

Enterprise Terms and Conditions

Last Modified: May 2016

These terms and conditions ("Standard Terms and Conditions"), together with the Subscription Order Form, govern Brainshark's provision and Customer's use of the services set forth in the applicable Subscription Order Form (the "Services"). As used in these Standard Terms and Conditions, "Agreement" means, collectively, (1) these Standard Terms and Conditions, and (2) the Subscription Order Form. If a conflict exists between these terms and conditions and the Subscription Order Form, the terms and conditions of the applicable Subscription Order Form will control.

1. Brainshark Services.

Subject to the terms and conditions of this Agreement, Brainshark agrees to provide Customer with the Services. Customer agrees to provide to Brainshark the proper license that allows and grants the right(s) to Brainshark to install the font that Customer provides to Brainshark.

2. License Grants.

2.1 – During the term of this Agreement, Brainshark hereby grants Customer a non-exclusive, non-transferable, non-sublicensable license to access and use Brainshark's proprietary software (in object code format only), all electronic data embodied therein, any upgrades thereto, as well as any user documentation provided by Brainshark to Customer (the "Software"), solely for Customer's internal business use. This license to Customer grants Customer the right to allow third parties access to the Services for reading purposes only; no license is granted to Customer to allow third parties to create or guest author or create content for third parties or to use Customer's license as if the Customer were a host provider at Customer's site without a reseller license.

2.2 – Brainshark is furnishing access to the Software for authorized use by Customer solely for the purposes of creating, editing, viewing and/or publishing a series of pages on a web site (each a "Presentation") with content provided by Customer ("Customer Content"). The Customer Content may include information, data, text, music, sound, photographs, graphics, video, messages and/or other materials provided to Brainshark by Customer.

2.3 – Depending on the licensing terms as specified in the Subscription Order Form, Customer may purchase a subscription which (i) specifies an upper limit on the total number of "Seats" or "Users," defined as individuals with unique logins/credentials to access the Software or the Customer Content made available by the Software; (ii) specifies an upper limit on the total number of employees in the company/business entity licensed to use the Software; and/or (iii) specifies a limit on the total, aggregate number of hours of Customer Content hosted by Brainshark ("Content Hours").

2.3.1 – Customer will have the ability to run report(s) to monitor and document the number of Content Hour(s) used in creating its Customer Content or the number of employees or Users licensed per the subscription term. If Customer after reviewing the report(s) finds it has exceeded the number of Content Hours contracted or the number of employees or Users licensed per the existing subscription term, Customer may do any of the following: (a) archive the additional Customer Content equal to the number of Content Hours originally contracted; (b) delete the excess Customer Content; (c) buy additional Content Hours to cover the additional hours of Customer Content or increase the number of employees or Users based on the existing subscription term usage; and/or (d) speak to a Brainshark representative to discuss future planned Customer usage of the Brainshark Services. If Customer fails to exercise any of the above options, this will result in overage charges being assessed by Brainshark to Customer for exceeding the original contracted number of Content Hours or the number of employees or Users per the existing subscription term.

2.3.2 – Customer shall not exceed a maximum total storage amount of uploaded documents/files equal to the greater of 5GB or 1GB for every US\$1,000 spent annually on the Software subscription.

2.4 – Customer Content will be considered the property of Customer. Subject to the terms and conditions of this Agreement, Customer hereby grants to Brainshark a non-exclusive, non-transferable, royalty-free, worldwide fully paid-up right and license to copy, modify (including, the right to make derivative works of), distribute, display and use Customer Content solely in connection with performing the Services.

2.5 – Customer agrees that, if audio is generated using the Brainshark Text to Speech (TTS) feature, Customer will not modify, make copies, or further distribute the TTS audio except to make a copy to their personal electronic devices. Further, the TTS audio may not be played back using the Brainshark phone playback feature.

3. Ownership and Protection of Content and Intellectual Property.

3.1 – *Brainshark Intellectual Property.* Brainshark or Brainshark's licensors retain all ownership and intellectual property rights to the Software. Except for the license granted to Customer in Section 2, Customer shall have no

right, title or interest in the Software. All rights not expressly granted herein are reserved to Brainshark.

3.2 – *Customer's Intellectual Property*. Customer shall retain all ownership and intellectual property rights in the Customer Content or derivative works of Customer Content developed specifically for Customer by Brainshark during the term of this Agreement. Except for the limited license granted to Brainshark in Section 2 to use Customer Content to provide Services to Customer for this Agreement only, Brainshark shall have no right, title or interest in the Customer Content.

3.3 *Confidentiality*. Each party agrees that information supplied by each to the other during the course of this Agreement may be of a competitively sensitive or proprietary nature and confidential to that party ("Confidential Information"). Each party shall (i) protect the Confidential Information disclosed hereunder to the same extent it protects its own proprietary information of similar importance; (ii) not disclose Confidential Information of the other party to any person or entity other than to an employee or approved agent of either party obligated to maintain the confidentiality of such information; or (iii) not to use Confidential Information of the other party for any purpose other than to exercise its rights and fulfill its obligations under this Agreement. Confidential Information shall not include information which can be shown by a recipient to have (w) been known by such party at the time of disclosure; (x) entered the public domain by some action other than breach of this Agreement by the receiving party; (y) been independently developed by the recipient by personnel without access to the Confidential Information or (z) been released in writing from the obligation of confidentiality by the owner or licensor of such Confidential Information. Each party's obligation of confidentiality under this Agreement shall extend for a period of one (1) year following termination or expiration of this Agreement.

3.4 *Disclosure*. Each party may disclose the Confidential Information of the other party if required by law or regulation, provided that the receiving party provides prompt written notice to the disclosing party of such impending release and the releasing party cooperates to the fullest extent required by law or regulation with the disclosing party to minimize such release.

4. Customer Content.

4.1 Customer agrees that Customer is solely responsible for all Customer Content (public or private) incorporated into Presentations which are posted, emailed or transmitted via the Services provided by Brainshark, including for obtaining prior written consent for the use of any third party materials contained in the Customer Content, and any associated payments. Customer agrees not to knowingly use the Services to upload, post, email or otherwise transmit any Customer Content that is unlawful, harmful, threatening, abusive, harassing, tortuous, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise offensive or objectionable. Customer acknowledges that Brainshark does not pre-screen Customer Content, but that Brainshark and Brainshark's designees shall have the right (but not the obligation) in their sole discretion to refuse or remove any Customer Content that does not abide by the terms contained in this Agreement, but Brainshark will not do so without first notifying Customer of its intent.

4.2 Non-public personal information (NPPI) is prohibited from Customer Content. Violations brought to Brainshark's attention will result in suspension of the Customer Services until Customer has deleted the prohibited Customer Content. The resumption of the Customer Services or termination of the Customer Services due to NPPI content violation(s) are at Brainshark's discretion.

5. Availability of Services.

Brainshark agrees to use commercially reasonable efforts to ensure that the Services shall be accessible to Customer via the World Wide Web twenty-four (24) hours a day, seven (7) days a week.

6. Fees and Taxes.

All fees payable to Brainshark are due net thirty (30) days after receipt of invoice by Customer, including any sales, use, excise, property or other taxes, duties, tariffs or other assessments which Brainshark must pay based on the Services Customer has acquired under or arising out of this Agreement. Any payments that are not paid when due shall bear interest at a rate equal to the lesser of one (1%) percent per month or the highest rate permitted by law, commencing on the date each payment was due.

7. Intellectual Property Infringement and Indemnity.

7.1 – *Customer Indemnity Obligations*. Customer will defend, indemnify and hold harmless Brainshark, Brainshark's subsidiaries, affiliates, officers, employees, agents, co-branders or other partners from and against any claim or demand, made by any third party, due to or arising out of (i) Customer Content that Customer submits, posts, transmits, or provides to Brainshark or (ii) Customer's use of the Software or Services (except to the extent Brainshark is obligated to indemnify Customer under Section 7.2), and will pay all costs and damages including

reasonable attorneys' fees incurred as a result of such claim.

7.2 Brainshark Indemnity Obligations. Brainshark will indemnify, defend, and hold harmless Customer, Customer's subsidiaries, affiliates, officers, employees, stockholders, agents, co-branders or other partners against any claim, demand, or judgment, made by any third party, due to or arising out of a claim that Customer's use of the Software and/or Services infringe or misappropriate any valid United States patent, copyright, trademark, trade secret, or other proprietary right belonging to a third party ("Third Party Claim") and to hold Customer harmless from any and all liabilities, losses, costs, damages, expenses, and reasonable attorney's fees that result from any such Third Party Claim. Brainshark's obligations under this Section 7.2 are conditioned upon (a) Brainshark's prompt notification in writing by Customer of any Third Party Claim; (b) Brainshark having sole authority and control to conduct the defense of any Third Party Claim and all negotiations of a settlement or compromise; (c) Customer providing Brainshark with all reasonable assistance in defending any Third Party Claim at Brainshark's expense; and (d) the Third Party Claim shall not have arisen due to unauthorized acts or misconduct of Customer or a third party acting on behalf of Customer.

7.3 – If the Software or Services becomes, or in Brainshark's opinion, is likely to become the subject of a Third Party Claim, Brainshark may at its option and expense either: (a) obtain an appropriate license for Customer from the party asserting the Third Party Claim; (b) replace or modify the Software (or parts thereof) or Services that is the subject of the Third Party Claim so that it is materially equivalent and no longer infringing; (c) provide a non-infringing work-around; or if none of the preceding options are economically feasible (d) terminate this Agreement and issue a pro-rata refund to Customer for the amounts paid to Brainshark for the Software or Services, as applicable. **THE INDEMNITY PROVIDED IN THIS SECTION 7 CONSTITUTES BRAINSHARK'S ENTIRE OBLIGATION TO CUSTOMER REGARDING THIRD PARTY INTELLECTUAL PROPERTY INFRINGEMENT CLAIMS ARISING HEREUNDER.**

8. Warranty.

8.1 – Brainshark warrants that (i) Brainshark is the owner or licensee of the Software and has the right to grant the license provided herein, (ii) the Services will be performed in professional and workmanlike manner, and (iii) the Services will conform in all material respects to the applicable Brainshark user manual and Brainshark documentation provided to Customer by Brainshark, as modified from time to time.

8.2 – THE WARRANTIES ABOVE ARE EXCLUSIVE AND BRAINSHARK HEREBY DISCLAIMS ANY AND ALL OTHER REPRESENTATIONS OR WARRANTIES NOT EXPRESSLY SET FORTH HEREIN AND ALL IMPLIED WARRANTIES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BRAINSHARK DOES NOT WARRANT THAT (I) THE RESULTS THAT MAY BE OBTAINED BY USING THE SOFTWARE OR SERVICES WILL MEET CUSTOMER'S REQUIREMENTS, (II) AN UNAUTHORIZED PERSON WILL NEVER GAIN ACCESS TO THE CUSTOMER CONTENT OR PRESENTATIONS, OR (III) THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE.

9. Breach of Warranty.

In the event of a breach of the warranty set forth in Section 8.1, Brainshark shall have a thirty (30) day period in which to cure the defect. In the event such defect is not cured by the conclusion of the cure period, then the Customer shall have the right to terminate the Subscription Order Form for the affected Services and receive a pro-rata refund of the fees paid therefore.

10. Limitation of Liability.

10.1 EXCEPT FOR LIABILITY ARISING FROM A (A) BREACH BY CUSTOMER OF THE LICENSE TERMS SET FORTH IN SECTION 2 ABOVE; (B) BREACH OF A PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER SECTION 3.3 ABOVE; OR (C) PARTY'S INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 7 ABOVE; NEITHER PARTY SHALL BE LIABLE, WHETHER IN AN ACTION IN NEGLIGENCE, CONTRACT, TORT OR BASED ON A WARRANTY OR OTHER LEGAL THEORY, IN ANY WAY TO THE OTHER PARTY OR ANY OTHER PERSON FOR ANY LOST PROFITS OR REVENUES, LOSS OF USE, LOSS OF DATA OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS, LICENSES OR SERVICES OR SIMILAR ECONOMIC LOSS, OR FOR ANY PUNITIVE, INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR SIMILAR DAMAGES OF ANY NATURE, WHETHER FORESEEABLE OR NOT.

10.2 – EXCEPT FOR LIABILITY ARISING FROM A (A) BREACH BY CUSTOMER OF THE LICENSE TERMS SET FORTH IN SECTION 2 ABOVE; (B) BREACH OF A PARTY'S CONFIDENTIALITY OBLIGATIONS UNDER SECTION 3.3 ABOVE; (C) PARTY'S INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 7 ABOVE; OR (D) PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, AS TO WHICH THE FOLLOWING LIMITATION OF LIABILITY SHALL NOT APPLY, EACH PARTY'S MAXIMUM LIABILITY FOR ANY DAMAGES, REGARDLESS OF FORM OF ACTION, SHALL NOT EXCEED THE LICENSE FEES ACTUALLY PAID TO

BRAINSHARK FOR THE RELEVANT SERVICES.

11. Term and Termination.

11.1 – This Agreement shall commence on the date that the Subscription Order Form is executed by both parties, and Brainshark's provision of the Services hereunder shall commence on the date set forth in the applicable Subscription Order Form. This Agreement and each Subscription Order Form shall renew automatically (unless earlier terminated pursuant to this Section 11) for additional periods of twelve (12) months unless Customer notifies Brainshark in writing at least thirty (30) days prior to the expiration date of the applicable Subscription Order Form. If Customer fails to notify Brainshark in writing of its intent to terminate the Subscription Order Form, the Subscription Order Form will renew, and Customer will be invoiced at the then current prices for a renewal term.

11.2 – Either party may terminate this Agreement at any time by providing thirty (30) days written notice to the other party if the other party materially breaches any material term of this Agreement and fails to cure such breach within thirty (30) days after receiving written notice of the breach from the non-breaching party.

11.3 Promptly upon the termination of this Agreement for any reason, each party shall deliver to the other party or destroy all copies in such party's possession of the other party's Confidential Information and, upon request, shall certify in writing that all such Confidential Information has been so delivered or destroyed.

11.4 – For thirty (30) days following the termination date or until such earlier time as Customer requests, Brainshark shall continue to store and Customer agrees to permit Brainshark to store Customer Content on Brainshark's server(s).

11.5 Termination of this Agreement shall be without prejudice to any rights of either party against the other and such termination shall not relieve either party of any of its obligations to the other existing at the time of termination.

11.6 – Notwithstanding anything to the contrary in this Agreement, Sections 3, 4, 7, 8, 9, 10, 11 and 12 shall survive expiration or earlier termination of this Agreement.

12. General Provisions.

12.1 – *Notices and Contacts.* Notices under this Agreement shall be deemed given when sent postage prepaid by first class mail, DHL or FedEx to the parties at the addresses specified below or such new address as they shall communicate to each other in writing from time to time.

To Customer:

To Brainshark:
Brainshark, Inc.
Attention: EVP/CFO
130 Turner Street, Bldg 1, Suite 100
Waltham, MA 02453

12.2 – *Assignment.* This Agreement may not be assigned or otherwise transferred by either party without the prior written consent of the other party except if such assignment or transfer is to an entity acquiring all or substantially all of a party's assets by merger or purchase. This Agreement will bind and inure to the benefit of each party's permitted successors and assigns.

12.3 – *Interpretation, Execution and Modification.* Nothing contained herein shall be construed as creating any agency, partnership, or other form of joint enterprise between the parties. The parties agree that the subject matter of this Agreement will be governed by the laws of the Commonwealth of Massachusetts and, to the extent applicable, the federal laws of the United States. No failure of either party to exercise or enforce any of its rights under this Agreement will act as a waiver of such rights. If any provision of this Agreement is found invalid or unenforceable, that provision will be enforced to the maximum extent permissible, and the other provisions of this Agreement will remain in force. This Agreement may be executed in any number of counterparts, all of which taken together will constitute a single instrument. This Agreement is the complete and exclusive Agreement between the parties with respect to the Agreement's subject matter. This Agreement may only be modified by a written document executed by both parties. Any such modification will become part of this Agreement and will be governed by the terms and conditions of this Agreement.

Agreed and Accepted:

Customer

By: _____

Printed Name: _____

Title: _____

Date: _____

Agreed and Accepted:

Brainshark, Inc.

By: _____

Printed Name: _____

Title: _____

Date: _____

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