

SPARK Family Website  
**USER AGREEMENT**

THIS AGREEMENT is between The SPARK Programs, having offices at 438 Camino Del Rio South, Suite 110, San Diego, CA 92108 ("SPE"), and the User of SPE's services ("LICENSEE").

The parties hereto agree as follows:

## 1. BACKGROUND

1.1 SPE has developed web pages and content and on-line software in the field of physical education.

1.2 SPE owns the entire right, title and interest in its web pages, content, on-line software and intellectual properties associated therewith.

1.3 SPE wishes to provide services making its physical education web pages and on-line software available to authorized subscribers for public use and benefit.

1.4 LICENSEE wishes to acquire a license to use the web pages and on-line software in the Licensed Field of Use (hereinafter defined).

## 2. DEFINITIONS

The following definitions apply throughout this Agreement:

2.1 "Affiliate" means any corporation, company, partnership, joint venture or other entity which controls, is controlled by, or is under common control with a party.

2.2 "Non-Exclusive" means SPE may grant further licenses in the Licensed Field of Use.

2.3 "License" or "this license" means the license granted in Section 3.1.

2.4 "Licensed Field of Use" means the field of physical education.

## 3. LIMITED LICENSE AND RESTRICTIONS ON USE

3.1 Non-Exclusive License - Station PE, Inc. ("SPE") will provide each person to whom a user Educational Identification Log-in Code ("User ID") has been issued (a "User") with access to the Educational services of SPE (the "Services") pursuant to the terms and conditions set forth in this Agreement. User will have a nonexclusive, non-transferable, limited license to access and use the Services at such times as the Services are generally available. LICENSEE agrees to be bound by the terms of this agreement upon accepting a User ID.

3.2 A User may use the Services solely for non-commercial purposes directly connected with the educational activities of his or her school (the "School"). The Services may be used for class preparation and activities, for research and projects for the School, for general use in connection with School classes, clinics or independent study courses, or for any other educational exercise directly connected with the School. Use of, or assisting another in the use

of, the Services for any purpose which is outside the scope of the educational activities of the School, whether or not remuneration to any party is involved, is unauthorized use. Unauthorized use includes, but is not limited to, for example, e-mailing copies of materials obtained from SPE through use of the Services to another person or legal entity.

Unauthorized use breaches the agreement which the School has with SPE and, if detected by SPE, will be reported to the School. Disciplinary action may be taken against the offender by the School and the offender's Educational Identification Log-in Code ("User ID") will be revoked.

3.3 All right, title, and interest in the Services and the materials included therein belong to SPE, except to the extent that third parties whose materials are made available in the Services possess copyright or proprietary interests in such materials.

3.4 Users may not publish, broadcast, e-mail or sell any materials retrieved through the Services or use any such materials in any fashion that may infringe any copyright or proprietary interest of SPE or its third party suppliers. Users may not copy or otherwise distribute any materials retrieved through the Services except to the extent permitted under Section 3.5 below.

3.5 If permitted by the School, Users may create online and offline printouts of materials retrieved through the Services. Users may reproduce or duplicate such printouts, and distribute such printouts and copies, to the extent permitted under the "fair use" provisions of the Copyright Act of 1976 (17 U.S.C. §107). If permitted by the School, Users may download and store, in machine-readable form, insubstantial portions of materials included in any individual file in the Services unless such downloading or storage is for use in a searchable, machine-readable database, or is not a "fair use" under the Copyright Act of 1976. Other provisions applicable to the use of particular materials are displayed electronically through the Services.

To inspect a copy of SPE's current Supplemental Terms for Specific Materials, contact the School's SPE account representative. From time to time, SPE may amend any of the terms and conditions set forth herein or any terms and conditions of the Supplemental Terms for Specific Materials upon notice to the School.

3.6 Users may not sublicense, assign or transfer this license or the Licensed Services. Any attempt to sublicense, assign or transfer any of the rights, duties or obligations hereunder is void.

3.7 Users may not take any steps, such as altering, decompiling, disassembling, reverse assembling, or reverse compiling, to derive the source code equivalent of the Licensed web page content and/or on-line software.

3.8 Each teacher must have their own login information; two or more teachers cannot share a subscription or any of the benefits of the subscription.

3.9 Contract and subscription term is 12 months. School Districts will be billed at the 11th month for the following year. Payment terms for districts are net 30 days.

3.10 Teacher information will be stored for 60 days after the subscription term has ended, if a new contract is not signed and payment for continuation of the subscription is not received within 60 days of the expiration date all data will be deleted from the database.

3.11 In consideration for the grant of the license, LICENSEE will pay SPE a nonrefundable service fee per 12 month subscription, to be paid upon each successive renewal or continuation of the subscription.

#### 4. LIMITED WARRANTY

4.1 SPE represents that it has the right and authority to make the materials included in the Services available pursuant to the terms and conditions set forth herein.

EXCEPT AS OTHERWISE PROVIDED IN THE PRECEDING SENTENCE, ALL SERVICES, EQUIPMENT, DATA, SOFTWARE AND OTHER PRODUCTS FURNISHED BY SPE TO USER OR THE SCHOOL ARE PROVIDED ON AN "AS IS" "AS AVAILABLE" BASIS, AND SPE EXPRESSLY DISCLAIMS ALL WARRANTIES, INCLUDING ANY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

4.2 Without limiting the generality of the foregoing, SPE shall not be liable for any loss, injury, claim, liability or damage of any kind resulting in any way from (a) any errors in or omissions from the Services or any materials included therein, (b) the unavailability or interruption of the Services or any features thereof or any materials included therein, (c) User's use of the Services (regardless of whether User received any assistance from SPE employees), (d) User's use of any equipment in connection with the Services, or (e) the content of materials included in the Services. IN NO EVENT WILL SPE BE LIABLE TO ANY USER FOR ANY DAMAGES, WHETHER DIRECT, INDIRECT, INCIDENTAL OR CONSEQUENTIAL, ARISING OUT OF THE USE OR INABILITY TO USE THE LICENSED PROGRAM, EVEN IF SPE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. Some states do not allow the limitation or exclusion of liability for incidental or consequential damages so the above limitation or exclusion may not apply in those states.

#### 5. NEGATION OF WARRANTIES AND INDEMNITY

5.1 Nothing in this Agreement is or shall be construed as:

(a) a warranty or representation that anything made, used, sold or otherwise disposed of under this license is or will be free from infringement of patents, copyrights and other rights of third parties;

(b) granting by implication, estoppel or otherwise any licenses or rights under any technology or patents other than expressly licensed by this Agreement.

5.2 SPE warrants that to the best of its knowledge, it has the right to enter into this license and that it is the rightful owner of the licensed subject matter.

5.3 Except as expressly set forth in this Agreement, SPE MAKES NO REPRESENTATIONS AND EXTENDS NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED. THERE

ARE NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR THAT THE USE OF THE LICENSED PRODUCTS WILL NOT INFRINGE ANY PATENT, COPYRIGHT, TRADEMARK OR OTHER RIGHTS.

5.4 LICENSEE agrees to indemnify, hold harmless and defend SPE and its trustees, directors, officers, employees and agents against any and all claims by any third party for death, illness, personal injury, property damage and improper business practices arising out of LICENSEE'S or its Affiliates' manufacture, use, sale or other disposition of the Cell Line, or the use of Licensed Products by LICENSEE, its Affiliates, or its customers.

5.5 The party with the indemnity obligation (the "Indemnitor") shall, at its sole expense, defend any suit based on such a claim or cause of action referred herein, and satisfy any judgment that may be rendered against the other party (the "Indemnitee") resulting therefrom, provided that (i) the Indemnitor is given prompt notice of such claim or suit, (ii) the Indemnitor shall have sole control of the defense and all related settlement negotiations, and (iii) the Indemnitee gives the Indemnitor full cooperation, information and assistance for the defense. The Indemnitor will not be responsible for any settlement made without its prior written consent, or for any costs, expenses or fees incurred by the Indemnitee without the Indemnitor's prior written consent. The Indemnitee may, at its election, participate in the defense at its own expense.

5.6 IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY LOST PROFITS OR SPECIAL OR INCIDENTAL OR CONSEQUENTIAL DAMAGES OF THE PARTIES TO THIS AGREEMENT REGARDLESS OF WHETHER ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## 6. TERMINATION

6.1 LICENSEE may terminate this Agreement by giving SPE notice in writing at least 30 days in advance of the expiration of the subscription, or by not signing a new contract upon expiration of an existing license agreement with SPE.

6.2 SPE may terminate this Agreement if LICENSEE:

(a) is in default in payment of any amount required under this Agreement, or providing of reports; or

(b) is in material breach of any other provision hereof; or

(c) becomes involved in any voluntary or involuntary bankruptcy or other insolvency proceedings which continues for 90 days, or ceases to be engaged in any business; and LICENSEE fails to remedy any such default, breach or false report within 90 days after written notice thereof by SPE.

6.3 Surviving any termination are:

(a) LICENSEE's obligation to pay any amount due under this Agreement accrued or accruable;

(b) Any cause of action or claim of LICENSEE or SPE, accrued or to accrue, because of any breach or default by the other party; and

(c) The provisions of Article 5 and Article 6.

## 7. NOTICES

All notices, consents and other communications under this Agreement shall be in writing and shall be deemed to have been duly given when (a) delivered by hand, (b) sent by telecopier (with receipt confirmed) provided that a copy is sent by one of the other recognized means or (c) when received by the addressee, if sent by first class or Express Mail or other express delivery service in each case to the appropriate addresses and telecopier numbers set forth below, or to such other address as may have been furnished in writing to the notifying party.

To SPE:

The SPARK Programs  
438 Camino Del Rio South, Suite 110,  
San Diego, CA 92108  
Attention: Subscription Services  
Telecopier No: (619) 293-7992

## 8. MISCELLANEOUS PROVISIONS

8.1 WAIVER: None of the terms, covenants or conditions of this Agreement can be waived except by the written consent of the party waiving compliance.

8.2 APPLICABLE LAW: This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of New York where state law is the appropriate standard, and by the laws as promulgated by the United States Court of Appeals for the Second Circuit in the District Court in which SPE maintains its principal place of business, if federal law is in question.

8.3 SEVERABILITY: If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby, provided that such provision or provisions are not material to the overall integrity of this Agreement.

8.4 NO JOINT VENTURE: No term or provision of this Agreement shall be construed as to create a joint venture relationship, or any other business relationship, between SPE and LICENSEE other than that of licensor and licensee. Neither party hereto, nor any respective agent or employee of either party, shall be regarded as an agent or employee of the other as a result of this Agreement.

8.5 ENTIRE AGREEMENT: This Agreement constitutes the entire agreement with respect to its subject matter and supersedes any and all prior agreements between SPE and LICENSEE with respect to its subject matter. No amendment, modification or waiver of any of the provisions of this Agreement shall be valid unless set forth in a written instrument signed by both parties.

8.6 FORCE MAJEURE: Each party hereto shall be relieved of its obligations hereunder to the extent that fulfillment of such obligations shall be prevented by acts beyond the reasonable control of the party affected thereby.

8.7 NO USE OF SPE NAME: LICENSEE shall not use SPE's name with respect to any Licensed Products without SPE's prior written approval.

8.8 CONFIDENTIALITY: SPE and LICENSEE agree that the terms of this Agreement shall be maintained in strict confidence, and shall only be disclosed internally on a need-to-know basis. Notwithstanding any other provisions contained herein, each party (and each of their respective employees, representatives or other agents) may disclose to any and all persons, without limitations of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including opinions and other tax analyses) that are provided to the taxpayer relating to such tax treatment and tax structure.