

**MICROSOFT AND MUSICNET WINDOWS MEDIA
PROMOTION AGREEMENT**

This Microsoft and MusicNet Windows Media Promotion Agreement ("Agreement") is made and entered into by and between Microsoft Corporation, a Washington corporation ("Microsoft") and MusicNet, a Delaware corporation, located at 220 West 42nd Street, New York, NY 10036 ("Company"), as of the date signed by the last signatory hereof ("Effective Date").

Recitals

Company desires to obtain support from Microsoft for its use of Windows Media technologies in connection with Company's products and services. Microsoft is willing to provide such support subject to the terms and conditions of this Agreement.

Agreement

1. DEFINITIONS

- 1.1. "MusicNet Content" means the audio and/or audiovisual content made available by Company to distributors and end users via online systems. Such content includes, without limitation, music obtained by Company from major and independent record labels, such as Warner Music Group, BMG Entertainment, EMI Recorded Music, Sony Music Entertainment, Universal Music Group, Zomba, Ritmoteca and Sanctuary.
- 1.2. "NDA" means the nondisclosure agreement between Company and Microsoft executed November 15, 2002.
- 1.3. "Third Party Encoding Provider(s)" means Loudeye Corporation, or one or more alternate content encoding service providers selected by mutual agreement of the parties.
- 1.4. "Windows Media Formats" means the Windows Media 9 Series formats developed by or for Microsoft for authoring, storing, editing, distributing, streaming, downloading, playing, referencing, or otherwise manipulating content and used by Windows Media Technologies.
- 1.5. "Windows Media Technologies" means the currently shipping (and updates thereof), or otherwise specified versions of, the Windows Media Player, Windows Media Server, Windows Media Encoder, Windows Media SDK and all its sub-components (including but not limited to, the Windows Media Formats SDK), and related content creation tools that Microsoft may choose, solely in its discretion, to release as part of the Windows operating systems. For purposes of this Section, "Windows Media Encoder" means the current version (and Updates thereof supported in the SDK during the Term) of Microsoft's Windows Media Technologies real-time encoder.

2. COMPANY OBLIGATIONS

- 2.1. **Content Encoding and Encryption.** Within ninety (90) days of the Effective Date, Company will (a) encode One Hundred Fifty Thousand (150,000) tracks of MusicNet Content into Windows Media Formats and (b) encrypt such content using the 9 Series version of the Windows Media Rights Manager. Company may, but is under no obligation to, use a Third Party Encoding Provider to perform the foregoing obligations.

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Date:	5-06-04
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Plaintiff's Exhibit

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2.2. **Availability.** Company represents that, as of the Effective Date, it has the right to encode, distribute and make available for distribution at least Three Hundred Thousand (300,000) tracks of MusicNet Content. Within ninety (90) days of the Effective Date and thereafter throughout the Term, Company will make Windows Media 9 Series formatted MusicNet Content available on a download and/or streaming basis to the third party distributors requesting such versions of MusicNet Content. Company may in its sole discretion charge a fee for users to download and/or stream such MusicNet Content. For the avoidance of doubt, nothing in this Section 2.2 requires MusicNet to encode or make available MusicNet content in Windows Media Formats beyond the requirements of Section 2.1.

3. **MICROSOFT OBLIGATIONS.**

3.1. **Payment to Company.** In consideration of Company's obligations hereunder, Microsoft shall pay Company as follows:

- (a) One Hundred Thousand U.S. Dollars (\$100,000) within thirty (30) days of the Effective Date;
- (b) One Hundred Thousand U.S. Dollars (\$100,000) within thirty (30) days of receiving notice from Company that One Hundred Fifty Thousand (150,000) tracks of MusicNet Content in Windows Media Formats is available via any single third party distributor listed in Table I of Exhibit A ("Initial Distributor");
- (c) Provided Company completes its encoding obligations in Section 2.1(a), Fifty Thousand U.S. Dollars (\$50,000) within thirty (30) days of receiving notice from Company that:

(i) One Hundred Fifty Thousand (150,000) tracks of MusicNet Content in Windows Media Formats is: (1) available via any single third party distributor listed in Table I of Exhibit A, other than Initial Distributor; or (2) available via three (3) or more third party distributors listed in Table II of Exhibit A, or (3) available via four (4) or more third party distributors listed in Table III of Exhibit A; or (4) for the immediately preceding month, Company has no less than Fifty Thousand (50,000) unique subscribers for MusicNet Content.

3.2. **SPLA Funds.** Subject to Company's compliance with this Agreement and the executed Microsoft Service Provider License Agreement ("SPLA"), Microsoft shall reimburse Company up to Fifty Thousand dollars (US\$50,000.00) for monthly costs actually incurred by Company to purchase SPLA licenses for Microsoft Advanced Window 2003 Server during the Term. For the avoidance of doubt, Company is under no obligation to purchase SPLA licenses or any other license to Microsoft technologies. If Company opts to purchase SPLA licenses, payment hereunder shall be made as follows:

- (a) Company shall issue to Microsoft an invoice within 10 days of the end of each calendar month for the per processor SPLA license fees paid the previous month.
- (b) Microsoft shall pay Company's invoice in accordance with the requirements set forth below:

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- (i) Upon receipt of a correct and undisputed invoice from Company, Microsoft shall pay such invoice net sixty (60) days. Company shall invoice Microsoft for all amounts due under this Agreement via the MS Invoice online tool, in accordance with the then-current requirements set forth at <http://invoice.microsoft.com>. Without limitation, Company's invoices shall set forth all amounts due from Microsoft to Company, and shall contain sufficient detail to allow Microsoft to determine the accuracy of the amount(s) billed. All invoices shall be expressed and payable in U.S. dollars. Payment of an invoice without asserting a dispute is not a waiver of any claim or right.
- (ii) Payments by Microsoft shall be made according to Microsoft's then-current payment policies, which may include payment via ACH electronic payment to Company's financial institution pursuant to instructions supplied to Microsoft by Company in Company's ACH Electronic Payment form.

3.3. **Sole Obligation.** For the avoidance of doubt, Microsoft's sole obligation to assist Company in the deployment and use of Windows Media Technologies, including without limitation the encoding of MusicNet Content, is to pay Company as set forth herein. Company shall be solely responsible for payments to third party vendors or contractors, including any Third Party Encoding Provider.

4. PROMOTION AND PUBLICITY

- 4.1. **Promotion by Company.** Throughout the Addendum Term, Company will describe and promote Windows Media Technologies and Windows Media Formats on a nonexclusive basis to potential and current Company customers and suppliers as a recommended streaming and downloadable media platform and format.
- 4.2. **Link Logo Usage.** Beginning on the Effective Date and continuing thereafter throughout the Term, Company shall include on a variety of Company web site pages containing or providing access to or relating to streaming and downloadable media a prominent "Get Windows Media Player" link logo ("Link Logo"), in accordance with Microsoft's then-current policies set forth at <http://www.microsoft.com/windows/windowsmedia/create/WMPlogo.asp#Guidelines>.
- 4.3. **Press Release.** The parties shall issue an initial joint or a coordinated press release regarding the subject matter of this Agreement within thirty (30) days after the Effective Date with content mutually acceptable to both parties. Company agrees that it will not release or approve any press release regarding the matters contemplated herein prior to such joint press release.

5. **CONFIDENTIALITY.** Each party expressly undertakes to retain in confidence the terms and conditions of this Agreement and all confidential information and know-how transmitted in connection with this Agreement in accordance with the NDA.

6. TERM AND TERMINATION.

- 6.1. **Term.** This Agreement commences on the Effective Date and expires two (2) years thereafter, unless terminated earlier as set forth below.

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6.2. **Termination.** Either party may suspend performance and/or terminate this Agreement immediately upon written notice at any time if: (a) The other party is in material breach of any material provision of this Agreement, other than those contained in Section 5 and fails to cure that breach within thirty (30) days after written notice thereof; or (b) Either party is in material breach of Section 5.

6.3. **Survival.** Sections 1, 5, and 6 through 9 shall survive termination or expiration of this Agreement. In the event Microsoft terminates this Agreement under Section 9.1, Microsoft's payment obligations under Sections 3.1(b) and 3.1(c) shall survive, *provided:* (a) Company performs the obligations under Sections 2.1 and 2.2 prior to such termination; or (b) Company's assignee performs the obligations under Sections 2.1 and 2.2 within six (6) months of termination.

7. **NONEXCLUSIVE RELATIONSHIP.** The parties expressly agree that the relationship established under this Agreement is nonexclusive. Nothing in this Agreement shall be deemed to prevent Company from supporting or promoting any other streaming and downloadable media formats or associated platform technologies in the MusicNet Content or the Company Web Site nor from permitting Company customers to change product configurations or use other options in order to support solely other streaming and downloadable media formats or associated platform technologies in connection with the MusicNet Content or the Company Web Site.

8. **NOTICES.** All notices and requests in connection with this Agreement shall be in writing and shall be deemed given as of the day they are received either by messenger, delivery service, or in the United States of America mails, postage prepaid, certified or registered, return receipt requested. Any such notices to Company shall be sent to the address set forth below:

Address:	
MusicNet	
220 West 42 nd Street	
New York, NY 10036	
Attention: Vice-President,	Business
Development	
Copy to: General Counsel	
MusicNet	
220 West 42 nd Street	
New York, NY 10036	
Attention: General Counsel	
Phone: (212) 869-2197	
Fax:	

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Any such notices to Microsoft shall be addressed as follows:

Address: Microsoft Corporation One Microsoft Way Redmond, WA 98052-6399 Attention: VP Digital Media Division
Phone: (425) 703-5404
Fax: (425) 936-7329
Copy to: Law and Corporate Affairs Microsoft Corporation One Microsoft Way Redmond, WA 98052-6399 Attention: Law & Corporate Affairs
Phone: (425) 882-8080
Fax: (425) 936-7409
Copy to: Digital Media Division Microsoft Corporation One Microsoft Way Redmond, WA 98052-6399 Attention: Business Development Administrator
Phone: (425) 703-5404
Fax: (425) 936-7329

or to such other address as a party may designate pursuant to this notice provision.

9. GENERAL

9.1. **Assignment.** Company may not assign this Agreement, or any rights or obligations hereunder (except as expressly provided in Section 6.3), whether by operation of contract, law or otherwise, except with the express written consent of Microsoft, and any attempted assignment by Company in violation of this Section will be void. For purposes of this Agreement, an "assignment" by Company under this Section will be deemed to include, without limitation, each of the following: (a) a change in beneficial ownership of Company of greater than twenty percent (20%) (whether in a single transaction or series of transactions) if Company is a partnership, trust, limited liability company or other like entity; (b) a merger of Company with another party, whether or not Company is the surviving entity; (c) the acquisition of more than twenty percent (20%) of any class of Company's voting stock (or any class of non-voting security convertible into voting stock) by another party (whether in a single transaction or series of transactions); or (iv) the sale or other transfer of more than fifty percent (50%) of Company's assets (whether in a single transaction or series of transactions). In the event of such assignment or attempted assignment by Company, Microsoft may, but is not obligated to, immediately terminate this Agreement.

9.2. **Dispute Resolution.** This Agreement will be construed and controlled by the laws of the State of Washington. Process may be served on either party in the manner authorized by applicable law or court

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rule. In any action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party will be entitled to recover its reasonable attorneys' fees, costs, and other expenses.

9.3. **Waiver.** Failure by either party to enforce any provision of this Agreement will not be deemed a waiver of future enforcement of that or any other provision.

9.4. **Construction.** If for any reason a court of competent jurisdiction finds any provision of this Agreement, or portion thereof, to be unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement will continue in full force and effect. Each party acknowledges that no other party, or any agent or attorney of any party, has made any promise, representation, or warranty whatsoever, expressed or implied, not contained herein, concerning the subject matter hereof, to induce it to execute this document, and each party acknowledges that it has not executed this document in reliance on any such promise, representation, or warranty not contained herein. This Agreement has been negotiated between the parties and their respective counsel. It will be construed according to the fair intent of the language as a whole and not for or against either party.

9.5. **Counterparts.** This Agreement may be signed in counterparts with the same effect as if the signatures to each counterpart were upon a single instrument. All counterparts shall be deemed an original to this Agreement.

9.6. **Entire Agreement.** This Agreement does not constitute an offer by either party and it shall not be effective until signed by both parties. This Agreement and the NDA constitute the entire agreement between the parties with respect to the subject matter hereof and merges all prior and contemporaneous communications. This Agreement shall not be modified except by a written agreement dated subsequent to the date of this Agreement and signed on behalf of Company and Microsoft by their respective duly authorized representatives.

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the Effective Date.

MICROSOFT CORPORATION	COMPANY
By: <i>[Signature]</i>	By: <i>[Signature]</i>
Name (print): <i>Kurt Buechler</i>	Name (print): <i>Cindy Charles</i>
Title: <i>Sr Dir Bus Development</i>	Title: <i>SVP Law & Business Affairs and General Counsel</i>
Date: <i>30 April '03</i>	Date: <i>4.29.03</i>

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Exhibit A

Table I Distributors
Amazon
Bell Canada
Best Buy
Comcast
Cox
Dell
Ebay
Echo Networks
Hewlett-Packard
HMV
Infinity
MTV Networks
RoadRunner/Time Warner Cable
SBC
Virgin
Wal-Mart
Yahoo

Table II Distributors
Bell South
BET
BMG Music Service
Cablevision
Charter
Columbia House
Hastings Entertainment Inc.
Kmart
Lycos
MuchMusic
Rogers
Shaw
Tower
Transworld
Univision
Westwood One
Wherehouse

Table III Distributors
Clear Channel
Earthlink
Gateway
MSN

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