

Napkee Labs End User License Agreement

Version 1.1, November 2009

The individual installing or using this software represents and warrants that he or she has authority to enter into this Agreement with Napkee Labs on behalf of the Licensee, that he or she has read the terms and conditions set out herein and that the Licensee accepts and agrees to be bound by this Agreement. If the Licensee does not agree with the terms and conditions, the Licensee must not use or permit the use of the Product.

1. Definitions

Napkee Labs means Napkee Labs e.U., Ottakringerstr. 21/2/28, 1160 Vienna, Austria.

Authorized Machine means a single installation of a copy of the Product on a single physical computer.

Authorized Use means the defined number of copies or instances of the Product that may be used by Licensee, and where applicable, limited to the number of Authorized Machines or Authorized Users, as designated in the Quote/Receipt/Invoice issued by Napkee Labs.

Authorized Users means the number of Authorized Machines, as designated in the Quote/Receipt/Invoice issued by Napkee Labs.

Authorized User means a person or user account who is licensed to use the Product, regardless of whether that person is an employee, contractor, subcontractor, vendor, partner or customer of the Licensee.

Commencement Date means the date that Napkee Labs receives payment of the License or Maintenance Fees from Licensee.

Desktop Version means a version of the Product that works outside the browser, as a standalone application.

License means the right to use the Product as defined by Authorized Use and in accordance with the terms and conditions of this Agreement.

Licensee means the individual or entity (inclusive of affiliates and subsidiaries) that has licensed the Product under the terms and conditions of this Agreement.

Product means the Napkee Labs product defined in the Quote/Receipt/Invoice delivered by Napkee Labs to Licensee, including any documentation and updates provided under the terms of this Agreement in accordance with Clause 5.

Protected Code means source code contained within the Product that is protected against access by Napkee Labs.

2. Licensee Fee

A one-time fee paid by Licensee to Napkee Labs, as designated by Product, in consideration for the Authorized Use of the Product. License fee is nonrefundable and payable upon acceptance of the terms and conditions set out herein.

3. Grant of License

Upon receipt of the license fees and subject to the terms of this Agreement, including limitations defined by the License, Napkee Labs grants to Licensee, and Licensee accepts from Napkee Labs, a worldwide, non-exclusive, nontransferable (except pursuant to Clause 18 below), non-sublicensable (except to Licensee's related entities) right to use the Product during the contract period as defined by Authorized Use.

4. No Warranty

Except as described in this Agreement and save as provided in Clauses 13 and 14 below, the Product is provided on an "as is" and "as available" basis without warranty, express or implied, of any kind or nature, including, but not limited to, any warranties of performance or merchantability or fitness for a particular purpose, including without limitation that Napkee Labs does not warranty that the Product will be error-free, complete, or correct. Napkee Labs provides evaluation copies of the Product so that customers can assess the Product.

5. Napkee Labs' Obligations

Upon receipt of Licensee Fee from Licensee, Napkee Labs will (a) supply the Licensee with the Product via electronic download; and (b) provide Software Maintenance as defined in Clause 6 below.

6. Software Maintenance

Software Maintenance includes Napkee Labs' provisioning to Licensee Product updates and/or enhancements made generally available to customers from time to time, and online technical support via online forums only (no email, instant messenger or phone support) to one Licensee-designated technical contact for the sole purpose of addressing technical issues relating to the use of the Product, for an unlimited period of time from the date Napkee Labs receives payment of the License Fees.

7. Licensee Obligations

The Licensee must at all times: (a) ensure that only an Authorized User may use the Product and only for Authorized Use in accordance with the terms and conditions of this Agreement; (b) promptly advise Napkee Labs, including in writing, if the Licensee becomes aware of any unauthorized use or distribution of the Product by any person.

8. Unauthorized Use or Distribution

Licensee may not, whether through deliberate or negligent act or act of omission, distribute or cause the distribution of the Product to any third party other than an Authorized User.

9. Investigation of Unauthorized Use and Distribution

Licensee is required to maintain accurate records regarding the Product (including relevant versions, serial numbers), as well as where the Product is being used. If requested, Licensee will provide Napkee Labs with details of these records. If Napkee Labs reasonably suspects that the Product has been distributed to or obtained by any person or party without Napkee Labs' prior written consent, Napkee Labs has the right to reasonably request once per calendar year from the Licensee an unqualified certificate executed by

the Licensee's auditor at the Licensee's cost for the purpose of verifying compliance with Authorized Use of the Product.

10. Licensee's Restrictions

Licensee will not, without the prior written consent of Napkee Labs, which may be withheld in Napkee Labs' sole discretion and which may include certain conditions:

- (a) decompile, reverse engineer, disassemble, analyze, modify, adapt, convert, create derivative works from, or otherwise attempt to derive, the Protected Code except as may be permitted by applicable mandatory law under certain circumstances;
- (b) sell, sublicense, redistribute, reproduce, transmit, circulate, disseminate, translate or reduce to or from any electronic medium or machine readable form the Product or any data/information provided to the Licensee through the Product to a person (except that nothing in Clause 10(b) is intended to prevent an Authorized Person undertaking Authorized Use);
- (c) vary or amend the Authorized Use without Napkee Labs' prior written approval;
- (d) publish, promote, broadcast, circulate or refer publicly to the Napkee Labs name, trade name, trademark, service mark or logo or
- (e) commit any act or omission the likely result of which is that Napkee Labs' reputation will be brought into disrepute or which act or omission could reasonably be expected to have or does have a material and adverse effect on Napkee Labs' interests.

In addition, the Product includes license protection mechanisms that are designed to manage and protect the intellectual property rights of Napkee Labs.

Licensee must not modify or alter those features to try to defeat the Product use rules that the license protection mechanisms are designed to enforce.

11. Term

The term of this Agreement begins on the Commencement Date and will continue in full force and effect unless terminated in accordance with Clause 12 below.

12. Termination

Licensee may terminate this Agreement at any time by destroying all copies of the Product in its possession. Either party hereto may terminate this Agreement if the other party commits a material breach and such party does not cure such material breach within thirty (30) days of written notice of such breach. Upon termination of this License Licensee must destroy all copies of the Product in its possession. Clauses 1, 4, 8 – 10, 13 – 24 shall survive any termination of this Agreement.

13. Infringement Indemnification

(a) Napkee Labs will as its own cost and expense defend, indemnify, hold Licensee harmless of any justified claim against any Licensee based on an infringement of a patent, trademark, copyright, trade secret, or other intellectual property or proprietary right (“IP Claim”) with respect to the Products used within the scope of the License granted under this Agreement; provided, however, that: (i) Licensee shall notify Napkee Labs promptly in writing of any such IP Claim; (ii) Licensee shall not enter into any settlement or compromise on any IP Claim without Napkee Labs’ prior written consent; (iii) Napkee Labs shall have sole control of any such action and settlement negotiations so long as there is no detriment or liability to Licensee; and (iv) Licensee shall provide Napkee Labs with reasonable information and assistance, at Napkee Labs’ request, necessary to settle, defend, indemnify or hold harmless such IP Claim. The foregoing states the sole liability of Napkee Labs and the exclusive remedy of Licensee for any infringement of intellectual property rights by the Product or any other items provided by Napkee Labs hereunder. Napkee Labs' liability for damages arising out of such infringement shall be limited according to Clause 14.

(b) If the Product becomes, or in the opinion of Napkee Labs may become, the subject of a claim of infringement of any third party right, Napkee Labs may, at its option and in its discretion promptly: (i) procure for Licensee the right to use the Product free of any liability; (ii) replace or modify the Product to make it noninfringing; or (iii) have any such Product returned to Napkee Labs against refund of any License Fees related to this Product paid by Licensee.

(c) Exclusions from Defense Obligation. Napkee Labs will have no duty to defend any IP Claim to the extent such IP Claim is based on: (i) use of a superseded release of the

Product, if such infringement would have been avoided by the use of a current release of the Product and Napkee Labs timely notified Licensee of the availability of the non-infringing Product at no additional cost; (ii) the combination, operation, or use of the Product with programs or data not furnished by Napkee Labs or at Napkee Labs' direction, or with hardware or operating system software other than the hardware platform and operating system with which the Product is designed to function, if such infringement would have been avoided by the use of the Product without such programs, data, hardware or operating systems; (iii) modification or attempted modification of the Product by anyone except Napkee Labs or at Napkee Labs' direction, or use or distributions of such modifications; or (iv) Licensee's use of the Product in a manner that results in defamation, violates the privacy rights of individuals, transmits material in violation of any applicable law, rule, regulation, or uses any proprietary third party content without legally binding consent of such third party.

(d) To the extent an IP Claim is excluded from Napkee Labs' defense obligation, is based upon the claim that any modifications to the Product or combination of the Product with products, not provided by Napkee Labs or at Napkee Labs' direction, infringes or violates any third party, Licensee will defend or settle, at its expense, any action brought against Napkee Labs provided, however, that: (i) Napkee Labs shall notify Licensee promptly in writing of any such claim; (ii) Napkee Labs shall not enter into any settlement or compromise any such claim without Licensee's prior written consent; (iii) Licensee shall have sole control of any such action and settlement negotiations; and (iv) Napkee Labs shall provide Licensee with information and assistance, at Licensee's request and expense, necessary to settle or defend such claim. Licensee agrees to pay all damages and costs finally awarded against Napkee Labs attributable to such claim. Napkee Labs may elect to assume control of the defense and settlement of any such claim with counsel of its choosing; provided however, that if Licensee will not have breached its defense and settlement obligations hereunder, Licensee will have no obligation to pay the costs and expenses of such Napkee Labs-controlled defense or settlement. The foregoing states the sole liability of Licensee and the exclusive remedy of Napkee Labs for any infringement of intellectual property rights by the Licensee modifications or combinations or any other items provided by Licensee hereunder.

(e) Notwithstanding Clause 13(a) above, Napkee Labs assumes no liability hereunder for, and shall have no obligation to defend Licensee or to pay costs, damages or attorney's fees for, any claim based upon any modifications to any of the Product not approved by Napkee Labs or at Napkee Labs' direction or combination of any of the Product with

products not approved by Napkee Labs or at Napkee Labs' direction.

14. Limitation of Liability

Napkee Labs is liable to the Licensee only for intentional and grossly negligent breach of its contractual obligations subject to the following terms and conditions. Napkee Labs shall not be liable in any event for slight and plain gross negligence.

Napkee Labs liability shall be limited to typically predictable damage which the Licensee has incurred and, in terms of amount, shall in no event, irrespective of the legal ground, exceed the contractually agreed compensations paid to Napkee Labs by Licensee.

Napkee Labs shall not be liable in any event for lost profit, consequential damage, direct and indirect damage, and pure property damage of any kind.

Any claim for damages shall become statute-barred, unless it is asserted in court within six months after the beneficiary has become aware of the damage, and in any event no later than within two years after the triggering event has occurred.

15. Ownership / Intellectual Property

This Agreement only confers the right to use the Product and does not convey any rights of ownership in or to the Product. The Licensee acknowledges that the Product and all intellectual property rights in relation to the Product are the property of Napkee Labs and Napkee Labs is entitled to take whatever action it may decide in order to protect its intellectual property rights in the Product.

16. Open Source Code

Third party software and open source software included in Napkee Labs Product or supplied by Napkee Labs under this Agreement may be subject to separate license terms and conditions, which the Licensee accepts with the use of such software.

All open source software included in Napkee Labs Product is listed on Exhibit A attached to this Agreement.

17. Publicity Rights

(a) The Licensee grants Napkee Labs the right to include the Licensee as a customer in Product promotional material.

(b) Licensee can deny Napkee Labs this right by submitting a written request via email to sales@napkee.com, requesting to be excluded from Product promotional material.

(c) Should the Licensee come to be or already be included in Product promotional material, as a result of any prior purchases where the Licensee did not request exclusion from Product promotional material, the Licensee can at any point in time, submit a written request via email to sales@napkee.com to have Napkee Labs remove the Licensee's name from Product promotional material. Upon receipt of such request, Napkee Labs will remove any reference to the Licensee from such promotional material within reasonable time and make no further reference to the Licensee.

18. No Assignment

Licensee may assign this Agreement only with prior written consent of Napkee Labs, which shall not be unreasonable withhold. If Licensee merges into or with a direct competitor of Napkee Labs, as determined in Napkee Labs' sole discretion, then Napkee Labs may terminate this Agreement for good cause as of the effective date of such merger. Napkee Labs may assign its rights and obligation under this Agreement without consent of Licensee.

19. Tax

Payments made by the Licensee under this Agreement exclude any taxes or duties payable in respect of the goods or services supplied in the jurisdiction where the payment is made or received. To the extent that any such taxes or duties are payable by Napkee Labs, the Licensee must pay to Napkee Labs the amount of such taxes or duties in addition to the license fee under this Agreement unless Licensee is exempt from paying such taxes or duties at the time such taxes or duties are levied or assessed. Napkee Labs will provide the Licensee with documents requested by Licensee necessary to enable the Licensee to obtain a tax or duty refund or credit.

20. Governing Law and Jurisdiction

This Agreement is governed by the laws of Austria, regardless of conflict of law provisions, and the parties hereby irrevocably and unconditionally submit to the exclusive jurisdiction of the courts in Vienna, Austria.

21. Amendments

Napkee Labs reserves its right to amend the Terms and Conditions of this Agreement. Any amendment will be communicated to the Licensee in due time in advance (e.g. by electronic mail or blog post). The amendment will be deemed as accepted if the Licensee does not object in writing within two weeks following notification. Together with the notification, the Licensee will be informed that the respective amendment will become effective if the licensee does not object within the period mentioned.

22. No Waiver

The failure of either party hereto to prosecute its rights with respect to a breach hereunder will not constitute a waiver of the right to enforce its rights with respect to the same or any other breach.

23. Notices

Napkee Labs may give notice by means of a general notice on the Napkee Labs website,

electronic mail to your e-mail address on record with Napkee Labs, or by written communication sent by first class mail or pre-paid post to your address on record. Such notice will be deemed to have been given upon the expiration of 48 hours after mailing or posting (if sent by first class mail or pre-paid post) or 12 hours after sending (if sent by email). You may give notice to Napkee Labs at any time by any of the following: letter delivered by nationally recognized overnight delivery service or first class postage prepaid mail to Napkee Labs' addresses on its website.

Licensee agrees that the Product will not be shipped, transferred or exported into any country or used in any manner prohibited by any export laws, restrictions or regulations.

Exhibit A – Open Source Components

- Adobe Flex SDK: licensing information here:
<http://opensource.adobe.com/wiki/display/flexsdk/Legal+Stuff>
- Flex Video Player by FX Components: more information here:
<http://www.fxcomponents.com/item/flex-video-player/29/>
- Coverflow by Doug McCune: more information here:
<http://dougmccone.com/blog/2007/11/19/flex-coverflow-performance-improvement-flex-carousel-component-and-vertical-coverflow/>
- Papervision 3D: more information here:
<http://code.google.com/p/papervision3d/>
- FlexLib: more information here:
<http://code.google.com/p/flexlib/>
- AS3CoreLib: more information here:
<http://code.google.com/p/as3corelib/>
- jQuery: more information here:
<http://www.jquery.com>
- jQuery UI: more information here:
<http://ui.jquery.com>
- jQuery treeview: more information here:
<http://bassistance.de/jquery-plugins/jquery-plugin-treeview/>
- jQuery Sparklines: more information here:
<http://omnipotent.net/jquery.sparkline>
- jmaps: more information here:
<http://code.google.com/p/jmaps/>
- jQuery SWFObject: more information here:
<http://jquery.thewikies.com/swfobject/>
- jQuery TagCloud: more information here:
<http://plugins.jquery.com/project/TagCloud>
- swfobject: more information here:
<http://code.google.com/p/swfobject/>
- Color Picker: more information here:
<http://www.eyecon.ro/colorpicker/>

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- Tango Icons: more information here:
http://tango.freedesktop.org/Tango_Icon_Library
- jQuery iPhone switch: more information here:
<http://www.elctech.com/snippets/mimicking-iphone-switch-with-jquery>