

5.3 DVB MHP OPENTV, INC. TEST APPLICATION LICENSE AGREEMENT

BETWEEN:

(1) European Telecommunications Standards Institute, as Custodian ("Custodian") named by the DVB Project (defined below), and agreed to by OpenTV, Inc., ("Licensor")

and

(2) the company whose name appears on the signature page hereof ("Licensee");

WHEREAS:

i) Custodian has entered into the DVB Conformance Testing Custodian Agreement (the "Custodian Agreement") with the DVB Project;

ii) By a decision of its Steering Board taken on February 22, 2000, the DVB Project has adopted a specification for the Multimedia Home Platform ("DVB MHP Specification" as further defined below), and, on November 9, 1999, the Steering Board issued a Declaration (DVB SB 27 (99) 15 Rev. 2) with respect to certain DVB MHP rules, the arrangements for a custodian and an experts group, testing and certain other matters;

iii) Custodian has been appointed by the DVB Project to undertake a variety of activities related to the administration of the DVB MHP Conformance Testing (defined below) as specified and approved by an experts group named by the DVB Project; and

iv) Licensor, with Custodian acting as Licensor's agent, is willing to license certain Test Applications (defined below) to Licensee for the limited purpose of testing and self-certifying Implementations of the DVB MHP Specification.

IT IS HEREBY AGREED AS FOLLOWS:

Article 1 - DEFINITIONS

1.1 "*Affiliate*" means any subsidiary or parent company of Licensee, as well as any entity that owns or controls Licensee or that is owned or controlled by Licensee.

1.2 "*Conformance Testing*" or "*MHP Test Suite*" refers to the test programs, rules, guides, documentation and other materials determined by DVB to be used for establishing whether an implementation of the DVB MHP Specification may be certified as an Implementation.

1.3 "*DVB MHP Specification*" (further referred to as the "Specification") means the DVB Multimedia Home Platform Specification as adopted by the Steering Board of the DVB Project on the date of its first adoption, and as such Specification may be amended from time to time.

1.4 "*DVB Project*" means the Digital Video Broadcasting Project, a not-for-profit association with legal personality governed by Swiss law under the terms of an Amended and Restated Memorandum of Understanding dated December 17, 1996, or, if such association ceases to exist, the body succeeding to its activities or its assignee named pursuant to Section 6(c) of the Custodian Agreement.

1.5 "*Implementation*" means an implementation of the DVB MHP Specification that:

- (i) fully implements the appropriate profile of the MHP Specification;
- (ii) implements all mandatory interfaces and functionality of the MHP Specification; and
- (iii) fully satisfies the MHP Test Suite including but not limited to any self-certification requirement.

1.6 “*Implementer*” means a legal entity that has:

- (i) produced an Implementation;
- (ii) entered into a DVB MHP OpenTV, Inc. Test Application License Agreement identical (except for the identity of Licensee) to this Agreement, and any other similar agreements required by Custodian;
- (iii) completed and satisfied the MHP Test Suite delivered to the Implementer by Custodian; and
- (iv) has provided to Custodian the Certificate of Completion of the Conformance Testing attached as Annex A to the Custodian Agreement.

1.7 “*Incomplete Implementation*” means an implementation of the DVB MHP Specification that implements less than all the mandatory interfaces and functionality of the MHP Specification and/or that does not fully satisfy the MHP Test Suite.

1.8 “*Test Applications*” means Licensor’s test applications, including, without limitation, all related code, documentation and other materials that are developed by Licensor, and as may be amended by Licensor from time to time, and included in the MHP Test Suite provided to Licensee by Custodian.

1.9 “*Term*” means the term of the Agreement as specified in Article 6.1.

Article 2 - LICENSE GRANTS

2.1 Test Applications License.

a. Limited Grant. Conditioned upon Licensee's full compliance with the obligations set forth in this Agreement, including this Article 2 and Article 4, Custodian, on behalf of Licensor, hereby grants, as of the effective date of this Agreement, to Licensee a limited, non-exclusive, non-transferable, worldwide, royalty-free right and license to use, and make a reasonable number of copies of, the Test Applications solely for the purpose of testing and self-certifying Implementations in accordance with the Conformance Testing, which shall include the right to test Incomplete Implementations that are delivered to an Implementer for subsequent integration and distribution as part of an Implementation distributed by such Implementer. Licensee need not require such Implementer to integrate and distribute an Incomplete Implementation as part of an Implementation, but Licensee shall not authorize the Implementer to distribute Licensee's Incomplete Implementation unless it is integrated into and distributed as part of Implementation.

Licensor reserves its rights to take legal action against Licensee if Licensee uses the Test Applications in breach of this Agreement or outside the scope of the licenses granted herein. Similarly, Licensee reserves its rights to take legal action to preserve its rights with respect to the use of the Test Applications. Licensee shall defend, indemnify and hold harmless Custodian and Licensor for any claims, damages, expenses (including reasonable attorneys' fees), judgments, and awards arising out of, or relating to, Licensee's unauthorized use of the Test Applications. Licensee's indemnity obligations hereunder shall survive any termination of this Agreement.

b. Additional Limitations. For the avoidance of doubt, Licensee acknowledges and agrees that it is not licensed hereunder to:

1. distribute the Test Applications to any third party;
2. modify or create derivative works of the Test Applications, or, except as otherwise provided by law, disassemble or decompile binary portions of the Test Applications, or otherwise attempt to derive the source code from such portions; or
3. use the Test Applications, or any portion thereof, to develop other test programs or test applications or suites intended to validate compatibility with the MHP Specification, or any portion thereof.

2.2 Proprietary Rights Notices. Licensee shall not remove any copyright notices, trademark notices or other proprietary legends of Licensor or its suppliers contained on or in the Test Applications.

2.3 Notice of Breach or Infringement. Licensee shall notify Custodian immediately in writing when it becomes aware of (i) any breach or violation of the terms of this Agreement, or (ii) any claim that the Test Applications, and /or Licensee's use thereof, infringe a third party's intellectual property rights. Custodian shall notify Licensor immediately in writing when it becomes aware, by notice from the Licensee or otherwise, of (i) any breach or violation of the terms of this Agreement, or (ii) any claim that the Test Applications, and /or Licensee's use thereof, infringe a third party's intellectual property rights.

2.4 Ownership. Licensor retains all right, title and interest in and to the Test Applications, including any upgrades thereto provided hereunder.

2.5 Support. Neither Custodian nor Licensor shall incur any obligations by virtue of this Agreement to provide any support or administrative services concerning the Test Applications, including providing access to any subsequent releases of the Test Applications.

2.6 Use of Contractors. Licensee may provide the Test Applications to a contractor for the limited purpose of assisting the contractor in performing services for Licensee to develop, test and self-certify Implementations in accordance with the Conformance Testing. Such contractor must have executed an agreement with Licensee that is consistent with Licensee's rights and obligations under this Agreement.

2.7 Incomplete Implementations. No license is granted hereunder with respect to Incomplete Implementations that are delivered to any third party other than an Implementer for subsequent integration and distribution as part of an Implementation distributed by such Implementer.

2.8 No Other Grant. Other than the express rights to use and copy the Test Applications granted at Article 2.1 above, Custodian and Licensor grant no other rights to Licensee under this Agreement. Licensee acknowledges that this Agreement does not grant any right or license to any intellectual property rights of Licensor and no other right or license is to be implied by or inferred from any provision of this Agreement or by the conduct of the parties. Licensee further acknowledges that no right, title, or interest in or to any patents, patent applications, copyrights, trademarks, or trade secrets of Licensor that might be essential to Licensee's Implementation is granted under this Agreement.

Article 3 - LIMITED WARRANTY AND DISCLAIMER

THE TEST APPLICATIONS ARE LICENSED "AS IS" AND ALL REPRESENTATIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT ARE HEREBY DISCLAIMED.

Article 4 - CONFIDENTIAL INFORMATION

4.1 Confidential Information. For the purposes of this Agreement, the Test Applications shall be considered "Confidential Information."

4.2 Preservation of Confidentiality. Licensee agrees that the Confidential Information shall be used solely for the purpose specified in Article 2.1, and agrees to keep the Confidential Information strictly confidential and shall not disclose it to any other person except to an Affiliate and to its employees (who under the terms of their employment by Licensee are subject to an obligation not to disclose confidential information of Licensee), who have a "need to know" for the purposes specified in Article 2.1 and are made aware of, and have agreed to abide by, the requirements of this Article 4.

4.3 Standard of Care. Licensee shall protect the Confidential Information with the same degree of care as it normally uses in the protection of its own confidential and proprietary information, but in no case with any less degree than reasonable care. Licensee shall, at Custodian's reasonable request, provide written assurances concerning the steps taken by Licensee and its Affiliates to preserve the confidentiality of Confidential Information.

4.4 Residual Knowledge. Except with respect to the development of other test applications intended to validate compatibility with the MHP Specification, or portions thereof, which shall not mean the development of test programs as development tools that are only for Licensee's internal use, this Agreement is not intended to prevent those employees of Licensee to whom Confidential Information is disclosed pursuant to Section 4.2 from using Residual Knowledge, subject to any valid patents, copyrights, and semiconductor mask rights of the disclosing party. Residual Knowledge means ideas, concepts, know-how or techniques related to the disclosing party's technology that are retained in the unaided memories of the receiving party's employees who have had access to information. An employee's memory will be considered unaided if the employee has not intentionally memorized the information for the purpose of retaining and subsequently using or disclosing it.

4.5 Identity of Licensee. Licensee acknowledges that, prior to Licensee obtaining the right to use the MHP Mark in connection with Licensee's Implementation, Custodian is obligated not to disclose Licensee's identity to Licensor except at the instruction of the Chairman of the DVB Steering Board or in the event that Licensor provides Custodian in good faith with reasonable grounds for believing that Licensee may be in violation of its obligations hereunder. The DVB Project Office will, however, make publicly available the list of Implementations that have obtained the DVB MHP Mark or Label.

Article 5 - LIMITATION OF LIABILITY

IN NO EVENT SHALL LICENSOR OR CUSTODIAN BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES IN CONNECTION WITH OR ARISING OUT OF THIS AGREEMENT (INCLUDING LOSS OF PROFITS, USE, DATA, OR OTHER ECONOMIC ADVANTAGE), NO MATTER WHAT THEORY OF LIABILITY, EVEN IF EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OR PROBABILITY OF SUCH DAMAGES. FURTHER, LIABILITY FOR SUCH DAMAGE SHALL BE EXCLUDED, EVEN IF THE EXCLUSIVE REMEDIES PROVIDED FOR IN THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE. The provisions of this Article 5 allocate the risks under this Agreement between Licensor and Custodian, on the one hand, and Licensee on the other hand, and the parties have relied upon the limitations set forth herein in determining whether to enter into this Agreement.

Article 6 - TERM AND TERMINATION

6.1 Term. The Term of this Agreement shall begin on the latest signature date below and shall continue unless and until the earlier of:

- (i) termination of this Agreement pursuant to this Article 6; or
- (ii) the Test Applications cease to be included as part of the MHP Test Suite.

Termination of this Agreement shall not relieve Licensee of any of its obligations hereunder.

6.2 The license granted in Section 2.1 of this Agreement may be terminated by Licensor or Custodian, upon written notice given by Custodian, upon the occurrence of any of the following events:

- a. the Licensee or any of its Affiliates breaches any of the terms hereof or uses the Test Applications outside the scope of the license granted in Section 2.1;
- b. a claim that the Test Applications, and /or Licensee's use thereof, infringe a third party's intellectual property rights; or
- c. there is a voluntary or involuntary filing of bankruptcy by, or similar event affecting, Licensee.

6.3 Effect of Termination. Upon termination of this Agreement, for any reason, Licensee shall forthwith cease its use of the Test Applications and return to Custodian all Confidential Information in written, electronic or magnetic form and any copies thereof. Articles 2.4, 2.8, 4.1, 4.2, 4.3, 4.4, 5, 6, and 7 shall survive any termination of this Agreement.

6.4 No Liability for Expiration or Lawful Termination. Neither party shall have the right to recover damages or to indemnification of any nature, whether by way of lost profits, expenditures for promotion, payment for goodwill or otherwise made in connection with the business contemplated by this Agreement, due to the expiration or permitted or lawful termination of this Agreement. EACH PARTY WAIVES AND RELEASES THE OTHER FROM ANY CLAIM TO COMPENSATION OR INDEMNITY FOR TERMINATION OF THE BUSINESS RELATIONSHIP UNLESS TERMINATION IS IN MATERIAL BREACH OF THIS AGREEMENT.

6.5 No Waiver. The failure of either party to enforce any provision of this Agreement shall not be deemed a waiver of that provision. The rights of Licensor under this Article 6 are in addition to any other rights and remedies permitted by law or under this Agreement.

6.6 Irreparable Harm. The parties acknowledge that a material breach of Articles 2 and/ or 4 would cause irreparable harm, the extent of which would be difficult to ascertain. Accordingly, they agree that, in addition to any other legal remedies to which a non-breaching party might be entitled, such party shall be entitled to obtain immediate injunctive relief in the event of a breach of the provisions of such Articles.

Article 7 - MISCELLANEOUS

7.1 Governing Law. This Agreement is made under and shall be governed by and construed under the laws of the State of California, regardless of its choice of laws provisions.

7.2 Compliance with Laws. The Test Applications are subject to U.S. export control laws, including the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee agrees to comply strictly with all such regulations and acknowledges that it has the responsibility to obtain such licenses to export, re-export or import the Test Applications, or any portion thereof, as may be required after delivery to Licensee.

7.3 Assignment. Custodian may upon notice to Licensee assign this Agreement to a replacement custodian which shall have the rights and obligations as Custodian hereunder. Licensors may assign its rights and obligations hereunder upon notice to Custodian.

7.4 Enforcement. Licensee agrees that, in addition to Custodian, Licensors shall have the right to enforce this Agreement.

7.5 Complete Understanding. This Agreement constitutes and expresses the final, complete and exclusive agreement and understanding between Licensee and Custodian, and between Licensee and Licensors, with respect to its subject matter (that is, the granting of a license to use the Test Applications with respect to testing and self-certifying Implementations).

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives.

Custodian:

Licensee:

By:

By:

Name:

Name:

Title:

Title:

(Date)

(Date)