

# Flurry for Publishers Terms of Service

Last Updated: April 20, 2014

## ACCEPTANCE OF TERMS

Flurry welcomes you ("Publisher," "You," or "Your"). By checking the "Terms and Conditions" box in our account sign-up, or registering for Flurry for Publishers (as defined below), Publisher agrees that he, she or it has read, understands, and accepts the terms and conditions described below (the "Terms of Service") and Publisher agrees to be bound by these Terms of Service and all terms, policies and guidelines incorporated in the Terms of Service by reference, including but not limited to, Flurry's Privacy Policy located at <http://www.flurry.com/privacy-policy.html> ("Privacy Policy") (or such other URL that Flurry may provide from time to time) (collectively, the "Agreement"). If Publisher does not agree to this Agreement, Publisher should not use the Services (as defined below) in any way. The Services are offered to Publisher conditioned on Publisher's acceptance without modification of this Agreement.

Flurry Analytics must be used in conjunction with Flurry for Publishers; therefore, the Flurry Analytics Terms of Service located <http://www.flurry.com/tos.html> (or such other URL that Flurry may provide from time to time) is incorporated herein by reference.

At Publisher's option, Flurry for Advertisers (as defined below) may be used in conjunction with Flurry for Publishers, and to the extent Publisher uses Flurry for Advertisers in conjunction with Flurry for Publishers, Publisher shall be obligated to the Flurry for Advertisers terms and conditions described herein.

At Publisher's option, the Flurry RTB Service (as defined below) may be used in conjunction with Flurry for Publishers, and to the extent Publisher uses the Flurry RTB Service (together with Flurry for Publishers and Flurry for Advertisers, the "Services" and each a "Service"), Publisher shall be obligated to the Flurry RTB Service terms and conditions described herein.

## REGISTRATION

To register for Flurry for Publishers, Publisher must complete the registration process at <http://www.flurry.com> (or such other URL that Flurry may provide from time to time) by providing Flurry with current, complete and accurate information. Upon registration for Flurry for Publishers, Publisher will be required to provide Flurry with its email password and user name. Publisher understands that it is solely responsible for maintaining the confidentiality of its password and that Publisher shall be solely and fully responsible for all activities that occur under its username and password. Flurry shall not be responsible for any loss, claim or other liability that may arise from the unauthorized use of any password. Publisher agrees to immediately notify Flurry of any unauthorized use of Publisher's password or username or any other breach of security. If a password is lost or stolen, it is Publisher's responsibility to change the password, and immediately notify Flurry, so that Publisher's account remains both secure and functional.

The Services are available only to individuals who are at least 18 years old and to companies that are appropriately licensed and otherwise legally permitted to conduct business. You represent and warrant that (a), if you are an individual, you are at least 18 years old, and (b) if you are a company, you are appropriately licensed and are legally permitted to conduct business.

## FLURRY FOR PUBLISHERS SERVICE

- **Description and Use**

"Flurry for Publishers" means the services and Software that allow Publisher to sell its advertising space ("Inventory") to advertisers ("Advertisers") in order to place such advertisements ("Ads") within Publisher's application(s). In order to use Flurry for Publishers, Publisher must integrate the Flurry software development kit (the "SDK") into Publisher's application(s). Flurry Analytics site code (the "Agent"), Flurry's processing code for Flurry's Analytics Service and the SDK are defined collectively herein as "Software". Publisher agrees that Flurry may require Publisher to use the then-current version of any and all Software.

- **Flurry for Publishers Service Fees and Payment**

The basic Flurry for Publishers service is provided to Publisher free of charge. Flurry may change its fees and payment policies for Flurry for Publishers from time to time. The changes will be posted at <http://www.flurry.com> (or such other URL that Flurry may provide from time to time). Publisher's use of the enhanced features of Flurry for Publishers requires the payment of additional fees, as described at [http://www.flurry.com/Flurry\\_for\\_Publishers\\_pricing.html](http://www.flurry.com/Flurry_for_Publishers_pricing.html) (or such other URL that Flurry may provide from time to time).

- **Advertisers and Advertisements**

Publisher is solely responsible for all matters related to the Advertisers, including without limitation, handling all support services, billing and payment, and any other inquiries and disputes of any type or nature. Publisher is solely responsible for all Ads and related urls, content and subject matter, editorial, text, graphic, audiovisual, and any other information Publisher makes available in connection with Flurry for Publishers (collectively, "Ad Content"). All Ad Content shall be subject to the Flurry's Content Guidelines located at <http://www.flurry.com/contentGuidelines.html> (the "Content Guidelines"). Flurry has no obligation to monitor or edit the Ad Content.

You represent and warrant to Flurry that: (i) you have and will maintain during your use of Flurry for Publishers all rights, authorizations and licenses (including without limitation any copyright, trademark, patent, publicity or other rights) that are required with respect to the Ad Content to permit Flurry to perform the services contemplated under this Agreement (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of the Ad Content); and (ii) the Ad Content will comply with all applicable laws, the Content Guidelines and applicable Flurry policies and will not contain any content that is infringing, libelous, defamatory, obscene, pornographic, abusive, and offensive or otherwise violates any right of any third party.

## FLURRY FOR ADVERTISERS

To the extent Publisher chooses to use the Flurry for Advertisers ad network, Publisher agrees to the following terms and conditions under this section.

- **Description and Use**

"Flurry for Advertisers" means the ad network services and Software provided by Flurry to you, which facilitates the purchase and placement of digital ad campaigns promoting a product or service on Flurry's network of publisher partners or on third party network partners with whom Flurry has a contractual relationship. A campaign may include Flurry for Advertisers rewards, an optional feature for the

integration of a virtual currency system in a Recommendation as a reward for installs or views.

In order to use Flurry for Advertisers, you must integrate the SDK. By making your application available for Recommendations, you hereby grant Flurry the right to access, index and cache requests made from your mobile applications to Flurry for Advertisers, and display Recommendations within your applications. "Recommendations" means the various digital ad campaigns you may place promoting your product or service, including without limitation, App Recommendations, Clips Recommendations, Re-Engagement Recommendations and display advertisements.

- **Content**

"Flurry Network Content" means all materials accessible through Flurry for Advertisers, including but not limited to the Recommendations. You hereby grant to Flurry a non-exclusive, worldwide, royalty-free, transferable right to fully exploit the Flurry Network Content (including all related intellectual property rights) and to allow others to do so in connection with Flurry for Advertisers. To the extent allowed by law, the foregoing includes all rights of paternity, integrity, disclosure and withdrawal and any other rights that may be known as or referred to as moral rights. To the extent you retain any such moral rights under applicable law, you hereby ratify and consent to any action that may be taken with respect to such moral rights by Flurry and agree not to assert any moral rights with respect thereto. Recommendations may include applications created by you and by outside developers through Flurry's use of preferred affiliate networks.

You represent and warrant to Flurry that: (i) you have and will maintain during your use of Flurry for Advertisers all rights, authorizations and licenses (including without limitation any copyright, trademark, patent, publicity or other rights) that are required with respect to the Flurry Network Content to permit Flurry to perform the Flurry for Advertisers service contemplated under this Agreement (including without limitation any rights needed to host, cache, route, transmit, store, copy, modify, distribute, perform, display, reformat, excerpt, analyze, and create algorithms from and derivative works of the Flurry Network Content); and (ii) the Flurry Network Content will comply with the Content Guidelines and all applicable laws, and will not contain any content that is infringing, libelous, defamatory, obscene, pornographic, abusive, and offensive or otherwise violates any right of any third party.

Flurry agrees not to transmit any Recommendations to you that are unlawful, deceptive, defamatory, libelous, harassing, abusive, fraudulent or obscene. You may also request that Flurry block Recommendations from a list of specified third parties, and Flurry agrees to use reasonable efforts to block Recommendations from such third parties for display on your mobile applications used as part of Flurry for Advertisers.

If you order and purchase Recommendations, you shall ensure that your Recommendations comply with all applicable laws and policies, including Flurry's Content Guidelines and do not contain any content that is infringing, libelous, defamatory, obscene, pornographic, abusive, and offensive or otherwise violate any right of any third party. You shall approve the format of all Recommendations you order. Flurry reserves the right to remove any Flurry Network Content from the Flurry for Advertisers service at any time, for any reason, or for no reason.

- **Flurry for Advertisers Fees and Payment**

Flurry for Advertisers is subject to the fees and payments as described below. Flurry may change its fees and payment policies at any time.

**Recommendation Orders and Purchases**

If you order and purchase Recommendations through Flurry for Advertisers, you agree to pay (or have Flurry deduct from your Recommendation Account) any and all applicable fees incurred in connection with your use of Flurry for Advertisers at the then-current prices in effect. Such prices will be specified on

Flurry's website at <http://www.flurry.com> or such other location as Flurry may specify from time to time. In addition, if you order and purchase Recommendations, you shall pay all applicable fees for each click, install or view, as applicable to your Recommendations. Pricing for Recommendations shall be determined by a bidding process setting the price you are willing to pay per click, install or view. You may select the price you want to bid per click, install or view provided that such price is equal to or greater than the minimum bid established by Flurry. Additional fees may be charged by Flurry for mutually agreed upon enhancements to the Recommendations. Other pricing metrics or fees may apply upon mutual agreement by you and Flurry.

You shall fund your Recommendation Account prior to ordering Recommendations for a minimum of \$250 USD. You may do this via check or credit card. Such funds shall be drawn down as fees become due to Flurry. If you do not fund your Recommendation Account and fees become due to Flurry, Flurry shall issue an invoice to you which shall be due immediately upon receipt. Notwithstanding the foregoing, Flurry reserves the right to not place the Recommendations ordered by you if your account is not funded. If your account is terminated, except for your breach, such termination will be effective immediately, and you shall receive a refund for any amounts you have pre-paid for Flurry for Advertisers that have not been rendered. In addition, you may request a partial refund of any unused amount in your Recommendations Account in writing. Such requests shall be limited to once per calendar quarter.

The terms set forth in any Insertion Order ("IO") that conflict with or are in addition to any of the terms and conditions relating to Flurry for Advertisers as set forth herein shall be void and of no effect, unless expressly agreed to by the parties in writing and signed by an officer of Flurry.

### **Recommendation Placements**

If you place Recommendations within your mobile applications, you will receive a percentage of Net Advertiser Revenue associated with the following "End-User Actions":

<b>Recommendations</b>	<b>End-User Actions</b>
App Recommendation	Download and launch of the application within the App Recommendation
Clips Recommendation	Complete a viewing of an entire video advertisement set forth in the Clips Recommendation
Re-Engagement Recommendation	Launch of the application previously installed by end-user as set forth in the Re-Engagement Recommendation
Display Advertisement	Click or engagement of the advertisement

"Net Advertiser Revenue" shall mean revenues actually received by Flurry from the sale, use or other disposition of the applicable Recommendation displayed within your mobile application less fees received for use of personas (if applicable), less applicable taxes, agency commissions, carrier and/or partner fees, affiliate network fees, and less allowances for bad debt, returns, cash discounts or promotional allowances actually made or taken.

Flurry shall send payment to you within approximately forty-five (45) days from the date when you request a payment, provided that Flurry will only send you a payment if your earned balance of Net Advertiser Revenue is greater than or equal to \$100 USD in the your Publisher Account. In addition, any payments that may become due to you are specifically conditioned upon Flurry's receipt of full payment from your order of the applicable Recommendation. In the event that Flurry is not paid in full by you in accordance with your order of the Recommendations, Flurry shall only be responsible for paying you from the portion of the amounts Flurry actually received from you. If you dispute any payment made in connection with Flurry for Advertisers, you must notify Flurry in writing within thirty (30) days of any such payment. If your Publisher account is inactive for a period of six (6) months, Flurry may, in its sole and absolute discretion close such account and pay any remaining balance to you.

In lieu of a cash payment, you can opt to receive credit in your Recommendation Account ("Credit Transfer"). Such credit may be used only to place Recommendations within the mobile applications of other publishers that are Flurry for Advertisers Service users.

## **FLURRY RTB SERVICE**

To the extent Publisher chooses to use Flurry's real-time automated auction service, Publisher agrees to the following terms and conditions under this section.

- **Description and Use**

The "Flurry RTB Service" means the automated real-time auction service that enables Publisher to offer and sell its Inventory to advertisers who are media buyers in the virtual Flurry RTB Marketplace ("Flurry RTB Marketplace") who desire to display and serve their ads ("Buyer Ads") on the applications that Publisher designates ("Publisher Sites"), based on the selling criteria selected by Publisher through the Flurry user interface for accessing the Flurry RTB Marketplace. Publisher acknowledges and agrees that Publisher is solely responsible for all of Publisher's Inventory and all aspects of the Publisher Sites (including, without limitation, content and subject matter, editorial, text, graphic, audiovisual, and all other content and information).

- **Flurry RTB Revenue Share and Payment**

The Flurry RTB Marketplace allows Publisher to monetize its Inventory on Publisher's Sites by paying Publisher a revenue share of the fees collected by Flurry from media buyers in the Flurry RTB Marketplace. If Publisher sells Inventory via the Flurry RTB Marketplace, Flurry will pay Publisher a percentage of the "Net Marketplace Revenue" generated by its Inventory sold via the Flurry RTB Service ("RTB Revenue Share"). The "Net Marketplace Revenue" means fees actually collected by Flurry from third party advertisers whose Buyer Ads were served to your Inventory, less any charges for taxes, refunds, and advertising agency fees, if any.

Flurry shall send payment to you within approximately forty-five (45) days from the date when you request a payment, provided that Flurry will only send you a payment if your RTB Revenue Share is greater than or equal to \$100 USD in the your Publisher Account. If Publisher owes amounts to Flurry for use of any other Service, then at Flurry's election, Flurry may offset the RTB Revenue Share owed to Publisher by such amounts. If Publisher disputes any payment made in connection with the Flurry RTB Service, Publisher must notify Flurry in writing within thirty (30) days of any such payment.

In lieu of a cash payment, you can opt to receive a Credit Transfer. Such credit may be used only to place Recommendations via the AppCircle Service.

## **LIMITED LICENSES**

Flurry hereby grants to Publisher a nonexclusive, limited, non-transferable, revocable and non-sublicensable license to (i) use the Software and (ii) distribute the SDK in each of (i) and (ii) solely as necessary to use the Services in accordance with this Agreement for applications that Publisher owns and controls. Publisher's use of the Services and accompanying documentation ("Documentation") is subject to this Agreement and does not include: (a) any resale, lease, rental, assignment or other transfer of rights of the Software or Documentation; (b) the distribution, public performance or public display of the Software or Documentation (except as expressly set forth above with respect to the Agent), (c) modification, revision, creation of derivative works from or otherwise making any derivative uses of the Software or Documentation or any information or content therein; (d) decompilation, reverse engineering or otherwise attempting to derive the source code for the Software (except to the extent applicable laws

specifically prohibit restriction of such activities); or (e) any use of the Services, Software or Documentation other than for its intended purpose. Flurry hereby reserves all rights not expressly granted herein. Any use of the Services, Software or Documentation other than as specifically authorized herein, without the prior written permission of Flurry, is strictly prohibited and will terminate the license granted herein. Such unauthorized use may also violate applicable laws, including, without limitation, copyright and trademark and other intellectual property laws.

Publisher hereby grants to Flurry a nonexclusive, limited, and revocable license under all of its applicable rights to host, serve, route and place the Ads and fill Publisher's Inventory via the Services. Flurry reserves the right to remove any Ads from the Services at any time, for any reason, or for no reason.

## **PRIVACY AND INFORMATION COLLECTION**

As a condition of Publisher's access to the Services, Publisher agrees that Flurry has the right, for any purpose, to collect, retain, use, and publish in an aggregate manner, subject to the terms of its Privacy Policy, information collected in Publisher's use of the Services, including without limitation, the characteristics and activities of end users ("User Data"). Unless you have expressly agreed otherwise, Flurry will not disclose to any third parties any User Data collected by the Services from your mobile applications or Recommendations in a manner that is specifically attributable to you, your applications or your end users; provided, that Flurry may disclose User Data to an advertiser regarding the conversion of such advertiser's Recommendation in your mobile application, or if you choose, in connection with your submitting a bid request in the Flurry RTB Marketplace. You will not (and will not allow any third party to) use the Services to track or collect personally identifiable information of end users, nor will you (nor will you allow any third party to) associate any data gathered from your mobile application(s) or Recommendations with any personally identifying information from any source as part of your use (or such third parties' use) of the Services. You agree that you have and will abide by an appropriate privacy policy and will comply with all applicable laws relating to the collection of information from end users of your applications.

You must post a privacy policy. Your privacy policy must (i) provide notice of your use of a tracking pixel, agent or any other visitor identification technology that collects, uses, shares and stores data about end users of your applications and Recommendations and (ii) contain a link to Flurry's Privacy Policy and/or describe Flurry's opt-out of Flurry Analytics to your end users in such a manner that they can easily find it and opt-out of Flurry Analytics tracking and personalized ads and/or recommendations from Flurry. The opt-out is specific to Flurry activities and does not affect the activities of other ad networks or analytics providers that Publisher uses. If an end user opts-out, Flurry will stop tracking data for the device identified by the provided MAC address and/or device identifier going forward. The Flurry Analytics tracking will stop across all applications within the Flurry network. In addition, Flurry will stop providing ads and/or Recommendations to that MAC address and/or device identifier across all publishers. Publisher agrees to obtain all end-user consents required by applicable law before Publisher uses any Service.

If you are using the Flurry RTB Service, you must disclose in your privacy policy that you are collecting and transmitting data (including the types of data) from end users of your application through the Flurry RTB Service to media buyers bidding to purchase your Inventory, and that such buyers of your Inventory may collect and store such data and use such data for retargeting or other advertising purposes.

You agree that you will not use any Service in connection with any application labeled or described as a "Kids" or "Children" application and will not use any Service (i) in connection with any application, advertisement or service directed towards children or (ii) to collect any personal information from children.

## **CONFIDENTIAL INFORMATION**



"Confidential Information" includes any proprietary data and any other information disclosed by one party to the other in writing and marked "confidential" or disclosed orally and, within ten business days, indicated in writing as "confidential". Notwithstanding the foregoing, Confidential Information will not include any information (a) which is or becomes publicly known, (b) which is already in the receiving party's possession prior to disclosure by a party or (c) which is independently developed or collected by the receiving party without the use of Confidential Information. Neither party will use or disclose the other party's Confidential Information without the other's prior written consent except for the purpose of performing its obligations under this Agreement or if required by law, regulation or court order. Upon termination of this Agreement, the parties will promptly either return or destroy all Confidential Information and, upon request, provide written certification of such.

## **REPRESENTATIONS AND WARRANTIES**

In addition to any representations and warranties made under the prior sections of this Agreement, you further represent and warrant to Flurry that: (i) you are the owner of each mobile application you designate in connection with the use of the Services or that you are legally authorized to act on behalf of the owner of such mobile application for the purposes of this Agreement; (ii) you have and will maintain during the use of any Service all necessary rights, power, license and authority to enter into this Agreement and to perform the acts required of you hereunder and to permit Flurry to perform the Services contemplated under this Agreement; (iii) you have complied and will continue to comply with all applicable laws, statutes, ordinances, and regulations (including, without limitation, any relevant data protection or privacy laws); (iv) you will comply with and have any and all consents, authorizations and clearances from end users to allow Flurry to collect, store, and use User Data; and (v) you will at all times comply with all applicable Flurry policies.

## **INCIDENTAL COSTS ASSOCIATED WITH USE OF THE SERVICES**

Publisher agrees that it is solely liable for all costs, fees, and other expenses resulting from Publisher's use of the Services. This specifically includes, but is not limited to, incidental costs incurred by Publisher in connection with its use of the Services, including, but not limited to, costs owed to Publisher's communication service providers.

## **INDEMNITY**

Publisher agrees to indemnify, defend and hold harmless Flurry, its subsidiaries, affiliates, or any of their respective directors, officers, employees and agents from and against any and all claims, liabilities, penalties, settlements, judgments, fees and expenses (including, without limitation, reasonable attorneys' fees and other litigation expenses) arising from (i) Publisher's violation of the terms of this Agreement; and (ii) any violation or failure by Publisher to comply with all laws and regulations in connection with Publisher's use of the Services, whether or not described herein.

## **DISCLAIMER OF WARRANTIES AND LIMITATION OF LIABILITY**

In connection with your use of the Services, you acknowledge and agree that Flurry is not affiliated with or responsible for any third-party products/services managed with the Service. Flurry neither represents or endorses the quality, accuracy, reliability, integrity or legality of any third party products/services, nor the truth or accuracy of the description of any advertisements, links, content, advice, opinion, offer, proposal, statement, data or other information from any third party products/services ("Disclaimed Content") that is displayed or distributed through the Services. Flurry disclaims any liability or responsibility for errors or omissions in any Disclaimed Content. Flurry reserves the right, but does not have the responsibility, to edit, modify, refuse to post or remove any Disclaimed Content, in whole or in part, that in Flurry, in its sole discretion, deems is objectionable, erroneous, illegal, fraudulent or otherwise in violation of this Agreement.

In connection with your use of Flurry for Advertisers, you specifically agree that Flurry shall not be responsible for unauthorized access to or alteration of the User Data or data from your mobile applications or Recommendations. You acknowledge that the availability and operation of and the Flurry Network Content made available within Flurry for Advertisers are subject to many factors outside of your control. You are solely responsible for determining whether Flurry Network Content is appropriate or acceptable to you. Flurry will store Recommendations within your mobile applications. Such storage may result in higher data usage charges for your end users. You assume all risk and liability to the end users associated with the storage of these Recommendations and agrees to notify the end users as required by law or by the carriers.

FLURRY DISCLAIMS ANY AND ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY REGARDING THE SERVICES TO THE FULL EXTENT PERMITTED BY LAW. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE SERVICES ARE PROVIDED "AS-IS" AND WITHOUT WARRANTIES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF PERFORMANCE OR IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. FURTHER, FLURRY DOES NOT MAKE, AND HAS NOT MADE, ANY REPRESENTATION OR WARRANTY THAT THE SERVICES ARE ACCURATE, COMPLETE, RELIABLE, CURRENT, ERROR-FREE, OR VIRUS-FREE OR THAT THE OPERATION OF THE SERVICES WILL BE UNINTERRUPTED. SOME STATES DO NOT ALLOW EXCLUSION OF AN IMPLIED WARRANTY, SO THIS DISCLAIMER MAY NOT APPLY TO PUBLISHER.

IN NO EVENT WILL FLURRY, ITS SUBSIDIARIES, AFFILIATES OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS (COLLECTIVELY, THE "FLURRY PARTIES"), BE LIABLE TO PUBLISHER OR ANY OTHER PERSON OR ENTITY UNDER ANY THEORY FOR INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES, LOST INCOME, REVENUE OR PROFITS, LOST OR DAMAGED DATA, OR OTHER COMMERCIAL OR ECONOMIC LOSS ARISING OUT OF THIS AGREEMENT OR THE SERVICES, EVEN IF FLURRY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES ARE FORESEEABLE. THE FLURRY PARTIES' AGGREGATE LIABILITY ARISING OUT OF THIS AGREEMENT OR THE SERVICES WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) USD OR THE AGGREGATE AMOUNT PUBLISHER HAS PAID FLURRY IN THE PAST TWELVE MONTHS FOR THE SERVICES. APPLICABLE LAW MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH CASES, THE FLURRY PARTIES' LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

## **OTHER RESTRICTIONS**

Publisher shall not, directly or indirectly, authorize or encourage any third party to generate fraudulent impressions of or fraudulent clicks, or take similar fraudulent actions or any other actions that interferes with, disrupts or interacts in an unauthorized manner with the Service (or servers and networks which are connected to the Service), in the use of the Services, including but not limited to, through repeated manual clicks, the use of robots, scrapers or other automated query tools and/or computer generated search requests, and/or the fraudulent use of other search engine optimization services and/or software. Flurry may terminate your account at anytime for any reason, including without limitation, such fraudulent activity. Publisher acknowledges and agrees that Flurry may, in its sole discretion, review impressions, click-throughs or other actions with respect to the Service and Publisher shall not be entitled to receive any applicable revenue share for actions that Flurry determines in its sole discretion are fraudulent or improper.

## **INTERNATIONAL USE; EXPORT CONTROLS**



Software available in connection with the Service and the transmission of applicable data, if any, is subject to United States export control laws. No Software may be downloaded from the Service or otherwise exported or re-exported in violation of the export control laws of the United States.

## **MODIFICATION OF AGREEMENT**

Flurry reserves the right to change or modify any of the terms and conditions contained in this Agreement at any time, in its sole discretion, by posting changes at <http://www.flurry.com> (or such other URL that Flurry may provide from time to time). Publisher's continued use of any part of the Services following the posting of such changes or modifications will constitute Publisher's acceptance of such changes or modifications.

## **MODIFICATIONS TO AND TERMINATION OF THE SERVICES**

Flurry reserves the right to discontinue offering the Services or to modify the Services at any time in its sole discretion. If Publisher is dissatisfied with any aspect of the Services at any time, Publisher's sole and exclusive remedy is to cease using it. Notwithstanding anything contained in this Agreement to the contrary, Flurry may also, in its sole discretion, terminate or suspend Publisher's access to the Services at any time. Upon any termination of this Agreement, Flurry will cease providing the Services, and Publisher will delete all Software and Documentation and certify thereto in writing to Flurry within five (5) business days of such termination. Upon termination of this Agreement for any reason, all fees shall become due and payable immediately.

## **WAIVER AND SEVERABILITY**

If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of this Agreement remain in full force and effect. Flurry's acquiescence in the breach of a provision of this Agreement or failure to act upon such breach does not waive Flurry's right to act with respect to subsequent or similar breaches. Likewise, the delay or failure of Flurry to exercise or enforce any right or provision of this Agreement shall not constitute a waiver of such right or provision.

## **CHOICE OF LAW AND FORUM**

This Agreement and the relationship between Publisher and Flurry shall be interpreted in accordance with the laws of the State of California without regard to conflict of laws principles. Subject to the arbitration provisions below, Publisher and Flurry hereby agrees to submit, exclusively, to the personal jurisdiction of the state courts with jurisdiction over San Francisco, California and/ or the U.S. District Court for the Northern District of California.

## **BINDING ARBITRATION**

Certain portions of this Section are deemed to be a "written agreement to arbitrate" pursuant to the Federal Arbitration Act. Each of Publisher and Flurry agrees that it intend that this Section satisfies the "writing" requirement of the Federal Arbitration Act.

Publisher or Flurry may elect to have any controversy, allegation or claim arising out of or relating to this Agreement, the Services or the User Data, including but not limited to claims for indemnification, contribution, or cross-claims in a pending action involving one or more third parties (collectively, a "Dispute") finally and exclusively resolved by binding arbitration before a sole arbitrator under the rules and regulations of the American Arbitration Association. If an in-person arbitration hearing is required,

then it will be conducted in San Francisco, California; but if the applicable arbitration rules or laws require the arbitration to be conducted in the “metropolitan statistical area” (as defined by the U.S. Census Bureau) where Publisher is a resident at the time the Dispute is submitted to arbitration, Flurry shall have the right to elect to proceed to arbitration in such location. All parties to the arbitration will have the right, at their own expense, to be represented by an attorney or other advocate of their choosing. Publisher and Flurry will pay the administrative and arbitrator’s fees and other costs in accordance with the applicable arbitration rules; but if applicable arbitration rules or laws require Flurry to pay a greater portion or all of such fees and costs in order for this Section to be enforceable, then Flurry will have the right to elect to pay the fees and costs and proceed to arbitration.

TO THE FULLEST EXTENT PERMITTED BY LAW, PUBLISHER AGREES THAT (I) NO ARBITRATION SHALL BE JOINED WITH ANY OTHER; (II) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE ARBITRATED ON A CLASS-ACTION BASIS OR TO UTILIZE CLASS ACTION PROCEDURES; AND (III) THERE IS NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC OR ANY OTHER PERSONS.

PUBLISHER AGREES TO WAIVE HIS/HER/ITS RIGHT TO A JURY TRIAL AND UNDERSTAND THAT, ABSENT THIS PROVISION, PUBLISHER WOULD HAVE THE RIGHT TO SUE IN COURT. THE SCOPE OF THIS WAIVER IS INTENDED TO BE ALL-ENCOMPASSING OF ANY AND ALL DISPUTES THAT MAY BE FILED IN ANY COURT AND THAT RELATE TO THE SUBJECT MATTER OF THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, CONTRACT CLAIMS, TORT CLAIMS AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS.

TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IF PUBLISHER OR FLURRY WANTS TO ASSERT A DISPUTE AGAINST THE OTHER, THEN PUBLISHER OR FLURRY MUST COMMENCE IT WITHIN ONE (1) YEAR AFTER THE DISPUTE ARISES – OR IT WILL BE FOREVER BARRED.

In the event either Publisher or Flurry elects arbitration, for any Dispute where the total amount of the award sought is less than \$10,000 USD, the party requesting relief may further elect to resolve the dispute in a cost effective manner through binding non-appearance-based arbitration through an established alternative dispute resolution (“ADR”) provider mutually agreed upon by the parties. The ADR provider and the parties must comply with the following rules: (i) the arbitration shall be conducted by telephone, online and/or be solely based on written submissions, and the specific manner shall be chosen by the party initiating the arbitration; (ii) the arbitration shall not involve any personal appearance by the parties or witnesses unless otherwise mutually agreed by the parties; and (iii) any judgment on the award rendered by the arbitrator shall be final and may be entered in any court of competent jurisdiction.

## **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between Publisher and Flurry and governs Publisher’s use of the Services, superseding any prior agreements between Publisher and Flurry with respect to the Services.

## **SURVIVAL**

The terms and conditions contained in this Agreement that by their sense and context are intended to survive the performance hereof by the parties hereunder, including but not limited to the provisions relating to Indemnity, Disclaimer of Warranties and Limitation of Liability, shall so survive the completion of the performance, cancellation or termination of this Agreement.