



## BITMAGIC SERVICE END USER LICENSE AGREEMENT

### IMPORTANT NOTICE:

**BY INDICATING YOUR ACCEPTANCE BY CLICKING ON THE "I ACCEPT" BUTTON, RECEIVING, COPYING, INSTALLING OR USING THE BITPLAYER SOFTWARE OR RELATED CONTENT YOU AGREE TO BE BOUND BY THE PROVISIONS OF THIS BITMAGIC SERVICE END USER LICENSE AGREEMENT. IF YOU DO NOT AGREE TO BE BOUND BY THIS AGREEMENT CLICK ON THE "I DECLINE" BUTTON, DO NOT USE ANY DELIVERED BITPLAYER SOFTWARE OR CONTENT, DO NOT INSTALL IT AND IMMEDIATELY DELETE ANY BITPLAYER SOFTWARE OR CONTENT FROM YOUR COMPUTER.**

This BitMagic Service End User License Agreement (the "**Agreement**") is made between us, BitMagic Corporation, 490 2nd Street, San Francisco, CA, USA, 94107 and you, the applicant/recipient of the BitMagic Service. Terms such as "**we**", "**our**" and "**us**" in this Agreement refer to BitMagic Corporation and our suppliers/licensors/contributors. Terms such as "**you**" and "**your**" refer to you, the applicant, recipient or user of the BitMagic Service; and terms such as "**we both**", "**both of us**", "**each of us**", "**either of us**" and "**our respective**" refer to both you and us.

You have applied to us: (i) to receive our proprietary BitPlayer software (the "**BitPlayer**"); (ii) to receive our Internet delivered content including BitFlicks, BitQuotes, BitClicks, BitMovies, our advertisers' content and any and all other content, including all animations, illustrations, images, graphics, icons, photographs, sound, music, audio, audio clips, videos, video clips, software, web pages, hypertext links, graphics, text, data and the like provided through the BitMagic Service (the "**Content**"); and (iii) to have access to our online discussion groups, archived Content, high score archives, databases, servers and other online information and services provided by us; all of which are referred to together in this Agreement along with corresponding documentation as the "**BitMagic Service**".

In consideration of and reliance on your truthful responses to the questions contained in the application(s) and questionnaire(s) you have provided to us and your agreement to, and ongoing compliance with, all of the provisions in this Agreement we will provide you with the BitMagic Service on the terms and conditions of this Agreement.

### WE BOTH AGREE AS FOLLOWS:

**1. BitPlayer & Content License:** Subject to the provisions of this Agreement, we hereby grant to you a limited, non-exclusive, personal, non-sublicensable, non-transferable, revocable license to (i) install one copy of the BitPlayer in object code format on your computer; (ii) to use the BitPlayer to view Content as part of the BitMagic Service; and (iii) use the BitPlayer to make certain parts of the Content available on your computer as a screen saver; for your private personal use only.

**2. Title and Ownership Acknowledgments:** You agree and Acknowledge that all world-wide right, title and interest, including all world-wide copyright, trademark, service mark, trade secret, trade name, patent and other intellectual property, appurtenant and other rights in and to every component of the BitMagic Service and every copy of every such component, including the BitPlayer and all Content, shall remain our exclusive property. Except as explicitly permitted in this Agreement, there are no implied licenses to any aspect or component of the BitMagic Service and you may not do anything with any component of the BitMagic Service inconsistent with our ownership rights, title and interest. The BitPlayer and Content are licensed and not sold to you. For greater certainty the appurtenant rights, title and interests owned by us include the exclusive ownership of (i) all titles, names, characters, character names, characterizations, likenesses, plots, events, incidents, concepts, themes, scenes, stories, story lines, fanciful characters or designs, brands, logos, music, songs, sounds, sound effects, lyrics, words, text, dialogue, images, videos, video clips, icons, depictions and interface elements and data structures; and (ii) all past, present and future drafts, treatments, adaptations, improvements, supplements, modifications, alterations, additions, revisions, enhancements, updates, upgrades, new versions, new editions, and translations thereof and all other literary material based on any component or aspect of the BitMagic Service. All updates, upgrades or repairs to the BitPlayer and Content shall become part of the BitPlayer and Content for the purposes of this Agreement when provided through the BitMagic Service. This Section 2 shall survive any termination or expiration of this Agreement.

**3. Copies:** You may make one backup copy of BitPlayer for emergency recovery, restart or program error verification purposes, but, except as provided in Section 4 (E-Mail-To-A-Friend Function) and Section 5 (Archive Function), you may not otherwise copy the BitPlayer or the Content. You must not strip out or alter, and shall replicate, all trademark, service mark, copyright, patent, trade secret, ownership or any other proprietary or intellectual property notices, legends, warnings, markings or indications on or within the backup copy.

**4. E-Mail-To-A-Friend Function:** You may use the BitPlayer's e-mail-to-a-friend feature to e-mail a copy of BitMagic Content to another individual or a group of individuals that you know personally. You may not send copies of any Content to any individual or organization that you do not personally know. In every such e-mail you must properly attribute the ownership of the Content to us and indicate how the recipient may obtain/download a copy of the BitPlayer from our website to view the Content. The e-mail-to-a-friend feature automatically generates the appropriate attribution and download information and you shall retain such minimal information within e-mails you send using this feature. You may not include any Content in any "spam" message whether directed to individuals, newsgroups or companies. You are wholly responsible for ensuring that your computer system remains free from viruses, worms and the like and that when sending such Content to others that you do not inadvertently send viruses and the like through the e-mail-to-a-friend feature. You may not in any way alter any such e-mailed copy of any Content and, specifically, you may not strip out or alter any trademark, service mark, copyright, patent, trade secret, ownership or any other proprietary or intellectual property notices, legends, warnings, markings or indications on or within the e-mailed. You may not use the e-mail-to-a-friend feature to send unsolicited advertising, promotional materials or other forms of solicitation to any individual, organization or entity. You may not e-mail any component of the BitMagic Service other than through the e-mail-to-a-friend feature.

**5. Archive Function:** You may use the BitPlayer's archive function to save individual pieces of Content into the BitPlayer's archive on your hard drive for future review and use with the BitPlayer.

**6. BitGame Play & Prizes:** We may, but will not be obligated to, provide prizes to the highest scoring BitGame end user. You are responsible for any taxes which your jurisdiction may apply in respect of your winning a prize. Some jurisdictions may not permit the awarding of prizes on such a basis so you may not be eligible for BitGame prize offerings.

**7. Automatic Updating & Reporting Feature:** You agree and acknowledge that when your computer is connected to the Internet without your prompting, involvement or notice:

- (a) as a fundamental feature of the BitMagic Services the Content will be updated on a daily basis;
- (b) the BitMagic Service and BitPlayer will/may regularly and automatically modify, update, alter, purge, delete or change aspects/components of the BitMagic Service, including the BitPlayer, the Content archived on our website, any Content archived on your hard drive, included data and documentation and other aspects or components of the BitMagic Service at any time or from time to time for any reason or for no reason; and
- (c) the BitMagic Service will regularly upload the End User Information described in Section 15 to our servers.

**8. BitMagic Service Restrictions/Prohibitions:**

(a) No BitPlayer Copying/Reverse Engineering Etc.: Except as explicitly permitted in this Agreement, you may not, and agree not to make any attempt, or to authorize any attempt, to (i) decompile, reverse engineer, disassemble or otherwise derive the source code from any component of the BitPlayer or Content; (ii) modify, enhance, translate, alter, tamper with, upgrade or create derivatives works from the BitPlayer and Content; (iii) duplicate, publish, publicly perform, publicly display, digitally perform, transmit by any means, transfer, upload, post, distribute, make copies of or otherwise make the BitPlayer, the Content or any other component of the BitMagic Service available to any person through the Internet or otherwise; (iv) strip out or alter any trademark, service mark, copyright, patent, trade secret, ownership or any other proprietary or intellectual property notices, legends, warnings, markings or indications on or within any component of the BitMagic Service; (v) install or run any software including "terminate and stay resident" type software or proprietary system shell's or system management software or hardware that in any way interferes with, hampers, blocks, defeats, inhibits, tampers with or in any way alters the functioning of the BitMagic Service including the BitPlayer, its display of advertising within the BitPlayer or otherwise, its information gathering, monitoring or reporting functionality, or its automatic

update, upgrade or repair functionality; or (vii) license, sell, resell, rent, lease, assign, transfer, sublicense, distribute, frame, embed within another product or service, provide as part of a service bureau offering or in any other way exploit any aspect or component of the BitMagic Service.

**(b) Content Restrictions:** You acknowledge and agree that the BitPlayer, Content, including all animations, illustrations, images, graphics, icons, photographs, sound, music, audio, audio clips, videos, video clips, software, web pages, hypertext links, graphics, text, data and other material contained within the Content including sponsor advertisements, e-mail, or commercially produced information presented to you through the BitMagic Service by us including our contributors, licensors and advertisers, is protected by copyright, trademark, patent, trade secret and other intellectual property laws of the United States, other nations and international treaties. Accordingly, you may not make any use of any component of the BitMagic Service inconsistent with our world-wide intellectual property rights and may only use and view the Content through the BitPlayer or as a screen saver and not through or with any other software or service and only as expressly authorized by us under this Agreement. You may not use, access or view the Content in any other manner for any other purpose.

**(c) Restricted BitMagic Service Uses:** You may not copy, download, install, transmit or use any data, software, content or other intellectual property or proprietary information on or through the BitMagic Service other than the Content. You may not use the BitPlayer to display, access or view any content of any kind other than the Content in .bm format.

**(d) Link/Download Restrictions:** You may not link to or download our .bm files directly or indirectly other than through the built-in BitPlayer functions and you may not pass off such files and Content as your own or view or otherwise make such files or Content available for viewing through any other interface or service.

**(e) No Encumbrances, Indications, Etc.:** You agree not to pledge, mortgage or in any way encumber any component of the BitMagic Service.

**(f) No Other Use:** You may not use the BitMagic Service, or any component thereof, including the BitPlayer and the Content for any purpose or for any other use of any kind other than for the display of the Content through the BitPlayer and as a screen saver as provided hereunder.

**(g) Country Specific Restrictions:** No component of the BitMagic Service including the BitPlayer or Content nor any underlying information or technology may be downloaded or otherwise exported or re-exported into (or to a national or resident of) Angola, Cuba, Iran, Iraq, Libya, North Korea, Sudan, Yugoslavia, Syria, or any other country to which the U.S. has embargoed goods; or anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders.

**9. Your Agreements & Acknowledgements:** You agree and acknowledge that:

**(a) BitMagic Service Limitations:** we may, from time to time without prior notice for any reason or no reason, either temporarily or permanently: (i) limit, deny or cancel some or all of the functionality of the BitMagic Service; (ii) limit, deny or cancel some or all of your access to or rights to use the BitMagic Service; and (iii) grant different access rights, differing service levels or grades, differing functionality and differing levels of access, or no access at all, to differing end users.

**(b) Limited BitPlayer Use:** the BitPlayer may not be used to display content other than the .bm files provided as part of the BitMagic Service; that the BitPlayer cannot display Flash movies or play other Shockwave games and that you may not display any other content through the BitPlayer;

**(c) Losses to Data:** we will not be responsible for, and will have no liability for, any loss or corruption of your software, or data or those of any individual or entity who is the recipient of anything sent to them via the e-mail-to-a-friend function described in Section 4;

**(d) No Upgrade Entitlements:** the license granted hereunder does not entitle you to any enhancements, upgrades or updates to the BitPlayer or to any other component of the BitMagic Service;

**(e) No Support Entitlement:** this Agreement does not entitle you to any support or maintenance services of any kind; and

- (f) Compliance with Laws: you will at all times comply with all applicable local, municipal, state, provincial, territorial, federal, national and international laws, regulations and the like in every relevant jurisdiction including those relating to copyright, trade secrets, privacy, defamation, import and export restrictions; your activities on the Internet and your use of the BitMagic Service.

**10. Your Representations and Warranties**: You represent and warrant to us that:

- (a) Age: you are at least 13 years of age or older;
- (b) Completion of Questionnaires: you have and will accurately, truthfully and completely answered/answer all questions contained in the BitMagic Service application, questionnaires and any supplementary questionnaires or reasonable requests for information sent to you by us electronically or otherwise from time to time through the Internet, the BitPlayer Interface;
- (c) Your E-commerce Activities: all obligations owed by to third parties and us with respect to any e-commerce or any other activities undertaken by you through or related to the BitMagic Service are or will be fully satisfied by you and that we will have no obligations with respect thereto; and
- (d) Your Domicile: you are not located in or under the control of a national or resident of any country or on any list referred to in Subsection 8(g).

**11. Your Responsibilities**: You agree, and acknowledge that:

- (a) E-Commerce Activities: you are solely responsible for fulfilling any contractual/e-commerce or other obligations you assume using the BitMagic Service. If you enter into correspondence with or participate in promotions of advertisers any such correspondence or promotions, including the delivery of and the payment for goods and services, and any other terms, conditions, warranties or representations associated with such correspondence or promotions, are solely between you and the advertiser. We assume no liability, obligation or responsibility for any part of any such correspondence or promotion.
- (b) Content Lock: you are responsible for using the Content locking mechanism within the BitPlayer to restrict access to Content which you do not want your children to access;
- (c) Virus Protection Etc.: it is your sole responsibility to use appropriate virus protection type software and to take all other necessary steps to guard your computer system, software and data against any possible computer viruses, contaminants, worms, Trojan horses; and
- (d) Computer System Backups: it is your sole responsibility to regularly backup your computer system including its operating system, software and data.

**12. BitMagic Rules & Regulations**: As part of this Agreement, you agree to be bound by and comply with all of our rules and regulations on the use of the BitMagic Service which we may, from time to time (i) make available for display within or in conjunction with the BitPlayer interface; (ii) publish within our website, the first page of which is currently available at [www.BitMagic.com](http://www.BitMagic.com); or (iii) notify you of from time to time in any other manner.

**13. No Endorsement Etc. of Third-Party Products**: We have not reviewed and do not endorse, warrant or guarantee (i) any goods, products, information or services (collectively "**Third Party Products**") sold, offered, made available or advertised through the BitMagic Service or through our advertisers', affiliates' or contributors' Web sites; or (ii) the accuracy, completeness, usefulness, quality, availability or delivery of any such Third Party Products. Your procurement of such Third Party Products is solely at your own risk. We are not and will not be a party to, or in any way monitor, any transaction, agreement or contract between you and third-party providers of Third Party Products. You understand and agree that, except as otherwise explicitly stipulated, we do not control, provide or operate the entities, persons or companies that are responsible for making such Third Party Products available to you. We shall not be held responsible or liable, directly or indirectly, for any loss or damage caused or alleged to have been caused by your use of or reliance on such Third Party Products or such third parties. The foregoing provisions shall apply with equal force even where the BitMagic Service features any such Third Party Product as part of its Content or displays a link or pointer to any particular Web site. The opinions, advice, statements, services, offers or other information or views expressed within any

Content or advertisements are those of the respective authors, contributors, licensors or advertisers and not necessarily ours, our agents, employees, officers, directors or advisers.

**14. Your Provision of Unsolicited Content Etc.:** We do not want to receive from you, and hereby discourage you from sending, any confidential or proprietary information, material or intellectual property to us by any means. However, to the extent you do, any such sent material, information or intellectual property shall be deemed not to be confidential and you agree that we may use such material, information or intellectual property in any way. By sending any such information, material or intellectual property to us, you hereby (i) disclaim any sole or exclusive right, title or interest you may have in it; (ii) represent and warrant that no other person or entity has any right, title or interest in it; (iii) grant to us all unrestricted, irrevocable, perpetual, royalty-free, non-exclusive world-wide, transferable rights and necessary licenses to use, reproduce, distribute, perform, modify, transmit, distribute, incorporate in any other work, product or service or otherwise commercially exploit in any way such materials, information and intellectual property; (iv) waive any moral rights of any kind you may have therein; and (v) agree that we are free to use any ideas, know-how, concepts or techniques disclosed therein for any purpose what-so-ever. This Section 14 shall survive any termination or expiration of this Agreement.

**15. Monitoring, Collection and Use of Your Information:**

**(a) BitMagic Service Specific Monitoring:** In order for us to customize your BitMagic Service experience, including our delivery of personalized advertisements to you within the BitMagic Service's interface, e-mail messages or in other ways, but subject to the information use restrictions described in this Section 17, the BitMagic Service will monitor your use of the BitMagic Service, will construct personal profiles about your interests and characteristics from the information supplied directly or indirectly by you to us and from your use of the BitMagic Service and collect other information about you (collectively "**End User Information**") in several ways including the ways described below:

- (i) Advertising and Administrative Information:** For the purposes of directing advertising and other marketing messages that we believe may be of interest to you through the BitMagic Service and for administering the BitMagic Service and our relationship with you, we will initially collect (A) the information provided by you to us through your responses to the BitMagic Service application and any questionnaire(s); (B) data related to your response to ads presented within the BitPlayer interface and our Web site(s); and (C) basic computer hardware configuration and Internet connection information including your computer's processor, memory, display resolution, color depth, sound card and download speeds.
- (ii) Use of our BitMagic Service:** In order to better customize your BitMagic Service and for us to determine which features are successful, we may follow/track your use of the BitMagic Service including your use of our web site(s) and the number of times you access any particular Content.
- (iii) Your E-Commerce Transactions:** When you use the BitMagic Service to order merchandise or otherwise engage in e-commerce activities through it, the BitMagic Service may track your purchases to the extent that, as you "click through" to an online merchant or e-commerce service through the BitMagic Service, an identifying number will be passed to our e-commerce affiliates/merchants such that, we will be able to identify when your use of the BitMagic Service has resulted in a particular purchase or online transaction with the affiliate/merchant.
- (iv) Your BitGame High Scores:** In order to determine which of our customers is eligible for our weekly BitGame high score prizes, the BitMagic Service will upload your BitGame high scores to our archives and if your score is one of the high scores, your name will be indicated within our high score page.

You hereby grant us all necessary rights and licenses to collect such End User Information and use and disclose it as described herein.

**(b) Our Use Restrictions:** We will not:

- (i)** trade, sell, give away or in any way disclose individually identifying information about you to any third party (including advertisers);

- (ii) review the message contents of e-mail messages sent to or received by you in the context of the BitPlayer's e-mail-to-a-friend feature; or
- (iii) except as provided in this Section 17, track the web pages you follow when you click on a feature or function of the BitPlayer which transports you to another web site;

unless you consent to such use, review or disclosure; or such use, review or disclosure is (i) required by law; (ii) needed to protect and defend our rights or property including those of our agents, consultants, directors, officers, employees, advisors, contributors, licensors and the like; (iii) needed to assist us in fulfilling our obligations or exercising our rights under this Agreement; (iv) needed to act under exigent circumstances to protect the personal safety of any person, individual or entity; or (v) needed for us to obtain advice and counsel from our advisers.

**(c) Ownership of End User Information:** You agree and acknowledge that, subject to the restrictions imposed by this Agreement, we will at all times own all right, title and interest in the End User Information.

**(d) Response to Further Disclosure Requests:** You agree to promptly respond to any requests we may make of you in respect of obtaining your consent to use End User Information for other purposes.

**(e) Aggregated Use of End User Information:** You hereby grant to us the right to disclose to third parties End User Information aggregated with other BitMagic Service end user's information (excluding your name, mailing address, e-mail address, account and phone number) in such a way that you may not be individually identified thereby.

**(f) No Breach of Privacy:** You agree and acknowledge that our collection and use of your personal information, including the End User Information, and our operation and provision of the BitMagic Service for/to you, as contemplated in this Agreement in no way constitutes an actionable breach of any privacy or other right, whether in equity, law, contract or otherwise and you hereby waive disclaim any and all such claims, rights, causes of action and the like.

**(g) Survival:** This Section 17 shall survive any termination or expiration of this Agreement.

**16. Termination:** Either of us may terminate this Agreement at any time without notice to the other for any reason or for no reason, including upon either of our breach of any provision of this Agreement.

**17. Effect of Termination:** Unless we direct otherwise, upon the termination or expiration of this Agreement for any reason you agree to remove the BitPlayer, all Content and all other data, files and content related thereto from your computer and to delete any and all copies of the BitPlayer or Content within your control or possession. This Section 17 shall survive any expiration or termination of this Agreement.

**18. NO REPRESENTATIONS OR WARRANTIES:** YOUR USE OF THE BITMAGIC SERVICE IS ENTIRELY AT YOUR OWN RISK. TO THE MAXIMUM EXTENT PERMITTED BY LAW THE BITMAGIC SERVICE AND EACH AND EVERY PART OF IT, INCLUDING THE BITPLAYER AND THE CONTENT, IS PROVIDED "AS-IS", "AS AVAILABLE" WITHOUT ANY REPRESENTATIONS, WARRANTIES OR CONDITIONS OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE INCLUDING, ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR NONINFRINGEMENT. WE DO NOT REPRESENT OR WARRANT THAT THE BITMAGIC SERVICE, OR ANY COMPONENT THEREOF INCLUDING THE BITPLAYER OR ANY CONTENT WILL BE UNINTERRUPTED, YEAR 2000 COMPLIANT, ACCURATE, COMPLETE, CURRENT, STABLE, BUG-FREE, ERROR-FREE, AVAILABLE AT ANY TIME, FREE OF VIRUSES, WORMS, TROJAN HORSES, TIME BOMBS OR THE LIKE WHICH MAY MANIFEST CONTAMINATING, DELETERIOUS OR DESTRUCTIVE PROPERTIES, FREE FROM ADULT-ORIENTED MATERIAL OR MATERIAL WHICH SOME INDIVIDUALS MAY DEEM OBJECTIONABLE. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY ANY OF US SHALL CREATE A WARRANTY OR REPRESENTATION AND YOU MAY NOT RELY ON SUCH INFORMATION OR ADVICE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES SO ASPECTS OF THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. THIS SECTION 18 SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS AGREEMENT.

**19. LIMITED LIABILITY:** TO THE MAXIMUM EXTENT PERMITTED BY LAW NEITHER WE NOR ANY OTHER PERSON OR ENTITY INVOLVED IN CREATING, PRODUCING OR MAKING THE BITMAGIC SERVICE AVAILABLE TO YOU SHALL UNDER ANY CIRCUMSTANCE BE LIABLE TO YOU OR ANY OTHER PARTY CLAIMING THROUGH YOU FOR ANY DIRECT, INDIRECT, SPECIAL, CONSEQUENTIAL, PUNITIVE, RELIANCE, INCIDENTAL OR OTHER DAMAGES OR EXPENSES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF PROFITS, SAVINGS, PRIZES, BUSINESS, SOFTWARE, DATA, INTERNET ACCESS, EQUIPMENT, GOODWILL, REVENUE, ANTICIPATED BENEFITS ARISING OUT OF THE BITMAGIC SERVICE, LOST BUSINESS OPPORTUNITIES, COSTS OF OVERHEAD, COSTS OF COVER, COSTS ASSOCIATED WITH THE INABILITY TO USE THE BITMAGIC SERVICE, OR LOSS FROM ANY OTHER OR SIMILAR DAMAGES OR PECUNIARY LOSSES, WHETHER SUCH DAMAGES ARISE OUT OF CONTRACT (INCLUDING FUNDAMENTAL BREACH) OR TORT (INCLUDING NEGLIGENCE) EVEN IF ANY OF US HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. YOU SPECIFICALLY ACKNOWLEDGE AND AGREE THAT WE WILL NOT BE LIABLE FOR THE DEFAMATORY, OFFENSIVE, ILLEGAL, INACCURATE, CONDUCT, ADVICE OR STATEMENTS OF OTHER END USERS, CONTRIBUTORS, ADVERTISERS OUR LICENSORS OR THIRD PARTIES AND THAT THE RISK OF INJURY FROM THE FOREGOING RESTS ENTIRELY WITH YOU. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY DAMAGES IN CERTAIN CIRCUMSTANCES SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. THIS SECTION 19 SHALL SURVIVE ANY TERMINATION OR EXPIRATION OF THIS AGREEMENT.

**20. Indemnity:** You agree to defend, indemnify and hold us, including our directors, officers, employees, agents, advisers, consultants, affiliates, successors and assigns harmless from any claim, demand, action, liabilities, damages, judgements, settlements, recoveries, costs, losses, fines and expenses (including reasonable attorneys' fees, experts' fees, court cost and arbitral costs) (i) made or asserted by you or any third party; (ii) due to or arising out of your use of the BitMagic Service; (iii) arising from your breach of this Agreement; (iv) arising from the untruthfulness of any representation or warranty made by you hereunder or otherwise; (v) relating to any import or export duties or claims arising from exportation or importation of any component of the BitMagic Service. Such defense and indemnity obligations include the obligation to defend, indemnify and hold us harmless from: (A) your failure to fulfill your online contractual commitments, your participation in promotions with advertisers, your failure to comply with any laws and regulations or your violation of any person's rights, including intellectual property rights, through your use of the BitMagic Service or otherwise contrary to Subsection 11(a) or otherwise; (B) claims, demands, actions flowing from your provision of unsolicited materials, information or intellectual property to us contrary to Section 14 or otherwise; and (C) privacy related claims and actions brought by anyone, including you, under any privacy law theory, or similar theory under any legal system in any jurisdiction in the world as anticipated under Subsection 15(f). This Section 20 shall survive any termination or expiration of this Agreement.

**21. Notices:** All notices required in this Agreement may be sent by registered mail, facsimile transmission, delivered in person or we may send notices to you by sending you an e-mail message to the e-mail account you specified in your initial application to receive the BitMagic Service. Notices will be deemed to be received three (3) business days after being sent or on proof of delivery whichever is the earlier.

**22. Confidentiality:** You acknowledge that all non-public underlying ideas, algorithms, concepts, procedures, processes, principles, know-how, methods of operation, designs, programming techniques, source codes (including all underlying intellectual property) and input data formats and structures of the BitPlayer, Content and the BitMagic Service generally (collectively referred to as "**Confidential Information**") are our trade secrets, confidential and proprietary information. You agree to keep the Confidential Information confidential and except as explicitly prescribed in this Agreement, you agree not to use, duplicate, disclose or distribute any Confidential Information, directly or indirectly, to any person. This Section 22 shall survive any termination or expiration of this Agreement.

**23. Jurisdiction & Governing Law:** This Agreement shall be construed and interpreted in accordance with the laws of the state of California and the federal laws of the United States applicable therein without reference to conflicts of laws, rules, regulations, statutes or laws otherwise applicable therein. The exclusive jurisdiction and venue of any legal action brought with respect to this Agreement and the interpretation or making of it, shall be the state courts of the State of California for the County of, at our discretion, San Francisco or Santa Clara, or the United States District Court for the Northern District of California and we both submit to the exclusive jurisdiction and venue of such courts for such purposes. You agree that any cause of action brought by you arising out of or related to this Agreement must commence within one (1) year after the cause of action arose; otherwise, such cause of action is permanently barred. The *U.N. Convention on Contracts for the International Sale of Goods* shall not apply to this Agreement. Any disclosures made by us or anyone

else in respect of our year 2000 readiness, if any, are year 2000 readiness disclosures under the *Year 2000 Information and Readiness Disclosure Act of 1998*. This Section 23 shall survive any termination or expiration of this Agreement.

**24. Equitable Relief:** You agree and acknowledge that we are entitled to equitable relief, including such injunction or injunctions, as may be required to prevent any breach or further breach of any provision of this Agreement and may specifically seek such injunctive relief and enforce such provisions by an action instituted in any court having jurisdiction. You acknowledge that damages would be an inadequate remedy for a breach of this Agreement. You covenant and agree not to contest the availability to us of such injunctive relief on any grounds other than on the basis that you did not breach the provisions of this Agreement. This Section 24 shall survive any termination or expiration of this Agreement.

**25. Remedies Cumulative:** Except as otherwise explicitly provided herein, our rights and remedies hereunder are cumulative and are in addition to and not in substitution for any other rights or remedies provided hereunder or otherwise at law or in equity and any such rights or remedies may be exercised by us from time to time concurrently or independently and as often and in such order as we may deem expedient in our sole and absolute discretion.

**26. Assignment/Non-Assignment:** You may not assign, transfer or delegate any portion of this Agreement without our prior written consent which consent may be withheld by us for any reason. Any assignment, transfer or delegation in violation of the foregoing sentence will be null and void. We may assign, transfer or delegate any portion of this Agreement. Subject to the foregoing, this Agreement will bind and inure to the benefit of the parties, their respective successors and permitted assigns.

**27. Waiver/Enforceability:** No waiver of any provision of this Agreement shall be binding on either of us unless it is in writing. A waiver by either of us of any provision shall not be deemed to waive the same provision thereafter of any other provision of this Agreement at any time.

**28. Enforceability:** If any provision or part of any provision contained in this Agreement is found by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions or portions thereof, shall not be in any way affected or impaired thereby.

**29. Interpretation:** In this Agreement (i) all capitalised derivative forms of defined terms and phrases have meanings that correspond to the defined terms and phrases; (ii) the words "**include**", "**includes**" or "**including**" mean "**include without limitation**", "**includes without limitation**"; and "**including without limitation**" respectively; (iii) the division of this Agreement into separate sections, subsections and schedules, the Agreement's title and the insertion of headings is for convenience of reference only and shall not affect the construction or interpretation of this Agreement; and (iv) words or abbreviations which have well known or trade meanings are used herein in accordance with their recognised meanings.

**30. Conflict:** To the extent that this Agreement conflicts with or is inconsistent with any provision contained in any invoice, purchase order, correspondence or other document or communication made or provided by you, the provisions of this Agreement shall prevail.

**31. U.S. Government Restrictions:** All components of the BitMagic Service, including the BitPlayer and all Content is provided with RESTRICTED RIGHTS. Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of The Rights in Technical Data and Computer Software clause of DFARS 252.227-7013 or subparagraphs (c)(i) and (2) of the Commercial Computer Software-Restricted Rights at 48 CFR 52.227-19, as applicable. Manufacturer is BitMagic Corporation, 490 - 2nd Street, San Francisco, California 94107, USA.

**32. Entire Agreement:** You acknowledge and agree that you have read and understand all the provisions contained in this Agreement. This Agreement, inclusive of any rules or regulations made by us from time to time as referenced in Section 12, constitutes the entire agreement between both of us pertaining to all the matters herein and supersedes all prior agreements, understandings, negotiations and discussions in respect thereof, whether oral or written, express or implied. You may not amend this Agreement without our prior written approval. We may amend this Agreement at any time on notice to you. You agree that such notice may be delivered via postings on our website, via e-mail, via changed terms included within any upgraded or enhanced version of any component of the BitMagic Service or in any other reasonable way to give you actual or constructive notice. Your continued use of any aspect or component of the BitMagic Service after such notice shall be deemed to be your acceptance of such new terms, conditions and provisions. You should periodically visit our Web site to review the then current BitMagic Service End User License Agreement.