

Modulate Online Terms and Conditions

This Standard Contract for AWS Marketplace (the “**Online Terms and Conditions**”) sets forth the terms and conditions applicable to the licensing of the Modulate Software from the licensor (“Modulate”) by the Party subscribing to the Product (“Customer”). The offer of the Modulate Software pursuant to this, and Customer’s purchase of the corresponding Subscription, constitutes each Party’s respective acceptance of this Online Terms and Conditions and their entry into this Agreement (defined below). Customer and Modulate may be referred to collectively as the “Parties” or individually as a “Party”

1. Definitions. In addition to those terms defined in the body of these Online Terms and Conditions or in the introduction, the following capitalized terms will have the meanings set forth below:

- 1.1. “**Confidential Information**” means any non-public information provided by either Party to the other that is identified as confidential in writing at the time of disclosure or should reasonably be considered confidential given the nature of the information and the circumstances of disclosure, including, without limitation, technical data, product plans, customer, user, and financial information, algorithms and presentations. For the avoidance of doubt, all Modulate Software is Confidential Information of Modulate.
- 1.2. “**End Users**” means individual end users of the Supported Titles who have entered into an end user license agreement with Customer.
- 1.3. “**Modulate Software**” means the ToxMod SDK and the ToxMod Web Service.
- 1.4. “**Order Form**” refers to the information Customer has submitted or will submit via the ToxMod Sign Up Form upon completion of Customer’s purchase through the AWS Marketplace portal.
- 1.5. “**Subscription**” refers to Subscription purchased by Customer within the AWS Marketplace portal, as described in the applicable product listing and the corresponding purchase transaction. The pricing and term are set forth in the product listing.
- 1.6. “**ToxMod SDK**” means Modulate’s proprietary software development kit and other tools that process live audio streams for purposes such as the detection of toxic behavior.
- 1.7. “**ToxMod Web Service**” means Modulate’s administrator console and associated API and other tools that enable the monitoring, alteration, and other processing of audio streams, and which hosts relevant documentation and other resources for the development of applications using the ToxMod SDK.
- 1.8. “**Supported Titles**” means the games or applications developed by Customer incorporating ToxMod SDK. The Supported Titles are listed in the applicable Order Form.

2. License Grants.

- 2.1. **Internal License to Customer.** Subject to Customer’s compliance with the terms and conditions of the Agreement, and execution of an applicable Order Form, Modulate hereby grants Customer a non-exclusive, non-transferable (subject to Section 12.1), non-sublicenseable license, solely to (a) access and use the ToxMod Web Service, (b) install, run, and use the ToxMod SDK, in each case internally for the purpose of internal development of the Supported Titles, and (c) install and run the ToxMod SDK internally as necessary to enable moderation or community-management features within the Supported Titles.
- 2.2. **External License to Customer.** Subject to Customer’s compliance with the terms and conditions of the Agreement and execution of an applicable Order Form, Modulate hereby grants Customer a non-exclusive, non-transferable (subject to the provisions in Section 12.1), non-sublicenseable (except as pursuant to Section 2.3) license, solely to (a) access and use the ToxMod Web Service, (b) market, resell and distribute to End Users the ToxMod SDK as embedded within the Supported Titles, and (c) to permit such End Users to install, run, and use the Supported Titles solely for their personal, non-commercial use.
- 2.3. **Sublicensing to End Users.** Prior to delivery of a Supported Title to any End User, Customer will enter into an end user license agreement with such End User, which contains, at a minimum, terms and conditions at

least as protective of Modulate and the ToxMod SDK as those set forth herein. Customer will not sublicense any of the rights and licenses granted to it hereunder except as expressly set forth herein.

- 2.4. **License to Modulate.** By uploading, posting, publishing or displaying (hereinafter, “uploading”) any code, video, images, information, data, text, software, music, sound, voice recordings, photographs, graphics, messages or other materials (“**User Content**”) to the ToxMod Web Service, Customer hereby grants Modulate a non-exclusive, worldwide, royalty-free, fully paid-up, transferable, sublicenseable, perpetual and irrevocable license to copy, display, upload, perform, distribute, store, modify and otherwise use Customer’s User Content as reasonably necessary for Modulate to perform under the Agreement, including for the general internal improvement of the Modulate Software and other internal Modulate products and services, and including in connection with the internal training of artificial intelligence and machine learning technologies, which Customer understands and acknowledges is a fundamental part of this license grant and the Agreement. Modulate may not sell Customer’s User Content to any third party, and will only distribute Customer’s User Content (a) to Modulate’s third-party subprocessors (including but not necessarily limited to Amazon Web Services), which are bound by confidentiality obligations at least as protective to Customer as those binding Modulate, as necessary for Modulate to exercise its rights under the Agreement; (b) in aggregated or de-identified form such that the underlying data is no longer directly attributable to any particular End User or to Customer, for the purposes of (i) providing statistics regarding the overall performance of the Modulate Software or (ii) for demonstrating the function of the Modulate Software, provided that any third parties receiving or using such a demonstration are bound by confidentiality obligations at least as protective to Customer as those binding Modulate.

2.5. **Restrictions.**

(a) Customer will not (and will not knowingly allow any third party to) and will cause its End Users not to: (i) reverse engineer, decompile, disassemble, or otherwise attempt to discover any source code, object code, or underlying structure, ideas, know-how, or algorithms of any part of the Modulate Software; (ii) modify, translate or otherwise create derivative works of the Modulate Software or any component thereof; (iii) resell or distribute the Modulate Software, or any component thereof, on a standalone basis; (iv) use any Modulate Software for timesharing or service bureau purposes or otherwise for the benefit of a third party; (v) provide access to any Modulate Software to any person who is not an authorized user; (vi) use the Modulate Software to build a similar or complete product or service; or (vii) delete or alter the proprietary rights notices appearing on any Modulate Software or documentation..

(b) Customer will: (a) comply with any applicable laws, rules, or regulations in connection with its activities under the Agreement, including providing all required privacy and other notices and obtaining all necessary consents and authorizations for Modulate to use the User Content to perform its obligations under the Agreement; (b) not access, modify, delete, damage, or disable the Modulate Software; and (c) not disrupt, interfere with, or access in an unauthorized manner the Modulate Software.

(c) During the Term (as defined below), should Customer be or become a party of any agreement with, or receive products or services from, any third party which offers, provides, is developing, or is known to Customer to intend to develop services or software substantially similar to any material component of the Modulate Software (a “Modulate Competitor”), then notwithstanding anything to the contrary in Section 7 (Confidentiality), Customer shall not without the prior written consent of Modulate (not to be unreasonably withheld, conditioned, or delayed) (x) permit the Modulate Competitor, its personnel, or its affiliates to access, view, or interact with the Modulate Software; (y) share with the Modulate Competitor any statistics, metrics, data schemas, or any other information regarding how or how well the Modulate Software functions within the Supported Titles, or (z) share any data generated by Modulate (including any of Modulate’s derivative works, analyses, or refactorings of any User Content) with the Modulate Competitor in any fashion.

- 2.6. **Feedback.** Customer acknowledges and agrees that any questions, comments, suggestions, ideas, feedback or other information about the Modulate Software (“**Feedback**”), provided by Customer to Modulate are non-confidential and Modulate will be entitled to the unrestricted use and dissemination of this Feedback for any purpose, commercial or otherwise, without acknowledgement, attribution, or compensation to Customer.

- 2.7. **Changes.** Modulate reserves the right to change the features and functionality of the ToxMod SDK upon advanced notice to Customer before the change, and to provide notice to Customer of any material changes to the ToxMod SDK that could reasonably require material updates to Customer or, to the knowledge of Modulate, the Supported Titles, or for which Modulate will stop supporting or validating the previous version of the ToxMod SDK, with Modulate to use commercially reasonable efforts to provide such notice in advance

by an amount of time that is at least the lesser value between (a) the length of the current Initial Term or Renewal Term, or (b) three (3) months.

- 2.8. **Export Control Laws.** The Modulate Software is subject to U.S. export control laws, including the Export Administration Regulations, of the Bureau of Industry and Security ("**BIS**"), U.S. Department of Commerce; and the economic sanctions administered by the Office of Foreign Assets Control ("**OFAC**"), of the U.S. Department of the Treasury. Customer agrees to comply strictly with all such laws and regulations as they relate to the Modulate Software, and, to the extent consistent with the Agreement, to obtain any necessary license or other authorization to export, reexport, or transfer the Modulate Software. Without limiting the foregoing, Customer agrees not to export, reexport, or transfer the Modulate Software to Cuba, Iran, North Korea, Syria, the Crimea region of Ukraine, or the so-called Donetsk People's Republic and Luhansk People's Republic; to the governments of these countries, wherever located; to any person or entity identified on BIS's Denied Persons List, Entity List, or Unverified List or OFAC's Specially Designated Nationals and Blocked Persons List or Consolidated Sanctions List; to Belarus, Russia, or Iraq if, at the time of export, reexport, or transfer, the exporter has knowledge or reason to know that the Modulate Software will be used for a military end-use or by a military end-user; to Belarus, Burma, Cambodia, China (including Honk Kong), Russia, or Venezuela if, at the time of export, reexport, or transfer, the exporter has knowledge or reason to know that the Modulate Software will be used for a military-intelligence end use or by a military intelligence end users; to any end user with knowledge or reason to know that the Modulate Software will be used for nuclear, chemical, or biological weapons proliferation, or for missile-development purposes; or to any person with knowledge or reason to know that they will export, reexport, or transfer the Modulate Software other than in compliance with the foregoing restrictions.

3. Access and Use of the ToxMod Web Service.

- 3.1. **Member Account, Password and Security.** Customer is responsible for maintaining the confidentiality of its password and account, if any, and is fully responsible for any and all activities that occur under its password or account. The ToxMod Web Service may be accessed or used only by the personnel of Customer who are authorized to access the ToxMod Web Service using a user identifier and password provided by Customer (each, a "**User**"). Customer shall not make available the ToxMod Web Service to any person or entity other than Users. Customer is responsible for maintaining the confidentiality of all secure login information, passwords and other information related to Users' respective accounts at all times. Customer is responsible for its Users' compliance with the terms and conditions of the Agreement as though they were Customer hereunder and will be responsible and liable for any User's breach of any such terms and conditions. Customer agrees to (a) immediately notify Modulate of any unauthorized use of Customer's or User's password or account or any other breach of security, and (b) ensure that Customer and each User exits from its account at the end of each session when accessing the ToxMod Web Service. Modulate will not be liable for any loss or damage arising from Customer's or a User's failure to comply with this section.
- 3.2. **Modifications to Service.** Modulate reserves the right to change the features and functionality of the ToxMod Web Service, and to provide notice to Customer of any material changes to the ToxMod Web Service that could reasonably require material updates to Customer or, to the knowledge of Modulate, the Supported Titles, with Modulate to use commercially reasonable efforts to provide such notice in advance by an amount of time that is at least the lesser value between (a) the length of the current Initial Term or Renewal Term, or (b) two (2) months.
- 3.3. **Uptime Requirements.** The Modulate Software will meet the uptime and service level requirements in Section 3.5 (the "**SLA**."). In the event of a breach of this obligation, Modulate's sole obligation, and Customer's sole remedy, shall be for Customer to receive credits as described in the SLA.
- 3.4. **General Practices Regarding Use and Storage.** Customer acknowledges that Modulate may establish general practices and limits concerning use of the ToxMod Web Service, including without limitation the maximum period of time that data or other content will be retained by the ToxMod Web Service and the maximum storage space that will be allotted on Modulate's servers on your behalf. Customer agrees that Modulate has no responsibility or liability for the deletion or failure to store any data or other content maintained or uploaded by the ToxMod Web Service. Customer acknowledges that Modulate reserves the right to terminate accounts that are inactive for an extended period of time. Customer further acknowledges that Modulate reserves the right to change these general practices and limits at any time, in its sole discretion, with or without notice.

3.5. SLA

(a) **Availability Objective.** Provider will provide 97% Availability (as defined below) for the ToxMod Web Service. For purposes hereof, “**Availability**” or “**Available**” means the ToxMod Web Service is available for access and use by Customer and its authorized users and operating substantially in accordance with its documentation.

(b) **Availability Calculation.** Availability is based on a monthly calculation. The calculation will be as follows: $((a - b) / a) \times 100$, where “a” is the total number of hours in a given calendar month (such month being the “**Measured Period**”), and “b” is the total number of hours that service is not Available in the Measured Period (“**Modulate Downtime**”). Specifically excluded from “b” in the calculation of the Availability measurement are (1) issues arising from misuse of the Modulate Software by Customer or its authorized users, including but not limited to (i) incorrect or malformed API requests; (ii) invalid authentication credentials; or (iii) use by an unauthorized party; and/or (2) service interruption due to downtime or other interruptions of Amazon Web Services offerings such as (but not necessarily limited to) DynamoDB, S3, EC2, and RDS.

(c) Should the ToxMod Web Service only offer Availability between 95.0% and 96.99% during the Measured Period, Customer’s sole remedy shall be a credit against future Fees by Modulate equal to 30% of the Fees paid by Customer for usage during the Measured Period.

(d) Should the ToxMod Web Service only offer Availability between 93.5% and 94.99% during the Measured Period, Customer sole remedy shall be a credit against future Fees by Modulate equal to 65% of the Fees paid by Customer for usage during the Measured Period.

(e) Should the ToxMod Web Service offer Availability of less than 93.5% (the “**Minimum Availability**”) during the Measured Period, Customer sole remedy shall be a credit against future Fees by Modulate equal to 100% of the Fees paid by Customer for usage during the Measured Period.

(f) Notwithstanding anything to the contrary in the Agreement, Customer’s sole remedy for Modulate’s breach of this SLA is described only in this SLA.

4. Intellectual Property Rights.

- 4.1. Except as expressly set forth in Section 2.1, 2.2, or 2.3, Modulate and its licensors retain all rights, title and interest in and to the Modulate Software, all copies thereof (by whomever produced), all rights therein, and all related documentation and materials. No licenses are granted to Customer except those expressly granted herein.

5. Fees.

- 5.1. **Monthly Usage Hours.** “**Monthly Usage Hours**” means the total number of hours of audio processed by the Modulate Software during a month. The Monthly Usage Hours for the past three (3) months and the current month shall be displayed to Customer at all times within the web console of Modulate’s platform. In some cases, Modulate, in its sole discretion may omit certain audio (such as pure silence) from the calculation of Monthly Usage Hours.
- 5.2. **Usage Cap.** The total ToxMod Fees charged to Customer within a given month shall not exceed the Usage Cap (the “**Maximum Monthly Fee**.”) The Maximum Monthly Fee shall initially be \$3,000/mo. Should the Monthly Usage Hours reach or exceed a number of hours such that Customer’s Usage Fees (after applying any appropriate discounts) would exceed the Maximum Monthly Fee, Modulate may, at its sole discretion, choose to immediately stop processing any further audio until the following month. In no case shall this decision impact Customer’s ability to view and respond to previously-processed audio through the rest of the Modulate ToxMod Web Service. The Maximum Monthly Fee may be amended at any point by Customer through two (2) weeks’ written notice to Modulate, provided that the Maximum Monthly Fee may not be less than \$1,000/mo.

- 5.3. **Usage Fees.** During each calendar month during the Term (or partial calendar month at the end or beginning of the Term), Customer will pay Modulate a fee equal to the Monthly Usage Hours multiplied by \$0.15/hr (the “Usage Fee”).
- 5.4. **Support Level.** Customer shall be entitled to support, and subject to usage restrictions, matching what is listed for the “Starter Tier” on Modulate’s pricing page at the URL <https://www.modulate.ai/toxmod-pricing> as of the effective date. This includes the fact that Customer shall only be entitled to use a single supported language and that Customer shall be entitled to a Marketing & Community consultation before deployment.
- 5.5. All payments and amounts referenced herein will be made from a bank located within the United States and in United States dollars. Customer will pay all applicable shipping charges, duties, assessments, taxes (exclusive of taxes on Modulate’s net income) and the like. Any payments more than thirty (30) days overdue will bear a late payment fee of one and a half percent (1.5%) per month, or, if lower, the maximum rate allowed by law. All Fees payable by Customer to Modulate for any calendar month during the Term (or partial calendar month at the end or beginning of the Term) will be paid by Customer to Modulate within thirty (30) days of the end of such calendar month.

Modulate Bank Details:	Beneficiary:
Citizens Bank 1 Citizens Drive Riverside, RI 02915 <i>Routing Number:</i> 211070175 <i>Swift Code:</i> CTZIUS33	Modulate, Inc 212 Elm Street, Suite 300 Somerville, MA 02144 <i>Account No.</i> 1405048996

6. Term and Termination.

- 6.1. **Term.** The Agreement will commence on the Effective Date, and continue through the Termination Date, unless terminated early as described herein (the “Initial Term”).
- 6.2. **Notice of Material Breach or Default.** If either Party commits a material breach or default in the performance of any of its obligations under the Agreement, then the other Party may give the defaulting Party written notice of the material breach or default (including a statement of the facts relating to the material breach or default, the provisions of the Agreement that are in material breach or default, and the action required to cure the material breach or default). Without limiting the foregoing, any failure by Customer to timely pay to Modulate any amounts owing under the Agreement will constitute a material breach of the Agreement.
- 6.3. **Termination for Insolvency.** Either Party may terminate the Agreement, effective immediately, if the other Party files a petition for, or has a petition filed against it for, voluntary or involuntary bankruptcy or pursuant to any other insolvency law, makes or seeks to make a general assignment for the benefit of its creditors or applies for, or consents to, the appointment of a trustee, receiver or custodian for a substantial part of its property (provided, that, if such proceeding is involuntary, it is not dismissed within sixty (60) days of its institution).
- 6.4. **Termination for Inactivity.** Notwithstanding anything in this Agreement to the contrary, Modulate may terminate the Agreement with fifteen (15) days’ notice if Customer ceases to upload User Content to the ToxMod SDK for a period of at least sixty (60) consecutive calendar days. For the avoidance of doubt, such termination shall not take effect if Customer resumes uploading User Content any point prior to the intended termination date, and the sixty (60) day period will reset.
- 6.5. **Notice of Termination.** If the defaulting Party fails to cure a material breach or default specified in any notice under Section 6.2 within thirty (30) days after receipt of such notice (or such later date as may be specified in such notice), then the non-defaulting Party may terminate the Agreement by giving the defaulting Party written notice of termination.

- 6.6. **Effects of Termination.** Upon expiration or termination of the Agreement, Customer will immediately cease use of the Modulate Software, disable use of the ToxMod SDK in all Supported Titles, and delete all copies of the Modulate Software in its possession or under its control, and Customer will return to Modulate all copies of Modulate's Confidential Information.
- 6.7. **Survival.** The following sections of these Online Terms and Conditions shall survive any expiration or termination of the Agreement: 1, 2.4, 2.5, 2.6, 2.8, 4, 6.5, 6.6, 7, 8, 9, 10.5, and 12.

7. Confidentiality.

- 7.1. **Exclusions.** Confidential Information shall not include, to the extent shown by the receiving Party, information previously known to the receiving Party or materials to which the receiving Party had access prior to the provision of such information or materials by the disclosing Party; information or materials that are now or later become publicly known without breach of the Agreement by the receiving Party; information or materials provided to the receiving Party by a third party who, to the knowledge of the receiving Party, was not bound by a duty of confidentiality to the disclosing Party; or information independently developed by the receiving Party without any use of Confidential Information.
- 7.2. **General Obligation.** Each Party will (a) hold the Confidential Information of the other Party in strict confidence; (b) protect and safeguard the confidentiality of such Confidential Information with at least the same degree of care as the receiving Party uses to protect and safeguard its own confidential and proprietary information (but in no event with less than a reasonable degree of care); (c) immediately notify the disclosing Party of any unauthorized access, use, or disclosure of any such Confidential Information; (d) cooperate with the disclosing Party's efforts to prevent further breaches of this Section 7; and only use such Confidential Information to exercise its rights or fulfill its obligations under the Agreement.
- 7.3. **Disclosure to Representatives.** The receiving Party may only disclose or disseminate the disclosing Party's Confidential Information to the receiving Party and its affiliates' employees and contractors who have a need to know and the receiving Party's professional advisers (e.g., lawyers and accountants), in each case, during the time that the receiving Party is permitted to retain such Confidential Information hereunder; provided that any and all such employees and consultants are bound by written agreements or, in the case of professional advisers, ethical duties, respecting the Confidential Information in the manner set forth in the Agreement.
- 7.4. **Survival.** The obligations pursuant to this Section 7 shall survive the termination of the Agreement for the longer of (a) five (5) years, and (b) for Confidential Information that is being protected as a trade secret, for so long as the Confidential Information is being protected as such.
- 7.5. **Disclosure.** Notwithstanding anything to the contrary herein, the receiving Party may disclose the disclosing Party's Confidential Information as required by judicial process or otherwise by law; provided that, prior to such disclosure and subject to applicable laws, the receiving Party shall: promptly notify the disclosing Party of any actual or threatened legal compulsion of disclosure, and any actual legal obligation of disclosure, and cooperate with the disclosing Party's reasonable, lawful efforts to resist, limit or delay disclosure.
8. **Limitation of Liability.** EXCEPT FOR LIABILITY ARISING FROM A PARTY'S BREACH OF SECTION 2, 4, OR 7, OR A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 9, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY OR ANY END USER UNDER ANY THEORY OF LIABILITY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES (EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES ARE FORESEEABLE) ARISING OUT OF OR RELATED TO THIS AGREEMENT OR USE OF THE MODULATE SOFTWARE, INCLUDING, BUT NOT LIMITED TO, ANY LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS. EXCEPT FOR LIABILITY ARISING FROM A PARTY'S BREACH OF SECTION 2, 4, OR 7, OR A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTION 9, AND A PARTY'S OR ITS END USERS' GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, IN NO EVENT WILL EITHER PARTY'S LIABILITY TO THE OTHER PARTY ARISING OUT OF OR RELATED TO THE AGREEMENT EXCEED THE AMOUNTS PAID BY CUSTOMER TO MODULATE UNDER THE AGREEMENT OVER THE PRECEDING TWELVE (12) MONTHS.

9. Indemnification.

- 9.1. **Modulate Indemnification:**

(a) Modulate will defend at its expense any third-party claim, suit or proceeding (each a “**Claim**”) brought against Customer and its officers, directors, employees, and agents (“**Customer Indemnified Parties**”) by any third party in the United States to the extent such Claim is based upon (i) claims that the Modulate Software infringes or misappropriates such third party’s patents in the United States, or copyrights or trade secrets, or (ii) Modulate’s gross negligence or willful misconduct. Modulate shall pay all costs and damages awarded against any Customer Indemnified Party by a court of competent jurisdiction, and settlement amounts agreed to by Modulate, as a result of any such Claim; *provided, however*, that Customer (x) promptly notifies Modulate in writing of such Claim; (y) promptly gives Modulate the right to control and direct the investigation, preparation, defense, and settlement of such Claim, with counsel of Modulate’s own choosing (provided that Customer shall have the right to reasonably participate, at its own expense, in the defense or settlement of any such Claim); and (z) gives assistance and full cooperation for the defense of same.

(b) If in Modulate’s opinion, the Modulate Software might be held to infringe as set forth above, Modulate may, at its option, replace or modify the Modulate Software so as to avoid infringement, procure the right for Customer to continue to use the Modulate Software or terminate the Agreement without liability along with all then-existing licenses to the Modulate Software; *provided*, that Modulate will be obligated to continue to indemnify Customer under this Section 9.

(c) Notwithstanding the foregoing, Modulate will have no obligation under Section 9.1 or otherwise with respect to any infringement claim based upon any unauthorized use of the Modulate Software (including any unauthorized reproduction or distribution of any component of the Modulate Software) or any breach of the Agreement by Customer; any combination of elements of the Modulate Software with other products, equipment, software, uses or data, to the extent such claim would not have arisen absent such combination; any modification of the Modulate Software by any person other than Modulate or its authorized agents or contractors or any activity after Modulate has provided Customer with a work around or modification that would have avoided such issue.

9.2. **Customer Indemnification.**

(a) Customer will defend at its expense any Claim brought against Modulate, its licensors and each of their respective officers, directors, employees, and agents (“**Modulate Indemnified Parties**”) by any third party in the United States to the extent such Claim arises out of (a) the marketing, use or other exploitation of the Modulate Software by Customer or its End Users that is not expressly permitted by the Agreement (except to the extent covered by Modulate’s indemnity obligations under Section 9.1), (b) the exercise of any rights granted to Modulate by Customer in or to the User Content in accordance with the Agreement, (c) Customer’s or its End Users gross negligence or willful misconduct, (d) Customer’s decision to ban, mute, suspend, otherwise penalize End Users, or prevent any End Users from using or accessing the Supported Titles, (e) a breach of any of Customer’s representations, warranties or covenants under Sections 2.5, 2.8, 10.1, 10.2, or 10.3, or (f) the marketing, use, or exploitation of the Modulate Software by Customer’s End Users that is not expressly permitted by the Agreement (except to the extent covered by Modulate’s indemnity obligations under Section 9.1). Customer shall pay all costs and damages awarded against the applicable Modulate Indemnified Party by a court of competent jurisdiction, and settlement amounts agreed to by Customer, as a result of any such Claim; *provided, however*, that such Modulate Indemnified Party (x) promptly notifies Customer in writing of such Claim; (y) promptly gives Customer the right to control and direct the investigation, preparation, defense, and settlement of such Claim, with counsel of Customer’s own choosing (provided that Modulate shall have the right to reasonably participate, at its own expense, in the defense or settlement of any such Claim); and (z) gives assistance and full cooperation for the defense of same.

10. **Representations and Warranties**

- 10.1. Each of Customer and Modulate represents and warrants to the other that it has the required power and authority to enter into the Agreement and to perform its obligations hereunder; the execution of the Agreement and performance of its obligations hereunder do not and will not violate any other agreement to which it is a party; and the Agreement constitutes a legal, valid, and binding obligation when signed by both Parties.
- 10.2. Customer represents, warrants, and covenants to Modulate that Customer’s use of the Modulate Software will be solely in accordance with the Agreement and any applicable law, rule or regulation.
- 10.3. Customer represents, warrants, and covenants to Modulate that Customer has provided all required End User notices, obtained all necessary End User consents, and has all rights necessary to grant to Modulate the rights to use the User Content as set forth herein, including but not limited to improving the Modulate Software.

- 10.4. Modulate represents, warrants, and covenants to Customer that the Modulate Software will substantially conform with the specifications for the Modulate Software provided in writing by Modulate to Customer, and Modulate will not include in the Modulate Software any computer code that intentionally disrupts, intentionally disables or intentionally damages the operation of a network or computer system or any component thereof. In the event of a breach of the foregoing representations, warranties, and covenants, Modulate's sole obligation, and Customer's sole remedy, will be for Modulate to use commercially reasonable efforts to correct the Modulate Software. If Modulate cannot, or determines that it is not practical to, make these corrections, Modulate may terminate the License and any prepaid Fees will be refunded to Customer.
- 10.5. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH HEREIN OR SET FORTH IN EXHIBIT A, IF APPLICABLE, THE MODULATE SOFTWARE IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. FURTHER, MODULATE DOES NOT WARRANT RESULTS OR USE OR THAT THE MODULATE SOFTWARE IS ERROR-FREE OR THAT ITS USE WILL BE UNINTERRUPTED.

11. Marketing and Press.

- 11.1. **Use of Company Names and Logos.** During the Term, Modulate may include Customer's name and logo on its sales materials or public website solely for advertising and marketing purposes. During the Term, Customer may include Modulate's name and logo on its sales materials, public website, or, if appropriate, in-game credits, solely for advertising and marketing purposes. Neither Party shall (i) use the other Party's name in either its own corporate name or any fictitious business name or (ii) use any trademarks, service marks, trade names or logos that are confusingly similar to the other Party's trademarks, service marks, trade names or logos. Each Party further agrees that all use of the name, trademarks, trade names and logos of the other Party shall inure to the benefit of the other Party.
- 11.2. **Publicization of Work.** During the Term, Modulate may discuss the nature of Customer's use of the Modulate Software in its sales materials or press releases, provided that such materials are approved in writing in advance by Customer, such approval not to be unreasonably withheld or delayed. During the Term, Customer may discuss the nature of its use of the Modulate Software in Customer's advertising and marketing materials provided that such materials are approved in writing in advance by Modulate, such approval not to be unreasonably withheld or delayed.

12. General.

- 12.1. **Assignment.** Neither Party may assign or transfer the Agreement (or any of its rights or obligations under the Agreement) without the other Party's prior written consent, except that consent to assign will not be required in the context of a merger, acquisition, change of control or sale of all or substantially all of a Party's assets to which the Agreement relates. Any attempted assignment or transfer without complying with the preceding sentence will be void. The Agreement inures to the benefit of and is binding upon the Parties and their respective legal representatives, successors, and permitted assigns.
- 12.2. **Entire Agreement; Amendments.** The Agreement supersedes all prior discussions and writings (including for clarity all white papers and marketing materials), and constitutes the entire agreement, between the Parties with respect to the Modulate Software. The Parties may only amend the Agreement in a writing executed by an authorized representative of each Party. No employee, agent, or other representative of Modulate has any authority to bind Modulate with respect to any statement, representation, warranty, or other expression unless the same is specifically set forth in the Agreement.
- 12.3. **Governing Law; Venue.** The Agreement will be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts. Each of the Parties hereby irrevocably and unconditionally consents to submit to the sole and exclusive jurisdiction of the courts of the Commonwealth of Massachusetts and of the United States of America located in the Commonwealth of Massachusetts for any litigation among the Parties arising out of or relating to the Agreement.
- 12.4. **Irreparable Harm.** The Parties agree that any actual or threatened breach of the Agreement by the other Party would cause immediate and irreparable harm to a Party hereof, the value of which would be difficult or impossible to determine and for which monetary damages would be inadequate compensation. Accordingly, in addition to any other remedies, the Party without breach of the Agreement will be entitled to obtain injunctive relief or specific performance from any court of competent jurisdiction to prevent any such breaches and the

Party with breach of the Agreement expressly waives: (a) the defense that monetary damages would be adequate compensation for the other Party; (b) the defense that the harm to the Party with breach of the Agreement and/or to others would outweigh the harm to the Party without breach of the Agreement.

- 12.5. **Notices.** To be valid, all notices permitted or required under the Agreement must be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by e-mail, by the applicable Party; and upon receipt, if sent by certified or registered mail (return receipt requested), postage prepaid. All notices under the Agreement may be provided using the address set forth in the Order Form or, if sent electronically, to the Primary Contact listed in the attached Order Form.
- 12.6. **Relationship.** The Agreement does not confer any third-party beneficiary rights and does not create a joint venture, agency, partnership, or other form of joint enterprise between the Parties. Except as expressly provided herein, neither Party has the right, power, or authority to create any obligation or duty, express or implied, on behalf of the other. There are no intended third-party beneficiaries of the Agreement.
- 12.7. **Severability, Waiver, and Interpretation.** If any provision of the Agreement is found to be unenforceable or invalid, such unenforceability or invalidity will not render the Agreement unenforceable or invalid as a whole and, in such event, such provision is to be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. No waiver of any breach of the Agreement will constitute a waiver of any other breach. In construing or interpreting the terms of the Agreement: (a) the headings in the Agreement are for convenience only, and are not to be considered, and (b) no presumption is to operate in either Party's favor as a result of its counsel's role in drafting the Agreement.
- 12.8. **Counterparts.** The Agreement may be executed in any number of identical counterparts, each of which will be deemed an original and all of which will be construed as and constitute the same agreement. The Agreement may also be executed and delivered by facsimile and such execution and delivery will have the same force and effect of an original document with original signatures.