward, and a reduction will be made with respect to such amount at the time of, and together with, any subsequent reduction which, together with such amount and any other amounts so carried forward, equal \$0.01 or more in the aggregate. For the purposes of this Section 3.4(d)(iv)(1), all shares of Common Stock issuable upon exercise of outstanding Options or the conversion of outstanding Convertible Securities and shares of Preferred Stock, and all Additional Shares of Common deemed issued pursuant to Section 3.4(d)(iii) hereof, shall be deemed to be outstanding.

(v) *Determination of Consideration.* For purposes of this Section 3.4(d), the consideration received by the Company for the issue (or deemed issue) of any Additional Shares of Common shall be computed as follows:

(1) *Cash and Property.* Such consideration shall:

a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Company;

b) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as determined in good faith by the Board of Directors; and

c) in the event Additional Shares of Common are issued together with other shares or securities or other assets of the Company for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (a) and (b) above, as reasonably determined in good faith by the Board of Directors.

(2) *Options and Convertible Securities.* The consideration per share received by the Company for Additional Shares of Common deemed to have been issued pursuant to Section 3.4(d)(iii) shall be determined by dividing

a) the total amount, if any, received or receivable by the Company as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Company upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

b) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(e) *Adjustments for Subdivisions or Combinations of Common Stock.* In the event the outstanding shares of Common Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Common Stock without a corresponding adjustment with respect to Preferred Stock, the Conversion Price of each series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased so that the number of shares of Common Stock issuable on conversion of any shares of Preferred Stock shall be increased in proportion to such increase in outstanding shares. In the event the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock without a corresponding adjustment with respect to Preferred Stock, the Conversion Prices in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased so that the number of shares of Common Stock issuable on conversion of any shares of Preferred Stock shall be decreased in proportion to such decrease in outstanding shares.

(f) *Adjustments for Subdivisions or Combinations of Preferred Stock.* In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Preferred Stock without a corresponding adjustment with respect to Common Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased so that the number of shares of Common Stock issuable upon conversion of the affected series of Preferred Stock after such subdivision shall be equal to the number of shares of Common Stock that were issuable upon a conversion of the affected series of Preferred Stock immediately prior to such subdivision. In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Preferred Stock without a corresponding adjustment with respect to Common Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased so that the number of shares of Common Stock issuable upon conversion of the affected series of Preferred Stock after such combination shall be equal to the number of shares of Common Stock that were issuable upon a conversion of the affected series of Preferred Stock immediately prior to such combination.

(g) *Adjustments for Reclassification, Exchange and Substitution.* Subject to Section 3.3 above (the "**Liquidation Rights**"), if the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification, merger or other transaction (other than a subdivision or combination of shares provided for above), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive, each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock into a number of shares of such other class or classes of stock which a holder of the number of shares of Common Stock deliverable upon conversion of such series of Preferred Stock immediately before that change would have been entitled to receive in such reorganization or reclassification, all subject to further adjustment as provided herein with respect to such other shares. The provisions of this Section 3.4(g) shall similarly apply to successive capital reorganization, reclassification, merger or other transaction. The Company shall not effect any such capital

reorganization, reclassification, merger or other transaction unless prior to or simultaneously with the consummation thereof the successor corporation or purchaser, as the case may be, shall assume by written instrument the obligation to deliver to the holders of Preferred Stock such shares of stock, securities or property as, in accordance with the foregoing provisions, each such holder is entitled to receive in accordance with this Section 3.4(g).

(h) *No Impairment.* The Company will not through any reorganization, transfer of assets, 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 Company but will at all times in good faith assist in the carrying out of all the provisions of this Section 3.4 and in the taking of all such action as may be necessary or appropriate in order to protect the Conversion Rights of the holders of Preferred Stock against impairment. Notwithstanding the foregoing, nothing in this Section 3.4(h) shall prohibit the Company from amending its Certificate of Incorporation with the requisite consent of its stockholders and the Board of Directors.

(i) *Certificate as to Adjustments.* Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section 3.4, the Company at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Company shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of Preferred Stock.

(j) *Waiver of Adjustment of Conversion Price.* Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price of any series of Preferred Stock may be waived, either prospectively or retroactively and either generally or in a particular instance, by the consent or vote of the holders of at least a majority of the outstanding shares of such series. Any such waiver shall bind all future holders of shares of such series of Preferred Stock.

(k) *Reservation of Stock Issuable Upon Conversion.* The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

### 3.5 *Voting.*

(a) *Restricted Class Voting.* Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) *No Series Voting.* Other than as provided herein or required by law, there shall be no series voting.

(c) *Preferred Stock.* Each holder of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Preferred Stock held by such holder could be converted as of the record date. The holders of shares of the Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote. Holders of Preferred Stock shall be entitled to notice of any stockholders meeting in accordance with the Bylaws of the Company. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

(d) *Election of Directors.* The Board of Directors shall consist of six (6) members unless and until changed by resolution of the Board of Directors and the consent of a majority of the then outstanding Preferred Stock.

(i) So long as any shares of Series A Preferred Stock remain outstanding, the holders of Series A Preferred Stock, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors (the "**Series A Director**").

(ii) So long as any shares of Series B Preferred Stock remain outstanding, the holders of Series B Preferred Stock, voting as a separate class, shall be entitled to elect two (2) members of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors (any such director, a "**Series B Director**;" the Series B Directors together with the Series A Director, the "**Preferred Directors**").

(iii) The holders of Common Stock, voting as a separate class, shall be entitled to elect one (1) member of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors.

(iv) Any additional members of the Board of Directors shall be elected by the holders of Common Stock and Preferred Stock, voting together as a single class. If a vacancy on the Board of Directors is to be filled by the Board of Directors, only directors elected by the same class, classes or series of stockholders as those who would be entitled to vote to fill such vacancy shall vote to fill such vacancy. Stockholders do not have the right to cumulate their votes for the election of directors and elections need not be by written ballot unless required by the Bylaws or applicable law.

(e) *Common Stock.* Each holder of shares of Common Stock shall be entitled to one vote for each share thereof held.

### 3.6 *Protective Provisions.*

(a) As long as any of the Preferred Stock shall be issued and outstanding, the Company shall not (by amendment, merger, consolidation or otherwise), without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least 60% of the then outstanding shares of the Preferred Stock:

(i) authorize or issue, or obligate itself to issue, any other equity security, including any security (other than Series A, Series B or Series C Preferred Stock) convertible into or exercisable for any equity security having a preference over, or being on parity with the Series A, Series B or Series C Preferred Stock with respect to voting (other than the *pari passu* voting rights of Common Stock), dividends, redemption, conversion or upon liquidation;

(ii) alter or change the rights, preferences and privileges of the Preferred Stock;

(iii) authorize or effect a Liquidation Event or an acquisition of, or a merger with or into, another entity by means of any transaction or series of related transactions;

(iv) authorize or effect the sale, lease, license, abandonment or other disposition of any material assets of the Company or any subsidiary other than software licenses in the ordinary course of business;

(v) increase or decrease (other than by conversion) the total number of authorized shares of the Preferred Stock or Common Stock;

(vi) redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred Stock or Common Stock; *provided, however*, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Company or any subsidiary pursuant to agreements under which the Company has the option to repurchase such shares at no greater than cost upon the occurrence of certain events, such as the termination of employment, or through the exercise of any right of first refusal;

(vii) authorize or effect the declaration or payment of dividends or other distributions upon any equity securities of the Company;

(viii) amend the Company's Restated Certificate or, in any material respect, the Bylaws;

(ix) create any subsidiary or permit any subsidiary to issue any debt or equity securities;

(x) change the authorized number of members of the Company's Board of Directors; or



(xi) incur, assume, guarantee, or otherwise become directly or indirectly liable with respect to any indebtedness for borrowed money in excess of \$250,000 outstanding at any time or any indebtedness secured by all or substantially all of the assets of the Company or the intellectual property of the Company.

(b) As long as any of the Preferred Stock shall be issued and outstanding, the Company shall not (by amendment, merger, consolidation or otherwise), without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least 70% of the then outstanding shares of the Preferred Stock:

(i) amend the Company's Restated Certificate in a manner that imposes obligations or commitments on the holders of Preferred Stock or materially alters or changes the rights, preferences and privileges of the Preferred Stock.

(c) As long as any of the Series C Preferred Stock shall be issued and outstanding, the Company shall not (by amendment, merger, consolidation or otherwise), without first obtaining the approval (by vote or written consent as provided by law) of the holders of a majority of the then outstanding shares of the Series C Preferred Stock:

(i) authorize or issue, or obligate itself to issue any equity security, including any security convertible into or exercisable for any equity security, that would result in Series C Preferred Stock being issued; or

(ii) take any action in Section 3.6(a) if the result of such action would have a disproportionate adverse effect on the Series C Preferred Stock relative to the effect on the Series A and Series B Preferred Stock.

#### ARTICLE IV

**4.1 *Limitation of Directors' Liability.*** To the fullest extent permitted by the DGCL as the same exists or may hereafter be amended, a director of the Company shall not be personally liable to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director; except for liability (i) for any breach of the director's duty of loyalty to the Company or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the DGCL, or (iv) for any transaction from which the director derived an improper personal benefit. If the DGCL is amended after the effective date of this Certificate of Incorporation to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Company shall be eliminated or limited to the fullest extent permitted by the DGCL. Any (x) repeal or amendment of this Section 4.1 by the stockholders of the Company or (y) amendment to the DGCL shall not adversely affect any right or protection existing at the time of such repeal or amendment with respect to any acts or omissions occurring before such repeal or amendment of a person serving as a director of the Company or otherwise enjoying the benefits of this Section 4.1 at the time of such repeal or amendment.

**4.2 Indemnification.** The Company shall indemnify to the fullest extent permitted by law any director made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that he or she, or his or her testator or intestate is or was a director of the Company or any predecessor to the Company or serves or served at any other enterprise as a director at the request of the Company or any predecessor to the Company. Any repeal or modification of this Section 4.2, by amendment of such section by the stockholders of the Company or by operation of law, shall not adversely affect any right or protection of a director, officer, employee or other agent of the Company existing at the time of, or increase the liability of any such person with respect to any acts or omissions in their capacity as a director, officer, employee, or other agent of the Company occurring prior to, such repeal or modification.

## ARTICLE V

Pursuant to Section 122(17) of the DGCL, the Company hereby renounces any interest or expectancy of the Company in, or in being offered an opportunity to participate in, any and all business opportunities that are presented to the holders of Preferred Stock, their affiliates or the Preferred Directors (collectively, the "**Preferred Investor Parties**") at any time that Preferred Directors sit on the Board or that such holders hold any capital securities of the Company. Without limiting the foregoing renunciation, the Company acknowledges that the Preferred Investor Parties are in the business of making investments in, and have investments in, other businesses similar to and that may compete with the Company's businesses ("**Competing Businesses**"), and agrees that the Preferred Investor Parties shall have the unfettered right to make additional investments in or have relationships with other Competing Businesses independent of their investments in the Company. By virtue of a Preferred Investor Party holding capital securities of the Company or by having persons designated by or affiliated with such Preferred Investor Party serving on or observing at meetings of the Company's Board of Directors or otherwise, no Preferred Investor Party shall have any obligation to the Company, any of its Subsidiaries or any other holder of capital securities of the Company to refrain from competing with the Company and any of its subsidiaries, making investments in or having relationships with Competing Businesses, or otherwise engaging in any commercial activity; and none of the Company, any of its subsidiaries or any or any other holder of capital securities shall have any right with respect to any such investments or activities undertaken by such Preferred Investor Party. Without limitation of the foregoing, each Preferred Investor Party may engage in or possess any interest in other business ventures of any nature or description, independently or with others, similar or dissimilar to the business of the Company or any of its Subsidiaries, and none of the Company, any of its subsidiaries or any other holder of capital securities of the Company shall have any rights or expectancy by virtue of such Preferred Investor Party's relationships with the Company, or otherwise in and to such independent ventures or the income or profits derived therefrom; and the pursuit of any such venture, even if such investment is in a Competing Business shall not be deemed wrongful or improper. No Preferred Investor Party shall be obligated to present any particular investment opportunity to the Company or any of its subsidiaries even if such opportunity is of a character that, if presented to the Company or such subsidiary, could be taken by the Company or such subsidiary, and the Preferred Investor Party shall continue to have the right to take for its own respective account or to recommend to others any such particular investment opportunity. The provisions of this Article X shall in no way limit or eliminate any Preferred Investor Party's duties, responsibilities and obligations with respect to the protection of

any proprietary information of the Company and any of its subsidiaries, including any applicable duty to not disclose or use such proprietary information improperly or to obtain therefrom an improper personal benefit.

## **ARTICLE VI**

Any action required or permitted to be taken at an annual or special meeting of the stockholders of the Company may be taken without a meeting, without prior notice, and without a vote, if a consent or consents, in writing setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted.