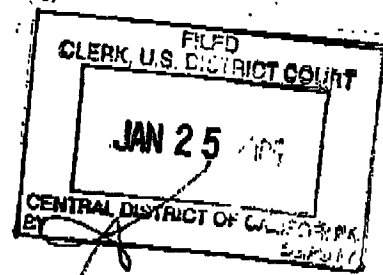


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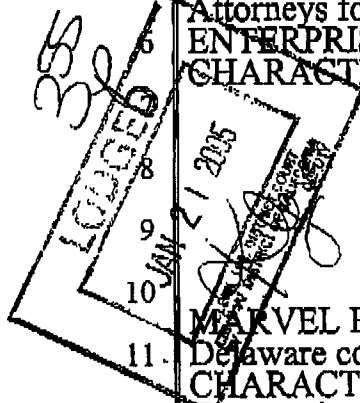
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN W. CRITTENDEN



12 MARVEL ENTERPRISES, INC., a
 13 Delaware corporation, and MARVEL
 14 CHARACTERS, INC., a Delaware
 15 Corporation,

Case No.: CV 04-9253 RGK (PLAx)

SECOND AMENDED COMPLAINT FOR:

Plaintiffs,

1. COPYRIGHT INFRINGEMENT (17 U.S.C. §§ 101 et seq.)
2. TRADEMARK INFRINGEMENT (15 U.S.C. § 1114)
4. TRADEMARK INFRINGEMENT (15 U.S.C. § 1125)
5. INTENTIONAL INTERFERENCE WITH ACTUAL AND PROSPECTIVE ECONOMIC ADVANTAGE
6. DECLARATORY RELIEF

vs.

16 NCSOFT CORPORATION, a South
 17 Korean corporation, NC
 18 INTERACTIVE, INC., a California
 19 corporation, and CRYPTIC STUDIOS,
 20 INC., a California corporation,

Defendants.

DEMAND FOR JURY TRIAL

24 Plaintiffs Marvel Enterprises, Inc. and Marvel Characters, Inc. (collectively,
 25 "Plaintiffs" or "Marvel"), by their undersigned attorneys, hereby complain against
 26 defendants NCSOFT Corporation, NC Interactive, Inc. and Cryptic Studios
 27 (collectively, "Defendants"), as follows:

28

INTRODUCTION

1
2 1. This is a civil action by Marvel against Defendants for direct,
3 contributory and vicarious copyright and trademark infringement arising out of
4 Defendants' creation, distribution and online facilitation of the computer game
5 entitled "City of Heroes." According to Defendants, "City of Heroes brings the
6 world of comic books alive in the first PC massively multiplayer online game of its
7 kind." Considering that Defendants own no comic book characters themselves, it
8 stands to reason that the comic books to which they refer are those that depict the
9 characters of Marvel and others. Through its character creation engine (the
10 "Creation Engine"), City of Heroes enables players to create customized "Heroes,"
11 which then enter "Paragon City" by way of Defendants' internet servers and engage
12 in multiplayer online games. Unfortunately, Defendants' Creation Engine facilitates
13 and, indeed, encourages players to create and utilize Heroes that are nearly identical
14 in name, appearance and characteristics to characters belonging to Marvel.

15 2. Within minutes of loading City of Heroes onto a personal computer
16 ("PC"), a player can use Defendants' character Creation Engine to "create" a
17 gigantic, green, "science-based" "tanker" – type Hero that looks, moves and behaves
18 nearly identically to Marvel's character "The Incredible Hulk." The player can even
19 name his or her "creation" "The Hulk" and enter Paragon City to join scores of other
20 such infringing Heroes.

21 3. Alternatively, a player can choose a "mutant-based" Hero and, within
22 minutes, enter Paragon City as a character nearly identical in appearance and
23 attributes as Marvel's X-Men characters "Wolverine" or "Storm."

24 4. In sum, Defendants have created, marketed, distributed and provided a
25 host environment for a game that "brings the world of comic books alive," not by
26 the creation of new or original characters but, instead, by directly, contributorily and
27 vicariously infringing upon Marvel copyrights and trademarks, in clear violation of
28 17 U.S.C. §§ 101 et seq., 15 U.S.C. § 1114(1)(a) and 15 U.S.C. § 1125.

PARTIES

1
2 5. Plaintiff Marvel Enterprises, Inc. (“Marvel Enterprises”) is, and at all
3 times mentioned has been, a corporation organized and existing under and by virtue
4 of the laws of the State of Delaware. Marvel maintains its principal offices in the
5 State of New York, and conducts business throughout the United States and in
6 California, as well as internationally. Marvel Enterprises is one of the world’s most
7 preeminent character-based entertainment companies and holds copyright and
8 trademark rights to a myriad of beloved characters, including Captain America,
9 Spider-Man, X-Men and The Incredible Hulk.

10 6. Plaintiff Marvel Characters, Inc. (“Marvel Characters”) is, and at all
11 times mentioned has been, a corporation organized and existing under and by virtue
12 of the laws of the State of Delaware, and is wholly owned by Marvel Enterprises.
13 Marvel Characters maintains its principal offices in the State of California and
14 conducts business throughout the United States and internationally.

15 7. Marvel is informed and believes and based thereon alleges that
16 Defendant NCSOFT Corporation (“NCSOFT”) is a corporation organized under the
17 laws of South Korea with offices in Austin, Texas. NCSOFT does business
18 throughout the United States, including California, and offers its products for sale
19 through various retail outlets and over the internet.

20 8. Marvel is informed and believes and based thereon alleges that
21 Defendant NC Interactive, Inc. (“NCI”) is a corporation organized and existing
22 under and by virtue of the laws of the State of California, with offices in Glendale,
23 California. NCI does business throughout the United States, including California,
24 and offers its products for sale through various retail outlets and over the internet.

25 9. Marvel is informed and believes and based thereon alleges that
26 Defendant Cryptic Studios, Inc. (“Cryptic”) is a corporation organized and existing
27 under and by virtue of the laws of the State of California, with its principal offices in
28 San Jose, California. Cryptic does business throughout the United States, including

1 California, and offers its products for sale through various retail outlets and over the
2 internet.

3 10. Marvel is informed and believes and based thereon alleges that
4 Defendants, and each of them, are and were at all times herein mentioned, the
5 agents, servants, employees and/or joint venturers of each of the other Defendants,
6 and at all times herein mentioned were acting within the course and scope of said
7 agency, employment or joint venture.

8 JURISDICTION

9 11. This Complaint alleges copyright infringement arising under the
10 Copyright Act of 1976, 17 U.S.C. §§ 101, 201(d), and 204(a) *et seq.*, and also
11 alleges trademark infringement and unfair competition arising under the Lanham
12 Act of 1946 (as amended), 15 U.S.C. § 1114 and 15 U.S.C. § 1125(a). This Court
13 has subject matter jurisdiction over the federal questions presented, pursuant to 15
14 U.S.C. § 1121(a) and 28 U.S.C. § 1331 and 1138(a) and (b).

15 12. This Complaint also alleges violations of California law. This Court
16 has supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1338(b) and
17 § 1367(a).

18 VENUE

19 13. Venue is proper in this district pursuant to the provisions of 28 U.S.C.
20 §§ 1391 (b) and (c) and 1400 (a) because a substantial part of the events giving rise
21 to this lawsuit occurred in this district and because Defendants conduct continuous
22 and systematic business in this district, advertise in this district and have caused
23 many of the injuries complained of to occur in this district.

24 FACTUAL BACKGROUND

25 14. In addition to its comic books and other world-famous publications,
26 Marvel licenses the exclusive rights to its universe of over 4,700 characters (the
27 “Marvel Characters”) including, but not limited to, Captain America, Spider-Man,
28 X-Men and The Incredible Hulk. Marvel also engages in the merchandising of

1 products based on the Marvel Characters. Merchandising and licensing account for
2 over 70% of Marvel's annual income. Indeed, the core of Marvel's business is the
3 exploitation of its valuable intellectual property, which is protected under the laws
4 of the United States governing copyright and trademark.

5 15. One of the areas in which Marvel actively licenses its world famous
6 Characters is the enormously popular and lucrative computer/console gaming
7 market – the very market that City of Heroes was created to exploit. Among the
8 many such games based on the Marvel Characters is “X-Men Legends,” an
9 Activision game based on Marvel's X-Men Universe, which is one of the most
10 successful and critically acclaimed computer/console games currently on the market.
11 Marvel is actively and aggressively pursuing similar licensing agreements with
12 several other game developers/manufacturers. Needless to say, the existence and
13 proliferation of games (such as City of Heroes) that blatantly infringe upon and
14 wrongfully exploit the popularity of the Marvel Characters poses a serious threat to
15 the success of Marvel's core business relationships and financial success in the
16 gaming industry.

17 16. Defendants promote their City of Heroes game as a “massively
18 multiplayer online game” that “brings the world of comic books alive.” Indeed,
19 City of Heroes can only be played online and only by way of Defendants' servers.
20 According to Defendants, over 180,000 new subscribers purchased City of Heroes
21 and signed up for Defendants' service in the first three months of the game's release
22 alone. Once loaded onto a PC, City of Heroes' character Creation Engine enables
23 the user to “create” Heroes that possess a variety of different attributes, powers and
24 appearances, all of which are integrated into Defendants' software. “Statesman,” a
25 character strikingly similar to Marvel's Captain America (right down to the
26 trademark large white star on his chest and shield), prominently appears on the front
27 of the City of Heroes box and guides the user through the “creation” process by way
28 of the “Game Manual.” Defendants' infringement is so brazen that their only

1 attempt to disguise “Statesman” was to give him a helmet that is nearly identical to
2 the trademark helmet worn by “Magneto,” another of Marvel’s X-Men characters.
3 Indeed, the consumer’s initial introduction to City of Heroes is via “Statesman,” a
4 tactic that Marvel believes is specifically designed to confuse consumers into falsely
5 believing that Marvel has endorsed or otherwise participated in the creation and
6 distribution of City of Heroes.

7 17. The Creation Engine takes users through a multi-stage “creation”
8 process. First, the user chooses the Hero’s “Origin,” which may be “Mutant” (a
9 genre into which virtually all of the Marvel Characters fall, including the popular X-
10 Men Characters), “Science,” “Technology,” “Natural” or “Magic.” The user then
11 chooses the Hero’s “Archetype,” which may be a “Blaster,” “Controller,”
12 “Defender,” “Scrapper” or “Tanker.” Finally, the user chooses the particular
13 attributes and appearance of the newly “created” Hero and enters Paragon City by
14 way of Defendants’ servers to interact with other Heroes and villains, many of
15 whom also have been “created” through the direct infringement of Marvel
16 copyrights and trademarks. Notably, the City of Heroes character Creation Engine
17 does not allow the user to start from scratch; Defendants’ software limits the
18 consumer’s options and leads the user through a series of choices within the
19 confines of categories that are specifically dictated by Defendants’ software.

20 18. One example is Wolverine, one of Marvel’s most popular X-Men
21 characters and perhaps the most prominent character in the hugely successful movie
22 “X-Men” and its sequel, “X-2.” Wolverine’s defining characteristics are as follows:
23 (1) he is a mutant; (2) he is a scrappy fighter who specializes in hand-to-hand
24 combat; (3) he has three unbreakable metal claws that protrude from his between his
25 fingers and can be used as weapons; and (4) he has incredible regenerative powers
26 that enable him to heal quickly from injuries sustained in battle.

27 19. In designing and marketing City of Heroes, Defendants have not only
28 made it *possible* for users to “create” Heroes that are nearly identical to Marvel

1 characters such as Wolverine – the very structure and flow of the Creation Engine
2 leads the user to do precisely that, and thus to create characters that infringe Marvel
3 copyrights. For example, if a user chooses the “Mutant” origin option (there are
4 only five “Origin” choices), the Creation Engine then prompts the user to choose
5 from one of five “Archetypes,” one of which is “Scrapper.” The Creation Engine
6 then prompts the user to choose one of six “Primary Power Sets,” one of which is
7 “Claws.” If the user chooses “Claws,” she then chooses between “Swipe” or
8 “Strike” claws. Next, the Creation Engine prompts the user to choose from four
9 “Secondary Power Sets,” one of which is “Regeneration.” Choosing “Regeneration”
10 leaves the user with only “Fast Healing” for a “Secondary Power” option. Less than
11 one minute into this process, the user has “created” a Hero that: (1) is a mutant; (2)
12 is a scrappy fighter who specializes in hand-to-hand combat; (3) has three metal
13 claws that protrude from his hands and can be used as weapons; and (4) has
14 incredible regenerative powers that enable him to heal quickly from injuries
15 sustained in battle. In other words, the user has “created” a clone of Wolverine. In
16 yet another example of their conscious disregard for Marvel’s intellectual property
17 rights, Defendants boldly display the Wolverine-type character in “screenshots”
18 used to entice consumers into buying City of Heroes.

19 20. The Creation Engine then prompts the user to customize the look and
20 appearance of the Hero, from the Hero’s hairstyle to the clothes he will don in the
21 game. Finally, the user is prompted to assign a name to the newly “created” Hero
22 before entering Paragon City. The Creation Engine, however, will not permit the
23 user to assign the name “Wolverine” to the new Hero; not because doing so would
24 violate Marvel’s valuable intellectual property rights, but because, as the game
25 quickly informs the user, “that name is already taken.” If, on the other hand, the
26 user names his new Hero “Wolverine20” or “Woolvereen,” he can enter Paragon
27 City immediately and interact with scores of other infringing Heroes; perhaps
28 meeting the user that got to the name Wolverine before he did.

1 21. Users can just as easily create an infringing clone of The Incredible
2 Hulk by choosing the “Science” origin, the “Tanker” archetype, and the “huge,”
3 “muscular,” “indestructible” and “powerful” characteristics. All that is left is to
4 paint the character green, give him short pants that reflect his enormous change in
5 size (a defining characteristic of The Incredible Hulk) and assign him a name. As
6 with Wolverine, the user cannot name his new Hero “The Hulk” because, alas, “that
7 name is already taken.” “Hulk10,” however can enter Paragon City immediately.

8 22. Wolverine and The Incredible Hulk are but two examples of Marvel
9 Characters that Defendants’ game enables (indeed, encourages) consumers to
10 infringe. Truth be told, the number of infringing Heroes that can be “created” using
11 Defendants’ software is limited only by the user’s familiarity with the Marvel
12 Characters. Given the enormous popularity and long term public exposure of the
13 Marvel Characters in the print and visual media, the potential for infringement (and
14 resulting damage to Marvel) is staggering, to say the least.

15
16 **FIRST CLAIM FOR RELIEF – DIRECT COPYRIGHT INFRINGEMENT**

17 **17 U.S.C. § 101 et seq.**

18 (Against All Defendants)

19 23. Marvel hereby incorporates the allegations contained in paragraphs 1
20 through 22, inclusive, as though set forth in full.

21 24. The expression contained in the Marvel Characters is wholly original
22 and is copyrightable subject matter under the copyright laws of the United States.

23 25. As of March 13, 1962, a Certificate of Registration was issued to
24 Zenith Publishing Corp. (“Zenith”) by the Register of Copyrights for The Incredible
25 Hulk and bears registration number B958840. A true and correct copy of the
26 Certificate of Registration is attached hereto as Exhibit A and is incorporated by
27 reference. On December 7, 1978, Cadence Industries Corporation, doing business
28 through Marvel Comics Group Division (“Cadence”) acquired all rights to The

1 Incredible Hulk, as well as all other copyrights owned by Zenith. A true and correct
2 copy of the Acknowledgement of Assignment to Cadence, along with the Copyright
3 Office certification of recordation, is attached hereto as Exhibit B. On December
4 24, 1986, Cadence assigned all rights to The Incredible Hulk to Marvel
5 Entertainment Group, Inc. ("Marvel Entertainment.") A true and correct copy of the
6 Copyright Assignment to Marvel Entertainment is attached hereto as Exhibit C. On
7 September 1, 1995, Marvel Entertainment assigned all rights to The Incredible Hulk
8 to plaintiff Marvel Characters, Inc. A true and correct copy of the Copyright
9 Assignment, along with the Copyright Office certificate of recordation, is attached
10 hereto as Exhibit D.

11 26. As of July 16, 1963, a Certificate of Registration was issued to Camam
12 Publishing Sales Corp. ("Camam") by the Register of Copyrights for The X-Men
13 Vol. 1 No. 1 (in which Magneto first appeared) and bears registration number
14 51855. A true and correct copy of this certificate is attached hereto as Exh. E and is
15 incorporated by reference. On December 7, 1978, Cadence Industries Corporation,
16 doing business through Marvel Comics Group Division ("Cadence") acquired all
17 rights to The X-Men, including Magneto, as well as all other copyrights owned by
18 Camam. On December 24, 1986, Cadence assigned all rights to The X-Men to
19 Marvel Entertainment Group, Inc. ("Marvel Entertainment.") On September 1,
20 1995, Marvel Entertainment assigned all rights to X-Men to plaintiff Marvel
21 Characters, Inc. (*See* Exs. B-D.)

22 27. As of November 4, 1968, a Certificate of Registration was issued to
23 Leading Magazine Corp., Marvel Comics Group ("Leading Magazine") by the
24 Register of Copyrights for Captain America and bears registration number 463904.
25 A true and correct copy of this certificate is attached hereto as Exhibit F and is
26 incorporated by reference. On December 7, 1978, Cadence Industries Corporation,
27 doing business through Marvel Comics Group Division ("Cadence") acquired all
28 rights to Captain America, as well as all other copyrights owned by Leading

1 Magazine. On December 24, 1986, Cadence assigned all rights to Captain America
2 to Marvel Entertainment Group, Inc. ("Marvel Entertainment.") On September 1,
3 1995, Marvel Entertainment assigned all rights to Captain America to plaintiff
4 Marvel Characters, Inc. (See Exs. B-D.)

5 28. As of August 20, 1974, a Certificate of Registration was issued to
6 Marvel Comics Group, a division of Cadence Industries Corp. ("Cadence") by the
7 Register of Copyrights for Incredible Hulk Vol. 1 No. 180 (in which Wolverine first
8 appeared) and bears registration number 956186. A true and correct copy of this
9 certificate is attached hereto as Exhibit G and is incorporated by reference. On
10 December 24, 1986, Cadence assigned all rights to Wolverine to Marvel
11 Entertainment Group, Inc. ("Marvel Entertainment.") On September 1, 1995,
12 Marvel Entertainment assigned all rights to Captain America to plaintiff Marvel
13 Characters, Inc. (See Exs. C & D.)

14 29. As of August 8, 1961, a Certificate of Registration was issued to
15 Camam by the Register of Copyrights for The Fantastic Four (in which The Thing
16 first appeared) and bears registration number 917811. A true and correct copy of this
17 certificate is attached hereto as Exhibit H and is incorporated by reference. On
18 December 7, 1978, Cadence Industries Corporation, doing business through Marvel
19 Comics Group Division ("Cadence") acquired all rights to The Fantastic Four,
20 including The Thing, as well as all other copyrights owned by Camam. On
21 December 24, 1986, Cadence assigned all rights to The Fantastic Four to Marvel
22 Entertainment Group, Inc. ("Marvel Entertainment.") On September 1, 1995,
23 Marvel Entertainment assigned all rights to the Fantastic Four to plaintiff Marvel
24 Characters, Inc. (See Exs. B-D.)

25 30. As of December 10, 1962, a Certificate of Registration was issued to
26 Vista Publications, Inc. ("Vista Publications") by the Register of Copyrights for
27 Tales of Suspense (in which Iron Man first appeared) and bears registration number
28 B12121. A true and correct copy of the Certificate of Registration is attached hereto

1 as Exhibit I and is incorporated by reference. On December 7, 1978, Cadence
2 Industries Corporation, doing business through Marvel Comics Group Division
3 (“Cadence”) acquired all rights to Iron Man, as well as all other copyrights owned
4 by Vista Publications. On December 24, 1986, Cadence assigned all rights to The
5 Incredible Hulk to Marvel Entertainment Group, Inc. (“Marvel Entertainment.”) On
6 September 1, 1995, Marvel Entertainment assigned all rights to the Fantastic Four to
7 plaintiff Marvel Characters, Inc. (See Exs. B-D.)

8 31. Thus, Marvel is the sole owner of all right, title and interest in and to
9 the copyrights in the Marvel Characters and the expression they contain. Marvel has
10 complied in all respects with the provisions of the Copyright Act of 1976.

11 32. Marvel is informed and believes, and based thereon alleges, that
12 Defendants have knowingly and willfully copied numerous Marvel Characters, and
13 the expression they contain, including, but not limited to, Captain America,
14 Wolverine and The Incredible Hulk in the creation, distribution and marketing of
15 their City of Heroes game. Among other things, Defendants’ “Statesman” character
16 is a blatant rip-off of Marvel’s Captain America. Defendants had direct access to
17 the Marvel Characters by virtue of the widespread and long-term public exposure of
18 the Marvel Characters in both the printed and audio-visual media. Indeed, the
19 Marvel Characters are among the most recognizable in the “world of comic books”
20 that Defendants claim to “bring alive” in City of Heroes, and Defendants’ principals
21 have mentioned Marvel as an inspiration in several articles and interviews.

22 33. Marvel is further informed and believes that Defendants, through their
23 City of Heroes game, will continue to infringe upon Marvel’s copyrights in and to
24 the Marvel Characters.

25 34. Each of the Defendants willfully, wantonly and, in conscious disregard
26 and intentional indifference to Marvel’s rights under the Copyright Act aided,
27 abetted, contributed to and participated in the unauthorized copying and distribution
28 of the Marvel Characters as described above. Defendants knew or should have

1 known that the Marvel Characters are protected by copyright. Each of the
2 Defendants continues to infringe on Marvel's rights in and to its copyrighted works
3 by marketing, distributing and facilitating their City of Heroes game and otherwise
4 exploiting rights that belong exclusively to Marvel.

5 35. The natural, probable and foreseeable consequence of Defendants'
6 wrongful conduct has been and will continue to be to deprive Marvel of the benefits
7 of its intellectual property and of licensing, marketing and promoting the Marvel
8 Characters.

9 36. As a direct and proximate result of Defendants' infringing use of
10 Marvel's copyrighted material, Defendants have realized and continue to realize
11 profits and other benefits rightfully belonging to Marvel. Marvel has suffered and
12 will continue to suffer severe injuries and damage and is entitled to those damages
13 permitted by federal copyright law. Accordingly, Marvel seeks an award of
14 damages pursuant to 17 U.S.C. § 504, as well as its costs and attorneys' fees
15 pursuant to 17 U.S.C. § 505, in an amount to be determined. Because Defendants'
16 conduct is willful, Marvel is entitled to the maximum statutory damages allowed
17 pursuant to 17 U.S.C. § 504(c).

18 37. By and through this Complaint, Marvel hereby demands that
19 Defendants cease infringing upon and otherwise violating Marvel's rights in and to
20 the Marvel Characters.

21 38. To halt the ever-mounting injury to Marvel, Marvel hereby requests
22 that the Court issue temporary, preliminary and permanent injunctive relief,
23 restraining Defendants from further infringing or otherwise violating Marvel's
24 intellectual property rights as herein described.

25 ///

26 ///

27 ///

28 ///

1 **SECOND CLAIM FOR RELIEF – CONTRIBUTORY COPYRIGHT**

2 **INFRINGEMENT**

3 **17 U.S.C. § 101 et seq.**

4 (Against All Defendants)

5 39. Marvel hereby incorporates the allegations contained in paragraphs 1
6 through 22 and 24 through 31, inclusive, as though set forth in full.

7 40. As detailed above, Defendants’ City of Heroes game enables and,
8 indeed, encourages users to “bring the world of comic books alive” by “creating”
9 Heroes that directly infringe upon Marvel’s valuable copyrights in and to the Marvel
10 Characters. Considering the popularity and proliferation of City of Heroes and the
11 ease with which users can “create” infringing Heroes, Defendants facilitate having
12 literally thousands of infringing Heroes roaming the streets of Paragon City at any
13 given moment.

14 41. By its very nature and design, Defendants’ City of Heroes game
15 induces, causes and materially contributes to the direct infringement of Marvel’s
16 copyrights in and to the Marvel Characters.

17 42. Defendants knew or should have known that a significant number of
18 the 180,000+ users of their game are “creating” and utilizing Heroes that directly
19 infringe upon Marvel’s copyrights in an to the Marvel Characters. Defendants
20 continuously and materially contribute to their users’ direct infringement by, among
21 other things, providing the precise tools by which users “create” their infringing
22 Heroes and providing users with the keys to Paragon City, the forum specifically
23 created and serviced by Defendants to facilitate game play. Indeed, because City of
24 Heroes can only be played online and only by way of Defendants’ servers,
25 Defendants are aware, or are on notice, and should be aware, of each and every
26 infringing Hero that walks the streets of Paragon City. Without the Creation Engine
27 and support services Defendants provide, users could not “create” their infringing
28 Heroes in the first place.

1 43. For example, one user “created” an imitation of Captain America,
2 called “Liberty’s Son,” who bears a nearly identical uniform to Captain America. A
3 true and correct copy of a screen shot depicting “Liberty’s Son” is attached hereto as
4 Exhibit J. Another user “created” an imitation of Marvel’s X-Men Phoenix
5 character, called “Pyra Phoenix, who bears a striking resemblance to Marvel’s
6 Phoenix character. A true and correct copy of a screen shot depicting “Pyra
7 Phoenix” is attached hereto as Exhibit K. Another user “created” an imitation of
8 Wolverine, called “Wolverine-,” who in addition to copying the name also copied
9 Wolverine’s appearance and powers. A true and correct copy of a screen shot
10 depicting “Wolverine-” is attached hereto as Exhibit L. Other imitations of
11 Wolverine, with his distinctive claws and cigar, are depicted in true and correct
12 copies of screen shots attached hereto as Exhibit M. Another user “created” an
13 imitation of Marvel’s Fantastic Four character The Thing. A true and correct copy
14 of a screen shot depicting the user’s imitation is attached hereto as Exhibit N. Other
15 users “created” imitations of The Incredible Hulk. True and correct copies of screen
16 shots depicting the users’ imitations are attached hereto as Exhibit O. Another user
17 “created” an imitation of Marvel’s X-Men character known as Cyclops, wearing his
18 distinctive eyewear. A true and correct copy of a screen shot depicting the user’s
19 imitation is attached hereto as Exhibit P. Another user “created” an imitation Iron
20 Man, who was named “Awesome Iron Man.” A true and correct copy of a screen
21 shot depicting “Awesome Iron Man,” as well as another imitation Incredible Hulk, is
22 attached hereto as Exhibit Q.

23 44. Marvel is informed and believes that Defendants, through their City of
24 Heroes game, will continue to contribute to the infringement of Marvel’s copyrights
25 in and to the Marvel Characters, as described above.

26 45. Each of the Defendants willfully, wantonly and, in conscious disregard
27 and intentional indifference to Marvel’s rights under the Copyright Act has aided,
28 abetted, contributed to and participated in the unauthorized copying and distribution

1 of the Marvel Characters as described above. Defendants knew or should have
2 known that the Marvel Characters are protected by copyright. Each of the
3 Defendants continues to contribute to the infringement of Marvel's rights in and to
4 its copyrighted works by marketing, distributing and facilitating their City of Heroes
5 game and otherwise facilitating the exploitation of rights that belong exclusively to
6 Marvel.

7 46. The natural, probable and foreseeable consequence of Defendants'
8 wrongful conduct has been and will continue to be to deprive Marvel of the benefits
9 of its intellectual property and of licensing, marketing and promoting the Marvel
10 Characters.

11 47. As a direct and proximate result of Defendants' contributory
12 infringement of Marvel's copyrighted material, Defendants have realized and
13 continue to realize profits and other benefits rightfully belonging to Marvel. Marvel
14 has suffered and will continue to suffer severe injuries and damage and is entitled to
15 those damages permitted by federal copyright law. Accordingly, Marvel seeks an
16 award of damages pursuant to 17 U.S.C. § 504, as well as its costs and attorneys'
17 fees pursuant to 17 U.S.C. § 505, in an amount to be determined. Because
18 Defendants' conduct is willful, Marvel is entitled to the maximum statutory
19 damages allowed pursuant to 17 U.S.C. § 504(c).

20 48. By and through this Complaint, Marvel hereby demands that
21 Defendants cease contributorily infringing or otherwise violating Marvel's
22 copyrights in and to the Marvel Characters.

23 49. To halt the ever-mounting injury to Marvel, Marvel hereby requests
24 that the Court issue temporary, preliminary and permanent injunctive relief,
25 restraining Defendants from further contributorily infringing or otherwise violating
26 Marvel's intellectual property rights as herein described.

27 ///

28 ///

1 activities. Defendants therefore have a direct and significant financial interest in
2 their users' infringing activities. Rather than fulfilling their obligation to police
3 possible infringement to the fullest extent possible, however, Marvel is informed
4 and believes and based thereon alleges that Defendants have turned a blind eye to
5 their users' readily detectable acts of infringement. In fact, despite Defendants'
6 undeniable ability to supervise their users' activities, Defendants have gone so far
7 as to suggest that Marvel should bear the cost and burden of policing Paragon City
8 and reporting any infringing activities to Defendants.

9 54. Defendants know or should know that a significant number of their
10 180,000 + users are "creating" and utilizing Heroes that directly infringe upon
11 Marvel's copyrights in and to the Marvel Characters because, among other things,
12 they have created and offer the tools that enable the users to do precisely that.
13 Defendants continuously and materially contribute to their users' direct
14 infringement by, among other things, providing the very tools by which users
15 "create" their infringing Heroes and providing users with the keys to Paragon City,
16 the forum specifically created and serviced by Defendants to facilitate game play.
17 Indeed, because City of Heroes can only be played online and only by way of
18 Defendants' servers, Defendants' – and only Defendants – are or should be aware of
19 each and every infringing Hero that walks the streets of Paragon City. Without the
20 Creation Engine and support services Defendants' provide, users could not "create"
21 their infringing Heroes in the first place.

22 55. Marvel is informed and believes that Defendants are continuing to
23 facilitate, through their City of Heroes game, the continuous infringement of
24 Marvel's copyrights in and to the Marvel Characters. Defendants therefore are
25 vicariously liable for that infringement.

26 56. Each of the Defendants willfully, wantonly and, in conscious disregard
27 and intentional indifference to Marvel's rights under the Copyright Act has aided,
28 abetted, contributed to and participated in the unauthorized copying and distribution

1 of the Marvel Characters as described above. Defendants knew or should have
2 known that the Marvel Characters are protected by copyright. Each of the
3 Defendants continues to facilitate the infringement of Marvel's rights in and to its
4 copyrighted works by marketing, distributing and facilitating their City of Heroes
5 game and otherwise facilitating the exploitation of rights that belong exclusively to
6 Marvel, and are vicariously liable for that infringement.

7 57. The natural, probable and foreseeable consequence of Defendants'
8 wrongful conduct has been and will continue to be to deprive Marvel of the benefits
9 of its intellectual property and of licensing, marketing and promoting the Marvel
10 Characters.

11 58. As a direct and proximate result of Defendants' vicarious infringement
12 of Marvel's copyrighted material, Defendants have realized and continue to realize
13 profits and other benefits rightfully belonging to Marvel. Marvel has suffered and
14 will continue to suffer severe injuries and damage and is entitled to those damages
15 permitted by federal copyright law. Accordingly, Marvel seeks an award of
16 damages pursuant to 17 U.S.C. § 504, as well as its costs and attorneys' fees
17 pursuant to 17 U.S.C. § 505, in an amount to be determined. Because Defendants'
18 conduct is willful, Marvel is entitled to the maximum statutory damages allowed
19 pursuant to 17 U.S.C. § 504(c).

20 59. By and through this Complaint, Marvel hereby demands that
21 Defendants cease facilitating the violation of Marvel's copyrights in and to the
22 Marvel Characters.

23 60. To halt the ever-mounting injury to Marvel, Marvel hereby requests
24 that the Court issue temporary, preliminary and permanent injunctive relief,
25 restraining Defendants from further vicariously infringing or otherwise violating
26 Marvel's intellectual property rights as herein described.

27 ///

28 ///

1 67. Defendants' use of "Statesman" in connection with their sale, offer for
2 sale and advertising of City of Heroes with knowledge of Marvel's trademark rights
3 renders Defendants' trademark infringement willful.

4 68. Defendants' conduct has caused Marvel to suffer and, unless enjoined
5 by the Court, will cause Marvel to continue to suffer, damage to its operations,
6 reputation and goodwill including, but not limited to, damage to Marvel's core
7 business of licensing and merchandising the Marvel Characters.

8 69. By reason of Defendants' wrongful acts, Marvel has been injured in an
9 amount to be determined at trial and is entitled to the remedies provided for in 15
10 U.S.C. §1116 et seq.

11 70. To halt the ever-mounting injury to Marvel, Marvel hereby requests
12 that the Court issue temporary, preliminary and permanent injunctive relief,
13 restraining Defendants from further infringing or otherwise violating Marvel's
14 intellectual property rights as herein described.

15
16 **FIFTH CLAIM FOR RELIEF – CONTRIBUTORY TRADEMARK**

17 **INFRINGEMENT**

18 **15 U.S.C. §1114 (1)(a)**

19 (Against All Defendants)

20 71. Marvel hereby incorporates the allegations contained in paragraphs 1
21 through 22 and 59 through 67, inclusive, as though set forth in full.

22 72. The City of Heroes Creation Engine enables Defendants'
23 customers/subscribers to identify their Heroes using names that violate Marvel's
24 trademarks in the Marvel Characters. Indeed, Paragon City is rife with infringing
25 Heroes whose names are either identical to or slight variations on "Hulk,"
26 "Wolverine," "Storm," "Captain America," and countless other Marvel Characters.

27 73. By and through the City of Heroes game and the Creation Engine,
28 Defendants intentionally invite and induce their users to infringe on trademarks

1 belonging to Marvel, specifically U.S. Trademark Registration No. No. 890917 (for
2 “The Incredible Hulk”), No. 1395639 (for “Wolverine”) and No. 1161898 (for “X-
3 Men”). Defendants further continue to supply the City of Heroes game, along with
4 its Creation Engine, knowing that the City of Heroes players are using the Creation
5 Engine to engage in infringement of Marvel trademarks.

6 74. In particular, users are “creating” imitations and reproductions of
7 trademarked Marvel Characters, including without limitation, The Incredible Hulk,
8 Wolverine and the X-Men in interstate commerce without authorization or consent
9 by Marvel.

10 75. City of Heroes’ players’ use of the above-identified Marvel Characters
11 is likely to cause confusion, mistake, or deception, in violation of 15 U.S.C.
12 §1114(1)(a).

13 76. Moreover, Defendants know or should know that a significant number
14 of their 180,000+ users are “creating” Heroes and assigning them names that
15 directly infringe upon Marvel’s trademarks. Defendants continuously and
16 materially contribute to their users’ direct infringement by, among other things,
17 providing the very tools by which users “create” their infringing Heroes and
18 providing users with the keys to Paragon City, the forum specifically created and
19 serviced by Defendants to facilitate game play. Indeed, because City of Heroes can
20 only be played online and only by way of Defendants’ servers, Defendants’ are or
21 should be aware of each and every infringing Hero that walks the streets of Paragon
22 City. Without the Creation Engine and support services Defendants’ provide, users
23 could not “create” their infringing Heroes in the first place.

24 77. The unauthorized use by Defendants’ customers/subscribers of Marvel
25 trademarks and imitations thereof is likely to cause confusion, mistake, or deception,
26 in violation of 15 U.S.C. §1114(1)(a).

27 78. Defendants’ have full knowledge of Marvel’s trademark rights. As
28 such, Defendants’ contributory infringement is willful.

1 79. Defendants' conduct has caused Marvel to suffer and, unless enjoined
2 by the Court, will cause Marvel to continue to suffer, damage to its operations,
3 reputation and goodwill including, but not limited to, damage to Marvel's core
4 business of licensing and merchandising the Marvel Characters.

5 80. By reason of Defendants' wrongful acts, Marvel has been injured in an
6 amount to be determined at trial and is entitled to the remedies provided for in 15
7 U.S.C. §1116 *et seq.*

8 81. To halt the ever-mounting injury to Marvel, Marvel hereby requests
9 that the Court issue temporary, preliminary and permanent injunctive relief,
10 restraining Defendants from further contributorily infringing or otherwise violating
11 Marvel's intellectual property rights as herein described.

12
13 **SIXTH CLAIM FOR RELIEF – VICARIOUS TRADEMARK**

14 **INFRINGEMENT**

15 **15 U.S.C. §1114 (1)(a)**

16 (Against All Defendants)

17 82. Marvel hereby incorporates the allegations contained in paragraphs 1
18 through 22 and 59 through 67, inclusive, as though set forth in full.

19 83. The City of Heroes Creation Engine enables Defendants'
20 customers/subscribers to identify their Heroes using names that violate Marvel's
21 trademarks in the Marvel Characters. Indeed, Paragon City is rife with infringing
22 Heroes whose names are either identical to or slight variations on "Hulk,"
23 "Wolverine," "Storm," "Captain America," and countless other Marvel Characters.

24 84. In particular, users are "creating" imitations and reproductions of
25 trademarked Marvel Characters, including without limitation, The Incredible Hulk,
26 Wolverine and the X-Men in interstate commerce without authorization or consent
27 by Marvel.

28 ///

1 85. City of Heroes' players' use of the above-identified Marvel Characters
2 is likely to cause confusion, mistake, or deception, in violation of 15 U.S.C.
3 §1114(1)(a).

4 86. By its very nature and design, Defendants' City of Heroes game
5 induces, causes and materially contributes to the direct infringement of Marvel's
6 trademarks. Considering that City of Heroes can only be played by way of
7 Defendants' servers, Defendants have the absolute right and ability to supervise and
8 prevent users' infringing activities. Moreover, Defendants have the authority and
9 control over the infringing activities and the infringing products created by their
10 users through the Creation Engine. According to Defendants, more than 180,000+
11 users purchased City of Heroes in the first three months of its April 2004 release.
12 Also according to Defendants, each of those 180,000+ users pays Defendants
13 \$14.95 every month for the privilege of entering Paragon City. Defendants
14 therefore have a direct and significant financial interest in their users' infringing
15 activities. Rather than fulfilling their obligation to police possible infringement to
16 the fullest extent possible, however, Marvel is informed and believes and based
17 thereon alleges that Defendants have turned a blind eye to their users' readily
18 detectable acts of infringement.

19 87. Defendants know or should know that a significant number of their
20 180,000+ users are "creating" Heroes and assigning them names that directly
21 infringe upon Marvel's trademarks. Defendants continuously and materially
22 contribute to their users' direct infringement by, among other things, providing the
23 very tools by which users "create" their infringing Heroes and providing users with
24 the keys to Paragon City, the forum specifically created and serviced by Defendants
25 to facilitate game play. Indeed, because City of Heroes can only be played online
26 and only by way of Defendants' servers, Defendants' are or should be aware of each
27 and every infringing Hero that walks the streets of Paragon City. Without the
28 Creation Engine and support services Defendants' provide, users could not "create"

1 their infringing Heroes in the first place. Defendants therefore are vicariously liable
2 for all such infringement.

3 88. The unauthorized use by Defendants' customers/subscribers of Marvel
4 trademarks and imitations thereof is likely to cause confusion, mistake, or deception,
5 in violation of 15 U.S.C. §1114(1)(a).

6 89. Defendants' have full knowledge of Marvel's trademark rights. As
7 such, Defendants' vicarious infringement is willful.

8 90. Defendants' conduct has caused Marvel to suffer and, unless enjoined
9 by the Court, will cause Marvel to continue to suffer, damage to its operations,
10 reputation and goodwill including, but not limited to, damage to Marvel's core
11 business of licensing and merchandising the Marvel Characters.

12 91. By reason of Defendants' wrongful acts, Marvel has been injured in an
13 amount to be determined at trial and is entitled to the remedies provided for in 15
14 U.S.C. §1116 et seq.

15 92. To halt the ever-mounting injury to Marvel, Marvel hereby requests
16 that the Court issue temporary, preliminary and permanent injunctive relief,
17 restraining Defendants from further vicariously infringing or otherwise violating
18 Marvel's intellectual property rights as herein described.

19
20 **SEVENTH CLAIM FOR RELIEF – DIRECT TRADEMARK**

21 **INFRINGEMENT**

22 **15 U.S.C. §1125**

23 (Against All Defendants)

24 93. Marvel hereby incorporates the allegations contained in paragraphs 1
25 through 22, inclusive, as though set forth in full.

26 94. Defendants have been using "Statesman," an imitation and
27 reproduction of Marvel's Captain America, in connection with their sale, offer for
28 sale and advertising of City of Heroes.

1 95. Defendants' are using the "Statesman" mark in interstate commerce
2 without authorization or consent by Marvel. Defendants' use of the star emblem
3 that identifies Captain America, together with the use of the name "Statesman,"
4 which suggests the patriotic qualities of Captain America, is likely to cause
5 confusion, mistake, or deception, in violation of 15 U.S.C. §1125. In addition,
6 Defendants' use of "Statesman" on the City of Heroes packaging is likely to mislead
7 and deceive the public into believing that City of Heroes either originates, is
8 endorsed by or is otherwise sanctioned by Marvel. Defendants' infringement of
9 Marvel's trademarks, especially in connection with a product so closely related to
10 Marvel's core business, dilutes and devalues Marvel's trademarks.

11 96. Defendants' use of "Statesman" in connection with their sale, offer for
12 sale and advertising of City of Heroes with knowledge of Marvel's trademark rights
13 renders Defendants' trademark infringement willful.

14 97. Defendants' conduct has caused Marvel to suffer and, unless enjoined
15 by the Court, will cause Marvel to continue to suffer, damage to its operations,
16 reputation and goodwill including, but not limited to, damage to Marvel's core
17 business of licensing and merchandising the Marvel Characters.

18 98. By reason of Defendants' wrongful acts, Marvel has been injured in an
19 amount to be determined at trial and is entitled to the remedies provided for in 15
20 U.S.C. §1116 et seq.

21 99. To halt the ever-mounting injury to Marvel, Marvel hereby requests
22 that the Court issue temporary, preliminary and permanent injunctive relief,
23 restraining Defendants from further infringing or otherwise violating Marvel's
24 intellectual property rights as herein described.

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1 **EIGHTH CLAIM FOR RELIEF – CONTRIBUTORY TRADEMARK**

2 **INFRINGEMENT**

3 **15 U.S.C. §1125**

4 (Against All Defendants)

5 100. Marvel hereby incorporates the allegations contained in paragraphs 1
6 through 22 and 91 through 96, inclusive, as though set forth in full.

7 101. The City of Heroes Creation Engine enables Defendants’
8 customers/subscribers to identify their Heroes using names that violate Marvel’s
9 trademarks in the Marvel Characters. Indeed, Paragon City is rife with infringing
10 Heroes whose names are either identical to or slight variations on “Hulk,”
11 “Wolverine,” “Storm,” Captain America,” and countless other Marvel Characters.

12 102. By and through the City of Heroes game and the Creation Engine,
13 Defendants intentionally induce their users to infringe on trademarks belonging to
14 Marvel, including The Incredible Hulk, Wolverine and the X-Men. Defendants
15 further continue to supply the City of Heroes game, along with its Creation Engine,
16 knowing that the City of Heroes players are using the Creation Engine to engage in
17 infringement of Marvel trademarks.

18 103. In particular, users are “creating” imitations and reproductions of
19 trademarked Marvel Characters, including without limitation, The Incredible Hulk,
20 Wolverine and the X-Men in interstate commerce without authorization or consent
21 by Marvel.

22 104. Moreover, Defendants know or should know, based on their published
23 policies, that a significant number of their 180,000+ users are “creating” Heroes and
24 assigning them names that directly infringe upon Marvel’s trademarks. Defendants
25 continuously and materially contribute to their users’ direct infringement by, among
26 other things, providing the very tools by which users “create” their infringing
27 Heroes and providing users with the keys to Paragon City, the forum specifically
28 created and serviced by Defendants to facilitate game play. Indeed, because City of

1 Heroes can only be played online and only by way of Defendants' servers,
2 Defendants' are or should be aware of each and every infringing Hero that walks the
3 streets of Paragon City. Without the Creation Engine and support services
4 Defendants' provide, users could not "create" their infringing Heroes in the first
5 place.

6 105. The unauthorized use by Defendants' customers/subscribers of Marvel
7 trademarks and imitations thereof is likely to cause confusion, mistake, or deception,
8 in violation of 15 U.S.C. §1125. In addition, the use by Defendants'
9 customers/subscribers of names that are either identical to or imitations of Marvel
10 trademarks is likely to mislead and deceive the public into believing that City of
11 Heroes either originates, is endorsed by or is otherwise sanctioned by Marvel.
12 Defendants' contributory infringement of Marvel's trademarks, especially in
13 connection with a product so closely related to Marvel's core business, dilutes and
14 devalues Marvel's trademarks.

15 106. Defendants' have full knowledge of Marvel's trademark rights. As
16 such, Defendants' contributory infringement is willful.

17 107. Defendants' conduct has caused Marvel to suffer and, unless enjoined
18 by the Court, will cause Marvel to continue to suffer, damage to its operations,
19 reputation and goodwill including, but not limited to, damage to Marvel's core
20 business of licensing and merchandising the Marvel Characters.

21 108. By reason of Defendants' wrongful acts, Marvel has been injured in an
22 amount to be determined at trial and is entitled to the remedies provided for in 15
23 U.S.C. §1116 et seq.

24 109. To halt the ever-mounting injury to Marvel, Marvel hereby requests
25 that the Court issue temporary, preliminary and permanent injunctive relief,
26 restraining Defendants from further contributorily infringing or otherwise violating
27 Marvel's intellectual property rights as herein described.

28 ///

1 **NINTH CLAIM FOR RELIEF – VICARIOUS TRADEMARK**

2 **INFRINGEMENT**

3 **15 U.S.C. §1125**

4 (Against All Defendants)

5 110. Marvel hereby incorporates the allegations contained in paragraphs 1
6 through 22 and 91 through 96, inclusive, as though set forth in full.

7 111. The City of Heroes Creation Engine enables Defendants'
8 customers/subscribers to identify their Heroes using names that violate Marvel's
9 trademarks in the Marvel Characters. Indeed, Paragon City is rife with infringing
10 Heroes whose names are either identical to or slight variations on "Hulk,"
11 "Wolverine," "Storm," Captain America," and countless other Marvel Characters.

12 112. In particular, users are "creating" imitations and reproductions of
13 trademarked Marvel Characters, including without limitation, The Incredible Hulk,
14 Wolverine and the X-Men in interstate commerce without authorization or consent
15 by Marvel.

16 113. By its very nature and design, Defendants' City of Heroes game
17 induces, causes and materially contributes to the direct infringement of Marvel's
18 trademarks. Considering that City of Heroes can only be played by way of
19 Defendants' servers, Defendants have the absolute right and ability to supervise and
20 prevent users' infringing activities. Moreover, Defendants have the authority and
21 control over the infringing activities and the infringing products created by their
22 users through the Creation Engine. According to Defendants, more than 180,000+
23 users purchased City of Heroes in the first three months of its April 2004 release.
24 Also according to Defendants, each of those 180,000+ users pays Defendants
25 \$14.95 every month for the privilege of entering Paragon City. Defendants
26 therefore have a direct and significant financial interest in their users' infringing
27 activities. Rather than fulfilling their obligation to police possible infringement to
28 the fullest extent possible, however, Marvel is informed and believes and based

1 thereon alleges that Defendants have turned a blind eye to their users' readily
2 detectable acts of infringement.

3 114. Defendants know or should know that a significant number of their
4 180,000+ users are "creating" Heroes and assigning them names that directly
5 infringe upon Marvel's trademarks. Defendants continuously and materially
6 contribute to their users' direct infringement by, among other things, providing the
7 very tools by which users "create" their infringing Heroes and providing users with
8 the keys to Paragon City, the forum specifically created and serviced by Defendants
9 to facilitate game play. Indeed, because City of Heroes can only be played online
10 and only by way of Defendants' servers, Defendants' are or should be aware of each
11 and every infringing Hero that walks the streets of Paragon City. Without the
12 Creation Engine and support services Defendants' provide, users could not "create"
13 their infringing Heroes in the first place. Defendants therefore are vicariously liable
14 for any such infringement.

15 115. The unauthorized use by Defendants' customers/subscribers of Marvel
16 trademarks and imitations thereof is likely to cause confusion, mistake, or deception,
17 in violation of 15 U.S.C. §1125. In addition, the use by Defendants'
18 customers/subscribers of names that are either identical to or imitations of Marvel
19 trademarks is likely to mislead and deceive the public into believing that City of
20 Heroes either originates, is endorsed by or is otherwise sanctioned by Marvel.
21 Defendants' vicarious infringement of Marvel's trademarks, especially in
22 connection with a product so closely related to Marvel's core business, dilutes and
23 devalues Marvel's trademarks.

24 116. Defendants' have full knowledge of Marvel's trademark rights. As
25 such, Defendants' vicarious infringement is willful.

26 117. Defendants' conduct has caused Marvel to suffer and, unless enjoined by the
27 Court, will cause Marvel to continue to suffer, damage to its operations,

28 ///

1 reputation and goodwill including, but not limited to, damage to Marvel's core
2 business of licensing and merchandising the Marvel Characters.

3 118. By reason of Defendants' wrongful acts, Marvel has been injured in an
4 amount to be determined at trial and is entitled to the remedies provided for in 15
5 U.S.C. §1116 et seq.

6 119. To halt the ever-mounting injury to Marvel, Marvel hereby requests
7 that the Court issue temporary, preliminary and permanent injunctive relief,
8 restraining Defendants from further vicariously infringing or otherwise violating
9 Marvel's intellectual property rights as herein described.

10
11 **TENTH CLAIM FOR RELIEF – INTENTIONAL INTERFERENCE WITH**
12 **ACTUAL AND PROSPECTIVE ECONOMIC ADVANTAGE**

13 (Against All Defendants)

14 120. Marvel hereby incorporates the allegations contained in paragraphs 1
15 through 22, inclusive, as though set forth in full.

16 121. Marvel currently has licensing agreements with Universal and
17 Activision for the authorized use of the Marvel Characters in the video/computer
18 game market. Defendants knew or should have known that licensing and
19 merchandising the Marvel Characters is Marvel's core business. Defendants also
20 knew or should have known about Marvel's licensing agreements with Universal
21 and Activision and of the existing and future benefit to Marvel as a result of the
22 licensing agreements.

23 122. Despite this knowledge, Defendants intentionally have acted in a
24 manner designed to disrupt Marvel's existing and future business relationships as
25 regards the licensing and merchandising of the Marvel Characters including, but not
26 limited to, the licensing of the Marvel Characters for use in video/computer games
27 similar to City of Heroes.

28 ///

1 123. Defendants knew or should have known that their wrongful acts of
2 copyright and trademark infringement as described hereinabove would substantially
3 interfere with Marvel's existing and prospective agreements for the licensing and
4 merchandising of the Marvel Characters. In fact, such wrongful acts have actually
5 disrupted Marvel's existing and prospective business relationships.

6 124. By their unsanctioned conduct, Defendants have interfered and, unless
7 enjoined by the Court, will continue to interfere with Marvel's existing and
8 prospective business relationships by misappropriating and/or diminishing the value
9 of Marvel's intellectual property rights in and to the Marvel Characters.

10 125. As a direct and proximate result of Defendants' tortious conduct as
11 described hereinabove, Marvel has been injured in an amount to be proven at trial.

12 126. Defendants wrongful acts as described hereinabove were willful,
13 wanton, malicious and oppressive and justify the award of exemplary and punitive
14 damages in an amount to be proven at trial.

15 127. To halt the ever-mounting injury, Marvel hereby requests that the Court
16 issue temporary, preliminary and permanent injunctive relief, restraining Defendants
17 from further tortiously interfering with Marvel's existing and prospective business
18 relationships.

19
20 **ELEVENTH CLAIM FOR RELIEF – DECLARATORY RELIEF**

21 (Against All Defendants)

22 128. Marvel hereby incorporates the allegations contained in paragraphs 1
23 through 22, inclusive, as though set forth in full.

24 129. A dispute and actual controversy has arisen between Marvel, on the one
25 hand, and Defendants, on the other hand, in that Defendants contend that they
26 qualify as an internet service provider ("ISP") and are shielded from liability for
27 copyright infringement by the "safe harbor" provision of the Digital Millennium
28 Copyright Act ("DMCA"), codified at 17 U.S.C. §512. Marvel contends that

1 Defendants are not an ISP and that, even if they are, they do not qualify under the
2 “safe harbor” provision of the DMCA.

3 130. Marvel desires a judicial declaration as to: (1) whether Defendants are
4 an ISP under the DMCA; and (2) whether Defendants are in any way shielded from
5 liability for copyright infringement under the DMCA’s “safe harbor” provision.
6 Such declarations are necessary and appropriate so that both parties may better
7 ascertain their respective rights and responsibilities under the DMCA and to
8 promote judicial efficiency. For the same reasons, Marvel desires a prompt
9 resolution of the issues herein.

10
11 WHEREFORE, Marvel prays for judgment against Defendants, and each of
12 them, as follows:

13
14 **On the First Claim for Relief**

15 1. For Marvel and against Defendants on the first claim for copyright
16 infringement;

17 2. For an injunction ordering Defendants to cease engaging in any and all
18 infringement of Marvel’s copyrights in and to the Marvel Characters;

19 3. For such damages as Marvel has sustained as a result of Defendants’
20 infringement of Marvel’s copyrights in and to the Marvel Characters including, but
21 not limited to, any and all profits gained by Defendants as a result of their infringing
22 activities or, if appropriate pursuant to federal copyright law, for any and all
23 damages provided for by statute; and

24 4. For costs of suit and attorneys’ fees incurred herein.

25
26 **On the Second Claim for Relief**

27 1. For Marvel and against Defendants on the second claim for
28 contributory copyright infringement;

1 2. For an injunction ordering Defendants to cease engaging in any and all
2 contributory infringement of Marvel's copyrights in and to the Marvel Characters;

3 3. For such damages as Marvel has sustained as a result of Defendants'
4 contributory infringement of Marvel's copyrights in and to the Marvel Characters
5 including, but not limited to, any and all profits gained by Defendants as a result of
6 their infringing activities or, if appropriate pursuant to federal copyright law, for any
7 and all damages provided for by statute; and

8 4. For costs of suit and attorneys' fees incurred herein.

9
10 **On the Third Claim for Relief**

11 1. For Marvel and against Defendants on the third claim for vicarious
12 copyright infringement;

13 2. For an injunction ordering Defendants to cease engaging in any and all
14 vicarious infringement of Marvel's copyrights in and to the Marvel Characters;

15 3. For such damages as Marvel has sustained as a result of Defendants'
16 vicarious infringement of Marvel's copyrights in and to the Marvel Characters
17 including, but not limited to, any and all profits gained by Defendants as a result of
18 their infringing activities or, if appropriate pursuant to federal copyright law, for any
19 and all damages provided for by statute; and

20 4. For costs of suit and attorneys' fees incurred herein.

21
22 **On the Fourth Claim for Relief**

23 1. For Marvel and against Defendants on the fourth claim for violation of
24 15 U.S.C. §1114(1)(a) in an amount to be proven at trial;

25 2. For an injunction ordering Defendants to cease engaging in any and all
26 infringement of Marvel's trademarks; and

27 3. For costs of suit and attorneys' fees incurred herein.

28 ///

1 **On the Fifth Claim for Relief**

2 1. For Marvel and against Defendants on the fifth claim for violation of
3 15 U.S.C. §1114(1)(a) in an amount to be proven at trial;

4 2. For an injunction ordering Defendants to cease engaging in any and all
5 contributory infringement of Marvel's trademarks; and

6 3. For costs of suit and attorneys' fees incurred herein.
7

8 **On the Sixth Claim for Relief**

9 1. For Marvel and against Defendants on the sixth claim for violation of
10 15 U.S.C. §1114(1)(a) in an amount to be proven at trial;

11 2. For an injunction ordering Defendants to cease engaging in any and all
12 vicarious infringement of Marvel's trademarks; and

13 3. For costs of suit and attorneys' fees incurred herein.
14

15 **On the Seventh Claim for Relief**

16 1. For Marvel and against Defendants on the seventh claim for violation
17 of 15 U.S.C. §1125(a) in an amount to be proven at trial;

18 2. For an injunction ordering Defendants to cease engaging in any and all
19 infringement of Marvel's trademarks;

20 3. For three times the amount of damages that Marvel has sustained as a
21 result of Defendants' violation of 15 U.S.C. §1125(a);

22 4. For an order requiring Defendants to deliver for destruction any and all
23 products or other physical items in Defendants' possession that infringe upon
24 Marvel's trademarks; and

25 5. For costs of suit and attorneys' fees incurred herein.
26 ///

27 ///

28 ///

1 **On the Eighth Claim for Relief**

2 1. For Marvel and against Defendants on the eighth claim for violation of
3 15 U.S.C. §1125(a) in an amount to be proven at trial;

4 2. For an injunction ordering Defendants to cease engaging in any and all
5 contributory infringement of Marvel's trademarks;

6 3. For three times the amount of damages that Marvel has sustained as a
7 result of Defendants' violation of 15 U.S.C. §1125(a);

8 4. For an order requiring Defendants to deliver for destruction any and all
9 products or other physical items in Defendants' possession that infringe upon
10 Marvel's trademarks; and

11 5. For costs of suit and attorneys' fees incurred herein.

12
13 **On the Ninth Claim for Relief**

14 1. For Marvel and against Defendants on the fourth claim for violation of
15 15 U.S.C. §1125(a) in an amount to be proven at trial;

16 2. For an injunction ordering Defendants to cease engaging in any and all
17 vicarious infringement of Marvel's trademarks;

18 3. For three times the amount of damages that Marvel has sustained as a
19 result of Defendants' violation of 15 U.S.C. §1125(a);

20 4. For an order requiring Defendants to deliver for destruction any and all
21 products or other physical items in Defendants' possession that infringe upon
22 Marvel's trademarks; and

23 5. For costs of suit and attorneys' fees incurred herein.

24
25 **On the Tenth Claim for Relief**

26 1. For Marvel and against Defendants on the tenth claim for relief for
27 intentional interference with actual and prospective economic advantage;

28 ///

1 2. For such damages as Marvel has sustained as a result of Defendants'
2 intentional interference with actual and prospective economic advantage, in an
3 amount to be proven at trial;

4 3. For an injunction ordering Defendants to cease infringing on Marvel's
5 intellectual property rights or otherwise interfering with Marvel's existing and
6 prospective business relationships;

7 4. For exemplary and punitive damages in an amount to be determine at
8 trial; and

9 5. For costs of suit.

10
11 **On the Eleventh Claim for Relief**

12 1. For a declaration that Defendants do not qualify as an ISP under the
13 DMCA and are not shielded from liability for copyright infringement under the
14 DMCA's "safe harbor" provision.

15
16 **On all Claims for Relief**

17 1. For reasonable attorneys' fees;

18 2. For costs of suit incurred herein;

19 3. For interest thereon; and

20 4. For such other and further relief as the Court deems just and proper.

21
22 Dated: January ____, 2005

THELEN REID & PRIEST LLP

23
24 By _____

25 Carole E. Handler
26 Attorneys for Plaintiffs
MARVEL ENTERPRISES, INC. and
MARVEL CHARACTERS, INC.


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DEMAND FOR JURY TRIAL

Plaintiffs Marvel Enterprises, Inc. and Marvel Characters, Inc. hereby demand
a trial by jury.

Dated: January 21, 2005

THELEN REID & PRIEST LLP

By 
Carole E. Handler
Attorneys for Plaintiffs
MARVEL ENTERPRISES, INC. and
MARVEL CHARACTERS, INC.