

DMXHOSTING.NET

USER AGREEMENT

This User Agreement ("Agreement") is an agreement between DMXHOSTING, INC. ("DMXHOSTING"), a California corporation, and the party set forth in the related order form ("Customer" or "you") incorporated herein by reference (together with any subsequent order forms submitted by Customer, the "Order Form"), and applies to the purchase of all services ordered by Customer on the Order Form (collectively, the "Services").

PLEASE READ THIS AGREEMENT CAREFULLY.

BY CLICKING ON THE BUTTON ON THE ORDER FORM CREATES A CONTRACT BETWEEN CUSTOMER AND DMXHOSTING, CONSISTING OF THE ORDER, THE APPLICABLE SERVICE DESCRIPTION AND THIS USER AGREEMENT AND YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS AGREEMENT AND ALL TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN THIS AGREEMENT, INCLUDING DMXHOSTING'S USAGE POLICY. YOUR USE OF THE SERVICES CONSTITUTES ACCEPTANCE OF THIS AGREEMENT.

1. **Acceptable Use Policy.** Under this Agreement, Customer shall comply with DMXHOSTING's then current Acceptable Use Policy ("AUP"), as amended, modified or updated from time to time by DMXHOSTING, which currently can be viewed under the Legal Details section of this web site, and which is incorporated in this Agreement by reference. Customer hereby acknowledges that it has reviewed the AUP and that the terms of the AUP are incorporated herein by reference. In the event of any inconsistencies between this Agreement and the AUP, the terms of the AUP shall govern. DMXHOSTING does not intend to systematically monitor the content that is submitted to, stored on or distributed or disseminated by Customer via the Service (the "Customer Content"). Customer Content includes content of Customer's customers and/or users of Customer's website. Accordingly, under this Agreement, you will be responsible for your customers content and activities on your website. Notwithstanding anything to the contrary contained in this Agreement, DMXHOSTING may immediately take corrective action, including removal of all or a portion of the Customer Content, disconnection or discontinuance of any and all Services, or termination of this Agreement in the event of notice of possible violation by Customer of the AUP. In the event DMXHOSTING takes corrective action due to a violation of the AUP, DMXHOSTING shall not refund to Customer any fees paid in advance of such corrective action. Customer hereby agrees that DMXHOSTING shall have no liability to Customer or any of Customer's customers due to any corrective action that DMXHOSTING may take (including, without limitation, disconnection of Services).

2. **Term; Termination; Cancellation Policy.**
 - a. The initial term of this Agreement shall be as set forth in the Order Form (the "Initial Term"). The Initial Term shall begin upon commencement of the Services to Customer. After the Initial Term, this Agreement shall automatically renew. **ADDITIONALLY AFTER THE INITIAL TERM, YOU ACKNOWLEDGE, AGREE AND AUTHORIZE DMXHOSTING TO AUTOMATICALLY BILL AND/OR CHARGE ON YOUR CREDIT CARD FOR SUCCESSIVE TERMS OF EQUAL LENGTH AS THE INITIAL TERM, UNLESS TERMINATED OR CANCELLED BY EITHER PARTY AS PROVIDED IN THIS SECTION.** The Initial Term and all successive renewal periods shall be referred to, collectively, as the "Term".

 - b. This Agreement may be terminated
 - i. by either party by giving the other party thirty (30) days prior written notice subject to a \$50.00 early cancellation fee payable by Customer,

 - ii. by DMXHOSTING in the event of nonpayment by Customer,

 - iii. by DMXHOSTING, at any time, without notice, if, in DMXHOSTING's sole and absolute discretion and/or judgment, Customer is in violation of any term or condition of the this Agreement and related agreements, AUP, or Customer's use of the Services disrupts or, in DMXHOSTING's sole and

absolute discretion and/or judgment, could disrupt, DMXHOSTING's business operations and/or

- iv. by DMXHOSTING in accordance with Sections 1, 9, and 10 of this Agreement.
- c. If you cancel this Agreement, upon proper notice to DMXHOSTING, prior to the end of the Initial Term or any Term thereafter,
 - . you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation;
 - i. DMXHOSTING may refund to you all pre-paid fees for basic hosting services for the full months remaining after effectiveness of cancellation (i.e., no partial month fees shall be refunded), less any setup fees and any discount applied for prepayment, provided that, you are not in breach of any terms and conditions of this AUP, User Agreement, Spamming Policy or Domain Policy; and/or
 - ii. you shall be obligated to pay 100% of all charges for all Services for each month remaining in the Term (other than basic hosting fees as provided in (ii) above. Any cancellation request shall be effective thirty (30) days after receipt by DMXHOSTING, unless a later date is specified in such request.
 - d. DMXHOSTING may terminate this Agreement, without penalty,
- . if the Services are prohibited by applicable law, or become impractical or unfeasible for any technical, legal or regulatory reason, by giving Customer as much prior notice as reasonably practicable; or
 - i. immediately, if DMXHOSTING determines in good faith that Customer's use of the Customer the Services, the Web site or the Customer Content violates any DMXHOSTING term or condition, including this AUP, User Agreement, Spamming Policy, or Domain Policy. If DMXHOSTING cancels this Agreement prior to the end of the Term for your breach of this Agreement and related agreements, including the AUP, User Agreement, Spamming Policy, or Domain Policy or Customer's use of the Services disrupts our network, DMXHOSTING shall not refund to you any fees paid in advance of such cancellation and you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation; further, you shall be obligated to pay 100% of all charges for all Services for each month remaining in the Term and DMXHOSTING shall have the right to charge you an administrative fee of \$50.00.
 - e. Upon termination of this Agreement for any cause or reason whatsoever, neither party shall have any further rights or obligations under this Agreement, except as expressly set forth herein. The provisions of Sections 2(e), 3, 4, 8, 10, 11, 13 and 15 of this Agreement shall survive the expiration or termination of this Agreement for any cause or reason whatsoever, and, notwithstanding the expiration or termination of this Agreement, the parties shall each remain liable to the other for any indebtedness or other liability theretofore arising under this Agreement. Termination of this Agreement and retention of pre-paid fees and charges shall be in addition to, and not be in lieu of, any other legal or equitable rights or remedies to which DMXHOSTING may be entitled.

3. **Customer's Responsibilities.**

- . Customer is solely responsible for the quality, performance and all other aspects of the Customer

Content and the goods or services provided through the Customer Web site.

- a. Customer will cooperate fully with DMXHOSTING in connection with DMXHOSTING's performance of the Services. Customer must provide any equipment or software that may be necessary for Customer to use the Services. Delays in Customer's performance of its obligations under this Agreement will extend the time for DMXHOSTING's performance of its obligations that depend on Customer's performance on a day for day basis. Customer will notify DMXHOSTING of any change in Customer's mailing address, telephone, e-mail or other contact information.
- b. Customer assumes full responsibility for providing end users with any required disclosure or explanation of the various features of the Customer Web site and any goods or services described therein, as well as any rules, terms or conditions of use.
- c. Because the Services permit Customer to electronically transmit or upload content directly to the Customer Web site, Customer shall be fully responsible for uploading all content to the Customer Web site and supplementing, modifying and updating the Customer Web site, including all back-ups. Customer is also responsible for ensuring that the Customer Content and all aspects of the Customer Web site are compatible with the hardware and software used by DMXHOSTING to provide the Services, as the same may be changed by DMXHOSTING from time to time. Specifications for the hardware and software used by DMXHOSTING to provide the Services will be available on DMXHOSTING's Web site. Customer shall periodically access DMXHOSTING's Web site to determine if DMXHOSTING has made any changes thereto. DMXHOSTING shall not be responsible for any damages to the Customer Content, the Customer Web site or other damages or any malfunctions or service interruptions caused by any failure of the Customer Content or any aspect of the Customer Web site to be compatible with the hardware and software used by DMXHOSTING to provide the Services.
- d. Customer is solely responsible for making back-up copies of the Customer Web site and Customer Content.

4. Customer's Representations and Warranties.

Customer hereby represents and warrants to DMXHOSTING, and agrees that during the Initial Term and any Term thereafter Customer will ensure that:

- Customer is the owner or valid licensee of the Customer Content and each element thereof, and Customer has secured all necessary licenses, consents, permissions, waivers and releases for the use of the Customer Content and each element thereof, including without limitation, all trademarks, logos, names and likenesses contained therein, without any obligation by DMXHOSTING to pay any fees, residuals, guild payments or other compensation of any kind to any Person;
 - i. Customer's use, publication and display of the Customer Content will not infringe any copyright, patent, trademark, trade secret or other proprietary or intellectual property right of any person, or constitute a defamation, invasion of privacy or violation of any right of publicity or any other right of any person, including, without limitation, any contractual, statutory or common law right or any "moral right" or similar right however denominated;
 - ii. Customer will comply with all applicable laws, rules and regulations regarding the Customer Content and the Customer Web site and will use the Customer Web site only for lawful purposes;
 - iii. Customer has used its best efforts to ensure that the Customer Content is and will at all times remain free of all computer viruses, worms, Trojan horses and other malicious code; and

- a. Customer shall be solely responsible for the development, operation and maintenance of Customer's web site, online store and e-commerce activities, for all products and services offered by Customer or appearing online and for all contents and materials appearing online or on Customer's products, including, without limitation

the accuracy and appropriateness of the Customer Content and content and material appearing in its store or on its products,

- i. ensuring that the Customer Content and content and materials appearing in its store or on its products do not violate or infringe upon the rights of any person, and
- ii. ensuring that the Customer Content and the content and materials appearing in its store or on its products are not defamatory or otherwise illegal. Customer shall be solely responsible for accepting, processing and filling customer orders and for handling customer inquiries or complaints. Customer shall be solely responsible for the payment or satisfaction of any and all taxes associated with its web site and online store.

- b. Customer grants DMXHOSTING the right to reproduce, copy, use and distribute all and any portion of the Customer Content to the extent needed to provide and operate the Services.

5. **License to DMXHOSTING.** Customer hereby grants to DMXHOSTING a non-exclusive, royalty-free, worldwide right and license during the Initial Term and any Term thereafter to do the following to the extent necessary in the performance of Services under the Order:

digitize, convert, install, upload, select, order, arrange, compile, combine, synchronize, use, reproduce, store, process, retrieve, transmit, distribute, publish, publicly display, publicly perform and hyperlink the Customer Content; and

- a. make archival or back-up copies of the Customer Content and the Customer Web site.
- b. Except for the rights expressly granted above, DMXHOSTING is not acquiring any right, title or interest in or to the Customer Content, all of which shall remain solely with Customer.

6. **Billing and Payment.**

Customer will pay to DMXHOSTING the service fees for the Services in the manner set forth in the Order Form.

- a. DMXHOSTING may increase the Service Fees (i) in the manner permitted in the service description and (ii) at any time on or after expiration of the Initial Term by providing ten (10) days prior written notice thereof to Customer.
- b. The Service Fees do not include any applicable sales, use, revenue, excise or other taxes imposed by any taxing authority with respect to the Services or any software provided hereunder (excluding any tax on DMXHOSTING's net income). All such taxes will be added to DMXHOSTING's invoices for the fees as separate charges to be paid by Customer. All fees are fully earned when due and non-refundable when paid.
- c. Unless otherwise specified, all fees and related charges shall be due and payable within thirty (30) days after the date of the invoice. If any invoice is not paid within seven (7) days after the date of the invoice, DMXHOSTING may charge Customer a late fee of \$15.00 for such invoice; in addition any amounts payable to DMXHOSTING not paid when due will bear interest at the rate of one and one half percent (1.5%) per month or the maximum rate permitted by applicable law, whichever is less.

- d. If DMXHOSTING collects any payment due at law or through an attorney at law or under advice therefrom or through a collection agency, or if DMXHOSTING prevails in any action to which the Customer and DMXHOSTING are parties, Customer will pay all costs of collection, arbitration and litigation, including, without limitation, all court costs and DMXHOSTING's reasonable attorneys' fees.
 - e. If any check is returned for insufficient funds DMXHOSTING may impose a processing charge of \$25.00.
 - f. In the event that any amount due to DMXHOSTING remains unpaid seven (7) days after such payment is due, DMXHOSTING, in its sole discretion, may immediately terminate this Agreement, and/or withhold or suspend Services.
 - g. There may be a \$50.00 charge to reinstate accounts that have been suspended or terminated.
 - h. Wire transfers will be assessed a \$30.00 charge.
 - i. Customer acknowledges and agrees that DMXHOSTING may pre-charge Customer's fees for the Services to its credit card supplied by Customer during registration for the Initial Term.
 - j. YOU ACKNOWLEDGE, AGREE AND AUTHORIZE DMXHOSTING TO AUTOMATICALLY BILL AND/OR CHARGE ON YOUR CREDIT CARD FOR SUCCESSIVE TERMS OF EQUAL LENGTH AS THE INITIAL TERM, UNLESS TERMINATED OR CANCELLED BY EITHER PARTY AS PROVIDED IN SECTION 2.
7. **DMXHOSTING as Reseller or Licensor.** DMXHOSTING is acting only as a reseller or licensor of the hardware, software and equipment used in connection with the products and/or Services that were or are manufactured or provided by a third party ("Non-DMXHOSTING Product"). DMXHOSTING shall not be responsible for any changes in the Services that cause the Non-DMXHOSTING Product to become obsolete, require modification or alteration, or otherwise affect the performance of the Services. Any malfunction or manufacturer's defects of Non-DMXHOSTING Product either sold, licensed or provided by DMXHOSTING to Customer or purchased directly by Customer used in connection with the Services will not be deemed a breach of DMXHOSTING's obligations under this Agreement. Any rights or remedies Customer may have regarding the ownership, licensing, performance or compliance of Non-DMXHOSTING Product are limited to those rights extended to Customer by the manufacturer of such Non-DMXHOSTING Product. Customer is entitled to use any Non-DMXHOSTING Product supplied by DMXHOSTING only in connection with Customer's permitted use of the Services. Customer shall use its best efforts to protect and keep confidential all intellectual property provided by DMXHOSTING to Customer through any Non-DMXHOSTING Product and shall make no attempt to copy, alter, reverse engineer, or tamper with such intellectual property or to use it other than in connection with the Services. Customer shall not resell, transfer, export or re-export any Non-DMXHOSTING Product, or any technical data derived therefrom, in violation of any applicable United States or foreign law.
8. **Internet Protocol (IP) Address Ownership.** If DMXHOSTING assigns Customer an Internet Protocol ("IP") address for Customer's use, the right to use that IP address shall belong only to DMXHOSTING, and Customer shall have no right to use that IP address except as permitted by DMXHOSTING in its sole and absolute discretion in connection with the Services, during the term of this Agreement. DMXHOSTING shall maintain and control ownership of all Internet Protocol numbers and addresses that may be assigned to Customer by DMXHOSTING, and DMXHOSTING reserves the right to change or remove any and all such Internet Protocol numbers and addresses, in its sole and absolute discretion.
9. **Caching.** Customer expressly
- . grants to DMXHOSTING a license to cache the entirety of the Customer Content and Customer's web site, including content supplied by third parties, hosted by DMXHOSTING under this Agreement

and

- a. agrees that such caching is not an infringement of any of Customer's intellectual property rights or any third party's intellectual property rights.

10. **CPU Usage.** Customer agrees that Customer shall not use excessive amounts of CPU processing on any of DMXHOSTING's servers. Any violation of this policy may result in corrective action by DMXHOSTING, including assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken in DMXHOSTING's sole and absolute discretion. If DMXHOSTING takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action.

11. **Bandwidth and Disk Usage.** Customer agrees that bandwidth and disk usage shall not exceed the number of megabytes per month for the Services ordered by Customer on the Order Form (the "Agreed Usage"). DMXHOSTING will monitor Customer's bandwidth and disk usage. DMXHOSTING shall have the right to take corrective action if Customer's bandwidth or disk usage exceeds the Agreed Usage. Such corrective action may include the assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken in DMXHOSTING's sole and absolute discretion. If DMXHOSTING takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action.

12. **Property Rights.**

DMXHOSTING hereby grants to Customer a limited, non-exclusive, non-transferable, royalty-free license, exercisable solely during the term of this Agreement, to use DMXHOSTING technology, products and services solely for the purpose of accessing and using the Services. Customer may not use DMXHOSTING's technology for any purpose other than accessing and using the Services. Except for the rights expressly granted above, this Agreement does not transfer from DMXHOSTING to Customer any DMXHOSTING technology, and all rights, titles and interests in and to any DMXHOSTING technology shall remain solely with DMXHOSTING. Customer shall not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from any of the DMXHOSTING.

- a. DMXHOSTING owns all right, title and interest in and to the Services and DMXHOSTING's trade names, trademarks, service marks, inventions, copyrights, trade secrets, patents, know-how and other intellectual property rights relating to the design, function, marketing, promotion, sale and provision of the Services and the related hardware, software and systems ("Marks"). Noting in this Agreement constitutes a license to Customer to use or resell the Marks.

13. **Disclaimer of Warranty.** Customer agrees to use all Services and any information obtained through or from DMXHOSTING, at Customer's own risk. Customer acknowledges and agrees that DMXHOSTING exercises no control over, and accepts no responsibility for, the content of the information passing through DMXHOSTING's host computers, network hubs and points of presence or the Internet. **THE SERVICES PROVIDED UNDER THIS AGREEMENT ARE PROVIDED ON AN AS IS, AS AVAILABLE BASIS. NONE OF DMXHOSTING, ITS PARENT, SUBSIDIARY OR AFFILIATED CORPORATIONS, OR ANY OF THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, SHAREHOLDERS, AFFILIATES, AGENTS, ATTORNEYS, SUPPLIERS, THIRD-PARTY INFORMATION PROVIDERS, MERCHANTS, LICENSORS OR THE LIKE (EACH, AN "DMXHOSTING PERSON") MAKE ANY WARRANTIES OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT, FOR THE SERVICES OR ANY EQUIPMENT DMXHOSTING PROVIDES. NO DMXHOSTING PERSON MAKES ANY WARRANTIES THAT THE SERVICES WILL NOT BE INTERRUPTED OR ERROR FREE; NOR DO ANY OF THEM MAKE ANY WARRANTIES AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SERVICES OR AS TO THE ACCURACY, RELIABILITY OR CONTENT OF ANY INFORMATION, SERVICES OR MERCHANDISE CONTAINED IN OR PROVIDED THROUGH THE SERVICES. DMXHOSTING IS NOT LIABLE, AND EXPRESSLY DISCLAIMS ANY LIABILITY, FOR THE CONTENT OF ANY DATA TRANSFERRED EITHER TO OR FROM**

CUSTOMER OR STORED BY CUSTOMER OR ANY OF CUSTOMER'S CUSTOMERS VIA THE SERVICES PROVIDED BY DMXHOSTING. NO ORAL ADVICE OR WRITTEN INFORMATION GIVEN BY ANY DMXHOSTING PERSON, WILL CREATE A WARRANTY; NOR MAY YOU RELY ON ANY SUCH INFORMATION OR ADVICE. The terms of this section shall survive any termination of this Agreement.

14. Limited Warranty.

DMXHOSTING represents and warrants to Customer that the Services will be performed (a) in a manner consistent with industry standards reasonably applicable to the performance thereof; (b) at least at the same level of service as provided by DMXHOSTING generally to its other customers for the same services; and (c) in compliance in all material respects with the applicable Service Descriptions. Customer will be deemed to have accepted such Services unless Customer notifies DMXHOSTING, in writing, within thirty (30) days after performance of any Services of any breach of the foregoing warranties. Customer's sole and exclusive remedy, and DMXHOSTING's sole obligation, for breach of the foregoing warranties shall be for DMXHOSTING, at its option, to re-perform the defective Services at no cost to Customer, or, in the event of interruptions to the Services caused by a breach of the foregoing warranties, issue Customer a credit in an amount equal to the current monthly service fees pro rated by the number of hours in which the Services have been interrupted. DMXHOSTING may provision the Services from any of its data centers and may from time to time re-provision the Services from different data centers.

- a. The foregoing warranties shall not apply to performance issues or defects in the Services (a) caused by factors outside of DMXHOSTING's reasonable control; (b) that resulted from any actions or inactions of Customer or any third parties; or (c) that resulted from Customer's equipment or any third-party equipment not within the sole control of DMXHOSTING. **EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION, DMXHOSTING MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES OR ANY SOFTWARE PROVIDED UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, AND DMXHOSTING HEREBY EXPRESSLY DISCLAIMS THE SAME. WITHOUT LIMITING THE FOREGOING, ANY THIRD-PARTY SOFTWARE PROVIDED TO CUSTOMER HEREUNDER IS PROVIDED "AS IS" WITHOUT ANY CONDITION OR WARRANTY WHATSOEVER. DMXHOSTING DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE.**

15. Limitation of Liability.

IN NO EVENT WILL DMXHOSTING'S LIABILITY IN CONNECTION WITH THE SERVICES, ANY SOFTWARE PROVIDED HEREUNDER OR ANY ORDER, WHETHER CAUSED BY FAILURE TO DELIVER, NON-PERFORMANCE, DEFECTS, BREACH OF WARRANTY OR OTHERWISE, EXCEED THE AGGREGATE SERVICE FEES PAID TO DMXHOSTING BY CUSTOMER DURING THE 12-MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH LIABILITY.

- a. **DMXHOSTING CANNOT GUARANTEE CONTINUOUS SERVICE, SERVICE AT ANY PARTICULAR TIME, INTEGRITY OF DATA, INFORMATION OR CONTENT STORED OR TRANSMITTED VIA THE INTERNET. DMXHOSTING WILL NOT BE LIABLE FOR ANY UNAUTHORIZED ACCESS TO, OR ANY CORRUPTION, ERASURE, THEFT, DESTRUCTION, ALTERATION OR INADVERTENT DISCLOSURE OF, DATA, INFORMATION OR CONTENT TRANSMITTED, RECEIVED OR STORED ON ITS SYSTEM.**
- b. **EXCEPT AS EXPRESSLY PROVIDED BELOW, NEITHER PARTY SHALL BE LIABLE IN ANY WAY TO THE OTHER PARTY OR ANY OTHER PERSON FOR ANY LOST PROFITS OR REVENUES, LOSS OF USE, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, LICENSES OR SERVICES OR SIMILAR ECONOMIC LOSS, OR FOR ANY PUNITIVE, INDIRECT, SPECIAL, INCIDENTAL,**

CONSEQUENTIAL OR SIMILAR DAMAGES OF ANY NATURE, WHETHER FORESEEABLE OR NOT, UNDER ANY WARRANTY OR OTHER RIGHT HEREUNDER, ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OR NON-PERFORMANCE OF ANY ORDER, OR FOR ANY CLAIM AGAINST THE OTHER PARTY BY A THIRD PARTY, REGARDLESS OF WHETHER IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH CLAIM OR DAMAGES.

- c. YOU UNDERSTAND, ACKNOWLEDGE AND AGREE THAT DMXHOSTING CANNOT GUARANTEE THAT YOU WILL OBTAIN A DESIRED DOMAIN NAME, EVEN IF AN INQUIRY INDICATES THAT A DOMAIN NAME IS AVAILABLE AT THE TIME OF SUBMISSION OF ANY APPLICATION FOR SUCH DOMAIN NAME. YOU FURTHER UNDERSTAND, ACKNOWLEDGE AND AGREE THAT DMXHOSTING SHALL NOT BE LIABLE FOR ANY (1) SUSPENSION OR LOSS OF ANY DOMAIN NAME REGISTRATION IN YOUR NAME, (2) USE OF YOUR DOMAIN NAME REGISTRATION, (3) INTERRUPTION OF BUSINESS, (4) ACCESS DELAYS OR ACCESS INTERRUPTIONS TO OUR SITE OR THE WEBSITE(S) OR SERVICES YOU ACCESS BY THE DOMAIN NAME REGISTERED IN YOUR NAME; (5) LOSS OR LIABILITY RESULTING FROM ACTS OF GOD (6) DATA NON-DELIVERY, MIS-DELIVERY, CORRUPTION, DESTRUCTION OR OTHER MODIFICATION; (7) EVENTS BEYOND DMXHOSTING'S CONTROL; (8) THE PROCESSING OF ANY APPLICATION; (9) LOSS OR LIABILITY RESULTING FROM THE UNAUTHORIZED USE OR MISUSE OF YOUR DOMAIN NAME AND/OR ACCOUNT IDENTIFIER OR PASSWORD; OR (10) APPLICATION OF OUR DISPUTE POLICY.
 - d. The limitations contained in this Section apply to all causes of action in the aggregate, whether based in contract, tort or any other legal theory (including strict liability), other than claims based on fraud or willful misconduct. The limitations contained in Section 15(c) shall not apply to Customer's indemnification obligations.
 - e. Notwithstanding anything to the contrary in this Agreement, DMXHOSTING's maximum liability under this Agreement for all damages, losses, costs and causes of actions from any and all claims (whether in contract, tort, including negligence, quasi-contract, statutory or otherwise) shall not exceed the actual dollar amount paid by Customer for the Services which gave rise to such damages, losses and causes of actions during the 12-month period prior to the date the damage or loss occurred or the cause of action arose.
 - f. Customer understands, acknowledges and agrees that if DMXHOSTING takes any corrective action under this Agreement because of an action of Customer or one of its customers or a reseller, that corrective action may adversely affect other customers of Customer or other reseller customers, and Customer agrees that DMXHOSTING shall have no liability to Customer, any of its customers or any Reseller Customer due to such corrective action by DMXHOSTING.
 - g. This limitation of liability reflects an informed, voluntary allocation between the parties of the risks (known and unknown) that may exist in connection with this Agreement. The terms of this section shall survive any termination of this Agreement.
16. **Indemnification.** Customer agrees to indemnify, defend and hold harmless DMXHOSTING and its parent, subsidiary and affiliated companies, and each of their respective officers, directors, employees, shareholders, attorneys and agents (each an "indemnified party" and, collectively, "indemnified parties") from and against any and all claims, damages, losses, liabilities, suits, actions, demands, proceedings (whether legal or administrative), and expenses (including, but not limited to, reasonable attorney's fees) threatened, asserted, or filed by a third party against any of the indemnified parties arising out of or relating to Customer's use of the Services, (ii) any violation by Customer of the AUP, (iii) any breach of any representation, warranty or covenant of Customer contained in this Agreement or (iv) any acts or omissions of Customer. The terms of this section shall survive any termination of this Agreement.

17. **Miscellaneous.**

Independent Contractor. DMXHOSTING and Customer are independent contractors and nothing contained in this Agreement places DMXHOSTING and Customer in the relationship of principal and agent, master and servant, partners or joint venturers. Neither party has, expressly or by implication, or may represent itself as having, any authority to make contracts or enter into any agreements in the name of the other party, or to obligate or bind the other party in any manner whatsoever.

- a. **Governing Law; Jurisdiction.** Any controversy or claim arising out of or relating to this Agreement, the formation of this Agreement or the breach of this Agreement, including any claim based upon arising from an alleged tort, shall be governed by the substantive laws of the State of California. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement. **ANY SUIT, ACTION OR PROCEEDING CONCERNING THIS AGREEMENT MUST BE BROUGHT IN A CALIFORNIA STATE OR FEDERAL COURT LOCATED IN LOS ANGELES COUNTY, CALIFORNIA, AND EACH OF THE PARTIES HEREBY IRREVOCABLY CONSENTS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS (AND OF THE APPROPRIATE APPELLATE COURTS THEREFROM) IN ANY SUCH SUIT, ACTION OR PROCEEDING AND IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY SUCH COURT OR THAT ANY SUCH SUIT, ACTION OR PROCEEDING WHICH IS BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.**
- b. **Headings.** The headings herein are for convenience only and are not part of this Agreement.
- c. **Entire Agreement; Amendments.** This Agreement, including documents incorporated herein by reference, supersedes all prior discussions, negotiations and agreements between the parties with respect to the subject matter hereof, and this Agreement constitutes the sole and entire agreement between the parties with respect to the matters covered hereby. In case of a conflict between this Agreement and any purchase order, service order, work order, confirmation, correspondence or other communication of Customer or DMXHOSTING, the terms and conditions of this Agreement shall control. No additional terms or conditions relating to the subject matter of this Agreement shall be effective unless approved in writing by any authorized representative of Customer and DMXHOSTING. This Agreement may not be modified or amended except by another agreement in writing executed by the parties hereto; provided, however, that these Terms of Service may be modified from time to time by DMXHOSTING in its sole discretion, which modifications will be effective upon posting to DMXHOSTING's web site.
- d. **Severability.** All rights and restrictions contained in this Agreement may be exercised and shall be applicable and binding only to the extent that they do not violate any applicable laws and are intended to be limited to the extent necessary so that they will not render this Agreement illegal, invalid or unenforceable. If any provision or portion of any provision of this Agreement shall be held to be illegal, invalid or unenforceable by a court of competent jurisdiction, it is the intention of the parties that the remaining provisions or portions thereof shall constitute their agreement with respect to the subject matter hereof, and all such remaining provisions or portions thereof shall remain in full force and effect.
- e. **Notices.** All notices and demands required or contemplated hereunder by one party to the other shall be in writing and shall be deemed to have been duly made and given upon date of delivery if delivered in person or by an overnight delivery or postal service, upon receipt if delivered by facsimile the receipt of which is confirmed by the recipient, or upon the expiration of five days after the date of posting if mailed by certified mail, postage prepaid, to the addresses or facsimile numbers set forth below the parties' signatures. Either party may change its address or facsimile number for purposes of this

Agreement by notice in writing to the other party as provided herein. DMXHOSTING may give written notice to Customer via e-mail to the Customer's e-mail address as maintained in DMXHOSTING's billing records.

- f. **Waiver.** No failure or delay by any party hereto to exercise any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy by any party preclude any other or further exercise thereof or the exercise of any other right or remedy. No express waiver or assent by any party hereto to any breach of or default in any term or condition of this Agreement shall constitute a waiver of or an assent to any succeeding breach of or default in the same or any other term or condition hereof.
- g. **Assignment; Successors.** Customer may not assign or transfer this Agreement, or any of its rights or obligations hereunder, without the prior written consent of DMXHOSTING. Any attempted assignment in violation of the foregoing provision shall be null and void and of no force or effect whatsoever. DMXHOSTING may assign its rights and obligations under this Agreement, and may engage subcontractors or agents in performing its duties and exercising its rights hereunder, without the consent of Customer. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.
- h. **Limitation of Actions.** No action, regardless of form, arising by reason of or in connection with this Agreement may be brought by either party more than two years after the cause of action has arisen.
- i. **Counterparts.** If this Agreement is signed manually, it may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. If this Agreement is signed electronically, DMXHOSTING's records of such execution shall be presumed accurate unless proven otherwise.
- j. **Force Majeure.** Neither party is liable for any default or delay in the performance of any of its obligations under this Agreement (other than failure to make payments when due) if such default or delay is caused, directly or indirectly, by forces beyond such party's reasonable control, including, without limitation, fire, flood, acts of God, labor disputes, accidents, acts of war or terrorism, interruptions of transportation or communications, supply shortages or the failure of any third party to perform any commitment relative to the production or delivery of any equipment or material required for such party to perform its obligations hereunder.
- k. **No Third-Party Beneficiaries.** Except as otherwise expressly provided in this Agreement, nothing in this Agreement is intended, nor shall anything herein be construed to confer any rights, legal or equitable, in any Person other than the parties hereto and their respective successors and permitted assigns. Notwithstanding the foregoing, Customer acknowledges and agrees that Microsoft, and any supplier of third-party supplier that is identified as a third-party beneficiary in the Service Description, is an intended third-party beneficiary of the provisions set forth in this Agreement as they relate specifically to its products or services and shall have the right to enforce directly the terms and conditions of this Agreement with respect to its products or services against Customer as if it were a party to this Agreement.
- l. **Government Regulations.** Customer may not export, re-export, transfer or make available, whether directly or indirectly, any regulated item or information to anyone outside the United States in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the United States government and any country or organization of nations within whose jurisdiction Customer operates or does business.
- m. **Marketing.** Customer agrees that during the term of this Agreement DMXHOSTING may publicly refer to Customer, orally and in writing, as a customer of DMXHOSTING.

Any other public reference to Customer by DMXHOSTING requires the written consent of Customer.

Revised: December 2005