

Note the following sample software development agreement clauses are for informational, commentary and educational purposes only and are not endorsed or recommended for use for any particular individual, company or situation.

## **Sample Clauses Affecting IP from Software Development Agreement 1**

### 2. Ownership of Software.

Developer agrees that the development of the Software is "work for hire" within the meaning of the Copyright Act of 1976, as amended from time to time, and that the Software shall be the sole property of Buyer. Developer hereby assigns to Buyer, without further compensation, all of its right, title and interest in and to the Software and any and all related patents, patent applications, copyrights, copyright applications, trademarks and trade names in the United States and elsewhere. Developer will keep and maintain adequate and current written records with respect to the Software (in the form of notes, sketches, drawings and as may otherwise be specified by Buyer), which records shall be available to and remain the sole property of Buyer at all times. All versions of the Software shall contain Buyer's conspicuous notice of copyright. Developer will assist Buyer in obtaining and enforcing patent, copyright and other forms of legal protection for the Software in any country. Upon request, Developer will sign all applications, assignments, instruments and papers and perform all acts necessary or desired by Buyer to assign the Software fully and completely to Buyer and to enable Buyer, its successors, assigns and nominees, to secure and enjoy the full and exclusive benefits and advantages of this work.

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### 4. Independent Contractor.

Developer is acting as an independent contractor with respect to the services provided to Buyer. Neither Developer nor the employees of the Developer performing services for Buyer will be considered employees or agents of Buyer. Buyer will not be responsible for Developer's acts or the acts of Developer's employees while performing services under this Agreement. Nothing contained in this Agreement shall be construed to imply a joint venture, business, partnership or principal-agent relationship between the parties, and neither party by virtue of this Agreement shall have any right, power or authority to act or create any obligation, express or implied, on behalf of the other party.

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### 7. Confidentiality.

A. Developer acknowledges that all material and information supplied by Buyer which has or will come into Developer's possession or knowledge of Developer in connection with its performance hereunder, is to be considered Buyer's confidential and proprietary information (the "Confidential Information"). By way of illustration, but not as a limitation, Confidential Information includes the Software, trade secrets, processes, data, know-how, program codes, documentation, flowcharts, algorithms, marketing plans, forecasts, unpublished financial

statements, budgets, licenses, prices, costs, and employee and customer lists. Developer's undertakings and obligations under this Section will not apply, however, to any Confidential Information which: (i) is or becomes generally known to the public through no action on Developer's part, (ii) is generally disclosed to third parties by Buyer without restriction on such third parties, or (iii) is approved for release by written authorization of Buyer. Upon termination of this Agreement or at any other time upon request, Developer will promptly deliver to Buyer all notes, memoranda, notebooks, drawings, records, reports, files, documented source codes and other documents (and all copies or reproductions of such materials) in its possession or under its control, whether prepared by Developer or others, which contain Confidential Information. Developer acknowledges that Confidential Information is the sole property of Buyer. Developer agrees that disclosure of such information to, or use by, third parties, either during or after this Agreement, will cause Buyer irreparable damage. Developer agrees to use best efforts to hold Confidential Information in the strictest confidence, not to make use of it other than for the performance of its obligations hereunder, to release it only to the Developer's employees or contractors with a need to know such information and not to release or disclose it to any other party. Developer further agrees not to release such information to any employee or contractor who has not signed a written agreement between Developer and the employee expressly binding the employee not to use or disclose the Confidential Information, except as expressly permitted in this Agreement. Buyer shall be listed as a third-party beneficiary of any such agreement. Developer will notify Buyer in writing of any circumstances within its knowledge relating to any unauthorized possession, use, or knowledge of such Confidential Information. At any time, upon request, the Developer will return any such information within its possession to Buyer.

B. Developer acknowledges that Buyer's purpose in pursuing the development of the Software is to gain a significant competitive advantage over competitors operating without such Software and that such advantage will be jeopardized if such competitors learn of Buyer's negotiations with Developer or the performance by Developer of its obligations hereunder. Accordingly, Developer agrees to keep such negotiations and performance of its obligations hereunder strictly confidential and not to disclose any information to any third party or entity without the prior written permission of Buyer. In no event, shall Developer or any of its employees use Buyer as a reference in marketing Developer's services to any third party or entity without Buyer's prior written permission.

B. Developer warrants that the Software will not infringe upon any copyright, patent, trade secret or other intellectual property interest of any third party. Developer will indemnify and hold Buyer harmless from and against all such infringement claims, losses, suits and damages including, but not limited to, attorney's fees and costs, and shall promptly following any bona-fide claim of infringement correct the Software so as not to be infringing, or secure at its own expense the right of Buyer to use the Software without infringement.

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C. Section 2, Ownership of Software, and Section 7, Confidentiality, shall survive the expiration or termination of this Agreement. In the event of early termination due to Developer's default or the death or disability of the individual(s) identified in subsection (iii), above, Developer agrees to deliver the Software then completed. Developer, in that instance, shall be paid a pro rata share for the work; if the amount cannot be agreed upon, the Buyer can return the work and the other terms of this contract go into effect, as outlined in this section and others.

## **Sample Clauses Affecting IP from Software Development Agreement 2**

**1.3.** "Intellectual Property" shall mean all intellectual property other than the Technology owned by Developer prior to the Effective Date or licensed to Developer by a third party, and used in the development of the Product.

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**2.7. MARKETING:** Client hereby grants Developer the right to use the name and service marks of Client in its marketing materials or other oral, electronic, or written promotions, which shall include naming Client as a client of Developer and a brief scope of services provided. Any use of Developer logos or links on Client's Product must be approved in writing by Client. Either party may elect to issue a press release related to this Agreement. In doing so, any release shall be approved by the other party and such approval shall not be unreasonably withheld.

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### **4. INTELLECTUAL PROPERTY RIGHTS AND LICENSE:**

**4.1. PRODUCT:** All materials, including, but not limited to, software, programs, source code and object code, comments to the source or object code, specifications, documents, abstracts and summaries thereof (collectively, the "Products") developed by Developer in connection with the provision of the Services to Client, or jointly by Client and Developer, or by Developer pursuant to specifications or instructions provided by Client, shall belong exclusively to Client. Developer acknowledges that the Products shall be deemed "works made for hire" by Developer for Client, and, therefore, shall be the exclusive property of Client. To the extent the Products are not deemed "works made for hire" under applicable law, Developer hereby irrevocably assigns and transfers to Client all right, title and interest in and to the Products, including, without limitation, all patent and copyright interests, and agrees to execute all documents reasonably requested by Client for the purpose of applying for and obtaining domestic and foreign patent and copyright registrations.

**4.2. PRE-EXISTING INTELLECTUAL PROPERTY:** Notwithstanding any provision of this Agreement to the contrary, any routines, methodologies, processes, libraries, tools or technologies created, adapted or used by Developer in its business generally, including all associated intellectual property rights (collectively, the "Development Tools"), shall be and remain the sole property of Developer, and Customer shall have no interest in or claim to the Development Tools, except as necessary to exercise its rights in the Products. In addition, notwithstanding any provision of this Agreement to the contrary, Developer shall be free to use any ideas, concepts, or know-how developed or acquired by Developer during the performance of this Agreement to the extent obtained and retained by Developer's personnel as impression and general learning. Subject to and limited by Client's intellectual property rights described in Section 4.1 above, nothing in this Agreement shall be construed to preclude Developer from using the Development Tools for use with third parties for the benefit of Developer.

**4.3. THIRD PARTY LICENSES:** In addition to any other fees set forth in this Agreement, Client shall be required to purchase any applicable third party licenses for any third party products that are necessary for

Developer to design and develop the Product. Such third party products may include, but are not limited to: server-side applications, clip art, "back-end" applications, music, stock images, or any other copyrighted work which Developer deems necessary to purchase on behalf of Client to design and develop the Product. In the event any such third party product exceeds \$250.00 per product (or \$3000.00 in the aggregate), Developer shall obtain Client's prior written consent before incorporating such third party product into the

Product. Developer shall provide Client with a list of all third party products upon launch of the Product.

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**5.4. RETURN OF PROPRIETARY OR CONFIDENTIAL INFORMATION:** Within ten (10) days after the termination or expiration of this Agreement, each party shall return to the other all Proprietary or Confidential Information of the other party (and any copies thereof) in the party's possession or, with the approval of the party, destroy all such Proprietary or Confidential Information. "Proprietary or Confidential Information" shall include, but is not limited to, written or oral contracts, trade secrets, knowhow, business methods, business policies, memoranda, reports, records, computer retained information, notes, or financial information. Proprietary or Confidential Information shall not include any information which: (i) is or becomes generally known to the public by any means other than a breach of the obligations of the receiving party; (ii) was previously known to the receiving party or rightly received by the receiving party from a third party; (iii) is independently developed by the receiving party; or (iv) is subject to disclosure under court order or other lawful process.

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**9.1. CLIENT INDEMNITY:** Client agrees that it shall defend, indemnify, save and hold Developer harmless from any and all demands, liabilities, losses, costs and claims, including reasonable attorneys' fees, (collectively "Liabilities") asserted against Developer, its contracted providers, agents, Clients, servants, officers and employees, that may arise or result from any service provided or performed or agreed to the performance of any product sold by Client, its agents, employees or assigns. Client agrees to defend, indemnify and hold harmless Developer against Liabilities arising out of (i) any injury to any person or property caused by any products sold or otherwise distributed in connection with the Product; (ii) any material supplied by Client infringing or allegedly infringing on the proprietary rights of a third party; or (iii) copyright infringement and/or litigation regarding content-related disputes.

**9.2. DEVELOPER INDEMNITY:** Developer shall indemnify and hold harmless Client (and its subsidiaries, affiliates, officers, agents, co-branders or other partners, and employees) from any and all claims, damages, liabilities, costs, and expenses (including, but not limited to, reasonable attorneys' fees and all related costs and expenses) incurred by Client as a result of any claim, judgment, or adjudication against Client arising from a claim that Client's use of the Developer Content, as permitted under this Agreement, infringes Intellectual Property rights of a third party or arising from a claim which results from Developer's breach of the warranties and agreements contained in this Agreement. To qualify for such defense and payment, Client must: (i) give Developer prompt written notice of a claim; and (ii) allow Developer to control, and fully cooperate with Developer in, the defense and all related negotiations. Developer shall have no obligation to indemnify Client under this Section to the extent the infringement arises from (i) the Client Content, (ii) specifications provided by Client or its agents; (iii) derivative works of the Product created by Client, (iv) use of the Product in combination with non-Developer approved third party products, including hardware and software, (v) modifications or maintenance of the Product by a party other than Developer, (vi) misuse of the Product, and (vii) failure of Client to implement any improvement or updates to the Product, if the infringement claim would have been avoided by the use of the improvement or updates.

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**10. CONFIDENTIALITY:** The parties agree to hold each other's Proprietary or Confidential Information in strict confidence. The parties agree not to make each other's Proprietary or Confidential Information available in any form to any third party or to use each other's Proprietary or Confidential Information for any purpose other than as specified in this Agreement. Each party's Proprietary or Confidential Information shall remain the sole and exclusive property of that party. The parties agree that in the event of use or disclosure by the other party other than as specifically provided for in this Agreement, the non-disclosing party may be entitled to equitable relief. Notwithstanding termination or expiration of this Agreement, Developer and Client

acknowledge and agree that their obligations of confidentiality with respect to Proprietary or Confidential Information shall continue in effect for a total period of three (3) years from the Effective Date.

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**13. INDEPENDENT CONTRACTOR STATUS:** The relationship of Developer to Client will be that of an independent contractor, and neither Developer nor any employee of Developer will be deemed to be an agent or employee of Client. It is expressly understood that this undertaking is not a joint venture.

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**19. SURVIVAL:** The following provisions shall survive termination or expiration of this Agreement: Sections 10 (Fees, Expenses, and Payment), 11 (Intellectual Property Rights and License), 12 (Term and Termination), 14 (Disclaimer of Warranties), 15 (Limitation of Liability), 16 (Third Party Disclaimer), 17 (Indemnification obligations) 18 (Confidentiality), 20 (Choice of Law; Venue; Limitation of Actions), 24 (Disputes), and 27 (Survival).

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**22. TRADEMARKS:** The Client unconditionally warrants and guarantees that any elements of text, graphics, photos, designs, trademarks, or other artwork furnished to Developer, Inc. and/or its assigns for inclusion in the Product are owned by the Client, or that the Client has permission from the rightful owner to use each of these elements, and will hold harmless, protect, indemnify and defend Developer, Inc. its assigns and its subcontractors from any liability (including attorney's fees and court costs), including any claim or suit, threatened or actual, arising from the use of such elements furnished by the Client.

**23. THIRD PARTY SOFTWARE:** Additionally, in the event Client elects to install or seek assistance from Developer in connection with the installation of any third-party software, the following terms shall apply. Client represents and warrants that Client has the right to use and install the third-party software, and have paid the applicable licensing fees for the third party software, and the third-party software does not and shall not infringe on the intellectual property rights of any other person or entity. Client agrees to defend, indemnify and hold harmless Developer and its employees, officers and directors for, from and against any and all claims brought against Developer and its employees, officers and directors by a third-party alleging the software infringes: (i) the third-party's rights; or (ii) a U.S. patent, trademark, copyright or other intellectual property right. Client agree that in such an event Client shall pay all resulting costs, damages, expenses and reasonable attorneys' fees that a court awards and settlements incurred by Developer in connection with any such claims.

# **Sample Clauses Affecting IP from Software Development Agreement 3**

## **iPhone Developer Program License Agreement**

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"Licensed Application Information" means screen shots, images, artwork, icons and/or any other copyrighted text, descriptions, representations or information relating to a Licensed Application that You provide to Apple for use in accordance with Schedule 1.

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### **2.3 Confidential Nature of Pre-Release Apple Software**

From time to time during the Term, Apple may provide You with pre-release versions of the Apple Software or related services that constitute Apple Confidential Information and are subject to the confidentiality obligations of this Agreement. Such pre-release Apple Software and related services should not be relied upon to perform in the same manner as a final-release commercial grade product, nor should it be used with data that is not sufficiently and regularly backed up, and may include features, functionality or APIs for services that are not yet available.

### **2.4 Copies**

You agree to retain and reproduce in full the Apple copyright, disclaimers and other proprietary notices (as they appear in the Apple Software and related services and Documentation provided) in all copies of the Apple Software and Documentation that You are permitted to make under this Agreement.

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### **2.5 Ownership**

Apple retains all rights, title, and interest in and to the Apple Software and any Updates it may make available to You under this Agreement. You agree to cooperate with Apple to maintain Apple's ownership of the Apple Software, and, to the extent that You become aware of any claims relating to the Apple Software, You agree to use reasonable efforts to promptly provide notice of any such claims to Apple. The parties acknowledge that this Agreement does not give Apple any ownership interest in Your Applications.

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This Agreement does not grant You any rights to use any trademarks, logos or service marks belonging to Apple, including but not limited to the iPhone or iPod word marks. If You

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You agree to comply with the published guidelines at <http://www.apple.com/legal/trademark/quidelinesfor3rdparties.html>. as modified by Apple from time to time.

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(e) For the purposes of Schedule 1(if applicable), You represent and warrant that You own or control the necessary rights in order to appoint Apple and Apple Subsidiaries as Your worldwide agent for the delivery of Your Licensed Applications, and that the fulfillment of such appointment by Apple and Apple Subsidiaries shall not violate or infringe the rights of any third party; and (f) You will not act in any manner which conflicts or interferes with any existing commitment or obligation You may have and no agreement previously entered into by You will interfere with Your performance of Your obligations under this Agreement.

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### **Content and Materials:**

3.3.12 Any master recordings and musical compositions embodied in Your Application must be wholly-owned by You or licensed to You on a fully paid-up basis and in a manner that will not require the payment of any fees, royalties and/or sums by Apple to You or any third party. In addition, if Your Application will be distributed outside of the United States, any master recordings and musical compositions embodied in Your Application (a) must not fall within the repertoire of any mechanical or performing/communication rights collecting or licensing organization now or in the future and (b) if licensed, must be exclusively licensed to You for Your Application by each applicable copyright owner.

3.3.13 If Your Application includes or will include any other content, You must either own all such content or have permission from the content owner to use it in Your Application.

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3.3.16 If Your Application includes any FOSS, You agree to comply with all applicable FOSS licensing terms. You also agree not to use any FOSS in the development of Your Application in such a way that would cause the non-FOSS portions of the Apple Software to be subject to any FOSS licensing terms or obligations.

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3.3.18 If Your Application interfaces, communicates, or otherwise interoperates with or controls an iPhone Accessory (as defined above) through Bluetooth or Apple's 30-pin dock connector, then the accessory must be licensed under Apple's MFi Program.

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### **7.3 No Other Distribution Authorized Under this Agreement**

Except for the distribution of freely available Licensed Applications and the distribution of Applications for use on Registered Devices as set forth in Sections 7.1 and 7.2 above, no other distribution of programs or applications developed using the Apple Software is authorized or permitted hereunder. In the absence of a separate agreement with Apple, You agree not to distribute Your Application to third parties via other distribution methods or to enable or permit others to do so.

## **8. Revocation**

You understand and agree that Apple may cease distribution of Your Licensed Application(s) and/or Licensed Application Information or revoke the digital certificate of any of Your Applications at any time. By way of example only, Apple might choose to do this if at any time:

- (a) Any of Your Provisioning Profiles, digital certificates or corresponding private keys has been compromised or Apple has reason to believe that either has been compromised;
- (b) Apple has been notified or otherwise has reason to believe that Your Application violates, misappropriates, or infringes the rights of a third party or of Apple;

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### **10.2 Obligations Regarding Apple Confidential Information**

You agree to protect Apple Confidential Information using at least the same degree of care that You use to protect Your own confidential information of similar importance, but no less than a reasonable degree of care. You agree to use Apple Confidential Information solely for the purpose of exercising Your rights and performing Your obligations under this Agreement and agree not to use Apple Confidential Information for any other purpose, for Your own or any third party's benefit, without Apple's prior written consent. You further agree not to disclose or disseminate Apple Confidential Information to anyone other than: (i) those of Your employees and contractors, or those of Your faculty and staff if You are an educational institution, who have a need to know and who are bound by a written agreement that prohibits unauthorized use or disclosure of the Apple Confidential Information; or (ii) except as otherwise agreed or permitted in writing by Apple. You may disclose Apple Confidential Information to the extent required by law, provided that You take reasonable steps to notify Apple of such requirement before disclosing the Apple Confidential Information and to obtain protective treatment of the Apple Confidential Information. You acknowledge that damages for improper disclosure of Apple Confidential

Information may be irreparable; therefore, Apple is entitled to seek equitable relief, including injunction and preliminary injunction, in addition to all other remedies.

### 10.3 Information Submitted to Apple Not Deemed Confidential

Apple works with many application and software developers and some of their products may be similar to or compete with Your Applications. Apple may also be developing its own similar or competing applications and products or may decide to do so in the future. To avoid potential misunderstandings, Apple cannot agree, and expressly disclaims, any confidentiality obligations or use restrictions, express or implied, with respect to any information that You may provide in connection with this Agreement or the Program, including information about Your Application, Licensed Application Information and metadata (such disclosures will be referred to as "Licensee Disclosures"). You agree that any such Licensee Disclosures will be **non-confidential**. Apple will be free to use and disclose any Licensee Disclosures on an unrestricted basis without notifying or compensating You. You release Apple from all liability and obligations that may arise from the receipt, review, use, or disclosure of any portion of any Licensee Disclosures. Any physical materials You submit to Apple will become Apple property and Apple will have no obligation to return those materials to You or to certify their destruction.

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### 10.4 Press Releases and Other Publicity

You may not issue any press releases or make any other public statements regarding this Agreement, its terms and conditions, or the relationship of the parties without Apple's express prior written approval, which may be withheld at Apple's discretion.

## 11. Indemnification

To the extent permitted by law, You agree to indemnify, defend and hold harmless Apple, its directors, officers, employees, independent contractors and agents (each an "Apple Indemnified Party") from any and all claims, losses, liabilities, damages, expenses and costs (including without limitation attorneys fees and court costs) (collectively "Losses") incurred by an Apple Indemnified Party as a result of: Your breach of this Agreement; a breach of any certification, covenant, representation or warranty made by You in this Agreement; any claims that Your Applications or the distribution, sale, offer for sale, use or importation of Your Applications (whether alone or as an essential part of a combination), Licensed Application Information or metadata **violate or infringe any third party intellectual property or proprietary rights**; any claims arising out of Apple's permitted use, promotion or distribution of Your Licensed Application(s), Licensed Application Information, related trademarks and logos, or images and other materials that You provide to Apple at Apple's request; and/or otherwise related to or arising from Your use of the Apple Software or services, Your Application(s), Licensed Application Information, metadata, Registered Devices, or Your development and distribution of Applications.

You acknowledge that neither the Apple Software nor any services are intended for use in the development of Applications in which errors or inaccuracies in the content, data or information provided by the Application or the failure of the Application, could lead to death, personal injury, or severe physical or environmental damage, and, to the extent permitted by law, You hereby agree to **indemnify, defend and hold harmless each Apple Indemnified Party from any Losses incurred by such Apple Indemnified Party by reason of any such use.**

In no event may You enter into any settlement or like agreement with a third party that affects Apple's rights or binds Apple in any way, without the prior written consent of Apple.

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### 12.3 Effect of Termination

Upon the termination of this Agreement for any reason, You agree to Immediately cease all use of the Apple Software and services and erase and destroy all copies, full or partial, of the Apple Software and any information pertaining to the services (including Your Push Application ID) and all copies of Apple Confidential Information in Your and Your Authorized Developers' possession or control. At Apple's request, You agree to provide written certification of such destruction to Apple. Upon the expiration of the Delivery Period defined and set forth in Schedule 1, all **Licensed Applications and Licensed Application Information in Apple's possession or control shall be deleted or destroyed within a reasonable time thereafter, excluding any archival copies maintained in accordance with Apple's standard business practices** or required to be maintained by applicable law, rule or regulation. The provisions of Sections 1, 2.5, 2.6, 3.1(d), 3.1(e), 3.1(f), 3.2(d), 3.2(e), 3.2(f), 3.3, 5 (second and third paragraphs), 6.1, 6.2, 7.1 (Schedule 1 for the

Delivery Period), 7.3, 8, and 10 through 15 inclusive, and the second sentence of Paragraph 2.3, Paragraph 2.5, the last sentence of Paragraph 4.1, the second sentence of Paragraph 4.3, and Paragraph 7 of Attachment 1 will survive any termination of this Agreement. Apple will not be liable for compensation, indemnity, or damages of any sort as a result of terminating this Agreement in accordance with its terms, and termination of this Agreement will be without prejudice to any other right or remedy Apple may have, now or in the future.

### **13. NO WARRANTY**

The Apple Software may contain inaccuracies or errors that could cause failures or loss of data and it may be incomplete. Apple or its licensors may provide or make available through the Apple Software or as part of the Program, certain web-based applications, certificate-issuance services, App Store services or other services for Your use (collectively the "Services" for purposes of this Section 13 and 14). Apple and its licensors reserve the right to change, suspend, remove, or disable access to any Services at any time without notice. In no event will Apple or its licensors be liable for the removal of or disabling of access to any such Services. Apple or its licensors may also impose limits on the use of or access to certain Services, in any case and without notice or liability. YOU EXPRESSLY ACKNOWLEDGE AND AGREE THAT USE OF THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE AND ANY SERVICES IS AT YOUR SOLE RISK AND THAT THE ENTIRE RISK AS TO SATISFACTORY QUALITY, PERFORMANCE, ACCURACY AND EFFORT IS WITH YOU. THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE AND ANY SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE", WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND APPLE, APPLE'S AGENTS AND APPLE'S LICENSORS (COLLECTIVELY REFERRED TO AS "APPLE" FOR THE PURPOSES OF SECTIONS 13 AND 14) HEREBY DISCLAIM ALL WARRANTIES AND CONDITIONS WITH RESPECT TO THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE AND SERVICES, EITHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES AND CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, TIMELINESS, AND NONINFRINGEMENT OF THIRD PARTY RIGHTS. APPLE DOES NOT WARRANT AGAINST INTERFERENCE WITH YOUR ENJOYMENT OF THE APPLE SOFTWARE, SERVICE-RELATED SOFTWARE OR SERVICES, THAT THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE OR SERVICES WILL MEET YOUR REQUIREMENTS, THAT THE OPERATION OF THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE OR THE PROVISION OF SERVICES WILL BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE, THAT DEFECTS OR ERRORS IN THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE OR SERVICES WILL BE CORRECTED, OR THAT THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE OR SERVICES WILL BE COMPATIBLE WITH FUTURE APPLE PRODUCTS, SERVICES OR SOFTWARE, OR THAT ANY INFORMATION STORED OR TRANSMITTED THROUGH ANY APPLE SOFTWARE, SERVICE-RELATED SOFTWARE OR SERVICES WILL NOT BE LOST, CORRUPTED OR DAMAGED. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY APPLE OR AN APPLE AUTHORIZED REPRESENTATIVE WILL CREATE A WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT. SHOULD THE APPLE SOFTWARE, SECURITY SOLUTION, SERVICE-RELATED SOFTWARE OR SERVICES PROVE DEFECTIVE, YOU ASSUME THE ENTIRE COST OF ALL NECESSARY SERVICING, REPAIR OR CORRECTION. Location data provided by any Services is for basic navigational purposes only and is not intended to be relied upon in situations where precise location information is needed or where erroneous, inaccurate or incomplete location data may lead to death, personal injury, property or environmental damage. Neither Apple nor any of its licensors guarantees the availability, accuracy, completeness, reliability, or timeliness of location data or any other data or information displayed by any Services.

### **14. LIMITATION OF LIABILITY**

TO THE EXTENT NOT PROHIBITED BY LAW, IN NO EVENT WILL APPLE BE LIABLE FOR PERSONAL INJURY, OR ANY INCIDENTAL, SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES WHATSOEVER, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, LOSS OF DATA, BUSINESS INTERRUPTION OR ANY OTHER COMMERCIAL DAMAGES OR LOSSES, ARISING OUT OF OR RELATED TO THIS AGREEMENT, YOUR USE OR INABILITY TO USE THE APPLE SOFTWARE, SECURITY

SOLUTION OR SERVICES, OR YOUR DEVELOPMENT EFFORTS OR PARTICIPATION IN THE PROGRAM, HOWEVER CAUSED, WHETHER UNDER A THEORY OF CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCTS LIABILITY, OR OTHERWISE, **EVEN IF APPLE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. IN NO EVENT SHALL APPLE'S TOTAL LIABILITY TO YOU UNDER THIS AGREEMENT FOR ALL DAMAGES (OTHER THAN AS MAY BE REQUIRED BY APPLICABLE LAW IN CASES INVOLVING PERSONAL INJURY) EXCEED THE AMOUNT OF FIFTY DOLLARS (\$50.00).**

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1.2 You are only permitted to use the APN and the APN APIs for the purpose of sending Push Notifications to Your Application on an iPhone or iPod touch device as expressly permitted by the Agreement (including but not limited to this Attachment 1) and the APN Documentation, and You **must** only do so in accordance with all applicable laws and regulations (including **all intellectual property laws**). You further agree that You must disclose to Apple any use of the APN as part of the submission process for Your Application.

### 1. Appointment of Agent

1.1 You hereby appoint Apple and Apple Subsidiaries (collectively "Apple") **as Your worldwide agent** for the delivery of the Licensed Applications to end-users, during the Delivery Period. You hereby acknowledge that Apple **will deliver the Licensed Applications to end users in Apple's own name**, through one or more App Stores, but for You and on Your behalf.

1.2 In furtherance of Apple's appointment under Section 1.1 of this Schedule 1, You hereby authorize and instruct Apple to:

(a) solicit and obtain orders on Your behalf for Licensed Applications from end-users located in the countries You designate under Section 2.1 hereof;

(b) provide hosting services to You, in order to allow for the storage of, and end-user access to, the Licensed Applications;

(c) **make copies of, format, and otherwise prepare Licensed Applications for acquisition and download by end-users, including adding the Security Solution;**

(d) allow end-users to access copies of the Licensed Applications, so that end-users may acquire from You and electronically download those Licensed Applications, Licensed Application Information, and associated metadata to end-users through one or more App Stores;

(e) use (i) screen shots and/or up to 30 second excerpts of the Licensed Applications; (ii) trademarks and logos associated with the Licensed Applications; and (iii) Licensed Application Information, for promotional purposes in marketing materials and gift cards, **excluding** those portions of the Licensed Applications, trademarks or logos, or Licensed Application Information which You do not have the right to use for promotional purposes, and which You identify in writing at the time that the Licensed Applications are delivered by You to Apple under Section 2.1 of this Schedule 1, and use images and other materials that You may provide to Apple, at Apple's reasonable request, for promotional purposes in marketing materials and gift cards; and

(f) otherwise use Licensed Applications, Licensed Application Information and associated metadata as may be reasonably necessary in the delivery of the Licensed Applications in accordance with this Schedule 1.

1.3 The parties acknowledge and agree that their relationship under this Schedule 1 is, and shall be, that of **principal and agent, and that You, as principal, are, and shall be, solely responsible for any and all claims and liabilities involving or relating to, the Licensed Applications, as provided in this Schedule 1.** The parties acknowledge and agree that Your appointment of Apple as its agent under this Schedule 1 is non-exclusive.

1.4 For purposes of this Schedule 1, the "Delivery Period" shall mean the period beginning on the Effective Date of the Agreement, and expiring on the last day of the Agreement or any renewal thereof; provided, however, that Apple's appointment as Your agent shall survive expiration of the Agreement for a reasonable phase-out period not to exceed thirty (30) days.

1.5 All of the Licensed Applications delivered by You to Apple under Section 2.1 of this Schedule 1 shall be **made available by Apple** for download by end-users **at no charge**. Apple shall have no duty to collect any fees for the Licensed Applications for any end-user and shall

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have no payment obligation to You with respect to any of those Licensed Applications under this

Schedule 1. In the event that You intend to charge end-users a fee for any Licensed Application, You must enter (or have previously entered) into a separate agreement (Schedule 2) with Apple with respect to that Licensed Application.

## **2. Delivery of the Licensed Applications to Apple**

2.1 You will deliver to Apple, at Your sole expense, using the iTunes Connect site, the Licensed Applications, Licensed Application Information and associated metadata, in a format and manner prescribed by Apple, as required for the delivery of the Licensed Applications to endusers in accordance with this Schedule 1. Metadata You deliver to Apple under this Schedule 1 will include: (i) the title and version number of each of the Licensed Applications; (ii) the countries You designate, in which You wish Apple to allow end-users to download those Licensed Applications; (iii) any **copyright or other intellectual property rights notices**; and (iv) **Your end-user license agreement ("EULA")**, if any, in accordance with Section 3.2 of this Schedule 1.

2.2 All Licensed Applications will be delivered by You to Apple using software tools, a secure FTP site address and/or such other delivery methods as prescribed by Apple.

2.3 You **hereby certify that all of the Licensed Applications You deliver to Apple under this Schedule 1 are authorized for export from the United States to each of the countries designated by You under Section 2.1 hereof**, in accordance with the requirements of the United States Export Administration Regulations, 15 C.F.R. Parts 730-774. Without limiting the generality of this Section 2.3, **You certify that (i) none of the Licensed Applications contains, uses or supports any data encryption or cryptographic functions; or (ii) in the event that any Licensed Application contains, uses or supports any such data encryption or cryptographic functionality, You have qualified that Licensed Application for export as a "mass market encryption item" in accordance with section 742.15(b)(2) of the Export Administration Regulations, and You will provide Apple with a PDF copy of the mass market export classification ruling (CCATS) issued by the United States Commerce Department, Bureau of Industry and Security for that Licensed Application.** For purposes of determining the proper export classification and export control status of each Licensed Application, You should consult the export compliance decision tree in the iTunes Connect tool. You acknowledge that Apple is relying upon Your certification in this Section 2.3 in allowing end-users to access and download the Licensed Applications under this Schedule 1. Except as provided in this Section 2.3, Apple will be responsible for compliance with the requirements of the Export Administration Regulations in allowing end-users to access and download the Licensed Applications under this Schedule 1.

## **3. Ownership and End-User Licensing**

3.1 The parties acknowledge and agree that **Apple shall not acquire any ownership interest in or to any of the Licensed Applications or Licensed Applications Information, and title, risk of loss, responsibility for, and control over the Licensed Applications shall, at all times, remain with You.** Apple may not use any of the Licensed Applications or Licensed Application Information for any purpose, or in any manner, except as specifically authorized in this Schedule 1.

3.2 You may deliver to Apple Your own EULA for any Licensed Application at the time that You deliver that Licensed Application to Apple, in accordance with Section 2.1 of this Schedule 1; provided, however, that **Your EULA must include and may not be inconsistent with the minimum terms and conditions specified on Exhibit A to this Schedule 1** and must comply with all applicable laws in all countries where You wish Apple to allow end-users to download that Licensed Application. Apple shall allow each end-user to which Apple allows access to any such Licensed Application to review Your EULA (if any) at the time that Apple delivers that Licensed Application to that end-user, and Apple shall notify each end-user that the end-user's use of that Licensed Application is subject to the terms and conditions of Your EULA (if any). In the event that You do not furnish Your own EULA for any Licensed Application to Apple, You acknowledge

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and agree that **each end-user's use of that Licensed Application shall be subject to Apple's standard EULA** (which is part of the App Store Terms of Service).

3.3 You hereby acknowledge that the EULA for each of the Licensed Applications is solely between You and the end-user and conforms to applicable law, and Apple shall not be responsible for, and shall not have any liability whatsoever under, any EULA or any breach by You or any end-user of any of the terms and conditions of any EULA.

## **4. Content Restrictions and Software Rating**

4.1 **You represent and warrant that:** (a) You have the right to enter into this Agreement, to reproduce and distribute each of the Licensed Applications, and to authorize Apple to permit endusers to download and use each of the Licensed Applications through one or more App Stores; (b) **none of the Licensed Applications, or Apple's or end-users' permitted uses of those Licensed Applications, violate or infringe any patent, copyright, trademark, trade secret or other intellectual**

property or contractual rights of any other person, firm, corporation or other entity; (c) each of the Licensed Applications is authorized for distribution, sale and use in, export to, and import into each of the countries designated by You under Section 2.1 of this Schedule 1, in accordance with the laws and regulations of those countries and all applicable export/import regulations; (d) none of the Licensed Applications contains any obscene, offensive or other materials that are prohibited or restricted under the laws or regulations of any of the countries You designate under Section 2.1 of this Schedule 1; and (e) all information You provide using the iTunes Connect tool, including any information relating to the Licensed Applications, is accurate and that, if any such information ceases to be accurate, You will promptly update it to be accurate using the iTunes Connect tool.

## 5. Responsibility, Liability and Indemnity

5.1 Apple shall have no responsibility for the installation and/or use of any of the Licensed Applications by any end-user. You shall be solely responsible for any and all product warranties, end-user assistance and product support with respect to each of the Licensed Applications.

5.2 You shall be solely responsible for, and Apple shall have no responsibility or liability whatsoever with respect to, any and all claims, suits, liabilities, losses, damages, costs and expenses arising from, or attributable to, the Licensed Applications and/or the use of those Licensed Applications by any end-user, including, but not limited to: (i) claims of breach of warranty, whether specified in the EULA or established under applicable law; (ii) product liability claims; and (iii) claims that any of the Licensed Applications and/or the end-user's possession or use of those Licensed Applications infringes the copyright or other intellectual property rights of any third party.

5.3 To the extent permitted by law, You shall indemnify and hold Apple harmless against any and all claims, suits, liabilities, losses, damages, taxes, costs and expenses arising from, or related or attributable to: (i) the Licensed Applications or their delivery; (ii) Your failure to fulfill or perform any of Your obligations under the EULA for those Licensed Applications; (iii) Your failure to fulfill or perform any of Your obligations under this Schedule 1, including, but not limited to, Your obligations under Section 5.2 hereof; or (iv) any breach of Your representations and warranties, as set forth in Section 4.1 hereof, or any breach of Your obligations under Section 4.2 hereof.

## 6. Termination

6.1 This Schedule 1, and all of Apple's obligations hereunder, shall terminate upon the expiration or termination of the Agreement.

6.2 In the event that You no longer have the legal right to distribute the Licensed Applications, or to authorize Apple to allow access to those Licensed Applications by end-users, in accordance with this Schedule 1, You shall promptly withdraw those Licensed Applications from the App Store using the tools provided on the iTunes Connect site; provided, however, that such withdrawal by You under this Section 6.2 shall not relieve You of any of Your obligations to Apple under this Schedule 1, or any liability to Apple and/or any end-user with respect to those Licensed Applications.

6.3 Apple reserves the right to cease allowing download by end-users of the Licensed Applications at any time, with or without cause, by providing notice of termination to You. Without limiting the generality of this Section 6.3, You acknowledge that Apple may cease allowing download by end-users of some or all of the Licensed Applications if Apple reasonably believes that: (i) those Licensed Applications are not authorized for export to one or more of the countries designated by You under Section 2.1 hereof, in accordance with the Export Administration Regulations; (ii) those Licensed Applications and/or any end-user's possession and/or use of those Licensed Applications, infringe patent, copyright, trademark, trade secret or other intellectual property rights of any third party; or (iii) the distribution and/or use of those Licensed Applications violates any applicable law in any country You designate under Section 2.1 of this Schedule 1. An election by Apple to cease allowing download of any Licensed Applications, pursuant to this Section 6.3, shall not relieve You of Your obligations under this Schedule 1.

6.4 You may withdraw any or all of the Licensed Applications from the App Store, at any time, and for any reason, by using the tools provided on the iTunes Connect site.

## 7. Legal Consequences

The relationship between You and Apple established by this Schedule 1 may have important legal consequences for You. You acknowledge and agree that it is Your responsibility to consult with Your legal advisors with respect to Your legal obligations hereunder.

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## EXHIBIT A

(to Schedule 1)

## Instructions for Minimum Terms of Developer's

### End-User License Agreement

**1. Acknowledgement:** You and the end-user must acknowledge that the EULA is concluded between You and the end-user only, and not with Apple, and You, not Apple, are solely responsible for the Licensed Application and the content thereof. The EULA may not provide for usage rules for Licensed Applications that are less restrictive than the Usage Rules set forth for Licensed Applications in, or otherwise be in conflict with, the App Store Terms of Service as of the Effective Date (which You acknowledge You have had the opportunity to review).

**2. Scope of License:** The license granted to the end-user for the Licensed Application must be limited to a non-transferable license to use the Licensed Application on any iPhone or iPod touch that the end-user owns or controls and as permitted by the Usage Rules set forth in the App Store Terms of Service.

**3. Maintenance and Support:** You must be solely responsible for providing any maintenance

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**6. Intellectual Property Rights:** You and the end-user must acknowledge that, in the event of any third party claim that the Licensed Application or the end-user's possession and use of that Licensed Application infringes that third party's intellectual property rights, You, not Apple, will be solely responsible for the investigation, defense, settlement and discharge of any such intellectual property infringement claim.

**7. Legal Compliance:** The end-user must represent and warrant that (i) he/she is not located in a country that is subject to a U.S. Government embargo, or that has been designated by the U.S. Government as a "terrorist supporting" country; and (ii) he/she is not listed on any U.S. Government list of prohibited or restricted parties.

**8. Developer Name and Address:** You must state in the EULA Your name and address, and the contact information (telephone number; E-mail address) to which any end-user questions, complaints or claims with respect to the Licensed Application should be directed.

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**9. Third Party Beneficiary:** You and the end-user must acknowledge and agree that Apple, and Apple's subsidiaries, are third party beneficiaries of the EULA, and that, upon the end-user's acceptance of the terms and conditions of the EULA, Apple will have the right (and will be deemed to have accepted the right) to enforce the EULA against the end-user as a third party beneficiary thereof.

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