

Terms of Service (TOS)

ACCEPTABLE USE POLICY ("AUP")

1. **General Information.** As a provider of Internet/World Wide Web access, web site hosting, and other Internet-related services, Barak Hosting ("BARAK") offers its customers, the means to acquire and disseminate a wealth of public, private, commercial, and non-commercial information. BARAK respects that the Internet provides a forum for free and open discussion and dissemination of information, however, when there are competing interests at issue, BARAK reserves the right to take certain preventative or corrective actions. In order to protect these competing interests, BARAK has developed this Acceptable Use Policy ("AUP"), which supplements and explains certain terms of each customer's respective service agreement and is intended as a guide to the customer's rights and obligations when utilizing BARAK's services. This AUP will be revised from time to time. A customer's use of BARAK's services after changes to the AUP are posted on BARAK's web site, [HTTP://WWW.BARAKHOSTING.COM](http://www.barakhosting.com) under the Legal Details section, will constitute the customer's acceptance of any new or additional terms of the AUP that result from those changes. One important aspect of the Internet is that no one party owns or controls it. This fact accounts for much of the Internet's openness and value, but it also places a high premium on the judgment and responsibility of those who use the Internet, both in the information they acquire and in the information they disseminate to others. When subscribers obtain information through the Internet, they must keep in mind that BARAK cannot monitor, verify, warrant, or vouch for the accuracy and quality of the information that users may acquire. For this reason, the user must exercise his or her best judgment in relying on information obtained from the Internet, and also should be aware that some material posted to the Internet is sexually explicit or otherwise offensive. Because BARAK cannot monitor or censor the Internet, and will not attempt to do so, BARAK cannot accept any responsibility for injury to its users, customers or subscribers that results from inaccurate, unsuitable, offensive, or illegal Internet communications. When users, customers or disseminate information through the Internet, they also must keep in mind that BARAK does not review, edit, censor, or take responsibility for any information its users, customers or subscribers may create. When users place information on the Internet, they have the same liability as other authors for copyright infringement, defamation, and other harmful speech. Also, because the information they create is carried over BARAK's network and may reach a large number of people, including both customers and subscribers and non-subscribers of BARAK, customers' and subscribers' postings to the Internet may affect other customers and subscribers and may harm BARAK's goodwill, business reputation, and operations. For these reasons, customers and subscribers violate BARAK policy and the service agreement when they, their customers, affiliates, or subsidiaries engage in activities described herein.
2. **Scope.** This AUP governs the usage of BARAK's products and services (the "Services"). This AUP is incorporated by reference into each contract BARAK enters into with a customer (each, a "Customer") for the use of such Services. BARAK may modify this AUP at any time without notice. In addition, this AUP is incorporated by reference into the Terms of Service applicable to BARAK's Web site so that no person who utilizes BARAK's Web site (regardless of whether that person is a Customer) may take any action utilizing BARAK's Web site that a Customer would be prohibited to take utilizing the Services.
3. **Purpose.** The purpose of this AUP is to enhance the quality of the Services and to protect BARAK's customers, and the Internet community as a whole, from illegal, irresponsible, or disruptive Internet activities. This AUP applies to each Customer and its employees, agents, contractors or other users of such Customer who obtain Services from BARAK (each such person being a "User"). Each User should use common sense and good judgment in connection with the Services. Parents or guardians should always supervise minors in using the Internet. Parents and guardians should remain aware at all times of what is on the Internet and how the minors under their care are using the Services and the Internet.
4. **Prohibited Uses.** Customers and Users may not:
 - a. Utilize the Services to send unsolicited bulk and/or commercial messages over the Internet (known as "spam" or "spamming"). It is not only harmful because of its negative impact on consumer attitudes toward BARAK, but also because it can overload BARAK's network and disrupt service to its Customers subscribers. Maintaining an open SMTP relay is prohibited. Any direct action, configuration, or setting that causes excessive outbound email traffic is subject to review and possible action. When a complaint is received, BARAK has the absolute and sole discretion to determine from all of the evidence whether the email recipients were from an "opt-in" email list, or whether the outbound email traffic generated from an account is suitable for a shared hosting environment.
 - b. Utilize the Services in connection with any illegal activity. Without limiting the general application of this rule, Customers and Users may not:
 - i. Utilize the Services to copy material from third parties (including text, graphics, music, videos or other copyrightable material) without proper authorization;
 - ii. Utilize the Services to misappropriate or infringe the patents, copyrights, trademarks or other intellectual property rights of any third party;

- iii. Utilize the Services to traffic in illegal drugs, illegal gambling, obscene materials or other any products or services that are prohibited under applicable law;
 - iv. Utilize the Services to export encryption software to points outside the United States in violation of applicable export control laws;
 - v. Utilize the Services to Forge or misrepresent message headers, whether in whole or in part, to mask the originator of the message; or
 - vi. Utilize the Services in any manner that violates applicable law.
- c. Utilize the Services in connection with any tortious or actionable activity. Without limiting the general application of this rule, Customers and Users may not:
- Utilize the Services to publish or disseminate information that (A) constitutes slander, libel or defamation, (B) publicizes the personal information or likeness of a person without that person's consent or (C) otherwise violates the privacy rights of any person. Utilize the Services to threaten persons with bodily harm, to make harassing or abusive statements or messages, or to solicit the performance of acts or services that are illegal under applicable law
 - i. Utilize the Services in connection with any other disruptive or abusive activity. Without limiting the general application of this rule, Customers and Users may not:
 - a. Utilize the Services to cause denial of service attacks against BARAK or other network hosts or Internet users or to otherwise degrade or impair the operation of BARAK's servers and facilities or the servers and facilities of other network hosts or Internet users; or
 - b. Post messages or software programs that consume excessive CPU time, or storage space, or network bandwidth; or
 - c. Utilize the Services to offer mail services, mail forwarding capabilities, POP accounts or auto responders other than for the User's own account; or
 - d. Utilize the Services to resell access to CGI scripts installed on BARAK's servers; or
 - e. Utilize the Services to subvert, or assist others in subverting, the security or integrity of any BARAK systems, facilities or equipment; or
 - f. Utilize the Services to gain unauthorized access to the computer networks of BARAK or any other person; or
 - g. Utilize the Services to provide passwords or access codes to persons not authorized to receive such materials by the operator of the system requiring the password or access code; or
 - h. Utilize the Services to (A) forge the signature or other identifying mark or code of any other person, (B) impersonate or assume the identity of any other person, or (C) engage in any other activity (including "spoofing") to attempt to deceive or mislead other persons regarding the true identity of the User (excluding the use of anonymous re-mailers or Internet nicknames); or
 - i. Utilize the Services to distribute or post any virus, worm, Trojan horse, or computer code intended to disrupt services, destroy data, destroy or damage equipment, or disrupt the operation of the Services; or
 - j. Utilize the Services to conduct port scans or other invasive procedures against any server (except any server for which the User is an authorized system administrator); or
 - k. Utilize the Services to distribute, advertise or promote software or services that have the primary purpose of encouraging or facilitating unsolicited commercial e-mail or Spam; or
 - l. Utilize the Services to solicit or collect, or distribute, advertise or promote, e-mail address lists for the purpose of encouraging or facilitating unsolicited commercial e-mail or Spam; or
 - m. Utilize the Services in any manner that might subject BARAK to unfavorable regulatory action, subject BARAK to any liability for any reason, or adversely affect BARAK's public image, reputation or goodwill, including, without limitation, sending or distributing sexually explicit, hateful, vulgar, racially, ethnically or otherwise objectionable materials as determined by BARAK in its sole discretion; or
 - n. While on a shared hosting platform, utilize, operate, enable, execute, compile, upload or publicly store source code, executable code, programs, or software packages designed to perform tasks not directly associated with website/email hosting, including, without limitation, (A) directly opening any listening port, (B) starting any 'daemon' process, (C) performing local/remote security scans, (D) simulating local shell/OS access by means of a tunneled/encapsulated connection to a remote host, (E) circumventing firewall restrictions, (F) connecting to any IRC/Peer to Peer file sharing server/network, (G) providing

'tracker' services to 'BitTorrent' clients and/or (H) exploiting web browser vulnerabilities, as determined by BARAK in its sole discretion; or

- o. Attempt to attack, disrupt, or abuse the support- and contact-related mechanisms of BARAK, including, but not limited to, telephone lines, email addresses, fax lines, bulletin boards or contact/signup forms; or
- p. Utilize the Services in any other manner to interrupt or interfere with the Internet usage of other persons;

5. Violations

- Disclaimer. BARAK expressly disclaims any obligation to monitor its Customers and other Users with respect to violations of this AUP. BARAK has no liability or responsibility for the actions of any of its Customers or other Users or any content any User may post on any Web site.
 - a. Reporting Non-Copyright Violations. BARAK encourages Users to report violations of this policy by e-mail to: abuse@BARAKHOSTING.com, including in any such report the name of the offending domain (for example, xyz.com) and the type of abuse (for example, Spam, illegal acts, harassment, etc.) in the "subject" field of the e-mail.
 - b. Reporting Copyright Violations. BARAK complies with the Digital Millennium Copyright Act ("DMCA"). BARAK encourages Users to report an alleged copyright infringement involving a user by sending a notice that complies with the DMCA which information is located under the Legal section of this website.
 - c. Remedies. If BARAK learns of a violation of this AUP, BARAK will respond to the applicable Customer and may, in BARAK's sole discretion, take any of the following actions, in accordance with the severity and duration of the violation:
 - Warning the Customer; and/or
 - i. Suspending the offending Customer from the Services; and/or
 - ii. Terminating the offending Customer from the Services; and/or
 - iii. Imposing fees or charges on the offending Customer account in accordance with the applicable service contract; and/or
 - iv. Removing the offending content; and/or
 - v. Taking other action in accordance with this AUP, the applicable service contract or applicable law.
 - vi. When a complaint is received, BARAK will investigate and shutdown the account(s) that is/are SPAMing. A \$250 USD charge for violating this policy will be charged to the person/account initiating the SPAM. In addition, BARAK reserves the right to prosecute for this violation. A \$1.00 USD charge will be assessed per each and every email sent.

- 6. **Reservation of Rights.** BARAK reserves the right to cooperate with appropriate legal authorities in investigations of claims of illegal activity involving BARAK's Services, Customers and other Users. BARAK reserves all other rights to respond to violations of this AUP to the extent of applicable law and in accordance with any applicable contractual obligations. BARAK may utilize technical means to monitor communications into, and out of, its network facilities to prevent the introduction of viruses or other hostile code, to prevent intrusions and otherwise to enforce this AUP and each Customer agrees that BARAK is authorized to monitor its communications through BARAK's network for such purposes.

Revised: May 2008

USER AGREEMENT

This User Agreement ("Agreement") is an agreement between BARAK HOSTING, ("BARAK"), a FLORIDA company, and the party set forth in the related order form ("Customer" or "you") incorporated herein by reference (together with any subsequent order forms submitted by Customer, the "Order Form"), and applies to the purchase of all services ordered by Customer on the Order Form (collectively, the "Services").

PLEASE READ THIS AGREEMENT CAREFULLY.

BY CLICKING ON THE BUTTON ON THE ORDER FORM CREATES A CONTRACT BETWEEN CUSTOMER AND BARAK, CONSISTING OF THE ORDER, THE APPLICABLE SERVICE DESCRIPTION AND THIS USER AGREEMENT AND YOU ARE AGREEING TO BE BOUND BY THE TERMS OF THIS AGREEMENT AND ALL TERMS AND CONDITIONS INCORPORATED BY REFERENCE IN THIS AGREEMENT, INCLUDING BARAK'S USAGE POLICY. YOUR USE OF THE SERVICES CONSTITUTES ACCEPTANCE OF THIS AGREEMENT.

1. **Acceptable Use Policy.** Under this Agreement, Customer shall comply with BARAK's then current Acceptable Use Policy ("AUP"), as amended, modified or updated from time to time by BARAK, which currently can be viewed under the Legal Details section of this web site, and which is incorporated in this Agreement by reference. Customer hereby acknowledges that it has reviewed the AUP and that the terms of the AUP are incorporated herein by reference. In the event of any inconsistencies between this Agreement and the AUP, the terms of the AUP shall govern. BARAK does not intend to systematically monitor the content that is submitted to, stored on or distributed or disseminated by Customer via the Service (the "Customer Content"). Customer Content includes content of Customer's customers and/or users of Customer's website. Accordingly, under this Agreement, you will be responsible for your customers content and activities on your website. Notwithstanding anything to the contrary contained in this Agreement, BARAK may immediately take corrective action, including removal of all or a portion of the Customer Content, disconnection or discontinuance of any and all Services, or termination of this Agreement in the event of notice of possible violation by Customer of the AUP. In the event BARAK takes corrective action due to a violation of the AUP, BARAK shall not refund to Customer any fees paid in advance of such corrective action. Customer hereby agrees that BARAK shall have no liability to Customer or any of Customer's customers due to any corrective action that BARAK may take (including, without limitation, disconnection of Services).
2. **Term; Termination; Cancellation Policy.**
 - a. The initial term of this Agreement shall be as set forth in the Order Form (the "Initial Term"). The Initial Term shall begin upon commencement of the Services to Customer. After the Initial Term, this Agreement shall automatically renew. ADDITIONALLY AFTER THE INITIAL TERM, YOU ACKNOWLEDGE, AGREE AND AUTHORIZE BARAK TO AUTOMATICALLY BILL AND/OR CHARGE ON YOUR CREDIT CARD FOR SUCCESSIVE TERMS OF EQUAL LENGTH AS THE INITIAL TERM, UNLESS TERMINATED OR CANCELLED BY EITHER PARTY AS PROVIDED IN THIS SECTION. The Initial Term and all successive renewal periods shall be referred to, collectively, as the "Term".
 - b. This Agreement may be terminated
 - i. by either party by giving the other party thirty (30) days prior written notice subject to a \$50.00 early cancellation fee payable by Customer,
 - ii. by BARAK in the event of nonpayment by Customer,
 - iii. by BARAK, at any time, without notice, if, in BARAK's sole and absolute discretion and/or judgment, Customer is in violation of any term or condition of the this Agreement and related agreements, AUP, or Customer's use of the Services disrupts or, in BARAK's sole and absolute discretion and/or judgment, could disrupt, BARAK's business operations and/or
 - iv. by BARAK in accordance with Sections 1, 9, and 10 of this Agreement.
 - c. If you cancel this Agreement, upon proper notice to BARAK, prior to the end of the Initial Term or any Term thereafter,
 - you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation;
 - i. BARAK may refund to you all pre-paid fees for basic hosting services for the full months remaining after effectiveness of cancellation (i.e., no partial month fees shall be refunded), less any setup fees and any discount applied for prepayment, provided that, you are not in breach of any terms and conditions of this AUP, User Agreement, Spamming Policy or Domain Policy; and/or
 - ii. you shall be obligated to pay 100% of all charges for all Services for each month remaining in the Term (other than basic hosting fees as provided in (ii) above. Any cancellation request shall be effective thirty (30) days after receipt by BARAK, unless a later date is specified in such request.
 - d. BARAK may terminate this Agreement, without penalty,
 - if the Services are prohibited by applicable law, or become impractical or unfeasible for any technical, legal or regulatory reason, by giving Customer as much prior notice as reasonably practicable; or
 - i. immediately, if BARAK determines in good faith that Customer's use of the Customer the Services, the Web site or the Customer Content violates any BARAK term or condition, including this AUP, User Agreement, Spamming Policy, or Domain Policy. If BARAK cancels this Agreement prior to the end of the Term for your breach of this Agreement and related agreements, including the AUP, User Agreement, Spamming Policy, or Domain Policy or Customer's use of the Services disrupts our network, BARAK shall not refund to you any fees paid in advance of such cancellation and you shall be obligated to pay all fees and charges accrued prior to the effectiveness of such cancellation; further, you shall be obligated to pay 100% of all charges for all Services for each month remaining in the Term and BARAK shall have the right to charge you an administrative fee of \$50.00.
 - e. Upon termination of this Agreement for any cause or reason whatsoever, neither party shall have any further rights or obligations under this Agreement, except as expressly set forth herein. The provisions of Sections 2(e), 3, 4, 8, 10, 11, 13 and 15 of this Agreement shall survive the expiration or termination of this Agreement for any cause or reason whatsoever, and, notwithstanding the expiration or termination of this Agreement, the parties shall each remain liable to the other for any indebtedness or other liability theretofore arising under this Agreement. Termination of this Agreement and retention of pre-paid

fees and charges shall be in addition to, and not be in lieu of, any other legal or equitable rights or remedies to which BARAK may be entitled.

3. Customer's Responsibilities.

- Customer is solely responsible for the quality, performance and all other aspects of the Customer Content and the goods or services provided through the Customer Web site.
 - a. Customer will cooperate fully with BARAK in connection with BARAK's performance of the Services. Customer must provide any equipment or software that may be necessary for Customer to use the Services. Delays in Customer's performance of its obligations under this Agreement will extend the time for BARAK's performance of its obligations that depend on Customer's performance on a day for day basis. Customer will notify BARAK of any change in Customer's mailing address, telephone, e-mail or other contact information.
 - b. Customer assumes full responsibility for providing end users with any required disclosure or explanation of the various features of the Customer Web site and any goods or services described therein, as well as any rules, terms or conditions of use.
 - c. Because the Services permit Customer to electronically transmit or upload content directly to the Customer Web site, Customer shall be fully responsible for uploading all content to the Customer Web site and supplementing, modifying and updating the Customer Web site, including all back-ups. Customer is also responsible for ensuring that the Customer Content and all aspects of the Customer Web site are compatible with the hardware and software used by BARAK to provide the Services, as the same may be changed by BARAK from time to time. Specifications for the hardware and software used by BARAK to provide the Services will be available on BARAK's Web site. Customer shall periodically access BARAK's Web site to determine if BARAK has made any changes thereto. BARAK shall not be responsible for any damages to the Customer Content, the Customer Web site or other damages or any malfunctions or service interruptions caused by any failure of the Customer Content or any aspect of the Customer Web site to be compatible with the hardware and software used by BARAK to provide the Services.
 - d. Customer is solely responsible for making back-up copies of the Customer Web site and Customer Content.

4. Customer's Representations and Warranties.

- Customer hereby represents and warrants to BARAK, and agrees that during the Initial Term and any Term thereafter Customer will ensure that:
 - Customer is the owner or valid licensee of the Customer Content and each element thereof, and Customer has secured all necessary licenses, consents, permissions, waivers and releases for the use of the Customer Content and each element thereof, including without limitation, all trademarks, logos, names and likenesses contained therein, without any obligation by BARAK to pay any fees, residuals, guild payments or other compensation of any kind to any Person;
 - i. Customer's use, publication and display of the Customer Content will not infringe any copyright, patent, trademark, trade secret or other proprietary or intellectual property right of any person, or constitute a defamation, invasion of privacy or violation of any right of publicity or any other right of any person, including, without limitation, any contractual, statutory or common law right or any "moral right" or similar right however denominated;
 - ii. Customer will comply with all applicable laws, rules and regulations regarding the Customer Content and the Customer Web site and will use the Customer Web site only for lawful purposes;
 - iii. Customer has used its best efforts to ensure that the Customer Content is and will at all times remain free of all computer viruses, worms, Trojan horses and other malicious code; and
 - a. Customer shall be solely responsible for the development, operation and maintenance of Customer's web site, online store and e-commerce activities, for all products and services offered by Customer or appearing online and for all contents and materials appearing online or on Customer's products, including, without limitation
 - the accuracy and appropriateness of the Customer Content and content and material appearing in its store or on its products,
 - i. ensuring that the Customer Content and content and materials appearing in its store or on its products do not violate or infringe upon the rights of any person, and
 - ii. ensuring that the Customer Content and the content and materials appearing in its store or on its products are not defamatory or otherwise illegal. Customer shall be solely responsible for accepting, processing and filling customer orders and for handling customer inquiries or complaints. Customer shall be solely responsible for the payment or satisfaction of any and all taxes associated with its web site and online store.

Customer Content to the extent needed to provide and operate the Services.

5. **License to BARAK.** Customer hereby grants to BARAK a non-exclusive, royalty-free, worldwide right and license during the Initial Term and any Term thereafter to do the following to the extent necessary in the performance of Services under the Order:
- digitize, convert, install, upload, select, order, arrange, compile, combine, synchronize, use, reproduce, store, process, retrieve, transmit, distribute, publish, publicly display, publicly perform and hyperlink the Customer Content; and
 - a. make archival or back-up copies of the Customer Content and the Customer Web site.
 - b. Except for the rights expressly granted above, BARAK is not acquiring any right, title or interest in or to the Customer Content, all of which shall remain solely with Customer.
6. **Billing and Payment.**
- Customer will pay to BARAK the service fees for the Services in the manner set forth in the Order Form.
 - a. BARAK may increase the Service Fees (i) in the manner permitted in the service description and (ii) at any time on or after expiration of the Initial Term by providing ten (10) days prior written notice thereof to Customer.
 - b. The Service Fees do not include any applicable sales, use, revenue, excise or other taxes imposed by any taxing authority with respect to the Services or any software provided hereunder (excluding any tax on BARAK's net income). All such taxes will be added to BARAK's invoices for the fees as separate charges to be paid by Customer. All fees are fully earned when due and non-refundable when paid.
 - c. Unless otherwise specified, all fees and related charges shall be due and payable within thirty (30) days after the date of the invoice. If any invoice is not paid within seven (7) days after the date of the invoice, BARAK may charge Customer a late fee of \$25.00 for such invoice; in addition any amounts payable to BARAK not paid when due will bear interest at the rate of one and one half percent (1.5%) per month or the maximum rate permitted by applicable law, whichever is less.
 - d. If BARAK collects through a collection agency, or if BARAK prevails in any action to which the Customer and BARAK are parties, Customer will pay all costs of collection, arbitration and litigation, including, without limitation, all court costs and BARAK's reasonable attorneys' fees.
 - e. If any check is returned for insufficient funds BARAK may impose a processing charge of \$25.00.
 - f. In the event that any amount due to BARAK remains unpaid seven (7) days after such payment is due, BARAK, in its sole discretion, may immediately terminate this Agreement, and/or withhold or suspend Services.
 - g. There may be a \$50.00 charge to reinstate accounts that have been suspended or terminated.
 - h. Wire transfers will be assessed a \$30.00 charge.
 - i. Customer acknowledges and agrees that BARAK may pre-charge Customer's fees for the Services to its credit card supplied by Customer during registration for the Initial Term.
 - j. YOU ACKNOWLEDGE, AGREE AND AUTHORIZE BARAK TO AUTOMATICALLY BILL AND/OR CHARGE ON YOUR CREDIT CARD FOR SUCCESSIVE TERMS OF EQUAL LENGTH AS THE INITIAL TERM, UNLESS TERMINATED OR CANCELLED BY EITHER PARTY AS PROVIDED IN SECTION 2.
7. **BARAK as Reseller or Licensor.** BARAK is acting only as a reseller or licensor of the hardware, software and equipment used in connection with the products and/or Services that were or are manufactured or provided by a third party ("Non-BARAK Product"). BARAK shall not be responsible for any changes in the Services that cause the Non-BARAK Product to become obsolete, require modification or alteration, or otherwise affect the performance of the Services. Any malfunction or manufacturer's defects of Non-BARAK Product either sold, licensed or provided by BARAK to Customer or purchased directly by Customer used in connection with the Services will not be deemed a breach of BARAK's obligations under this Agreement. Any rights or remedies Customer may have regarding the ownership, licensing, performance or compliance of Non-BARAK Product are limited to those rights extended to Customer by the manufacturer of such Non-BARAK Product. Customer is entitled to use any Non-BARAK Product supplied by BARAK only in connection with Customer's permitted use of the Services. Customer shall use its best efforts to protect and keep confidential all intellectual property provided by BARAK to Customer through any Non-BARAK Product and shall make no attempt to copy, alter, reverse engineer, or tamper with such intellectual property or to use it other than in connection with the Services. Customer shall not resell, transfer, export or re-export any Non-BARAK Product, or any technical data derived therefrom, in violation of any applicable United States or foreign law.
8. **Internet Protocol (IP) Address Ownership.** If BARAK assigns Customer an Internet Protocol ("IP") address for Customer's use, the right to use that IP address shall belong only to BARAK, and Customer shall have no right to use that IP address except as permitted by BARAK in its sole and absolute discretion in connection with the Services, during the term of this Agreement. BARAK shall maintain and control ownership of all Internet Protocol numbers and addresses that may be assigned to Customer by BARAK, and BARAK reserves the right to change or remove any and all such Internet Protocol numbers and addresses, in its sole and absolute discretion.

9. **Caching.** Customer expressly
- grants to BARAK a license to cache the entirety of the Customer Content and Customer's web site, including content supplied by third parties, hosted by BARAK under this Agreement and
 - a. agrees that such caching is not an infringement of any of Customer's intellectual property rights or any third party's intellectual property rights.
10. **CPU Usage.** Customer agrees that Customer shall not use excessive amounts of CPU processing on any of BARAK's servers. Any violation of this policy may result in corrective action by BARAK, including assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken in BARAK's sole and absolute discretion. If BARAK takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action.
11. **Bandwidth and Disk Usage.** Customer agrees that bandwidth and disk usage shall not exceed the number of megabytes per month for the Services ordered by Customer on the Order Form (the "Agreed Usage"). BARAK will monitor Customer's bandwidth and disk usage. BARAK shall have the right to take corrective action if Customer's bandwidth or disk usage exceeds the Agreed Usage. Such corrective action may include the assessment of additional charges, disconnection or discontinuance of any and all Services, or termination of this Agreement, which actions may be taken in BARAK's sole and absolute discretion. If BARAK takes any corrective action under this section, Customer shall not be entitled to a refund of any fees paid in advance prior to such action.
12. **Property Rights.**
- BARAK hereby grants to Customer a limited, non-exclusive, non-transferable, royalty-free license, exercisable solely during the term of this Agreement, to use BARAK technology, products and services solely for the purpose of accessing and using the Services. Customer may not use BARAK's technology for any purpose other than accessing and using the Services. Except for the rights expressly granted above, this Agreement does not transfer from BARAK to Customer any BARAK technology, and all rights, titles and interests in and to any BARAK technology shall remain solely with BARAK. Customer shall not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from any of the BARAK.s
 - a. BARAK owns all right, title and interest in and to the Services and BARAK's trade names, trademarks, service marks, inventions, copyrights, trade secrets, patents, know-how and other intellectual property rights relating to the design, function, marketing, promotion, sale and provision of the Services and the related hardware, software and systems ("Marks"). Noting in this Agreement constitutes a license to Customer to use or resell the Marks.
13. **Disclaimer of Warranty.** Customer agrees to use all Services and any information obtained through or from BARAK, at Customer's own risk. Customer acknowledges and agrees that BARAK exercises no control over, and accepts no responsibility for, the content of the information passing through BARAK's host computers, network hubs and points of presence or the Internet. **THE SERVICES PROVIDED UNDER THIS AGREEMENT ARE PROVIDED ON AN AS IS, AS AVAILABLE BASIS. NONE OF BARAK, ITS PARENT, SUBSIDIARY OR AFFILIATED CORPORATIONS, OR ANY OF THEIR RESPECTIVE EMPLOYEES, OFFICERS, DIRECTORS, SHAREHOLDERS, AFFILIATES, AGENTS, ATTORNEYS, SUPPLIERS, THIRD-PARTY INFORMATION PROVIDERS, MERCHANTS, LICENSORS OR THE LIKE (EACH, AN "BARAK PERSON") MAKE ANY WARRANTIES OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT, FOR THE SERVICES OR ANY EQUIPMENT BARAK PROVIDES. NO BARAK PERSON MAKES ANY WARRANTIES THAT THE SERVICES WILL NOT BE INTERRUPTED OR ERROR FREE; NOR DO ANY OF THEM MAKE ANY WARRANTIES AS TO THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SERVICES OR AS TO THE ACCURACY, RELIABILITY OR CONTENT OF ANY INFORMATION, SERVICES OR MERCHANDISE CONTAINED IN OR PROVIDED THROUGH THE SERVICES. BARAK IS NOT LIABLE, AND EXPRESSLY DISCLAIMS ANY LIABILITY, FOR THE CONTENT OF ANY DATA TRANSFERRED EITHER TO OR FROM CUSTOMER OR STORED BY CUSTOMER OR ANY OF CUSTOMER'S CUSTOMERS VIA THE SERVICES PROVIDED BY BARAK. NO ORAL ADVICE OR WRITTEN INFORMATION GIVEN BY ANY BARAK PERSON, WILL CREATE A WARRANTY; NOR MAY YOU RELY ON ANY SUCH INFORMATION OR ADVICE. The terms of this section shall survive any termination of this Agreement.**
14. **Limited Warranty.**
- BARAK represents and warrants to Customer that the Services will be performed (a) in a manner consistent with industry standards reasonably applicable to the performance thereof; (b) at least at the same level of service as provided by BARAK generally to its other customers for the same services; and (c) in compliance in all material respects with the applicable Service Descriptions. Customer will be deemed to have accepted such Services unless Customer notifies BARAK, in writing, within thirty (30) days after performance of any Services of any breach of the foregoing warranties. Customer's sole and exclusive remedy, and BARAK's sole obligation, for breach of the foregoing warranties shall be for BARAK, at its option, to re-perform the defective Services at no cost to Customer, or, in the event of interruptions to the Services caused by a breach of the foregoing warranties, issue Customer a credit in an amount equal to the current monthly service fees pro rated by the number of hours in which the Services have been interrupted. BARAK may provision the Services from any of its data centers and may from time to time re-provision the Services from different data centers.

- a. The foregoing warranties shall not apply to performance issues or defects in the Services (a) caused by factors outside of BARAK's reasonable control; (b) that resulted from any actions or inactions of Customer or any third parties; or (c) that resulted from Customer's equipment or any third-party equipment not within the sole control of BARAK. **EXCEPT AS EXPRESSLY PROVIDED IN THIS SECTION, BARAK MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES OR ANY SOFTWARE PROVIDED UNDER THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD-PARTY RIGHTS, AND BARAK HEREBY EXPRESSLY DISCLAIMS THE SAME. WITHOUT LIMITING THE FOREGOING, ANY THIRD-PARTY SOFTWARE PROVIDED TO CUSTOMER HEREUNDER IS PROVIDED "AS**

- g. This limitation of liability reflects an informed, voluntary allocation between the parties of the risks (known and unknown) that may exist in connection with this Agreement. The terms of this section shall survive any termination of this Agreement.

16. **Indemnification.** Customer agrees to indemnify, defend and hold harmless BARAK and its parent, subsidiary and affiliated companies, and each of their respective officers, directors, employees, shareholders, attorneys and agents (each an "indemnified party" and, collectively, "indemnified parties") from and against any and all claims, damages, losses, liabilities, suits, actions, demands, proceedings (whether legal or administrative), and expenses (including, but not limited to, reasonable attorney's fees) threatened, asserted, or filed by a third party against any of the indemnified parties arising out of or relating to Customer's use of the Services, (ii) any violation by Customer of the AUP, (iii) any breach of any representation, warranty or covenant of Customer contained in this Agreement or (iv) any acts or omissions of Customer. The terms of this section shall survive any termination of this Agreement.

17. **Miscellaneous.**

- **Independent Contractor.** BARAK and Customer are independent contractors and nothing contained in this Agreement places BARAK and Customer in the relationship of principal and agent, master and servant, partners or joint venturers. Neither party has, expressly or by implication, or may represent itself as having, any authority to make contracts or enter into any agreements in the name of the other party, or to obligate or bind the other party in any manner whatsoever.

- a. **Governing Law; Jurisdiction.** Any controversy or claim arising out of or relating to this Agreement, the formation of this Agreement or the breach of this Agreement, including any claim based upon arising from an alleged tort, shall be governed by the substantive laws of the State of FLORIDA. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement. **ANY SUIT, ACTION OR PROCEEDING CONCERNING THIS AGREEMENT MUST BE BROUGHT IN A FLORIDA STATE OR FEDERAL COURT LOCATED IN LOS ANGELES COUNTY, FLORIDA, AND EACH OF THE PARTIES HEREBY IRREVOCABLY CONSENTS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS (AND OF THE APPROPRIATE APPELLATE COURTS THEREFROM) IN ANY SUCH SUIT, ACTION OR PROCEEDING AND IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF THE VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY SUCH COURT OR THAT ANY SUCH SUIT, ACTION OR PROCEEDING WHICH IS BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.**
- b. **Headings.** The headings herein are for convenience only and are not part of this Agreement.
- c. **Entire Agreement; Amendments.** This Agreement, including documents incorporated herein by reference, supersedes all prior discussions, negotiations and agreements between the parties with respect to the subject matter hereof, and this Agreement constitutes the sole and entire agreement between the parties with respect to the matters covered hereby. In case of a conflict between this Agreement and any purchase order, service order, work order, confirmation, correspondence or other communication of Customer or BARAK, the terms and conditions of this Agreement shall control. No additional terms or conditions relating to the subject matter of this Agreement shall be effective unless approved in writing by any authorized representative of Customer and BARAK. This Agreement may not be modified or amended except by another agreement in writing executed by the parties hereto; provided, however, that these Terms of Service may be modified from time to time by BARAK in its sole discretion, which modifications will be effective upon posting to BARAK's web site.
- d. **Severability.** All rights and restrictions contained in this Agreement may be exercised and shall be applicable and binding only to the extent that they do not violate any applicable laws and are intended to be limited to the extent necessary so that they will not render this Agreement illegal, invalid or unenforceable. If any provision or portion of any provision of this Agreement shall be held to be illegal, invalid or unenforceable by a court of competent jurisdiction, it is the intention of the parties that the remaining provisions or portions thereof shall constitute their agreement with respect to the subject matter hereof, and all such remaining provisions or portions thereof shall remain in full force and effect.
- e. **Notices.** All notices and demands required or contemplated hereunder by one party to the other shall be in writing and shall be deemed to have been duly made and given upon date of delivery if delivered in person or by an overnight delivery or postal service, upon receipt if delivered by facsimile the receipt of which is confirmed by the recipient, or upon the expiration of five days after the date of posting if mailed by certified mail, postage prepaid, to the addresses or facsimile numbers set forth below the parties' signatures. Either party may change its address or facsimile number for purposes of this Agreement by notice in writing to the other party as provided herein. BARAK may give written notice to Customer via e-mail to the Customer's e-mail address as maintained in BARAK's billing records.
- f. **Waiver.** No failure or delay by any party hereto to exercise any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy by any party preclude any other or further exercise thereof or the exercise of any other right or remedy. No express waiver or assent by any party hereto to any breach of or default in any term or condition of this Agreement shall constitute a waiver of or an assent to any succeeding breach of or default in the same or any other term or condition hereof.
- g. **Assignment; Successors.** Customer may not assign or transfer this Agreement, or any of its rights or obligations

hereunder, without the prior written consent of BARAK. Any attempted assignment in violation of the foregoing provision shall be null and void and of no force or effect whatsoever. BARAK may assign its rights and obligations under this Agreement, and may engage subcontractors or agents in performing its duties and exercising its rights hereunder, without the consent of Customer. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

- h. **Limitation of Actions.** No action, regardless of form, arising by reason of or in connection with this Agreement may be brought by either party more than two years after the cause of action has arisen.
- i. **Counterparts.** If this Agreement is signed manually, it may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. If this Agreement is signed electronically, BARAK's records of such execution shall be presumed accurate unless proven otherwise.
- j. **Force Majeure.** Neither party is liable for any default or delay in the performance of any of its obligations under this Agreement (other than failure to make payments when due) if such default or delay is caused, directly or indirectly, by forces beyond such party's reasonable control, including, without limitation, fire, flood, acts of God, labor disputes, accidents, acts of war or terrorism, interruptions of transportation or communications, supply shortages or the failure of any third party to perform any commitment relative to the production or delivery of any equipment or material required for such party to perform its obligations hereunder.
- k. **No Third-Party Beneficiaries.** Except as otherwise expressly provided in this Agreement, nothing in this Agreement is intended, nor shall anything herein be construed to confer any rights, legal or equitable, in any Person other than the parties hereto and their respective successors and permitted assigns. Notwithstanding the foregoing, Customer acknowledges and agrees that Microsoft, and any supplier of third-party supplier that is identified as a third-party beneficiary in the Service Description, is an intended third-party beneficiary of the provisions set forth in this Agreement as they relate specifically to its products or services and shall have the right to enforce directly the terms and conditions of this Agreement with respect to its products or services against Customer as if it were a party to this Agreement.
- l. **Government Regulations.** Customer may not export, re-export, transfer or make available, whether directly or indirectly, any regulated item or information to anyone outside the United States in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the United States government and any country or organization of nations within whose jurisdiction Customer operates or does business.
- m. **Marketing.** Customer agrees that during the term of this Agreement BARAK may publicly refer to Customer, orally and in writing, as a customer of BARAK. Any other public reference to Customer by BARAK requires the written consent of Customer.