

Instart Logic Terms of Service

THESE TERMS OF SERVICE (“**AGREEMENT**”, INCLUDING ANY EXHIBITS OR SCHEDULES HERETO, ANY VALID SERVICE ORDERS, AND THE TERMS AND CONDITIONS OF ANY TPOS (DEFINED BELOW) YOU PURCHASE THROUGH INSTART) IS A LEGAL AGREEMENT BETWEEN INSTART LOGIC, INC., A DELAWARE CORPORATION WITH OFFICES AT 450 LAMBERT AVENUE, PALO ALTO, CA 94306, USA (“**INSTART**”) AND YOU OR THE LEGAL ENTITY (OR ENTITIES) THAT YOU REPRESENT (INCLUDING THE CUSTOMER (AS DEFINED BELOW)). YOU HEREBY REPRESENT AND WARRANT THAT YOU HAVE AUTHORITY TO LEGALLY BIND THE CUSTOMER AND ANY OTHER ENTITIES THAT YOU REPRESENT. YOUR (INCLUDING ANY ENTITIES THAT YOU REPRESENT) AND/OR THE CUSTOMER’S USE OF ANY INSTART SERVICES, ACCEPTANCE OF AN INSTART SERVICE ORDER (AS DEFINED BELOW), OR OTHER CONTRACT FORMATION MECHANISM RECOGNIZED UNDER APPLICABLE LAW FROM TIME TO TIME, CONSTITUTES YOUR ACCEPTANCE (ON YOUR BEHALF AND ON BEHALF OF CUSTOMER AND ANY OTHER ENTITIES THAT YOU REPRESENT) OF THIS AGREEMENT AND ANY APPLICABLE TPO TERMS AND CONDITIONS. THIS AGREEMENT IS SOMETIMES ALSO REFERRED TO AS A MASTER SERVICES AGREEMENT OR “**MSA**”. CAPITALIZED TERMS SHALL HAVE THEIR MEANINGS DEFINED HEREIN. IN CONSIDERATION OF THE PREMISES AND COVENANTS SET FORTH IN THIS AGREEMENT, THE PARTIES HEREBY AGREE AS FOLLOWS:

1. SERVICE AND RESTRICTIONS

1.1 Scope of Supply.

(a) **Instart Core Service.** During the Term and subject this Agreement, Customer may place orders for Instart services in a form specified by Instart from time to time, provided both parties accept such order in writing (each accepted order a “**Service Order**”). The Instart services subject to this Agreement are those specified in a Service Order (such services, the “**Services**”).

(b) **Properties.** Any reference in a Service Order to a “**Property**” means a unique web site, web application, or mobile application which (i) is made up of one or more web domains or web subdomains with substantially similar configurations (including security settings); (ii) may contain a main public facing instance accessed by users and number of internal testing instances used for development which also have substantially similar configurations (including security settings) to the main public facing instance; (iii) may contain up to ten (10) unique domains and subdomains. Other groupings of web domains that have substantially dissimilar configurations or security settings are a separate and distinct property. Subject to Customer’s payment of the applicable fees, Instart will use commercially reasonable efforts to make the Services available to Customer on a seven day per week, twenty-four hour per day basis, pursuant to any applicable service level agreements incorporated into a Service Order.

(c) **TPOs.** Customer may purchase third party services or products through Instart (each a “**Third Party Offering**” or “**TPO**”) by executing a Service Order specifying the TPO(s). TPOs are made available by Instart from time to time in its discretion, and Customer acknowledges and agrees that (i) the Service does not include any TPOs, and (ii) the terms and conditions applicable to the Services as set forth in this Agreement do not apply to TPOs, and (iii) all TPOs are subject to additional terms and conditions as may be specified in an appendix attached and incorporated into a Service Order or incorporated by reference to terms and conditions posted on www.instartlogic.com/company/legal (any such terms and conditions, an “**Appendix**”). Instart and the TPO supplier will use commercially reasonable efforts to provide the TPO to Customer in accordance with the terms of the corresponding Appendix.

1.2 Access. Subject to Customer’s compliance with this Agreement and the Service Order(s), Customer may access and use the Services during the term specified in the Service Order for Customer’s business purposes only and subject to this Agreement. Customer acknowledges that the Services are made available by Instart, and no software code for the Services will be provided to Customer.

1.3 Restrictions. Customer will not (and will not allow any third party to): (i) reverse engineer, decompile, disassemble, or otherwise attempt to discover the underlying structure, ideas, or algorithms of the Services or any software used to provide or make the Services available except where such prohibition violates applicable law; (ii) remove or otherwise alter any proprietary notices or labels from the Services or any portion thereof; or (iii) access or use the Services to develop, promote, distribute, sell or support any product or service competitive with the Services or (iv) disclose any details about benchmarking results or technical specifications of any Services. Customer will use the Service only in accordance with applicable laws, including without limitation laws related to privacy (whether laws of the United States, European Union, or otherwise), intellectual property, consumer and child protection, obscenity, and defamation. Customer shall not make representations, warranties, or guarantees to any person or entity with respect to the Services that purport to be by or on behalf of Instart or its suppliers.

1.4 Ownership. Instart retains all rights, title, and interest in and to the Services, and any and all software, products, works or other intellectual property created, used, provided or made available by Instart under this Agreement or a Service Order.

1.5 Customer Content. Customer retains all right, title and interest in and to its website content (“**Customer Content**”) but excluding routing information, request headers, and other general internet transit information. Customer Content shall not be deemed part of any Instart Services by virtue of being located on or served from Instart servers. Customer is solely responsible for the operation, maintenance, development and use of Customer Content, including without limitation:

(a) any claims that Customer’s Content infringes, misappropriates, or otherwise violates any third party’s rights, including the handling of notices by any person claiming that Customer Content violates such person’s rights (including without limitation notices pursuant to the Digital Millennium Copyright Act);

(b) backing up Customer Content;

(c) the technical operation of Customer’s Content, and

(d) properly configuring and using the Services including taking steps to establish and maintain appropriate security and protection of Customer Content (e.g. encryption technology to prevent unauthorized access.)

1.6 Customer’s Users. Customer is responsible for all use of Customer Content by users of Customer’s website (“**Users**”). Customer will use best efforts to ensure that (i) no terms of its agreement(s) with its Users

are inconsistent with this Agreement, and (ii) such terms are diligently enforced.

1.7 Suspension of Service. Instart may suspend Customer's access to or use of Services as follows:

(a) immediately if Instart reasonably believes: (i) Customer has become insolvent, ceased to operate in the ordinary course, made an assignment for the benefit of creditors, or become the subject of any proceeding in any jurisdiction related thereto; or (ii) Customer's use of the Service poses a security risk to the Service or any third party, or may adversely impact the Service or the systems or content of any third party.

(b) if Customer is in breach of this Agreement (including for nonpayment of Instart fees, other than Disputed Fees) or a Service Order and has not cured such breach, if curable, prior to the expiration of a 30 day written notice from Instart.

1.8 Data Measurement. Data usage (and resulting billing) for applicable Services shall be as follows:

(a) Service Measurement (for most Instart Services, including Application Delivery): Data utilized is determined by the amount of data requested by Users ("**Original Data**"), not the data presented to the User in response to such a request ("**Actual Data**"). However, when using Instart's Image Adaptation service to reduce the file size of an image and deliver a cached (smaller) version, fees are determined (in part) based on the amount of data comprising the reduced file size rather than the original file size. This reduced file size will be deemed as the Original Data in determining fees with respect to any further optimizations applied after file size reduction. In many cases Original Data and Actual Data may differ; for example, they may differ when a User makes a request for a web page, and leaves the web page before all the data associated with such web page is loaded. Data is also calculated based on use of Instart's Global Network Accelerator ("**GNA**" or sometimes also referred to as "**Middle Mile Acceleration**"). Requests associated with static objects are typically fulfilled from edge proxy servers (such request a "**Last Mile Delivery**" or "**LMD**"). Requests associated with dynamic content are typically accelerated by use of the GNA and then fulfilled by LMD. In such a scenario, data is measured once for use of the GNA and again for use of the LMD. Instart Logic's Customer Portal contains real time reports indicating Original and Actual Data, LMD requests, and use of the GNA.

(b) Mobile Application Acceleration ("**MAA**") Service Data Measurement: The amount of data requested by Users from their mobile device flowing through the MAA service is measured and reported, with data transfer and overages calculated as the sum of all traffic for all mobile apps with the Instart Logic SDK integrated.

(c) TPO data measurement (if applicable): Any usage measurement required by a TPO shall be in accordance with the TPO supplier's practices and policies.

2. FEES AND TAXES

(a) Payment: Customer agrees to pay the fees for the Services and any ordered TPOs as set forth in this Agreement and applicable Service Order(s). All fees due are non-cancelable and nonrefundable. All amounts invoiced are payable in U.S. dollars and are due and payable as stated in a Service Order. If not otherwise stated, such amounts are due within 30 days of invoice date, provided however that if Customer acting in good faith notifies Instart of a bona fide error on the face of an invoice, the obligation to pay the portion of fees to which the error relates (the "**Disputed Fees**") shall be temporarily suspended. Instart shall within a reasonable time provide to the Customer either a) an explanation of the invoice or b) a revised invoice. Upon Customer's receipt of either a) or b) the amounts so invoiced are no longer Disputed

Fees and shall be due and payable within thirty (30) days.

(b) Overages: (i) Overages for Services using an Annual Allocation (e.g. of data transfer) shall be calculated as follows: Instart will periodically measure the usage and invoice based on any aggregate data usage exceeding the Annual Allocation in the 12 month period to which such Annual Allocation applies (an "**Overage**"). Invoices for Overage fees will be issued in each month that follows a month during which such overage occurs. Unused Annual Allocated Data Transfer will not rollover from year to year, and (ii) Overages for services using a Monthly Allocation (e.g. of data transfer) shall be invoiced in the beginning of the month following any month in which the Overages occurred.

(c) Disputed Fees: If payment of fees (other than Disputed Fees) is not received in full by the due date on Customer's invoice, late fees may be assessed, in amounts up to one percent (1%) per month or the maximum amount permitted by law, whichever is less. If Instart is required to initiate legal action due to nonpayment of fees, Customer shall indemnify and hold Instart harmless for all costs resulting from the collection of such fees.

(d) POs: If Customer's internal process involves the issuance of a purchase order or similar document in order to pay any fees due to Instart, Customer shall issue such document within five (5) business days of executing a Service Order, and thereafter as necessary during the Term specified in the applicable Service Order to ensure timely invoicing and payment to Instart.

(e) Indexation: Instart may increase fees due for Services in a renewal period (provided at least 12 months has elapsed since the Billing Start Date (defined below) in the applicable Service Order) by an amount not to exceed the rate of increase of the Consumer Price Index or 5%, whichever is greater.

(f) Taxes: Customer agrees to pay any sales, value-added or other similar taxes imposed by applicable law on the services that Customer ordered and which Instart is required by law to collect and remit to the relevant taxing authorities, other than corporate income taxes based on Instart's net income. Our fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "**Taxes**"). All payments to be made under this Agreement shall be made in cleared funds, without any deduction or set-off and free and clear of and without deduction for or on account of any taxes, levies, imports, duties, charges, fees and withholdings of any nature. If Customer is compelled per applicable tax laws to make any such deduction or withhold any Taxes, the amount payable to Instart will be grossed up to cover such Taxes deducted or withheld, and Customer will pay to Instart such additional amounts as are necessary to ensure receipt by Instart of the full amount which would have received but for the deduction net of such withholding taxes.

3. TERM AND TERMINATION

3.1 Term. The term of this Agreement shall commence on the earliest date of any Service Order in effect, and unless terminated earlier according to this Section 3, will end on the last day of the term specified in the last to expire Service Order (the "**Term**"). The Service(s) will begin according to the service start date specified in the applicable Service Order (such date, the "**Service Start Date**"). Either party may, upon notice, terminate this Agreement due to a material breach that remains unremedied for thirty (30) days following notice. TPOs are further subject to the term and termination rights specified in the applicable Service Order(s) and/or Appendix.

3.2 Effects of Termination. Upon termination of this Agreement, all rights granted hereunder and in any Service Order(s) terminate

immediately and Customer will make no further use of the Services. Customer remains responsible for all fees and charges incurred prior to the effective date of termination. The following Sections will survive termination of this Agreement: 1.4 (Ownership), 3.2 (Effects of Termination), 4 (Confidentiality), 5 (Indemnification), 7 (Limitation of Liability), and 8 (Miscellaneous). If a Service Order contains a minimum financial commitment and/or recurring fee over a minimum term commitment (each a “**Commitment**”), Customer may not, except in the case of Instart’s uncured material breach, terminate such Service Order without first paying the fees required to satisfy (as liquidated damages and not a penalty) the Commitment in full.

4. CONFIDENTIALITY

During the Term, either party may provide the other party with confidential and/or proprietary materials and information (“**Confidential Information**”). All materials and information provided by the disclosing party and identified at the time of disclosure as “**Confidential**” or bearing a similar legend, or which the receiving party reasonably should have known was the confidential information of the disclosing party, shall be considered Confidential Information, including for avoidance of doubt Customer Content, this Agreement, and all economic terms between the parties. The receiving party shall maintain the confidentiality of the Confidential Information and will not disclose such information to any third party without the prior written consent of the disclosing party. The receiving party will only use the Confidential Information internally for the purposes contemplated hereunder. The obligations in this Section shall not apply to any information that: (a) is made generally available to the public without breach of this Agreement, (b) is developed by the receiving party independently from and without reference to the Confidential Information, (c) is disclosed to the receiving party by a third party without restriction, or (d) was in the receiving party’s lawful possession prior to the disclosure and was not obtained by the receiving party either directly or indirectly from the disclosing party. The receiving party may disclose Confidential Information as required by law or court order provided that the receiving party promptly notifies the disclosing party thereof and uses best efforts to limit disclosure. At any time, upon the disclosing party’s written request, the receiving party shall return to the disclosing party all disclosing party’s Confidential Information in its possession, including, without limitation, all copies and extracts.

INDEMNIFICATION

5.1 Indemnification by Customer. Customer will defend, indemnify, and hold Instart, its affiliates, suppliers and licensors, and each of their respective officers, directors, employees and representatives, harmless from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys’ fees) arising out of or relating to any third party claim with respect to: (a) breach of this Agreement or violation of applicable law by Customer or Users, including claims related to Customer’s Content or the combination of Customer’s Content with other applications, content or processes; or (b) alleged infringement or misappropriation of third-party’s intellectual property rights resulting from Customer’s Content or by the use, development, design, or production of Customer’s Content.

5.2 Indemnification by Instart. Instart will defend, indemnify, and hold Customer harmless from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys’ fees) arising from claims by a third party: (a) with respect to Instart’s breach of this Agreement or violation of applicable law; or (b) that Customer’s use of the Service infringes or misappropriates a third party’s intellectual property rights (an “**Infringement Claim**”). Should any portion of the Service become, or in Instart’s opinion be likely to

become, the subject of an Infringement Claim, Customer will permit Instart, at Instart’s option and expense, (i) to procure for Customer the right to continue using the Service; (ii) to replace or modify the Service or portion thereof to be non-infringing, or (iii) to take any other action reasonably deemed advisable by Instart related to such Infringement Claim. In the event none of these remedies is available and/or practical, Instart may, in its sole discretion, terminate the right to use the Service and return to Customer the fees paid with respect to the infringing Service, reduced on a prorated basis for each month the Service is used by Customer. Notwithstanding any other provision in this Agreement, Instart shall have no obligation to indemnify or reimburse Customer with respect to any Infringement Claim to the extent arising from: (a) the combination of any Customer Content with the Service; or (b) the combination of any products or services, other than those provided by Instart to Customer under this Agreement, with the Service.

5.3 Notice of Claim and Indemnity Procedure. In the event of a claim for which a party seeks indemnity or reimbursement under this Section 5 (each an “**Indemnified Party**”) and as a condition of the indemnity, the Indemnified Party shall:

- (a) notify the indemnifying party in writing as soon as practicable, but in no event later than 30 days after receipt of such claim, together with such further information as is necessary for the indemnifying party to evaluate such claim to the extent that the Indemnified Party is in possession or has knowledge of such information, provided that any delay in giving such notice shall not preclude the Indemnified Party from seeking indemnification or reimbursement hereunder if: (i) such delay has not materially prejudiced the indemnifying party’s ability to defend the claim and (ii) such delay does not materially affect the amount of any damages awarded for or paid in settlement of such claim; and
- (b) allow the indemnifying party to assume full control of the defense of the claim, including retaining counsel of its own choosing. Upon the assumption by the indemnifying party of the defense of a claim with counsel of its choosing, the indemnifying party will not be liable for the fees and expenses of additional counsel retained by any Indemnified Party. The Indemnified Party shall cooperate with the indemnifying party in the defense of any such claim.

5.4 Notwithstanding the foregoing provisions, the indemnifying party shall have no obligation to indemnify or reimburse for any losses, damages, costs, disbursements, expenses, settlement liability of a claim or other sums paid by any Indemnified Party voluntarily, and without the indemnifying party’s prior written consent, to settle a claim. Subject to the maximum liability set forth in Section 7, the provisions of this Section 5 constitute the entire understanding of the parties regarding each party’s respective liability under this Section 5, including without limitation Infringement Claims (and related claims for breach of warranty) and each party’s sole obligation to indemnify and reimburse any Indemnified Party.

6. WARRANTY

THE SERVICES HEREUNDER ARE PROVIDED ON AN “AS IS” BASIS. INSTART HEREBY DISCLAIMS ALL EXPRESS OR IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, SECURITY, ACCURACY, QUALITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. INSTART DOES NOT WARRANT THAT THE SERVICES WILL BE PERFORMED ERROR-FREE OR UNINTERRUPTED.

7. LIMITATIONS OF LIABILITY

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY LOST DATA, LOST PROFITS, BUSINESS INTERRUPTION, REPLACEMENT SERVICES OR OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR INDIRECT DAMAGES, HOWEVER CAUSED AND REGARDLESS OF THEORY OF LIABILITY. EXCEPT FOR EACH PARTY’S CONFIDENTIALITY OBLIGATIONS

UNDER SECTION 4 AND INDEMNITY OBLIGATIONS UNDER SECTION 5, EACH PARTY'S LIABILITY FOR ALL CLAIMS ARISING UNDER THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR OTHERWISE, SHALL NOT EXCEED THE AMOUNT OF FEES PAID OR PAYABLE BY CUSTOMER UNDER THE APPLICABLE SERVICE ORDER. NOTWITHSTANDING ANYTHING TO THE CONTRARY, EACH PARTY'S LIABILITY FOR ALL CLAIMS ARISING UNDER SECTION 5 SHALL NOT EXCEED ONE MILLION US DOLLARS (\$1,000,000).

8. MISCELLANEOUS

8.1 Compliance with law. Each party shall obey all applicable laws and regulations in its performance under this Agreement. Customer certifies that it will comply with (i) all current U.S. Export Control laws, and (ii) the U.S. Foreign Corrupt Practices Act, U.K. Bribery Act, and any other anti-corruption laws prohibiting the same type of conduct (each of the foregoing to the extent applicable). Customer agrees to defend, indemnify and hold Instart harmless from any liability for Customer's violation of law.

8.2 Assignment. Neither party may transfer and assign its rights and obligations under this Agreement without the prior written consent of the other party. Notwithstanding the foregoing, Instart may transfer and assign its rights under this Agreement without consent from the other party in connection with a change in control, acquisition or sale of all or substantially all of its assets.

8.3 Force Majeure. Neither party shall be responsible for failure or delay in performance by events out of their reasonable control, including but not limited to, acts of God, internet outage, terrorism, war, fires, earthquakes and other disasters. The foregoing does not excuse Customer's payment obligations.

8.4 Notice. All notices between the parties shall be in writing and shall be deemed given if personally delivered or sent by registered or certified mail (return receipt), by electronic mail (if to Instart, to billing@instartlogic.com), or by recognized courier service to the

address of the party indicated in this Agreement or in a notice delivered pursuant to this Agreement from time to time.

8.5 Independent Contractor. Instart is an independent contractor and both parties agree that no agency, partnership, joint venture, or employment is created as a result of this Agreement. Customer does not have any authority of any kind to bind Instart.

8.6 Governing Law. This Agreement shall be governed by the laws of the State of California, without regard to the conflict of law provisions. All controversies or claims arising out of or relating to this Agreement shall be subject to the exclusive jurisdiction of and venue in the state and Federal courts located in San Francisco, California. Notwithstanding the foregoing, if Customer is located outside of the United States, any controversy or claim arising out of or relating to this Agreement shall be (i) determined by arbitration by the International Centre for Dispute Resolution in accordance with its then current International Arbitration Rules, and (ii) finally resolved by arbitration conducted by one arbitrator in San Francisco, California. The arbitration will be conducted in English, the governing language of this Agreement. Notwithstanding the foregoing, each party will have the right to seek equitable relief from any court of competent jurisdiction.

8.7 Entire Agreement. This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications, and other understandings relating to the subject matter of this Agreement. Waivers and modifications must be in writing signed by both parties, except as otherwise provided herein. Any term or provision of this Agreement held to be illegal or unenforceable shall be, to the fullest extent possible, interpreted so as to be construed as valid, but in any event the validity or enforceability of the remainder hereof shall not be affected. In the event of a conflict between this Agreement and a Service Order, this Agreement shall control. Each Appendix shall control with respect to the applicable TPO.