



## Terms & Conditions of Service

*Last update: Saturday, August 25<sup>th</sup>, 2009*

The following terms of service (these "Terms of Service" or this "Agreement") govern the provision by ServerTune.com Internet Services, Inc. ("ServerTune") to the customer executing this online transaction ("Customer"), of the products and services described in (i) the Order Form submitted in connection with this online transaction (the "Order Form"), (ii) the Service Level Agreement (as in effect from time to time and set forth on ServerTune's website, the "SLA") governing the Customer's limited right to recover certain service credits and (iii) ServerTune's technical support descriptions (collectively clauses (i) through (iii), the "Products and Services"). These Terms of Service shall be effective as of the date that Customer executes its online transaction and thereby accepts these Terms of Services (the "Effective Date"). These Terms of Service hereby incorporate by reference the SLA, ServerTune's Acceptable Usage Policy (as in effect from time to time as set forth on ServerTune's website, the "AUP") and the Order Form each of which is made a part of these Terms of Service and collectively referred to herein as the "Agreement." Capitalized terms used herein without being defined herein shall have the meaning ascribed to such capitalized term in the SLA or AUP, as applicable. Customer's use of ServerTune's website, ServerTune Network, and the Products and Services is also subject to Customer's acceptance and compliance with ServerTune's Privacy Policy which ServerTune hereby reserves the right to amend, alter, modify, replace or suspend, from time to time in its sole discretion. Current copies of ServerTune's SLA, AUP and Privacy Policy may be reviewed or printed by Customer at the Legal section of ServerTune's website. CUSTOMER HEREBY REPRESENTS AND WARRANTS THAT IT HAS READ, UNDERSTOOD AND ACCEPTED THE TERMS OF THE SLA, AUP AND PRIVACY POLICY.

By submitting an Order Form online or by using ServerTune's website, ServerTune Network (as defined in the SLA), products or services, Customer hereby agrees to the terms and conditions of the Agreement.

1. **Services and Monthly Commitments.** ServerTune agrees to provide the Products and Services in accordance with the terms and conditions of this Agreement beginning on the Effective Date. ServerTune may perform additional technical, supplemental, or professional services (other than the Products and Services) for Customer at either ServerTune's published pricing rates or at rates mutually agreed to in writing between Customer and ServerTune. Also, ServerTune may perform remedial services as provided for in the AUP at the pricing set forth therein and without obtaining Customer's consent in advance. If a Customer subscribes for any Product and Service for a term other than on a month-to-month basis, then each month of such term Customer shall pay ServerTune the greater of (i) the actual fees and expenses payable by Customer for the Products and Services for which Customer has subscribed for such term (based on all actual

licensing and usage of such Products and Services on a monthly basis) and (ii) the Minimum Monthly Commitment. For purposes of this Agreement, "Minimum Monthly Commitment" shall be determined each month and shall mean with respect to each Product and Service subscribed for by Customer other than on a month-to-month basis, the greater of (A) the amount specified as the "Minimum Monthly Commitment" in the Order Form associated with the subscription for such Products and Services and (B) the highest aggregate monthly amount paid or payable by Customer with respect to all Products and Services subscribed to for a term other than on a month-to-month basis, during the current term for which Customer subscribed for such Products and Services. If for any month Customer's aggregate monthly fees and expenses actually paid or payable by Customer for the Products and Services for which Customer has subscribed for such term (based on all actual licensing and usage of such Products and Services on a monthly basis) does not exceed the Minimum Monthly Commitment, then Customer shall pay the Minimum Monthly Commitment in lieu of the charges that would otherwise be due with respect to such Products and Services. All payments made by Customer with respect to such Products and Services shall be credited first towards the Minimum Monthly Commitment.

2. **Term and Renewal.** Unless Customer agrees to a one-year term or unless otherwise stated in an Order Form or any service description, the initial term ("Initial Term") of this Agreement shall be month-to-month, commencing on the Effective Date and shall automatically renew (A) in the case of a month-to-month term, the first day of each month for successive one-month periods unless cancelled or terminated earlier pursuant to the express terms of this Agreement or (B) in the case of a one-year term, each yearly anniversary of the Effective Date for successive one-year periods unless cancelled or terminated earlier pursuant to the express terms of this Agreement (in each case, a "Renewal Period"). Customer agrees to be bound by the service term selected on the Order Form or via applicable promotional codes. ServerTune may cancel or elect not to renew the Products and Services for any reason or no reason at all by delivering to Customer a written notice of non-renewal at least five (7) days prior to the expiration of the Initial Term or the then-current Renewal Period, as applicable.
3. **Customer Cancellation or Non-Renewal.** In order to cancel or elect not to renew any Product or Service, Customer must submit an online service cancellation request (a "Cancellation Notice") by completing the cancellation form provided in our Technical Support Tickets (<http://ServerTune.com/tickets/>) at least seven (7) days prior to expiration of the Initial Term or the then-current Renewal Term and upon submission of the Cancellation Notice. An email note will be sent to you to confirm the information set forth on the Cancellation Notice, unless otherwise instructed in writing by ServerTune to do so otherwise.

CUSTOMER ACKNOWLEDGES AND AGREES THAT NO PRODUCT OR SERVICE WILL BE CANCELLED UNLESS CANCELLATION NOTICE IS SUBMITTED 7 DAYS. ALL PRODUCTS AND SERVICES SHALL CONTINUE TO RENEW AND CUSTOMER WILL CONTINUE TO BE BILLED FOR ALL PRODUCTS AND SERVICES.

4. **Termination.** ServerTune may immediately terminate this Agreement at any time, and without liability, upon the occurrence of any of the following events (“ServerTune Termination”):
- i. Customer’s failure to pay any overdue amount within three (3) days after written notice by ServerTune is given to Customer or
  - ii. Customer’s material breach or violation of any provision of this Agreement (other than such violations set forth in clauses (iii), (iv) and (v) below) that is not cured within seven (7) days of Customer’s receipt of written notice from ServerTune referencing such breach or violation.
  - iii. Customer ceasing to do business in the normal course, becoming or being declared insolvent or bankrupt, being the subject of any proceeding relating to liquidation or insolvency which is not dismissed within ninety (30) calendar days, or making an assignment for the benefit of its creditors.
  - iv. Customer’s violation of the AUP or the Privacy Policy; or
  - v. ServerTune determines in its sole discretion that Customer continues to host content that may subject ServerTune to legal liability (in which case, ServerTune may terminate or modify the Products and Services to avoid such liability).

Customer may terminate this Agreement with respect to all, and not less than all, of the Products and Services without liability (except for Charges due through the effective date of such termination) upon the occurrence of a material breach by ServerTune of its obligations to provide the Products and Services according to the terms of this Agreement that is not cured within seven (7) business days after written notice from Customer describing such breach in detail is received by ServerTune (“Customer Termination”). In the event of a Customer Termination, Customer shall pay (1) all outstanding amounts payable through the effective date of such termination and (2) if the Products and Services include software for which ServerTune does not then provide general customer support, Customer shall pay to ServerTune an amount equal to ServerTune's cost of such software for the entire Initial Term and any applicable Renewal Periods. If Customer terminates this Agreement for any reason other than a Customer Termination, Customer shall

pay to ServerTune an amount equal to all unpaid Charges through the effective date of such termination and (A) in the case of any Product and Service subscribed for on a month-to-month basis, all Charges for the Products and Services through the remainder of the Initial Term or the then-current Renewal Term, as applicable and (B) in the case of any Product and Service subscribed for other than on a month-to-month basis, all Charges for the Products and Services through the remainder of the Initial Term or the then-current Renewal Term, as applicable, calculated based upon the then-current Minimum Monthly Commitment payable by Customer upon the date of termination. CUSTOMER ACKNOWLEDGES THAT CUSTOMER WILL NOT BE ENTITLED TO ANY REFUND OR CREDIT IN THE EVENT THAT ANY PRODUCT OR SERVICE THAT IS PROVIDED ON THE BASIS OF A ONE-YEAR TERM IS TERMINATED, WITH OR WITHOUT CAUSE, PRIOR TO THE EXPIRATION OF THE ONE-YEAR TERM. CUSTOMER HEREBY WAIVES ALL RIGHTS TO ANY SUCH REFUND OR CREDIT.

Upon termination of this Agreement, ServerTune and Customer shall have no obligations to each other, except as provided for in this Agreement. Upon termination of this Agreement, Customer shall (i) pay all Charges and other amounts due and owing to ServerTune under these Terms of Service, (ii) immediately remove from ServerTune's premises all property owned by Customer, including, but not limited to, immediately removing all of Customer's data from ServerTune Network (including all servers owned or operated by ServerTune), and (iii) return to ServerTune all software, access keys, and any other property provided to Customer by ServerTune under this Agreement. Any physical property of Customer not removed from ServerTune's premises within forty-five (45) days after such termination shall become the property of ServerTune, which may, among other things, dispose of such property without the payment of any compensation to Customer. Sections 4, 5, 6, 7 and 8 shall survive the expiration, cancellation and termination of this Agreement for any reason.

**5. Payment.**

Customer agrees to pay all charges, fees, penalties, early cancellation charges, reconnection fees, service interruption fees, installation fees and other amounts due under this Agreement (collectively "Charges") in US dollars.

Each Customer that is a Minnesota resident agrees to pay all taxes applicable to its account. Except as otherwise provided for herein, all Charges for the Products and Services, and for any additional services described herein, shall be invoiced to the Customer and paid in advance of the Initial Term and each Renewal Term (but may include any applicable pro-rated amounts for partial months of for Products and Services provided on a month-to-month basis) and shall be due and payable upon receipt. Any additional one-time charges, including early cancellation

charges, accrued interest, late fees, service reinstatement fees, and any usage-based charges (installation or set-up fees) shall be invoiced in arrears and appear on either regular monthly invoices or separate invoices.

Server rental charges are incurred immediately at signup and are prorated by 3 days to allow for server provisioning and delivery.

Customer also shall pay to ServerTune all expenses incurred by ServerTune in exercising any of its rights under this Agreement or applicable law with respect to the collection of a payment default, including attorneys' fees, court costs, and collection agency fees. If Customer fails to pay any past due amount within five (5) days after written notice by ServerTune is given to Customer, ServerTune may suspend performance under this Agreement and if such past due amounts remain unpaid within five (5) days thereafter, ServerTune may terminate this Agreement. ServerTune may charge interest on any invoice amounts that are overdue by more than ten (10) days at the lesser of (a) 1.5% per month or (b) the maximum non-usurious rate under applicable law.

Customer shall be deemed to have accepted as conclusively accurate any invoice that it has not disputed in a writing delivered to ServerTune within sixty (60) days of the invoice date.

Customer may withhold the disputed portions of payments that are properly and timely disputed hereunder as long as it timely pays all undisputed charges that are outstanding. The parties shall work together in good faith to resolve any such disputed charge. In the event that this Agreement is terminated by ServerTune for any reason constituting "ServerTune Termination" (as defined above) or by Customer for any reason other than "Customer Termination" (as defined above), all Charges under the Agreement, including all remaining monthly or yearly fees due for the remaining portion of the Initial Term and each applicable Renewal Period, shall accelerate and are immediately due and payable. All set-up fees, monthly service fees and usage fees are non-refundable.

Customer shall not be entitled to any refunds or credits, pro-rated or otherwise, in the event of early termination of this Agreement by ServerTune according to the terms herein.

- 6. Indemnification.** Customer agrees to indemnify and hold harmless ServerTune, its subsidiaries, their affiliates and each of their respective directors, officers, employees, shareholders and agents (each an "Indemnified Party") against any losses, claims, damages, liabilities, penalties, actions, proceedings, judgments, or any and all costs thereof (collectively, "Losses") to which an

Indemnified Party may become subject and which Losses arise out of, or relate to the Agreement, Customer's use of the Products and Services, breach of any confidentiality obligation or any alleged infringement of any trademark, copyright, patent or other intellectual property right and will reimburse an Indemnified Party for all legal and other expenses, including reasonable attorneys' fees incurred by such Indemnified Party, in connection with investigating, defending, or settling any Loss, whether or not in connection with pending or threatened litigation in which such Indemnified Party is a party.

7. **Disclaimers;** Limitation on Company Liability.

ServerTune SHALL NOT BE LIABLE FOR (i) ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES, OR FOR ANY LOSS OF PROFITS OR LOSS OF REVENUE RESULTING FROM THE USE OF THE PRODUCTS AND SERVICES BY THE CUSTOMER OR ANY THIRD PARTIES OR ANY FAILURE OF THE PRODUCTS AND SERVICES OR (ii) ANY LOSS OF DATA, INCLUDING LOSS OF DATA RESULTING FROM DELAYS, NONDELIVERIES, MISDELIVERIES, SERVICE INTERRUPTIONS, FAILURE OF ServerTune NETWORK, RECLAMATION OF SERVERS BY ServerTune, FAILURE OF SERVERS, THE RELOADING OF AN OPERATING SYSTEM OR OTHER SOFTWARE ON A SERVER OR THE NEGLIGENCE OF ServerTune. CUSTOMER IS SOLELY RESPONSIBLE FOR SAFEGUARDING, BACKING UP AND ARCHIVING ALL DATA OWNED, CONTROLLED OR TRANSMITTED BY CUSTOMER THAT RESIDES ON ServerTune NETWORK OR ANY SERVER OWNED OR OPERATED BY ServerTune. IN NO EVENT SHALL ServerTune'S AGGREGATE LIABILITY FOR ANY CLAIM UNDER THIS AGREEMENT EXCEED THE AGGREGATE AMOUNT PAID BY CUSTOMER TO ServerTune IN THE BILLING CYCLE IMMEDIATELY PRECEEDING SUCH CLAIM. ServerTune PROVIDES ALL PRODUCTS AND SERVICES "AS IS," WITHOUT WARRANTY OF ANY KIND, WHETHER EXPRESS OR IMPLIED AND DISCLAIMS ALL IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER SHALL BE SOLELY RESPONSIBLE FOR THE SELECTION, USE AND SUITABILITY OF THE PRODUCTS AND SERVICES AND ServerTune SHALL HAVE NO LIABILITY THEREFORE. NO CLAIM MAY BE ASSERTED BY CUSTOMER AGAINST ServerTune MORE THAN TWO (2) YEARS FOLLOWING THE DATE OF THE EVENT THAT UNDERLIES ANY SUCH CLAIM. CUSTOMER HEREBY ACKNOWLEDGES AND AGREES THAT ITS SOLE REMEDY IN THE EVENT OF ServerTune'S FAILURE TO PROVIDE ANY PRODUCTS AND SERVICES IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT AS A RESULT OF A "QUALIFIED DOWNTIME EVENT" (AS DEFINED IN THE SLA) SHALL BE THE RIGHT TO SERVICE CREDITS (AS DEFINED IN THE SLA) SOLELY AS PROVIDED FOR

IN THE SLA.

## 8. Miscellaneous Terms

**Notices.** Unless otherwise specified herein, all notices, requests and other communications hereunder shall be sufficiently given if in writing and delivered personally or sent by electronic mail, or registered or certified mail (return receipt requested) to the address or email address of Customer listed in ServerTune's records or if to ServerTune then to the address set forth below. Such notices or other communications shall be deemed to have been given on the date that return confirmation is received (if sent via snail mail), (b) on the business day, or (c) five days after being sent (if sent by registered or certified mail). ServerTune.com Internet Services, Inc. 7611 Harold Avenue, Minneapolis, MN 55427 Attn: Customer Service Department Phone: (414) 455-5600 Email: customerservice@ServerTune.com

**Waiver.** It is agreed that no waiver by any party hereto of any breach or default of any of the covenants or agreements herein set forth shall be deemed a waiver as to any subsequent and/or similar breach or default.

**Severability.** If one or more of the provisions contained in this Agreement are found to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not be affected.

**Force Majeure.** Neither party shall lose any rights hereunder or be liable to the other party for damages or losses on account of failure of performance by the defaulting party if the failure is occasioned by any occurrence or contingency beyond its reasonable control, including war, strike, fire, Act of God, earthquake, flood, lockout, embargo, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of the nonperforming party; provided that such party shall use commercially reasonable efforts to promptly mitigate any damages or losses.

**ServerTune's Use of Customer's Name.** Customer agrees that ServerTune may, upon written consent by Customer, publicly disclose that ServerTune is providing services to Customer and may include Customer's name in any promotional materials, such as press releases or ServerTune's web site. Neither party may publicly use the other party's logo or other trade or service mark without that party's written consent.

**Non-Solicitation.** During the term of this Agreement and for twelve (12) months following

termination of this Agreement, Customer agrees that it shall not solicit for employment with Customer (or with any other party) any employee of ServerTune or interfere in the employment relationship between ServerTune and any of its employees with whom Customer has had contact in connection with this Agreement.

**Ownership.** ServerTune shall be the sole owner of all intellectual property, and all derivatives thereof, that ServerTune may develop in the course of providing the Products and Services. Each party to this Agreement retains exclusive ownership and rights in its trade secrets, inventions, copyrights, and other intellectual property. Upon termination of the Agreement, Customer agrees to promptly release any Internet protocol numbers, addresses, or address blocks assigned to Customer in connection with the Products and Services.

**Customer Hardware.** ServerTune acknowledges and agrees that the hardware provided by Customer to ServerTune to be used in connection with any Products and Services (the "Customer Hardware") is the property of Customer and shall be tagged and identified as such. ServerTune shall not pledge, hypothecate or otherwise encumber the Customer Hardware in any way and upon demand by Customer shall surrender the Customer Hardware to Customer, unless Customer fails to remove such Customer Hardware as provided for in Section 4 above.