



The terms and conditions of this Agreement are attached

**Signed for and on behalf of MCPS:**

**Name:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Signed for and on behalf of PRS:**

\_\_\_\_\_ **Date:** \_\_\_\_\_

**Name:** \_\_\_\_\_

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

\_\_\_\_\_ **Date:** \_\_\_\_\_

**Name:** \_\_\_\_\_

## TERMS AND CONDITIONS

### 1. Definitions

**"Accounting Statement"** means the MCPS-PRS Ringtones revenue reporting form as set out in Schedule 2 to this Agreement.

**"Agreement"** means these terms and conditions and the schedules to these terms and conditions.

**"Alliance"** means MCPS-PRS Alliance Limited whose registered office is at 29-33 Berners Street London W1T 3AB.

**"Applicable Revenue"** means the Gross Revenue less VAT (or other equivalent sales tax, where applicable).

**"Audio-Visual Material"** means any specific presentation of Musical Works in synchronisation or otherwise with images, whether moving or still.

For the avoidance of doubt (but without prejudice to the express restrictions contained in this Agreement), the following shall not be treated as Audio-Visual Material for the purpose of this Agreement:

- (a) the fact that ordinary web pages (or equivalent) are visible to the User while the User is listening to a preview or to a Ringtone; or
- (b) the fact that the Device used to pay the Ringtone generates random visual images while the Ringtone is playing;

provided in both cases, that the User would not reasonably be expected to associate the Repertoire Works being played with the images presented or think that there is any deliberate association by the Licensee of the Repertoire Works with such images.

**"Agency Territories"** means the territories listed in Schedule 4 (each an "Agency Territory"), as may be amended by the Licensors from time to time upon notice to the Licensee.

**"CDPA"** means the Copyright Designs and Patents Act 1988, as amended from time to time.

**"Device"** means a portable or static electronic communications device which is capable of allowing Users to communicate with each other via wire and/or wireless networks and which is capable of playing a Ringtone.

**"Dramatico-Musical Work"** means any ballet, opera, operetta, musical, musical play or work of a similar nature.

**"Gross Revenue"** shall have the meaning set out in schedule 1.

**"IVR"** means an interactive voice response system: a software application that allows a telephone caller to

interact with a computer through a combination of voice telephone input and touch-tone keypad selection and provides appropriate responses in the form of music, voice, fax, callback, e-mail or other media. Each response by the caller triggers another response from the computer until the caller has completed their transaction.

**"Musical Work"** means any work (as defined in the CDPA) consisting of music and any lyrics or words written to be used with the music (if applicable). It includes any part of such a work.

**"Music Service Provider"** means the party which, in relation to a Ringtone, most closely meets the following criteria:

- (a) contracts with the purchaser of the Ringtone (including when provided for free) in relation to the provision of the Ringtone;
- (b) sets and controls the price the purchaser of the Ringtone pays;
- (c) can fully report on all elements of Gross Revenue (including relevant advertising revenues);
- (d) can fully report on all elements of music usage (or can procure such reporting);
- (e) controls how Ringtone content is offered and bundled;
- (f) carries out or authorises, on their instruction, the carrying out of the copyright restricted acts licensed under this Agreement.

**"Music Usage Information"** means the information required in the reporting form as set out in Schedule 3 to this Agreement.

**"Music Videogram"** means any audio-visual production:

- (a) which has as the main feature of the soundtrack thereof a recording of a single Repertoire Work copies of which recording have been or are intended to be released in digital or physical form for sale to the general public; and
- (b) the making of which was carried out by or on behalf of the record company releasing that recording or by or on behalf of the main artist(s) featured in that recording.

**"Permitted Excerpts"** refers only to Dramatico-Musical Works and means excerpts where the use of all such excerpts in any Audio-Visual Material complies with all the following limitations:

- (a) the total duration of the excerpts does not exceed 20 minutes;
- (b) the use is not a "potted version" of the Dramatico-Musical Work;
- (c) the use is not or does not cover a complete act of the Dramatico-Musical Work;
- (d) each excerpt is not presented in a "dramatic form" as defined below; and
- (e) as regards ballets specifically devised for television or excerpts from existing ballets, the total duration does not exceed five minutes.

A dramatic form shall be deemed to be created only by a performance in which there is a distinct plot depicted by actors and where the story of the Dramatico-Musical Work and/or its associated words is woven into and carries forward the plot and its accompanying action (a dramatic form shall not, for example, be deemed to be created by the use of costume, scenery, and/or any dance routine merely to provide an acceptable presentation of the work). For the purposes of this paragraph the word "actors" shall include actors, singers, mimics and/or puppets.

"**Quarter**" means each of the periods from 1<sup>st</sup> January to 31<sup>st</sup> March, 1<sup>st</sup> April to 30<sup>th</sup> June, 1<sup>st</sup> July to 30<sup>th</sup> September, and 1<sup>st</sup> October to 31<sup>st</sup> December, throughout the Term.

"**Realtone**" means a Ringtone incorporating a Repertoire Work (or part thereof) where the sound recording incorporated into such Ringtone consists of a real sound recording as opposed to a ringtone which is a 'polyphonic' or 'monophonic' ringtone (as those terms are commonly understood).

"**Relevant Party**" means a party which is involved in the operation of the Licensee's Ringtones service (in accordance with the terms of this Licence) as set out in clause 10.8.

"**Repertoire Work**" means:

- (a) in relation to the licence granted by MCPS, each Musical Work (or such part of a Musical Work) the copyright in which is owned or controlled, from time to time, in the United Kingdom by MCPS or a member of MCPS or an affiliated society or an affiliated society member PROVIDED THAT it shall exclude any Musical Works that a member of MCPS or an affiliated society has withdrawn or withheld from this Agreement; and
- (b) in relation to the licence granted by PRS, each Musical Work (or such part of a Musical Work) the copyright in which is owned or controlled, from time to time, in the United Kingdom by PRS or an affiliated society or an affiliated society member.
- (c) but excluding in all cases:

- (i) any Musical Works licensable by CELAS GmbH;
- (ii) any Musical Works that the Licensors have notified to the Licensee as being excluded.

"**Ringtone**" means a short audio recording incorporating a Repertoire Work (or part thereof) the primary purpose of which is to notify the User of an incoming call or message on a Device.

"**Royalty Fee**" means the sum set out in clause 4.

"**Term**" means the period starting on the Commencement Date and ending upon 31 December 2009 unless terminated earlier in accordance with clause 8.

"**United Kingdom**" means the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.

"**User**" means a person who has ordered from the Licensee a Ringtone for a Device, or the intended recipient of the Ringtone where that person is different from the person who ordered the Ringtone.

"**VAT**" means value added tax pursuant to the Value Added Tax Act 1994 and each like tax imposed in addition to or in substitution therefore.

## 2. Grant of Licence

2.1 Subject to the terms and conditions contained in this Agreement and conditional upon compliance with such terms and conditions, MCPS grants to the Licensee on a non-exclusive basis during the Term the right to:

- (a) reproduce Repertoire Works onto servers in the form of Ringtones anywhere in the World solely for the purposes of the Licensee:
  - (i) transmitting the same to Users in the United Kingdom and the Agency Territories (for private and domestic use); or
  - (ii) providing a free of charge on-demand streamed-only clip to potential Users in the United Kingdom and the Agency Territories for the purpose of such User previewing the same in deciding whether to purchase a Ringtone; or
  - (iii) providing an IVR service to potential Users in the United Kingdom and the Agency Territories, through which Users are charged via the cost of the telephone call to purchase a Ringtone or potential Users are charged to preview streamed-only clips for the purposes of deciding whether to purchase a Ringtone; and

- (b) reproduce, on a temporary basis only, Repertoire Works in the form of Ringtones anywhere in the World in the form of temporary server or network copies solely for the purposes of the transmission of the Ringtone from the originating server to a User's Device in the United Kingdom or an Agency Territory;
- (c) reproduce or authorise the reproduction of Repertoire Works in the United Kingdom and the Agency Territories in the form of Ringtones on Users' Devices.

For the avoidance of doubt (but subject to all terms of this Agreement), it is intended that this Agreement licenses all reproductions of Repertoire Works necessary in the ordinary operation of the Licensed Services.

2.2 Subject to the terms and conditions contained in this Agreement and conditional upon compliance with such terms and conditions, PRS licenses to the Licensee on a non-exclusive basis during the Term the right to:

- (a) communicate to the public (as that act is defined in the CDPA) in the United Kingdom and the Agency Territories Repertoire Works in the form of Ringtones to Users solely for the purpose of (i) delivering such Ringtone to a User's Device and (ii) allowing a User to preview an on-demand streamed-only clip of a Ringtone in order to decide whether to purchase it; and
- (b) authorising the public performance (as that term is defined in the CDPA) in the United Kingdom and the Agency Territories of Repertoire Works in the form of Ringtones resulting from the playing in public of Ringtones on Users' Devices as part of the ordinary use of such Devices.

2.3 The Licensee shall use appropriate encryption measures to prevent the unauthorised supply (and any onward-supply from one Device to another) or reproduction of Ringtones incorporating Repertoire Works licensed under this Agreement. The minimum requirement for such encryption measures shall be the so-called 'forward-lock' specifications of the industry standard Open Mobile Alliance DRM version 1.0.

2.4 The Licensee shall comply at all times with the PhonepayPlus Code of Practice (eleventh edition as amended) (or any future edition or code of practice which may replace it) to the extent that the PhonepayPlus Code of Practice is applicable to the Ringtone service; and all applicable codes of practice or guidelines published by Ofcom, or any successor organisation.

2.5 The Licensee shall include the following provisions (or substantially similar provisions) in its terms and conditions for the supply of Ringtones to Users:

- (a) that any Ringtones distributed to Users may only be copied for private non commercial use as a Ringtone or as permitted by applicable law; and
- (b) that, save as may be permitted by law, no attempt shall be made by Users to interfere with, remove or alter any rights management, encryption or identifier information that may be associated with any Ringtone or any technical measures associated with any Ringtone which are designed to prevent or restrict the unauthorised use of such Ringtone.

The Licensee shall, upon request by the Licensors, supply the Licensors forthwith with a copy of the Licensee's standard terms and conditions applying to the provision of any or all of its Ringtone services.

2.6 The provisions of clauses 3.2, 3.6, 4.1, 4.2, 4.4 and 4.5 shall not apply to a particular Repertoire Work where the owner of the relevant rights in such Repertoire Work has granted permission to the Licensee for the use of that Repertoire Work on the Licensed Services in the manner described under the relevant clause on such terms and conditions (including, if required, the payment of royalties or fees in addition to those specified under this Agreement) as the owner thinks fit.

### **3. Limitations on Licence**

3.1 The licences granted under clause 2 of this Agreement are valid only insofar as the Licensee is the Music Service Provider in relation to the Licensed Services.

3.2 The licences granted under clause 2 of this Agreement do not apply to any Ringtone which incorporates more than 1 minute of a Repertoire Work.

3.3 For the avoidance of doubt, this Agreement does not license the incorporation of Repertoire Works into Audio-Visual Material to be reproduced or communicated to the public as a Ringtone and does not include any "synchronisation" licence.

3.4 For the avoidance of doubt, the licences granted under clause 2 of this Agreement shall not authorise the manufacture or distribution of physical products containing Ringtones, such as (without limitation) the distribution of compact discs (or any other type of physical media) incorporating Ringtones.

3.5 Subject to clause 2.6, the licence granted under clause 2.1 of this Agreement shall not permit the

use of Repertoire Work(s) with any advertising or sponsorship of whatsoever nature where:

- (a) such Repertoire Work(s) are incorporated into such advertising or sponsorship; or
- (b) such Repertoire Work(s) are otherwise presented in such a way that a reasonable person might associate the Repertoire Work(s) with the advertising or sponsorship.

3.6 Subject to clause 2.6, for the avoidance of doubt (but without prejudice to the generality of clause 3.5), the licences granted under this Agreement shall not apply to any Repertoire Work(s) made available for the purpose of (whether in whole or in part):

- (a) directly or indirectly encouraging the User to purchase or obtain goods or services of whatsoever nature (other than music via the Licensed Service); or
- (b) promoting the branding of the Licensee, any affiliate of the Licensee or any third party;

in such a manner that:

- (i) one or more particular Repertoire Works, composers or writers are associated with such promotion; or
- (ii) a reasonable person might assume that there was an association between particular Repertoire Works, composers or writers and such promotion.

3.7 The licences granted under this Agreement do not apply to any graphic presentation (meaning, without limitation, lyrics, notation or scores) of Repertoire Works.

3.8 Subject to clause 2.6, where any Repertoire Work forms part of any Dramatico-Musical Work, the licence granted under clause 2.1 of this Agreement shall not apply, in relation to Audio-Visual Material, to the reproduction of:

- (a) the whole Dramatico-Musical Work; or
- (b) any excerpt(s) from such Dramatico-Musical Work unless all of the following circumstances apply:
  - (i) that which is copied or communicated to the public under this Agreement contains only excerpt(s) within the definition of Permitted Excerpts; and
  - (ii) neither of the Licensors has notified the Licensee in writing that their member or an affiliated society member objects to the reproduction of any such Repertoire Work.

3.9 Subject to clause 2.6, where any Repertoire Work forms part of any Dramatico-Musical Work, the licence granted under clause 2.1 shall not apply, in relation to material other than Audio-Visual Material, to the reproduction of the whole or substantially the whole Dramatico-Musical Work unless:

- (a) the Licensee has specifically notified the Licensors that it wishes to reproduce the whole or substantially the whole work; and
- (b) the Licensors have notified the Licensee that all relevant members consent to such reproduction.

For the purposes of this clause 3.9, the expression "Dramatico-Musical Work" shall include any version of such work (with or without cuts, additions, interpolations or the like) which has been publicly performed. Furthermore, for the avoidance of doubt, substantially the whole work shall be deemed to be reproduced where all or nearly all the individual songs or other music included in the work are reproduced.

3.10 In any event, any licence hereunder only applies to the relevant Repertoire Works and not (by way of example only) to any underlying dramatic or literary work which forms part of the Dramatico-Musical Work or which such Dramatico-Musical Work is based on or uses.

3.11 Subject to clause 2.6, the licences granted under this Agreement shall not extend to or permit any adaptation of any Repertoire Work to be copied or communicated to the public as part of a Licensed Service unless the relevant member has consented to such adaptation. By way of example only, this applies to:

- (a) any sampling (meaning the taking of part of the music and/or lyrics of a Repertoire Work and incorporating such part into another Musical Work) or the communication to the public or reproduction in the form of a sample of such part of a Repertoire Work; or
- (b) using with music lyrics other than those written to be used with the music or authorised for use with the music; or
- (c) using with lyrics music other than that written to be used with the lyrics or authorised for use with the lyrics.

However, subject always to clause 3.17 and provided that such alterations do not amount to an adaptation of a Repertoire Work and do not contravene clause 3.13, then this Agreement shall apply in relation to Repertoire Works that have been modified (including music and/or lyrics) for the purpose of satisfying the requirements of the relevant recording.

Notwithstanding the above, the licences granted under this Agreement do apply to the production and inclusion in a Ringtone of (i) clips of Repertoire Works of up to 60 seconds and (ii) Repertoire Works in a form excluding lyrics.

3.12 Subject to clause 2.6, the licences granted under this Agreement shall not extend to:

- (a) the reproduction or communication to the public of any Repertoire Work or part thereof in the form of a parody or burlesque of any Repertoire Work or of any composer or writer of any Repertoire Work or any band or other group of artists which includes any composer or writer of any Repertoire Work; or
- (b) the use of any Repertoire Work in any context which the Licensee ought reasonably to consider as being likely to be insulting or detrimental to the composer featured on the commercially released sound recording of the music or the relevant member or affiliated society member.

Without prejudice to (i) the Licensors' right to remove certain Musical Works within their repertoire from the Repertoire Works to be licensed under this Agreement and (ii) the moral rights of the composers and writers of Repertoire Works, monophonic and polyphonic Ringtones which incorporate versions of Repertoire Works will not ordinarily be a breach of (a) or (b) above.

3.13 Any additional limitations in relation to affiliated societies' rights to grant the licences set out in clause 2 of this Agreement which have been notified to the Licensors shall be notified to the Licensee in writing (which may include by email) and shall be binding no less than 10 days following such notice. Where any restriction of a material or adverse nature is added, the Licensee shall have the right to terminate this Agreement by giving written notice to the Licensors.

3.14 All rights not specifically granted under this Agreement are hereby reserved.

3.15 This Agreement only covers Repertoire Works. It does not extend to other rights or interests, including (by way of example only), rights in sound recordings, films, dramatic works or performers' rights. The Licensee is required to obtain the appropriate waivers, consents and/or licences from the person(s) owning or controlling rights in relation to sound recordings containing Repertoire Works or performers of that Repertoire Work.

3.16 It is the responsibility of the Licensee to obtain all necessary licences in relation to any Musical Work which is not, or to the extent that it is not, a Repertoire Work, and no licence is granted under this Agreement in relation thereto.

3.17 Nothing in this Agreement affects the moral rights of authors of Repertoire Works whether subsisting in the United Kingdom or any other territory.

#### **4. Quarterly Advance and Royalty Fees**

4.1 In consideration of the licence granted under this Agreement, the Licensee shall pay to the Licensors:

- (a) the Quarterly Advance; and
- (b) subject to clause 4.3, the Royalty Fee.

4.2 The Royalty Fee shall be:

- (a) in respect of Realtones, the greater of:
  - (i) 12% of Applicable Revenue; and
  - (ii) 10p in respect of each such Realtone downloaded by a User; or
- (b) in respect of all Ringtones other than Realtones, the greater of:
  - (i) 15% of Applicable Revenue; and
  - (ii) 15p in respect of each such Ringtone downloaded by a User.

4.3 The Quarterly Advance is recoupable against the Royalty Fee. If any part of the Quarterly Advance remains unrecouped at the end of a Quarter, such unrecouped amount may be carried over to subsequent quarters, but for the avoidance of doubt, shall not (except as set out in clause 4.5 below) have the effect of reducing any subsequent Quarterly Advance. If any part remains unrecouped upon termination or expiry of the Agreement, the Licensors shall return such part to the Licensee.

4.4 The Licensee shall be entitled to provide free streaming-only clips of a Ringtone of duration up to 30 seconds duration (without payment of any minimum royalty (as referred to in clauses 4.2(a)(ii) and 4.2(b)(ii) provided that such clip is used solely to promote the sale of such Ringtone by the Licensee. However and for the avoidance of doubt, any revenue falling within the definition of Gross Revenue which is received (or receivable) as a result of such activity which is received (or receivable) shall be included for the purposes of calculating royalties due under this Agreement.

4.5 The Quarterly Advance is intended to represent the expected royalties due for each Quarter. The Quarterly Advance shall be reviewed at the end of each calendar year. It may also be reviewed during a calendar year if the royalties calculated for any particular Quarter under Schedule 2 differ from the Quarterly Advance by 20% or more.

- 4.6 Where, in relation to any particular Quarter, the Licensee fails to provide by the required date the information required under the Agreement to allow the calculation referred to in clause 4.2, then the Licensors shall be entitled to fix the Royalty Fee based on (a) the Royalty Fees payable in previous Quarters and (b) any other relevant factors which could reasonably lead the Licensors to believe that the Royalty Fees payable would be materially different to those paid or payable in previous Quarters.
- 4.7 The licence fees referred to in clause 4.1 are subject to VAT or other equivalent sales tax if applicable. The Licensee shall pay to the Licensors VAT (or other tax where applicable) at the rate or rates from time to time in force on any sums payable under this Agreement.
- 4.8 Insofar that (i) a Musical Work is not in copyright in the relevant part of the United Kingdom and the Agency Territories, or (ii) it is not a Repertoire Work, credit shall be given by either or both of the Licensors (as the case may be) for any overpayment of royalties. The parties shall discuss in good faith the mechanism for calculating and granting any rebate for Musical Works which are not Repertoire Works. Unless and until agreed otherwise, the terms set out in this Agreement shall apply, it being acknowledged by the Licensors that it may then be necessary to make adjustments to payments that have already been made by the Licensee to the Licensors as from the Commencement Date so as to allow for royalties paid on Musical Works that are not Repertoire Works.
- 4.9 The Licensors confirm and warrant that the Alliance is authorised to receive all payments under this Agreement as agent on behalf of the Licensors, each of their members and their affiliated societies.

## **5. Payment of Quarterly Advance and Royalty Fees**

- 5.1 The Quarterly Advance shall be payable by direct debit on the first day of each Quarter. Where the Commencement Date is not the first day of a Quarter, the first Quarterly Advance payment shall be pro-rated (according to the Commencement Date).
- 5.2 Within 21 days of the end of each Quarter the Licensee shall provide to the Licensors (at the address notified by the Licensors to the Licensee) a fully and accurately completed Accounting Statement.
- 5.3 If the Royalty Fee for any given Quarter exceeds the Quarterly Advance, then the Alliance shall, on behalf of the Licensors, send the Licensee an invoice for the required additional licence fees in respect of that Quarter. The Licensee shall pay such amount to the Licensors within 31 days of

the date of such invoice. If, in respect of a Quarter, the Licensee is late in submitting a fully and accurately completed Accounting Statement or Music Usage Information, the Licensors shall be entitled to reduce the period for payment of any additional licence fees for that Quarter by a corresponding period of time.

- 5.4 Without prejudice to any other right or remedy of the Licensors, and without imposing an obligation to accept late payment, where any fees payable under this Agreement are not paid by the due date, the Licensee shall pay interest on such late payment calculated on a daily basis at an annual rate of 3% over the base rate, current from time to time, of National Westminster Bank Plc payable from the date on which the payment should have been made to the date on which the payment was made.

## **6. Reporting**

- 6.1 In relation to any and all Repertoire Works reproduced and communicated to the public in the form of Ringtones under this Agreement, the Licensee will deliver the Music Usage Information to the Licensors or to the Licensors' duly authorised agent (details of which will be provided to the Licensee) quarterly within one month of the end of the Quarter to which reporting relates.
- 6.2 The Licensee must also supply the Licensors with any further information or documentation in its possession, power, custody or control (and use its reasonable endeavours to supply the Licensors with any further information or documentation not in its possession, power, custody or control) reasonably requested by the Licensors at any time, in order to enable the Licensors to verify the Repertoire Work(s) which have been reproduced or distributed via all Licensed Services.
- 6.3 Where Ringtones are accessible by Users only on payment of subscription or other similar payment (or access is otherwise limited or controlled in some way), the Licensee shall, upon request of the Licensors, use reasonable endeavours to ensure that such Ringtones are at all times accessible by the Licensors (and the Alliance) free of charge for the purposes of the Licensors verifying that the Licensee is acting in accordance with this Agreement. For the avoidance of doubt, the Licensee shall not be required to provide free Ringtones to the Licensors.
- 6.4 The Licensee acknowledges that the Licensors have a responsibility to maximise the efficiency of their reporting to their members and affiliated societies. Therefore, if the Licensors wish to make any reasonable upgrade or alteration of whatsoever nature to the Music Usage Information or data specification referred to in Schedule 3 during the Term, the Licensee agrees to use its reasonable endeavours to implement the changes required as soon as is reasonably practicable,

PROVIDED THAT the Licensors shall not request that the Licensee implements the change in less than six months from the making of the request, and in each case of a change the following procedures shall apply:

- (a) the Licensors shall give full details thereof in writing to the Licensee;
- (b) the Licensee will respond in writing within 4 weeks of receipt of the request, stating the date by which it commits to comply with the change and the Licensors shall provide full assistance to the Licensee in order to assist the Licensee in complying with the change; and

the parties will then finalise the details and undertake tests to ensure that the change operates satisfactorily within the terms of this Agreement, satisfactory operation of which will be deemed acceptance of the change and Schedule 4 and/or the definition of Music Usage Information will be amended or replaced accordingly. For the purpose of this clause, in determining what change may be reasonable, regard shall be had to the DDEX project.

- 6.5 Without prejudice to any right in law that the Alliance may have to obtain such information, the Licensee shall not be obliged to provide to the Licensors any information which identified Users or which otherwise constitutes "personal data" as defined in the Data Protection Act 1998. For the avoidance of doubt, the Licensee must still provide all required Music Usage Information or other information to be provided under this Agreement) but is entitled to remove any element of it which reveals the identity of Users or otherwise causes it to constitute "personal data".

## **7. Auditing**

- 7.1 The Licensee shall keep and make available for inspection upon not less than 30 days' notice (and shall procure that each Relevant Party keeps and makes available for inspection upon reasonable notice), both during and for twelve months after termination of this Agreement, proper, detailed books and records relating to (a) the use of all Musical Works and whether they use thereof is in accordance with the terms of this Agreement, and (b) any income or other consideration received by or on behalf of the Licensee in relation to the Licensed Services, together with any supporting documentation relating thereto covering the period up to six years prior to the date of notification of audit.
- 7.2 For the purposes of this clause 7, the Licensee shall allow during normal business hours and upon not less than 30 days' notice (and shall procure that each Relevant Party shall allow) access to its premises to inspect relevant accounting records, but not more than once per annum. The duly

authorised representatives (who shall be external qualified accountants or auditors unless otherwise agreed between the parties) of the Licensors shall have such access to the Licensee's premises and shall be entitled to inspect, make extracts and take copies of any of the information and/or documentation available and to carry out such work as is, in their reasonable opinion, considered necessary to verify compliance with the provisions of this Agreement.

- 7.3 If tests under any audit and verification process indicate under-payment of the correct Royalty Fee during the period under audit, then, without prejudice to the Licensors' other rights under this Agreement, the Licensee shall pay the amount of the underpayment plus interest based on the period from which the correct fee should have been paid to the Licensors to the date when it was actually paid (at the rate set out in clause 5.4).
- 7.4 If any audit and verification process discloses (a) under-payment of more than 7.5% of the correct Royalty Fee during the period under audit and/or (b) failures to report correctly (so as to affect a distribution by the Licensors to their Members) amounting to at least 7.5% of the music usage during the period under audit, then, without prejudice to the Licensors' other rights under this Agreement, the Licensee shall pay, in addition to the payment referred to in clause 7.3, the Licensors' reasonable costs of such audit and verification within 28 days of receipt of the Licensors' VAT invoice therefor.
- 7.5 If tests under any audit and verification process indicate over-payment of the correct Royalty Fee during the period under audit, then the Licensors shall, as soon as is reasonably practical, pay the amount of the overpayment back to the Licensee (but, for the avoidance of doubt, no interest shall be payable unless the overpayment is a result of an act or omission of the Licensors (in which case interest shall be payable at the rate set out in clause 5.4)). However, where the overpayment does not result from an act or omission of the Licensors and the Licensors have already distributed such overpayment to their members and/or their affiliated societies, the Licensors shall be entitled to deduct its reasonable internal and/or external costs in administering the payment back of the overpayment.
- 7.6 The Licensors shall not (and shall procure that their representatives shall not), without the Licensee's written consent, disclose to any third party any confidential information of the Licensee (so long as it remains confidential) received in the course of an audit carried out under this clause 7, save that such confidential information may be disclosed to the Licensors' directors, board sub-committee members, officers, employees and professional advisors (solely where such persons are under a duty of confidentiality in relation to information so received and the Licensors shall be

liable to the Licensee in respect of any breach of such confidentiality obligation) solely for purposes connected with this Agreement.

7.7 For the avoidance of doubt, books, records and accounting records as referred to in clauses 7.1 and 7.2 above shall include data, information and records held on computers.

7.8 The Licensee shall, if requested by the Licensors, provide a statement from its auditors (but not more than once per year) confirming that the financial information submitted by the Licensee for the relevant requested period is in accordance with the actual Gross Revenue (as defined under this agreement) for that period.

## **8. Termination and effect of termination**

8.1 The Licensee may terminate this Agreement by giving three months' written notice to the Licensors at any time.

8.2 Either party shall have the right to terminate this Agreement immediately by written notice to the other party if:

- (a) the other commits a material breach of this Agreement which is not capable of remedy; or
- (b) the other commits a material breach of this Agreement which is capable of remedy but which has not been so remedied within 14 days of notice thereof; or
- (c) the other goes into receivership or any resolution is passed for its winding-up or liquidation (other than for the purposes of reconstruction or amalgamation) or is otherwise unable to pay its debts.

8.3 Upon termination of this Agreement all licences granted hereunder shall terminate and the Licensee shall immediately cease to be licensed by the Licensors for the reproduction or communication to the public of Ringtones containing Repertoire Works. Termination shall be without prejudice to the ability of Users to retain a copy of a Ringtone supplied to them prior to the date of termination.

8.4 Clauses 4, 5, 6, 7 and 9 shall survive the termination of this Agreement, but only in relation to the Licensee's activities during the Term.

## **9. Notices**

9.1 Except where expressly stated otherwise, any notice or other written communication given under or in connection with this Agreement shall only be effective if it is in writing. Faxes and e-mails are permitted save that notices under clause 8 of this Agreement shall not be served by e-mail. In the absence of any legitimate electronic

signature system, either party shall be permitted to require the confirmation in writing (signed by an authorised signatory) of any notice originally sent by email.

9.2 The address for service of any party shall be its registered office marked for the attention of the Chief Executive or Managing Director, or, if any other address or addressee for service has previously been notified to the server, to the address so notified. A single notice served on or sent to the Alliance and addressed to either Licensor shall be treated as validly served on both Licensors.

9.3 Any such notice or other written communication shall be deemed to have been served:

- (a) if personally delivered, at the time of delivery;
- (b) if posted, at the expiry of two business days or in the case of airmail four business days after it was posted;
- (c) if sent by facsimile message or e-mail, at the time of receipt of transmission (if received during normal business hours that is 09.30 to 17.30 local time) in the place to which it was sent or (if not received during such normal business hours) at the beginning of the next business day at the place to which it was sent.

9.4 In proving service of a notice it shall be sufficient proof that personal delivery was made, or that such notice or other written communication was properly addressed stamped and posted or in the case of a facsimile message or e-mail that an activity or other report from the sender's facsimile machine or computer can be produced in respect of the notice or other written communication, in the case of a fax, showing the recipient's facsimile number and the number of pages transmitted.

## **10. Miscellaneous**

10.1 The parties shall (and shall procure that any other necessary party within its control shall) execute all such documents and do all such acts and things as may reasonably be required on or subsequent to completion of this Agreement for securing each of the obligations of the respective parties under this Agreement.

10.2 This Agreement has been granted by the Licensors on the basis of the representations made by the Licensee in the process of applying for this Agreement, and in particular the information provided by the Licensee in the 'Application Form (Ringtones)'. If any of those representations are materially incorrect, the licence granted under this Agreement shall not apply. The Licensee must notify the Licensors immediately of any material changes in any of the

facts and matters express or implied set out in the answers to the 'Application Form (Ringtones)' and the licence granted under this Agreement shall not apply in any such case unless the Licensors agrees otherwise in writing. For the avoidance of doubt, the Licensee seeking to supply Ringtones via additional services, clients or websites (to those included on the original Application Form) shall be deemed to be a 'material change'.

10.3 This Agreement sets forth the entire agreement of the parties in relation to the subject matter hereof and each of the parties hereto acknowledges that it has not entered into this Agreement in reliance on any representation or term not contained herein. This Agreement shall not be modified or varied except by a written instrument signed by the parties hereto.

10.4 Except as set out in clause 9.4 below, this Agreement is personal to the Licensee and the Licensee must not assign, sub-license or otherwise transfer any of its rights or obligations under this Agreement whether in whole or in part without the prior written consent of the Licensors.

10.5 Subject always to the other provisions of this Agreement, the Licensee shall be permitted to use the services of a third party in operating its Ringtone services (including the performance of its obligations under clause 6 above) provided that:

- (a) the Licensee retains complete control and direction over the provision of Ringtones to Users; and
- (b) the Licensors are able to audit such third party in accordance with clause 7 above.

10.6 No party to this Agreement shall be liable to the other parties for any failure to perform any or all of its obligations hereunder is due to or attributable to acts, events, omissions or accidents beyond the reasonable control of the defaulting party, including a so-called act of God, fire, lockout, strike or other official labour dispute, union problem, riot or civil commotion, terrorism, satellite failure, failure of technical facilities not within the reasonable control of the defaulting party, act of public enemy, enactment, rule or order or act of government, such act or event being deemed an event of force majeure. Each party to this Agreement undertakes to use all reasonable endeavours to notify the other parties as soon as practicable of the incidence and termination of any event or force majeure.

10.7 No delay or omission in exercising any right or remedy hereunder shall operate as a waiver thereof or of any other right or remedy and no single or partial exercise thereof shall preclude any other or further exercise thereof or the exercise of any other rights or remedies. No waiver shall be binding or effectual for any

purpose unless expressed in writing and signed by the party giving it and any such waiver shall be effective only in the specific instance and for the purpose given.

10.8 If this Agreement creates any rights which would in the absence of this provision be enforceable by any person not a party to this Agreement, such rights shall not be enforceable, and the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Agreement.

10.9 This Agreement shall be construed according to the laws of England and Wales and the parties agree to submit to the jurisdiction of the English Courts.

### **SCHEDULE 1 Definition of Gross Revenue**

1. "**Gross Revenue**" means, subject to the provisions of this Schedule:

(a) all revenue received (or receivable) by the Licensee from Users (and other purchasers of Ringtones if not Users), whether in the form of a la carte or subscription payments (including, but not limited to, sign-up and termination fees for subscriptions and so-called "ringtone clubs"), in consideration for the provision of Ringtones (including revenue received (or receivable) in consideration for the browsing of available Ringtones on a premium rate telephone line and also including revenue received or (receivable) when the Ringtone is not actually delivered provided no refund has been made); and

(b) all revenue, including by way of sponsorship and commissions, received (or receivable) by the Licensee as a result of the inclusion of third party advertising "in-stream" or "in-download" as part of a Ringtone, being advertising placed immediately at the start, end or during the actual delivery (by way of streaming as a "preview" clip or downloading as applicable) of a Ringtone to a User; and

(c) all revenue, including by way of sponsorship and commissions, received (or receivable) by the Licensee as a result of the inclusion of third party advertising heard by a User when choosing and/or ordering a Ringtone through any telephone based ringtone ordering service (for example, a service by which ringtones are ordered using a standard or premium rate telephone and/or IVR service); and

(d) all revenue, including by way of sponsorship and commissions, received (or receivable) by the Licensee as a result of the placement of third party advertising on a Relevant Page (as defined below) and any page which directly

follows such Relevant Page, the User having selected to download a Ringtone (or stream a preview clip), leading up to and including the downloading or streaming of the Ringtone;

and in each of the above cases such revenue shall, for the avoidance of doubt, include any such revenue whether received or receivable by the Licensee or any associate, affiliate, agent or representative of such party.

The Licensee shall notify the Licensors promptly of its intention to first introduce advertising or sponsorship within its Ringtone service where it would give rise to revenue falling within (b), (c) or (d) above.

2. **"Relevant Page"** means a page:

(a) from which Ringtones (whether for download or streaming as preview clips) are "actually offered" to Users. A Ringtone is "actually offered" to Users from a page if Ringtones are enabled or made directly available (for preview or download) from that page to the User to download or stream from that page (in most cases this will be where such Ringtones can be purchased by the User or their download or stream otherwise takes place); but only:

(b) where such offering of Ringtones forms all or the predominant part of that page, being for the purposes of this Agreement where the offering comprises 75% or more of the space on that page excluding space occupied by any advertising. For the purposes of performing the foregoing calculation, the "offering" shall include any content which directly relates to the actual offering of the Ringtone pursuant to sub-paragraph (a) above (by way of example, but without limitation, an image of the artist or artwork closely associated with the offering, reviews of the offering, credits, and, where applicable, music player controls).

3. Where content "actually offered" from a single page includes a combination of Ringtones and content licensable under the Joint Online Licence scheme operated by the Licensors (for which the Licensee is the party required to hold a licence from the Licensors) ("mixed content"), the definition of Relevant Page set out in paragraph 2 above shall be modified to include all content under this Agreement and that Joint Online Licence in calculating whether the offering of Ringtones and content licensable under the Joint Online Licence together comprises 75% or more of the space on the single page. Where mixed content does comprise 75% or more of the space on the page, the royalty rate (in relation to all of the mixed content on that Relevant Page) shall be 10% of the Applicable Revenue (in respect of revenue falling within paragraph 1(d) above) unless either party can show that a different rate

should reasonably apply. When determining whether another rate should reasonably apply, the parties may have regard to the relative amount of mixed content on the Relevant Page (as between Ringtone and other content under the Joint Online Licence and also as between types of Ringtone (Realtones and other Ringtones)).

4. Where Realtones and no other type of Ringtone are offered from a Relevant Page the royalty rate shall be 12% of Applicable Revenue (in respect of revenue falling within paragraph 1(d) above).
5. Where Ringtones other than Realtones and no Realtones are offered from a Relevant Page the royalty rate shall be 15% of Applicable Revenue (in respect of revenue falling within paragraph 1(d) above).
6. Where Realtones and other types of Ringtones are offered from a single Relevant Page and no other content licensable under the Joint Online Licence operated by the Licensors (for which the Licensee is the party required to hold a licence from the Licensors) appears on that Relevant Page, the royalty rate shall be 13.5% of the Applicable Revenue (in respect of revenue falling within paragraph 1(d) above) unless either party can show that a different rate should reasonably apply.
7. For the avoidance of doubt, in relation to paragraphs 3 to 6 above, the royalty rate in respect of Applicable Revenue other than that falling within paragraph 1(d) above should be the royalty rate applicable to that type of content.
8. Where Ringtone content is offered from a page together with other content licensable by MCPS and/or PRS to the Licensee (except for content licensable under the Joint Online Licence), the parties will enter good faith discussions to determine, in respect of such content, how the royalty rate should be determined in relation to revenue gained from advertising on that page.
9. Subject to the remainder of this schedule 1, there shall be no other deduction or set-off from the above revenues other than refunds to Users for services that they were unable to use due to technical faults in the Licensed Services.
10. The Licensors confirm that no revenue which is included in Gross Revenue under this Agreement shall form any part of the "revenue base" under any other licence or licensing scheme operated by the Licensors (or either of them) which grants all or some of the rights set out in clauses 2.1 and 2.2 of the main body of this Agreement (albeit in relation to a service other than for the supply of Ringtones).
11. For the further avoidance of doubt, revenue which relates solely to services other than the supply of

Ringtones shall not be included in the Gross Revenue. By way of example, this includes:

- (a) revenue derived from non-Ringtone voice, content and text services;
- (b) revenue derived from music or music-related services which are not licensable under this Agreement; or
- (c) revenue derived from non-Ringtone products and services (including search services) supplied by the Licensee.

For the avoidance of doubt, the above is without prejudice to the requirement to include within Gross Revenue all "browsing" revenue generated through a premium rate telephone line service as referred to in paragraph 1(a) above.

- 12. For the further avoidance of doubt, Gross Revenue shall not be reduced by credit card commissions or similar payment process charges.
- 13. Gross Revenue obtained in the form of advertising or sponsorship revenue shall be reduced by 5% to reflect the costs of obtaining it.
- 14. For the avoidance of doubt, advertising revenue referred to in paragraph 1(d) above shall not include revenue arising from sponsored searches or click-through commissions arising from such searches.
- 15. (a) Where service offering Ringtones (for the purposes of this clause "Service A") is provided to Users in conjunction with another service (for the purpose of this clause "Service B"), then the price deemed to be payable by Users ("the User Price") for the Ringtone(s) (for the purpose of calculating Gross Revenue) shall be calculated in accordance with this paragraph 15.
  - (b) Where there are separate bona fide published prices for Service A and Service B when available alone, then the User Price shall be the proportion of the bundled price represented by the relative standalone prices for Service A and Service B, subject to "weighting" to be carried out in accordance with example 16(c) below.
  - (c) Where there are no separate published prices for Service A and Service B, then the User Price shall be deemed to be the proportion of the bundled price represented by the relative bona fide standalone prices for comparable United Kingdom services for Service A and Service B subject to "weighting" to be carried out in accordance with example 16(c) below. If there is more than one comparable service, then the average shall be used.

(d) If there are no comparable United Kingdom standalone services for Service A and Service B, then the applicable minimum royalties (as referred to in clauses 4.2(a)(ii) and 4.2(b)(ii) of the main body of this Agreement) shall be payable.

(e) For the avoidance of doubt, where the User Price is set according to either of paragraphs (b) and (c) above, the royalty payable shall be the higher of the applicable royalty rate applied to the User Price and the applicable minimum royalty.

(f) The provisions of paragraph 17 below shall apply if any dispute arises in relation to the application of the provisions of this paragraph 15 as to whether and if so at what level the User Price shall be set pursuant to paragraphs (b) and (c) above.

16. The following are non-exhaustive examples of the application of this Schedule 1 to various scenarios:

(a) A Ringtone is delivered to a User, but the payment is not collected by the Licensee: The Royalty Fee is calculated as per clause 4.2 of the main body of the Agreement and the price that the User (or purchaser) should have paid will be included in the Gross Revenue.

(b) A Ringtone is not delivered to a User but the price of the Ringtone is received by the Licensee from the User (or purchaser) and not subsequently refunded: The Royalty Fee is calculated as per clause 4.2 of the main body of the Agreement and the price that the User (or purchaser) paid will be included in the Gross Revenue.

(c) Ringtones (and other content) are offered as part of a subscription package whereby for a fee of £3.00 a week, a User (or purchaser) may download a mixture of Ringtones and/or other content up to set limits during each a week: The provisions of paragraph 10 above are applied to calculate the Gross Revenue. The following example illustrates how this process would operate:

A service offers a subscription of £3 per week (excluding VAT), for which consumers get 5 credits to redeem against content. Any credits not redeemed within the week are lost.

Ringtones cost 3 credits & wallpapers cost 1 credit.

At the end of the Quarter the Licensee has sold 100,000 Ringtones and 30,000 wallpapers and generated £600,000 in revenue.

The unbundling of the revenue would take place as follows:

(i) Content is weighted to account for value within the bundle:

Ringtones (3 credits) = 100,000 x 3 = 300,000

Wallpapers (1 credit) = 30,000 x 1 = 30,000

Total = 330,000

(ii) Revenue is pro-rated in accordance with content recouped within the period:

Gross Revenue = £600,000 / 330,000 = 1.82

Ringtones = 300,000 x 1.82 = £546,000

The Gross Revenue for the purposes of calculating royalties due within the content bundle = £546,000.

(d) Ringtones (but no other content) are offered as part of a subscription package whereby for a fee of £3.00 a week (excluding VAT), a User (or purchaser) may download up to two Ringtones a week: The £3.00 fee is always included in the Gross Revenue regardless of whether any Ringtones are actually downloaded during any particular week.

(e) Revenue is received (or receivable) through an IVR system as a result of Users (or purchasers) browsing for Ringtones: Such revenue is included in the Gross Revenue whether or not any Ringtone is actually chosen to be downloaded by the User (or purchaser).

17. (a) The provisions of this paragraph 17 shall apply if a dispute (a "Dispute") arises in relation to the application of the provisions of this Schedule 1 as to what revenue is included within the definition of Gross Revenue

(b) Provided that the Licensors and the Licensee shall have held substantive negotiations in good faith regarding the subject matter of the Dispute over a period of at least 21 days from the date on which the Licensors notify the Licensee or the Licensee notifies the Licensor (as the case may be) in writing of the existence of such Dispute, the Licensors or the Licensee shall then be entitled by notice in writing from the Licensors to the Licensee or by Licensee to the Licensors to refer the Dispute for determination to an independent online adjudicator acting as an expert. The identity of such expert shall either be agreed or, in the absence of such agreement within 7 days of the written notice of referral, shall be determined by the President for the time being of the Institute of Chartered Accountants, and shall be an independent chartered accountant, unless the Licensors and the Licensee agree that another type of expert would be more suitable to determine such Dispute. The Licensors and the Licensee will seek to agree the procedure for the conduct of any expert determination. If such agreement is not reached within 7 days of the appointment of the expert, the expert shall have power to set the procedure for the expert determination. The expert shall make his determination as soon as reasonably practicable. The expert shall have power to award costs in the expert's determination, unless the Licensors and the Licensee agree otherwise. The decision of the expert is final and binds the parties to the Dispute unless there is manifest error, wilful default or fraud. For the avoidance of doubt, it is hereby confirmed that the expert shall have no jurisdiction to amend any term of the Agreement.

**Schedule 2**

**Form of Accounting Statement**  
MCPS-PRS Ringtones Revenue Reporting form

**MCPS-PRS Ringtones Revenue Reporting Form**

**Company Name:**  
**Contact Name:**  
**Quarter**  
**Quarterly Advance**


**Type of Service**

**SERVICE NAME**

--

**SERVICE TYPE (A LA CARTE / SUBSCRIPTION)**

--

**REVENUE DECLARATION**

*Insert details of the applicable price points (Exc .VAT) in the grey boxes (including free tones under the price point £0.00) and the applicable levels of revenue (including any applicable indirect revenue) at each price point in the boxes below*

**Mono/PolyTone Revenue at 15%**  
**RealTone Revenue at 12%**  
**Revenue at 13.5% (Mixed Mono-Poly/Real Ringtone Revenue)**  
**Revenue at 10% (Mixed Ringtone-JOL Revenue)**  
**Other Revenue at [\_\_\_\_]%**

<b>Price Points (Exc. VAT)</b>		
£	£	£

**USAGE DECLARATION**

*Insert details of the applicable price points (Exc .VAT) in the grey boxes (including free tones under the price point £0.00) and the applicable levels of usage at each price point in the boxes below*

**No. of Mono/PolyTones Sold at each Price Point**  
**No. of RealTones Sold at each Price Point**

<b>Price Points (Exc. VAT)</b>		
£	£	£

### **Schedule 3**

#### **Music Usage Information**

Alliance Reporting Format v.2.1  
(a separate file is to be submitted for each Ringtone Service e.g. Realtone vs.  
Polytone)

### **Schedule 4**

#### **List of Agency Territories (To be agreed)**