

FEB-29-00 14:38 FROM-INSTANT VIDEO TECHNOLOGIES

415-201-3382

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cc: Sales



500 Sansome Street
San Francisco
California 94111
tel 415.391.4400
fax 415.391.3382
www.burst.com

BURSTWARE® Pre-BETA EVALUATION AGREEMENT

This Burstware Pre-BETA Evaluation Agreement is made and entered into as of March 3, 2000 (the "Effective Date") between BURST.COM, INC., a Delaware corporation, with office at 500 Sansome Street, San Francisco, California 94111 (hereinafter "Burst.Com") and SEQUANET, INC. a Delaware corporation, with offices at 924 North 54th Street, Mesa, Arizona 85205 (hereinafter "Evaluator"), with reference to the following facts:

- A. Burst.Com is engaged in the design, development and licensing of interactive network technologies including certain software related to the Faster-Than-Real-Time™ transmission of audio and video programming;
- B. Evaluator is Systems integrator / Service provider (describe business);
- C. Evaluator desires to evaluate Burst.Com's Burstware® products to deliver video on DSL based systems (describe use).

1. DEFINITIONS. For the purpose of this Agreement, the following terms when used herein shall have the meanings set forth below:

1.1 "Evaluation Agreement" shall mean this document, together with any and all attachments hereto, or related document(s), as may be executed by the Parties.

1.2 "Burstware®" shall mean software developed by Burst.Com that enables the Faster-Than-Real-Time™ transmission of audio and video programming.

1.3 "Burstware Conductor™" shall mean a software component of the Burstware® product suite that manages the distribution of Burstware Player requests over multiple Burstware Servers. In addition, it provides centralized network management services.

1.4 "Burstware Player™" shall mean a software component that displays both video and audio media files.

1.5 "Burstware Server™" shall mean a software component of the Burstware® product suite that stores multimedia files, delivers the files to players on client machines, and manages client buffers.

2. LOAN OF PRE-BETA PRODUCT.

2.1 Burst.Com shall loan to Customer and permit Customer to evaluate a "Pre-BETA Development Product" identified in the Supplement attached hereto under the terms and conditions of this Agreement and all additional terms and conditions and for the purposes applicable to such lease/situation as specified in the Supplement.

2.2 Customer shall upgrade to the official BETA version of the MPEG2 Video Decoder Burstware® product (included in the Supplement(s)) when it is available for testing.

2.3 The Software received by Customer is not generally available to the public ("PREPRODUCTION SOFTWARE" OR "PRE-BETA SOFTWARE") and is not intended for Customer's production purposes. Customer acknowledges that it should not rely on the functionality of Preproduction Software or Documentation since it may change before it is released as a production product or it may not be released at all.

Exhibit:	<u>4</u>
Name:	<u>Hansen</u>
Date:	<u>11-22-03</u>
Meri Coast CCR, RMR	

CONFIDENTIAL

BUR5143148

Plaintiff's Exhibit

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Comes V. Microsoft

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Burware® Pre-BETA Evaluation Agreement

3. EVALUATION OF AND RESTRICTIONS ON USE BY EVALUATOR

3.1 Non-exclusive Evaluation. Subject to and in accordance with the terms of this Agreement, Burst.Com grants to Evaluator and Evaluator accepts from Burst.Com a limited 45-day, non-exclusive, non-transferable license to evaluate Burst.Com's Burware® product suite Release 1.1 consisting of Burware Player™, Burware Conductor™, and Burware Server™ ("Evaluated Products").

3.2 Assignment or Transfer. Evaluator shall not rent, lease, sell, sublicense, assign, or otherwise transfer the Evaluated Products, including any accompanying printed materials. Evaluator will not use or permit the Evaluated Products to be used in any manner, directly or indirectly, which would enable any person or entity other than Evaluator to use the Evaluated Products, without Burst.Com's prior written consent.

3.3 Modification. Evaluator shall not be entitled to alter, modify, revise or enhance the Evaluated Products, whether directly or indirectly, without Burst.Com's written consent, which consent may be withheld at Burst.Com's sole discretion.

4. SOFTWARE DOCUMENTATION

4.1 Burst.Com does not warrant the accuracy of Documentation associated with the Pre-BETA Software listed in the Supplement(s).

4.2 Burst.Com is not obligated to include Documentation with the Pre-BETA Software listed in the Supplement(s).

5. TERM

This Evaluation shall be for a term extending 30 days commencing on the effective date of this Agreement. Burst.Com wishes to receive feedback from Evaluator on the evaluated software. Accordingly, by the end of the evaluation, Evaluator is required to complete a questionnaire provided by Burst.Com. At the end of the 30-day period if Evaluator has not executed a full term license agreement, all software and printed materials shall be returned to Burst.Com within five (5) business days.

6. OWNERSHIP OF EVALUATED PRODUCTS

6.1 Ownership of Evaluated Products. Evaluator acknowledges that the Evaluated Products, including any related documentation and all associated intellectual property rights, are the exclusive property of Burst.Com. Evaluator further acknowledges that the Evaluated Products, including any related documentation, are treated by Burst.Com as the secret and proprietary information of Burst.Com, and Evaluator shall treat any such information related to the Evaluated Products as confidential and shall not use, copy or disclose such information for any purpose that is not specifically authorized under this Agreement. Except for the limited Evaluation granted herein, Evaluator shall have no right, title or interest in or to the Evaluated Products.

6.2 Reproduction of Evaluated Products and Documentation. Evaluator shall not reproduce, in whole or in part, any Evaluated Products or documentation that have been provided by Burst.Com under this Agreement. Evaluator shall not remove or destroy any proprietary markings or legends placed upon or contained within the Evaluated Products, documentation or any related materials, and all copies thereof shall contain such proprietary markings or legends. **Evaluator SHALL NOT REVERSE ENGINEER, DECOMPILE OR DISASSEMBLE THE PRODUCT.**

7. WARRANTY

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Boardware Pre-BETA Evaluation Agreement

EXCEPT AND TO THE EXTENT EXPRESSLY PROVIDED ABOVE, AND IN LIEU OF ALL OTHER WARRANTIES, THE PRODUCTS ARE FURNISHED "AS IS" AND WITHOUT WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

8. LIMITATIONS OF LIABILITY.

8.1 EXCEPT AS PROVIDED HEREIN, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OR LOST PROFITS, EITHER IN CONTRACT OR TORT, INCLUDING NEGLIGENCE, ARISING OUT OF OR RELATED TO THIS LOAN AGREEMENT, THE USE OF THE PRODUCTS, OR THE PERFORMANCE OR BREACH OF THIS AGREEMENT.

8.2 BURST.COM SHALL NOT BE LIABLE TO CUSTOMER FOR ANY DAMAGES RESULTING FROM OR RELATED TO ANY FAILURE OR DELAY OF BURST.COM IN THE DELIVERY OF THE PRODUCTS OR IN THE PERFORMANCE OF ANY SERVICES UNDER THIS AGREEMENT.

9. GENERAL PROVISIONS.

9.1 Other Software. Evaluator understands and agrees that Burst.Com may market new or different software that uses part of the function of the Evaluated Products and may include additional features. Nothing contained in this Agreement gives Evaluator any rights with respect to such new or different software.

9.2 Governing Law. Arbitration Fees. This Agreement shall be governed by and construed in accordance with the laws of the State of California. The parties agree that any litigation regarding this Agreement shall be filed in and heard by the state or federal courts with jurisdiction to hear such disputes in San Francisco County, California and the parties hereby submit to the personal jurisdiction of such courts. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

BURST.COM, INC.

By: [Signature]
Name: Thomas Koshy
Title: Chief Operating Officer
Date: February 29, 2000

SEQUANT, INC.

By: [Signature]
Name: Paul R King
Title: Vice President
Date: March 3, 2000