

Fitness Music Services Scheme Agreement



NAME OF LICENSEE	[] ("the Licensee")
REGISTERED ADDRESS OF LICENSEE	[]
COMMENCEMENT OF AGREEMENT	[] ("the Commencement Date")
ADVANCE	[] ("the Advance")
The terms and conditions for this Agreement are contained in the attached schedule	

Signed on behalf of the LICENSEE:

Signature *Name* *Position* *Date*

Signed on behalf of the Mechanical-Copyright Protection Society Limited ("MCPS"), contracting for and on behalf of itself and for and on behalf of and as agent of its various Members and the Associated Societies:

Signature *Name* *Position* *Date*

Signed on behalf of the Performing Right Society Limited ("PRS"), contracting for and on behalf of itself and for and on behalf of and as agent of the Associated Societies:

Signature *Name* *Position* *Date*

TERMS AND CONDITIONS

1. Definitions

"the Act" shall mean the Copyright Designs and Patents Act 1988, as amended from time to time.

"Agreement" shall mean these terms and conditions, the Appendix to these terms and conditions and the cover sheet completed and signed by the Licensee and the Licensors.

"Advance" shall mean the figure set out on the cover sheet to this Agreement.

"Applicable Revenue" shall mean the Gross Revenue less VAT (or other equivalent sales tax, as applicable).

"Application Form" shall mean the application, substantially in the form attached at Appendix 1, submitted to the Licensors prior to entering into this Agreement.

"Associated Society" shall mean a collecting society with which the Licensors have at the relevant time an agreement under which the Licensors are authorised to grant licences in relation to the other society's repertoire for the Authorised Exploitation.

"Catalogue Number" shall have the meaning ascribed to it in clause 5.1.

"Data Storage Device" means any medium on which data can be stored (whether temporarily or permanently) whether existing now or invented in the future.

"Dramatico-Musical Work" shall mean any ballet, opera, operetta, musical play or work of a similar nature. It shall include any version of such work (with or without cuts, additions, interpolations or the like) which has been publically performed.

"EEA" shall mean those countries which from time to time constitute full member states of the European Economic Area.

"Electronic Means" shall mean any distribution of data in an electronic form and not in a physical hard copy, whether wire or wireless and shall include without limitation, public and private telecommunication networks, satellite and, for the avoidance of doubt, the internet.

"End Customer(s)" shall mean a customer of the Licensee, being a fitness industry professional.

"Gross Revenue" shall mean all revenue received (or receivable) by the Licensee in consideration (a) for the provision of the Licensed Service(s) and (b) in the form of advertising or sponsorship revenue from any website from which Permanent Downloads are distributed as part of the Licensed Service(s).

"Licences" shall mean the licences granted by MCPS under clause 2.1 and by PRS under clause 2.2 of this Agreement.

"Licensed Service" shall mean the Licensee's service consisting of the provision of music to End Customers in the form of Physical Product(s) and/or Permanent

Downloads for the sole purpose of the playing thereof by End Customers as an accompaniment to fitness classes, and which shall not be made available for sale to the general public.

"Licensor(s)" shall mean MCPS and PRS.

"MCPS" shall mean Mechanical Copyright Protection Society Limited (a company incorporated in England under the registered number 3444246) whose registered office is at 2nd Floor Synergy House, 114-118 Southampton Row, London WC1B 5AA.

"Member" shall mean:

(a) in the case of MCPS, each person, firm or company who or which, from time to time, has appointed MCPS as agent in relation to the exploitation of Musical Works as set out in this Agreement PROVIDED THAT a member who has so appointed MCPS after the commencement of the Term shall only be regarded as a member for the purposes of this Agreement with effect from the date on which the Member so appointed MCPS; and

(b) in the case of PRS, any person, firm or company who or which, from time to time, pursuant to the Articles of Association of PRS has been admitted either before or during the Term as a member of PRS other than where such person, firm or company has reserved to himself the relevant rights pursuant to Article 7(cd) of the Articles of Association of PRS (or other equivalent article), PROVIDED THAT a member who has been so admitted after the commencement of the Term shall only be regarded as a member for the purposes of this Agreement with effect from the date of admission into PRS.

"Musical Work(s)" shall mean any work consisting of music and/or any lyrics or words written to be used with music. It includes any part of such work.

"Network" shall mean the internet, a mobile network or any other wired or wireless network.

"Permanent Download" shall mean a Musical Work communicated to the public via a Network in the form of a download and where such download may be retained by the End Customer on a permanent basis.

"Physical Product" shall mean physical media including, without limitation, cassette tape, compact disc, DVD, CD-Rom used for the physical distribution of content to End Customers.

"PMSR" shall mean any production music sound recording being a sound recording (as opposed to a Musical Work) the copyright in which is owned or controlled in the United Kingdom and the Republic of Ireland by MCPS or any Member and where such party has authorised MCPS to license such recordings as so-called production or library music.

"PRS" shall mean the Performing Right Society (a company incorporated in England under registered number 134396) whose registered office is at 1st Floor Goldings House, 2 Hays Lane, London SE1 2HB.

"PRS for Music" shall mean PRS for Music Limited trading under the name of PRS for Music of 1st Floor Goldings House, 2 Hays Lane, London SE1 2HB.

"Quarter" shall mean each of the periods 1 January to 31 March, 1 April to 30 June, 1 July to 30 September and 1 October to 31 December.

"Repertoire Work" shall mean:

- (a) in relation to the licences granted by MCPS, each PMSR, and each Musical Work the copyright in which is owned or controlled, from time to time, in the UK by MCPS or a Member or an Associated Society or an Associated Society Member PROVIDED THAT (i) if one or more of those who own or control the copyright in a relevant Repertoire Work is not MCPS or a Member or an Associated Society or Associated Society Member, the expression "Repertoire Work" shall only apply to such interest in the Repertoire Work as is owned or controlled by MCPS or the Associated Society or the relevant Member or Associated Society Member, and (ii) it shall exclude any Musical Work that a Member of MCPS or an Associated Society has withdrawn or withheld from this Agreement (or a particular form of exploitation licensable under this Agreement); and
- (b) in relation to the licences granted by PRS, each Musical Work the copyright in which is owned or controlled, from time to time, in the UK by PRS or a Member or an Associated Society or an Associated Society Member PROVIDED THAT (i) if one or more of those who own or control the copyright in a relevant Repertoire Work is not PRS or a Member or an Associated Society or Associated Society Member, the expression "Repertoire Work" shall only apply to such interest in the Repertoire Work as is owned or controlled by PRS or the Associated Society or the relevant Member or Associated Society Member, and (ii) it shall exclude any Musical Work that PRS or an Associated Society has withdrawn or withheld from this Agreement (or a particular form of exploitation licensable under this Agreement).

For the avoidance of doubt, if a Musical Work is a Repertoire Work in relation to one Licensor and not the other then it remains a Repertoire Work under this Agreement in relation only to the licence granted by that Licensor.

"Reporting Form" shall mean the reporting form provided at Appendix 2.

"Royalty Fee" shall mean the royalties payable as set out in clause 4.5 and 4.6.

"Server Territory" shall mean the EEA, Switzerland, the United States of America, Canada and such other territories as may be agreed in writing by the parties.

"Sites" shall mean any premises where fitness classes are conducted.

"Term" shall mean the period starting on the Commencement Date and ending on the termination of the Agreement in accordance with clause 8.

"Territories of Distribution" shall mean the EEA and such other countries or territories (if any) as are notified by the Licensors to the Licensee from time to time.

"Territories of Manufacture" shall mean the United Kingdom and such other countries or territories (if any) as are notified by the Licensors to the Licensee from time to time.

"United Kingdom" shall mean the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.

2. Grant of Licence

2.1 Subject to and conditional upon compliance with the terms and conditions contained herein and in particular subject to the exclusions and restrictions set out in clause 3, MCPS grants to the Licensee a nonexclusive licence during the Term to:

- (a) reproduce Repertoire Works in the Territories of Manufacture for the sole purpose of manufacturing Physical Product(s); and
- (b) to manufacture copies of such Physical Product(s) within the Territories of Manufacture for the sole purpose of distributing within the Territories of Distribution such Physical Product(s) for sale to End Customers; and
- (c) to reproduce Repertoire Works on servers within the Server Territory for the purpose of transmitting the same to End Customers by Electronic Means only via websites owned and/or controlled by the Licensee; and
- (d) where Repertoire Works are delivered to End Customers by Electronic Means, to cause temporary or permanent copies of Repertoire Works to be made on End Customers Data Storage Devices in the United Kingdom; and
- (e) to communicate to the public PMSRs from within the United Kingdom by Electronic Means;

all for the sole purpose of providing the Licensed Service.

2.2 Subject to and conditional upon compliance with the terms and conditions contained herein and in particular subject to the exclusions and restrictions set out in clause 3, PRS grants the Licensee a non-exclusive licence, during the Term, to communicate to the public (as that term is defined in the Act) and to authorise the communication to the public of Repertoire Works from the United Kingdom to End Customers for the sole purpose of providing the Licensed Service.

2.3 Notwithstanding clause 2.1 above, the Licensors authorise the Licensee to appoint third parties to manufacture the Physical Product(s) (or any component thereof) incorporating any Repertoire Work PROVIDED THAT:

- (a) any breach of the terms of this Agreement by such manufacturer shall be deemed to be a breach also by the Licensee; and
- (b) if the Licensors obtain reasonable evidence that such manufacturer is infringing any music copyright in relation to either the Physical Product(s) or any other product manufactured at the same premises, then the Licensors shall have the right to require the Licensee to immediately cease manufacturing the Physical Product(s) using that manufacturer.

2.4 All rights in each Repertoire Work other than those expressly granted to the Licensee herein are reserved to the Licensors.

3. Limitations on Licence

3.1 Where Repertoire Works are incorporated into audio-visual material, any Licences granted hereunder shall only apply to such audio-visual material where it consists of:

- (a) a substantial part of which has been previously licensed for broadcast in the United Kingdom or elsewhere in the world (whether or not actually broadcast); or
- (b) programming made for children; or
- (c) fitness and/or sports footage; or
- (d) promotional music videos and live music concert footage; or
- (e) photographs or other still images relating to the relevant artists or composers.

3.2 The Licences granted under clause 2 above will not cover the following (for which either a separate licence and/or the approval of the relevant copyright owner(s) would be required):

- (a) the copyright in any sound recording;
- (b) parodies or burlesques of Repertoire Works, composer or writer or any artist associated with the work, or any derogatory or defamatory images or references thereto;
- (c) the use of any Repertoire Work in such a way that the Licensee ought reasonably to consider as being insulting or detrimental to the composer, member or to the artist performing the Repertoire Work;
- (d) the use of any political, religious, sexual or drug-related visual image in connection with any Repertoire Work, unless this is a direct pictorial image of the lyrics of that work;
- (e) the use of any Repertoire Work in a way that implies approval or endorsement of any product or service by the composer, writer or any artist associated with the work;

- (f) the public performance, broadcasting or other communication to the public of Repertoire Works;
- (g) the graphical depiction of lyrics, whether on screen or in a booklet;
- (h) incorporation of Repertoire Works into advertising or sponsorship of whatsoever nature or use of a Repertoire Work in such a way that a reasonable person might associate the Repertoire Work with the advertising or sponsorship. For the avoidance of doubt this exclusion also prohibits the use of any Repertoire Work in any advertisement for a Licensed Service;
- (i) any 'premium' use of a Licensed Service, which for the purposes of these terms and conditions means any use (or supply with the express or implied authority to sell for use) of a Licensed Service as an incentive to purchase or acquire other goods or services of whatsoever nature or to encourage brand awareness and/or loyalty.
- (j) any other rights not specifically granted under this Agreement.

3.3 For the avoidance of doubt, this Agreement does not grant any "synchronisation licence" (to the extent that such a licence may be required by the Licensee) covering the initial fixation of Repertoire Works in combination with visual images.

3.4 The Licences grant no licence whatsoever in relation to Repertoire Works which are made available by the Licensee outside of the Licensed Service. However, such other exploitation of Repertoire Works may fall within the scope of other licensing schemes operated by the Licensors, details of which shall be made available to the Licensee on request.

3.5 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 the 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, provided that such alterations do not amount to an adaptation of a Repertoire Work and do not contravene clause 3.2, 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.

3.6 Where any Repertoire Work forms part of any Dramatico-Musical Work, the licence granted under this Agreement 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 Licensor that it wishes to reproduce the whole or substantially the whole work; and
- (b) the Licensor has notified the Licensee that all relevant members consent to such reproduction.

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.

3.7 The moral rights of the composers of Repertoire Works are unaffected by this Agreement.

3.8 The Licensee shall procure that the following appears on Physical Products:

- (a) the capitalised initials MCPS; and
- (b) a notice to the following effect:

"ALL RIGHTS OF THE PRODUCER AND OF THE OWNER OF THE MUSICAL WORKS REPRODUCED ARE RESERVED. UNAUTHORISED COPYING, HIRING, LENDING, PUBLIC PERFORMANCE AND COMMUNICATION TO THE PUBLIC OF THIS DISC PROHIBITED."

These requirements must be displayed together, without separation, and placed on the label of the Physical Product(s) (as opposed to any packaging sleeve in which the Physical Product(s) is provided).

3.9 The Licensee shall include on any website providing the Licensed Service:

- (a) the logo of PRS for Music; and
- (b) details of the following website and, where practical, hypertext links to it: <http://www.prsformusic.com>; and
- (c) where reasonably practicable, the name of the composer and publisher of the Repertoire Works provided via the Licensed Service; and
- (d) a notice explaining that use of the Musical Works is subject to restrictions and that a summary of these restrictions may be obtained by accessing the Licensors' website through the link referred to above.

Approval of the Licensors shall be deemed to be given to the positioning of the above credits and noticed within the terms and conditions of the

Licensed Service where it is not reasonably practical to position such information elsewhere.

3.10 For the avoidance of doubt, the Licences granted under clause 2 of this Agreement shall not extend to the public performance (as that term is used in the Act) of Repertoire Works supplied to Sites, whether as part of the Licensed Services or otherwise. A separate licence for the public performance of the Repertoire Work(s) must be obtained (by the entity requiring such a licence) from PRS, and elsewhere from the relevant performing right society in the relevant country.

4. Licence Fee

4.1 In consideration of the Licences granted by the Licensors, the Licensee shall pay to the Licensors:

- (a) the Advance; and
- (b) subject to clause 4.2, the Royalty Fee.

4.2 The Advance is recoupable against the Royalty Fee, but is non-returnable. For the avoidance of doubt, in the event that, throughout the Term, the total Royalty Fees paid by the Licensee to the Licensors is less than the Advance, no part of the Advance shall be repayable to the Licensee by the Licensors.

4.3 Where, in relation to any Quarter, the Licensee fails to provide the information necessary to allow the calculation referred to in clause 4.1(b), then the Licensors shall be entitled to fix the Royalty Fee based on (a) the Royalty Fee 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.

4.4 The licence fees referred to in clause 4.1 are subject to VAT. The Licensee shall pay to the Licensors VAT (if applicable) at the rate or rates from time to time in force on any sums payable under this Agreement.

4.5 In respect of the delivery of content via Physical Products the Royalty Fee shall be the greater of:

- (a) 15% of the Applicable Revenue; and
- (b) £0.06 in respect of each Repertoire Work reproduced.

4.6 In respect of the delivery of content via Electronic Means the Royalty Fee shall be the greater of:

- (a) 16% of the Applicable Revenue; and
- (b) £0.07 in respect of each Repertoire Work downloaded per download.

5. Supply of Information

- 5.1 The Licensee shall ensure that each Physical Product and each Permanent Download is given a unique Catalogue Number applicable to the same content and configuration of tracks.
- 5.2 The Licensee shall provide to the Licensors, upon request, a copy of any Physical Product within 7 days of a request (or within 7 days of the pressing of a Physical Product).
- 5.3 The Licensee must also supply the Licensors with any further information or documentation in its possession, power, custody or control (and use its best 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 and/or distributed by the Licensee under this Agreement or to verify that the Licensee is abiding by the terms and conditions of this Agreement.

6. Payment

- 6.1 The Licensee shall pay the Advance to the Licensors upon signature of this Agreement.
- 6.2 Within 30 days of the end of each Quarter the Licensee shall prepare and deliver to the Licensors electronically a fully and accurately completed selfaccounting royalty statement in the Reporting Form attached at Appendix 2.
- 6.3 Within 7 days of receipt of the Reporting Form referred to in clause 6.2, the Alliance shall, on behalf of the Licensors, each of the Members and the Associated Societies, raise an invoice for the Royalty Fee due, and the Licensee shall pay such amount to the Alliance no later than 15 days after the invoice is delivered to the Licensee (such delivery to be deemed to have occurred in accordance with clause 9).
- 6.4 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 (if required by the Licensors) 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.

7. Right of Audit

- 7.1 The Licensee shall keep and make 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 (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 upon reasonable notice access to its premises to inspect relevant accounting record, but not more than once per annum. The duly authorised representatives 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 provision of this Agreement.
- 7.3 If tests under any audit and verification process indicate under-payment of the correct licence fees during which monitoring has been carried out by or on behalf of the Licensors, 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 6.4.
- 7.4 If any audit and verification process discloses under-payment of more than 7.5% of the correct licence fees during which monitoring has been carried out by or on behalf of the Licensors, 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 therefore.
- 7.5 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 and 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.
- 7.6 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.
- 7.7 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 of Licence

- 8.1 Either party shall have the right to terminate this Agreement on giving at least three months notice in writing to the other party.
- 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 administration, 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 Where the Licensors have terminated a licence granted under these terms and conditions in accordance with clause 8.2, the Licensee shall immediately cease to manufacture or distribute any and all Physical Products. All Physical Products that remain in the possession or control of the Licensee shall be deemed unlicensed.

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 notice to terminate 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 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 This Agreement is personal and the Licensee shall not assign, sub-license, sub-contract or otherwise transfer this Agreement or any of its rights or obligations under this Agreement in whole or in part without the prior written consent of the Licensors, except as set out in clause 2.3 above.

10.2 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.

10.3 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.

10.4 This Agreement shall be construed in accordance with the laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts.