

TERMS OF SERVICE 2012

Updated January 3, 2012

THESE TERMS OF SERVICE ("TOS" OR "AGREEMENT") IS A BINDING AGREEMENT BETWEEN BITGRAVITY, INC ("BITGRAVITY," THE "COMPANY," "WE" OR "US") AND YOU AND, IF APPLICABLE, THE COMPANY OR OTHER LEGAL ENTITY YOU REPRESENT ("CUSTOMER" OR "YOU"). THIS AGREEMENT GOVERNS THE PROVISION OF THOSE SERVICES (THE "SERVICES") AND/OR SOFTWARE (THE "SOFTWARE") THAT ARE EITHER (A) SET FORTH IN A SERVICE AGREEMENT OR AGREEMENTS ("SERVICE AGREEMENT(S)") EXECUTED BY YOU; (B) SET FORTH ON THE AGREEMENT PAGE FOR ONLINE ORDERS, SUCH AS FOR BG DIRECT ("BG DIRECT"); OR (C) AS DESCRIBED ON THE DOWNLOAD PAGE FOR SOFTWARE OFFERED BY THE COMPANY THROUGH AN ONLINE PROCESS, WHICH INCLUDES, AS OF THE DATE OF THESE TOS, (i) THE BITGRAVITY FLASH PLAYER - ON DEMAND; (ii) THE BITGRAVITY FLASH PLAYER - LIVE; (iii) THE BITGRAVITY SECURITY SOFTWARE; (iv) THE BITGRAVITY ENCODING SOFTWARE; AND (v) THE BITGRAVITY VIDEO PLAYBACK SOFTWARE.

BY (A) EXECUTING AND RETURNING THE SERVICE AGREEMENT(S) GOVERNING THE PROVISION OF SERVICES AND/OR SOFTWARE; (B) (ACCEPTING THIS AGREEMENT BY CLICKING ACCEPT OR CHECKING AN ACCEPTANCE BOX) CLICKING THE "ACCEPT" BUTTON FOR THIS AGREEMENT IF YOU ARE DOWNLOADING THE SOFTWARE ONLINE; OR (C) OTHERWISE INDICATING YOUR ACCEPTANCE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT BY A METHOD APPROVED IN WRITING BY THE COMPANY, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE LEGAL AUTHORITY TO BIND THE LEGAL ENTITY TO THIS AGREEMENT, IN WHICH CASE "YOU" SHALL MEAN SUCH ENTITY. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT, YOU MAY NOT USE THE SERVICES OR SOFTWARE AND YOU MUST EITHER INFORM THE ACCOUNT REPRESENTATIVE LISTED ON THE SERVICE AGREEMENT(S), OR NOT CLICK ACCEPT, NOT CHECK THE ACCEPTANCE BOX OR SELECT THE "DECLINE" BUTTON, IF USING AN ONLINE PROCESS.

1. MODIFICATIONS TO THIS AGREEMENT

You agree that we may modify this Agreement or any policy or other terms referenced in this Agreement ("Additional Policy(ies)") at any time by posting a revised version of the Agreement or such Additional Policy on the BitGravity Web site. The revised terms shall be effective as follows:

- If the revised terms are
 - a. For a Service or Software that we are adding at the time of the revision,
 - b. For our Privacy Policy
 - c. For the AUP (as defined in Section 12), or
 - d. For any other general terms and conditions applicable to our services, Web sites or other properties, then the revised terms shall be effective upon posting (unless we expressly state otherwise at the time of posting); and
- If the revised terms are otherwise for an existing Service or Software, then the revised terms shall be effective upon the earlier to occur of (a) fifteen (15) days after posting and (b) if, in our sole discretion, we provide a mechanism for your immediate acceptance of the revised terms, such as a click-through confirmation or acceptance button, your acceptance.

By continuing to use the Software, or use or receive the Service(s), after the effective date of any revisions to this Agreement or any Additional Policies, you agree to be bound by the revised Agreement or any revised Additional Policies. It is your responsibility to check the BitGravity Web site regularly for changes to this Agreement or the Additional Policies, as applicable. We last modified this Agreement on the date set forth at the top of this Agreement.

2. TERM

2.1 Service Agreement(s)

With respect to Services and/or Software ordered pursuant to Service Agreements:

- a. Each Service Agreement is effective as of the Contract Effective Date set forth in such Service Agreement.
- b. The Term for the provision of Services by the Company shall be as set forth in the applicable Service Agreement. The Term shall begin at the "Term Start Date" as set forth in such Service Agreement.
- c. The Service Activation Date is the date service was provisioned on the network and BitGravity sent you notification of the same via email.
- d. If you have first become a customer or renew your Service Agreement on or after April, 5, 2010, unless you provide notice in accordance with Section 13 no earlier than ninety (90) days and no later than thirty (30) days before the end of the Term as outlined in the Service Agreement, the Initial Term shall automatically renew for subsequent twelve (12) month terms (each a 'Renewal Term'), unless not less than ninety (90) days prior to the end of the initial term or any Renewal Term one Party indicates in writing to the other Party of its intention not to renew this Service Agreement in accordance with Section 13 of this Agreement.
- e. Termination of an individual Service Agreement shall not terminate any other Service Agreement.

2.2. Downloaded Software

With respect to Software that is downloaded for no additional charge to you, your license to use the Software is subject to termination by BitGravity at any time, for any reason or no reason. Web site regularly for changes to this Agreement or the Additional Policies, as applicable. We last modified this Agreement on the date set forth at the top of this Agreement.

3. TERMINATION AND SUSPENSION

3.1. Termination or Suspension by Us

We may suspend your right and license to use the Services and/or Software in a particular Service Agreement, or terminate this Agreement in its entirety or as to a particular Service Agreement (and, accordingly, your right to use the Service and/or Software as provided in this Agreement or in such particular Service Agreement), effective as set forth below:

- 3.1.1. Immediately upon our notice to you in accordance with the notice provisions set forth in Section 13 below if:
 - i. We receive notice, or we otherwise determine in our sole discretion, that you have violated the AUP;
 - ii. You otherwise use the Service in a way that disrupts or threatens the Service;
 - iii. There is an unusual spike or increase in your use of the Service;
 - iv. We determine, in our sole discretion, there is evidence of fraud with respect to your account;
 - v. You use any of the Software, BitGravity Content (as defined in Section 5) or Marks (as defined in Section 14) other than as expressly permitted herein;
 - vi. We determine, in our sole discretion, that our provision of a Service or Software to you is prohibited by applicable law, or has become impractical or unfeasible for any legal or regulatory reason; or
 - vii. Subject to applicable law, upon your liquidation, commencement of dissolution proceedings, disposal of your assets, failure to continue your business, assignment for the benefit of creditors, or if you become the subject of a voluntary or involuntary bankruptcy or similar proceeding.
- 3.1.2. Default of Payment Obligation
Upon at least twenty-four (24) hours following our provision of notice to you in accordance with the notice provisions set forth in Section 13 below, if you are in default of any payment obligation with respect to the Services or Software, including any payment obligation under any current or prior Service Agreements, or if any payment mechanism you have provided to us is invalid or charges are refused for such payment mechanism, and you fail to cure such payment obligation default or correct such payment mechanism problem within such notice period.

3.1.3. Default of Any Other Provision

Upon at least five (5) days following our provision of notice to you in accordance with the notice provisions set forth in Section 13 below, if you breach any other provision of this Agreement and fail, as determined by us, in our sole discretion, to cure such breach within such notice period.

3.1.4. For Convenience

Upon ninety (90) days notice in accordance with Section 13, or, if within ninety (90) days of the end of the term set forth in the applicable Service Agreement, the end of such term.

3.1.5. Downloaded Software

With respect to Software downloaded through the Company's online process at no additional charge, we may suspend your right and license to use such Software, for any reason or for no reason, at our discretion at any time by providing you at least sixty (60) days' advance notice in accordance with the notice provisions set forth in Section 13 below.

3.1.6. Modification of Services or Software

The Company may modify components of, or the method of providing, its Services or use of the Software, upon thirty (30) days notice, or a shorter period if such change is due to compliance with applicable laws or regulations. In such case, these TOS and applicable Service Agreement(s) shall be modified solely to the extent necessary to reflect such modification(s); provided, that if such modification results in a material decrease in the functionality of the Services and/or Software, then you may terminate the applicable Service Agreement if such material decrease is not remedied within thirty days notice from you.

3.2. Effect of Suspension or Termination by Us

3.2.1. Upon our suspension or termination of your use of a Service or Software, we shall have no obligation to continue to store your data during any period of suspension or termination or to permit you to retrieve the same and may take any or all of the following actions, in any particular order, to limit, deactivate, and/or remove access to your account and content:

- a. Deactivate access to your BitGravity dashboard, FTP, or any other account including your ability to add, modify, or remove content or to access reports;
- b. Deny requests for serving your content on Our network;
- c. Remove any or all of your content from Our network, including from your account.

3.2.2. Payment and Rights

3.2.2.1 Suspension

Upon Our suspension of your use of a Service or Software, in whole or in part, for any reason, (i) applicable fees will continue to accrue for such Service or Software, notwithstanding the suspension (including your continued storage of data during the period of suspension); (ii) you remain liable for all fees, charges and any other obligations through the end of the Term outlined in the Service Agreement; (iii) in the case where your Service Agreement was automatically renewed at the end of a Term, you remain liable for all obligations for ninety (90) days after you deliver us notice of termination pursuant to Section 13 of this Agreement; and (iv) all of your rights with respect to the Service shall be terminated during the period of the suspension. Notwithstanding any suspension or subsequent termination of this Agreement, in the event you continue to deliver content using the Service or Software, you shall continue to be liable for the fees for such delivery in effect as of the date of suspension or subsequent termination (as applicable) as provided in the applicable Service Agreement for such delivery of content, including without limitation Section 7 of this Agreement and Section 7.2, specifically, as to the calculation of usage of the Service.

3.2.3. Termination

Upon termination of this Agreement for any reason: (i) you remain liable for all applicable fees, charges and any other obligations through the end of the Term outlined in the Service Agreement; (ii), (ii) all of your rights under this Agreement shall immediately terminate; and (iii) you shall immediately return, or if instructed by us, destroy all BitGravity Confidential Information (as defined in Section 9 below) and any BitGravity Properties then in your possession. Notwithstanding any termination of this Agreement, in the event you continue to deliver content using the Service or Software, you shall be continue to be liable for the fees for such delivery in effect as of the date of termination as provided in the applicable Service Agreement for such delivery of content, including without limitation Section 7 of this Agreement and Section 7.2, specifically, as to the calculation of usage of the Service.

3.3. Termination by You

You may terminate this Agreement in its entirety or as to a particular Service Agreement (and, accordingly, your right to use the Service and/or Software as provided in this Agreement or in such particular Service Agreement), for any reason or for no reason at all, by providing us ninety (90) days' written notice in accordance with Section 13. Upon termination of this Agreement: (i) you remain liable for all applicable fees, charges and any other obligations through the end of the then-current Term; (ii) in the case where your Service Agreement was automatically renewed at the end of the initial Term, you remain liable for all obligations for during such ninety (90) day notice period; (iii) all of your rights under this Agreement shall terminate; and (iv) you shall return, or if instructed by us, destroy all BitGravity Confidential Information (as defined in Section 9 below) and any BitGravity Properties then in your possession within three (3) business days after the date of termination. Notwithstanding any termination of this Agreement, in the event you continue to deliver content using the Service or Software, you shall continue to be liable for the fees for such delivery in effect as of the date of termination as provided in the applicable Service Agreement for such delivery of content, including without limitation Section 7 of this Agreement and Section 7.2, specifically, as to the calculation of usage of the Service.

4. AUTHORIZATION AND LICENSE TO USE SERVICES

Subject to your acceptance of and compliance with this Agreement, we hereby grant you a limited, non-exclusive, non-transferable, non-sublicenseable right and license, in and under our intellectual property rights, to access and use the Services, solely in accordance with the terms and conditions of this Agreement.

4.1. Permitted Uses Generally

4.1.1. You may write a software application or Web site ("Application") that interfaces with the applicable Service solely in accordance with our APIs (as defined in Section 5.1 below) and any documentation provided in connection with such APIs. You acknowledge that we may change, deprecate or republish APIs for such Service or feature of such Service from time to time, and that it is your responsibility to ensure that calls you make to the Service are compatible with then-current APIs for the Service. You further acknowledge that we may change or remove features or functionality of any Service at any time.

4.1.2. You may make network calls or requests to such Service at any time that such Service is available, provided that you (or if you build and release an Application, each installed copy of your Application) may not exceed any maximum file sizes or maximum calls per second limits imposed by BitGravity (as such sizes or limits may be established or changed from time to time by BitGravity in its sole discretion).

4.1.3. Subject to the terms and conditions of this Agreement, you may generally publicize your use of the Service; however, you may not issue any press release with respect to the Service or this Agreement without our prior written consent. You hereby grant BitGravity the right to list and publicize you as a customer of the Service.

4.2. Accounts and Keys

You may only create one account per email address. When you complete the account creation process, you will

have provided unique account identifiers (“Account Identifiers”), including your email address and password, and you will be issued unique account identifier. Account Identifiers (i) identify your account and (ii) allow you to access information and make requests to BitGravity. The Account Identifier is immutable and will always uniquely identify your BitGravity account. Account Identifiers are unique to your account and are subject to change. Account Identifiers are for your personal use only, and you may not sell, transfer, sublicense or otherwise disclose your private key to any other party. You are responsible for maintaining the secrecy and security of your Account Identifiers. You are fully responsible for all activities that occur under your Account Identifiers, regardless of whether such activities are undertaken by you or a third party. Therefore, you should contact us immediately if you believe a third party may be using your Account. you are responsible for maintaining up-to-date and accurate information (including contact information) for your BitGravity account. We are not responsible for any unauthorized access to, alteration of, or the deletion, destruction, damage, loss or failure to store any of, your Content (as defined in Section 9.2), your Applications, or other data which you submit or use in connection with your account or the Service.

4.3. Monitoring Your Use of the BitGravity Service

You agree to provide information and/or other materials related to your Applications as reasonably requested by us to verify your compliance with this Agreement. You further acknowledge and agree that, with respect to:

4.3.1. Online Applications, we may crawl or otherwise monitor the external interfaces of your Application for the purpose of verifying your compliance with this Agreement. You may not seek to block or otherwise interfere with such crawling or monitoring (and we may use technical means to overcome any methods used on your Application to block or interfere with our crawling or monitoring); and

4.3.2. Client-Side Applications, you agree to furnish a copy of your Application upon request for the purpose of verifying your compliance with this Agreement.

5. LICENSE TO USE THE BITGRAVITY PROPERTIES

5.1. BitGravity Properties

We may make available to you, for your installation, copying and/or use in connection with the Service, from time to time, a variety of software, data and other content and printed and electronic documentation (all such materials except those specifically made available by us under separate license terms, the “BitGravity Properties”). Subject to your acceptance of this Agreement, ongoing compliance with its terms and conditions with respect to the subject Service, and payment if and as required for your right to use the Service, we hereby grant to you, without the right to sublicense, a limited, non-exclusive, non-transferable license during the Term, under our intellectual property or proprietary rights in the BitGravity Properties, only to install, copy and use the BitGravity Properties solely in connection with and as necessary for your use of the Service and solely to the extent in compliance with all the terms and conditions of this Agreement. The BitGravity Properties may include, without limitation:

- Proprietary application programming interfaces (“APIs”);
- Developer tools for use in connection with the APIs;
- Articles and documentation for use in connection with the use and implementation of the APIs (collectively, “Documentation”);
- Specifications describing the operational and functional capabilities, use limitations, technical and engineering requirements, and testing and performance criteria relevant to the proper use of the Service and its related APIs and other technology;
- Textual materials made available as part of the Service (“Text Materials”); and
- Other forms of digital content, data, text, images, logos, user interface designs and other creative designs, audio and video (with the Text Materials, collectively, “BitGravity Content”). Sample source code which we may make available from time to time for use in connection with the Service (“Sample Source Code”) and libraries which we may make available from time to time for use in connection with the Service (“Libraries”) will be made available to you under separate license that accompanies each Sample Source Code or Library and the term “BitGravity Properties,” as used herein, specifically excludes any Sample Source Code or Libraries made available to you

under separate license. Except as may be expressly authorized under this Agreement:

- You may not, and may not attempt to, modify, alter, tamper with, repair, or otherwise create derivative works of any software included in or accessed via the BitGravity Properties.
- You may not, and may not attempt to, reverse engineer, disassemble, or decompile the BitGravity Properties or the Service or apply any other process or procedure to derive the source code of any software included in or accessed via the BitGravity Properties.
- You shall ensure that all employees and independent contractors with access to the Software shall be bound to make no unauthorized use or disclosure of the Software.

5.2 Software

With respect to Software provided to you, we hereby grant you a non-exclusive, non-transferable, non-sublicensable (except as provided below) license to the Software. The license granted herein is further subject to the following conditions:

- The Software shall only be used in conjunction with services provided by BitGravity;
- The Software may not be enabled for use, operation or interaction with any software, hardware or any other application other than your Flash-based media player or those provided by BitGravity, except as specifically authorized in writing by BitGravity;
- You may grant sublicenses to the Software to end-users of your Web site(s) that utilize BitGravity's services along with your standard end-user license agreement, Web site terms of use, or similar agreement; provided, that such sublicenses shall only grant rights as to compiled versions of the Software for use with your Web site(s).
- You shall take all reasonable precautions to protect the Software and documentation, and preserve its confidential, proprietary and trade secret status in perpetuity;
- You shall ensure that all employees and independent contractors with access to the Software shall be bound to make no unauthorized use or disclosure of the Software;
- You may not, and may not attempt to, reverse engineer, disassemble, or decompile the Software or apply any other process or procedure to derive the source code of any Software.
- You may not repackage the Software or any related product for the purpose of serving the Software or related functionality to third parties without obtaining the prior express written consent of BitGravity;

5.3. Third Party Software

The BitGravity Properties, Services and Software may include software and/or services that are proprietary to third parties. Such third parties are referred to individually as a "Third Party Provider," and collectively as "Third Party Providers," and the software and/or services of each Third Party Provider referred to as "Third Party Properties". As of the date of these TOS set forth above, the Third Party Providers and Third Party Properties are:

<u>Name of Third Party Provider</u>	<u>Third Party Properties</u>
Twistage, Inc. ("Twistage")	BG Video Director

The Third Party Properties are subject to the restrictions set forth in this Agreement, to the same extent as all other BitGravity Properties, Services and Software, as applicable. In addition, with respect to the Third Party Providers and their respective Third Party Properties:

- Twistage is an express third-party beneficiary under this Agreement, with a right to enforce the terms of this Agreement against you.
- The Third Party Provider makes no representation or warranty to you.
- To the extent you receive confidential information of the Third Party Provider (the "Third Party Confidential Information", the Third Party Confidential Information will be subject to the provisions of Section 8 of this Agreement as if the Third Party Provider were the disclosing party.
- You shall not attempt to illegally gain access to any systems or networks of any Third Party Provider, except as required to access and use the Third Party Properties.

- The provisions of Section 10.2 specifically apply to your use of the the Third Party Properties and your responsibility for your Content.

5.4. Nonexclusive Rights

The rights granted by BitGravity in this Agreement with respect to BitGravity Properties, the Marks, the Services and Software are nonexclusive, and BitGravity reserves the right to: (i) itself act as a developer of products or services related to any of the products that you may develop in connection with the BitGravity Properties or via your use of the Service; and (ii) appoint third parties as developers or systems integrators who may offer products or services which compete with BitGravity or your Application.

6. DOWNTIME AND SERVICE SUSPENSIONS; SECURITY

6.1. Downtime and Service Suspensions

In addition to our rights to terminate or suspend Services to you as described in Section 3 above, you acknowledge that: (i) your access to and use of the Services may be suspended for the duration of any unanticipated or unscheduled downtime or unavailability of any portion or all of the Services for any reason, including as a result of power outages, system failures or other interruptions; and (ii) we shall also be entitled, without any liability to you, to suspend access to any portion or all of the Services at any time, on a Service-wide basis: (a) for scheduled downtime to permit us to conduct maintenance or make modifications to the Service; (b) in the event of a denial of service attack or other attack on the Services or other event that we determine, in our sole discretion, may create a risk to the Services, to you or to any of our other customers if the Service were not suspended; or (c) in the event that we determine that provision of the Services is prohibited by law or we otherwise determine that it is necessary or prudent to do so for legal or regulatory reasons (collectively, "Service Suspensions"). Without limitation to Section 10.5, we shall have no liability whatsoever for any damage, liabilities, losses (including any loss of data or profits) or any other consequences that you may incur as a result of any Service Suspension.

6.2. Security

We cannot guarantee that we will be successful at keeping your Content secure, given the nature of the Internet. Accordingly, without limitation to Section 4.3 above and Section 10.5 below, you acknowledge that you bear sole responsibility for adequate security, protection and backup of your Content and Applications. We strongly encourage you, where available and appropriate, to (a) use encryption technology to protect your Content from unauthorized access, (b) routinely archive your Content, and (c) keep your Applications or any software that you use or run with our Services current with the latest security patches or updates. We will have no liability to you for any unauthorized access or use, corruption, deletion, destruction or loss of any of your Content or Applications.

7. FEES

7.1 Service Agreements

With respect to Services ordered pursuant to Service Agreements, if you transfer less than or up to the minimum committed traffic, you will be charged the minimum commitment on the applicable Service Agreement. Beyond the minimum committed traffic, you will be charged overage rates as dictated by the applicable Service Agreement. Payment for monthly recurring fees is due in advance at the beginning of each billing cycle. Overages from the previous month will be due in arrears on the next month's bill. The initial month will be prorated accordingly, based upon the Service Activation Date. One time fees are billed in advance. The Company reserves the right to limit your usage of BitGravity's service in excess of your committed usage in the event that such excess usage will have a material adverse effect upon BitGravity's network. The Company may, as part of a general increase in fees, increase fees for the Services and/or Software; provided, that (i) we shall provide thirty days notice of such increase, and (ii) You shall have the right to terminate receipt of the applicable Services or use of the Software by providing notice to the Company within thirty days after the effectiveness of the fee increase. Upon termination of this Agreement pursuant to this Section 7.1: (i) you remain liable for all applicable fees, charges and any other obligations through the date of termination; and (ii) you shall return, or if instructed by us, destroy all BitGravity Confidential Information (as defined in Section 9 below) and any BitGravity Properties then in your possession within three (3) business

days after the date of termination. Notwithstanding any termination of this Agreement, in the event you continue to deliver content using the Service or Software, you shall be liable for the fees in effect as of the date of termination as provided in the applicable Service Agreement for such delivery of content.

Monthly Fees set forth in the Service Agreement will commence starting on the Service Activation Date. During the period between the Contract Effective Date and the Term Start Date, Customer will be responsible for any One Time Fees and prorated Monthly Fees at the rates set forth in the applicable Service Agreement and may receive an invoice during that time period.

Customers of BG Live may request additional publishing points from Customer Support, as needed. By requesting additional publishing points, Customer agrees to incur the additional cost per publishing point, as listed on the Customer's Service Agreement, for the remainder of the Term defined in the Service Agreement.

Payments for Invoices must be received within fifteen (15) days of the Invoice date. For any Invoices past due over fifteen (15) days, BitGravity reserves the right to charge interest on those invoices at the rate of 18% per annum, compounded monthly.

For any Invoices past due over thirty (30) days, BitGravity reserves the right to charge interest on those invoices at the rate of 18% per annum, compounded monthly.

7.1.1 Purchasing Online

With respect to Services or Software ordered and/or downloaded through the Company's online process, you agree to pay applicable fees in the amounts set forth on the Service's Detail page on the BitGravity Web site (including any minimum subscription fees). Fees for any new Service feature will be effective upon posting by us on the Service's detail page of the BitGravity Web site for the Service. We may increase or add new fees for the Service or Service feature by giving you 30 days' advance notice. Such notice will be posted on the Service's detail page of the BitGravity Web site on the Service detail page located at one of the following relevant URLs:

BG Video Delivery: http://bitgravity.com/products/bg_video_delivery.html

BG Video Director: http://bitgravity.com/products/bg_video_director.html

BG Live: http://bitgravity.com/products/bg_live.html

BG Web Site Acceleration: http://bitgravity.com/products/bg_wsa.html

You agree that you are responsible for checking the Service's detail page of the BitGravity Web site each month to confirm whether there are any new fees and their effective date(s). We may specify the manner in which you will pay any fees, and any such payment shall be subject to the Company's general accounts receivable policies from time to time in effect. Payment for your monthly base fee is due in advance at the beginning of each billing cycle. Overages from the previous month will be due in arrears on the next month's bill. The initial month will be prorated accordingly, based upon the Service Activation Date. BitGravity reserves the right to limit your usage of BitGravity's service in the event that such usage will have a material adverse effect upon BitGravity's network.

7.2 Network Calculations

With respect to Services ordered pursuant to Service Agreements,

- The Company shall invoice you based upon the total amount of delivery for each service multiplied by the price plan set forth in the Service Agreement.
- The Company shall invoice you based upon the maximum amount of storage for each service multiplied by the price plan set forth in the Service Agreement.
- For 95th percentile, sampling will be based upon traffic from BitGravity to and from the end-user over two minute intervals. At the end of the month, all the data samples will be collected and sorted from highest to lowest individually. The highest 5% will be discarded, and the next highest remaining data sample is the 95th Percentile number.

- For Total GB, at the end of the month all traffic from BitGravity to and from the end-user will be totaled to determine the Total GB.
- For Max Mbps Sum, BitGravity will take the peak bandwidth measured in Mbps used from any date, starting at 00:00 hours -24:00 hours Pacific Time from BitGravity to and from the end-user to determine the Max Mbps for a calendar date. At the end of the month, all the data samples will be collected and summed to determine Max Mbps Sum.

7.3 Delivery and Storage

We use the following conversions to determine your usage of a Service: (i) bytes * 1024 = KB (ii) KB * 1024 = MB (iii) MB * 1000 = GB (iv) GB * 1000 = TB

7.4 Payment

All fees payable by you are exclusive of applicable taxes and duties, including, without limitation, VAT and applicable sales tax. You will provide such information to us as reasonably required to determine whether we are obligated to collect VAT from you, including without limitation your VAT identification number. All amounts payable by you under this Agreement will be made without setoff or counterclaim and without deduction or withholding. If any deduction or withholding is required by applicable law, you shall notify us and shall pay such additional amounts to us as necessary to ensure that the net amount that we receive, after such deduction and withholding, equals the amount we would have received if no such deduction or withholding had been required. Additionally, you shall provide us with documentation that the withholding and deducted amounts have been paid to the relevant taxing authority. In the event of any breach of your payment obligations, the Company shall be entitled to recover its costs of collection, including reasonable attorneys' fees and expenses.

8. CONFIDENTIALITY

- a. This Section 8 shall not apply at such times as the Company and you are parties to a non-disclosure agreement that governs the disclosure of confidential information by either party to the other.
- b. Each party acknowledges that it will have access to certain confidential information of the other party, including the term, fees and commissions and other terms and conditions of this Agreement ("Confidential Information"), and agrees that it will not use in any way, for its own account or the account of any third party, such Confidential Information, nor disclose to any third party (except to that party's attorneys, accountants and other advisors as necessary), any of the other party's Confidential Information. Information will not be deemed Confidential Information if it (i) is or becomes known to the receiving party from a source other than one having an obligation of confidentiality to the disclosing party; (ii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; (iii) is independently developed by the receiving party without reference to the Confidential Information.
- c. Each party shall take all reasonable steps to ensure that the other's Confidential Information is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement, but in no event will either party use less effort to protect the Confidential Information of the other party than it uses to protect its own Confidential Information of like importance. Each party will ensure that any agents or subcontractors that are permitted to access any of the other's Confidential Information are legally bound to comply with the obligations set forth herein. Notwithstanding the foregoing, Confidential Information may be disclosed as required by any governmental agency, provided that before disclosing such information the disclosing party must provide the non-disclosing party with sufficient advance notice of the agency's request for the information to enable the non-disclosing party to exercise any rights it may have to challenge or limit the agency's authority to receive such Confidential Information.

9. INTELLECTUAL PROPERTY

9.1. Our Service and the BitGravity Properties

Other than the limited use and access rights and licenses expressly set forth in this Agreement, we reserve all right, title and interest (including all intellectual property and proprietary rights) in and to: (i) the Service; (ii) the Software; (iii) the BitGravity Properties; (iv) the Marks; and (v) any other technology and software that we provide or use to

provide the Service and the BitGravity Properties. You do not, by virtue of this Agreement or otherwise, acquire any ownership interest or rights in the Services, the BitGravity Properties, the Marks, or other technology and software (including third party technology and software), except for the limited use and access rights described in this Agreement.

9.2. Your Applications, Data and Content

Other than the rights and interests expressly set forth in this Agreement, and excluding BitGravity Properties and works derived from BitGravity Properties, you reserve all right, title and interest (including all intellectual property and proprietary rights) in and to: (i) content and data you may send to us or use as part of your use of the Services which are designed by us to permit you to send content or data to us (“Content”); and (ii) your Applications.

9.3. Feedback

In the event you elect, in connection with the Services or Software, to communicate to us suggestions for improvements to the Services, the Software, the BitGravity Properties or the Marks (collectively, “Feedback”), we shall own all right, title, and interest in and to the same, even if you have designated the Feedback as confidential, and we shall be entitled to use the Feedback without restriction. You hereby irrevocably assign all right, title and interest in and to the Feedback to us and agree to provide us such assistance as we may require to document, perfect, and maintain our rights to the Feedback.

9.4. Non-Assertion

During and after the term of the Agreement, with respect to the Service, the Software, the BitGravity Properties or Marks, you will not assert, nor will you authorize, assist, or encourage any third party to assert, against us or any of our customers, end users, vendors, business partners (including third party sellers on Web sites operated by or on behalf of us), licensors, sublicensees or transferees, any patent infringement or other intellectual property infringement claim with respect to such Service, Software, BitGravity Properties or Marks.

10. REPRESENTATIONS AND WARRANTIES; DISCLAIMERS; LIMITATIONS OF LIABILITY

10.1. Use of the Service

You represent and warrant that you will not use the Services, Software, BitGravity Properties and/or your Application and your Content: (i) in a manner that infringes, violates or misappropriates any rights of us or any third party; (ii) to engage in spamming or other impermissible advertising, marketing or other activities, including, without limitation, any activities that violate anti-spamming laws and regulations, including, without limitation, the CAN SPAM Act of 2003; (iii) in any manner that constitutes or facilitates the illegal export of any controlled or otherwise restricted items, including, without limitation, software, algorithms or other data that is subject to export laws; and/or (iv) in a way that is otherwise illegal or promotes illegal activities, including, without limitation, in a manner that might be libelous or defamatory or otherwise malicious or harmful to any person or entity, or discriminatory based on race, sex, religion, nationality, disability, sexual orientation, or age.

10.2. Applications and Content

You represent and warrant: (i) that you are solely responsible for the development, operation, and maintenance of your Application and for your Content, including without limitation, the accuracy, security, appropriateness and completeness of your Content and all product-related materials and descriptions; (ii) that you have the necessary rights and licenses, consents, permissions, waivers and releases to use and display your Application and your Content; (iii) that neither your Application nor your Content (a) violates, misappropriates or infringes any rights of us or any third party, (b) constitutes defamation, invasion of privacy or publicity, or otherwise violates any rights of any third party, or (c) is designed for use in any illegal activity or promotes illegal activities, including, without limitation, in a manner that might be libelous or defamatory or otherwise malicious, illegal or harmful to any person or entity, or discriminatory based on race, sex, religion, nationality, disability, sexual orientation, or age; (iv) that neither your Application nor your Content contains any Harmful Components; and (v) to the extent to which you use any of the Marks, that you will conduct your business in a professional manner and in a way that reflects favorably on the goodwill and reputation of BitGravity.

10.3. Public Software and Feedback

You represent and warrant that you will not use, and will not authorize any third party to use, any Public Software in connection with the Service in any manner that requires, pursuant to the license applicable to such Public Software, that any BitGravity Properties or Service be (a) disclosed or distributed in source code form, (b) made available free of charge to recipients, or (c) modifiable without restriction by recipients. With respect to any Feedback, you represent and warrant that such Feedback, in whole or in part, contributed by or through you, (i) contains no third party software or any software that may be considered Public Software and (ii) does not violate, misappropriate or infringe any intellectual property rights of any third party. "Public Software" means any software, documentation or other material that contains, or is derived (in whole or in part) from, any software, documentation or other material that is distributed as free software, open source software (e.g., Linux) or similar licensing or distribution models, including, but not limited to software, documentation or other material licensed or distributed under any of the following licenses or distribution models, or licenses or distribution models similar to any of the following: (i) GNU's General Public License (GPL), Lesser/Library GPL (LGPL), or Free Documentation License, (ii) The Artistic License (e.g., PERL), (iii) the Mozilla Public License, (iv) the Netscape Public License, (v) the Sun Community Source License (SCSL), (vi) the Sun Industry Standards License (SISL), (vii) the BSD License and (viii) the Apache License.

10.4. Authorization and Account Information

You represent and warrant that: (i) the information you provide on the Service Agreements is accurate and complete; (ii) if you are an individual, that you are at least 18 years of age and have the legal capacity to enter into this Agreement; and (iii) if you are accepting these TOS as an entity or organization, (a) you are duly authorized to do business in the country or countries where you operate, (b) the individual accepting these TOS meets the requirements of subsection (ii) above and is an authorized representative of your entity, and (c) your employees, officers, representatives and other agents accessing the Services are duly authorized to access the Services and to legally bind you to this Agreement and all transactions conducted under your account.

10.5. Disclaimers

EXCEPT AS SPECIFICALLY PROVIDED HEREIN, YOUR USE OF THE SERVICES, SOFTWARE, BITGRAVITY PROPERTIES AND MARKS IS "AS-IS," AND THE COMPANY DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. EXCEPT AS PROVIDED IN A SERVICE AGREEMENT, THE COMPANY DOES NOT WARRANT THAT THE USE OF THE SERVICES OR SOFTWARE WILL BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE OR THAT THE DATA STORED BY CUSTOMER WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED. IN NO EVENT SHALL THE COMPANY BE LIABLE FOR ANY SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR INCOME, WHETHER OR NOT BITGRAVITY HAD KNOWLEDGE, THAT SUCH DAMAGES MIGHT BE INCURRED. IN NO EVENT SHALL BITGRAVITY BE LIABLE FOR MORE THAN THE AGGREGATE PAYMENTS ACTUALLY RECEIVED FROM YOU IN THE TWELVE MONTHS PRECEDING THE EVENT GIVING RISE TO A CLAIM BY CUSTOMER. Users of the BitGravity GeoBlocking Service are hereby notified that such service is a mechanism implemented using third-party IP geolocation data and services. The accuracy of results based on these third-party solutions can vary significantly. Given the accuracy limitations of third-party IP geolocation solutions, BitGravity cannot guarantee any particular level of accuracy with regards to the BitGravity GeoBlocking Service. CERTAIN JURISDICTIONS LIMIT DISCLAIMERS OF WARRANTIES AND LIMITATIONS OF DAMAGES. IN ANY SUCH JURISDICTION, THE ABOVE DISCLAIMERS AND LIMITATIONS SHALL BE DEEMED AMENDED SOLELY TO THE EXTENT NECESSARY TO COMPLY WITH THE LAWS OF SUCH JURISDICTION.

10.6. Your Applications are Your Responsibility

In addition to the foregoing, we specifically disclaim all liability, and you shall be solely responsible for the development, operation, and maintenance of your Application and for all materials that appear on or within your Application and you agree that you shall, without limitation, be solely responsible for:

10.6.1. The technical operation of your Application and all related equipment;

- 10.6.2. The accuracy and appropriateness of any materials posted on or within your Application (including, among other things, any product-related materials);
- 10.6.3. Ensuring that any materials posted on your site or within your Application are not illegal and do not promote illegal activities, including without limitation any activities that might be libelous or defamatory or otherwise malicious, illegal or harmful to any person or entity, or discriminatory based on race, sex, religion, nationality, disability, sexual orientation, or age;
- 10.6.4. Ensuring that your Application accurately and adequately discloses, either through a privacy policy or otherwise, how you collect, use, store, and disclose data collected from visitors, including, where applicable, that third parties (including advertisers) may serve content and/or advertisements and collect information directly from visitors and may place or recognize cookies on visitors' browsers; and
- 10.6.5. Any of your users' or customers' claims relating to your Application or the Service utilized in connection with your Application; and

10.7. Links

The BitGravity Web site and/or the Service may contain links to Web sites that are not under our control ("Third Party Sites"). We are not responsible for the contents or functionality of any Third Party Sites or any web site that can be accessed via links on any Third Party Site. We provide these links to you as a convenience and the inclusion of any such links does not constitute or imply our endorsement or validation of any Third Party Site.

11. INDEMNIFICATION

- a. You shall indemnify and hold harmless the Company from and against any and all claims and suits, (including attorney's fees and costs) brought against the Company (i) alleging that your Content infringes or misappropriates any intellectual property right, or (ii) resulting from non-compliance with this Agreement (including the AUP).
- b. You shall not enter into a settlement imposing liability on BitGravity without BitGravity's prior written consent.

12. ACCEPTABLE USE POLICY

Use of the BitGravity network and systems, and its services, software and products are also governed by and subject to BitGravity's Acceptable Use Policy, (AUP) found here . The AUP is incorporated into, and made a part of, this Agreement.

13. MISCELLANEOUS

13.1 Notices

Notices under this Agreement shall be in writing and shall be made first by email to notices@bitgravity.com for the Company, and to you at the email address set forth on the Service Agreement, and shall be deemed delivered upon delivery to such email address, unless the party sending notice is unable to deliver to such email address two (2) consecutive times. If this occurs, notice must be delivered personally or by commercial messenger or courier service, or mailed by registered or certified mail (return receipt requested) to you at the postal address set forth on the Service Agreement, or to BitGravity at the address set forth at www.bitgravity.com under Contact Us.

The email address or postal address used by you for notice may be changed upon notice to BitGravity, and may be changed by BitGravity by modification of these TOS.

- a. This Agreement shall be governed by the English language and by the laws of the state of California. The parties consent to the jurisdiction of the courts of the county of San Mateo, California. In the event the Company is the prevailing party in any dispute between you and the Company, the Company shall be awarded its reasonable fees and expenses (including attorneys' fees).



b. If any provision is held unenforceable, this Agreement shall be deemed to be modified so as to render the remainder of the parties' agreement enforceable. Sections 1, 3.4, 5.3 and 6-13 of these TOS shall survive termination. This Agreement may be amended by BitGravity at any time, without notices, and can be accessed at: <http://www.bitgravity.com/about/about.html#policies>
No failure or delay of BitGravity to exercise or enforce its rights shall operate as a waiver.

13.2 Marketing

You agree that the Company can use you marks/logo in marketing materials, including in its Web site, data sheets, newsletters, case studies, and other appropriate materials.

14. COPYRIGHTS AND TRADEMARKS

BitGravity and the BitGravity logo are registered trademarks of BitGravity, Inc. BitCast, BG Live, BG Video Delivery, BG Video Director, BG Web Site Acceleration, BG Secure, and SecureAccess are trademarks of BitGravity, Inc. All other company, product, and service names mentioned may be trademarks of their respective owners.