

# CELLMANIA APPLICATION SUBMISSION AGREEMENT

APPLICANT NAME \_\_\_\_\_

Fax to: +1 650 210 3849

## 1.0 ACKNOWLEDGMENT AND ACCEPTANCE OF SERVICE AGREEMENT

**1.1** The Cellmania Submit Service ("Submit"), owned and operated by Cellmania, Inc. ("Cellmania") is provided to you ("you" or "Applicant") under the terms and conditions of this Cellmania Application Submission Agreement (the "Agreement"). If this agreement has been consummated electronically, then a) the Applicant has 10 business days to submit a written signed copy for the purpose of receiving a written signed copy by Cellmania in return b) request any changes to this agreement for consideration by Cellmania. This agreement replaces any other agreement previously signed.

**1.2** Cellmania reserves the right, in its sole discretion, in the future, to change, modify, add or remove all or part of the Agreement at any time with reasonable advance notification given to Applicant for material or otherwise substantial changes and excepting that under no circumstances shall Cellmania have any right to Applicant's intellectual property and Applicant reserves the right to remove the application at any time.

## 2.0 DESCRIPTION OF CELLMANIA SUBMIT SERVICE

**2.1** Cellmania Submit is a free service, except when stated explicitly, provided by Cellmania to consider your mobile application for inclusion in Cellmania's mFinder™ ("mFinder") and publishing to Cellmania and Cellmania partner channels. By signing up with Cellmania Submit, Cellmania will consider and respond to your request for inclusion in mFinder and if accepted, will publish the application where possible at Cellmania driven, or Cellmania partnered channels. Cellmania agrees that a member of Cellmania's editorial staff will look at your application, consider it for inclusion in mFinder.

**2.2** NOTHING IN THIS AGREEMENT OBLIGATES CELLMANIA TO LIST, LINK TO, ACCEPT OR OTHERWISE HOST YOUR APPLICATION ANYWHERE ON CELLMANIA OR ANY OF CELLMANIA'S DISTRIBUTION PARTNERS. IN ADDITION, IF YOUR APPLICATION IS ACCEPTED, NOTHING IN THIS AGREEMENT OBLIGATES CELLMANIA TO PLACE YOUR APPLICATION WITHIN A SPECIFIC CATEGORY OR SUBCATEGORY, DISTRIBUTION CHANNEL OR TO PROVIDE ANY SPECIFIC COMMENTS OR ANNOTATIONS WITH THE LISTING OF YOUR APPLICATION. CELLMANIA MAY CHOOSE NOT TO PROCESS YOUR APPLICATION FOR ANY REASON OR NO REASON.

**2.3** Modification of files: If Applicant chooses a subscription billing option, then Applicant gives Cellmania permission to modify the Applicant submitted application files by wrapping the files with a digital wrapper solely for the purposes of implementing digital rights management for subscription billing. Applicant will cooperate in testing the modified file, if requested, and agree not to litigate against Cellmania if any errors in the digital wrapping appear.

**2.3.4.** the Applicant warrants that it has not introduced any viruses, worms, software bombs, malicious code or similar items into any of its applications and conforms to all ethical use guidelines of software distribution;

- 2.3.5.** the Applicant warrants that it has exercised care consistent with prevailing industry standards to ensure no viruses, worms, software bombs, malicious code or similar items have been introduced by any third party into any of the Applicants applications;
- 2.3.6 the Applicant will provide descriptions and all other information such as marketing information, necessary for Cellmania to distribute the application in the form requested by Cellmania.
- 2.3.7 the Applicant warrants that it has provided the correct customer care information within the application.
- 2.3.8 the Applicant warrants that it conforms with the all legal regulations in the countries in which Cellmania distributes, including privacy laws and will not collect user information for the purposes of transference to other parties.
- 2.3.9 the applications shall conform at the time of delivery in all material respects to the description and specification for the same as provided to the user; shall be of satisfactory quality; and shall be free from defects;
- 2.3.10 Applicant will provide Application compatibility list to Cellmania that will be accurate;
- 2.3.11 Applicant will correct free of charge to Cellmania and Users any instance of non-compliance of any application with its description and specification as provided previously;
- 2.3.12 the applications shall not breach the law or any regulatory requirement of any territory that Cellmania distributes the application including but not limited to data protection laws, infringement of copyright and other IPR;
- 2.3.13 the applications shall not to the best of the Applicant's knowledge and belief, Applicant having made diligent enquiry, be considered to be defamatory, libellous, slanderous, obscene, offensive or illegal for any of the territories that Cellmania distributes applications;
- 2.3.14 the submitted applications shall have a life span of at least 12 (twelve) months or such other period agreed between Applicant and Cellmania for a specific application from the date of download to the users and also applications shall not expire on the handset for any period unless described as such;
- 2.3.15 applicant will use where available commercially available virus checking software to check that the applications do not contain any virus, worm, trojan horse or other destructive or contaminating program or disabling device. The applicant further warrants that it will utilise such up to date virus checking software as may be recommended by Cellmania from time to time;
- 2.3.16 Without limitation, the Applicant shall notify Cellmania immediately that it has a reasonable suspicion that any application supplied hereunder may not be in accordance with its description or any term of this Contract or in the event of problems with the supply of the applications.
- 2.3.17 Cellmania and its distribution partners have the right to use Applicant trademarks solely for the purpose of promoting Applicant's submissions. Additionally, Cellmania may place Applicant's logo on Cellmania's partner section of its website.
- 2.3.18 Applications shall not have other billing methods inside the application without clearance from Cellmania.
- 2.3.19 Applicant shall inform Cellmania of any advertising placed inside the application.

### **3.0 MINIMUM APPLICATION CRITERIA**

**3.1** The following are only minimum criteria for the editors to approve your application for inclusion in mFinder:

- *Originality of content - The application should have substantially unique content.*

- *Usability - The application should be easy to navigate keeping in mind the logistics of a mobile device.*
- *The application should work with most popular devices.*
- *Functionality - The application should be fully operational, with all links functioning properly.*
- *Usefulness - The application should offer some useful content to the user.*
- *Robust content - The application should offer a solid amount of content to satisfy a user.*

THESE CRITERIA ARE MINIMUM REQUIREMENTS ONLY, AND CELLMANIA, IN ITS SOLE DISCRETION, MAY CONSIDER OTHER CRITERIA BEFORE ACCEPTING OR REJECTING AN APPLICATION.

#### **4.0 SELECTION AND LISTING OF APPLICATIONS**

**4.1** Cellmania reserves the right to decide whether, where, and how an application is listed in mFinder or Cellmania distribution channels. If Cellmania accepts your application for inclusion in mFinder or Cellmania distribution channels, Cellmania will consider your preferences, but reserves the right to list your application in any category or subcategory, as Cellmania deems appropriate, in its sole discretion. Once Cellmania accepts an application for inclusion in mFinder, or Cellmania distribution channels that application shall be treated as any other by Cellmania. Cellmania reserves the right not to include any specific keywords, comments, or annotations with the listing of an application.

**4.2** Cellmania also reserves the right, in its sole discretion, to remove your application, move the listing to a different category or subcategory, and change or remove any keywords, comments, or annotations at any time, for any reason, including but not limited to, a change in the nature, business, goods, or services or content available on the application.

**4.3** Any and all press releases and other public announcements related to your inclusion or possible inclusion in mFinder, including the method and timing of such announcements, must be approved in advance by Cellmania in writing. Cellmania reserves the right to withhold approval of any public announcement in its sole discretion.

**4.4.** For submissions for the AT&T Beyond MEdiaNet channel, you are additionally required to submit the application through the AT&T Beyond MEdiaNet DevCentral website at <http://developer.cingular.com/developer>, clicking on Technologies and Platforms, clicking on MEdiaNet, and then clicking on Beyond MEdiaNet.

**4.5** For submissions for the Orange channel, you are additionally required to submit a signed version of the application through the Orange Partner website at <http://www.orangepartner.com>. To proceed your submission will then require approval from Orange, to be processed through the Cellmania system.

#### **5.0 FEEDBACK**

**5.1** Cellmania will contact Applicant by e-mail describing whether the application has been accepted or rejected. If the application is rejected, Applicant is entitled to request one re-consideration, or appeal, of the application at no additional charge by sending e-mail to the address provided by Cellmania. Cellmania must receive the Applicant's e-mail within thirty days from the date that Cellmania transmits the rejection e-mail to the Applicant. If the request is timely received, Cellmania will again review the Applicant's application and will then notify Applicant of its final decision regarding including the application in mFinder. If Cellmania reaffirms its denial of the application, no further appeals or submissions will be considered.

**5.2** If Cellmania accepts a suggested application, Applicant is entitled to request one re-consideration of the placement of the application, comment fields, title, etc, at no additional charge by sending an e-mail to the address provided by Cellmania. Cellmania must receive the Applicant's e-mail within thirty days from the date that Cellmania transmits the acceptance e-mail to the Applicant. If the request is timely received, Cellmania will again review the Applicant's application and will then notify Applicant of its final decision regarding the application. Once an application is included in mFinder, if Applicant makes any substantial changes to the application,

Applicant must comply with Cellmania's standard change process form to make any changes to the listing in mFinder.

## **6.0 APPLICANT PRIVACY**

**6.1** Cellmania maintains information about Applicant on Cellmania servers, including but not limited to Applicant's registration information. Applicant agrees that Cellmania may use such information in aggregate form for marketing or other promotional purposes. Applicant agrees that Cellmania may disclose such information in the good faith belief that such action is reasonably necessary: (a) to comply with the law or legal process; (b) to enforce this Agreement; or (c) to protect the rights or interests of Cellmania or others; provided, however, that nothing in this section shall impose a duty on Cellmania to make any such disclosures.

**6.2** Cellmania may contact Applicant regarding Cellmania Submit or Re-review using the Applicant's e-mail address provided during the registration process (or as updated by Applicant). Such e-mail messages may contain opportunities regarding special offers and new products from Cellmania's advertisers.

## **7.0 REVENUE SHARING**

The end users have the option to pay any applicable Application license fees by credit card to Cellmania or by phone bill to the mobile phone operator. You will set a Retail Application Price during submission of the application. If there are only fixed price points available to choose from, your set Retail Application Price is be rounded up to the closest available fixed price point, and that will be the Retail Application Price ("Retail Application Price"). Cellmania will keep the revenue shares and provide license fees to you at the following rates on the following channels;

For Sprint, including Sprint's Nextel iDEN network and Sprint CDMA network: 60% of the Net Application Price and give 40% to you.

For Boost: fifty percent ("50%") of the Net Application Price and give fifty percent ("50%") to you. For Boost, the 50% is applied on the Net Application Price after an 8% charge has been taken out for billing, process and tax fees.

For AT&T: forty-five percent ("45%") of the Net Application Price and give fifty-five percent ("55%") to you.

For Virgin Mobile USA: 60% of the Net Application Price and give 40% to you. For Virgin Mobile USA, percentage revenue share is calculated after a 2% fee has been deducted which Virgin Mobile USA has declared will apply to a marketing fund to apps.

For T-Mobile USA: For non-network aware applications: 55% of the Net Application Price and give 45% to you. For network aware applications: 60% of the Net Application Price and give 40% to you. An additional 5% is deducted for applications that are promoted, a) by making it available to subscribers (via download or via a link, as applicable) in any category other than a standard content category (i.e., genre) on T-Mobile's wireless web site, or b) by embedding a trial Application version of the Application with an up-sell component on a Wireless Device. T-Mobile specific testing fees charged by T-Mobile's testing house will be passed at cost, or applicant may supply pre-approved tested items by an approved T-Mobile testing house.

For Orange: revenue shares are provided upon execution of an NDA.

For Qwest: 55% of the Net Application Price and give 45% to you.

For Cellmania's own application store: forty percent ("40%") of the Net Application Price and give sixty percent ("60%") to you.

For Palm applications through the BREW platform, forty percent ("40%") of the Net Application Price and give sixty percent ("60%") to you.

For Telstra: 60% of the Net Application Price and give 40% percent to you.

For Telus: 60% of the Net Application Price and give 40% percent to you.

For Kajeet: 55% of the Net Application Price and give 45% percent to you. For Kajeet, the 55% is applied on the Net Application Price after an 8% charge has been taken out for billing, process and tax fees.

For Embarq: 55% of the Net Application Price and give 45% percent to you.

For SouthernLINC: 50% of the Net Application Price and give 50% to you.

For Nextel International: 55% of the Net Application Price and give 45% to you.

For Singtel Mobile: 60% of the Net Application Price and give 40% to you, for non-games only. For games, the revenue share will be 70% of what Cellmania receives. Currently, for Singtel games, estimate is that Cellmania will receive 30%.

For Airtel App Central: the revenue share will be 70% of what Cellmania receives. Currently, Cellmania will receives 40% and therefore you will receive 28%.

For ringtones, wallpapers, videos and voice-tone raw files (not as part of a java application), irrespective of channel except where stated, and where the channel will accept such content types for distribution, Cellmania will make the following payments:

Cellmania will pay Applicant the higher of 25% of Net Application Price or \$0.20 per polyphonic, sound or non-premium voice ringtone download,

Cellmania will pay, with the exception of T-Mobile, Applicant the higher of 42.5% of Net Application Price or \$0.75 per Independent Label Master ringtone download. For the T-Mobile USA channel, Cellmania will pay Applicant the higher of 30% of Net Application Price or \$0.60 per Independent Label Master ringtone download.

Cellmania will pay Applicant the higher of 55% of Net Application Price or \$1.00 per Major Label (Sony/BMG, EMI, College Mastertones) Master ringtone download.

Cellmania will pay Applicant the higher of 35% of Net Application Price or \$0.25 per Premium Voice Ringtone download.

Cellmania will pay Applicant the higher of 30% of Net Application Price or \$0.50 per Premium Wallpaper download.

Cellmania will pay Applicant the higher of 20% of Net Application Price or \$0.20 per Standard Wallpaper download.

Cellmania will pay Applicant the higher of 40% of Net Application Price or \$0.20 per video downloads.

For mature content, a further 10% of the Net Application Price is provided to Cellmania.

For ringtones, if performing rights organization fees are required such as those from ASCAP, BMI, SESAC, these are the responsibility of Applicant.

For each java application title submitted, except for T-Mobile, the first \$250 of amounts due will be kept by Cellmania to cover testing and processing.

For any other channel not listed, Cellmania will pay 70% of net revenues (defined as revenues received from operator or channel after any cut that operator or channel takes as well as credit card fees and bad debt computed on a blended basis) that Cellmania receives from that channel. This shall also apply on Cellmania's own site.

You may opt out of any individual channel in Cellmania's network by notifying Cellmania with 60 days notice.

Net Application Price is defined as Retail Application Price ("Retail Application Price") net of any data charge fees applied by an operator to Cellmania, credit card fees, applicable taxes, bad debt allowances, returns, cancellations or any other reason where there has been an inability to collect revenue from the end-user. Cellmania may share its share of the Application revenue with mobile phone operators or other third parties. Furthermore, in the case where Cellmania or Cellmania's distribution partners (eg. BREW systems) demand the right to mark up or mark down the Retail Application Price, Cellmania or its partners may mark up or mark down the Retail Application Price to the Marked Application Price. In this case, and only in this case, Cellmania will pay percentage of the Marked Application Price net of any data charge fees applied by an operator to Cellmania, credit card fees, applicable taxes, returns and cancellations, bad debt allowance, regardless of the published Marked Application Price. If products are bundled with other products, then Retail Application Price maybe marked down by up to 50%, and in this case and only this case the percentage paid will be based upon the resulting marked down price.

Cellmania and the operator shall use reasonable endeavors to collect the payment from the end users on your behalf. All payment collected shall be remitted to you within thirty ("30") days after Cellmania's receipt of the fees. Payments will not be made if a minimum value of hundred dollars (\$100) due has not been reached in any twelve-month period, and will not accrue to the following years. Within a 12 month period, a \$100 due amount must be reached before payment is made. The above-mentioned revenue sharing is subject to Cellmania's successful collection of the Application license fee. If there are bad debts, or if Cellmania or operator is unable to collect the payment from end-user, Cellmania is not obligated to pay you for the outstanding amount. You have no right to audit the bad debt through Cellmania.

## **8.0 INDEMNITY**

Applicant agrees to indemnify, defend and hold harmless Cellmania, and its parents, subsidiaries, affiliates, officers, directors, shareholders, employees and agents, from any claim or demand, including reasonable attorney's fees, made by any third party due to or arising out of Applicant's use of or listing in the Service, the acceptance or rejection of Applicant's suggested application, any alleged violation of this Agreement, or any alleged violation of any rights of others. Cellmania

reserves the right, at its own expense, to assume the exclusive defense and control of any matter subject to indemnification by Applicant, which shall not excuse Applicant's indemnity obligations. Furthermore, you shall enter into the standard license agreement provided upon download or access with each end user, and clarify the licensor's and licensee's rights and duties in the license agreement. If there is any dispute between you and an end user, you shall not involve Cellmania whether directly or indirectly. You shall settle all disputes directly with end users. You agree to defend at your expense any lawsuits against Cellmania caused by the Application you provided hereunder, including but not limited to violation of intellectual property rights, as well as your violation of the software license agreement you signed with the end users, and to pay any costs and damages awarded against Cellmania in any such lawsuits.

You shall ensure that the Application is original, and does not infringe the intellectual property or any rights of any third party and that you are entitled or duly licensed to submit the Application. If this warranty is breached, you will indemnify Cellmania for any damages, loss, cost, and expense caused. You shall ensure that you obtain all requisite licenses, approvals, permits etc as may be required by the authorities for public use of the Application.

You shall indemnify Cellmania for any violation of the terms and conditions herein.

#### **9.0 DISCLAIMER OF WARRANTIES AND LIABILITIES**

THE SERVICE IS PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NEITHER THIS AGREEMENT NOR ANY DOCUMENTATION FURNISHED UNDER IT IS INTENDED TO EXPRESS OR IMPLY ANY WARRANTY THAT THE SERVICE WILL BE UNINTERRUPTED, TIMELY OR ERROR-FREE.

CELLMANIA, AND ITS PARENTS, SUBSIDIARIES, AFFILIATES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS, SHALL NOT BE LIABLE, UNDER ANY CIRCUMSTANCES OR LEGAL THEORIES WHATSOEVER, FOR ANY LOSS OF BUSINESS, PROFITS OR GOODWILL, LOSS OF USE OR DATA, INTERRUPTION OF BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY CHARACTER, EVEN IF CELLMANIA IS AWARE OF THE RISK OF SUCH DAMAGES, THAT RESULT IN ANY WAY FROM APPLICANT'S USE OF OR INABILITY TO USE THIS SERVICE, CELLMANIA'S ACCEPTANCE OR REJECTION OF A SUGGESTED APPLICATION, OR CELLMANIA'S CONTINUED LISTING OF A APPLICATION IN THE DIRECTORY.

CELLMANIA'S LIABILITY TO APPLICANT SHALL NOT, FOR ANY REASON, EXCEED THE AMOUNT ACTUALLY PAID BY APPLICANT TO CELLMANIA UNDER THIS AGREEMENT. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR LIABILITIES, SO SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO YOU.

#### **10.0 FORCE MAJEURE**

Neither party to this Agreement shall be liable to the other for any delay or failure in performance under the Agreement resulting directly or indirectly from acts of nature or causes beyond its reasonable control.

#### **11.0 NOTICES**

Any notices or communications under the Agreement shall be by electronic mail or in writing and shall be deemed delivered upon receipt to the party to whom such communication is directed, at the addresses specified below. If to Cellmania, such notices shall be addressed to [mobile@staff.cellmania.com](mailto:mobile@staff.cellmania.com) or 82 Pioneer Way, Mountain View, California 94041, USA. If to Applicant, such notices shall be addressed to the electronic or mailing address specified in Applicant's Service registration form, or such other address as either party may give the other by notice as provided in this Section.

#### **12.0 ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between the parties with respect to the Service and supersedes all previous proposals, both oral and written, representations, writings and all other communications between the parties.

#### **13.0 GENERAL**

The Agreement and the relationship between Applicant and Cellmania shall be governed by the laws of the state of California without regard to its conflict of law provisions. Applicant and

Cellmania agree to submit to the personal and exclusive jurisdiction of the Superior Court of the State of California for the County of Santa Clara or the United States District Court for the Northern District of California. Cellmania's failure to exercise or enforce any right or provision of the Agreement shall not constitute a waiver of such right or provision. If any provision of the Agreement is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and agree that the other provisions of the Agreement remain in full force and effect. Applicant agrees that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service, to the Agreement, or to Applicant's listing in the Directory must be filed within one (1) year after such claim or cause of action arose or be forever barred. The section titles in the Agreement are for convenience only and have no legal or contractual effect. If there is any conflict with multiple agreements with Applicant, this agreement shall take precedence if it is dated later than any previous agreement.

If electronically signed, and a written signature is required, please sign below and fax, or sign and scan, within 10 business days of electronically executing this agreement through a Cellmania Agreement extranet.

Applicant\_\_\_\_\_

Cellmania, Inc.

Signed\_\_\_\_\_

Signed\_\_\_\_\_

Date\_\_\_\_\_

Date\_\_\_\_\_

**Applicant Contact Information:**

Contact Name:\_\_\_\_\_

Company\_\_\_\_\_

Phone number\_\_\_\_\_

Fax number\_\_\_\_\_

Email address\_\_\_\_\_

Address:

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**Applicant payment information**

Payee to whom payments should be made to\_\_\_\_\_

Fax to: +1 650 210 3849