

Last Updated November 14th, 2017

TOMIS TERMS OF SERVICE AND SUBSCRIPTION AGREEMENT

TOMIS LLC, a Delaware limited liability company (including any subsidiaries or other affiliates, "TOMIS"), owns and/or operates the websites available at app.tomis.tech, www.tomis.com, www.tomis.tech, and all sub-domains thereof (collectively, the "Site"). Access to and use of the Site and any paid web delivered software as a service application, content, and other technical services ("Service") available on or through the Site (including, without limitation, the TOMIS analytics and marketing platform, search engine optimization ("SEO") services, blog library subscriptions, as well as any future software or Services provided by TOMIS) are governed by this Terms of Service and Subscription Agreement (this "Agreement").

THIS IS A LEGALLY BINDING AGREEMENT BETWEEN TOMIS AND YOU AND, IF APPLICABLE, THE COMPANY OR LEGAL ENTITY THAT YOU REPRESENT (COLLECTIVELY, "YOU" OR "YOUR").

BY ENTERING AND CONTINUING TO USE THIS SITE OR THE SERVICES OR CLICKING THE "I ACCEPT" BUTTON ON AN AGREEMENT OF SERVICES PROPOSAL OR OTHER ORDER DOCUMENT, YOU AGREE TO BE BOUND BY THE TOS. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT AND WARRANT THAT YOU ARE AUTHORIZED TO BIND THAT COMPANY OR LEGAL ENTITY TO THIS AGREEMENT. IF YOU DO NOT HAVE SUCH AUTHORITY OR DID NOT WISH TO BE BOUND TO THE TERMS OF THIS AGREEMENT, CLICK "LEAVE THIS SITE" AND/OR DO NOT USE THE SITE OR SERVICES.

YOU AGREE THAT TOMIS MAY MODIFY THIS AGREEMENT OR ANY POLICY OR OTHER TERMS REFERENCED IN THIS AGREEMENT (COLLECTIVELY, "ADDITIONAL POLICIES") AT ANY TIME BY POSTING A REVISED VERSION OF THE AGREEMENT OR SUCH ADDITIONAL POLICY ON THE SITE. ANY REVISED TERMS WILL BECOME EFFECTIVE IMMEDIATELY FOR ALL SITE VISITORS AND TRIAL SUBSCRIBERS. FOR SUBSCRIBERS ANY REVISED TERMS WILL BECOME EFFECTIVE THIRTY (30) DAYS AFTER WE POST THEM TO THE SITE OR, IF TOMIS PROVIDES YOU A CLICK-THROUGH OR OTHER MEANS OF ACCEPTING THE REVISED TERMS, UPON YOUR ACCEPTANCE. CONTINUED USE OF THE SITE OR THE SERVICES AFTER THE REVISED TERMS BECOME EFFECTIVE CONSTITUTES ACCEPTANCE ON YOUR PART OF SUCH ADDITIONAL POLICIES. IF A SUBSCRIBER REJECTS ANY ADDITIONAL POLICIES, THE SUBSCRIBER'S SERVICES WILL TERMINATE ON THE EFFECTIVE DATE OF THE ADDITIONAL POLICIES.

1. Definitions. As used in this Agreement or in any Order Form, the following terms shall have the following meanings:

1.1 "Agreement" means this Terms of Service and Subscription Agreement, any Order Forms, whether written or submitted online, and any materials available on the Site specifically incorporated by reference herein, as such materials, including these terms, may be updated by TOMIS from time to time in its sole discretion.

1.2 “Content” means the audio and visual information, documents, databases, software, products, and services contained or made available to You in the course of using the Digital Properties.

1.3 “Digital Properties” means the Site, the Service, and any services provided by TOMIS, including without limitation, the blog libraries, SEO services, documentation, Content and TOMIS Application Programming Interfaces (“APIs”).

1.4 “Documentation” means any and all manuals, instructions and other documents and materials that TOMIS provides or makes available to Subscriber in any form or medium which describe the functionality, components, features or requirements of the Digital Properties, including any aspect of the installation, configuration, integration, operation, use, support or maintenance thereof.

1.5 “Effective Date” means the earlier of the date You first access the Site or begin using the Service.

1.6 “Initial Subscription Term” means the initial period during which You are obligated to pay for the Service equal to the billing frequency selected by Subscriber during the subscription process (e.g., if the billing frequency is quarterly, the Initial Subscription Term is the first quarter).

1.7 “Intellectual Property Rights” means any unpatented inventions, patent applications, patents, design rights, copyrights, trademarks, service marks, trade names, domain name rights, mask work rights, know-how and other trade secret rights, and all other intellectual property rights, derivatives thereof, and forms of protection of a similar nature anywhere in the world.

1.8 “Order Form(s)” means the form(s), no matter the title, evidencing the Initial Subscription Term for subscription for the Service and any subsequent order forms submitted online or in written form, specifying, among other things, the number of subscriptions and other services contracted for, the applicable fees, the billing period, and other charges as agreed to between the parties. Each such Order Form is incorporated into and is made a part of this Agreement (in the event of any conflict between the terms of this Agreement and the terms of any such Order Form, the terms of this Agreement shall prevail).

1.9 “Person” shall mean any individual, entity, firm, corporation, partnership, association, limited liability company, joint-stock company, trust, or unincorporated organization.

1.10 “Subscriber” means the Person who subscribed for the Service and any Digital Properties.

1.11 “Subscriber Customer Data” means a subset of Subscriber Data, which may include information concerning a tour, guide trip, or similar service booked by a Subscriber’s customer, which data may include: services booked, date booked, dates of services, Subscriber’s customers’ name, mailing address, e-mail, telephone number, and credit card billing zip code.

Subscriber Customer Data will not include any customer credit card information or any other Subscriber Private Data.

1.12 “Subscriber Data” means any data, information, or material provided or submitted by Subscriber to the Service in the course of using the Service whether manually or through APIs.

1.13 “Subscriber Private Data” means any information or combination of information from which an individual (including Subscriber’s customers) may be personally identified, and includes: (a) an individual’s name or portion thereof, (b) Social Security number, (c) driver’s license number or a state identification card number issued in lieu of a driver’s license, (d) financial account number, credit or debit card number.

1.14 “TOMIS Technology” means all of TOMIS’ proprietary technology (including software, hardware, products, processes, algorithms, user interfaces, know-how, techniques, designs, and other tangible or intangible technical material or information) made available to Subscriber by TOMIS in connection with the Service.

1.15 “Trial Subscriber” means a Person who is provided access to all or part of the Digital Properties for evaluation purposes to determine if the Service is suitable for such Person’s use. TOMIS may offer such access on limited terms, such as duration or limited functionality.

1.16 “User(s)” means Subscriber’s employees, representatives, consultants, contractors, or agents who are authorized by Subscriber to use the Service and have been supplied user identifications and passwords by Subscriber (or by TOMIS at Subscriber’s request).

1.17 “Visitor” means any Person visiting the Site who is not a Subscriber.

2. ACCESS AND USE LICENSE AND RESTRICTIONS.

2.1 **Access and Use License.** Subject to the terms and conditions of this Agreement, TOMIS hereby grants Subscriber a nonexclusive, nontransferable, worldwide license to access and use the Site and the Service to which Subscriber subscribes, solely in the ordinary course for Subscriber’s own internal business purposes, during the Term and subject to the terms and conditions of this Agreement (the “Permitted Use”). All rights not expressly granted to Subscriber are reserved by TOMIS and its licensors.

2.2 **Restrictions.** Except as this Agreement expressly permits, Subscriber shall not, and shall not permit any other Person to: (a) copy the Digital Properties, in whole or in part; (b) modify, correct, adapt, translate, enhance or otherwise prepare derivative works or improvements of any Digital Properties; (c) rent, lease, sell, sublicense, assign, distribute, publish, transfer or otherwise make available the Digital Properties to any Person, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud or other technology or service; (d) reverse engineer, disassemble, decompile, decode or adapt the Digital Properties, or otherwise attempt to derive or gain access to the source code of the Digital Properties, in whole or in part; (e) bypass or breach any security device or protection used for or contained in

the Digital Properties or Documentation; (f) remove, delete, efface, alter, obscure, translate, combine, supplement or otherwise change any trademarks, terms of the Documentation, warranties, disclaimers, or Intellectual Property Rights, proprietary rights or other symbols, notices or marks on or relating to any copy of the Digital Properties or Documentation; (g) use the Digital Properties in any manner or for any purpose that infringes, misappropriates or otherwise violates any Intellectual Property Right or other right of any Person, or that violates any applicable law; (h) use the Digital Properties for purposes of: (i) benchmarking or competitive analysis of the Digital Properties; (ii) developing, using or providing a competing software product or service; or (iii) any other purpose that is to TOMIS' detriment or commercial disadvantage; or (i) use the Digital Properties or Documentation other than for the Permitted Use or in any manner or for any purpose or application not expressly permitted by this Agreement.

2.3 **Additions and Modifications.** TOMIS may make changes to the Digital Properties from time to time. Changes may include replacements, enhancements, updates, bug fixes, or upgrades. Certain updates, enhancements, and upgrades may migrate to a higher tiered price of Service for which an additional fee may be required in order to access or use such updates, enhancements or upgrades. Subscriber acknowledges that TOMIS may change or remove features or functionality of the Digital Properties at any time without notice.

3. **SUBSCRIBER'S RESPONSIBILITIES.**

3.1 **Generally.** Subscriber is responsible for all activity occurring under Subscriber's User accounts and shall abide by all applicable local, state, national, and foreign laws, treaties and regulations in connection with Subscriber's use of the Service, including those related to data privacy, international communications, and the transmission of technical or personal data. Subscriber shall: (a) notify TOMIS immediately of any unauthorized use of any password or account or any other known or suspected breach of security related to the Service; (b) report to TOMIS immediately and use reasonable efforts to stop immediately any copying or distribution of Digital Properties that is known or suspected by Subscriber or Subscriber's Users; and (c) not impersonate TOMIS or another TOMIS subscriber or provide false identity information to gain access to or use the Digital Properties.

3.2 **Unauthorized Uses of the Digital Properties.** The license to access and use the Site and Service only extends to the uses expressly described herein. The license to access and use the Site and Service granted to Subscriber in this Agreement does not include any right of collection, aggregation, copying, scraping, duplication, display or derivative use of the Digital Properties nor any right of use of data mining, robots, spiders or similar data gathering and extraction tools without our prior written permission; provided, however, that a limited exception from the foregoing exclusion is provided to general purpose Internet search engines that use tools to gather information for the sole purpose of displaying hyperlinks to the Site, provided they each do so from a stable IP address or range of IP addresses using an easily identifiable agent and comply with our robots.txt file. "General purpose Internet search engines" do not include a website or search engine or other service that provides competitive or similar services to those offered by TOMIS, or any subset of the same.

4. **INTEROPERABILITY REQUIREMENTS.** Subscriber is responsible for obtaining and maintaining any equipment, software, and other services needed to connect to, access, and

use the Digital Properties, including, without limitation, hardware, software, and Internet service. Subscriber shall be solely responsible for ensuring that such equipment, software, and ancillary services are compatible with the Digital Properties.

5. FEES AND PAYMENT OF FEES.

5.1 **Subscription Fees.** In consideration of the rights granted to Subscriber under this Agreement, Subscriber shall pay to TOMIS the subscription fees set forth in the Order Form in accordance with the terms of this Section 5. TOMIS reserves the right to modify the subscription fees and to introduce new charges at any time, upon at least thirty (30) days' prior written notice to Subscriber, which notice may be provided by email. Any such modified subscription fees and charges will take effect upon commencement of the next renewal term for the subscription and shall be deemed automatically to amend and restate the Order Form.

5.2 **Payment of Fees.** Subscriber shall pay all fees or charges due and owing under this Agreement as indicated on the Order Form, and if not so indicated, upon registering for a Service. Any recurring fees (e.g., a renewal subscription term for a Service) shall be payable on the 15th of each month unless otherwise indicated on the Order Form. The Order Form may provide Subscriber with options to pay its fees. Upon registering for Services, Subscriber may be required to designate a valid credit card. Subscriber authorizes TOMIS to charge to Subscriber's designated credit card for all fees due and owing under this Agreement, and Subscriber agrees to pay all such fees in accordance with the applicable card member agreement terms and conditions.

5.3 **Taxes.** All subscription fees and other amounts payable by Subscriber under this Agreement are exclusive of taxes and similar assessments. Without limiting the foregoing, Subscriber is responsible for all sales, service, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental or regulatory authority on any amounts payable by Subscriber hereunder, other than any taxes imposed on TOMIS' income.

6. BILLING AND RENEWAL. Subscriber agrees to provide TOMIS with complete and accurate billing and contact information. This information includes Subscriber's legal company name, street address, email address, and name and telephone number of an authorized billing contact. Subscriber agrees to update this information within thirty (30) days of any change to it. If the contact information Subscriber has provided is false or fraudulent, TOMIS reserves the right to terminate Subscriber's access to and use of the Site and Service in addition to any other legal remedies.

If Subscriber believes its bill is incorrect, Subscriber must contact TOMIS in writing within sixty (60) days of the invoice date of the invoice containing the amount in question to be eligible to receive an adjustment or credit.

7. NONPAYMENT AND SUSPENSION. In addition to any other rights granted to TOMIS herein, TOMIS reserves the right to suspend or terminate this Agreement and Subscriber's access to and use of the Digital Properties if Subscriber's account becomes delinquent. Delinquent invoices and accounts are subject to interest at a rate of one percent

(1.0%) per month on any outstanding balance, or the maximum rate permitted by law, whichever is less, plus all expenses of collection. Subscriber will continue to be charged subscriber fees during any period of suspension. If Subscriber or TOMIS initiates termination of this Agreement, Subscriber will be obligated to pay the balance due on Subscriber's account, which shall become immediately due and payable. Subscriber agrees that TOMIS may bill Subscriber for such unpaid fees.

TOMIS reserves the right to impose a reconnection fee in the event Subscriber is suspended and thereafter requests access to the Site and Service. Subscriber agrees and acknowledges that TOMIS has no obligation to retain Subscriber Data and that such Subscriber Data may be irretrievably deleted if Subscriber's account is sixty (60) days or more past due.

8. TERM. The initial term of this Agreement shall begin on the Effective Date and, unless earlier terminated as provided herein, shall continue until the expiration of the latest of any Initial Subscription Term stated in any Order Form. Thereafter, this Agreement and Subscriber's subscription shall automatically renew for additional periods of the same duration as the Initial Subscription Term stated in the Order Form, unless either party provides the other party with written notice of its desire to terminate the Agreement at least thirty (30) days prior to the end of the then-current term. The Initial Subscription Term and any renewal terms are referred to herein collectively as the "Term." Unless otherwise indicated by TOMIS, fees for renewal terms shall be at TOMIS' then-current fees.

9. TERMINATION

9.1 **Termination for Cause.** Either party may terminate this Agreement by giving to the other party written notice of such termination upon the other party's (a) material breach of this Agreement (subject to the other party's right to cure within thirty (30) days after receipt of such notice); or (b) insolvency, or the institution of any bankruptcy or similar proceedings by or against the other party.

9.2 **Effect of Termination.** Upon any termination of this Agreement the following shall apply: (a) All licenses granted herein and all access to the Digital Properties shall terminate, and TOMIS shall terminate all passwords; (b) TOMIS may delete and has no obligation to retain any Subscriber Data; and (c) Any termination is without prejudice to any other remedies provided for in this Agreement or otherwise available to the parties at law or in equity.

10. ACCOUNT INFORMATION AND DATA; SUBSCRIBER CUSTOMER DATA LICENSE. TOMIS does not own any Subscriber Data. Subscriber, not TOMIS, shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right to use of all Subscriber Data, and TOMIS shall not be responsible or liable for the deletion, correction, destruction, damage, loss or failure to store any Subscriber Data. TOMIS reserves the right to withhold, remove, and/or discard Subscriber Data without notice for any breach, including, without limitation, Subscriber's non-payment. Upon termination for cause, Subscriber's right to access or use Subscriber Data immediately ceases, and TOMIS shall have no obligation to maintain or forward any Subscriber Data.

Subscriber is solely responsible for all uploaded Subscriber Data, including Subscriber Customer Data. TOMIS has no obligation to monitor any Subscriber Data and shall have no liability to Subscriber or any other person or entity with respect thereto, including, without limitation, liability with respect to any information (including Subscriber's confidential information) contained in or apparent from any Subscriber Data. Subscriber represents and warrants that it owns or has a valid and enforceable license and right to use all Subscriber Data, and that no Subscriber Data infringes, misappropriates or violates the rights (including, without limitation, any privacy rights, or any copyrights or other intellectual property rights) of any Person or any applicable law, rule or regulation of any government authority of competent jurisdiction. TOMIS is not responsible for the loss, corruption or other changes to Subscriber Data. Without limiting the foregoing, any feature(s) of the Services that may permit Subscriber to temporarily save or otherwise store Subscriber Data is offered for Subscriber's convenience only and TOMIS does not guarantee that the Subscriber Data will be retrievable. Subscriber is solely responsible for saving, storing and otherwise maintaining Subscriber Data, including by maintaining backup copies of Subscriber's Subscriber Data on appropriate independent systems that do not rely on the Service.

Subscriber shall comply with all applicable statutes, regulations, ordinances and government directives for protecting the privacy of Subscriber Private Data. Subscriber agrees that (a) Subscriber shall not sue the Service to store or transmit any personally identifiable medical information, social security numbers, credit or debit card numbers or financial account numbers ("Sensitive PII"); and (b) TOMIS shall have no liability for failure to adequately secure or protect any Sensitive PII.

Notwithstanding the foregoing, by uploading or entering any Subscriber Data, Subscriber grants to TOMIS, its affiliates and contractors, a nonexclusive, worldwide, royalty-free and fully-paid, transferable and sublicensable, perpetual, and irrevocable license to (a) copy, store, and use Subscriber's Subscriber Data in connection with the provision of the Services, (b) aggregate, compile, decompile, manipulate, reproduce, modify, supplement, adapt, translate, create derivative works from, distribute, publish, disclose and otherwise use all Subscriber Data for any and all purposes, including without limitation, improving the Site or Service, or commercial purposes unrelated to the Site or Service, and (c) use the Subscriber Data to power TOMIS and third party applications and services. Subscriber Data, including Subscriber Customer Data, will be used to benefit all other TOMIS platform subscribers, including but not limited to improving all TOMIS Digital Properties and for cross marketing purposes. Subscriber represents and warrants that: (a) Subscriber's own terms of services and privacy policy grants it authority to transfer Subscriber Customer Data within the terms of this Agreement; (b) Subscriber has full rights and authority to license Subscriber Customer Data; and (c) if a Subscriber provides Subscriber Customer Data not through Subscriber's website, that the customer expressly consented for the license and transfer of Subscriber Customer Data for use consistent with this Agreement. As to all Subscriber Data transmitted to TOMIS prior to termination of this Agreement, Subscriber's grant contained in this Section shall survive the termination of this Agreement. If Subscriber is restricted by law in the duration, permission, individual or class of Subscriber's customer revoking authority for this license, or license of Subscriber Customer Data, Subscriber shall promptly notify TOMIS of such restriction.

11. INTELLECTUAL PROPERTY OWNERSHIP. TOMIS (and its licensors, where applicable) shall exclusively own all right, title, and interest, including all related Intellectual Property Rights, in and to the TOMIS Technology, the Content, the Digital Properties and any suggestions, ideas, enhancement requests, feedback, recommendations, or other information provided by Subscriber or any other party relating to the foregoing. This Agreement is not a sale and does not convey to Subscriber any rights of ownership in or related to the TOMIS Technology, the Content, the Digital Properties or the Intellectual Property Rights owned by TOMIS. TOMIS' name, TOMIS' logo, and the product and service names associated with the Site and Service are trademarks of TOMIS or third parties, and no right or license is granted to use them unless expressly permitted by TOMIS in writing.

12. THIRD PARTY INTERACTIONS. During use of the Service, Subscriber may enter into correspondence with, purchase goods and/or services from, or participate in promotions of advertisers or sponsors showing their goods and/or services through the Service. Any such activity, and any terms, conditions, warranties, or representations associated with such activity, is solely between Subscriber and the applicable third party. TOMIS and its licensors shall have no liability, obligation, or responsibility for any such correspondence, purchase, or promotion between Subscriber and any such third party. TOMIS does not endorse any sites on the Internet that are linked through the Service. TOMIS provides these links to Subscriber only as a matter of convenience, and in no event shall TOMIS or its licensors be responsible for any content, products, services, or other materials on or available from such sites. TOMIS provides the Service to Subscriber pursuant to the TOS. Subscriber recognizes, however, that certain third party providers of ancillary software, hardware, or services may require Subscriber's agreement to additional or different license or other terms prior to Subscriber's use of or access to such software, hardware or services.

13. CONFIDENTIALITY.

13.1 **Use and Disclosure.** Subscriber shall not disclose TOMIS Confidential Information during the Term or any time thereafter for so long as the TOMIS Confidential Information remains nonpublic. As used in this Agreement, "TOMIS Confidential Information" includes all nonpublic information disclosed by TOMIS, TOMIS' affiliates, business partners, or its or their respective agents or contractors that is designated as confidential or proprietary or that, given the nature of the information or circumstances surrounding its disclosure, reasonably should be understood to be confidential. TOMIS Confidential Information includes, without limitation:

- (a) nonpublic information relating to TOMIS' or TOMIS' business partners' technology, customers, business plans, promotional and marketing activities, finances and other business affairs (including any information about or involving beta tests or a product that Subscriber obtains as a result of Subscriber's participation in such beta test);
- (b) third-party information that TOMIS is obligated to keep confidential; and
- (c) the nature, content and existence of any discussions or negotiations between Subscriber and TOMIS.

Confidential Information does not include any information described in Section 13.2 or any information that Subscriber is legally required to disclose provided that Subscriber provides TOMIS (unless prohibited by applicable law) with prompt written notice of any such request for TOMIS Confidential Information so that TOMIS may seek a protective order or other relief to prevent or limit the requested disclosure.

13.2 **Non-Confidential Information.** Notwithstanding any other provision in this Agreement, Subscriber shall not have any obligation to ensure the confidentiality of any information provided or made available by TOMIS hereunder with respect to any information, software application, data or content provided or made available to Subscriber hereunder that:

- (a) is or becomes publicly available without breach of this Agreement;
- (b) can be shown by credible documentation to have been known to Subscriber at the time of Subscriber's receipt from TOMIS;
- (c) is received from a third party who did not acquire or disclose the same by a wrongful or tortious act; or
- (d) can be shown by documentation to have been independently developed by Subscriber without use of or reference to the TOMIS Confidential Information.

13.3 **Protection and Use of Confidential Information.** Other than Subscriber's access to and use of the Site and Service as intended under this Agreement, Subscriber shall not disclose or use the TOMIS Confidential Information other than as necessary to perform under this Agreement. Subscriber shall limit disclosure of the TOMIS Confidential Information to Subscriber's Users. Subscriber shall ensure that Subscriber's Users are advised of the confidential nature of such information and bound to keep such information confidential.

13.4 **Subscriber Private Data.** TOMIS shall keep confidential all Subscriber Private Data on the same basis contained in Sections 13.1 and 13.2; provided, however, that Subscriber Data other than Subscriber Private Data is not covered by the confidentiality obligations of this Section 13.4.

14. REPRESENTATIONS AND WARRANTIES. Each party represents and warrants that (a) it has the legal power and authority to enter into this Agreement; (b) this Agreement won't violate any other agreements with third parties; and (c) it will comply with all applicable laws. TOMIS represents and warrants that it will provide the Service in a manner consistent with general industry standards reasonably applicable to the provision thereof. Subscriber represents and warrants that (i) Subscriber has not falsely identified Subscriber nor provided any false information to gain access to the Service, (ii) Subscriber's billing information is correct, (iii) Subscriber has full permission and authority to make the license grant with respect to the Subscriber Data provided for in Section 10, and (iv) Subscriber has full permission to make calls to third party APIs and to transfer Subscriber Data.

15. INDEMNIFICATION.

15.1 Subscriber Indemnification. Subscriber shall indemnify, defend and hold TOMIS, its licensors and each such party's parent organizations, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents harmless from and against any and all claims, costs, damages, losses, liabilities, and expenses (including attorneys' fees and costs) arising out of or in connection with: (a) a claim alleging that use of the Subscriber Data infringes the rights of, or has caused harm to, a third party (including a claim by Subscriber's customers under Subscriber's license grant of Subscriber Data provided for in Section 10); (b) a breach of Subscriber's representations and warranties contained in this Agreement; or (c) the breach by Subscriber or Subscriber Users of this Agreement; provided in each such case that TOMIS: (i) gives written notice of the claim promptly to Subscriber (provided that failure to give such notice shall not waive or reduce any indemnity obligation except to the extent such failure prejudices the defense or mitigation of such claim); (ii) gives Subscriber sole control of the defense and settlement of the claim (provided that Subscriber may not settle any claim unless Subscriber unconditionally releases TOMIS of all liability and such settlement does not affect TOMIS' business or Service); and (iii) provides to Subscriber all available information and assistance.

15.2 TOMIS Indemnification. TOMIS shall indemnify, defend and hold Subscriber and Subscriber's parent organizations, subsidiaries, affiliates, officers, directors, employees, attorneys, and agents harmless from and against any and all claims, costs, damages, losses, liabilities, and expenses (including attorneys' fees and costs) arising out of or in connection with: (a) a claim alleging that the Service directly infringes a copyright, a U.S. patent issued as of the Effective Date, or a trademark of a third party; or (b) a breach of this Agreement by TOMIS; provided that Subscriber (i) promptly gives written notice of the claim to TOMIS (provided that failure to give such notice shall not waive or reduce any indemnity obligation except to the extent such failure prejudices the defense or mitigation of such claim); (ii) gives TOMIS sole control of the defense and settlement of the claim (provided that TOMIS may not settle or defend any claim unless it unconditionally releases Subscriber of all liability); and (iii) provides to TOMIS all available information and assistance. Should any part of the Digital Properties provided by TOMIS hereunder become, or in TOMIS' opinion is likely to become, the subject of any claim described in Section 15.2(a) above, TOMIS may at its option: (x) procure for Subscriber the right to continue to use the affected Service as contemplated hereunder; (y) replace or modify the Service (such that it does not lose functionality or performance in any material manner) to make its use non-infringing, or (z) should such options not be available at reasonable expense, terminate this Agreement and refund to Subscriber the prorated amount of any fees prepaid by Subscriber that were to apply to the remainder of the unexpired term.

15.3 Exclusions Relating to Infringement Indemnification. TOMIS will have no obligation to indemnify Subscriber to the extent any claim is based on Subscriber's improper use of the Site or Service or any use by Subscriber in combination with other products, equipment, software or systems not supplied by TOMIS to the extent such claim is related to such combination.

16. DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES IN THIS AGREEMENT, TOMIS AND ITS LICENSORS MAKE NO REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY, OR COMPLETENESS OF THE SERVICE OR ANY CONTENT. TOMIS AND

ITS LICENSORS DO NOT REPRESENT OR WARRANT THAT: (A) THE USE OF THE SERVICE WILL BE SECURE, TIMELY, UNINTERRUPTED, OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEM, OR DATA; (B) THE SERVICE WILL MEET SUBSCRIBER'S REQUIREMENTS OR EXPECTATIONS; (C) ANY STORED DATA WILL BE ACCURATE OR RELIABLE; (D) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY SUBSCRIBER THROUGH THE SERVICE WILL MEET SUBSCRIBER'S REQUIREMENTS OR EXPECTATIONS; (E) ERRORS OR DEFECTS WILL BE CORRECTED; OR (F) THE SERVICE OR THE SERVER(S) THAT MAKE THE SERVICE AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE SERVICE AND ALL CONTENT IS PROVIDED TO SUBSCRIBER STRICTLY ON AN "AS IS" BASIS. ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS, ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY TOMIS AND ITS LICENSORS.

17. LIMITATION OF LIABILITIES. IN NO EVENT SHALL TOMIS' AGGREGATE LIABILITY EXCEED THE AMOUNTS ACTUALLY PAID BY SUBSCRIBER IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM. EXCEPT WITH RESPECT TO (A) EACH PARTY'S RESPECTIVE INDEMNIFICATION OBLIGATIONS HEREUNDER, (B) EACH PARTY'S OBLIGATIONS UNDER SECTION 13, AND (C) GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT, IN NO EVENT SHALL EITHER PARTY AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL, OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING LOSS OF DATA, REVENUE, PROFITS, USE, OR OTHER ECONOMIC ADVANTAGE) ARISING OUT OF, OR IN ANY WAY CONNECTED WITH THIS SERVICE, INCLUDING BUT NOT LIMITED TO THE USE OR INABILITY TO USE THE SERVICE, OR FOR ANY CONTENT OBTAINED FROM OR THROUGH THE SERVICE, ANY INTERRUPTION, INACCURACY, ERROR, OR OMISSION, REGARDLESS OF CAUSE IN THE CONTENT, EVEN IF THE PARTY FROM WHICH DAMAGES ARE BEING SOUGHT OR SUCH PARTY'S LICENSORS HAVE BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

18. INTERNET DELAYS. TOMIS' SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. TOMIS IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

19. ADDITIONAL RIGHTS. Certain states and/or jurisdictions do not allow the exclusion of implied warranties or limitation of liability for incidental, consequential, or certain other types of damages, so the exclusions set forth above may not apply to Subscriber or TOMIS.

20. LOCAL LAWS AND EXPORT CONTROLS. TOMIS provides services and uses software and technology that may be subject to U.S. export controls administered by the U.S. Department of Commerce, the U.S. Department of Treasury Office of Foreign Assets Control, and other U.S. agencies and the export control regulations of Switzerland and the European Union. Subscriber acknowledges and agrees that the Site and Service shall not be used, and none of the underlying information, software, or technology may be transferred or otherwise exported or re-exported to countries on which the United States, Switzerland, and/or the European Union maintains an embargo (collectively, “Embargoed Countries”), or to or by a national or resident thereof, or any person or entity on the U.S. Department of Treasury’s List of Specially Designated Nationals or the U.S. Department of Commerce’s Table of Denial Orders (collectively, “Designated Nationals”). The lists of Embargoed Countries and Designated Nationals are subject to change without notice. By using the Site and Service, Subscriber represents and warrants that Subscriber is not located in, under the control of, or a national or resident of an Embargoed Country or Designated National. Subscriber agrees to comply strictly with all U.S., Swiss, and European Union export laws and assumes sole responsibility for obtaining licenses to export or re-export as may be required.

The Site and Service may use encryption technology that is subject to licensing requirements under the U.S. Export Administration Regulations, 15 C.F.R. Parts 730–774 and Council Regulation (EC) No. 1334/2000.

TOMIS and its licensors make no representation that the Site or Service is appropriate or available for use in locations outside of the U.S. Subscriber is solely responsible for compliance with all applicable laws, including without limitation export and import regulations of other countries. Any diversion of the Content contrary to U.S., Swiss, or European Union (including European Union Member States) law is prohibited. None of the Content, nor any information acquired through the use of the Service, is or will be used for nuclear activities, chemical, or biological weapons, or missile projects, unless specifically authorized by the U.S. government or appropriate European body for such purposes.

21. GENERAL.

21.1 **Independent Contractors.** Nothing in this Agreement shall be construed to constitute either party as a partner, employee, or agent of the other, nor shall any party bind, attempt to bind, or have the authority to bind the other party in any respect, it being intended that each party shall remain an independent contractor responsible for its own actions. Each party shall conduct its business in its own name and, to the extent consistent with this Agreement, in such manner as it may see fit; provided, however, that each party shall be responsible for the acts and expenses of its agents, employees, associates and, in the case of Subscriber, Users.

21.2 **Assignment.** Subscriber may not assign this Agreement without TOMIS’ prior written consent. Any attempted assignment shall render this Agreement and the subscription granted herein terminated.

21.3 **No Third Party Rights.** Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it and their respective successors and assigns, nor is anything in this

Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision give any third persons any right of subrogation or action over or against any party to this Agreement.

21.4 **Binding Effect.** All of the terms, provisions and conditions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective successors, assigns and legal representatives.

21.5 **Notices.** All notices between the parties shall be deemed to have been given on the date of receipt, if sent by certified or registered mail or overnight courier with confirmation of receipt to the addresses set forth on the Order Form, until such time as a party provides written notice of its change of address.

21.6 **Governing Law; Venue.** This Agreement was entered into in the State of Montana, and its validity, construction, interpretation and legal effect shall be governed by the laws and judicial decisions of the State of Montana applicable to contracts entered into and performed entirely within the State of Montana. Any action at law or in equity arising under this Agreement shall be filed only in the federal or state courts in the State of Montana. Each party hereby consents and submits to the personal jurisdiction of such courts for the purposes of litigating any such action.

21.7 **Attorneys' Fees.** In the event of any action or arbitration for the breach of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs and expenses incurred in connection with such action or arbitration.

21.8 **Severability.** If any provision of this Agreement or application to any party or circumstance shall be held by a court of competent jurisdiction to be invalid and unenforceable to any extent, the remainder of this Agreement or the application of such provision to such party or circumstance, other than those to which it is so determined to be invalid or unenforceable, shall not be affected thereby, such provision shall be deemed to be amended to the maximum extent enforceable by such court, and each other provision hereof shall be valid, not be affected thereby, and be enforceable to the fullest extent permitted by law.

21.9 **Non-Waiver.** No right or obligation under this Agreement shall be deemed to have been waived unless evidenced by a writing signed by the party against whom the waiver is asserted, or its duly authorized representative. Any waiver shall be effective only with respect to the specific instance involved, and shall not impair or limit the right of the waiving party to insist upon strict performance in any other instance, in any other respect, or at any other time.

21.10 **Entire Agreement.** This Agreement, together with any Order Forms, comprises the entire agreement between Subscriber and TOMIS and supersedes all prior or contemporaneous negotiations, discussions or agreements, whether written or oral, between the parties regarding the subject matter contained herein.

21.11 **Amendment.** Except as otherwise expressly permitted herein, this Agreement constitutes the entire agreement between the parties, and supersedes all prior writings or oral agreements. This Agreement shall be amended only by a writing clearly setting forth the amendments and signed by the party against whom enforcement is sought.

21.12 **Further Assurances.** Each party shall take such further actions and to make, execute and deliver such further written instruments, as may be reasonably required from time to time to carry out the terms, provisions, intentions and purposes of this Agreement.

21.13 **Force Majeure.** Provided that the parties hereto are making reasonable efforts in good faith to comply with the terms of this Agreement, each party shall excuse the other's performance hereunder (except as it relates to the payment of fees) upon the occurrence of an Act of God, accident, fire, labor controversy, war or act of aggression by any government, riot or civil commotion, epidemic, terrorist act, act of public enemy, law, enactment, rule, order, act of government or governmental instrumentality, failure of technical facilities, failure or delay of transportation facilities or other cause of a similar or dissimilar nature not within such party's control or which such party cannot by reasonable diligence avoid (collectively, a "**Force Majeure**"). Upon the occurrence of a Force Majeure, the party so affected shall continue to make all reasonable efforts in good faith to comply with the terms of this Agreement and shall be in full compliance hereof as soon as is reasonably practicable.

TOMIS LLC Terms of Service and Subscription Agreement

Last Updated: November 14th, 2017