

## APRA|AMCOS RINGTONE SERVICE AGREEMENT

THIS AGREEMENT IS MADE ON

### PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales on its own behalf and on behalf of each of the AMCOS Members (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED**  
ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

### YOUR DETAILS

Registered Company Name: .....  
(You)

ABN: .....

Trading Name:.....

Street Address: .....

Postal Address (if different): .....

Main Contact: .....

Contact's Title: .....

Contact's Email Address: .....

Contact's Phone Number: .....

Contact's Fax Number: .....

### BACKGROUND

- A. AMCOS and APRA are mechanical right and performing right collecting societies respectively.
- B. AMCOS is the exclusive licensee in the Territory of the right to reproduce the AMCOS Works in certain circumstances.
- C. APRA controls in the Territory the right to communicate the APRA Works.
- D. You are a provider of Ringtones and require a licence from APRA|AMCOS in order to conduct Your Ringtone Service.
- E. AMCOS and APRA have agreed to grant licences and make arrangements respectively on the terms of this agreement.

### LICENCE

In consideration of payment of the Licence Fees and compliance with the attached terms (**Terms**), AMCOS and APRA grant You a Licence commencing on the

Commencement Date. The Terms are incorporated into this agreement and each party must comply with its obligations under them.

**SIGNED AS AN AGREEMENT**

Signed by **Australasian Mechanical  
Copyright Owners Society Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person(print)

Signed by **Australasian Performing  
Right Association Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person (print)

Signed by **You:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person (print)

## **RINGTONES TERMS**

### **1. Subject matter and grant of rights**

#### **1.1 Entire agreement**

This agreement, and the Terms, including the schedules, contain the entire agreement between APRA|AMCOS and You relating to the reproduction of AMCOS Works and the communication of APRA Works as part of Your Ringtone Service.

#### **1.2 Grant of rights**

Subject to clause 1.3 and on the Terms, APRA|AMCOS grants You a Licence.

#### **1.3 Exclusions and limitations**

- 1.3.1 The Licence is conditional on Your compliance with the Terms, subject to the right to Cure, including provision of Sales Reports and payment of Licence Fees.
- 1.3.2 Nothing in this agreement constitutes the grant of a licence to reproduce a Work that is not an AMCOS Work.
- 1.3.3 Nothing in this agreement constitutes the grant of a licence to communicate a Work that is not an APRA Work.
- 1.3.4 This agreement does not apply to reproductions of Works made, sold, distributed or communicated by You or on Your behalf with the intention of, or with Your expressed or implied authorisation for, use other than as part of Your Ringtone Service.
- 1.3.5 The Licence does not include the right to synchronise AMCOS Works with audiovisual material, including Music Videos, or still images.
- 1.3.6 The Licence does not include the right to reproduce or communicate to the public any Work in a manner that represents that particular Works or groups of Works identified by songwriter or title are associated with or promotes the sale or provision of any goods or services.
- 1.3.7 The Licence does not include the right to reproduce AMCOS Works or communicate APRA Works as part of a Subscription Service.
- 1.3.8 The Licence does not include the right or authorise:
  - (a) the reproduction of any Work into an Advertisement;
  - (b) the reproduction or communication of any Work in circumstances where there is consideration for the Ringtone or the right to receive the Ringtone, that does not consist wholly of money;
  - (c) the making of an adaptation or a parody of an AMCOS Work;
  - (d) the reproduction or communication of any Work with words that are not approved or normally associated with the Work by the copyright owner for Australia;
  - (e) the reproduction or communication of any Work as a Digital Download;
  - (f) the reproduction or communication of any Works in a graphic form;
  - (g) the performance in public of any Works;
  - (h) the performance in public or communication to the public of any Grand Right Work in its entirety unless the communication is of commercially released soundtrack album of a theatrical production;

- (i) the performance in public or communication to the public of any choral work of more than 20 minutes duration in its entirety, unless the communication is of commercially released soundtrack of such a choral work;
- (j) the reproduction, performance in public or communication to the public of any sound recording; or
- (k) any other right not expressly granted under this agreement.

1.3.9 Nothing in the Terms constitutes a consent by the authors of Works in relation to any act contrary to the author's moral rights.

1.3.10 If APRA|AMCOS notifies you in accordance with clause 3.4 that a Work is no longer an APRA Work or an AMCOS Work for the purposes of this agreement, You will cease to be licensed under this agreement in respect of the reproduction or communication of the Work (as the case may be), from the date specified in the notice.

#### **1.4 Term**

- (a) This agreement commences with effect from Commencement Date and, subject to earlier termination in accordance with clause 7, will continue until terminated by either party on 3 months' notice, such termination not to be effective before 31 December 2014.
- (b) Following termination on giving notice under clause 1.4(a), if You still require a licence from APRA|AMCOS for Ringtone Service and the parties have not agreed on the terms of that future licence, then the terms of this agreement will remain in force pending such agreement, or a determination by or other order of the Copyright Tribunal, as to the terms of the licence.

#### **1.5 Licence Fees**

- (a) For each New Work on Your Service, You must pay to AMCOS \$10.00 (plus GST), payable at the time of the first Sale of the Work.
- (b) For each Ringtone Sale You must pay APRA|AMCOS the greater of 12% of the retail price (exclusive of GST) or the Minimum Fee.

1.5.2 Notwithstanding anything contained in this agreement, You are not required to pay Licence Fees under this agreement, and You will be entitled to a Rebate where either, APRA or AMCOS (as the case may be) is reasonably satisfied, or You can demonstrate to the reasonable satisfaction of APRA or AMCOS (as the case may be), or You can otherwise establish that:

- (a) the Work is a Work in which copyright does not subsist;
- (b) the Work is not an AMCOS Work, including because a prior licence has been obtained for the reproduction of the Work on Your Ringtone Service; or
- (c) the Work is not an APRA Work, including because a prior licence has been obtained for the communication of that Work on Your Ringtone Service,

such Rebate to be paid at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months, whichever is the earlier.

1.5.3 For each Accounting Period the total of the Licence Fee referred to in clause 1.5 must be adjusted by deducting the net Licence Fee paid or payable on Fraudulent Transactions and adding the net Licence Fee payable on Fraudulent Transactions subsequently recovered, reported in that Accounting Period.

## **2. Your obligations**

### **2.1 Sales Reports**

- 2.1.1 You must account to APRA|AMCOS for all transactions that are the subject of the Terms for each Accounting Period in accordance with this clause 2.1.
- 2.1.2 You must deliver a Sales Report to APRA|AMCOS by the Due Date.
- 2.1.3 Subject to clause 2.1.4, each Sales Report must be, at your election, either in DDEX, APRA|AMCOS' current EDI or such other form reasonably required from time to time by APRA|AMCOS and must contain the following details:
- (a) information sufficient to identify the Sales Report, including:
    - (i) Your details (including where applicable any password allocated to You by APRA|AMCOS, Your APRA|AMCOS identification number and Your contact email address); and
    - (ii) file identification details (including the identification of the Sales Report as a Ringtone Service Sales Report, the transmission date of the file and the number of records in the file);
  - (b) information sufficient to separately identify each Sales Batch in the Sales Report, including:
    - (i) the Accounting Period start and end date;
  - (c) in respect of each Ringtone in each Sales Batch:
    - (i) title of the Work (or Works in the case of Medleys);
    - (ii) subject to clause 2.1.5, songwriter(s) of the Work(s) or ISWC;
    - (iii) for Phonographic and Video Ringtones, the name of the artist or band that recorded the Work, and for other Ringtones, the name of the artist or band that is usually associated with the Work
    - (iv) subject to clause 2.1.5, if indicated on the Ringtone, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
    - (v) the number of units Sold at each Retail Price (including where free) and the Retail Price (in Australian dollars), whether You have a direct licence from a relevant member of APRA or AMCOS.
- 2.1.4 On entering into this agreement, You must notify APRA|AMCOS of the reporting format elected by You in accordance with clause 2.1.3, and thereafter if you intend to change to that reporting format, clauses 2.7.2 to 2.7.4 apply.
- 2.1.5 You are required to provide the information in clauses 2.1.3(c)(ii), 2.1.3(c)(iii), and 2.1.3(c)(iv) only to the extent that such information is in Your possession.
- 2.1.6 You must use reasonable endeavours to obtain the information referred to in clause 2.1.5 from the supplier of the relevant Ringtone.

### **2.2 Failure to provide relevant or accurate statements**

- 2.2.1 If You fail to comply with clause 2.1, and have failed to Cure, APRA|AMCOS may reasonably estimate Sales and music use information, including any relevant previous information provided by You, for the purpose of issuing a tax invoice for a Provisional Payment.
- 2.2.2 If You fail to comply with clause 2.1 in respect of any Accounting Period to an extent that APRA|AMCOS cannot reasonably identify the Works sold:

- (a) in respect of more than 20% of the value of Sales reported; or
- (b) in a manner such that APRA|AMCOS cannot reasonably process more than 50% of the Ringtones Sold,

APRA|AMCOS may decline to issue a tax invoice to You under clause 3.1.1, in respect of the unidentified Works, and clause 3.3 will not apply in respect of the unidentified Works until such time as APRA|AMCOS is reasonably satisfied that You have complied with clause 2.1.

## **2.3 Payment of Licence Fees**

- 2.3.1 You must provide APRA|AMCOS with contact details of the appropriate recipient at Your address for invoices and must notify APRA|AMCOS should these details change.
- 2.3.2 You must pay Licence Fees to APRA|AMCOS within 21 days after receipt of a tax invoice from APRA|AMCOS.
- 2.3.3 If You are notified of late payment and have failed to Cure, You must pay interest at the Agreed Rate on any amount that remains unpaid from the date of expiry of the right to Cure until the date of payment.
- 2.3.4 You acknowledge that the information contained in Sales Reports is critical to the calculation and distribution of Licence Fees by APRA and AMCOS to their respective members.
- 2.3.5 If You fail to provide a Sales Report in accordance with the Terms, and APRA|AMCOS notifies You that the Sales Report has not been provided, You must pay interest at the Agreed Rate calculated from 28 days after the Due Date on amounts that would have become payable had the reports been provided.

## **2.4 Provisional Payment**

- 2.4.1 If the amount of Licence Fees payable in any Accounting Period exceeds the Provisional Payment, You must pay the excess to APRA|AMCOS within 21 days after the date of the tax invoice.
- 2.4.2 If the amount of the Licence Fees payable in any Accounting Period is less than the Provisional Payment, APRA|AMCOS must credit the amount to Your account within 21 days after the date of the tax invoice.

## **2.5 Security**

- 2.5.1 Before the Commencement Date or at any time during the term of this agreement, if:
  - (a) You are a new client of APRA|AMCOS;
  - (b) You have a credit history that reasonably justifies concern on the part of APRA|AMCOS that You may fail to pay Licence Fees in accordance with this agreement;
  - (c) You have been repeatedly late in paying Licence Fees under this or another APRA|AMCOS licence agreement, whether or not You have remedied the breach; or
  - (d) Your business is not registered or has no obvious presence in Australia (as the case may be);if required by APRA|AMCOS, You must give APRA|AMCOS Security as security for performance of Your obligations under this agreement.
- 2.5.2 The Security will be calculated by APRA|AMCOS based on a reasonable estimate of the amount of Licence Fees payable for any Accounting Period.
- 2.5.3 If required by APRA|AMCOS, the amount of the Security may be increased proportionally with any increase in the amount of Licence Fees payable under clause 1.5.
- 2.5.4 APRA|AMCOS may use the Security to recover any loss or expense APRA|AMCOS incurs due to a breach of this agreement by You.

- 2.5.5 If any part of the Security has been used by APRA|AMCOS under clause 2.5.4, You must replace that part of the Security within 5 business days of notice by APRA|AMCOS that it has used the Security.
- 2.5.6 Upon the termination of this agreement APRA|AMCOS must promptly return to You any part of the Security not needed to recover an expense or loss of APRA|AMCOS.

## **2.6 Records**

You must keep proper records relating to Your Ringtone Service including but not limited to accounting records, which must be maintained to a standard sufficient to enable an audit trail to be established relating to Sales such that there are at least two sources of data from which your Sales can be verified, provided that the auditor's right to inspect such documents is limited to documents that are reasonably required and are relevant to the audit. Such documents may include monthly source log files and backup tapes or similar historical records.

## **2.7 Training and upgrades**

- 2.7.1 APRA|AMCOS may provide You with notice from time to time of updates, revisions, amendments or other changes to the Sales Report formats.
- 2.7.2 Any notice referred to in clause 2.1.4 or 2.7.1 must be:
  - (a) reasonable in the circumstances; and
  - (b) allow the recipient of the notice reasonable time to make adjustments and implement the updates, revisions, amendments or other changes to the recipient's current systems.
- 2.7.3 If a party disputes the reasonableness of matters notified in accordance with clause 2.1.4 or 2.7.1 (as the case may be), clause 6 applies.
- 2.7.4 If a party receiving a notice does not notify the other party of a dispute under clause 2.7.3 within 2 months of receiving notice under clause 2.1.4 or 2.7.1, the updates, revisions, amendments or other changes the subject of the notice will take effect from the date specified in the notice.

## **3. Obligations of APRA|AMCOS**

### **3.1 Tax invoices**

- 3.1.1 On receipt of Sales Reports, or where clause 2.2.1 applies, APRA|AMCOS must each issue a tax invoice to You showing the total Licence Fees or the Provisional Payment payable for the Accounting Period.
- 3.1.2 If GST is payable for a taxable supply made under this agreement, then any party (**Recipient**) that is required to provide consideration to another party (**Supplier**) for that supply must pay an additional amount to the Supplier equal to the amount of that GST at the same time as any other consideration is to be first provided for that supply, subject to the Supplier providing a tax invoice to the Recipient in respect of that supply.
- 3.1.3 APRA|AMCOS will provide, when requested by You, an electronic statement in respect of each tax invoice issued under clause 3.1.1 after the date of APRA|AMCOS receiving the request.
- 3.1.4 Any payment or reimbursement required to be made under this agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.



- 3.1.5 Terms used in this clause 3.1 that have a defined meaning in the GST law shall have the same meaning given to those terms in the GST law unless expressly stated otherwise.
- 3.1.6 Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 3.1.
- 3.1.7 Unless otherwise expressly stated, all consideration to be provided under this agreement is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 3.1.

### **3.2 Disputed ownership of Works**

- 3.2.1 If a third party not being a Member approaches You and claims the right to receive licence fees payable in relation to a Work:
- (a) You must notify APRA|AMCOS in writing within 7 days of such claim and advise the third party to make a written application to APRA|AMCOS to investigate the claim for ownership; and
  - (b) within 28 days of receipt of Your notification APRA|AMCOS must advise You whether the relevant rights in the Work are:
    - (i) controlled by a Member;
    - (ii) controlled by the third party claiming the right, in which case APRA|AMCOS must repay monies paid in respect of the Work to You at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months (whichever is the earlier), or provide You with a Rebate; or
    - (iii) claimed by two or more persons, one or more of whom is a Member, in dispute, in which case APRA|AMCOS will hold the monies in a dispute account until such time as the matter is resolved.
- 3.2.2 In the case of rights described in clause 3.2.1(b)(iii), APRA|AMCOS will continue to issue tax invoices in respect of Your use of the Work until such time as the matter is resolved.

### **3.3 Indemnity**

- 3.3.1 Subject to clauses 2.2.2 and 3.3.3, APRA|AMCOS will indemnify and keep You and any Affiliate authorised by You in accordance with this agreement harmless from any and all damages, losses, costs (including reasonable legal fees and court costs) and expenses incurred, suffered or expended by You as a consequence of any claim of copyright infringement in respect of Your exercise of the Licence, or the exercise of those rights in respect of any other Work where APRA|AMCOS has not previously given you effective notice under clause 3.4.2 in respect of the Work that it is not an AMCOS Work or APRA Work (as the case may be).
- 3.3.2 You must promptly notify APRA|AMCOS of any claim under clause 3.3.1.
- 3.3.3 The indemnity in clause 3.3.1 is subject to:
- (a) You providing all reasonable assistance reasonably requested by APRA|AMCOS in relation to the claim; and
  - (b) You agreeing to APRA|AMCOS having sole control and conduct of the defence of such claim,

and does not apply in relation to any Work for which a Rebate has been given from the date of the Rebate until such time as the Work becomes an APRA or AMCOS Work (as the case may be).

- 3.3.4 The indemnity in clause 3.3.1 is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this agreement.

### **3.4 Notice of changes in repertoire**

- 3.4.1 APRA or AMCOS (as the case may be) must notify You of any Works that cease to be APRA Works or AMCOS Works for the purposes of this agreement, other than by reason of falling into the public domain.

- 3.4.2 To constitute a notice under clause 3.4.1, it must be effective from a 31 March, 30 June, 30 September or 31 December as specified in the notice and be given at least 14 days before the relevant date.

## **4. Management of amounts payable**

### **4.1 Fixed Retail Price**

For the purpose of determining Licence Fees the amounts will be separately assessed in respect of each Sale at each different Retail Price reported in the relevant Sales Report.

### **4.2 Fractions of Cents**

If the aggregate Licence Fee for any Accounting Period in respect of each separately reported Ringtone payable under this agreement includes a fraction of a cent:

- (a) where the fraction is less than one half of a cent, that fraction will be treated as zero; and
- (b) where the fraction is equal to or more than one half of a cent, that fraction will be treated as one cent.

### **4.3 Medleys and Samples**

For the purposes of calculating Licence Fees, a Medley or a Work containing Samples will be taken to be one Work.

### **4.4 Currency Conversion**

- 4.4.1 All payments under this agreement must be made in Australian currency. Where any payments are stated to be in any other currency, You must pay APRA|AMCOS in Australian currency at the mid-point of the buying and selling rate published by the Reserve Bank of Australia on the last Business Day of the Accounting Period, and if the Accounting Period is longer than a month, the average from the last Business Day in each month in the Accounting Period.

- 4.4.2 APRA|AMCOS will issue tax invoices in respect of Sales in currencies other than Australian currency in accordance with clause 4.4.1, and You are responsible for all costs of conversion and remittance, including bank charges.

## **5. Rights of AMCOS and APRA**

### **5.1 Audit**

- 5.1.1 Subject to clause 5.1.2, APRA|AMCOS may on 30 days' notice to You during Your normal business hours at Your principal place of business in Australia appoint a nationally recognised independent accountant or auditor (licensed by the appropriate authority, not being the auditor of a competitor of Yours and not

compensated on a contingency fee basis) who is approved by You, such approval not to be unreasonably withheld, to examine Your records to:

- (a) determine the correctness of any notice or payment supplied or made under this agreement or any previous licence agreement for Ringtones for the period since any previous audit or 6 years, whichever is the lesser; or
- (b) in the case of a failure by You to provide information in accordance with clause 2.1, to obtain information required to be provided under that clause.

5.1.2 APRA|AMCOS may only exercise this audit right once every 2 years.

5.1.3 You must pay the reasonable cost of the audit or examination if it:

- (a) establishes that the information provided by You resulted in the amounts payable under the Terms being understated by more than 7.5%;
- (b) establishes that You have not kept the records required pursuant to clause 2.6; or
- (c) is undertaken under clause 5.1.1(b).

5.1.4 After an audit or examination has been conducted, APRA|AMCOS must direct the auditor to provide a copy of the report to You at the same time as the report is provided to APRA|AMCOS.

5.1.5 Subject to clause 5.1.6, You must pay any moneys determined by the auditor or agreed between the parties to have been payable but unpaid under this agreement, and any amount payable under clause 5.1.3, within 21 days of receipt of a tax invoice from APRA|AMCOS.

5.1.6 If You dispute the findings of the auditor:

- (a) You must notify APRA|AMCOS within 28 days of receipt of the report; and
- (b) the provisions of clause 6 apply.

## **6. Dispute resolution**

### **6.1 Disputes**

6.1.1 The parties must, during and after the term of the Agreement, without delay and in good faith and at a senior management level, attempt to resolve any dispute which arises out of or in connection with the Terms prior to commencing any proceedings, but failure to do so will not be deemed a breach of the Terms entitling any party to terminate.

6.1.2 Without limiting clause 6.1.1, the parties agree that where the provisions of the Terms would be manifestly unfair to a party, including because You have obtained direct licences from a copyright owner, the parties must attempt to resolve any issue between them by negotiation in good faith.

6.1.3 A party wishing to resolve a dispute must notify the other party of the existence of the dispute and must identify the nature of the dispute in writing. If a dispute under the Terms has not been resolved between the parties within 30 days after notice of the dispute has been given, You may require the dispute to be:

- (a) referred to expert determination or resolution in accordance with clause 6.2; or
- (b) mediated.

6.1.4 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under the Terms.

## **6.2 Expert determination**

6.2.1 Subject to clause 6.3, disputes under this agreement that have not been resolved in accordance with clause 6.1 may be referred by You to the expert determination procedure offered by APRA in accordance with the terms of its authorisations under the *Trade Practices Act 1974* or other dispute resolution mechanism as agreed between the parties.

6.2.2 If a dispute is submitted to expert determination under clause 6.2.1, then a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to expert determination, or such other time as the parties agree.

## **6.3 Copyright Tribunal**

Nothing in this clause 6 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.

## **7. Termination**

### **7.1 Termination for default**

7.1.1 If a party (**Defaulting Party**):

- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration, or being an individual, commits any act of bankruptcy or enters into a scheme of arrangement with creditors;
- (b) fails to Cure a breach of its obligations under the Terms which is capable of remedy; or
- (c) materially breaches any of its obligations under the Terms which is not capable of remedy,

the other party may, by notice to the Defaulting Party, terminate this agreement.

7.1.2 If APRA|AMCOS terminates this agreement for breach it may seek to include such additional terms as it believes reasonable to secure performance of Your obligations under any future agreement offered on otherwise the same terms as the Terms.

## **8. Miscellaneous**

### **8.1 Confidentiality**

8.1.1 Subject to clauses 8.1.2 and 8.1.3, APRA|AMCOS must not during or after the term of this agreement (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without Your prior written consent any information provided to APRA|AMCOS under clause 2.1 or 2.2.

8.1.2 With respect to information supplied under clause 2.1 or 2.2, APRA|AMCOS may:

- (a) use that information to determine Licence Fees and to distribute money to their respective members; and
- (b) provided they first agree to the same obligations of confidentiality contemplated by this clause, disclose that information to APRA|AMCOS' auditors for the purposes of an audit, and other of APRA|AMCOS' professional advisers.

8.1.3 The obligations of confidentiality set out in this clause 8 do not apply to information provided to APRA|AMCOS which is:

- (a) required to be disclosed by law; or
- (b) in the public domain other than by breach of this clause.

## 8.2 Notices

All notices required to be given under this agreement must be sent in writing to the parties at the addresses set out in this agreement or to such other address as any party may notify in writing from time to time. Notices may be served by hand delivery, by post, email or by facsimile. Notices served by hand, email or by facsimile will be deemed to have been received on the day of sending. Notices sent by post will be deemed to have been received on the third business day after sending.

## 8.3 Law of agreement

This agreement must be construed in accordance with the laws for the time being in force in the State of New South Wales.

## 8.4 Waiver

A waiver by any of the parties of any provision of the Terms will not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach. All remedies, rights, undertakings and obligations contained in the Terms will be cumulative and none of them will be in limitation of any other remedy, right, undertaking or obligation of any other party.

## 8.5 Variation

This agreement may only be varied by the written agreement of the parties.

## 8.6 Assignment

A party may only assign a right under this agreement with the prior written consent of the other party.

## 8.7 Severability

If any provision of this agreement is held to be unenforceable, all other provisions shall nevertheless continue in full force and effect.

## 9. Definitions and interpretation

### 9.1 Definitions

**Accounting Period** means each month or such other period as is agreed by the parties;

**Act** means the *Copyright Act 1968* and *Copyright Regulations*;

**Advertisement** means any production which is an announcement designed to attract the attention of the public or any part of it to a product or service, person, organisation or line of conduct, including community service announcements and infomercials;

**Affiliate** means, with respect to a party, any entity which directly or indirectly owns, is owned by or is under common ownership with such party to the extent of at least fifty percent of the equity having the power to vote on or direct the affairs of the entity, and any entity actually controlled by, controlling or under common control with such party;

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to You that it is entitled to grant a Licence;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for Australia, or APRA represents to You that it is entitled to grant a Licence;

**Business Day** means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney;

**Commencement Date** means the later of 1 January 2010 and the date specified in the schedule;

**Cure** means to remedy a breach of an obligation under the Terms (which is capable of remedy) within 21 days of notice of the breach, or for a breach of a payment or reporting obligation, within 7 Business Days of notice of the breach;

**Digital Download** means a copy of a Track in the form of an electronic file in which sounds are embodied (including a Music Video) where the primary purpose is for use other than a ringtone;

**Due Date** means the 30th day after the end of an Accounting Period;

**Fraudulent Transaction** means the acquisition of a Ringtone made available for Sale by You as part of a deliberate action by an individual or individuals intended to defraud You (such as the compromise of Your security protocols), and where You have referred the matter and the whole dollar amount of that transaction to the police;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime insofar as it consists of words and music expressly written for it;

**GST** has the same meaning as in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*;

**ISRC** means International Standard Record Code ISO 3901:2001, as amended from time to time by the International Organisation for Standardisation (**ISO**);

**ISWC** means International Standard Works Code ISO 15707:2001 as amended from time to time by the ISO;

**Licence** means a non-exclusive licence to:

- (a) reproduce AMCOS Works;
- (b) authorise the reproduction of AMCOS Works;
- (c) communicate in the Territory the APRA Works (including authorising their electronic transmission from Your Ringtone Service to Your customers);
- (d) authorise Your Affiliates to communicate the APRA Works to customers in the Territory as necessary in the course of providing the Ringtone Service,

in the form of Ringtones (whether by You, or Your customers in the Territory, onto storage devices) for the purpose of Sale or to complete a Sale, including in the form of Previews provided at no charge for the sole purpose of demonstrating the Preview to customers and potential customers of Your Ringtone Service;

**Licence Fee** means the fees payable by You under clause 1.5;

**Medley** means a Ringtone no longer than 8 minutes in duration embodying two or more Works, where there is no space between the Works, excluding Samples and DJ Mixes;

**Member** means a member of APRA or AMCOS as at the date of this agreement and any person who becomes a member of APRA or AMCOS during the term of this agreement;

**Minimum Fee** means AUD0.18 (exclusive of GST);

**Music Video** means a cinematograph film produced for the primary purpose of promoting or visually representing:

- (a) the performer of a sound recording; and/or
- (b) the sound recording,

of a Work or Works embodied in the soundtrack of that cinematograph film;

**New Work** means the first reproduction of a recording of a Work offered for Sale on Your Service;

**Preview** means a part of a Ringtone, no longer than 30 seconds in duration, used for the sole purpose of demonstrating, for no charge, the Ringtone to customers and potential customers of Your Service;

**Provisional Payment** means a reasonable estimate by APRA|AMCOS of the Licence Fees;

**Rebate** means at your election, either a credit to Your account for, or a repayment to You of, an amount equal to all payments by You to APRA and/or AMCOS (as the case may be) in respect of a Work during the period in which any of paragraphs 1.5.2(a) to (c) or 3.2.1(b)(ii) applies;

**Retail Price** means the selling price of a Ringtone that is advertised to the general public or to Your customers by You or on Your behalf, excluding GST;

**Ringtone** means a reproduction of a Work used to alert an end user of an incoming phone call or other event on a device, being a Monophonic Ringtone, a Phonographic Ringtone, a Polyphonic Ringtone or a Video Ringtone, which when played back at normal speed in an uncompressed format on a user's device, is no more than sixty seconds in duration;

**Ringtone Service** means the business carried on under the trading names in schedule 1 providing Ringtones for Sale;

**Sale** means the sale or supply of Ringtones (including supply free of charge) to customers for their personal use on terms that prohibit further supply to third parties;

**Sales Batch** means, in an Accounting Period, a group of Sales reported by reference to common factors as reasonably required by APRA|AMCOS from time to time;

**Sales Report** means a statement in accordance with clause 2.1, and which may contain one or more Sales Batches;

**Sample** means a part of a sound recording of a Work which (along with the accompanying Work) is subsequently embodied in another sound recording;

**Security** means a bank cheque or unconditional bank guarantee on terms and conditions approved by APRA|AMCOS;

**Subscription Service** means a service that supplies Ringtones and access to which is made available in return for a periodic payment, or a service that is primarily funded by advertising;

**Territory** means Australia;

**Track** means a sound recording of a Work or in the case of Music Videos, the soundtrack (or each part thereof in the case of a long form video) embodying a Work forming part of the film;

**UPC** means Universal Product Code; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for Australia, and a reference to a Work includes a reference to a share in any such Work.

Words defined in this agreement have the same meaning in the Terms.

## **9.2 Interpretation**

In the Terms, unless the subject matter or context otherwise requires:

- (a) the singular denotes the plural and vice versa;
- (b) a reference to one gender includes all other genders;
- (c) a person includes an individual, a body corporate and a government;
- (d) a reference to a statute, regulation, or provision of a statute or regulation includes a reference to that statute, regulation or provision as amended or re-enacted from time to time;
- (e) where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have corresponding meanings; and
- (f) any word or phrase defined in the Act has that meaning in the Terms unless otherwise defined in the Terms.

## **Schedule 1**

**Name of licensee (You)** .....

**Trading name(s)** .....

**Date of commencement** .....



**Australasian Performing Right Association Limited  
Australasian Mechanical Copyright Owners Society Limited**

**BANKI HADDOCK FIORA**

LAWYERS

Level 10, 179 Elizabeth Street Sydney NSW 2000 Australia  
Telephone 61 2 9266 3400 Facsimile 61 2 9266 3455  
email@bhf.com.au www.bhf.com.au

Liability limited by a scheme approved under Professional Standards Legislation

# LICENCE AGREEMENT

THIS AGREEMENT IS MADE ON

## PARTIES

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

---

(Licensee)

## BACKGROUND

- A.** APRA owns or controls for the Territory the exclusive right of Communication in relation to a large number of musical works and associated lyrics.
- B.** AMCOS is the exclusive licensee in the Territory of the right to reproduce the AMCOS Works.
- C.** The Licensee conducts a Video On Demand Service, and in the course of providing the service causes or authorises the Communication of APRA Works and the reproduction of AMCOS Works contained in Films.
- D.** The Licensee requires a licence, and APRA and AMCOS have agreed to grant a licence to the Licensee subject to the terms contained in this agreement.

## AGREEMENTS

### 1. Definitions and interpretation

#### 1.1 Definitions

##### 1.1.1 Where commencing with a capital letter:

**Act** means *the Copyright Act 1968*;

**Agreed Rate** means the interest rate for overdrafts of \$100,000 or more charged by the National Australia Bank plus 2 percentage points, calculated on daily rests from the due date to the date of payment;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to the Licensee that it is entitled to grant the licence in clause 2.2 for the Territory;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for the Territory;

**Clips** means a digital media file of a Film or Concert Film which is made available free of charge to the Customer primarily for the purpose of promoting content available on the Video on Demand Service which when played at normal speed in an uncompressed format on a Customer's Device, is no more than 5 minutes in duration.

**Commencement Date** means 1 October 2012;

**Communicate** has the same meaning as in the Act;

**Concert Film** means a Film where the content consists primarily of footage of a live performance of music in front of an audience;

**Confidential Information** means the information provided to APRA|AMCOS by the Licensee under clause 5.1, clause 5.2, clause 5.4.1 and any information obtained by APRA|AMCOS pursuant to the exercise of its rights under clause 7;

**Customer** means a person located in the Territory who requests a Film or Concert Film and (except in the case of Free Films) pays monetary consideration in return for a licence to view the Film or Concert Film;

**Device** means any device that is capable of receiving and displaying audio-visual content from Licensee;

**Download** means a copy of a Film or Concert Film in the form of an electronic file in which sounds are embodied;

**Film** means a copy of a cinematograph film within the meaning of that term contained in the Act in the form of an encrypted digital media file in which sounds and images are embodied, which contains digital rights management information and which is intended for Download or Streaming for the purpose of viewing, but does not include Concert Films or Music Videos; provided that, where Licensee delivers (a) two copies of the same cinematograph film to the same end user in different resolutions, solely for the technical purpose of accommodating efficient transfer and rendering of the cinematograph film on different devices, or (b) separate copies of several related cinematograph films as part of a single transaction (e.g., in the case of a motion picture and related "extras" such as interviews, outtakes, etc.), such copies shall be considered one "Film" for purposes of this Agreement;

**Free Film** means a Film or Concert Film made available for Download or Streaming to some or all Customers for no monetary consideration, provided that (i) each such Free Film is made available for Download or Streaming for no more than 30 days; (ii) no more than 5 Free Films are available for Download or Streaming at any given time; and (iii) Licensee pays no monies to its suppliers in relation to Downloads or Streams of such Free Films;

**Gross Concert Film Revenue** for a reporting period means all monies, excluding GST receivable directly by the Licensee from Customers for Communication or reproduction of Concert Films via the Video on Demand Service in that reporting period in respect of or otherwise in relation to the sale or rental of Concert Films;

**Gross Film Sales Revenue** for a reporting period means all monies, excluding GST receivable directly by the Licensee from Customers for Communication or reproduction of Films, excluding Concert Films, via the Video on Demand Service in that reporting period in respect of or otherwise in relation to the sale of permanent Downloads of Films;

**Gross Film Rental Revenue** for a reporting period means all monies, excluding GST receivable directly by the Licensee from Customers for Communication or reproduction of Films, excluding Concert Films, via the Video on Demand Service in that reporting period in respect of or otherwise in relation to the rental of Films via means of Tethered Downloads or on demand Streaming;

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999*;

**Licence Fee** means the amount payable under this agreement calculated in accordance with clause 4;

**Licence Year** means any consecutive period of 12 months ending on 30 September. The first Licence Year is the period commencing on the Commencement Date and ending on the next 30 September, and where this agreement terminates on a date other than 30 September, the last Licence Year shall end on the date of termination;

**Music Video** means a cinematograph film:

- (a) produced for the primary purpose of promoting:
  - (i) the performer of the sound recording; or
  - (ii) the sound recording,of a musical work embodied in the sound track of the cinematograph film; and
- (b) made with the permission of the owner of the musical work;

**Redownload Film** means a Film or Concert Film made available for Download or Streaming, for no monetary consideration, to Customers who have previously obtained a copy of the same Film or Concert Film from the Video On Demand Service, provided that Licensee pays no monies to its suppliers in relation to Downloads or Streaming of such Redownload Films;

**Sound Recording** has the same meaning as in the Act;

**Streaming** means the Communication of Films, Concert Films or Clips by means of the internet to a Device under circumstances in which the Customer is prohibited from making a copy (other than a temporary copy) of the Film or Concert Film;

**Territory** means Australia;

**Tethered Download** means a Download of a Film or Concert Film in an encrypted format that results in a time-limited playable copy of the file that is automatically disabled within 48 hours after first being viewed by a Customer or within 32 days of Download;

**Video On Demand Service** means the service of delivering Films, Concert Films, Clips and Free Films over the internet or an IP network to a Customer's Device at the request of the Customer; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for Australia, and a reference to a Work includes a reference to a share in any such Work.

- 1.1.2 Where a word or phrase is given a defined meaning another part of speech or grammatical form in respect of that word or phrase has a corresponding meaning.

## **1.2 Presumptions of interpretation**

- 1.2.1 Unless the context otherwise requires a word which denotes the singular denotes the plural and vice versa.

- 1.2.2 Unless the context otherwise requires a reference to:

- (a) any legislation includes a regulation or instrument made under it and where amended, re-enacted or replaced means that amended, re-enacted or replacement legislation; and
- (b) a thing or amount is a reference to the whole and each part of it.

## **2. Licence**

### **2.1 Grant of licence**

- 2.1.1 Subject to clause 2.2, APRA grants to the Licensee a licence to Communicate the APRA Works for the purpose only of the Video On Demand Service.
- 2.1.2 Subject to clause 2.2, AMCOS grants to the Licensee a licence to reproduce and authorise the reproduction of the AMCOS Works in the Territory for the purpose only of the Video On Demand Service.

### **2.2 Limitations**

The licence in clause 2.1 does not include or authorise:

- (a) the Communication or reproduction of any musical work in association with new or substituted lyrics, or any lyrics that have been notified in writing by APRA|AMCOS to the Licensee as prohibited unless the making of the new or substituted lyrics is authorised by the owner of the copyright in the work for Australia or by APRA|AMCOS;
- (b) the Communication or reproduction of any Films or Concert Films (to the extent that they contain APRA|AMCOS Works) that include within the file delivered to the Customer (including preceding or following the Film or Concert Film itself) any paid-for advertising material;

- (c) the reproduction or Communication of Music Videos;
- (d) the reproduction or Communication of any audio-only material;
- (e) the reproduction or Communication of any Sound Recordings;
- (f) the reproduction of any musical work for which a licence has already been granted to Licensee by a third-party;
- (g) the making of an adaptation of any musical, literary or dramatic work; and
- (h) the giving of a public performance by means of the reception of a Communication.

### **3. Term**

This agreement commences with effect from the Commencement Date and, subject to earlier termination in accordance with clause 11, continues until 30 September 2017, and thereafter until terminated by either party on not less than three months' notice.

### **4. Calculation of licence fees**

In each Licence Year during the Term, the Licensee must pay APRA|AMCOS the following licence fees in accordance with clause 6:

- (a) 2% of the Gross Film Rental Revenue;
- (b) 1.5% of the Gross Film Sales Revenue; and
- (c) 8% of the Gross Concert Film Revenue.

### **5. Supply of information**

#### **5.1 Statements**

The Licensee must, within 30 days after the end of each month during the Term, supply APRA|AMCOS with a separate statement, for each country in the Territory, in the form reasonably specified by APRA|AMCOS stating the Licensee's Gross Film Rental Revenue, Gross Film Sales Revenue and Gross Concert Film Revenue for that country for that month. The parties agree that the form currently used by them for Film reporting, modified as reasonably necessary for purposes of this license, shall suffice.

#### **5.2 Certification**

The Licensee must, within 45 days after the end of each Licence Year, provide APRA|AMCOS with a statement certified by a senior member of the accounting staff of the Licensee (being a person holding a recognised accounting qualification) of the Licensee's Gross Film Rental Revenue, Gross Film Sales Revenue and Gross Concert Film Revenue for that Licence Year.

#### **5.3 Failure to provide information**

If the Licensee does not comply with clause 5.1, without limiting APRA|AMCOS's rights under this agreement, APRA|AMCOS may, having regard to any matters it considers appropriate and having given the Licensee not less than 5 day's notice to comply, reasonably determine the Licensee's Gross Film Rental Revenue, Gross Film Sales Revenue and Gross Concert Film Revenue as at the end of that month for the purpose of issuing invoices under clause 6; provided, however, that if Licensee subsequently provides the reporting information required under clause 5.1, the Parties will then promptly reconcile any such APRA|AMCOS - determined invoice with such reporting information, such that the amounts ultimately paid by Licensee shall be consistent with the reporting information (subject to clauses 5.2 and 7.2).

#### **5.4 Other information**

- 5.4.1 The Licensee must, within 30 days after the end of each month during the Term, provide APRA|AMCOS with a report in such format and containing such details as APRA|AMCOS may reasonably specify from time to time, including the title of the Films and Concert Films delivered (and such other information including year released, type of program (movie or television series), series number, episode name or number, and, where in possession of the Licensee the country of origin, ISAN, production company, director and principal actors, to enable APRA|AMCOS to identify the Film or Concert Film), and the number of times each Film and Concert Film has been purchased or rented, in respect of musical works Communicated or reproduced by means of the Video on Demand Service during that month.
- 5.4.2 The Licensee must provide a separate report as required by clause 5.4.1 for Film rentals, Film sales and Concert Films.
- 5.4.3 The parties agree that the Licensee will not be obliged to provide any information regarding the APRA|AMCOS Works which are reproduced in Films or Concert Films, which it has not been able to obtain from its suppliers provided the Licensee has made reasonable commercial endeavours to obtain such information.

### **6. Payments**

#### **6.1 Invoices**

APRA|AMCOS will issue monthly invoices for the Licence Fees payable in accordance with clause 4 calculated using the information supplied by the Licensee under clause 5.1 and 5.2 or determined by APRA|AMCOS under clause 5.3.

#### **6.2 Payment**

The Licensee must pay any invoice issued by APRA|AMCOS under this agreement within 21 days after the date of the invoice unless it disputes the amount of the invoice, in which case it will pay the undisputed amount of the invoice (if any) and dispute the balance.

#### **6.3 Goods and Services and Withholding Tax**

- 6.3.1 Unless otherwise indicated, amounts stated in this agreement do not include GST.
- 6.3.2 In relation to any GST payable for a taxable supply by a party under this agreement, the recipient of the supply must pay the GST subject to the supplier providing a tax invoice.

6.3.3 Terms used in this clause 6.3 which are defined in the GST Act have the same meaning as in the GST Act.

6.3.4 The payments specified in this agreement to be made to APRA|AMCOS are net of all withholding or similar taxes and the Licensee must pay to the relevant taxation authority all such taxes, in addition to the payments specified in this agreement to be made to APRA|AMCOS.

## **6.4 Currency**

6.4.1 All payments under this agreement must be made in Australian currency. Where any reports provided by the Licensee hereunder are stated in another currency, APRA|AMCOS must process such reports in that currency, and must then convert the amount to be invoiced in that currency into Australian currency at the mid-point of the buying and selling rate published by the Reserve Bank of Australia on the last Business Day of the month. APRA|AMCOS shall indicate on each invoice the actual currency exchange rate that it used in accordance with the preceding sentence.

6.4.2 APRA|AMCOS will issue tax invoices in respect of transactions in currencies other than Australian currency in accordance with clause 6.1, and the Licensee is responsible for all costs of conversion and remittance, including bank charges.

## **6.5 Further payments**

The Licensee must pay all stamp duties arising as a result of or in consequence of this agreement.

## **6.6 Interest**

The Licensee must pay to APRA|AMCOS interest at the Agreed Rate on each amount due and payable but unpaid under this agreement if the Licensee has failed to pay that amount within 21 days' of receiving written notice from APRA|AMCOS.

## **7. Books of account and examination**

### **7.1 Books of account**

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to APRA|AMCOS under this agreement can be properly ascertained.

### **7.2 Examination**

7.2.1 APRA|AMCOS may on 30 days' written notice, appoint a nationally recognised third party accountant or auditor not being the auditor of a competitor of the Licensee, not currently engaged in another audit of Licensee other than for APRA|AMCOS, and not compensated on a contingency fee basis to examine the Licensee's relevant records at a reasonable time at Licensee's principal place of business or another mutually agreed location to determine:

(a) the correctness of any report or payment under this agreement; or



- (b) in the case of a failure by the Licensee to provide information in accordance with this agreement for a particular quarter, to obtain the information required to be provided,

and for this purpose is entitled to access all relevant records of the Licensee or under its control, wherever held.

**7.2.2** APRA|AMCOS must pay the cost of any examination, except that the Licensee must pay the reasonable cost of the examination if the examination:

- (a) establishes that the amounts payable under this agreement were understated by more than 5%; or
- (b) is undertaken under clause 7.2.1(b),

and must also pay any amount determined by the examination to be payable under this agreement within 30 days of receipt of an invoice from APRA|AMCOS, subject to the dispute resolution mechanism of clause 12 if the parties do not agree as to the results of the examination.

## **8. Information about repertoire**

APRA|AMCOS must give the Licensee, on request, all such information as APRA|AMCOS can reasonably give concerning works claimed or represented as being APRA|AMCOS Works provided that such requests are made in respect of named works or works of named writers.

## **9. Warranties**

### **9.1 Licensee**

**9.1.1** The Licensee warrants the accuracy of the information supplied under clause 5, except for any information supplied under clause 5.4 that is derived from information provided to Licensee by its suppliers as to which Licensee only warrants that it is providing such information as it was supplied to Licensee.

### **9.2 APRA|AMCOS**

**9.2.1** APRA|AMCOS warrants that it has full power and authority to enter into and perform this agreement.

**9.2.2** APRA|AMCOS warrants that it has the authority to grant the licence contained in this agreement.

## **10. Confidentiality**

### **10.1 Obligation to keep confidential**

APRA|AMCOS must:

- (a) keep the Confidential Information confidential;

- (b) not use the Confidential Information for any purpose other than the performance of its obligations under this agreement or to enable APRA|AMCOS to meet its bona fide legal obligations to its members in respect of the APRA|AMCOS Works;
- (c) only disclose the Confidential Information to officers of APRA|AMCOS who have a need to know the Information and have agreed to keep it confidential; and
- (d) take all other steps necessary to keep the Confidential Information confidential.

## **10.2 Exclusions**

The obligations of APRA|AMCOS under clause 10.1 do not apply to any Confidential Information of the Licensee which APRA|AMCOS can demonstrate to the reasonable satisfaction of the Licensee:

- (a) was in APRA|AMCOS's possession at the time of disclosure to APRA|AMCOS and was not acquired in breach of an obligation of confidence or under an obligation of confidence;
- (b) is in the public domain, other than as a result of a breach of confidence by APRA|AMCOS;
- (c) is acquired from a third party, provided that it was not acquired from or by the third party unlawfully or in breach of an obligation of confidence; or
- (d) is required to be disclosed by law, but only to the extent so required to be disclosed.

## **11. Termination**

### **11.1 Winding up**

APRA|AMCOS may immediately terminate this agreement by notice to the Licensee if the Licensee:

- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration; or
- (b) ceases to operate the Video on Demand Service.

### **11.2 Termination for breach**

If the Licensee:

- (a) fails to pay any sum due and payable under this agreement within 21 days after the due date and fails to remedy such breach within 7 days after being requested in writing to do so by APRA|AMCOS; or
- (b) breaches any other term of this agreement and fails to remedy the breach within 14 days after being requested in writing to do so by APRA|AMCOS,

APRA|AMCOS may by one month's written notice terminate this agreement without prejudice to its right to recover payment of any outstanding monies payable under the provisions of this agreement.

### **11.3 Termination by Licensee**

- (a) Licensee may immediately terminate this agreement by notice to APRA|AMCOS if APRA|AMCOS goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.
- (b) If APRA|AMCOS breaches any other term of this agreement and fails to remedy the breach within 14 days after being requested in writing to do so by the Licensee, the Licensee may by one month's written notice terminate this agreement without prejudice to any other right it may have.

### **11.4 Material reduction in repertoire**

11.4.1 If during the term of this agreement APRA or AMCOS no longer controls the rights the subject of this agreement in respect of all of the works the copyright in which is owned by a single corporate entity (i.e., a so-called withdrawal of rights by a particular publisher), APRA|AMCOS must promptly notify the Licensee and:

- (a) if the number of works controlled by that entity amount to less than 15% of the number of works in the APRA or AMCOS repertoire as the case may be as at the date of the notice, the Licensee may terminate this agreement by three months' notice to APRA|AMCOS; or
- (b) if the number of works controlled by that entity amount to more than 15% of the number of works in the APRA or AMCOS repertoire as the case may be as at the date of the notice, the Licensee may terminate this agreement by 14 days' notice to APRA|AMCOS.

11.4.2 If clause 11.4.1(a) applies, if the Licensee does not terminate this agreement, the parties must together promptly discuss and determine whether the reduction in the APRA or AMCOS repertoire materially affects the ownership or control of the number of Works actually communicated by the Licensee. If clause 11.4.1(b) applies, the parties agree that such reduction in the APRA or AMCOS repertoire is likely to materially affect the ownership or control of the number of Works actually communicated by the Licensee. In either case, if the reduction has such a material effect, APRA|AMCOS shall, within 30 days of the later of (i) the date of the withdrawal of rights, or (ii) the date as of which the parties agreed the reduction is material, make a proposal to Licensee of corresponding revisions to this agreement, and the parties agree that they then will negotiate regarding the terms of a new licence agreement or a variation in the fees payable under this agreement, and APRA|AMCOS acknowledges that the fees payable under any such new or varied agreement will commercially reflect the fact that the licence offered is in respect of materially fewer Works. The terms of the new or varied agreement shall be retroactive to the date of the withdrawal of rights that prompted the renegotiation.

11.4.3 The Licensee acknowledges that if clause 11.4.2 applies, detailed and accurate reporting of music use (the specific details of which will be mutually and reasonably agreed by the parties) will be a requirement under any new or varied agreement.

- 11.4.4 The parties agree that if either clause 11.4.1(a) or 11.4.1(b) applies and they are unable to agree on the terms of any new or varied agreement, or they are unable to agree whether the reduction in the APRA or AMCOS repertoire is material, clause 12 will apply. In the event the parties are unable to resolve any dispute between them arising from a notice by APRA|AMCOS under clause 11.4.1 prior to the next payment due date pursuant to clause 6, then Licensee's obligation to make payments hereunder shall be deferred, provided that Licensee agrees to accrue a reserve in the amount of any payments that otherwise would have been made hereunder, until such time as the dispute has been resolved (whether by agreement, through dispute resolution under clause 12 or otherwise), at which point Licensee shall provide payment in full of all deferred payments in accordance with the retroactively applicable terms of the new or varied agreement.

## **12. Dispute resolution**

### **12.1 Negotiation and condition precedent**

- 12.1.1 The parties must, during and after the term of this agreement, without delay and in good faith, attempt to resolve any dispute which arises out of or in connection with this agreement prior to commencing any proceedings.
- 12.1.2 If a party requires resolution of a dispute during or after the term of this agreement, it must do so in accordance with the provisions of this clause 12 and the parties acknowledge that compliance with these provisions is a condition precedent to any entitlement to claim relief or remedy, whether by way of proceedings in a court of law or otherwise in respect of such disputes, except in the case of applications for urgent interlocutory relief or a breach by the other party of this clause 12.
- 12.1.3 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under this agreement.

### **12.2 Submission of dispute**

- 12.2.1 If a party requires resolution of a dispute it must immediately submit full details of the dispute to the representative of the other party listed in clause 13.2.3.
- 12.2.2 If the dispute is not resolved within 30 days of submission of the dispute to them, or such other time as they agree, the provisions of clause 12.3 will apply.

### **12.3 Mediation**

- 12.3.1 If a dispute is not resolved within 30 days of submission of the dispute by a party to the other party, or such other time as they agree, the dispute must be submitted to mediation in accordance with and subject to The Institute of Arbitrators and Mediators Australia *Mediation and Conciliation Rules*.
- 12.3.2 A party may not commence proceedings in respect of the dispute unless the dispute is not settled by mediation within 30 days of submission to mediation, or such other time as the parties agree.

## **13. Miscellaneous**

### **13.1 Assignment**

This agreement is personal to each party. Neither party may assign any of its rights or obligations under this Licence without the prior written consent of the other party, which must not be unreasonably withheld.

### **13.2 Notices**

13.2.1 A notice under this agreement must be in writing and may be given to the addressee by:

- (a) delivering it to the address of the addressee;
- (b) sending it by pre-paid registered post to the address of the addressee; or
- (c) sending it by facsimile to the facsimile number of the addressee,

and the notice will be deemed to have been received by the addressee on receipt.

13.2.2 A facsimile is deemed to have been received at the time indicated on a transmission report created by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the addressee.

13.2.3 Any notice or other communication required or permitted to be given by or pursuant to this agreement should be sent to the following addresses:

- (a) In the case of Licensee:

Facsimile: Telephone:

Attention:

- (b) In the case of APRA|AMCOS:

Facsimile: 02 9935 7999 Telephone: 02 9935 7900

Attention: Director of Recorded Music Services

or to such other person or at such address as the relevant party may from time to time direct in writing.

### **13.3 Amendment**

This agreement may only be varied by the written agreement of the parties.

### **13.4 Entire agreement**

This agreement embodies the entire understanding and agreement between the parties as to the subject matter of this agreement.

**13.5 Further assurance**

Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this agreement and all transactions incidental to it.

**13.6 Governing law**

This Agreement shall be construed in accordance with the laws in force in New South Wales and the parties agree to submit to the jurisdiction of New South Wales courts.

## SIGNED AS AN AGREEMENT

Signed by **Australasian Performing  
Right Association Limited:**

.....  
Signature of authorised person

.....  
Position of authorised person (print)

.....  
Name of authorised person (print)

.....  
Signature of witness

.....  
Name of witness (print)

Signed by **Australasian Mechanical  
Copyright Owners Society Limited:**

.....  
Signature of authorised person

.....  
Position of authorised person (print)

.....  
Name of authorised person(print)

.....  
Signature of witness

.....  
Name of witness (print)

Signed by:\_\_\_\_\_

.....  
Signature of witness

.....  
Name of witness (print)

.....  
Signature of authorised person

.....  
Office held

.....  
Name of authorised person (print)

## APRA|AMCOS DIGITAL MUSIC SERVICE AGREEMENT

### THIS AGREEMENT IS MADE ON

### PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales on its own behalf and on behalf of each of the AMCOS Members (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED**  
ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

### YOUR DETAILS

**Registered Company Name:** ..... (You)

**ABN:** .....

**Trading Name:** .....

**Street Address:** .....

**Postal Address (if different):** .....

**Main Contact:** .....

**Contact's Title:** .....

**Contact's Email Address:** .....

**Contact's Phone Number:** .....

**Contact's Fax Number:** .....

### BACKGROUND

- A.** AMCOS and APRA are mechanical right and performing right collecting societies respectively.
- B.** AMCOS is the exclusive licensee in the Territory of the right to reproduce the AMCOS Works in certain circumstances.
- C.** APRA controls in the Territory the right to communicate the APRA Works.
- D.** You are a provider of Downloads and require a licence from APRA|AMCOS in order to conduct Your Digital Music Service.
- E.** AMCOS and APRA have agreed to grant licences and make arrangements respectively on the terms of this agreement.



## LICENCE

In consideration of payment of the Licence Fees and compliance with the attached terms (**Terms**), AMCOS and APRA grant You a Licence commencing on the Commencement Date. The Terms are incorporated into this agreement and each party must comply with its obligations under them.

## SIGNED AS AN AGREEMENT

Signed by **Australasian Mechanical Copyright Owners Society Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person(print)

Signed by **Australasian Performing Right Association Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person (print)

Signed by **You:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person (print)

## **DIGITAL DOWNLOAD TERMS**

### **1. Subject matter and grant of rights**

#### **1.1 Entire agreement**

This agreement, and the Terms, including the schedules, contain the entire agreement between APRA|AMCOS and You relating to the reproduction of AMCOS Works and the communication of APRA Works as part of Your Digital Music Service.

#### **1.2 Grant of rights**

Subject to clause 1.3 and on the Terms, APRA|AMCOS grants You a Licence.

#### **1.3 Exclusions and limitations**

1.3.1 The Licence is conditional on Your compliance with the Terms, subject to the right to Cure, including provision of Sales Reports and payment of Licence Fees.

1.3.2 Nothing in this agreement constitutes the grant of a licence to reproduce a Work that is not an AMCOS Work.

1.3.3 Nothing in this agreement constitutes the grant of a licence to communicate a Work that is not an APRA Work.

1.3.4 This agreement does not apply to reproductions of Works made, sold, distributed or communicated by You or on Your behalf with the intention of, or with Your expressed or implied authorisation for, use other than as part of Your Digital Music Service.

1.3.5 The Licence does not include the right to synchronise AMCOS Works with audiovisual material, including Music Videos, or still images.

1.3.6 The Licence does not include the right to reproduce or communicate to the public any Work in a manner that represents that particular Works or groups of Works identified by songwriter or title are associated with or promotes the sale or provision of any goods or services.

1.3.7 The Licence does not include the right to reproduce AMCOS Works or communicate APRA Works as part of a Subscription Service.

1.3.8 The Licence does not include the right or authorise:

- (a) the reproduction of any Work into an Advertisement;
- (b) the reproduction or communication of any Work in circumstances where there is consideration for the Download or the right to receive the Download, that does not consist wholly of money;
- (c) the reproduction or communication of any Work as a ringtone;
- (d) the making of an adaptation or a parody of an AMCOS Work;
- (e) the reproduction or communication of any Work with words that are not approved or normally associated with the Work by the copyright owner for Australia;
- (f) the reproduction or communication of any Works in a graphic form;
- (g) the performance in public of any Works;
- (h) the performance in public or communication to the public of any Grand Right Works in their entirety, unless the communication is of a commercially released soundtrack album of a theatrical production or a cinematograph film of Grand Right Works;
- (i) the performance in public or communication to the public of any choral work of more than 20 minutes' duration in its entirety, unless the communication is of a commercially released soundtrack of such a choral work;

- (j) the reproduction, performance in public or communication to the public of any sound recording; or
- (k) any other right not expressly granted under this agreement.

1.3.9 Nothing in the Terms constitutes a consent by the authors of Works in relation to any act contrary to the author's moral rights.

1.3.10 If APRA|AMCOS notifies you in accordance with clause 3.4 that a Work is no longer an APRA Work or an AMCOS Work for the purposes of this agreement, You will cease to be licensed under this agreement in respect of the reproduction or communication of the Work (as the case may be), from the date specified in the notice.

## 1.4 Term

- (a) This agreement commences with effect from Commencement Date and, subject to earlier termination in accordance with clause 7, will continue until terminated by either party on 3 months' notice, such termination not to be effective before 31 December 2014.
- (b) Following termination on giving notice under clause 1.4(a), if You still require a licence from APRA|AMCOS for Your Digital Music Service and the parties have not agreed on the terms of that future licence, then the terms of this agreement will remain in force pending such agreement, or a determination by or other order of the Copyright Tribunal, as to the terms of the licence.

## 1.5 Licence Fees

1.5.1 You must pay APRA|AMCOS the greater of:

- (a) the following percentages of the Retail Price:

Downloads other than Music Videos	Music Videos
9% (exclusive of GST)	8% (exclusive of GST)

or

- (b) the Track Rate.

1.5.2 Notwithstanding anything contained in this agreement, You are not required to pay Licence Fees under this agreement, and You will be entitled to a Rebate where either, APRA or AMCOS (as the case may be) is reasonably satisfied, or You can demonstrate to the reasonable satisfaction of APRA or AMCOS (as the case may be), or You can otherwise establish that:

- (a) the Work is a Work in which copyright does not subsist;
- (b) the Work is not an AMCOS Work, including because a prior licence has been obtained for the reproduction of the Work on Your Digital Music Service; or
- (c) the Work is not an APRA Work, including because a prior licence has been obtained for the communication of that Work on Your Digital Music Service,

such Rebate to be paid at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months, whichever is the earlier.

1.5.3 For each Accounting Period the total of the Licence Fee referred to in clause 1.5.1 must be adjusted by deducting the net Licence Fee paid or payable on Fraudulent Transactions and adding the net Licence Fee payable on Fraudulent Transactions subsequently recovered, reported in that Accounting Period.

## 1.6 Free Downloads

1.6.1 No Licence Fee is payable on Promotional Downloads.

1.6.2 From 1 January 2012, APRA|AMCOS may review the Code and, on 3 months' notice, issue a revised Code. If You object to the Code, clause 6 applies and the new Code will not come into effect until the dispute is resolved.

1.6.3 If You do not object to the revised Code within the 3 month notice period, the revised Code will come into effect in accordance with the notice.

## **2. Your obligations**

### **2.1 Sales Reports**

2.1.1 You must account to APRA|AMCOS for all transactions that are the subject of the Terms for each Accounting Period in accordance with this clause 2.1.

2.1.2 You must deliver a Sales Report to APRA|AMCOS by the Due Date.

2.1.3 Subject to clause 2.1.5, each Sales Report must be, at your election, either in DDEX, APRA|AMCOS' current EDI or such other form reasonably required from time to time by APRA|AMCOS and must contain the following details:

- (a) information sufficient to identify the Sales Report, including:
  - (i) Your details (including where applicable any password allocated to You by APRA|AMCOS, Your APRA|AMCOS identification number and Your contact email address); and
  - (ii) file identification details (including the identification of the Sales Report as a Digital Music Service Sales Report, the transmission date of the file and the number of records in the file);
- (b) information sufficient to separately identify each Sales Batch in the Sales Report, including:
  - (i) the Accounting Period start and end date; and
  - (ii) the type of Download;
- (c) in respect of each Track in each Sales Batch:
  - (i) title of the Work (or Works in the case of Medleys);
  - (ii) subject to clause 2.1.6, songwriter(s) of the Work(s) or ISWC;
  - (iii) name of the artist or band that recorded the version of the Work reported (or has been used by You to identify the Work);
  - (iv) subject to clause 2.1.6, if indicated on the Track, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
  - (v) the number of units Sold at each Retail Price (including where free) and the Retail Price (in Australian dollars);
  - (vi) the type of Download; and
  - (vii) whether You have a direct licence from a relevant member of APRA or AMCOS;
- (d) in respect of each Bundle in each Sales Batch:
  - (i) title of the Bundle;
  - (ii) name of the artist or band that recorded the Bundle reported (or "various" if the Bundle is a compilation recording);
  - (iii) if relevant, the name of the record company that provided You with the Bundle and that record company's catalogue number or UPC for the Bundle;

- (iv) the number of units Sold at each Retail Price (including where free) and the Retail Price (in Australian dollars);
- (v) the type of Download;
- (vi) the number of tracks on the Bundle; and
- (vii) whether You have a direct licence from a relevant member of APRA or AMCOS.

2.1.4 In respect of each Bundle included by You in a Sales Report that is not matched to an existing production on APRA|AMCOS's database, APRA|AMCOS may request in electronic or such other form reasonably required from time to time by APRA|AMCOS, the following details in respect of each Track on that Bundle:

- (i) title of the Work (or Works in the case of Medleys);
- (ii) subject to clause 2.1.6, songwriter(s) of the Work(s);
- (iii) name of the artist or band that recorded the version of the Work reported (or has been used by You to identify the Work);
- (iv) the track number;
- (v) subject to clause 2.1.6, if indicated on the Track, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
- (vi) whether You have a licence from an owner of the copyright in the Work or under a direct licence from a relevant member of APRA; and
- (vii) whether the Work as recorded is a local cover of a foreign work.

2.1.5 On entering into this agreement, You must notify APRA|AMCOS of the reporting format elected by You in accordance with clause 2.1.3, and thereafter if you intend to change to that reporting format, clauses 2.7.2 to 2.7.4 apply.

2.1.6 You are required to provide the information in clauses 2.1.3(c)(ii), 2.1.3(c)(iv), 2.1.4(ii) and 2.1.4(v) only to the extent that such information is in Your possession.

2.1.7 You must use reasonable endeavours to obtain the information referred to in clause 2.1.6 from the supplier of the relevant Track or Bundle.

## **2.2 Failure to provide relevant or accurate statements**

2.2.1 If You fail to comply with clause 2.1, and have failed to Cure, APRA|AMCOS may reasonably estimate Sales and music use information, including any relevant previous information provided by You, for the purpose of issuing a tax invoice for a Provisional Payment.

2.2.2 If You fail to comply with clause 2.1 in respect of any Accounting Period to an extent that APRA|AMCOS cannot reasonably identify the Works sold:

- (a) in respect of more than 20% of the value of Sales reported; or
- (b) in a manner such that APRA|AMCOS cannot reasonably process more than 50% of the Tracks or Bundles (as the case may be) Sold,

APRA|AMCOS may decline to issue a tax invoice to You under clause 3.1.1, in respect of the unidentified Works, and clause 3.3 will not apply in respect of the unidentified Works until such time as APRA|AMCOS is reasonably satisfied that You have complied with clause 2.1.

## **2.3 Payment of Licence Fees**

2.3.1 You must pay Licence Fees to APRA|AMCOS within 21 days after receipt of a tax invoice from APRA|AMCOS.

- 2.3.2 If You are notified of late payment and have failed to Cure, You must pay interest at the Agreed Rate on any amount that remains unpaid from the date of expiry of the right to Cure until the date of payment.
- 2.3.3 You acknowledge that the information contained in Sales Reports is critical to the calculation and distribution of Licence Fees by APRA and AMCOS to their respective members.
- 2.3.4 If You fail to provide a Sales Report in accordance with the Terms, and APRA|AMCOS notifies You that the Sales Report has not been provided, You must pay interest at the Agreed Rate calculated from 28 days after the Due Date on amounts that would have become payable had the reports been provided.

## **2.4 Provisional Payment**

- 2.4.1 If the amount of Licence Fees payable in any Accounting Period exceeds the Provisional Payment, You must pay the excess to APRA|AMCOS within 21 days after the date of the tax invoice.
- 2.4.2 If the amount of the Licence Fees payable in any Accounting Period is less than the Provisional Payment, APRA|AMCOS must credit the amount to Your account within 21 days after the date of the tax invoice.

## **2.5 Security**

- 2.5.1 Before the Commencement Date or at any time during the term of this agreement, if:
  - (a) You are a new client of APRA|AMCOS;
  - (b) You have a credit history that reasonably justifies concern on the part of APRA|AMCOS that You may fail to pay Licence Fees in accordance with this agreement;
  - (c) You have been repeatedly late in paying Licence Fees under this or another APRA|AMCOS licence agreement, whether or not You have remedied the breach; or
  - (d) Your business is not registered or has no obvious presence in Australia (as the case may be);if required by APRA|AMCOS, You must give APRA|AMCOS Security as security for performance of Your obligations under this agreement.
- 2.5.2 The Security will be calculated by APRA|AMCOS based on a reasonable estimate of the amount of Licence Fees payable for any Accounting Period.
- 2.5.3 If required by APRA|AMCOS, the amount of the Security may be increased proportionally with any increase in the amount of Licence Fees payable under clause 1.5.
- 2.5.4 APRA|AMCOS may use the Security to recover any loss or expense APRA|AMCOS incurs due to a breach of this agreement by You.
- 2.5.5 If any part of the Security has been used by APRA|AMCOS under clause 2.5.4, You must replace that part of the Security within 5 business days of notice by APRA|AMCOS that it has used the Security.
- 2.5.6 Upon the termination of this agreement APRA|AMCOS must promptly return to You any part of the Security not needed to recover an expense or loss of APRA|AMCOS.

## **2.6 Records**

You must keep proper records relating to Your Digital Music Service including but not limited to accounting records, which must be maintained to a standard sufficient to enable an audit trail to be established relating to Sales such that there are at least two sources of data from which your Sales can be verified, provided that the auditor's right to inspect such documents is limited to documents that are reasonably required and are

relevant to the audit. Such documents may include monthly source log files and backup tapes or similar historical records.

## **2.7 Training and upgrades**

2.7.1 APRA|AMCOS may provide You with notice from time to time of updates, revisions, amendments or other changes to the Sales Report formats.

2.7.2 Any notice referred to in clause 2.1.5 or 2.7.1 must be:

- (a) reasonable in the circumstances; and
- (b) allow the recipient of the notice reasonable time to make adjustments and implement the updates, revisions, amendments or other changes to the recipient's current systems.

2.7.3 If a party disputes the reasonableness of matters notified in accordance with clause 2.1.5 or 2.7.1 (as the case may be), clause 6 applies.

2.7.4 If a party receiving a notice does not notify the other party of a dispute under clause 2.7.3 within 2 months of receiving notice under clause 2.1.5 or 2.7.1, the updates, revisions, amendments or other changes the subject of the notice will take effect from the date specified in the notice.

## **3. Obligations of APRA|AMCOS**

### **3.1 Tax invoices**

3.1.1 On receipt of Sales Reports, or where clause 2.2.1 applies, APRA|AMCOS must each issue a tax invoice to You showing the total Licence Fees or the Provisional Payment payable for the Accounting Period.

3.1.2 If GST is payable for a taxable supply made under this agreement, then any party (**Recipient**) that is required to provide consideration to another party (**Supplier**) for that supply must pay an additional amount to the Supplier equal to the amount of that GST at the same time as any other consideration is to be first provided for that supply, subject to the Supplier providing a tax invoice to the Recipient in respect of that supply.

3.1.3 APRA|AMCOS will provide, when requested by You, an electronic statement in respect of each tax invoice issued under clause 3.1.1 after the date of APRA|AMCOS receiving the request.

3.1.4 Any payment or reimbursement required to be made under this agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

3.1.5 Terms used in this clause 3.1 that have a defined meaning in the GST law shall have the same meaning given to those terms in the GST law unless expressly stated otherwise.

3.1.6 Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 3.1.

3.1.7 Unless otherwise expressly stated, all consideration to be provided under this agreement is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 3.1.

### **3.2 Disputed ownership of Works**

3.2.1 If a third party not being a Member approaches You and claims the right to receive licence fees payable in relation to a Work:

- (a) You must notify APRA|AMCOS in writing within 7 days of such claim and advise the third party to make a written application to APRA|AMCOS to investigate the claim for ownership; and
- (b) within 28 days of receipt of Your notification APRA|AMCOS must advise You whether the relevant rights in the Work are:
  - (i) controlled by a Member;
  - (ii) controlled by the third party claiming the right, in which case APRA|AMCOS must repay monies paid in respect of the Work to You at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months (whichever is the earlier), or provide You with a Rebate; or
  - (iii) claimed by two or more persons, one or more of whom is a Member, in dispute, in which case APRA|AMCOS will hold the monies in a dispute account until such time as the matter is resolved.

3.2.2 In the case of rights described in clause 3.2.1(b)(iii), APRA|AMCOS will continue to issue tax invoices in respect of Your use of the Work until such time as the matter is resolved.

### **3.3 Indemnity**

3.3.1 Subject to clauses 2.2.2 and 3.3.3, APRA|AMCOS will indemnify and keep You and any Affiliate authorised by You in accordance with this agreement harmless from any and all damages, losses, costs (including reasonable legal fees and court costs) and expenses incurred, suffered or expended by You as a consequence of any claim of copyright infringement in respect of Your exercise of the Licence, or the exercise of those rights in respect of any other Work where APRA|AMCOS has not previously given you effective notice under clause 3.4.2 in respect of the Work that it is not an AMCOS Work or APRA Work (as the case may be).

3.3.2 You must promptly notify APRA|AMCOS of any claim under clause 3.3.1.

3.3.3 The indemnity in clause 3.3.1 is subject to:

- (a) You providing all reasonable assistance reasonably requested by APRA|AMCOS in relation to the claim; and
- (b) You agreeing to APRA|AMCOS having sole control and conduct of the defence of such claim,

and does not apply in relation to any Work for which a Rebate has been given from the date of the Rebate until such time as the Work becomes an APRA or AMCOS Work (as the case may be).

3.3.4 The indemnity in clause 3.3.1 is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this agreement.

### **3.4 Notice of changes in repertoire**

3.4.1 APRA or AMCOS (as the case may be) must notify You of any Works that cease to be APRA Works or AMCOS Works for the purposes of this agreement, other than by reason of falling into the public domain.

3.4.2 To constitute a notice under clause 3.4.1, it must be effective from a 31 March, 30 June, 30 September or 31 December as specified in the notice and be given at least 14 days before the relevant date.



## **4. Management of amounts payable**

### **4.1 Fixed Retail Price**

For the purpose of determining Licence Fees the amounts will be separately assessed in respect of each Sale at each different Retail Price reported in the relevant Sales Report.

### **4.2 Fractions of Cents**

If the aggregate Licence Fee for any Accounting Period in respect of each separately reported Single-Track Download or Bundle payable under this agreement includes a fraction of a cent:

- (a) where the fraction is less than one half of a cent, that fraction will be treated as zero; and
- (b) where the fraction is equal to or more than one half of a cent, that fraction will be treated as one cent.

### **4.3 Medleys and Samples**

For the purposes of calculating Licence Fees, a Medley or a Work containing Samples will be taken to be one Work.

### **4.4 Currency Conversion**

4.4.1 All payments under this agreement must be made in Australian currency. Where any payments are stated to be in any other currency, You must pay APRA|AMCOS in Australian currency at the mid-point of the buying and selling rate published by the Reserve Bank of Australia on the last Business Day of the Accounting Period, and if the Accounting Period is longer than a month, the average from the last Business Day in each month in the Accounting Period.

4.4.2 APRA|AMCOS will issue tax invoices in respect of Sales in currencies other than Australian currency in accordance with clause 4.4.1, and You are responsible for all costs of conversion and remittance, including bank charges.

## **5. Rights of AMCOS and APRA**

### **5.1 Audit**

5.1.1 Subject to clause 5.1.2, APRA|AMCOS may on 30 days' notice to You during Your normal business hours at Your principal place of business in Australia appoint a nationally recognised independent accountant or auditor (licensed by the appropriate authority, not being the auditor of a competitor of Yours and not compensated on a contingency fee basis) who is approved by You, such approval not to be unreasonably withheld, to examine Your records to:

- (a) determine the correctness of any notice or payment supplied or made under this agreement or any previous licence agreement for Downloads for the period since any previous audit or 6 years, whichever is the lesser; or
- (b) in the case of a failure by You to provide information in accordance with clause 2.1, to obtain information required to be provided under that clause.

5.1.2 APRA|AMCOS may only exercise this audit right once every 2 years.

5.1.3 You must pay the reasonable cost of the audit or examination if it:

- (a) establishes that the information provided by You resulted in the amounts payable under the Terms being understated by more than 7.5%;
- (b) establishes that You have not kept the records required pursuant to clause 2.6; or
- (c) is undertaken under clause 5.1.1(b).

- 5.1.4 After an audit or examination has been conducted, APRA|AMCOS must direct the auditor to provide a copy of the report to You at the same time as the report is provided to APRA|AMCOS.
- 5.1.5 Subject to clause 5.1.6, You must pay any moneys determined by the auditor or agreed between the parties to have been payable but unpaid under this agreement, and any amount payable under clause 5.1.3, within 21 days of receipt of a tax invoice from APRA|AMCOS.
- 5.1.6 If You dispute the findings of the auditor:
  - (a) You must notify APRA|AMCOS within 28 days of receipt of the report; and
  - (b) the provisions of clause 6 apply.

## **6. Dispute resolution**

### **6.1 Disputes**

- 6.1.1 The parties must, during and after the term of the Agreement, without delay and in good faith and at a senior management level, attempt to resolve any dispute which arises out of or in connection with the Terms prior to commencing any proceedings, but failure to do so will not be deemed a breach of the Terms entitling any party to terminate.
- 6.1.2 Without limiting clause 6.1.1, the parties agree that where the provisions of the Terms would be manifestly unfair to a party, including because You have obtained direct licences from a copyright owner, the parties must attempt to resolve any issue between them by negotiation in good faith.
- 6.1.3 A party wishing to resolve a dispute must notify the other party of the existence of the dispute and must identify the nature of the dispute in writing. If a dispute under the Terms has not been resolved between the parties within 30 days after notice of the dispute has been given, You may require the dispute to be:
  - (a) referred to expert determination or resolution in accordance with clause 6.2; or
  - (b) mediated.
- 6.1.4 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under the Terms.

### **6.2 Expert determination**

- 6.2.1 Subject to clause 6.3, disputes under this agreement that have not been resolved in accordance with clause 6.1 may be referred by You to the expert determination procedure offered by APRA in accordance with the terms of its authorisations under the *Competition and Consumer Act 2010* or other dispute resolution mechanism as agreed between the parties.
- 6.2.2 If a dispute is submitted to expert determination under clause 6.2.1, a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to expert determination, or such other time as the parties agree.

### **6.3 Copyright Tribunal**

Nothing in this clause 6 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.

## **7. Termination**

### **7.1 Termination for default**

- 7.1.1 If a party (**Defaulting Party**):
  - (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or

suffers any other form of external administration, or being an individual, commits any act of bankruptcy or enters into a scheme of arrangement with creditors;

- (b) fails to Cure a breach of its obligations under the Terms which is capable of remedy; or
- (c) materially breaches any of its obligations under the Terms which is not capable of remedy,

the other party may, by notice to the Defaulting Party, terminate this agreement.

- 7.1.2 If APRA|AMCOS terminates this agreement for breach it may seek to include such additional terms as it believes reasonable to secure performance of Your obligations under any future agreement offered on otherwise the same terms as the Terms.

## **8. Miscellaneous**

### **8.1 Confidentiality**

- 8.1.1 Subject to clauses 8.1.2 and 8.1.3, APRA|AMCOS must not during or after the term of this agreement (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without Your prior written consent any information provided to APRA|AMCOS under clause 2.1 or 2.2.

- 8.1.2 With respect to information supplied under clause 2.1 or 2.2, APRA|AMCOS may:

- (a) use that information to determine Licence Fees and to distribute money to their respective members; and
- (b) provided they first agree to the same obligations of confidentiality contemplated by this clause, disclose that information to APRA|AMCOS' auditors for the purposes of an audit, and other of APRA|AMCOS' professional advisers.

- 8.1.3 The obligations of confidentiality set out in this clause 8 do not apply to information provided to APRA|AMCOS which is:

- (a) required to be disclosed by law; or
- (b) in the public domain other than by breach of this clause.

### **8.2 Notices**

All notices required to be given under this agreement must be sent in writing to the parties at the addresses set out in this agreement or to such other address as any party may notify in writing from time to time. Notices may be served by hand delivery, by post, email or by facsimile. Notices served by hand, email or by facsimile will be deemed to have been received on the day of sending. Notices sent by post will be deemed to have been received on the third business day after sending.

### **8.3 Law of agreement**

This agreement must be construed in accordance with the laws for the time being in force in the State of New South Wales.

### **8.4 Waiver**

A waiver by any of the parties of any provision of the Terms will not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach. All remedies, rights, undertakings and obligations contained in the Terms will be cumulative and none of them will be in limitation of any other remedy, right, undertaking or obligation of any other party.

### **8.5 Variation**

This agreement may only be varied by the written agreement of the parties.

## 8.6 Assignment

A party may only assign a right under this agreement with the prior written consent of the other party.

## 8.7 Severability

If any provision of this agreement is held to be unenforceable, all other provisions shall nevertheless continue in full force and effect.

## 9. Definitions and interpretation

### 9.1 Definitions

**Accounting Period** means each month or such other period as is agreed by the parties;

**Act** means the *Copyright Act 1968* and *Copyright Regulations*;

**Advertisement** means any production which is an announcement designed to attract the attention of the public or any part of it to a product or service, person, organisation or line of conduct, including community service announcements and infomercials;

**Affiliate** means, with respect to a party, any entity which directly or indirectly owns, is owned by or is under common ownership with such party to the extent of at least fifty percent of the equity having the power to vote on or direct the affairs of the entity, and any entity actually controlled by, controlling or under common control with such party;

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to You that it is entitled to grant a Licence;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for Australia, or APRA represents to You that it is entitled to grant a Licence;

**Bundle** means a number of Downloads Sold as a single set or album for a single price;

**Business Day** means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney;

**Clip** means a Stream which when played back at normal speed in an uncompressed format on a device is no more than 30 seconds in duration for audio visual streams and no more than 90 seconds for audio only streams;

**Code** means the code in schedule 2;

**Commencement Date** means the later of 1 January 2010 and the date specified in the schedule;

**Cure** means to remedy a breach of an obligation under the Terms (which is capable of remedy) within 21 days of notice of the breach, or for a breach of a payment or reporting obligation, within 7 Business Days of notice of the breach;

**Digital Music Service** means the business carried on under the trading names in schedule 1 providing Downloads for Sale;

**DJ Mix** means a sequence of Tracks mixed together to sound as one continuous track;

**Download** means a copy of a Track in the form of an electronic file in which sounds are embodied (including a Music Video);

**Dual Download** means a Download occurring as a result of a single Sale and resulting in more than one copy being delivered by You to a customer to different storage devices;

**Due Date** means the 30th day after the end of an Accounting Period;

**Fraudulent Transaction** means the acquisition of a Download made available for Sale by You as part of a deliberate action by an individual or individuals intended to defraud You (such as the compromise of Your security protocols), and where You have referred the matter and the whole dollar amount of that transaction to the police;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime insofar as it consists of words and music expressly written for it;

**GST** has the same meaning as in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*;

**ISRC** means International Standard Record Code ISO 3901:2001, as amended from time to time by the International Organisation for Standardisation (**ISO**);

**ISWC** means International Standard Works Code ISO 15707:2001 as amended from time to time by the ISO;

**Licence** means a non-exclusive licence to:

- (a) reproduce AMCOS Works;
- (b) authorise the reproduction of AMCOS Works;
- (c) communicate in the Territory the APRA Works (including authorising their electronic transmission from Your Digital Music Service to Your customers);
- (d) authorise Your Affiliates to communicate the APRA Works to customers in the Territory as necessary in the course of providing the Digital Music Service,

in the form of Downloads (whether by You, or Your customers in the Territory, onto storage devices) for the purpose of Sale or to complete a Sale, including in the form of Clips provided at no charge for the sole purpose of demonstrating the Clip to customers and potential customers of Your Digital Music Service;

**Licence Fee** means the fees payable by You under clause 1.5;

**Medley** means a Track no longer than 8 minutes duration embodying two or more Works, where there is no space between the Works, excluding Samples and DJ Mixes;

**Member** means a member of APRA or AMCOS as at the date of this agreement and any person who becomes a member of APRA or AMCOS during the term of this agreement;

**Music Video** means a cinematograph film produced for the primary purpose of promoting or visually representing:

- (a) the performer of a sound recording; and/or
- (b) the sound recording,

of a Work or Works embodied in the soundtrack of that cinematograph film;

**Promotional Download** means a Download to which the Code applies;

**Provisional Payment** means a reasonable estimate by APRA|AMCOS of the Licence Fees;

**Rebate** means at your election, either a credit to Your account for, or a repayment to You of, an amount equal to all payments by You to APRA and/or AMCOS (as the case may be) in respect of a Work during the period in which any of paragraphs 1.5.2(a) to (c) or 3.2.1(b)(ii) applies;

**Retail Price** means the selling price of a Download that is advertised to the general public or to Your customers by You or on Your behalf, excluding GST;

**Sale** means the sale or supply of Downloads (including supply free of charge) to customers for their personal use on terms that prohibit further supply to third parties;

**Sales Batch** means, in an Accounting Period, a group of Sales reported by reference to common factors as reasonably required by APRA|AMCOS from time to time;

**Sales Report** means a statement in accordance with clause 2.1, and which may contain one or more Sales Batches;

**Sample** means a part of a sound recording of a Work which (along with the accompanying Work) is subsequently embodied in another sound recording;

**Security** means a bank cheque or unconditional bank guarantee on terms and conditions approved by APRA|AMCOS;

**Single-Track Download** means a Download comprising one Track (or part of a Track) only;

**Streaming** means the communication to the public of Tracks and Music Videos (which may or may not be pre-recorded) by means of the internet to a device under circumstances in which the user is prohibited from making a copy of the Track or Music Video;

**Subscription Service** means a service that supplies Downloads and access to which is made available in return for a periodic payment, or a service that is primarily funded by advertising;

**Territory** means Australia;

**Track** means a sound recording of a Work or in the case of Music Videos, the soundtrack (or each part thereof in the case of a long form video) embodying a Work forming part of the film;

**Track Rate** means in respect of:

- (a) a Single-Track Download or a Dual Download

Downloads other than Music Videos	Music Videos
9 cents (exclusive of GST)	8 cents (exclusive of GST)

- (b) a Bundle, 6.5 cents (exclusive of GST) for each Track in the Bundle up to a maximum of 65 cents (exclusive of GST) per Bundle, provided the rate per Track is never lower than 2.5 cents (exclusive of GST) per Track;

**UPC** means Universal Product Code; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for Australia, and a reference to a Work includes a reference to a share in any such Work.

Words defined in this agreement have the same meaning in the Terms.

## 9.2 Interpretation

In the Terms, unless the subject matter or context otherwise requires:

- (a) the singular denotes the plural and vice versa;
- (b) a reference to one gender includes all other genders;
- (c) a person includes an individual, a body corporate and a government;
- (d) a reference to a statute, regulation, or provision of a statute or regulation includes a reference to that statute, regulation or provision as amended or re-enacted from time to time;
- (e) where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have corresponding meanings; and
- (f) any word or phrase defined in the Act has that meaning in the Terms unless otherwise defined in the Terms.

**Schedule 1**

**Name of licensee (You)** .....

**Trading name(s)** .....

**Date of commencement** .....

**Schedule 2 – Code**

A complimentary Licence applies to all Promotional Downloads providing that:

- (a) You nominate the Work embodied in the Download;
- (b) they are offered to all customers and potential customers of Your Digital Music Service;
- (c) the owner of the copyright in the master sound recording has also granted a complimentary licence in respect of that Download;
- (d) the promotion of the Download is limited to no more than 30 days;
- (e) no more than five promotions are made available concurrently at any time; and
- (f) they are not offered for free as part of a package (for example, “buy one, get one free”) or introductory offer to Your Digital Music Service.

## **APRA|AMCOS DIGITAL MUSIC SERVICE AGREEMENT**

### **BACKING TRACKS AND KARAOKE TRACKS**

**THIS AGREEMENT IS MADE ON**

#### **PARTIES**

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales on its own behalf and on behalf of each of the AMCOS Members (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED**  
ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

#### **YOUR DETAILS**

**Registered Company Name:** ..... (You)

**ABN:** .....

**Trading Name:** .....

**Street Address:** .....

**Postal Address (if different):** .....

**Main Contact:** .....

**Contact's Title:** .....

**Contact's Email Address:** .....

**Contact's Phone Number:** .....

**Contact's Fax Number:** .....

#### **BACKGROUND**

- A.** AMCOS and APRA are mechanical right and performing right collecting societies respectively.
- B.** AMCOS is the exclusive licensee in the Territory of the right to reproduce the AMCOS Works in certain circumstances.
- C.** APRA controls in the Territory the right to communicate the APRA Works.
- D.** You are a provider of Downloads and require a licence from APRA|AMCOS in order to conduct Your Digital Music Service.
- E.** AMCOS and APRA have agreed to grant licences and make arrangements respectively on the terms of this agreement.



## LICENCE

In consideration of payment of the Licence Fees and compliance with the attached terms (**Terms**), AMCOS and APRA grant You a Licence commencing on the Commencement Date. The Terms are incorporated into this agreement and each party must comply with its obligations under them.

## SIGNED AS AN AGREEMENT

Signed by **Australasian Mechanical Copyright Owners Society Limited:**

..... Signature of authorised person	..... Signature of witness
Director, Recorded Music Services ..... Position of authorised person (print)	..... Name of witness (print)
Matthew Fackrell ..... Name of authorised person(print)	

Signed by **Australasian Performing Right Association Limited:**

..... Signature of authorised person	..... Signature of witness
Director, Recorded Music Services ..... Position of authorised person (print)	..... Name of witness (print)
Matthew Fackrell ..... Name of authorised person (print)	

Signed by **You:**

..... Signature of authorised person	..... Signature of witness
..... Position of authorised person (print)	..... Name of witness (print)
..... Name of authorised person (print)	

## DIGITAL DOWNLOAD TERMS

### 1. Subject matter and grant of rights

#### 1.1 Entire agreement

This agreement, and the Terms, including the schedules, contain the entire agreement between APRA|AMCOS and You relating to the reproduction of AMCOS Works and the communication of APRA Works as part of Your Digital Music Service.

#### 1.2 Grant of rights

Subject to clause 1.3 and on the Terms, APRA|AMCOS grants You a Licence.

#### 1.3 Exclusions and limitations

1.3.1 The Licence is conditional on Your compliance with the Terms, subject to the right to Cure, including provision of Sales Reports and payment of Licence Fees.

1.3.2 Nothing in this agreement constitutes the grant of a licence to reproduce a Work that is not an AMCOS Work.

1.3.3 Nothing in this agreement constitutes the grant of a licence to communicate a Work that is not an APRA Work.

1.3.4 This agreement does not apply to reproductions of Works made, sold, distributed or communicated by You or on Your behalf with the intention of, or with Your expressed or implied authorisation for, use other than as part of Your Digital Music Service.

1.3.5 The Licence does not include the right to synchronise AMCOS Works with audiovisual material, including Music Videos and Karaoke Tracks, or still images.

1.3.6 The Licence does not include the right to reproduce or communicate to the public any Work in a manner that represents that particular Works or groups of Works identified by songwriter or title are associated with or promotes the sale or provision of any goods or services.

1.3.7 The Licence does not include the right to reproduce AMCOS Works or communicate APRA Works as part of a Subscription Service.

1.3.8 The Licence does not include the right or authorise:

- (a) the reproduction of any Work into an Advertisement;
- (b) the reproduction or communication of any Work in circumstances where there is consideration for the Download or the right to receive the Download, that does not consist wholly of money;
- (c) the reproduction or communication of any Work as a ringtone;
- (d) the making of an adaptation or a parody of an AMCOS Work;
- (e) the reproduction or communication of any Work with words that are not approved or normally associated with the Work by the copyright owner for Australia;
- (f) the performance in public of any Works;
- (g) the performance in public or communication to the public of any Grand Right Works in their entirety, unless the communication is of a commercially released soundtrack album of a theatrical production or a cinematograph film of Grand Right Works;
- (h) the performance in public or communication to the public of any choral work of more than 20 minutes' duration in its entirety, unless the communication is of a commercially released soundtrack of such a choral work;
- (i) the reproduction, performance in public or communication to the public of any sound recording; or

(j) any other right not expressly granted under this agreement.

1.3.9 Nothing in the Terms constitutes a consent by the authors of Works in relation to any act contrary to the author's moral rights.

1.3.10 If APRA|AMCOS notifies you in accordance with clause 3.4 that a Work is no longer an APRA Work or an AMCOS Work for the purposes of this agreement, You will cease to be licensed under this agreement in respect of the reproduction or communication of the Work (as the case may be), from the date specified in the notice.

## 1.4 Term

(a) This agreement commences with effect from Commencement Date and, subject to earlier termination in accordance with clause 7, will continue until terminated by either party on 3 months' notice, such termination not to be effective before 31 December 2014.

(b) Following termination on giving notice under clause 1.4(a), if You still require a licence from APRA|AMCOS for Your Digital Music Service and the parties have not agreed on the terms of that future licence, then the terms of this agreement will remain in force pending such agreement, or a determination by or other order of the Copyright Tribunal, as to the terms of the licence.

## 1.5 Licence Fees

1.5.1 You must pay APRA|AMCOS the greater of:

(a) the following percentages of the Retail Price:

Downloads of Backing Tracks	Downloads of Karaoke Tracks
9% (exclusive of GST)	13.5% (exclusive of GST)

or

(b) the Backing Track Rate or the Karaoke Track Rate, as the case may be.

1.5.2 Notwithstanding anything contained in this agreement, You are not required to pay Licence Fees under this agreement, and You will be entitled to a Rebate where either, APRA or AMCOS (as the case may be) is reasonably satisfied, or You can demonstrate to the reasonable satisfaction of APRA or AMCOS (as the case may be), or You can otherwise establish that:

- (a) the Work is a Work in which copyright does not subsist;
- (b) the Work is not an AMCOS Work, including because a prior licence has been obtained for the reproduction of the Work on Your Digital Music Service; or
- (c) the Work is not an APRA Work, including because a prior licence has been obtained for the communication of that Work on Your Digital Music Service,

such Rebate to be paid at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months, whichever is the earlier.

1.5.3 For each Accounting Period the total of the Licence Fee referred to in clause 1.5.1 must be adjusted by deducting the net Licence Fee paid or payable on Fraudulent Transactions and adding the net Licence Fee payable on Fraudulent Transactions subsequently recovered, reported in that Accounting Period.

## 2. Your obligations

### 2.1 Sales Reports

2.1.1 You must account to APRA|AMCOS for all transactions that are the subject of the Terms for each Accounting Period in accordance with this clause 2.1.

2.1.2 You must deliver a Sales Report to APRA|AMCOS by the Due Date.

- 2.1.3 Subject to clause 2.1.4, each Sales Report must be, at your election, either in DDEX, APRA|AMCOS' current EDI or such other form reasonably required from time to time by APRA|AMCOS and must contain the following details:
- (a) information sufficient to identify the Sales Report, including:
    - (i) Your details (including where applicable any password allocated to You by APRA|AMCOS, Your APRA|AMCOS identification number and Your contact email address); and
    - (ii) file identification details (including the identification of the Sales Report as a Digital Music Service Sales Report, the transmission date of the file and the number of records in the file);
  - (b) information sufficient to separately identify each Sales Batch in the Sales Report, including:
    - (i) the Accounting Period start and end date; and
    - (ii) the type of Download;
  - (c) in respect of each Backing Track or Karaoke Track in each Sales Batch:
    - (i) title of the Work (or Works in the case of Medleys);
    - (ii) songwriter(s) of the Work(s) or ISWC;
    - (iii) name of the artist or band that recorded the version of the Work reported (or has been used by You to identify the Work);
    - (iv) if indicated on the Backing Track or Karaoke Track, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
    - (v) the number of units Sold at each Retail Price (including where free) and the Retail Price (in Australian dollars);
    - (vi) whether the Download is a Backing Track or a Karaoke Track; and
    - (vii) whether You have a direct licence from a relevant member of APRA or AMCOS.

- 2.1.4 On entering into this agreement, You must notify APRA|AMCOS of the reporting format elected by You in accordance with clause 2.1.3, and thereafter if you intend to change to that reporting format, clauses 2.8.2 to 2.8.4 apply.

## **2.2 Failure to provide relevant or accurate statements**

- 2.2.1 If You fail to comply with clause 2.1, and have failed to Cure, APRA|AMCOS may reasonably estimate Sales and music use information, including any relevant previous information provided by You, for the purpose of issuing a tax invoice for a Provisional Payment.

- 2.2.2 If You fail to comply with clause 2.1 in respect of any Accounting Period to an extent that APRA|AMCOS cannot reasonably identify the Works sold:

- (a) in respect of more than 20% of the value of Sales reported; or
- (b) in a manner such that APRA|AMCOS cannot reasonably process more than 50% of the Backing Tracks and Karaoke Tracks Sold,

APRA|AMCOS may decline to issue a tax invoice to You under clause 3.1.1, in respect of the unidentified Works, and clause 3.3 will not apply in respect of the unidentified Works until such time as APRA|AMCOS is reasonably satisfied that You have complied with clause 2.1.

## **2.3 Payment of Licence Fees**

- 2.3.1 You must pay Licence Fees to APRA|AMCOS within 21 days after receipt of a tax invoice from APRA|AMCOS.
- 2.3.2 If You are notified of late payment and have failed to Cure, You must pay interest at the Agreed Rate on any amount that remains unpaid from the date of expiry of the right to Cure until the date of payment.
- 2.3.3 You acknowledge that the information contained in Sales Reports is critical to the calculation and distribution of Licence Fees by APRA and AMCOS to their respective members.
- 2.3.4 If You fail to provide a Sales Report in accordance with the Terms, and APRA|AMCOS notifies You that the Sales Report has not been provided, You must pay interest at the Agreed Rate calculated from 28 days after the Due Date on amounts that would have become payable had the reports been provided.

## **2.4 Provisional Payment**

- 2.4.1 If the amount of Licence Fees payable in any Accounting Period exceeds the Provisional Payment, You must pay the excess to APRA|AMCOS within 21 days after the date of the tax invoice.
- 2.4.2 If the amount of the Licence Fees payable in any Accounting Period is less than the Provisional Payment, APRA|AMCOS must credit the amount to Your account within 21 days after the date of the tax invoice.

## **2.5 Security**

- 2.5.1 Before the Commencement Date or at any time during the term of this agreement, if:
  - (a) You are a new client of APRA|AMCOS;
  - (b) You have a credit history that reasonably justifies concern on the part of APRA|AMCOS that You may fail to pay Licence Fees in accordance with this agreement;
  - (c) You have been repeatedly late in paying Licence Fees under this or another APRA|AMCOS licence agreement, whether or not You have remedied the breach; or
  - (d) Your business is not registered or has no obvious presence in Australia (as the case may be);if required by APRA|AMCOS, You must give APRA|AMCOS Security as security for performance of Your obligations under this agreement.
- 2.5.2 The Security will be calculated by APRA|AMCOS based on a reasonable estimate of the amount of Licence Fees payable for any Accounting Period.
- 2.5.3 If required by APRA|AMCOS, the amount of the Security may be increased proportionally with any increase in the amount of Licence Fees payable under clause 1.5.
- 2.5.4 APRA|AMCOS may use the Security to recover any loss or expense APRA|AMCOS incurs due to a breach of this agreement by You.
- 2.5.5 If any part of the Security has been used by APRA|AMCOS under clause 2.5.4, You must replace that part of the Security within 5 business days of notice by APRA|AMCOS that it has used the Security.
- 2.5.6 Upon the termination of this agreement APRA|AMCOS must promptly return to You any part of the Security not needed to recover an expense or loss of APRA|AMCOS.

## **2.6 Advance**

- 2.6.1 If an Advance is payable, on receipt of a tax invoice from APRA|AMCOS You must pay the Advance set out in Schedule 2 by the date set out in Schedule 2.
- 2.6.2 The Advance payable in each year of the Term shall be fully recoupable against the Licence Fees payable for that year, but shall not be refundable in the event that the relevant Advance exceeds Licence Fees payable in the relevant year.

## **2.7 Records**

You must keep proper records relating to Your Digital Music Service including but not limited to accounting records, which must be maintained to a standard sufficient to enable an audit trail to be established relating to Sales such that there are at least two sources of data from which your Sales can be verified, provided that the auditor's right to inspect such documents is limited to documents that are reasonably required and are relevant to the audit. Such documents may include monthly source log files and backup tapes or similar historical records.

## **2.8 Training and upgrades**

- 2.8.1 APRA|AMCOS may provide You with notice from time to time of updates, revisions, amendments or other changes to the Sales Report formats.
- 2.8.2 Any notice referred to in clause 2.1.4 or 2.8.1 must be:
  - (a) reasonable in the circumstances; and
  - (b) allow the recipient of the notice reasonable time to make adjustments and implement the updates, revisions, amendments or other changes to the recipient's current systems.
- 2.8.3 If a party disputes the reasonableness of matters notified in accordance with clause 2.1.4 or 2.8.1 (as the case may be), clause 6 applies.
- 2.8.4 If a party receiving a notice does not notify the other party of a dispute under clause 2.8.3 within 2 months of receiving notice under clause 2.1.4 or 2.8.1, the updates, revisions, amendments or other changes the subject of the notice will take effect from the date specified in the notice.

## **3. Obligations of APRA|AMCOS**

### **3.1 Tax invoices**

- 3.1.1 On receipt of Sales Reports, or where clause 2.2.1 applies, APRA|AMCOS must each issue a tax invoice to You showing the total Licence Fees or the Provisional Payment payable for the Accounting Period.
- 3.1.2 If GST is payable for a taxable supply made under this agreement, then any party (**Recipient**) that is required to provide consideration to another party (**Supplier**) for that supply must pay an additional amount to the Supplier equal to the amount of that GST at the same time as any other consideration is to be first provided for that supply, subject to the Supplier providing a tax invoice to the Recipient in respect of that supply.
- 3.1.3 APRA|AMCOS will provide, when requested by You, an electronic statement in respect of each tax invoice issued under clause 3.1.1 after the date of APRA|AMCOS receiving the request.
- 3.1.4 Any payment or reimbursement required to be made under this agreement that is calculated by reference to a cost, expense, or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.
- 3.1.5 Terms used in this clause 3.1 that have a defined meaning in the GST law shall have the same meaning given to those terms in the GST law unless expressly stated otherwise.

3.1.6 Any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 3.1.

3.1.7 Unless otherwise expressly stated, all consideration to be provided under this agreement is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 3.1.

### **3.2 Disputed ownership of Works**

3.2.1 If a third party not being a Member approaches You and claims the right to receive licence fees payable in relation to a Work:

- (a) You must notify APRA|AMCOS in writing within 7 days of such claim and advise the third party to make a written application to APRA|AMCOS to investigate the claim for ownership; and
- (b) within 28 days of receipt of Your notification APRA|AMCOS must advise You whether the relevant rights in the Work are:
  - (i) controlled by a Member;
  - (ii) controlled by the third party claiming the right, in which case APRA|AMCOS must repay monies paid in respect of the Work to You at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may be) or within 6 months (whichever is the earlier), or provide You with a Rebate; or
  - (iii) claimed by two or more persons, one or more of whom is a Member, in dispute, in which case APRA|AMCOS will hold the monies in a dispute account until such time as the matter is resolved.

3.2.2 In the case of rights described in clause 3.2.1(b)(iii), APRA|AMCOS will continue to issue tax invoices in respect of Your use of the Work until such time as the matter is resolved.

### **3.3 Indemnity**

3.3.1 Subject to clauses 2.2.2 and 3.3.3, APRA|AMCOS will indemnify and keep You and any Affiliate authorised by You in accordance with this agreement harmless from any and all damages, losses, costs (including reasonable legal fees and court costs) and expenses incurred, suffered or expended by You as a consequence of any claim of copyright infringement in respect of Your exercise of the Licence, or the exercise of those rights in respect of any other Work where APRA|AMCOS has not previously given you effective notice under clause 3.4.2 in respect of the Work that it is not an AMCOS Work or APRA Work (as the case may be).

3.3.2 You must promptly notify APRA|AMCOS of any claim under clause 3.3.1.

3.3.3 The indemnity in clause 3.3.1 is subject to:

- (a) You providing all reasonable assistance reasonably requested by APRA|AMCOS in relation to the claim; and
- (b) You agreeing to APRA|AMCOS having sole control and conduct of the defence of such claim,

and does not apply in relation to any Work for which a Rebate has been given from the date of the Rebate until such time as the Work becomes an APRA or AMCOS Work (as the case may be).

3.3.4 The indemnity in clause 3.3.1 is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this agreement.

### **3.4 Notice of changes in repertoire**

3.4.1 APRA or AMCOS (as the case may be) must notify You of any Works that cease to be APRA Works or AMCOS Works for the purposes of this agreement, other than by reason of falling into the public domain.

3.4.2 To constitute a notice under clause 3.4.1, it must be effective from a 31 March, 30 June, 30 September or 31 December as specified in the notice and be given at least 14 days before the relevant date.

## **4. Management of amounts payable**

### **4.1 Fixed Retail Price**

For the purpose of determining Licence Fees the amounts will be separately assessed in respect of each Sale at each different Retail Price reported in the relevant Sales Report.

### **4.2 Fractions of Cents**

If the aggregate Licence Fee for any Accounting Period in respect of each separately reported Download payable under this agreement includes a fraction of a cent:

- (a) where the fraction is less than one half of a cent, that fraction will be treated as zero; and
- (b) where the fraction is equal to or more than one half of a cent, that fraction will be treated as one cent.

### **4.3 Medleys and Samples**

For the purposes of calculating Licence Fees, a Medley or a Work containing Samples will be taken to be one Work.

### **4.4 Currency Conversion**

4.4.1 All payments under this agreement must be made in Australian currency. Where any payments are stated to be in any other currency, You must pay APRA|AMCOS in Australian currency at the mid-point of the buying and selling rate published by the Reserve Bank of Australia on the last Business Day of the Accounting Period, and if the Accounting Period is longer than a month, the average from the last Business Day in each month in the Accounting Period.

4.4.2 APRA|AMCOS will issue tax invoices in respect of Sales in currencies other than Australian currency in accordance with clause 4.4.1, and You are responsible for all costs of conversion and remittance, including bank charges.

## **5. Rights of AMCOS and APRA**

### **5.1 Audit**

5.1.1 Subject to clause 5.1.2, APRA|AMCOS may on 30 days' notice to You during Your normal business hours at Your principal place of business in Australia appoint a nationally recognised independent accountant or auditor (licensed by the appropriate authority, not being the auditor of a competitor of Yours and not compensated on a contingency fee basis) who is approved by You, such approval not to be unreasonably withheld, to examine Your records to:

- (a) determine the correctness of any notice or payment supplied or made under this agreement or any previous licence agreement for Downloads for the period since any previous audit or 6 years, whichever is the lesser; or
- (b) in the case of a failure by You to provide information in accordance with clause 2.1, to obtain information required to be provided under that clause.

5.1.2 APRA|AMCOS may only exercise this audit right once every 2 years.

5.1.3 You must pay the reasonable cost of the audit or examination if it:



- (a) establishes that the information provided by You resulted in the amounts payable under the Terms being understated by more than 7.5%;
- (b) establishes that You have not kept the records required pursuant to clause 2.6; or
- (c) is undertaken under clause 5.1.1(b).

5.1.4 After an audit or examination has been conducted, APRA|AMCOS must direct the auditor to provide a copy of the report to You at the same time as the report is provided to APRA|AMCOS.

5.1.5 Subject to clause 5.1.6, You must pay any moneys determined by the auditor or agreed between the parties to have been payable but unpaid under this agreement, and any amount payable under clause 5.1.3, within 21 days of receipt of a tax invoice from APRA|AMCOS.

5.1.6 If You dispute the findings of the auditor:

- (a) You must notify APRA|AMCOS within 28 days of receipt of the report; and
- (b) the provisions of clause 6 apply.

## **6. Dispute resolution**

### **6.1 Disputes**

6.1.1 The parties must, during and after the term of the Agreement, without delay and in good faith and at a senior management level, attempt to resolve any dispute which arises out of or in connection with the Terms prior to commencing any proceedings, but failure to do so will not be deemed a breach of the Terms entitling any party to terminate.

6.1.2 Without limiting clause 6.1.1, the parties agree that where the provisions of the Terms would be manifestly unfair to a party, including because You have obtained direct licences from a copyright owner, the parties must attempt to resolve any issue between them by negotiation in good faith.

6.1.3 A party wishing to resolve a dispute must notify the other party of the existence of the dispute and must identify the nature of the dispute in writing. If a dispute under the Terms has not been resolved between the parties within 30 days after notice of the dispute has been given, You may require the dispute to be:

- (a) referred to expert determination or resolution in accordance with clause 6.2; or
- (b) mediated.

6.1.4 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under the Terms.

### **6.2 Expert determination**

6.2.1 Disputes under this agreement that have not been resolved in accordance with clause 6.1 may be referred to the expert determination procedure offered by APRA in accordance with the terms of its authorisations under the *Competition and Consumer Act 2010* or such other dispute resolution mechanism as agreed between the parties.

6.2.2 If a dispute is submitted to expert determination under clause 6.2.1, a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to expert determination, or such other time as the parties agree.

### **6.3 Copyright Tribunal**

Nothing in this clause 6 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.

## **7. Termination**

### **7.1 Termination for default**

#### **7.1.1 If a party (Defaulting Party):**

- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration, or being an individual, commits any act of bankruptcy or enters into a scheme of arrangement with creditors;
- (b) fails to Cure a breach of its obligations under the Terms which is capable of remedy; or
- (c) materially breaches any of its obligations under the Terms which is not capable of remedy,

the other party may, by notice to the Defaulting Party, terminate this agreement.

#### **7.1.2 If APRA|AMCOS terminates this agreement for breach it may seek to include such additional terms as it believes reasonable to secure performance of Your obligations under any future agreement offered on otherwise the same terms as the Terms.**

## **8. Miscellaneous**

### **8.1 Confidentiality**

#### **8.1.1 Subject to clauses 8.1.2 and 8.1.3, APRA|AMCOS must not during or after the term of this agreement (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without Your prior written consent any information provided to APRA|AMCOS under clause 2.1 or 2.2.**

#### **8.1.2 With respect to information supplied under clause 2.1 or 2.2, APRA|AMCOS may:**

- (a) use that information to determine Licence Fees and to distribute money to their respective members; and
- (b) provided they first agree to the same obligations of confidentiality contemplated by this clause, disclose that information to APRA|AMCOS' auditors for the purposes of an audit, and other of APRA|AMCOS' professional advisers.

#### **8.1.3 The obligations of confidentiality set out in this clause 8 do not apply to information provided to APRA|AMCOS which is:**

- (a) required to be disclosed by law; or
- (b) in the public domain other than by breach of this clause.

### **8.2 Notices**

All notices required to be given under this agreement must be sent in writing to the parties at the addresses set out in this agreement or to such other address as any party may notify in writing from time to time. Notices may be served by hand delivery, by post, email or by facsimile. Notices served by hand, email or by facsimile will be deemed to have been received on the day of sending. Notices sent by post will be deemed to have been received on the third business day after sending.

### **8.3 Law of agreement**

This agreement must be construed in accordance with the laws for the time being in force in the State of New South Wales.

### **8.4 Waiver**

A waiver by any of the parties of any provision of the Terms will not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach. All remedies, rights, undertakings and obligations contained in the Terms will be

cumulative and none of them will be in limitation of any other remedy, right, undertaking or obligation of any other party.

## 8.5 Variation

This agreement may only be varied by the written agreement of the parties.

## 8.6 Assignment

A party may only assign a right under this agreement with the prior written consent of the other party.

## 8.7 Severability

If any provision of this agreement is held to be unenforceable, all other provisions shall nevertheless continue in full force and effect.

## 9. Definitions and interpretation

### 9.1 Definitions

**Accounting Period** means each month or such other period as is agreed by the parties;

**Act** means the *Copyright Act 1968* and *Copyright Regulations*;

**Advance** means the amount set out in Schedule 2;

**Advertisement** means any production which is an announcement designed to attract the attention of the public or any part of it to a product or service, person, organisation or line of conduct, including community service announcements and infomercials;

**Affiliate** means, with respect to a party, any entity which directly or indirectly owns, is owned by or is under common ownership with such party to the extent of at least fifty percent of the equity having the power to vote on or direct the affairs of the entity, and any entity actually controlled by, controlling or under common control with such party;

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to You that it is entitled to grant a Licence;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for Australia, or APRA represents to You that it is entitled to grant a Licence;

**Backing Track** means a sound recording or MIDI File of a Work for use as a backing track intended for use by a singer or other musician during a performance (whether or not that performance is to the public) and which may augment or replace other performers;

**Backing Track Rate** means 9 cents (exclusive of GST);

**Business Day** means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney;

**Clip** means a Stream which when played back at normal speed in an uncompressed format on a device is no more than 30 seconds in duration for audio visual streams and no more than 90 seconds for audio only streams;

**Commencement Date** means the later of 1 January 2010 and the date specified in the schedule;

**Cure** means to remedy a breach of an obligation under the Terms (which is capable of remedy) within 21 days of notice of the breach, or for a breach of a payment or reporting obligation, within 7 Business Days of notice of the breach;

**Digital Music Service** means the business carried on under the trading names in schedule 1 providing Downloads for Sale;

**Download** means a copy of a Backing Track or Karaoke Track in the form of an electronic file in which sounds are embodied;

**Due Date** means the 30th day after the end of an Accounting Period;

**Fraudulent Transaction** means the acquisition of a Download made available for Sale by You as part of a deliberate action by an individual or individuals intended to defraud You (such as the compromise of Your security protocols), and where You have referred the matter and the whole dollar amount of that transaction to the police;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime insofar as it consists of words and music expressly written for it;

**GST** has the same meaning as in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*;

**ISRC** means International Standard Record Code ISO 3901:2001, as amended from time to time by the International Organisation for Standardisation (**ISO**);

**ISWC** means International Standard Works Code ISO 15707:2001 as amended from time to time by the ISO;

**Karaoke Track** means a sound recording or MIDI File of a Work synchronised with images together with a graphic reproduction of the lyrics of the Work intended for use as entertainment that includes the singing of lyrics by members of the public, but does not include an Advertisement;

**Karaoke Track Rate** means 13.5 cents (exclusive of GST);

**Licence** means a non-exclusive licence to:

- (a) reproduce AMCOS Works;
- (b) authorise the reproduction of AMCOS Works;
- (c) communicate in the Territory the APRA Works (including authorising their electronic transmission from Your Digital Music Service to Your customers);
- (d) authorise Your Affiliates to communicate the APRA Works to customers in the Territory as necessary in the course of providing the Digital Music Service,

in the form of Downloads (whether by You, or Your customers in the Territory, onto storage devices) for the purpose of Sale or to complete a Sale, including in the form of Clips provided at no charge for the sole purpose of demonstrating the Clip to customers and potential customers of Your Digital Music Service;

**Licence Fee** means the fees payable by You under clause 1.5;

**Medley** means a Backing Track or Karaoke Track no longer than 8 minutes duration embodying two or more Works, where there is no space between the Works, excluding Samples;

**Member** means a member of APRA or AMCOS as at the date of this agreement and any person who becomes a member of APRA or AMCOS during the term of this agreement;

**MIDI File** means a digital file that carries information in respect of a Work that can be read by an enabling sound card or other interfacing mechanism for the reproduction of the Work;

**Music Video** means a cinematograph film produced for the primary purpose of promoting or visually representing:

- (a) the performer of a sound recording; and/or

(b) the sound recording,  
of a Work or Works embodied in the soundtrack of that cinematograph film;

**Provisional Payment** means a reasonable estimate by APRA|AMCOS of the Licence Fees;

**Rebate** means at your election, either a credit to Your account for, or a repayment to You of, an amount equal to all payments by You to APRA and/or AMCOS (as the case may be) in respect of a Work during the period in which any of paragraphs 1.5.2(a) to (c) or 3.2.1(b)(ii) applies;

**Retail Price** means the selling price of a Download that is advertised to the general public or to Your customers by You or on Your behalf, excluding GST;

**Sale** means the sale or supply of Downloads (including supply free of charge) to customers for their personal use on terms that prohibit further supply to third parties;

**Sales Batch** means, in an Accounting Period, a group of Sales reported by reference to common factors as reasonably required by APRA|AMCOS from time to time;

**Sales Report** means a statement in accordance with clause 2.1, and which may contain one or more Sales Batches;

**Sample** means a part of a sound recording of a Work which (along with the accompanying Work) is subsequently embodied in another sound recording;

**Security** means a bank cheque or unconditional bank guarantee on terms and conditions approved by APRA|AMCOS;

**Streaming** means the communication to the public of Backing Tracks and Karaoke Tracks by means of the internet to a device under circumstances in which the user is prohibited from making a copy of the Backing Track or Karaoke Track;

**Subscription Service** means a service that supplies Downloads and access to which is made available in return for a periodic payment, or a service that is primarily funded by advertising;

**Territory** means Australia;

**UPC** means Universal Product Code; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for Australia, and a reference to a Work includes a reference to a share in any such Work.

Words defined in this agreement have the same meaning in the Terms.

## 9.2 Interpretation

In the Terms, unless the subject matter or context otherwise requires:

- (a) the singular denotes the plural and vice versa;
- (b) a reference to one gender includes all other genders;
- (c) a person includes an individual, a body corporate and a government;
- (d) a reference to a statute, regulation, or provision of a statute or regulation includes a reference to that statute, regulation or provision as amended or re-enacted from time to time;
- (e) where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have corresponding meanings; and
- (f) any word or phrase defined in the Act has that meaning in the Terms unless otherwise defined in the Terms.

**Schedule 1**

**Name of licensee (You)** .....

**Trading name(s)** .....

**Date of commencement** .....

**Schedule 2**

**Advance Amount:**

**Date by which Advance must be paid:**



# APRA|AMCOS Limited Digital Music Service Agreement 2012

## THIS AGREEMENT IS MADE ON

### PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales on its own behalf and on behalf of each of the AMCOS Members (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED**  
ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

### THE SCHEDULE

Registered Company Name (You):

ABN:

Trading Name:

Street Address:

Postal Address (if different):

Main Contact:

Contact's Title:

Contact's Email Address:

Contact's Phone Number:

Contact's Fax Number:

Date of commencement:

First Year Advance:

**Licence Fee:** For each Download Sale during the Term of this agreement you must pay APRA|AMCOS 15 cents (exclusive of GST).

### BACKGROUND

- A. AMCOS is a mechanical right collecting society and the exclusive licensee in the Territory of the right to reproduce the AMCOS Works in certain circumstances.
- B. APRA is a performing right collecting society and controls in the Territory the right to communicate the APRA Works.
- C. You require a licence from APRA|AMCOS in order to conduct Your Limited Digital Music Service which sells up to a maximum of 10,000 Downloads each Licence Year.
- D. AMCOS and APRA have agreed to grant licences and make arrangements respectively on the terms of this agreement.

### LICENCE

In consideration of payment of the Licence Fees and compliance with the attached terms (**Terms**), AMCOS and APRA grant You a Licence commencing on the Commencement Date. The Terms are incorporated into this agreement and each party must comply with its obligations under them.

Signed by **You**:

SIGNATURE OF AUTHORISED PERSON

POSITION OF AUTHORISED PERSON (PRINT)

NAME OF AUTHORISED PERSON(PRINT)

### SIGNED AS AN AGREEMENT

Signed by **Australasian Mechanical Copyright Owners Society Limited:**

SIGNATURE OF AUTHORISED PERSON

POSITION OF AUTHORISED PERSON (PRINT)

NAME OF AUTHORISED PERSON(PRINT)

Signed by **Australasian Performing Right Association Limited:**

SIGNATURE OF AUTHORISED PERSON

POSITION OF AUTHORISED PERSON (PRINT)

NAME OF AUTHORISED PERSON(PRINT)

## DIGITAL DOWNLOAD TERMS

### 1. Subject matter and grant of rights

#### 1.1 Entire agreement

This agreement, and the Terms, including the schedule, contain the entire agreement between APRA|AMCOS and You relating to the reproduction of AMCOS Works and the communication of APRA Works as part of Your Limited Digital Music Service.

#### 1.2 Grant of rights

Subject to clause 1.3 and on the Terms, APRA|AMCOS grants You a Licence.

#### 1.3 Exclusions and limitations

1.3.1 The Licence is conditional on Your compliance with the Terms, subject to the right to Cure, including provision of Sales Reports and payment of Licence Fees.

1.3.2 Nothing in this agreement constitutes the grant of a licence to reproduce a Work that is not an AMCOS Work.

1.3.3 Nothing in this agreement constitutes the grant of a licence to communicate a Work that is not an APRA Work.

1.3.4 This agreement does not apply to reproductions of Works made, sold, distributed or communicated by You or on Your behalf with the intention of, or with Your expressed or implied authorisation for, use other than as part of Your Limited Digital Music Service.

1.3.5 The Licence does not include the right to synchronise AMCOS Works with audiovisual material, including Music Videos, or still images.

1.3.6 The Licence does not include the right to reproduce or communicate to the public any Work in a manner that represents that particular Works or groups of Works identified by songwriter or title are associated with or promotes the sale or provision of any goods or services.

1.3.7 The Licence does not include the right to reproduce AMCOS Works or communicate APRA Works as part of a Subscription Service.

1.3.8 The Licence does not include the right or authorise:

- (a) the reproduction of any Work into an Advertisement;
- (b) the reproduction or communication of any Work in circumstances where there is consideration for the Download or the right to receive the Download, that does not consist wholly of money;
- (c) the reproduction or communication of any Work with words that are not approved or normally associated with the Work by the copyright owner for Australia;
- (d) the performance in public or communication to the public of any Grand Right Works in their entirety, unless the communication is of a commercially released soundtrack album of a theatrical production or a cinematograph film of Grand Right Works;
- (e) the performance in public or communication to the public of any choral work of more than 20 minutes' duration in its entirety, unless the communication is of a commercially released soundtrack of such a choral work; or
- (f) any other right not expressly granted under this agreement.

1.3.9 Nothing in the Terms constitutes a consent by the authors of Works in relation to any act contrary to the author's moral rights.

1.3.10 If APRA|AMCOS notifies you in accordance with clause 3.4 that a Work is no longer an APRA Work or an AMCOS Work for the purposes of this agreement, You will cease to be licensed under this agreement in respect of the reproduction or communication of the Work (as the case may be), from the date specified in the notice.

#### 1.4 Term

- (a) This agreement commences with effect from Commencement Date and, subject to earlier termination in accordance with clause 7, will continue until terminated by either party on 3 months' notice.
- (b) Following termination on giving notice under clause 1.4(a), if You still require a licence from APRA|AMCOS for Your Limited Digital Music Service and the parties have not agreed on the terms of that future licence, then the terms of this agreement will remain in force pending such agreement, or a determination by or other order of the Copyright Tribunal, as to the terms of the licence.

#### 1.5 Licence Fees

For each Download Sale during the Term of this agreement You must pay APRA|AMCOS the Licence Fee.

## 2. Your obligations

### 2.1 Sales Reports

2.1.1 You must account to APRA|AMCOS for all transactions that are the subject of the Terms for each Licence Year in accordance with this clause 2.1.

2.1.2 You must deliver a Sales Report to APRA|AMCOS by the Due Date.

2.1.3 Subject to clause 2.5, each Sales Report must be, in APRA|AMCOS' current EDI or such other form reasonably required from time to time by APRA|AMCOS and must contain the following details:

(a) information sufficient to identify the Sales Report, including:

- (i) Your details (including where applicable any password allocated to You by APRA|AMCOS, Your APRA|AMCOS identification number and Your contact email address); and
- (ii) file identification details (including the identification of the Sales Report as a Limited Digital Music Service Sales Report, the transmission date of the file and the number of records in the file);

(b) information sufficient to separately identify each Sales Batch in the Sales Report, including the Licence Year start and end date;

(c) in respect of each Track in each Sales Batch:

- (i) title of the Work (or Works in the case of Medleys);
- (ii) subject to clause 2.1.4, songwriter(s) of the Work(s) or ISWC;
- (iii) name of the artist or band that recorded the version of the Work reported (or has been used by You to identify the Work);
- (iv) subject to clause 2.1.4, if indicated on the Track, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
- (v) the number of units Sold;
- (vi) the type of Download; and
- (vii) whether You have a direct licence from a relevant member of APRA or AMCOS;

2.1.4 You are required to provide the information in clauses ii), 2.1.3(c)(iv), only to the extent that such information is in Your possession.

2.1.5 You must use reasonable endeavours to obtain the information referred to in clause 2.1.4 from the supplier of the relevant Track.

2.1.6 If Your Limited Digital Music Service exceeds 10,000 Download Sales in any given Licence Year, You must notify APRA|AMCOS of that fact within 21 days of the date on which Your Limited Digital Music Service exceeded that threshold.

### 2.2 Failure to provide relevant or accurate statements

2.2.1 If You fail to comply with clause 2.1, and have failed to Cure, APRA|AMCOS may reasonably estimate Sales and music use information, including any relevant previous information provided by You, for the purpose of issuing a tax invoice.

### 2.2.2 Payment of Licence Fees

2.2.3 You must pay Licence Fees to APRA|AMCOS within 21 days after receipt of a tax invoice from APRA|AMCOS.

2.2.4 If You are notified of late payment and have failed to Cure, You must pay interest at the Agreed Rate on any amount that remains unpaid from the date of expiry of the right to Cure until the date of payment.

2.2.5 If You fail to provide a Sales Report in accordance with the Terms, and APRA|AMCOS notifies You that the Sales Report has not been provided, You must pay interest at the Agreed Rate calculated from 28 days after the Due Date on amounts that would have become payable had the reports been provided.

### 2.3 Advances

2.3.1 You must, on signing this agreement and receipt of a tax invoice, pay APRA|AMCOS an advance for the first Licence Year (**First Year Advance**) in the amount specified in the Schedule.

2.3.2 You must, within 60 days of each anniversary of the Commencement Date and on receipt of a tax invoice, pay APRA|AMCOS an advance for each subsequent Licence Year (**Subsequent Advances**). Each Subsequent Advance will be in the same amount as the Licence Fees paid in respect of the previous Licence Year, rounded to the nearest AUD\$50 (exclusive of GST) and subject to a minimum advance amount of AUD\$300 (exclusive of GST).

2.3.3 Each Advance payable under this clause 2.3 is recoupable against the Licence Fees otherwise payable in respect of the relevant Licence Year by You under clause 1.5 of this agreement, but is not refundable.



2.3.4 If the Licence Fees earned in any Licence Year under clause 1.5 of this agreement exceed the Advance paid in respect of that Licence Year, APRA|AMCOS will issue you with a tax invoice for the excess Licence Fees in accordance with clause 3.1.1.

## 2.4 Records

You must keep proper records relating to Your Limited Digital Music Service including but not limited to accounting records, which must be maintained to a standard sufficient to enable an audit trail to be established relating to Sales such that there are at least two sources of data from which your Sales can be verified, provided that the auditor's right to inspect such documents is limited to documents that are reasonably required and are relevant to the audit.

## 2.5 Training and upgrades

2.5.1 APRA|AMCOS may provide You with notice from time to time of updates, revisions, amendments or other changes to the Sales Report formats.

2.5.2 Any notice referred to in clause 2.5.1 must be:

- (a) reasonable in the circumstances; and
- (b) allow the recipient of the notice reasonable time to make adjustments and implement the updates, revisions, amendments or other changes to the recipient's current systems.

2.5.3 If a party disputes the reasonableness of matters notified in accordance with clause 2.5.1, clause 5 applies.

## 3. Obligations of APRA|AMCOS

### 3.1 Tax invoices

3.1.1 On receipt of Sales Reports, or where clause 2.2.1 or 2.3.4 applies, APRA|AMCOS must each issue a tax invoice to You showing the total Licence Fees payable for the Licence Year.

3.1.2 If GST is payable for a taxable supply made under this agreement, then any party (Recipient) that is required to provide consideration to another party (Supplier) for that supply must pay an additional amount to the Supplier equal to the amount of that GST at the same time as any other consideration is to be first provided for that supply, subject to the Supplier providing a tax invoice to the Recipient in respect of that supply.

3.1.3 Terms used in this clause 3.1 that have a defined meaning in the GST law shall have the same meaning given to those terms in the GST law unless expressly stated otherwise.

3.1.4 Unless otherwise expressly stated, all consideration to be provided under this agreement is exclusive of GST. Any consideration that is specified to be inclusive of GST must not be taken into account in calculating the GST payable in relation to a supply for the purposes of this clause 3.1.

3.1.5 The payments specified in this agreement to be made to APRA|AMCOS are net of all withholding or similar taxes and the Licensee must pay to the relevant taxation authority all such taxes, in addition to the payments specified in this agreement to be made to APRA|AMCOS.

3.1.6 All payments under this agreement must be made in Australian currency. Where any payments are stated to be in any other currency, You must pay APRA|AMCOS in Australian currency at the mid-point of the buying and selling rate published by the Reserve Bank of Australia on the last Business Day of the Licence Year, and if the Licence Year is longer than a month, the average from the last Business Day in each month in the Licence Year.

3.1.7 APRA|AMCOS will issue tax invoices in respect of Sales in currencies other than Australian currency in accordance with clause 3.1.8, and You are responsible for all costs of conversion and remittance, including bank charges.

### 3.2 Disputed ownership of Works

3.2.1 If a third party not being a Member approaches You and claims the right to receive licence fees payable in relation to a Work:

- (a) You must notify APRA|AMCOS in writing within 7 days of such claim and advise the third party to make a written application to APRA|AMCOS to investigate the claim for ownership; and
- (b) within 28 days of receipt of Your notification APRA|AMCOS must advise You whether the relevant rights in the Work are:
  - (i) controlled by a Member;
  - (ii) controlled by the third party claiming the right, in which case APRA|AMCOS must repay monies paid in respect of the Work to You at the earliest practical opportunity consistent with the standard business practice of APRA or AMCOS (as the case may

be) or within 6 months (whichever is the earlier), or provide You with a Rebate; or

- (iii) claimed by two or more persons, one or more of whom is a Member, in dispute, in which case APRA|AMCOS will hold the monies in a dispute account until such time as the matter is resolved.

3.2.2 In the case of rights described in clause iii), APRA|AMCOS will continue to issue tax invoices in respect of Your use of the Work until such time as the matter is resolved.

### 3.3 Indemnity

3.3.1 Subject to clause 3.3.3, APRA|AMCOS will indemnify and keep You and any Affiliate authorised by You in accordance with this agreement harmless from any and all damages, losses, costs (including reasonable legal fees and court costs) and expenses incurred, suffered or expended by You as a consequence of any claim of copyright infringement in respect of Your exercise of the Licence, or the exercise of those rights in respect of any other Work where APRA|AMCOS has not previously given you effective notice under clause 3.4.2 in respect of the Work that it is not an AMCOS Work or APRA Work (as the case may be).

3.3.2 You must promptly notify APRA|AMCOS of any claim under clause 3.3.1.

3.3.3 The indemnity in clause 3.3.1 is subject to:

- (a) You providing all reasonable assistance reasonably requested by APRA|AMCOS in relation to the claim; and
- (b) You agreeing to APRA|AMCOS having sole control and conduct of the defence of such claim,
- (c) and does not apply in relation to any Work for which a Rebate has been given from the date of the Rebate until such time as the Work becomes an APRA or AMCOS Work (as the case may be).

3.3.4 The indemnity in clause 3.3.1 is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this agreement.

### 3.4 Notice of changes in repertoire

3.4.1 APRA or AMCOS (as the case may be) must notify You of any Works that cease to be APRA Works or AMCOS Works for the purposes of this agreement, other than by reason of falling into the public domain.

3.4.2 To constitute a notice under clause 3.4.1, it must be effective from a 31 March, 30 June, 30 September or 31 December as specified in the notice and be given at least 14 days before the relevant date.

## 4. RIGHTS OF AMCOS AND APRA

### 4.1 Audit

4.1.1 Subject to clause 4.1.2, APRA|AMCOS may on 30 days' notice to You during Your normal business hours at Your principal place of business appoint a nationally recognised independent accountant or auditor who is approved by You, such approval not to be unreasonably withheld, to examine Your records to:

- (a) determine the correctness of any notice or payment supplied or made under this agreement or any previous licence agreement for Downloads for the period since any previous audit or 6 years, whichever is the lesser; or
- (b) in the case of a failure by You to provide information in accordance with clause 2.1, to obtain information required to be provided under that clause

4.1.2 APRA|AMCOS may only exercise this audit right once every 2 years.

4.1.3 You must pay the reasonable cost of the audit or examination if it:

- (a) establishes that the information provided by You resulted in the amounts payable under the Terms being understated by more than 7.5%;
- (b) establishes that You have not kept the records required pursuant to clause 2.4; or
- (c) is undertaken under clause 4.1.1(b).

4.1.4 After an audit or examination has been conducted, APRA|AMCOS must direct the auditor to provide a copy of the report to You at the same time as the report is provided to APRA|AMCOS.

4.1.5 Subject to clause 4.1.6, You must pay any moneys determined by the auditor or agreed between the parties to have been payable but unpaid under this agreement, and any amount payable under clause 4.1.3, within 21 days of receipt of a tax invoice from APRA|AMCOS.

4.1.6 If You dispute the findings of the auditor:

- (a) You must notify APRA|AMCOS within 28 days of receipt of the report; and  
(b) the provisions of clause 5 apply.
- 5. DISPUTE RESOLUTION**
- 5.1 Disputes**
- 5.1.1 The parties must, during and after the term of the Agreement, without delay and in good faith and at a senior management level, attempt to resolve any dispute which arises out of or in connection with the Terms prior to commencing any proceedings, but failure to do so will not be deemed a breach of the Terms entitling any party to terminate.
- 5.1.2 Without limiting clause 5.1.1, the parties agree that where the provisions of the Terms would be manifestly unfair to a party, including because You have obtained direct licences from a copyright owner, the parties must attempt to resolve any issue between them by negotiation in good faith.
- 5.1.3 A party wishing to resolve a dispute must notify the other party of the existence of the dispute and must identify the nature of the dispute in writing. If a dispute under the Terms has not been resolved between the parties within 30 days after notice of the dispute has been given, You may require the dispute to be:
- (a) referred to expert determination or resolution in accordance with clause 5.2; or  
(b) mediated.
- 5.1.4 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under the Terms.
- 5.2 Expert determination**
- 5.2.1 Subject to clause 5.3, disputes under this agreement that have not been resolved in accordance with clause 5.1 may be referred by You to the expert determination procedure offered by APRA in accordance with the terms of its authorisations under the Competition and Consumer Act 2010 or other dispute resolution mechanism as agreed between the parties.
- 5.2.2 If a dispute is submitted to expert determination under clause 5.2.1, then a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to expert determination, or such other time as the parties agree.
- 5.3 Copyright Tribunal**
- Nothing in this clause 5 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.
- 6. TERMINATION**
- 6.1 Termination for default**
- 6.1.1 If a party (**Defaulting Party**):
- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration, or being an individual, commits any act of bankruptcy or enters into a scheme of arrangement with creditors;  
(b) fails to cure a breach of its obligations under the Terms which is capable of remedy; or  
(c) materially breaches any of its obligations under the Terms which is not capable of remedy,  
the other party may, by notice to the Defaulting Party, terminate this agreement.
- 6.1.2 If APRA|AMCOS terminates this agreement for breach it may seek to include such additional terms as it believes reasonable to secure performance of Your obligations under any future agreement offered on otherwise the same terms as the Terms.
- 6.2 Termination if Your Limited Digital Music Service exceeds 10,000 Download threshold**
- 6.2.1 If APRA|AMCOS receives a notice under clause 2.1.6 of this agreement, it may by 30 days notice to You, terminate this agreement.
- 6.2.2 In the event that APRA|AMCOS exercises its termination right under clause 6.2.1, APRA|AMCOS must offer you its full Digital Music Service licence at the same time as it provides you with notice of termination under clause 6.2.1.

## 7. MISCELLANEOUS

### 7.1 Confidentiality

7.1.1 Subject to clauses 7.1.2 and 7.1.3, APRA|AMCOS must not during or after the term of this agreement (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without Your prior written consent any information provided to APRA|AMCOS under clause 2.1.

7.1.2 With respect to information supplied under clause 2.1, APRA|AMCOS may:

- (a) use that information to determine Licence Fees and to distribute money to their respective members; and  
(b) provided they first agree to the same obligations of confidentiality contemplated by this clause, disclose that information to APRA|AMCOS' auditors for the purposes of an audit, and other of APRA|AMCOS' professional advisers.

7.1.3 The obligations of confidentiality set out in this clause 7 do not apply to information provided to APRA|AMCOS which is:

- (a) required to be disclosed by law; or  
(b) in the public domain other than by breach of this clause.

### 7.2 Notices

All notices required to be given under this agreement must be sent in writing to the parties at the addresses set out in this agreement or to such other address as any party may notify in writing from time to time. Notices may be served by hand delivery, by post, email or by facsimile. Notices served by hand, email or by facsimile will be deemed to have been received on the day of sending. Notices sent by post will be deemed to have been received on the third business day after sending.

### 7.3 Law of agreement

This agreement must be construed in accordance with the laws for the time being in force in the State of New South Wales.

### 7.4 Waiver

A waiver by any of the parties of any provision of the Terms will not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach. All remedies, rights, undertakings and obligations contained in the Terms will be cumulative and none of them will be in limitation of any other remedy, right, undertaking or obligation of any other party.

### 7.5 Variation

This agreement may only be varied by the written agreement of the parties.

### 7.6 Assignment

A party may only assign a right under this agreement with the prior written consent of the other party.

### 7.7 Severability

If any provision of this agreement is held to be unenforceable, all other provisions shall nevertheless continue in full force and effect.

## 8. DEFINITIONS AND INTERPRETATION

### 8.1 Definitions

**Act** means the Copyright Act 1968 and Copyright Regulations;

**Advertisement** means any production which is an announcement designed to attract the attention of the public or any part of it to a product or service, person, organisation or line of conduct, including community service announcements and infomercials;

**Affiliate** means, with respect to a party, any entity which directly or indirectly owns, is owned by or is under common ownership with such party to the extent of at least fifty percent of the equity having the power to vote on or direct the affairs of the entity, and any entity actually controlled by, controlling or under common control with such party;

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to You that it is entitled to grant a Licence;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for Australia, or APRA represents to You that it is entitled to grant a Licence;

**Business Day** means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney;

**Clip** means a Stream which when played back at normal speed in an uncompressed format on a device is no more than 30 seconds in duration for audio visual streams and no more than 90 seconds for audio only streams;

**Commencement Date** means the date specified in the Schedule;

**Cure** means to remedy a breach of an obligation under the Terms (which is capable of remedy) within 21 days of notice of the breach, or for a breach of a payment or reporting obligation, within 7 Business Days of notice of the breach;

**Download** means a copy of a Track in the form of an electronic file in which sounds are embodied (including a Music Video);

**Due Date** means the 30th day after the end of the Licence Year;

**Fraudulent Transaction** means the acquisition of a Download made available for Sale by You as part of a deliberate action by an individual or individuals intended to defraud You (such as the compromise of Your security protocols), and where You have referred the matter and the whole dollar amount of that transaction to the police;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime insofar as it consists of words and music expressly written for it;

**GST** has the same meaning as in section 195-1 of A New Tax System (Goods and Services Tax) Act 1999;

**ISRC** means International Standard Record Code ISO 3901:2001, as amended from time to time by the International Organisation for Standardisation (ISO);

**ISWC** means International Standard Works Code ISO 15707:2001 as amended from time to time by the ISO;

**Licence** means a non-exclusive licence to:

- reproduce AMCOS Works;
- authorise the reproduction of AMCOS Works;
- communicate in the Territory the APRA Works (including authorising their electronic transmission from Your Limited Digital Music Service to Your customers);
- authorise Your Affiliates to communicate the APRA Works to customers in the Territory as necessary in the course of providing the Limited Digital Music Service,

in the form of Downloads (whether by You, or Your customers in the Territory, onto storage devices) for the purpose of Sale or to complete a Sale, including in the form of Clips provided at no charge for the sole purpose of demonstrating the Clip to customers and potential customers of Your Limited Digital Music Service;

**Licence Fee** means the fees payable by You under the Schedule;

**Licence Year** means any consecutive period of 12 months commencing on the Commencement Date or the anniversary of the Commencement Date 1 July during the term of this agreement;

**Limited Digital Music Service** means the business carried on under the trading names in the Schedule providing Downloads for Sale;

**Member** means a member of APRA or AMCOS as at the date of this agreement and any person who becomes a member of APRA or AMCOS during the term of this agreement;

**Music Video** means a cinematograph film produced for the primary purpose of promoting or visually representing:

- the performer of a sound recording; and/or
- the sound recording,

of a Work or Works embodied in the soundtrack of that cinematograph film;

**Rebate** means at your election, either a credit to Your account for, or a repayment to You of, an amount equal to all payments by You to APRA and/or AMCOS (as the case may be) in respect of a Work during the period in which paragraph Error! Reference source not found.3.2.1(b)(ii) applies;

**Sale** means the sale or supply of Downloads (including supply free of charge) to customers for their personal use on terms that prohibit further supply to third parties;

**Sales Batch** means, in a Licence Year, a group of Sales reported by reference to common factors as reasonably required by APRA|AMCOS from time to time;

**Sales Report** means a statement in accordance with clause 2.1, and which may contain one or more Sales Batches;

**Sample** means a part of a sound recording of a Work which (along with the accompanying Work) is subsequently embodied in another sound recording;

**Security** means a bank cheque or unconditional bank guarantee on terms and conditions approved by APRA|AMCOS;

**Single-Track Download** means a Download comprising one Track (or part of a Track) only;

**Streaming** means the communication to the public of Tracks and Music Videos (which may or may not be pre-recorded) by means of the internet to a device under circumstances in which the user is prohibited from making a copy of the Track or Music Video;

**Subscription Service** means a service that supplies Downloads and access to which is made available in return for a periodic payment, or a service that is primarily funded by advertising;

**Territory** means Australia;

**Track** means a sound recording of a Work or in the case of Music Videos, the soundtrack (or each part thereof in the case of a long form video) embodying a Work forming part of the film;

**UPC** means Universal Product Code; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for Australia, and a reference to a Work includes a reference to a share in any such Work.

Words defined in this agreement have the same meaning in the Terms.

## 8.2

- In the Terms, unless the subject matter or context otherwise requires:
- the singular denotes the plural and vice versa;
- a reference to one gender includes all other genders;
- a person includes an individual, a body corporate and a government;
- a reference to a statute, regulation, or provision of a statute or regulation includes a reference to that statute, regulation or provision as amended or re-enacted from time to time;
- where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have corresponding meanings; and
- any word or phrase defined in the Act has that meaning in the Terms unless otherwise defined in the Terms.

**Licence No:**  
(APRA use only)



**NOT FOR USE FOR LICENCES TAKEN OUT AFTER 30 JUNE 2013**

# LICENCE AGREEMENT

**THIS AGREEMENT IS MADE ON**

**201**

## **PARTIES**

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851  
of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099  
of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

--

(company name)

ABN

(street address)

("Licensee")

## **BACKGROUND**

- A.** The Licensors own or control the copyright in a large number of musical and associated literary works.
- B.** The Licensee requires a licence from the Licensors in order to pursue its business activities.
- C.** The Licensee wishes to obtain licences from the Licensors for the purposes of conducting its business, and the Licensors have agreed to grant the licences, on the terms of this agreement.

## **AGREEMENT**

### **1. DEFINITIONS AND INTERPRETATION**

#### **1.1** Where commencing with a capital letter:

**Advertisement** means any audio or audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct and includes a Service Identification.

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Works** means all musical works and associated lyrics for which AMCOS is entitled to grant the licence referred to in clause 2.1;

**APRA Works** means all musical works, including any words normally associated with those works by the copyright owner for Australia, the right of communication of which is vested in APRA for Australia and New Zealand;

**Consumer Price Index** means the index of that title All Groups for the 8 capital cities published by the Australian Bureau of Statistics or any authority substituted by statute, related to the base year 1989-90 equals 100, and **March Quarter** means the quarter year ending 31 March;

**Grand Right Work** an opera, operetta, musical play, revue or pantomime to the extent that it consists of music and words written expressly for the work;

**Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Service;

**Licence Year** means any consecutive period of 12 months commencing on 1 July during the term of this agreement provided that:

- (a) where the date of this agreement is not 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June; and
- (b) where this agreement does not terminate on 30 June, the last Licence Year is the period from the 1 July preceding the date of termination to the date of termination;

**Licensors** means APRA and AMCOS;

**Purpose** means the purpose described in the Schedule;

**Quarter** means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October;

**Service** means the service described in the Schedule; and

**Service Identification** means any audio or audio-visual production made specifically for the purpose of identifying or promoting the services of the Licensee.

- 1.2 An agreement, warranty, representation or obligation which binds or benefits 2 or more persons under this agreement binds or benefits them jointly and severally.

## **2. LICENCES**

- 2.1 AMCOS grants the Licensee a non-exclusive licence to reproduce the AMCOS Works for the Purpose only.

- 2.2 APRA grants to the Licensee a licence to communicate the APRA Works for the Purpose only.

- 2.3 The Licensee must not:

- (a) change or make an adaptation or a parody of an AMCOS Work; or
- (b) rent or hire any recording of an AMCOS Work.

- 2.4 The licences in clause 2.1 and 2.2 do not include or authorise:

- (a) the communication of Grand Right Works in their entirety;
- (b) the public performance in whole or in part of any musical work;
- (c) the communication in whole or in part of any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet;
- (d) the communication of any choral work of more than 20 minutes' duration in its entirety;
- (e) the communication of any music and associated words so as to burlesque or parody the work;
- (f) the communication of any musical work with new or substituted words, or any words which have been notified by APRA as prohibited;
- (g) the reproduction of any musical works or lyrics in a graphic form;
- (h) the reproduction, performance or communication of any sound recording;
- (i) the reproduction of any musical works or associated words into an Advertisement; and
- (j) any other right not expressly granted under this agreement.

## **3. TERM**

This agreement commences with effect from  and, subject to earlier termination in accordance with clause 10, continues until terminated by either party on at least 2 months' notice.

## **4. CALCULATION OF LICENCE FEES**

The Licensee must pay the licence fee, including any provisional licence fee, in accordance with paragraph 4 of the Schedule.

## **5. SUPPLY OF INFORMATION**

The Licensee must, within 14 days after the end of each Quarter, provide the Licensors with the revenue and music use information described in the Schedule.

## **6. PAYMENTS**

- 6.1 On the Licensors' receipt of the information under clause 5, the Licensors must calculate the licence fee for the Quarter in accordance with the Schedule.
- 6.2 The Licensee must pay any invoice issued by the Licensors under this agreement, within 14 days after the date of the invoice
- 6.3 On the Licensors' receipt of the information under clause 8, the Licensors may issue an invoice for any additional licence fees payable. The Applicant must pay any invoice issued under this clause within 14 days after the date of the invoice.
- 6.4 The Licensee must pay the Licensors interest at the Agreed Rate on each amount outstanding under this agreement.

## **7. RECORDS**

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to the Licensors under this agreement can be properly ascertained.

## **8. AUDIT OR EXAMINATION**

- 8.1 APRA, on behalf of the Licensors, may on 30 days' notice to the Licensee audit or examine the Licensee's books of account and other records to:

- (a) determine the correctness of any notice or payment under this agreement; or
- (b) in the case of a failure by the Licensee to provide information in accordance with clause 5, to obtain information required to be provided under that clause.

- 8.2 The Licensee must pay the cost of the audit or examination if the audit or examination:

- (a) establishes that the information provided by the Licensee resulted in the amounts payable under this agreement being understated by more than 5%; or
- (b) is undertaken under clause 8.1(b).

## **9. CONFIDENTIALITY**

- 9.1 Subject to clauses 9.2 and 9.3, the Licensors must not during or after the Term (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without the Licensee's prior written consent any information provided to the Licensors under clause 5.

- 9.2 With respect to information supplied under clause 5, the Licensors may:
- (a) use that information to determine licence fees payable to the Licensors under this agreement; and
  - (b) disclose that information to the Licensors' auditors for the purposes of an audit, and other of the Licensors' professional advisers.
- 9.3 The obligations of confidentiality set out in this clause 9 do not apply to information provided to the Licensors which is:
- (a) required to be disclosed by law; or
  - (b) in the public domain other than by breach of this clause.

## **10. TERMINATION**

- 10.1 The Licensors may immediately terminate this agreement by notice to the Licensee if the Licensee:
- (a) breaches any term of this agreement and fails to remedy the breach within 7 days after being required in writing to do so by the Licensors; or
  - (b) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.
- 10.2 Either party may terminate this agreement by giving 2 months' notice in writing to the other party.

## **11. DISPUTE RESOLUTION**

If any dispute arises out of or in connection with this agreement, either party may submit that dispute to the alternative dispute resolution mechanism approved by the Australian Competition Tribunal constituted under the *Trade Practices Act 1974* in the determination in relation to File Nos. 4 and 5 of 1998. Information about the mechanism can be obtained from APRA.

## **12. NOTICES**

- 12.1 A notice under this agreement must be in writing and may be given to a party by:
- (a) delivering it to the address of the party;
  - (b) sending it by pre-paid post to the address of the party; or
  - (c) sending it by facsimile to the facsimile number of the party,
- and the notice will be deemed to have been received by the party on receipt.
- 12.2 A facsimile is deemed to have been received on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the party.
- 12.3 Until a party gives notice of a change, the contact details for that party is:

### **Licensors**

Postal address: Locked Bag 5000, Strawberry Hills, New South Wales, 2012  
Telephone number: (02) 9935 7900  
Facsimile number: (02) 9935 7996  
Email: online@apra.com.au  
Attention: Online Licensing Manager

### **Licensee**

Postal address:	
Telephone Number:	
Facsimile number:	
Email:	
Attention:	

## **13. MISCELLANEOUS**

- 13.1 No waiver by the Licensors of any breach of any provision of this agreement operates as a waiver of another breach of the same or of any other provision of this agreement.
- 13.2 This agreement is personal to the Licensee. The Licensee is not entitled to assign any of its rights without the prior written consent of the Licensors.
- 13.3 This agreement may only be varied by the written agreement of the parties.
- 13.4 In addition to the payments under clause 6, the Licensee must pay to the Licensors within 14 days after the date of an invoice issued by the Licensors an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.
- 13.5 This agreement must be construed in accordance with the laws in force in the State of New South Wales and the parties agree to submit to the jurisdiction of New South Wales Courts.
- 13.6 Unless the context otherwise requires, a word which denotes the singular denotes the plural and vice versa.



# Schedule 1

## General Description Licence Type:

## Looped Background Music (limited general) E2

### 1. DEFINITIONS

In this Schedule, where commencing with a capital letter:

**Advertisement** is defined as any audio or audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct, and includes a community service announcement or service.

**Download** means the process of making a digital copy of sounds and/or images from the internet onto a storage device including but not limited to a personal computer hard-drive, server, mobile phone or any peripheral device;

**Fee** means \$175.00 (inclusive of GST at 10%) per Quarter or part thereof;

**Looped Background Music Website** means a limited form of audio only Streaming for non-simultaneous receipt by users, where the loop must begin from a different point (ie with a different song) each time the music loop is accessed, and where users cannot control or chose:

- (a) when particular sounds are received;
- (b) the content of the sounds concerned; or
- (c) the order in which the sounds are received,

and which:

- (d) is not synchronised with any images on the Website so that the Streaming of the music must be completely independent of the users progress through the site;
- (e) commences Streaming with the launch of the Licensee's Website to the user's browser;
- (f) ceases Streaming when the user leaves or exits the Licensee's Website;
- (g) contains no less than three and no more than fifteen separate Songs;
- (h) has equal excerpts of different Works, where Songs are not being used;
- (i) contains different Works from different writers; and
- (j) immediately after the last Song or excerpt of a Work is Streamed, Streams the first Song or excerpt of a Work such that the selection of music is continually looped;

**Service** means the Looped Background Website Music operated by the Licensee from the Licensee's Website and available to the public;

**Streaming** means the communication to the public of sounds and/or images (which may or may not be pre-recorded) from the Licensee's Website via the internet to a device under circumstances in which the user cannot Download those sounds and/or images; and

**Website** means the World Wide Web destination commencing with the URL \_\_\_\_\_.

### 2. PURPOSE

The purpose of this agreement is to make reproductions of AMCOS works and communicate APRA works in the course of and for the sole purpose of operating the Service

### 3. LIMITATIONS

In addition to the general limitations set out in clause 2.3 and 2.4 of the agreement the Licensee must not under this agreement:

- (a) carry any Advertisements in-stream within the Looped Background Website Music service;
- (b) carry any Advertisements on the Website;
- (c) make available, reproduce or communicate music from any other URL other than the Licensee's Website; and
- (d) provide access from the Licensee's Website, or provide links to
  - (i) any computer files containing either AMCOS or APRA Works notified by the Licensors; or
  - (ii) any infringing computer file containing either AMCOS or APRA Works if the Licensee knows or ought reasonably to know that the file is an infringing copy.

### 4. ASSESSMENT, INVOICING AND PAYMENT OF LICENCE FEE

#### 4.1 Amount

The Licensee shall pay for each Quarter the Fee.

#### 4.2 Invoices and Payments

The Licensors will issue an invoice in advance for the Fee each Quarter. The Licensee must pay any invoice issued by the Licensors within 14 days of the date of invoice or on the first day of the Quarter, whichever date is the later.

#### 4.3 CPI

4.3.1 On 1 July 2002 and on each 1 July each year after that, the Fee will be calculated by increasing the then Fee by the percentage increase in the Consumer Price Index between the last two March Quarters.

4.3.2 The Fee calculated under paragraph 4.3.1 of the schedule must be rounded to the nearest whole dollar amount.

### 5. OTHER INFORMATION

Except as otherwise agreed, the Licensee must provide to the Licensors, within 14 days after the end of each Quarter during the term of this agreement, a list of all musical works made available on the Service during that Quarter. The list must be in the form reasonably required by the Licensors (the current form is attached at Annexure B) and must include the following information:

- (a) the titles of all musical works made available;
- (b) the surnames of the writers of such works;
- (c) the name of the artist or band who performed the version of the work made available;
- (d) the record manufacturers' catalogue numbers of such works;
- (e) the duration of each work; and
- (f) such other relevant information as may be reasonably required.

**SIGNED AS AN AGREEMENT**

Signed for and on behalf of **Australasian Mechanical Copyright Owners Society Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

Signed for and on behalf of **Australasian Performing Right Association Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

Signed for and on behalf of **the Licensee** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Name of authorised person (print)



# **SUBSCRIPTION MUSIC SERVICE – SUBSCRIPTION REVENUE ONLY**

## **LICENCE AGREEMENT**

**THIS AGREEMENT IS MADE ON**

### **PARTIES**

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

**THE PARTY NAMED IN ITEM 1 OF THE SCHEDULE (Licensee)**

### **BACKGROUND**

- A.** APRA owns or controls for the Territory the exclusive right of Communication in relation to a large number of musical works and associated lyrics.
- B.** AMCOS is the exclusive licensee in the territory of the right to reproduce the AMCOS Works.
- C.** The Licensee conducts a subscription music service, and in the course of providing the Service causes or authorises the Communication of APRA Works and the reproduction of AMCOS Works.
- D.** The Licensee requires a licence, and APRA and AMCOS have agreed to grant licences to the Licensee subject to the terms contained in this agreement.

### **AGREEMENTS**

#### **1. Subject matter and grant of rights**

##### **1.1 Entire agreement**

This agreement, including the Schedule, embodies the entire understanding and agreement between the parties as to the subject matter of this agreement.

##### **1.2 Grant of licence**

**1.2.1** Subject to clause 1.3, APRA grants to the Licensee a licence to Communicate the APRA Works in the Territory for the Purpose.

**1.2.2** Subject to clause 1.3, AMCOS grants to the Licensee a licence to reproduce and authorise the reproduction of the AMCOS Works in the Territory for the Purpose.

### **1.3 Exclusions and limitations**

**1.3.1** The licence in clause 1.2 does not include or authorise:

- (a) the right to Communicate a Work that is not an APRA Work;
- (b) the right to reproduce a Work that is not an AMCOS Work;
- (c) the right to Communicate or reproduce Works other than as part of the Service;
- (d) the right to Communicate or reproduce any musical work in association with new or substituted lyrics, or any lyrics that have been notified in writing by APRA|AMCOS to the Licensee as prohibited unless the making of the new or substituted lyrics is authorised by the owner of the copyright in the work for Australia or by APRA|AMCOS;
- (e) the right to Communicate or reproduce any Works that include within the file delivered to the Subscriber (including preceding or following the Work itself) any paid-for advertising material;
- (f) the right to Communicate to the public or reproduce any Work as part of a service that is partially or wholly funded by advertising revenue, where the subscription payment is not the primary funding for the service or where the service is bundled with the provision of other goods or services;
- (g) the right to Communicate to the public or reproduce any Work as part of a service that provides content other than Streams or Tethered Downloads;
- (h) the right to synchronise AMCOS Works with audiovisual material, including Music Videos, or still images;
- (i) the right to reproduce or Communicate to the public any Work in a manner that suggests any connection between individual Works or groups of Works and any goods or services, including the Service, by way of an Advertisement or otherwise;
- (j) the reproduction of any Work into an Advertisement;
- (k) the reproduction or Communication of any Work as a ringtone;
- (l) the reproduction or Communication of any Work in the form of a Download for Sale;
- (m) the reproduction or Communication of any Works in a graphic form;
- (n) the performance in public of any Works, including by means of the reception of a Communication;
- (o) the Communication to the public of any Grand Right Works in their entirety;
- (p) the Communication to the public of any choral work of more than 20 minutes' duration in its entirety;
- (q) the reproduction or Communication of Music Videos to the extent that they contain APRA Works or AMCOS Works;

- (r) the reproduction or Communication of any Sound Recordings;
  - (s) the making of an adaptation or parody of any musical, literary or dramatic work; or
- or any other right not expressly granted under this agreement.

1.3.2 Nothing in this agreement constitutes a consent by the authors of Works in relation to any act contrary to the author's moral rights.

## **2. Term**

### **2.1 Period**

This agreement commences with effect from the Commencement Date and subject to earlier termination in accordance with clause 10:

- (a) continues until the date specified in item 3 of the Schedule (**Initial Term**); and
- (b) after the Initial Term, subject to clause 2.2, continues for successive 1 year periods.

### **2.2 Termination**

This agreement may be terminated by either party on at least 3 months' notice to the other party terminating on the last day of the Initial Term or any subsequent anniversary of that date.

## **3. Calculation of licence fees**

### **3.1 Licence fees**

For each month during the Term, the Licensee must pay APRA|AMCOS in accordance with clause 5 the licence fee set out in item 5 of the schedule.

### **3.2 Fractions of cents**

If the aggregate Licence Fees payable under this agreement includes a fraction of a cent, the fee will be rounded to the nearest whole cent, and an amount with a fraction of a half cent or more will be rounded up to the nearest cent.

## **4. Supply of information**

### **4.1 Statements**

The Licensee must, within 21 days after the end of each month during the Term, supply APRA|AMCOS with a statement in the form reasonably specified by APRA|AMCOS stating the Licensee's Total Revenue and the number of Subscribers for that month.

### **4.2 Activity Reports**

- 4.2.1 The Licensee must account to APRA|AMCOS for all Activity the subject of this agreement for each Accounting Period in accordance with this clause 4.2.
- 4.2.2 The Licensee must deliver an Activity Report to APRA|AMCOS by the Due Date.
- 4.2.3 Each Activity Report must be in DDEX or such other form agreed between the parties and must contain the following details:
- (a) information sufficient to identify the Activity Report, including:
    - (i) the Licensee's details (including where applicable any password allocated to the Licensee by APRA|AMCOS, the Licensee's APRA|AMCOS identification number and contact email address); and
    - (ii) file identification details (including the file transmission date and the number of records in the file);
  - (b) in respect of each Track and Music Video in the Activity Report:
    - (i) the title of the Work (or Works in the case of Medleys);
    - (ii) the composer(s) of the Work(s);
    - (iii) the name of the artist or band that recorded the version of the Work reported (or has been used by the Licensee to identify the Work);
    - (iv) if indicated on the Track or Music Video as the case may be, or requested by APRA|AMCOS, the APRA work identifier, ISWC, ISRC and the name of record label that provided the digital master recording;
    - (v) the total number of times the Track or Music Video has been Streamed or delivered as a Tethered Download;
    - (vi) whether the Licensee has a direct licence from a relevant Member.

#### **4.3 Medleys and Samples**

For the purposes of reporting music use, a Medley or a Work containing Samples will be taken to be one Work.

#### **4.4 Certification**

The Licensee must, within 45 days after the end of each Licence Year, provide APRA|AMCOS with a statement certified by a senior member of the accounting staff of the Licensee (being a person holding a recognised accounting qualification) of the Licensee's Total Revenue for that Licence Year.

#### **4.5 Upgrades**

APRA|AMCOS may notify the Licensee of updates, revisions, amendments or other changes to reporting formats. Any such notice must be:

- (a) reasonable in the circumstances; and

- (b) allow the Licensee reasonable time to make adjustments and implement the updates, revisions, amendments or other changes to its then current systems.

## **5. Payments and invoicing**

### **5.1 Advance**

- 5.1.1 If an Advance is payable, on receipt of a tax invoice from APRA|AMCOS the Licensee must pay the Advance set out in item 6 of the Schedule by the date set out in item 7 of the Schedule.
- 5.1.2 The Advance payable in each year of the Term shall be fully recoupable against the Licence Fees payable for that Licence Year, but shall not be refundable in the event that the relevant Advance exceeds Licence Fees payable in the relevant Licence Year.

### **5.2 Payment of Licence Fees**

- 5.2.1 Unless otherwise stated in this agreement, APRA|AMCOS will invoice the Licensee each Accounting Period during the term of this agreement. If APRA|AMCOS notifies the Licensee that it wishes to vary the Accounting Period, the Licensee must consider the request in good faith and must not unreasonably withhold or delay its consent.
- 5.2.2 The Licensee must pay Licence Fees to APRA|AMCOS within 21 days of the date of the invoice from APRA|AMCOS.
- 5.2.3 The Licensee must pay interest at the Agreed Rate on any amount that remains unpaid 28 days of the date of an invoice from APRA|AMCOS.
- 5.2.4 The Licensee acknowledges that the Music Use Information is critical to the calculation and distribution of Licence Fees by APRA|AMCOS to their respective Members, and that APRA|AMCOS will distribute income to members in reliance on the information provided by the Licensee.

### **5.3 Provisional Payment**

- 5.3.1 If the Licensee does not comply with clause 4.1, without limiting APRA|AMCOS's rights under this agreement, APRA|AMCOS may, having regard to any matters they consider appropriate and having given the Licensee not less than 5 days' notice to comply, reasonably determine the Licensee's Total Revenue and monthly Subscriber numbers as at the end of that Accounting Period for the purpose of issuing a tax invoice for a Provisional Payment.
- 5.3.2 If the amount of Licence Fees payable in any Accounting Period exceeds the Provisional Payment, the Licensee must pay the excess to APRA|AMCOS within 21 days after the date of receipt of the tax invoice.
- 5.3.3 If the amount of the Licence Fees payable in any Accounting Period is less than the Provisional Payment, APRA|AMCOS must credit the amount to the Licensee's account within 21 days after the date of the tax invoice.

### **5.4 Security**

- 5.4.1 Before the Commencement Date or at any time during the term of this agreement, if:

- (a) the Licensee is a new client of APRA|AMCOS;
- (b) the Licensee has a credit history that reasonably justifies concern on the part of APRA|AMCOS that it may fail to pay Licence Fees in accordance with this agreement;
- (c) the Licensee has been repeatedly late in paying Licence Fees under this or another APRA|AMCOS licence agreement, whether or not it has remedied the breach; or
- (d) the Licensee's business is not registered or has no obvious presence in the Territory;

if required by APRA|AMCOS, the Licensee must give APRA|AMCOS Security as security for performance of its obligations under this agreement.

5.4.2 The Security will be calculated by APRA|AMCOS based on a reasonable estimate of the amount of Licence Fees payable for any Accounting Period.

5.4.3 If required by APRA|AMCOS, the amount of the Security may be increased proportionally with any increase in the amount of Licence Fees payable under clause 3.1.

5.4.4 APRA|AMCOS may use the Security to recover any loss or expense APRA|AMCOS incurs due to a breach of this agreement by the Licensee.

5.4.5 If any part of the Security has been used by APRA|AMCOS under clause 5.4.4, the Licensee must replace that part of the Security within 5 Business Days of notice by APRA|AMCOS that it has used the Security.

5.4.6 Upon the termination of this agreement APRA|AMCOS must promptly return to the Licensee any part of the Security not needed to recover an expense or loss of APRA|AMCOS.

## **5.5 Tax invoices, GST, withholding tax and currency conversion**

5.5.1 On receipt of the information under clause 4.1 APRA|AMCOS must issue tax invoices to the Licensee showing the total Licence Fees payable for the Accounting Period.

5.5.2 Unless otherwise stated, amounts quoted in this agreement do not include GST.

5.5.3 In relation to any GST payable for a taxable supply (as defined under GST law) by either party, the recipient of the supply must pay the GST subject to the supplier providing a tax invoice (as defined under GST law).

5.5.4 The payments specified in this agreement to be made to APRA|AMCOS are net of all withholding or similar taxes and the Licensee must pay to the relevant taxation authority all such taxes, in addition to the payments specified in this agreement to be made to APRA|AMCOS.

5.5.5 All payments under this agreement must be made in Australian currency. Where any payments are stated to be in any other currency, the Licensee must pay APRA|AMCOS in Australian currency at the rate which is the average of the buy and sell rate of APRA|AMCOS's current foreign exchange service provider on the last Business Day of the Accounting Period, and if the Accounting Period is longer than a month, the average from the last Business Day in each month in the Accounting Period.

- 5.5.6 APRA|AMCOS will issue invoices in respect of transactions in currencies other than Australian currency in accordance with clause 5.5.1, and the Licensee is responsible for all costs of conversion and remittance, including bank charges.

## **6. Books of account and examination**

### **6.1 Books of account**

The Licensee must warrant that it will keep proper records relating to the Service enabling full database logging sufficient to maintain and keep Monthly Source Log Files and Backup Tapes for the Service (including all Streams), including accounting records (such as Subscriber numbers), which must be maintained to a standard sufficient to enable an audit trail to be established relating to Activity.

### **6.2 Examination**

- 6.2.1 APRA|AMCOS may on 30 days' written notice, appoint a nationally recognised third party accountant or auditor not being the auditor of a competitor of the Licensee, not currently engaged in another audit of Licensee other than for APRA|AMCOS, and not compensated on a contingency fee basis to examine the Licensee's relevant records at a reasonable time at Licensee's principal place of business or another mutually agreed location to determine:

- (a) the correctness of any report or payment under this agreement; or
- (b) in the case of a failure by the Licensee to provide information in accordance with this agreement, to obtain the information required to be provided,

and for this purpose is entitled to access all relevant records of the Licensee or under its control, wherever held.

- 6.2.2 APRA|AMCOS must pay the cost of any examination, except that the Licensee must pay the reasonable cost of the examination if the examination:

- (a) establishes that the amounts payable under this agreement were understated by more than 5%; or
- (b) is undertaken under clause 6.2.1(b),

and must also pay any amount determined by the examination to be payable under this agreement within 21 days of receipt of an invoice from APRA|AMCOS, subject to the dispute resolution mechanism of clause 11 if the parties do not agree as to the results of the examination.

## **7. Information about repertoire**

APRA|AMCOS must give the Licensee, on request, all such information as APRA|AMCOS can reasonably give concerning works claimed or represented as being APRA|AMCOS Works provided that such requests are made in respect of named works or works of named writers.

## **8. Warranties**

## **8.1 Licensee**

The Licensee warrants the accuracy of the information supplied under clause 4.

## **8.2 APRA|AMCOS**

8.2.1 APRA|AMCOS warrant that they have full power and authority to enter into and perform this agreement.

8.2.2 APRA|AMCOS warrant that they have the authority to grant the licences contained in this agreement.

## **9. Confidentiality**

### **9.1 Obligation to keep confidential**

APRA|AMCOS must:

- (a) keep the Confidential Information confidential;
- (b) not use the Confidential Information for any purpose other than the performance of its obligations under this agreement or to enable APRA|AMCOS to meet its bona fide legal obligations to its members in respect of the APRA|AMCOS Works;
- (c) only disclose the Confidential Information to officers of APRA|AMCOS who have a need to know the Information and have agreed to keep it confidential; and
- (d) take all other steps necessary to keep the Confidential Information confidential.

### **9.2 Exclusions**

9.2.1 The obligations of APRA|AMCOS under clause 9.1 do not apply to any Confidential Information of the Licensee that APRA|AMCOS can demonstrate to the reasonable satisfaction of the Licensee:

- (a) was in APRA|AMCOS's possession at the time of disclosure to APRA|AMCOS and was not acquired in breach of an obligation of confidence or under an obligation of confidence;
- (b) is in the public domain, other than as a result of a breach of confidence by APRA|AMCOS;
- (c) is acquired from a third party, provided that it was not acquired from or by the third party unlawfully or in breach of an obligation of confidence; or
- (d) is required to be disclosed by law, but only to the extent so required to be disclosed.

9.2.2 With respect to information supplied under clauses 4.1 and 4.2, APRA|AMCOS may:

- (a) use the information to determine Licence Fees and to distribute money to their respective Members; and



- (b) disclose that information to APRA|AMCOS' auditors for the purposes of an audit, and other of APRA|AMCOS' professional advisers.

## **10. Termination**

### **10.1 Default**

#### **10.1.1 If a party (Defaulting Party):**

- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration, or being an individual, commits any act of bankruptcy or enters into a scheme of arrangement with creditors;
- (b) fails, within 21 days after receipt of notice, to remedy any breach of its obligations under this agreement that is capable of remedy; or
- (c) breaches any of its obligations under this agreement that is not capable of remedy,

the other party may, by notice to the Defaulting Party, terminate this agreement.

#### **10.1.2 If APRA|AMCOS terminates this agreement under clause 10.1.1 it may seek to include such additional terms as it believes reasonable to secure performance of the Licensee's obligations under any future agreement offered on otherwise the same terms as this agreement.**

### **10.2 Notice**

#### **10.2.1 The Licensee may terminate this agreement by notice to APRA|AMCOS if it ceases to offer the Service.**

#### **10.2.2 The Licensee may terminate this agreement at any time by giving at least 3 months' notice to APRA|AMCOS terminating on the anniversary of the Commencement Date.**

### **10.3 Non-controlled Works**

#### **10.3.1 If during the term of this agreement APRA or AMCOS no longer controls the rights the subject of this agreement in respect of all of the works the copyright in which is owned by a single corporate entity (Non Controlled Works), APRA|AMCOS must promptly notify the Licensee and:**

- (a) if the Non Controlled Works as at the date of the notice:
  - (i) amount to less than 15% of the total APRA Works or AMCOS Works as the case may be as at the date of the notice; and
  - (ii) are Works regularly communicated and reproduced by the Licensee for the purposes of the Service and the inability of APRA or AMCOS to license them under this agreement materially adversely affects the provision of the Service,

the Licensee may, by 3 months' notice to APRA|AMCOS, terminate this agreement; and

- (b) if the Non Controlled Works as at the date of the notice:
  - (i) amount to 15% or more of the total APRA Works or AMCOS Works as at the date of the notice; and
  - (ii) are Works regularly communicated and reproduced by the Licensee for the purposes of the Service and the inability of APRA|AMCOS to license them under this agreement materially adversely affects the provision of the Service,the Licensee may, by 14 days' notice to APRA|AMCOS, terminate this agreement.

10.3.2 If APRA|AMCOS gives notice under clause 10.3.1 the parties must at the request of the Licensee meet to discuss in good faith:

- (a) whether the inability of APRA|AMCOS to license the Non Controlled Works under this agreement materially adversely affects the provision of the Service; and
- (b) a variation in the Licence Fees payable under this agreement,

and any failure to agree under this clause 10.3.2 must be dealt with in accordance with clause 11.

10.3.3 If clause 10.3.1(a) applies, if the Licensee does not terminate this agreement, the parties must together promptly discuss and determine whether the reduction in the APRA|AMCOS repertoire materially affects the ownership or control of the number of Works actually communicated and reproduced by the Licensee.

10.3.4 If clause 10.3.1(b) applies, the parties agree that such reduction in the APRA|AMCOS repertoire is likely to materially affect the ownership or control of the number of Works actually communicated and reproduced by the Licensee.

10.3.5 If the reduction referred to in clause 10.3.1 has such a material effect, APRA|AMCOS shall, within 30 days of the later of:

- (a) the date of the withdrawal of rights; and
- (b) the date as of which the parties agreed the reduction is material, make a proposal to the Licensee of corresponding revisions to this agreement, and the parties agree that they will negotiate regarding the terms of a new licence agreement or a variation in the fees payable under this agreement, and APRA|AMCOS acknowledge that the fees payable under any such new or varied agreement will commercially reflect the fact that the licence offered is in respect of materially fewer Works.

10.3.6 Notwithstanding anything contained in this agreement, the Licensee is not required to pay Licence Fees for a Work under this agreement, and the Licensee may be entitled to an Adjustment where APRA|AMCOS is reasonably satisfied, or the Licensee can demonstrate to the reasonable satisfaction of APRA|AMCOS, that:

- (a) the Work is a Work in which copyright does not subsist;
- (b) the Work is not an APRA Work or AMCOS Work, including because a prior licence has been obtained for the reproduction and communication of the Work on the Service.

- 10.3.7 If a third party not being a Member approaches the Licensee and claims the right to receive licence fees payable in relation to a Work:
- (a) the Licensee must notify APRA in writing within 7 days of such claim and advise the third party to make written application to APRA|AMCOS to investigate the claim for ownership; and
  - (b) within 28 days of receipt of the Licensee's notification APRA|AMCOS must advise the Licensee whether the relevant rights in the Work are:
    - (i) controlled by a Member;
    - (ii) controlled by the third party claiming the right, in which case APRA|AMCOS must consider whether an Adjustment should be made; or
    - (iii) claimed by two or more persons, one or more of whom is a Member, in dispute, in which case APRA|AMCOS will hold the monies in a dispute account until such time as the matter is resolved.
- 10.3.8 In the case of rights described in clause 10.3.7(b)(iii), APRA|AMCOS will continue to issue invoices in respect of the Licensee's use of the Work until such time as the matter is resolved, which invoices are payable in accordance with this agreement.
- 10.3.9 The Licensee acknowledges that detailed and accurate reporting of music use is essential to the operation of this clause 10, including the calculation of any Adjustment.
- 10.3.10 The parties agree that if either clause 10.3.1(a) or 10.3.1(b) applies and they are unable to agree on the terms of any new or varied agreement, or they are unable to agree whether the reduction in the APRA|AMCOS repertoire is material, clause 11 will apply.

## **11. Dispute resolution**

### **11.1 Disputes**

- 11.1.1 The parties must, during and after the term of this agreement, without delay and in good faith, attempt to resolve any dispute which arises out of or in connection with this agreement prior to commencing any proceedings, but failure to do so will not be deemed a breach of this agreement entitling any party to terminate.
- 11.1.2 Without limiting clause 11.1.1, where the provisions of this agreement would be manifestly unfair to a party, including because the Licensee has obtained direct licences from a copyright owner, the parties must attempt to resolve any issue between them by negotiation in good faith.
- 11.1.3 A party wishing to resolve a dispute must notify the other party of the existence of the dispute and must identify the nature of the dispute in writing. If a dispute under this agreement has not been resolved between the parties within 30 days after notice of the dispute has been given, either party may require the dispute to be:
- (a) referred to expert determination in accordance with clause 11.2; or
  - (b) mediated in accordance with clause 11.3.

- 11.1.4 The existence of a dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under this agreement.

## **11.2 Expert determination**

- 11.2.1 Disputes under this agreement that have not been resolved in accordance with clause 11.1 may be referred to the expert determination procedure offered by APRA in accordance with the terms of its authorisations under the *Competition and Consumer Act 2010* or such other dispute resolution mechanism as agreed between the parties.
- 11.2.2 If a dispute is submitted to expert determination under clause 11.2.1, a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to expert determination, or such other time as the parties agree.

## **11.3 Mediation**

- 11.3.1 Disputes under this agreement that have not been resolved in accordance with clause 11.1 may be submitted to mediation in accordance with and subject to The Institute of Arbitrators and Mediators Australia *Mediation Rules*.
- 11.3.2 If a dispute is submitted to mediation under clause 11.3.1, a party may not commence proceedings in respect of the dispute unless the dispute is not determined within 30 days of submission to mediation, or such other time as the parties agree.

## **11.4 Copyright Tribunal**

Nothing in this clause 11 affects the right of any party to seek a determination from the Copyright Tribunal of Australia in relation to the subject matter of this agreement.

## **12. Miscellaneous**

### **12.1 Assignment**

This agreement is personal to each party. Neither party may assign any of its rights or obligations under this agreement without the prior written consent of the other party, which must not be unreasonably withheld.

### **12.2 Notices**

- 12.2.1 A notice under this agreement must be in writing and may be given to the addressee by:
- (a) delivering it to the address of the addressee;
  - (b) sending it by pre-paid registered post to the address of the addressee; or
  - (c) sending it by facsimile to the facsimile number of the addressee,
- and the notice will be deemed to have been received by the addressee on receipt.

- 12.2.2 A facsimile is deemed to have been received at the time indicated on a transmission report created by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the addressee.

### 12.3 **Amendment**

This agreement may only be varied by the written agreement of the parties.

### 12.4 **Further assurance**

Each party must promptly execute all documents and do all things that another party from time to time reasonably requests to effect, perfect or complete this agreement and all transactions incidental to it.

### 12.5 **Severability**

If any provision of this agreement is held to be unenforceable, all other provisions continue in full force and effect.

### 12.6 **Governing law**

This Agreement shall be construed in accordance with the laws in force in New South Wales and the parties agree to submit to the jurisdiction of New South Wales courts.

## 13. **Definitions and interpretation**

### 13.1 **Definitions**

- 13.1.1 Where commencing with a capital letter:

**Act** means *the Copyright Act 1968*;

**Accounting Period** means each calendar month;

**Activity** means the provision of Works in the form of Streams and Tethered Downloads as part of the Service;

**Activity Report** means the reports referred to in clause 4.2;

**Adjustment** means a reduction in the fees to be paid under this agreement that acknowledges the fact that Subscribers have accessed Works referred to in clause 10.3.6, and takes account of the extent to which those Works materially affects the ownership or control of the number of Works actually Communicated or reproduced under this agreement;

**Advance** means the amount set out in item 6 of the Schedule;

**Advertisement** means any production that is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct including community service announcements and infomercials;

**Agreed Rate** means the interest rate for overdrafts of \$100,000 or more charged by the National Australia Bank plus 2 percentage points, calculated on daily rests from the due date to the date of payment;

**AMCOS Work** means a Work in respect of which AMCOS is entitled to administer the right of reproduction, or represents to the Licensee that it is entitled to grant the licence in clause 1.2.2;

**APRA|AMCOS** means APRA and AMCOS;

**APRA Work** means a Work in respect of which the right of communication to the public is owned or controlled by APRA for the Territory;

**Backup Tapes** means a backup of the Licensee's content, Activity and Subscriber database taken at the end of each Accounting Period;

**Business Day** means a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally in Sydney;

**Clip** means a Stream that when played back at normal speed in an uncompressed format on a device is no more than 30 seconds in duration;

**Commencement Date** means the date set out in item 2 of the Schedule;

**Communicate** has the same meaning as in the Act;

**Confidential Information** means the information provided to APRA|AMCOS by the Licensee under clause 4.1 and 4.2, and any information obtained by APRA|AMCOS pursuant to the exercise of its rights under clause 6;

**Device** means any device that is capable of receiving and displaying music content from the Licensee;

**Download** means a copy of a Track in the form of an electronic file in which sounds are embodied (including a Music Video);

**Due Date** means the 30th day after the end of an Accounting Period;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime insofar as it consists of words and music expressly written for it;

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999*;

**ISO** means the International Organisation for Standardisation;

**ISRC** means International Standard Record Code ISO 3901:2001, as amended from time to time by the ISO;

**ISWC** means International Standard Works Code ISO 15707:2001 as amended from time to time by the ISO;

**Licence Fee** means the amount payable under this agreement calculated in accordance with clause 3;

**Licence Year** means any consecutive period of 12 months ending on 30 June. The first Licence Year is the period commencing on the Commencement Date and ending on the next 30 June, and where this agreement terminates on a date other than 30 June, the last Licence Year shall end on the date of termination;

**Medley** means a Track no longer than 8 minutes duration embodying two or more Works, where there is no space between the Works, excluding Samples and DJ Mixes;

**Member** means a member of APRA or AMCOS as at the date of this agreement and any person who becomes a member of APRA or AMCOS during the term of this agreement;

**Monthly Source Log Files** means a copy of the Licensee's content and subscriber database and associated log files which record every change made to the records in those databases in the relevant month;

**Music Use Information** means the information provided under clause 4.2;

**Music Video** means a cinematograph film:

- (a) produced for the primary purpose of promoting:
  - (i) the performer of the Sound Recording; or
  - (ii) the Sound Recording,of a musical work embodied in the sound track of the cinematograph film; and
- (b) made with the permission of the owner of the musical work;

**Provisional Payment** means an amount calculated by APRA|AMCOS in accordance with clause 5.3.1;

**Purpose** means delivering Tracks, Music Videos and Clips in the form of Streams and Tethered Downloads to Subscribers at their request and only for their personal and domestic use, as follows;

**Sample** means a part of a Sound Recording of a Work that (along with the accompanying Work) is subsequently embodied in another sound recording;

**Security** means a bank cheque or unconditional bank guarantee on terms approved by APRA|AMCOS for the amount set out in item 9 of the Schedule;

**Service** means the service provided by the Licensee of delivering Tracks, Music Videos and Clips over the internet or an IP network to a Subscriber's Device for the Subscriber's personal use at the request of the Subscriber, provided the Tracks, Music Videos and Clips can only be used during the currency of the Subscription as further described in item 8 of the Schedule, and further provided that only one Device per Subscriber may be used at any point in time;

**Sound Recording** has the same meaning as in the Act;

**Streaming** means the communication to the public of Tracks and Music Videos by means of the internet to a Device under circumstances in which the user is prohibited from making a copy (other than a temporary copy) of the Track or Music Video;

**Subscriber** means, in a calendar month, a person in the Territory who is either an existing paying subscriber at the start of the month or whose subscription commences (or is re-activated) during the month;

**Territory** means the territory set out in item 4 of the Schedule;

**Tethered Download** means a Download of a Track or Music Video in an encrypted format that results in a time-limited playable copy of the file that is automatically disabled when a Subscriber's subscription is no longer current or is terminated;

**Total Revenue** for a reporting period means all monies, excluding GST receivable directly by the Licensee from Subscribers for Communication and Download of Tracks and Clips via the Service in that reporting period;

**Track** means a Sound Recording of a Work; and

**Work** means a musical work and any literary work normally associated with it by the copyright owner for the Territory, and a reference to a Work includes a reference to a share in any such Work.

13.1.2 Where a word or phrase is given a defined meaning another part of speech or grammatical form in respect of that word or phrase has a corresponding meaning.

### **13.2 Presumptions of interpretation**

13.2.1 Unless the context otherwise requires a word which denotes the singular denotes the plural and vice versa.

13.2.2 Unless the context otherwise requires a reference to:

- (a) any legislation includes a regulation or instrument made under it and where amended, re-enacted or replaced means that amended, re-enacted or replacement legislation; and
- (b) a thing or amount is a reference to the whole and each part of it.



## SIGNED AS AN AGREEMENT

Signed by **Australasian Performing  
Right Association Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Name of authorised person (print)

.....  
Name of witness

Signed by **Australasian Mechanical  
Copyright Owners Society Limited:**

.....  
Signature of authorised person

.....  
Signature of witness

.....  
Position of authorised person (print)

.....  
Name of witness (print)

.....  
Name of authorised person(print)

Signed by **Licensee:**

.....  
Signature of witness

.....  
Signature of authorised person

.....  
Name of witness (print)

.....  
Office held

.....  
Name of authorised person (print)

## **SCHEDULE**

1.	LICENSEE	
2.	COMMENCEMENT DATE	
3.	TERM	
4.	TERRITORY	
5.	LICENCE FEE	
6.	ADVANCE (IF ANY)	
7.	DATE BY WHICH ADVANCE MUST BE PAID	
8.	NAME OF SERVICE AND ANY OTHER RELEVANT DETAILS	
9.	SECURITY	

**Licence No:**  
(APRA|AMCOS use only)



**NOT FOR USE FOR LICENCES TAKEN OUT AFTER 30 JUNE 2013**

# LICENCE AGREEMENT

**THIS AGREEMENT IS MADE ON**

**2013**

## PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851  
of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099  
of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

--

(company name)

ABN
-----


(street address)

("Licensee")

## BACKGROUND

- A.** The Licensors own or control the copyright in a large number of musical and associated literary works.
- B.** The Licensee requires a licence from the Licensors in order to pursue its business activities.
- C.** The Licensee wishes to obtain licences from the Licensors for the purposes of conducting its business, and the Licensors have agreed to grant the licences, on the terms of this agreement.

## AGREEMENT

### 1. DEFINITIONS AND INTERPRETATION

1.1 Where commencing with a capital letter:

**Act** means the *Australian Copyright Act 1968*;

**Advertisement** means any audio, visual or audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct and includes a Service Identification.

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rates;

**AMCOS Works** means all musical works and associated lyrics for which AMCOS is entitled to grant the licence referred to in clause 2.1, except any Production Music Work;

**APRA Works** means all musical works, including any words normally associated with those works by the copyright owner for Australia, the right of communication of which is owned or controlled by APRA for Australia;

**Clip** means a Song or a Music Video, which when played back at normal speed in an uncompressed format on a user's device, is no more than thirty seconds in duration;

**Communicate** has the same meaning as in the Act;

**Consumer Price Index** means the index of that title All Groups for the 8 capital cities published by the Australian Bureau of Statistics or any authority substituted by statute, related to the base year 1989-90 equals 100, and **March Quarter** means the quarter year ending 31 March;

**Discrete Music Mix** means an audio-only production that consists predominantly of a series of musical works;

**Download** means the process of making a digital copy of audio or audio-visual material from the internet onto a storage device including but not limited to a personal computer hard-drive, server, mobile phone or any peripheral device;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime to the extent that it consists of music and words written expressly for the work;

**Licence Fee** means the amount calculated in accordance with the following formula:

$F = 8.25\% \text{ (inc. GST)} \times \text{LGR}$

Where LGR means the Licensee's Gross Revenue, subject to the Minimum Fee;

**Licensee's Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Licensee's online music service;

**Licence Year** means any consecutive period of 12 months commencing on 1 July during the term of this agreement provided that:

- (a) where the date of this agreement is not 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June; and
- (b) where this agreement does not terminate on 30 June, the last Licence Year is the period from the 1 July preceding the date of termination to the date of termination;

**Licensors** means APRA and AMCOS;

**Minimum Fee** means the amount assessed in accordance with the following table;

	Maximum of up to: (at any given time over the Quarter)	On-Demand Music Service:	Minimum Fee: (per Quarter, or part thereof)
<u>Tier One</u>	Unlimited	Music News Programs	Price on Application
		Discrete Music Mixes	
		Clips	
		Songs	
		Movie Trailers	
	Maximum of up to:		
<u>Tier Two</u>	80 hours	Music News Programs	\$4,200.00 per Quarter (inc. GST)
	80 hours	Discrete Music Mixes	
	2000	Clips	
	400	Songs	
	100	Movie Trailers	
	Maximum of up to:		
<u>Tier Three</u>	40 hours	Music News Programs	\$1,400.00 per Quarter (inc. GST)
	40 hours	Discrete Music Mixes	
	1000	Clips	
	200	Songs	
	50	Movie Trailers	
	Maximum of up to:		
<u>Tier Four</u>	15 hours	Music News Programs	\$700.00 per Quarter (inc. GST)
	15 hours	Discrete Music Mixes	
	250	Clips	
	50	Songs	
	20	Movie Trailers	

**MIDI (Musical Instrument Digital Interface) File** means the general purpose serial communication protocol used to reproduce works for the purpose of triggering a MIDI equipped sound device for playback in real time;

**Music News Program** means any audio or audio-visual production the main purpose of which is to deliver music related news;

**Movie Trailer** means a pre-recorded promotional production for a theatrically released motion picture supplied to the Licensee by the movie studio or distributor who releases the motion picture in Australia;

**Music Video** means a cinematograph film:

- (a) produced for the primary purpose of promoting (i) the performer of the sound recording; or (ii) the sound recording, of an AMCOS work embodied in the sound track of the cinematograph film; and
- (b) made with the permission of the owner of the copyright in the musical work;

**On-Demand Streaming** means Streaming to users under which users cannot control or choose:

- (a) when particular audio or audio-visual material is received (except, if provided by the Licensee, a choice to receive the Stream or not);
- (b) the content of the audio or audio-visual material received; or
- (c) the order in which the audio or audio-visual material is received;

**Production Music Work** means any musical work for which AMCOS is granted by the music publisher the right to license reproductions of sound recordings of that work;

**Purpose** means providing access free of charge, by means of On-Demand Streaming, to Clips, Songs, Music Videos, Discrete Music Mixes, Music News Programs and Movie Trailers;

**Quarter** means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October;

**Service Identification** means any audio or audio-visual production made specifically for the purpose of identifying or promoting the services of the Licensee.

**Song** means a sound recording, Music Video or MIDI File of a musical work which when played back at normal speed in an uncompressed format on a user's device, is more than thirty seconds in duration;

**Streaming** means the Communication of audio or audio-visual material (which may or may not be pre-recorded) via the internet to a device under circumstances in which the user is prohibited from Downloading the audio or audio-visual material; and

**Website** means the World Wide Web destination commencing with the URL:

1.2 An agreement, warranty, representation or obligation which binds or benefits 2 or more persons under this agreement binds or benefits them jointly and severally.

## F1 – On-Demand Music Service (general)

## **2. LICENCES**

2.1 AMCOS grants the Licensee a non-exclusive licence to reproduce the AMCOS Works:

- (a) contained in Music News Programs, provided the use of any AMCOS Work in the program is:
  - (i) associated with the interviewee(s), and they are an artist, composer, producer or other person involved in the creation, performance or production of the music used; or
  - (ii) associated with a music related topic whereby the story is specifically related to an artist, composer, producer or other person involved in the creation, performance or production of the music used;
- (b) contained in Discrete Music Mixes, provided that the production contains no fewer than three separate AMCOS works each of which must be at least 30 seconds in duration when played back at normal speed in an uncompressed format on a user's device;
- (c) contained in Clips, Songs and Music Videos;  
on the Website during the Term, for the Purpose only.

2.2 APRA grants to the Licensee a non-exclusive licence to Communicate the APRA Works from the Website during the Term for the Purpose.

2.3 The Licensee must not under this agreement:

- (a) change or make an adaptation or a parody of an AMCOS Work;
- (b) rent or hire any recording of an AMCOS Work;
- (c) synchronise any visual material (including graphics and/or video) with any Song, Clip, Music Video, Discrete Music Mix or Movie Trailer;
- (d) attach any Song, Clip, Music Video, Discrete Music Mix, Music News Program or Movie Trailer to an email;
- (e) provide access to any Song, Clip, Music Video, Discrete Music Mix or Music News Program for the purpose of Download;
- (f) provide access to, reproduce or Communicate music from any other URL other than the Website;
- (g) provide access from the Licensee's Website, or provide links to:
  - (i) any computer files containing either AMCOS or APRA Works notified as prohibited by the Licensors; or
  - (ii) any infringing computer file containing either AMCOS or APRA Works if the Licensee knows or ought reasonably to know that the file is an infringing copy.

2.4 The licences in clause 2.1 and 2.2 do not include or authorise:

- (a) the Communication of Grand Right Works in their entirety;
- (b) the public performance in whole or in part of any musical work;
- (c) the Communication in whole or in part of any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet;
- (d) the Communication of any choral work of more than 20 minutes' duration in its entirety;
- (e) the Communication of any music and associated words so as to burlesque or parody the work;
- (f) the Communication of any musical work with new or substituted words, or any words which have been notified by APRA as prohibited;
- (g) the reproduction of any musical works or lyrics in a graphic form;
- (h) the reproduction, performance or communication of any sound recording;
- (i) the reproduction of any musical works or associated words to promote any product or service;
- (j) the reproduction of any musical works or associated words into an Advertisement; or
- (k) any other right not expressly granted under this agreement.

## **3. TERM**

This agreement commences with effect from   
and, subject to earlier termination in accordance with clause 10, continues until terminated by either party on at least 2 months notice.

## **4. LICENCE FEES**

The Licensee must pay the Licence Fee, including any provisional licence fee, in accordance with clause 5.

## **5. ASSESSMENT, INVOICING AND PAYMENT OF LICENCE FEE**

### **5.1 Amount**

The Licensee must pay for each Quarter or part thereof an amount equal to the greater of:

- (a) the Licence Fee; or
- (b) the Minimum Fee.

### **5.2 Statements**

The Licensee must, within 14 days after 30 June and 31 December in each Licence Year, supply the Licensors with a statement in the form reasonably specified by the Licensors (the current form is attached at Annexure A) stating for the previous two Quarters:

- (a) the Licensee's Gross Revenue;
- (b) the maximum number of Movie Trailers, Songs, Music Videos and Clips available at any one time from the Licensee's Website;  
and
- (c) the maximum duration of Discrete Music Mixes and Music News Programs available at any one time from the Licensee's Website.

### **5.3 Failure to Provide a Statement**

If the Licensee does not comply with clause 5.2, without limiting the Licensors' rights under this agreement, the Licensors may, having regard to any matters they consider reasonably appropriate, determine for the previous two Quarters:

- (a) the Licensee's Gross Revenue;
- (b) the maximum number of Movie Trailers, Songs, Music Videos and Clips available at any one time from the Licensee's Website; and
- (c) the maximum duration of Discrete Music Mixes and Music News Programs available at any one time from the Licensee's Website,

for the purpose of issuing invoices under clause 5.4.

### **5.4 Invoices and Payments**

- 5.4.1 On execution of this agreement, the Lensor will charge a provisional fee and issue an invoice for the period from the commencement of the service to the next 30 June or 31 December, whichever date occurs first. The provisional fee will be based on the Licensors' reasonable estimate of the Minimum Fee payable by the Licensee under clause 5.1.
- 5.4.2 On the Licensors' receipt of the information under clause 5.2, the Licensors must calculate the Licence Fee in accordance with clause 5.1. If the Licensee does not comply with clause 5.2, the Licensors may issue an invoice based on the determination referred to in clause 5.3.
- 5.4.3 For the period referred to in clause 5.4.1, if the Licence Fee exceeds the provisional fee invoiced, the Licensee must pay the excess to the Licensors on receipt of an invoice specifying the amount.
- 5.4.4 For the period referred to in clause 5.4.1, if the Licence Fee is less than the provisional fee invoiced, the Licensors must, at their option, either refund the amount of the difference to the Licensee or credit the difference to the Licensee's account.
- 5.4.5 On the Licensors' receipt of any information under clause 8, the Licensors may issue an invoice for any additional licence fees payable.
- 5.4.6 The Licensee must pay any invoice issued by the Licensors, including any invoice for provisional fees, within 14 days of the date of invoice.
- 5.4.7 The Licensee must pay the Licensors interest at the Agreed Rate on each amount outstanding under this agreement.

### **5.5 CPI**

- 5.5.1 On 1 July of each year, the Minimum Fee will be calculated by increasing the then Minimum Fee by the percentage increase in the Consumer Price Index between the last two March Quarters.
- 5.5.2 The Minimum Fee calculated under clause 5.5.1 must be rounded to the nearest whole dollar amount.

### **5.6 Annual Financial Returns**

- 5.6.1 In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year.
- 5.6.2 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 exceeds the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensee must pay the Licensors the difference between the Licence Fee and the amount that was paid within 30 days of the date of the Licensors' invoice for such amount.
- 5.6.3 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 is less than the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensors must, at their option, either credit the Licensee or refund to the Licensee the difference between the Licence Fee and the amount that was paid.

### **5.7 Intent to Charge Users**

The Licensee must provide the Licensors with a minimum of 30 days notice of the Licensee's intent to charge users for access to the Website or any of the rights licensed under clause 2.1 or 2.2. The parties will negotiate in good faith the terms of any additional licence, and in the absence of any agreement to the contrary the terms of this agreement will apply to the new or altered service for a period of 60 days after commencement.

## **6. MUSIC USE INFORMATION**

Except as otherwise agreed, the Licensee must provide to the Licensors within 14 days after the end of each Quarter during the term of this agreement, a list of all musical works Communicated on the Licensee's service during the previous Quarter. The list must be in the form reasonably required by the Licensors (the current forms are attached at Annexure B) and must include the following information in respect of each work:

- (a) the title;
- (b) the surnames of the writers;
- (c) the name of the artist or band who performed the work;
- (d) the record manufacturers' catalogue number in respect of the sound recording used;
- (e) the duration;
- (f) the title of any production that contains musical works;
- (g) the number of times the work has been communicated in each month; and
- (h) such other relevant information as may be reasonably required.

## **7. RECORDS**

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to the Licensors under this agreement can be properly ascertained

## **8. AUDIT OR EXAMINATION**

- 8.1 APRA, on behalf of the Licensors, may on 30 days' notice to the Licensee audit or examine the Licensee's books of account and other records to:
- (a) determine the correctness of any notice or payment under this agreement; or
  - (b) in the case of a failure by the Licensee to provide information in accordance with clause 5, to obtain information required to be provided under that clause.
- 8.2 The Licensee must pay the cost of the audit or examination if the audit or examination:
- (a) establishes that the information provided by the Licensee resulted in the amounts payable under this agreement being understated by more than 5%; or
  - (b) is undertaken under clause 8.1(b).

## **9. CONFIDENTIALITY**

- 9.1 Subject to clauses 9.2 and 9.3, the Licensors must not during or after the Term (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without the Licensee's prior written consent any information provided to the Licensors under clause 5.
- 9.2 With respect to information supplied under clause 5, the Licensors may:
- (a) use that information to determine licence fees payable to the Licensors under this agreement; and
  - (b) disclose that information to the Licensors' auditors for the purposes of an audit, and other of the Licensors' professional advisers.
- 9.3 The obligations of confidentiality set out in this clause 9 do not apply to information provided to the Licensors which is:
- (a) required to be disclosed by law; or
  - (b) in the public domain other than by breach of this clause.

## **10. TERMINATION**

- 10.1 The Licensors may immediately terminate this agreement by notice to the Licensee if the Licensee:
- (a) breaches any term of this agreement and fails to remedy the breach within 7 days after being required in writing to do so by the Licensors; or
  - (b) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.
- 10.2 Either party may terminate this agreement by giving 2 months' notice in writing to the other party.

## **11. DISPUTE RESOLUTION**

If any dispute arises out of or in connection with this agreement, either party may submit that dispute to APRA's alternative dispute resolution mechanism. Information about the mechanism can be obtained from APRA.

## **12. NOTICES**

- 12.1 A notice under this agreement must be in writing and may be given to a party by:
- (a) delivering it to the address of the party;
  - (b) sending it by pre-paid post to the address of the party; or
  - (c) sending it by facsimile to the facsimile number of the party,
- and the notice will be deemed to have been received by the party on receipt.
- 12.2 A facsimile is deemed to have been received on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the party.
- 12.3 Until a party gives notice of a change, the contact details for that party is:

### **Licensors**

Postal address: Locked Bag 5000, Strawberry Hills, New South Wales, 2012  
Telephone number: (02) 9935 7900  
Facsimile number: (02) 9935 7999  
Email: online@apra.com.au  
Attention: Online & Mobile Licensing Manager

### **Licensee**

Postal address:			
Telephone Number:		Facsimile number:	
Email:			
Attention:			

### 13. MISCELLANEOUS

- 13.1 No waiver by the Licensors of any breach of any provision of this agreement operates as a waiver of another breach of the same or of any other provision of this agreement.
- 13.2 This agreement is personal to the Licensee. The Licensee is not entitled to assign any of its rights without the prior written consent of the Licensors.
- 13.3 This agreement may only be varied by the written agreement of the parties.
- 13.4 In addition to the payments under clause 5, the Licensee must pay to the Licensors within 14 days after the date of an invoice issued by the Licensors an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.
- 13.5 This agreement must be construed in accordance with the laws in force in the State of New South Wales and the parties agree to submit to the jurisdiction of New South Wales Courts.
- 13.6 Unless the context otherwise requires, a word which denotes the singular denotes the plural and vice versa.

---

### SIGNED AS AN AGREEMENT

Signed for and on behalf of **Australasian Mechanical Copyright Owners Society Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

Office held

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

Name of authorised person

Signed for and on behalf of **Australasian Performing Right Association Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

Office held

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

Name of authorised person

Signed for and on behalf of the **Licensee** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Name of authorised person (print)



**AMCOS/APRA and Quarterly Statement**

On-Demand Music Service

For the calendar quarter ending \_\_\_\_\_ (please complete for each Quarter)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee:</b>	
<b>Account Number:</b>	

**Part 2 – Gross Earnings**

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Music Use**

In accordance with the Minimum Fee (under clause 1 in the agreement) please indicate the level of music use on the Website over the Quarter:

	<b>Maximum of up to:</b> (at any given time over the Quarter)	<b>On-Demand Music Services</b>	<b>Please Tick One</b>
<b><u>Tier One</u></b>	Unlimited	Music News Programs, Discrete Music Mixes, Clips, Songs and Movie Trailers	<input type="checkbox"/>
<b><u>Tier Two</u></b>	80 hours	Music News Programs	<input type="checkbox"/>
	80 hours	Discrete Music Mixes	
	2000	Clips	
	400	Songs	
	100	Movie Trailers	
<b><u>Tier Three</u></b>	40 hours	Music News Programs	<input type="checkbox"/>
	40 hours	Discrete Music Mixes	
	1000	Clips	
	200	Songs	
	50	Movie Trailers	
<b><u>Tier Four</u></b>	15 hours	Music News Programs	<input type="checkbox"/>
	15 hours	Discrete Music Mixes	
	250	Clips	
	50	Songs	
	20	Movie Trailers	

**Part 4 – Certification**

I confirm I am an authorised employee of the Licensee and that the information and figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Date</b>	

**AMCOS/APRA Annual Financial Statement**

On-Demand Music Service

For the licence year ending 30 June \_\_\_\_\_ (please complete)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee</b>	
<b>Account Number</b>	

**Part 2 – Gross Earnings**

**Licensee's Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Licensee's online music service;

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Certification**

Clause 5.6.1 of the licence states: "In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year".

**FIGURES MUST BE CERTIFIED BY THE LICENSEE'S NORMAL EXTERNAL AUDITORS OR ACCOUNTANT.**

I confirm the information and figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Name of Company</b> (please print)	
<b>Date</b>	

**APRA PM Account No:**  
(office use only)



**NOT FOR USE FOR LICENCES TAKEN OUT AFTER 30 JUNE 2013**

## **LICENCE AGREEMENT**

**THIS AGREEMENT IS MADE ON**

**2013**

### **PARTIES**

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099  
of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851  
of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

--

(company name)

ABN
-----


(street address)

("Licensee")

This agreement constitutes a licence to communicate from the Website the Production Music Works and sound recordings, as specified and for the Purpose set out in the AMCOS Production Music Licence Application identified by:

PM Licence Application (**Batch Number**): \_\_\_\_\_ submitted by the Licensee, on the terms set out in this letter.

Title of Production : \_\_\_\_\_

### **BACKGROUND**

- A.** The Licensors own or control the copyright in a large number of musical and associated literary works.
- B.** The Licensee requires a licence from the Licensors in order to pursue its business activities.
- C.** The Licensee wishes to obtain licences from the Licensors for the purposes of conducting its business, and the Licensors have agreed to grant the licences, on the terms of this agreement.

### **AGREEMENT**

#### **1. DEFINITIONS AND INTERPRETATION**

1.1 Where commencing with a capital letter:

**Advertisement** means an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct;

**Consumer Price Index** means the index of that title All Groups for the 8 capital cities published by the Australian Bureau of Statistics or any authority substituted by statute, related to the base year 1989-90 equals 100, and March Quarter means the quarter year ending 31 March;

**Download** means the process of making a digital copy of audio or audio-visual material from the internet onto a storage device including but not limited to a personal computer hard-drive, server, mobile phone or any peripheral device;

**Grand Right Work means** an opera, operetta, musical play, revue or pantomime to the extent that it consists of music and words written expressly for the work;

**Licence Fee** means the amount calculated in accordance with the table under Schedule 1

**Licence Year** means any consecutive period of 12 months commencing on 1 July during the term of this agreement provided that:

- (a) where the date of this agreement is not 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June; and
- (b) where this agreement does not terminate on 30 June, the last Licence Year is the period from the 1 July preceding the date of termination to the date of termination;

**Licensors** means the Australasian Performing Right Association Limited (APRA) and the Australasian Mechanical Copyright Owners Society Limited (AMCOS);

**Production Music** means Production Music Works and Production Music Sound Recordings;

**Production Music Sound Recording** means any sound recording for which AMCOS is granted by the music publisher the right to license reproductions of the sound recording;

**Production Music Work** means any musical work for which AMCOS is granted by the music publisher the right to license reproductions of the sound recording of that work;

**Purpose** means the Streaming of Production Music, free of charge to users;

**Streaming** means the communication to the public of audio or audio-visual material (which may or may not be pre-recorded) via the internet to a device under circumstances in which the user is prohibited from Downloading the audio or audio-visual material;

**Quarter** means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October;

**User Generated Content** means content created and uploaded to a website by end users;

**Website** means the World Wide Web destination commencing with the **URL:** \_\_\_\_\_

## **2. LICENCES**

2.1 The Licensors grant the Licensee a non-exclusive licence to communicate Production Music, covered under the Licensee's *AMCOS Production Music Licence*, from the Website during the Term, for the Purpose.

2.2 The Licensee must not under this agreement:

- (a) change or make an adaptation or a parody of a Production Music Work;
- (b) rent or hire any recording of a Production Music Work;
- (c) communicate any Production Music as a Download, including:
  - in the form of a full-length music download; or
  - in the form of a mobile phone ringtone;
- (d) authorise the communication of any Production Music for inclusion in User Generated Content (UGC);
- (e) communicate any Production Music in the form of a podcast or vodcast;
- (f) provide access to, or communicate music from any other URL or WAP, other than the Websites; and
- (g) provide access from the service, or provide links to:
  - (i) any computer files containing Production Music notified as prohibited by the Licensors; or
  - (ii) any infringing computer file containing Production Music if the licensee knows or ought reasonably to know that the file is an infringing copy.

2.3 The licences in clause 2.1 and 2.2 do not include or authorise:

- (a) the communication of Production Music other than for the service;
- (b) the communication of Grand Right Works in their entirety;
- (c) the public performance in whole or in part of any musical work;
- (d) the communication in whole or in part of any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet;
- (e) the communication of any choral work of more than 20 minutes' duration in its entirety;
- (f) the communication of any music and associated words so as to burlesque or parody the work;
- (g) the communication of any musical work with new or substituted words, or any words which have been notified by The Licensors as prohibited;
- (h) the reproduction of any Production Music or any other musical work;
- (h) the reproduction of any lyrics in a graphic form;
- (i) the reproduction, performance or communication of any sound recording, with the exception of Production Music Sound Recordings;
- (l) any other right not expressly granted under this agreement.

## **3. TERM**

This agreement commences \_\_\_\_\_ with effect from and, subject to earlier termination in accordance with clause 6.

#### **4. LICENCE FEES , INVOICING AND PAYMENT**

##### **4.1 Amount**

The Licensee must pay for each Licence Year or part thereof, the Licence Fee.

##### **4.2 Invoices and Payments**

4.2.1 On execution of this agreement, the Licensors will issue an invoice for the Licence Fee for the period from the commencement of the service to the next 30 June.

4.2.2 For each subsequent Licence Year, the Licensors will issue an invoice for the Licence Fee no earlier than 14 days prior to the commencement of that period.

4.2.3 The Licensee must pay any invoice issued by the Licensors within 14 days of the date of invoice.

##### **4.3 CPI**

4.3.1 On 1 July of each year, the Licence Fee will be calculated by increasing the then Licence Fee by the percentage increase in the Consumer Price Index between the last two March Quarters.

4.3.2 The Licence Fee calculated under clause 4.3.1 must be rounded to the nearest whole dollar amount.

#### **5. RECORDS**

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to the Licensors under this agreement can be properly ascertained

#### **6. TERMINATION**

6.1 The Licensors may immediately terminate this agreement by notice to the Licensee if the Licensee:

- (a) breaches any term of this agreement and fails to remedy the breach within 7 days after being required in writing to do so by the Licensors; or
- (b) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.

#### **7. NOTICES**

7.1 A notice under this agreement must be in writing and may be given to a party by:

- (a) delivering it to the address of the party;
  - (b) sending it by pre-paid post to the address of the party; or
  - (c) sending it by facsimile to the facsimile number of the party,
- and the notice will be deemed to have been received by the party on receipt.

7.2 A facsimile is deemed to have been received on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the party.

7.3 Until a party gives notice of a change, the contact details for that party is:

##### **Licensors**

Postal address: Locked Bag 5000, Strawberry Hills, New South Wales, 2012  
Telephone number: (02) 9935 7900  
Facsimile number: (02) 9935 7999  
Email: online@apra.com.au  
Attention: Online Licensing Manager

##### **Licensee**

Postal address:

Telephone Number:

Facsimile number:

Email:

Attention:

#### **8. MISCELLANEOUS**

8.1 No waiver by the Licensors of any breach of any provision of this agreement operates as a waiver of another breach of the same or of any other provision of this agreement.

8.2 This agreement is personal to the Licensee. The Licensee is not entitled to assign any of its rights without the prior written consent of the Licensors.

8.3 This agreement may only be varied by the written agreement of the parties.

8.4 In addition to the payments under clause 4, the Licensee must pay to the Licensors within 14 days after the date of an invoice issued by the Licensors an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.

8.5 This agreement must be construed in accordance with the laws in force in the State of New South Wales and the parties agree to submit to the jurisdiction of New South Wales Courts.

8.6 Unless the context otherwise requires, a word which denotes the singular denotes the plural and vice versa.

## Schedule 1 - **Production Music Communication rates:**

<u>Fee Calculation Table</u>		
All productions <b>(Excluding Advertisements)</b> Inclusive of GST at 10% and are per annum or part thereof		
Number of 30 sec Units	\$	Please tick
1-10	119.00	
11-20	238.00	
21-30	357.00	
31-40	476.00	
41-50	595.00	
51-60	714.00	
61-70	833.00	
71-80	952.00	
81-90	1071.00	
91-100	1190.00	
101-110	1288.00	
111-120	1364.00	
121-130	1484.00	
131-140	1583.00	
141-150	1680.00	
151-160	1778.00	
161-170	1877.00	
171-180	1975.00	
181-190	2073.00	
191-200	2172.00	
201 +	Price on application	

### **All productions EXCLUDING ADVERTISEMENTS**

(All prices are including 10% GST and are per annum or part thereof)

Number of 30 sec units: \_\_\_\_\_

Total price including GST: \_\_\_\_\_

**1 – 100 30 sec units** = \$119.00 per 10, 30 sec units or part thereof

**101–200 30 sec units** = \$1288.00 (for first 100 units), plus \$98.22 per additional 30 sec 10 units or part thereof

**201 + 30 sec units** = Price on application

<u>Fee Calculation Table</u>		
All productions <b>(Including Advertisements)</b> Inclusive of GST at 10% and are per annum or part thereof		
Number of 30 sec Units	\$	Please Tick
1-10	179.00	
11-20	358.00	
21-30	537.00	
31-40	716.00	
41-50	895.00	
51-60	1074.00	
61-70	1253.00	
71-80	1432.00	
81-90	1611.00	
91-100	1790.00	
101-110	1950.00	
111-120	2111.00	
121-130	2272.00	
131-140	2432.00	
141-150	2593.00	
151-160	2753.00	
161-170	2914.00	
171-180	3074.00	
181-190	3234.00	
191-200	3395.00	
201 +	Price on Application	

### **All productions INCLUDING ADVERTISEMENTS**

(All prices are including 10% GST and are per annum or part thereof)

Number of 30 sec units: \_\_\_\_\_

Total price including GST: \_\_\_\_\_

**1 – 100 30 sec units** = \$179.00 per 10, 30 sec units or part thereof

**101 – 200 30 sec units** = \$1950.00 (for first 100 units) plus \$160.56 per additional 10, 30 sec units or part thereof

**201 + 30 sec units** = Price on application

Signed for and on behalf of **the Licensor** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Frank Rodi

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

Signed for and on behalf of the **Licensee** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Name of authorised person (print)

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

**Licence No:**  
(APRA|AMCOS use only)



**NOT FOR USE FOR LICENCES TAKEN OUT AFTER 30 JUNE 2013**

# LICENCE AGREEMENT

**THIS AGREEMENT IS MADE ON**

**2013**

## PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851  
of 16 Mountain Street, Ultimo, New South Wales (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099  
of 16 Mountain Street, Ultimo, New South Wales (**APRA**)

--

(company name)

ABN
-----


(street address)

("Licensee")

## BACKGROUND

- A.** The Licensors own or control the copyright in a large number of musical and associated literary works.
- B.** The Licensee requires a licence from the Licensors in order to pursue its business activities.
- C.** The Licensee wishes to obtain licences from the Licensors for the purposes of conducting its business and the Licensors have agreed to grant the licences, on the terms of this agreement.

## AGREEMENT

### 1. DEFINITIONS AND INTERPRETATION

1.1 Where commencing with a capital letter:

**Advertisement** means any audio, visual or audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct and includes a Service Identification.

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated at daily rests;

**AMCOS Works** means all musical works and associated lyrics for which AMCOS is entitled to grant the licence referred to in clause 2.1, except Production Music Works;

**APRA Works** means all musical works, including any words normally associated with those works by the copyright owner for Australia, the right of communication of which is owned or controlled by APRA for Australia and New Zealand;

**Audio Webcast Channel** means a limited form of audio-only Streaming for simultaneous receipt by users under which users cannot control or choose:

- (a) the content of the sounds concerned;
  - (b) the order in which the sounds are received; or
  - (c) when those sounds are received,
- except to the extent of being able to control whether or not the users' receiving device receives the Stream or not;

**Audio Webcast Channel Archive** means any audio-only production previously Streamed on the Licensee's Audio Webcast Channel and then made available for point to point Streaming to users under which users cannot control or choose:

- (a) when particular audio or audio-visual material is received (except, if provided by the Licensee, a choice to receive the Stream or not);
- (b) the content of the audio or audio-visual material received; or
- (c) the order in which the audio or audio-visual material is received;

**Consumer Price Index** means the index of that title All Groups for the 8 capital cities published by the Australian Bureau of Statistics or any authority substituted by statute, related to the base year 1989-90 equals 100, and **March Quarter** means the quarter year ending 31 March;

**Download** means the process of making a digital copy of audio or audio-visual material from the internet onto a storage device including but not limited to a personal computer hard-drive, server, mobile phone or any peripheral device;

**Grand Right Work** means an opera, operetta, musical play, revue or pantomime to the extent that it consists of music and words written expressly for the work;

**Licence Fee** means the amount calculated in accordance with the following formula:

$F = P \times LGR$  - Where P means the percentage of Licensee's Gross Revenue payable that corresponds to the Music Use Band, and LGR means the Licensee's Gross Revenue;



**Licensee's Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Licensee's online music service;

**Licence Year** means any consecutive period of 12 months commencing on 1 July during the term of this agreement provided that:

- (a) where the date of this agreement is not 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June; and
- (b) where this agreement does not terminate on 30 June, the last Licence Year is the period from the 1 July preceding the date of termination to the date of termination;

**Licensors** means APRA and AMCOS;

**Minimum Fee** means:

- (a) for the Licensee's first Audio Webcast Channel an amount of \$1400.00 (inc. GST) per Quarter or part thereof; and
- (b) for each additional Audio Webcast Channel on the Website an additional amount of \$700.00 (inc. GST) per Quarter or part thereof; and
- (c) for any Audio Webcast Channel Archive, an amount in addition to (a) and (b) of \$700.00 (inc GST) per Quarter or part thereof;

**Music Use Band** means the band set out in the following table into which the Licensee's Music Use Percentage falls;

**Music Use Percentage** means the aggregate percentage of airtime occupied by the Webcast of APRA Works calculated in accordance with the following table - and reported under clause 5.2:

Music Use Percentage	Percentage of Gross Revenue (inc of GST)
≥90%	5.500%
80-89.99%	4.290%
60-79.99%	3.355%
40-59.99%	2.420%
25-39.99%	1.54%
<25%	0.605%

**Production Music Work** means any musical work for which AMCOS is granted by the music publisher the right to license reproductions of sound recordings of that work;

**Purpose** means providing access free of charge, to Audio Webcast Channel(s) and Audio Webcast Channel Archives;

**Quarter** means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October;

**Service Identification** means any audio or audio-visual production made specifically for the purpose of identifying or promoting the services of the Licensee.

**Streaming** means the communication to the public of audio or audio-visual material (which may or may not be pre-recorded) via the internet to a device under circumstances in which the user is prohibited from Downloading the audio or audio-visual material; and

**Website** means the World Wide Web destination commencing with the URL:

- 1.2 An agreement, warranty, representation or obligation which binds or benefits 2 or more persons under this agreement binds or benefits them jointly and severally.

## 2. LICENCES

2.1 AMCOS grants the Licensee a non-exclusive licence to reproduce the AMCOS Works:

- (a) contained in any Audio Webcast Channel; and
- (b) contained in any Audio Webcast Channel Archive; on the Website during the Term, for the Purpose only.

2.2 APRA grants to the Licensee a non-exclusive licence to communicate the APRA Works from the Website during the Term for the Purpose.

2.3 The Licensee must not under this agreement:

- (a) change or make an adaptation or a parody of an AMCOS Work;
- (b) rent or hire any recording of an AMCOS Work;
- (c) synchronise any visual material (including graphics and/or video) with any Audio Webcast Channel or Audio Webcast Channel Archive;
- (d) attach any Audio Webcast Channel Archive to an email;
- (e) provide access to any Audio Webcast Channel or Audio Webcast Channel Archive for the purpose of Download;
- (f) provide access to, reproduce or communicate music from any other URL other than the Website;
- (g) provide access from the Licensee's Website, or provide links to:
  - (i) any computer files containing either AMCOS or APRA Works notified as prohibited by the Licensors; or
  - (ii) any infringing computer file containing either AMCOS or APRA Works if the Licensee knows or ought reasonably to know that the file is an infringing copy.

2.4 The licences in clause 2.1 and 2.2 do not include or authorise:

- (a) the communication of Grand Right Works in their entirety;
- (b) the public performance in whole or in part of any musical work;
- (c) the communication in whole or in part of any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet;
- (d) the communication of any choral work of more than 20 minutes' duration in its entirety;
- (e) the communication of any music and associated words so as to burlesque or parody the work;
- (f) the communication of any musical work with new or substituted words, or any words which have been notified by APRA as prohibited;
- (g) the reproduction of any musical works or lyrics in a graphic form;
- (h) the reproduction, performance or communication of any sound recording;
- (i) the reproduction of any musical works or associated words to promote any product or service;

- (j) the reproduction of any musical works or associated words into an Advertisement; or
- (k) any other right not expressly granted under this agreement.

### **3. TERM**

This agreement commences with effect from  and, subject to earlier termination in accordance with clause 10, continues until terminated by either party on at least 2 months' notice.

### **4. LICENCE FEES**

The Licensee must pay the Licence Fee, including any provisional licence fee, in accordance with clause 5.

### **5. ASSESSMENT, INVOICING AND PAYMENT OF LICENCE FEE**

#### **5.1 Amount**

The Licensee must pay for each Quarter or part thereof an amount equal to the greater of:

- (a) the Licence Fee; or
- (b) the Minimum Fee.

#### **5.2 Statements**

The Licensee must, within 14 days after 30 June and 31 December in each Licence Year, supply the Licensors with a statement in the form reasonably specified by the Licensors (the current form is attached at Annexure A) stating for the previous two Quarters:

- (a) the Licensee's Gross Revenue;
- (b) the Average Weekly Transmission hours (AWT) of each of the Licensee's Audio Webcast Channels;
- (c) the Average number of Weekly Hours of transmission occupied by APRA Works (AWH) on each Audio Webcast Channel;
- (d) the common name given to and the music program format of each of the Licensee's Audio Webcast Channels; and
- (e) the number of Audio Webcast Channel Archives.

#### **5.3 Failure to Provide a Statement**

If the Licensee does not comply with clause 5.2, without limiting the Licensors' rights under this agreement, the Licensors may, having regard to any matters they consider reasonably appropriate, determine for the previous two Quarters:

- (a) the Licensee's Gross Revenue;
- (b) the AWT;
- (c) the AWH; and
- (d) the number of Audio Webcast Channel Archives; for the purpose of issuing invoices under clause 5.4.

#### **5.4 Invoices and Payments**

5.4.1 On execution of this agreement, the Licensor will issue an invoice for the provisional fee, for the period from the commencement of the service to the next 30 June or 31 December, whichever date occurs first. The provisional fee will be based on the Licensors' reasonable estimate of the Minimum Fee payable by the Licensee under clause 5.1.

5.4.2 On the Licensors' receipt of the information under clause 5.2, the Licensors must calculate the Licence Fee in accordance with clause 5.1. If the Licensee does not comply with clause 5.2, the Licensors may issue an invoice based on the determination referred to in clause 5.3.

5.4.3 For the period referred to in clause 5.4.1, if the Licence Fee exceeds the provisional fee invoiced, the Licensee must pay the excess to the Licensors on receipt of an invoice specifying the amount.

5.4.4 For the period referred to in clause 5.4.1, if the Licence Fee is less than the provisional fee invoiced, the Licensors must, at their option, either refund the amount of the difference to the Licensee or credit the difference to the Licensee's account.

5.4.5 On the Licensors' receipt of any information under clause 8, the Licensors may issue an invoice for any additional licence fees payable.

5.4.6 The Licensee must pay any invoice issued by the Licensors, including any invoice for provisional fees, within 14 days of the date of invoice.

5.4.7 The Licensee must pay the Licensors interest at the Agreed Rate on each amount outstanding under this agreement.

#### **5.5 CPI**

5.5.1 On 1 July of each year, the Minimum Fee will be calculated by increasing the then Minimum Fee by the percentage increase in the Consumer Price Index between the last two March Quarters.

5.5.2 The Minimum Fee calculated under clause 5.5.1 must be rounded to the nearest whole dollar amount.

#### **5.6 Annual Financial Returns**

5.6.1 In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term, audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year.

5.6.2 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 exceeds the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensee must pay the Licensors the difference between the Licence Fee and the amount that was paid within 30 days of the date of the Licensors' invoice for such amount.

5.6.3 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 is less than the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensors must, at their option, either credit the Licensee or refund to the Licensee the difference between the Licence Fee and the amount that was paid.

#### **5.7 Intent to Charge Users**

The Licensee must provide the Licensors with a minimum of 30 days notice of the Licensee's intent to charge users for access to the Website or any of the rights licensed under clause 2.1 or 2.2. The parties will negotiate in good faith the terms of any additional licence, and in the absence of any agreement to the contrary the terms of this agreement will apply to the new or altered service for a period of 60 days after commencement.

### **6. MUSIC USE INFORMATION**

Except as otherwise agreed, the Licensee must provide to the Licensors within 14 days after the end of each Quarter during the term of this agreement, a list of all musical works communicated on the Licensee's service during the previous Quarter. The list must be in the form reasonably required by the Licensors (the current forms are attached at Annexure B) and must include the following information in respect of each work:

- (a) the title;
- (b) the surnames of the writers;
- (c) the name of the artist or band who performed the work;

- (d) the record manufacturers' catalogue number in respect of the sound recording used;
- (e) the duration;
- (f) the title of any production that contains musical works;
- (g) the number of times the work has been communicated in each month; and
- (h) such other relevant information as may be reasonably required.

## 7. RECORDS

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to the Licensors under this agreement can be properly ascertained

## 8. AUDIT OR EXAMINATION

- 8.1 APRA, on behalf of the Licensors, may on 30 days' notice to the Licensee audit or examine the Licensee's books of account and other records to:
- (a) determine the correctness of any notice or payment under this agreement; or
  - (b) in the case of a failure by the Licensee to provide information in accordance with clause 5, to obtain information required to be provided under that clause.
- 8.2 The Licensee must pay the cost of the audit or examination if the audit or examination:
- (a) establishes that the information provided by the Licensee resulted in the amounts payable under this agreement being understated by more than 5%; or
  - (b) is undertaken under clause 8.1(b).

## 9. CONFIDENTIALITY

- 9.1 Subject to clauses 9.2 and 9.3, the Licensors must not during or after the Term (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without the Licensee's prior written consent any information provided to the Licensors under clause 5.
- 9.2 With respect to information supplied under clause 5, the Licensors may:
- (a) use that information to determine licence fees payable to the Licensors under this agreement; and
  - (b) disclose that information to the Licensors' auditors for the purposes of an audit, and other of the Licensors' professional advisers.
- 9.3 The obligations of confidentiality set out in this clause 9 do not apply to information provided to the Licensors which is:
- (a) required to be disclosed by law; or
  - (b) in the public domain other than by breach of this clause.

## 10. TERMINATION

- 10.1 The Licensors may immediately terminate this agreement by notice to the Licensee if the Licensee:
- (a) breaches any term of this agreement and fails to remedy the breach within 7 days after being required in writing to do so by the Licensors; or
  - (b) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.
- 10.2 Either party may terminate this agreement by giving 2 months' notice in writing to the other party.

## 11. DISPUTE RESOLUTION

If any dispute arises out of or in connection with this agreement, either party may submit that dispute to the alternative dispute resolution mechanism approved by the Australian Competition Tribunal constituted under the *Trade Practices Act 1974* in the determination in relation to File Nos. 4 and 5 of 1998. Information about the mechanism can be obtained from APRA.

## 12. NOTICES

- 12.1 A notice under this agreement must be in writing and may be given to a party by:
- (a) delivering it to the address of the party;
  - (b) sending it by pre-paid post to the address of the party; or
  - (c) sending it by facsimile to the facsimile number of the party,
- and the notice will be deemed to have been received by the party on receipt.
- 12.2 A facsimile is deemed to have been received on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the party.
- 12.3 Until a party gives notice of a change, the contact details for that party is:

### Licensors

Postal address: Locked Bag 5000, Strawberry Hills, New South Wales, 2012  
 Telephone number: (02) 9935 7900  
 Facsimile number: (02) 9935 7999  
 Email: [online@apra.com.au](mailto:online@apra.com.au)  
 Attention: Online & Mobile Licensing Manager

### Licensee

Postal address:

Telephone Number:

Email:

Attention:

	Facsimile number:	

### 13. MISCELLANEOUS

- 13.1 No waiver by the Licensors of any breach of any provision of this agreement operates as a waiver of another breach of the same or of any other provision of this agreement.
- 13.2 This agreement is personal to the Licensee. The Licensee is not entitled to assign any of its rights without the prior written consent of the Licensors.
- 13.3 This agreement may only be varied by the written agreement of the parties.
- 13.4 In addition to the payments under clause 5, the Licensee must pay to the Licensors within 14 days after the date of an invoice issued by the Licensors an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.
- 13.5 This agreement must be construed in accordance with the laws in force in the State of New South Wales and the parties agree to submit to the jurisdiction of New South Wales Courts.
- 13.6 Unless the context otherwise requires, a word which denotes the singular denotes the plural and vice versa.

---

### SIGNED AS AN AGREEMENT

Signed for and on behalf of **Australasian Mechanical Copyright Owners Society Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Office held

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

\_\_\_\_\_  
Name of authorised person

Signed for and on behalf of **Australasian Performing Right Association** Limited in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Office held

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Frank Rodi

\_\_\_\_\_  
Name of authorised person

Signed for and on behalf of the **Licensee** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Name of authorised person (print)

**AMCOS/APRA and Quarterly Statement**

Audio Webcast Channel

For the calendar quarter ending \_\_\_\_\_ (please complete for each Quarter)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee:</b>	
<b>Account Number:</b>	

**Part 2 – Gross Earnings**

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Music Use**

In accordance with the Licence Fee (under clause 1 in the agreement) please indicate the Average Weekly Transmission hours (AWT), the Average number of Weekly Hours of transmission occupied by the transmission of APRA Works (AWH), and the number of Audio Webcast Channel Archives for each separate Audio Webcast Channel in operation:

<b>Name of Audio Webcast Channel</b>	<b>Programme Format</b> (make selection from list below) <sup>1</sup>	<b>AWT</b>	<b>AWH</b>	<b>Audio Webcast Channel Archives</b>	<b>APRA/AMCOS Use Only</b>

**Part 4 – Certification**

I confirm I am an authorised employee of the Licensee and that the information and figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Date</b>	

<sup>1</sup> Please select the description that best fits the format of each channel.

Adult Contemporary  
Easy Listening  
Foreign Language

Christian Music  
Gold/Classics  
News/Talk/Sport

Classical Music  
Indie Music  
Other (specify)

Country Music  
World Music

Dance Music  
Top 40

**AMCOS/APRA Annual Financial Statement**

Audio Webcast Channel

For the licence year ending 30 June \_\_\_\_\_ (please complete)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee</b>	
<b>Account Number</b>	

**Part 2 – Gross Earnings**

**Licensee's Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Licensee's online music service;

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Certification**

Clause 5.6.1 of the licence states: "In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year".

**FIGURES MUST BE CERTIFIED BY THE LICENSEE'S NORMAL EXTERNAL AUDITORS OR ACCOUNTANT.**

I confirm the information and figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Name of Company</b> (please print)	
<b>Date</b>	

**Licence No:**  
(APRA|AMCOS use only)



**NOT FOR USE FOR LICENCES TAKEN OUT AFTER 30 JUNE 2013**

# LICENCE AGREEMENT

**THIS AGREEMENT IS MADE ON**

**2013**

## PARTIES

**AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED** ABN 78 001 678 851 of 16 Mountain Street, Ultimo, New South Wales 2007 (**AMCOS**)

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED** ABN 42 000 016 099 of 16 Mountain Street, Ultimo, New South Wales 2007 (**APRA**)

--

(company name)

ABN
-----


(street address)

("Licensee")

## BACKGROUND

- A.** The Licensors own or control the copyright in a large number of musical and associated literary works.
- B.** The Licensee requires a licence from the Licensors in order to pursue its business activities.
- C.** The Licensee wishes to obtain licences from the Licensors for the purposes of conducting its business, and the Licensors have agreed to grant the licences, on the terms of this agreement.

## AGREEMENT

### 1. DEFINITIONS AND INTERPRETATION

1.1 Where commencing with a capital letter:

**Act** means the *Copyright Act 1968*;

**Advertisement** means any audio or audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct and includes a Service Identification.

**Agreed Rate** means the benchmark rate published by the National Australia Bank Limited plus 2%, calculated on daily rests from the due date to the date of payment;

**AMCOS Works** means all musical works and associated lyrics for which AMCOS is entitled to grant a licence, except any Production Music Work;

**APRA Works** means all musical works, including any words normally associated with those works by the copyright owner for Australia, the right of Communication of which is owned or controlled by APRA for its territories which includes Australia and New Zealand;

**Church Service** means the Licensee's mass held on \_\_\_\_\_ [insert the day/s] between \_\_\_\_\_ and \_\_\_\_\_ [insert times] at \_\_\_\_\_ [insert location], where music use does not exceed more than 30% of the total duration of the mass service;

**Church Service Channel** means a limited form of Streaming that transmits live and simultaneously all or part of the Church Service, for the simultaneous receipt by Users;

**Commencement Date** means \_\_\_\_\_;

**Communicate** has the same meaning as in the Act;

**Consumer Price Index** means the index of that title All Groups for the 8 capital cities published by the Australian Bureau of Statistics or any authority substituted by statute, related to the base year 1989-90 equals 100, and **March Quarter** means the quarter year ending 31 March;

**Download** means the process of making a digital copy of images and/or sounds from the internet onto a storage device including but not limited to a personal computer hard-drive, server, mobile phone or any peripheral device;

**Dramatico-musical Work** means an opera, operetta, musical play, revue or pantomime, to the extent that it consists of musical works and lyrics written expressly for it;

**Fee** means 1.54% (inclusive of GST at 10%) multiplied by Gross Revenue;

**Film** means a cinematograph film as defined in the Act;

**Grand Right Work** an opera, operetta, musical play, revue or pantomime to the extent that it consists of music and words written expressly for the work;

**Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Service;

**Licence Year** means any consecutive period of 12 months commencing on 1 July during the term of this agreement provided that:

- (a) where the date of this agreement is not 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June; and
- (b) where this agreement does not terminate on 30 June, the last Licence Year is the period from the 1 July preceding the date of termination to the date of termination;

**Licensors** mean the Australasian Performing Right Association Limited (**APRA**) and the Australasian Mechanical Copyright Owners Society Limited (**AMCOS**);

**Minimum Fee** means \$550 (inclusive of GST) per Quarter or part thereof;

**On-Demand Streaming** means the Streaming of audio or audio-visual content, under which users cannot control or choose:

- (a) when particular audio or audio-visual material is received (except, if provided by the Licensee, a choice to receive the Stream or not);
- (b) the content of the audio or audio-visual material received; or
- (c) the order in which the audio or audio-visual material is received;

**Production Music Work** means any musical work for which AMCOS is granted by the music publisher the right to license reproductions of Sound Recordings of that work;

**Quarter** means a 3 monthly period commencing on 1 January, 1 April, 1 July or 1 October;

**Service** means the Streaming of Works as part of the Church Service Channel on the Website, free of charge to Users;

**Service Identification** means any audio or audio-visual production made specifically for the purpose of identifying or promoting the services of the Licensee.

**Sound Recording** has the same meaning as in the Act;

**Streaming** means the Communication of images and/or sounds (which may or may not be pre-recorded) via the internet to a device under circumstances in which the user cannot Download those images and/or sounds;

**User** means a natural person in the Territory who receives the Service intended for their own private and non-commercial use;

**User Generated Content** means content created and uploaded to a website by end users;

**Website** means the World Wide Web destination commencing with the URL: \_\_\_\_\_; and

**Work** means a musical work and any literary work normally associated with it by the owner of the copyright in the Territory.

- 1.2 An agreement, warranty, representation or obligation which binds or benefits 2 or more persons under this agreement binds or benefits them jointly and severally.

## **2. LICENCES**

- 2.1 AMCOS grants the Licensee a non-exclusive licence to reproduce AMCOS Works in the Territory during the Term for the Service.

- 2.2 APRA grants the Licensee a non-exclusive licence to Communicate APRA Works from within the Territory during the Term for the Service.

### **2.3 Limitations**

The Licensee must not under this agreement:

- (a) Communicate any APRA Work or reproduce any AMCOS Work other than for the Service;
- (b) authorise Users to program specific Sound Recordings in a controlled order, for transmission to the User;
- (c) allow Users to retain a permanent or temporary copy of any Work, with the exception of a required cached copy;
- (d) change or make an adaptation or a parody of an APRA Work or AMCOS Work;
- (e) rent or hire any Sound Recording of an APRA Work or AMCOS Work;
- (f) Communicate any APRA Work or reproduce any AMCOS Work as a Download, including:
  - in the form of a full-length music download;
  - in the form of a mobile phone ringtone; or
  - a podcast or vodcast;



- (g) authorise the Communication of any APRA Work or the reproduction of any AMCOS Work for inclusion in the Service as User Generated Content;
- (h) synchronise any audiovisual material with any AMCOS Work;
- (i) provide access to, Communicate or authorise the Communication of any APRA Work or AMCOS Work other than for the Service; and
- (j) provide access from the Service, or provide links to:
  - any computer files containing APRA Works or AMCOS Works notified as prohibited by APRA|AMCOS in writing; or
  - any infringing computer file containing APRA Works or AMCOS Works if the Licensee knows that the file is an infringing copy.

## 2.4 Exclusions

The licence in clause 2.1 and clause 2.2 does not include or authorise:

- (a) the Communication of Grand Right Works in their entirety;
- (b) the Communication of Dramatico-musical Works in their entirety unless the Communication is of a Film;
- (c) the Communication in whole or in part of any music and associated words composed or used for a ballet if accompanied by a visual representation of that ballet, unless the Communication is of a Film;
- (d) the Communication in its entirety of any choral work of more than 20 minutes' duration unless the Communication is of a Film;
- (e) the Communication of any music and associated words so as to burlesque or parody the Work;
- (f) the making of an adaptation of any musical, literary or dramatic Work;
- (g) the Communication of any musical work in association with new or substituted lyrics, or any lyrics which have been notified by APRA|AMCOS as prohibited;
- (h) the public performance in whole or in part of any musical work;
- (i) the reproduction of any musical works or lyrics in a graphic form;
- (j) the reproduction, performance or Communication of any Sound Recording;
- (k) the reproduction of any AMCOS Work and its associated words, to promote any product or service;
- (l) the reproduction of any AMCOS Work and its associated words into an Advertisement; or
- (m) any other right not expressly granted under this agreement.

## 3. TERM

Subject to earlier termination in accordance with clause 10, this agreement will continue until terminated by either party on at least 3 months' notice.

## 4. LICENCE FEES

The Licensee must pay the Licence Fee, including any provisional licence fee, in accordance with clause 5.

## 5. ASSESSMENT, INVOICING AND PAYMENT OF LICENCE FEE

### 5.1 Amount

The Licensee must pay for each Quarter or part thereof an amount equal to the greater of:

- (a) the Fee; or
- (b) the Minimum Fee.

### 5.2 Statements

The Licensee must, within 14 days after 30 June and 31 December in each Licence Year, supply the Licensors with a statement in the form reasonably specified by the Licensors (the current form is attached at Annexure A) stating for the previous two Quarters the Licensee's Gross Revenue.

### 5.3 Failure to Provide a Statement

If the Licensee does not comply with clause 5.2, without limiting the Licensors' rights under this agreement, the Licensors may, having regard to any matters they consider reasonably appropriate, determine for the previous two Quarters the Licensee's Gross Revenue for the purpose of issuing invoices under clause 5.4.

### 5.4 Invoices and Payments

- 5.4.1 On execution of this agreement, the Licensors will raise an invoice based on the Minimum Fee, for the period from the Commencement Date to the next 30 June or 31 December, whichever date occurs first.
- 5.4.2 For each six month period following this date, the Licensors will then raise an invoice no later 30 June or 31 December, based on the Minimum Fee.
- 5.4.3 On the Licensors' receipt of the information under clause 5.2, the Licensors must calculate the Fee in accordance with clause 5.1. If the Licensee does not comply with clause 5.2, the Licensors may issue an invoice based on the determination referred to in clause 5.3.
- 5.4.4 For the period referred to in clause 5.4.1 and 5.4.2, if the Fee exceeds the Minimum Fee invoiced, the Licensee must pay the excess to the Licensors on receipt of an invoice specifying the amount.
- 5.4.5 On the Licensors' receipt of any information under clause 8, the Licensors may issue an invoice for any additional licence fees payable.
- 5.4.6 The Licensee must pay any invoice issued by the Licensors, within 14 days of the date of invoice.
- 5.4.7 The Licensee must pay the Licensors interest at the Agreed Rate on each amount outstanding under this agreement.

## **5.5 CPI**

- 5.5.1 On 1 July of each year, the Minimum Fee will be calculated by increasing the then Minimum Fee by the percentage increase in the Consumer Price Index between the last two March Quarters.
- 5.5.2 The Minimum Fee calculated under clause 5.5.1 must be rounded to the nearest whole dollar amount.

## **5.6 Annual Financial Returns**

- 5.6.1 In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year.
- 5.6.2 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 exceeds the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensee must pay the Licensors the difference between the Licence Fee and the amount that was paid within 30 days of the date of the Licensors' invoice for such amount.
- 5.6.3 If the Licensee's Gross Revenue as provided in accordance with clause 5.6.1 is less than the total of the Licensee's Gross Revenue shown in the statements provided under clause 5.2 for the Licence Year, the Licensors must, at their option, either credit the Licensee or refund to the Licensee the difference between the Licence Fee and the amount that was paid.

## **5.7 Intent to Charge Users**

The Licensee must provide the Licensors with a minimum of 30 days notice of the Licensee's intent to charge users for access to the Website or any of the rights licensed under clause 2.1 or 2.2. The parties will negotiate in good faith the terms of any additional licence, and in the absence of any agreement to the contrary the terms of this agreement will apply to the new or altered service for a period of 60 days after commencement.

## **6. MUSIC USE INFORMATION**

Except as otherwise agreed, the Licensee must provide to the Licensors within 14 days after the end of each Quarter during the Term of this agreement, a list of all musical works Communicated on the Licensee's Service during the previous Quarter. The list must be in the form reasonably required by the Licensors and must include the following information in respect of each Work:

- (a) the title of the song;
- (b) the surnames of the writers;
- (c) the name of the artist or band who performed the work or the artist or band most commonly associated with the Work;
- (d) the duration; and
- (e) any other relevant information as may be reasonably required.

## **7. RECORDS**

The Licensee must keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to the Licensors under this agreement can be properly ascertained.

## **8. AUDIT OR EXAMINATION**

- 8.1 APRA, on behalf of the Licensors, may on 30 days' notice to the Licensee audit or examine the Licensee's books of account and other records to:
- (a) determine the correctness of any notice or payment under this agreement; or
  - (b) in the case of a failure by the Licensee to provide information in accordance with clause 5, to obtain information required to be provided under that clause.
- 8.2 The Licensee must pay the cost of the audit or examination if the audit or examination:
- (a) establishes that the information provided by the Licensee resulted in the amounts payable under this agreement being understated by more than 5%; or
  - (b) is undertaken under clause 8.1(b).

## **9. CONFIDENTIALITY**

- 9.1 Subject to clauses 9.2 and 9.3, the Licensors must not during or after the Term (except in the proper course of performance of this agreement), disclose to or authorise the disclosure to any person without the Licensee's prior written consent any information provided to the Licensors under clause 5.
- 9.2 With respect to information supplied under clause 5, the Licensors may:
- (a) use that information to determine licence fees payable to the Licensors under this agreement; and
  - (b) disclose that information to the Licensors' auditors for the purposes of an audit, and other of the Licensors' professional advisers.
- 9.3 The obligations of confidentiality set out in this clause 9 do not apply to information provided to the Licensors which is:
- (a) required to be disclosed by law; or
  - (b) in the public domain other than by breach of this clause.

## **10. TERMINATION**

- 10.1 The Licensors may immediately terminate this agreement by notice to the Licensee if the Licensee:
- (a) breaches any term of this agreement and fails to remedy the breach within 7 days after being required in writing to do so by the Licensors; or

- (b) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.

10.2 Either party may terminate this agreement by giving 3 months' notice in writing to the other party.

## **11. DISPUTE RESOLUTION**

If any dispute arises out of or in connection with this agreement, either party may submit that dispute to the Licensors alternative dispute resolution mechanism. Information about the mechanism can be obtained from APRA|AMCOS.

## **12. NOTICES**

12.1 A notice under this agreement must be in writing and may be given to a party by:

- (a) delivering it to the address of the party;
  - (b) sending it by pre-paid post to the address of the party; or
  - (c) sending it by facsimile to the facsimile number of the party,
- and the notice will be deemed to have been received by the party on receipt.

12.2 A facsimile is deemed to have been received on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the party.

12.3 Until a party gives notice of a change, the contact details for that party is:

### **Licensors**

Postal address: Locked Bag 5000, Strawberry Hills, New South Wales, 2012  
Telephone number: (02) 9935 7900  
Facsimile number: (02) 9935 7999  
Email: online@apra.com.au  
Attention: Online & Mobile Licensing Manager

### **Licensee**

Street address:

Telephone Number:

Facsimile number:

Email:

Attention:


## **13. MISCELLANEOUS**

13.1 No waiver by the Licensors of any breach of any provision of this agreement operates as a waiver of another breach of the same or of any other provision of this agreement.

13.2 This agreement is personal to the Licensee. The Licensee is not entitled to assign any of its rights without the prior written consent of the Licensors.

13.3 This agreement may only be varied by the written agreement of the parties.

13.4 In addition to the payments under clause 5, the Licensee must pay to the Licensors within 14 days after the date of an invoice issued by the Licensors an amount on account of stamp duties and taxes, including any goods and services tax, arising in respect of this agreement.

13.5 This agreement must be construed in accordance with the laws in force in the State of New South Wales and the parties agree to submit to the jurisdiction of New South Wales Courts.

13.6 Unless the context otherwise requires, a word which denotes the singular denotes the plural and vice versa.

**SIGNED AS AN AGREEMENT**

Signed for and on behalf of **Australasian Mechanical Copyright Owners Society Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Frank Rodi

\_\_\_\_\_  
Name of authorised person (print)

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

Signed for and on behalf of **Australasian Performing Right Association Limited** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Online & Mobile Licensing Manager

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Frank Rodi

\_\_\_\_\_  
Name of authorised person (print)

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

Signed for and on behalf of the **Licensee** in the presence of:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Office held (print)

\_\_\_\_\_  
Name of authorised person (print)

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness (print)

**APRA and AMCOS Quarterly Statement**

Church Service Channel

For the calendar quarter ending \_\_\_\_\_ (please complete for each Quarter)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee</b>	
<b>Account Number</b>	

**Part 2 – Gross Earnings**

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Certification**

I confirm I am an authorised employee of the Licensee and that the information and financial figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Date</b>	

**AMCOS/APRA Annual Financial Statement**

Church Service Channel For the licence year ending 30 June

(please complete)

**Part 1 – Name of Licensee and Account Number**

<b>Name of Licensee</b>	
<b>Account Number</b>	

**Part 2 – Gross Earnings**

**Licensee's Gross Revenue** means all monies and the monetary value of all benefits receivable directly or indirectly in connection with any exploitation of the rights granted under this agreement, including all monies and the monetary value of all benefits receivable in relation to the Licensee's online music service;

<b>Gross Revenue</b>	<b>\$</b>
Plus bad debts written off in previous periods and subsequently recovered	+ \$
Less bad debts written off in period	- \$
<b>TOTALS</b>	<b>\$</b>

**Part 3 – Certification**

Clause 5.6.1 of the Schedule states: "In order to enable the Licensors to make the calculation of the Licence Fees payable under this agreement, the Licensee must provide within 90 days after 30 June in each Licence Year during the term audited verification (current form is attached at Annexure C) of the Licensee's Gross Revenue in the previous Licence Year".

**FIGURES MUST BE CERTIFIED BY THE LICENSEE'S NORMAL EXTERNAL AUDITORS OR ACCOUNTANT.**

I confirm the information and figures provided above are a true and accurate record.

<b>Signature of Person Certifying</b>	
<b>Name of Position Certify</b> (please print)	
<b>Position of Person Certifying</b> (please print)	
<b>Name of Company</b> (please print)	
<b>Date</b>	