

**Before the  
Copyright Royalty Judges  
Library of Congress  
Washington, D.C.**

In the Matter of

Mechanical and Digital Phonorecord  
Delivery Rate Adjustment Proceeding

Docket No. 2006-3 CRB DPRA

**The Written Direct Testimony of  
Alan McGlade**

**Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.**

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**TESTIMONY OF ALAN McGLADE**

1. My name is Alan McGlade and I am the President and Chief Executive Officer of MusicNet. I submit this testimony in connection with the Written Direct Statement of the Digital Media Association (“DiMA”) in the above-captioned proceeding for setting rates and terms for the making and distribution of digital phonorecord deliveries (“DPDs”).

2. MusicNet is a United States corporation organized under the laws of the State of Delaware, with offices in Seattle, WA, New York, NY, and London, England. With over eighty employees worldwide, we provide the infrastructure, features and functionality, content licensing, reporting and payment services, and other expertise to our distributors to enable them to offer a range of cutting-edge, personalized subscription music services to consumers.

3. Before joining MusicNet, I was President and CEO of The Box Music Network (“The Box”), an early interactive music television channel. The Box was acquired by Viacom, Inc. in 2000 and combined with MTV2. From 1991 to 1995, I served as President of StarNet, a pioneer in providing marketing, advertising, and information services to the cable television

industry utilizing digital technology. In 1985, I founded and served as President of Adlink, the first satellite-delivered cable television advertising interconnect, which grew into the United States' top grossing cable advertising distribution service.

4. I make this statement on the basis of my personal knowledge, which I have acquired through my experience in entertainment and interactive businesses, and as a result of my review of the documents appended to this statement. To the extent that the facts and matters set out in this statement are within my knowledge, they are true. To the extent that I have relied upon the information provided by others, my testimony is made to the best of my knowledge, information, and belief. I identify the instances in this Testimony in which I rely on sources other than my own personal knowledge.

#### **I. SUMMARY OF TESTIMONY**

5. MusicNet is a leading online digital music company offering business-to-business digital music streaming, conditional downloading and permanent downloading services over the Internet. The company was founded in 2001 by Warner Music Group, Bertelsmann AG, EMI and RealNetworks. In April, 2005, 100% of the company was purchased by Baker Capital, a private equity firm. The company remains privately held.

6. MusicNet is a business-to-business provider of digital music services to ISPs, consumer electronics companies, offline and online retailers, offline and online media companies, and others. We differentiate ourselves from other players in the online digital music industry by offering a wholesale infrastructure solution to our distribution partners rather than directly marketing a retail service to consumers. As a business-to-business provider, MusicNet

provides to its distributors the ability for them to offer a completely customized solution for their consumer-facing digital music delivery service, including a library of licensed content, technology and music delivery systems tailored to their audiences. MusicNet's platform enables distribution partners to achieve speed to market, reliability, and scalability as well. In choosing to work with MusicNet, distribution partners can maintain complete control of their brand, customer relationships, and customer account information. In return, MusicNet is able to achieve extensive reach through its distribution partners' marketing and established customer base. Unlike other digital music services that sell subscription and permanent downloads directly to consumers, we seek to provide services to a massive customer base of brand-name distributors, without incurring the significant marketing expenses required for customer acquisition.

7. MusicNet has invested nearly **seventy million** dollars in technology infrastructure and products for the sole purpose of providing digital music services to our customers and to their end users. By efficiently enabling our distributors to provide such services at a lower cost and more expeditiously than they could do it themselves, we maximize the availability of creative works in the marketplace and create a value chain that benefits all parties from creators to end customers. As a result, MusicNet makes it easier for creators to get their works to the broadest audience and get compensated for it. We enhance the ability of distributors to add value to their existing customer relationships by providing a turnkey music solution we can customize to their needs. Distributors, for their part, commit to marketing the service and maximizing its reach, and listeners get a compelling music experience for a competitive price.

8. Ongoing investment in the business is crucial because the music marketplace is intensely competitive and our success is dependent on a number of factors, some in our control and some not. We compete primarily with the pervasive availability of “free” music on peer-to-peer (“P2P”) services. Despite the highly public lawsuits and demise of many well-known P2P sites, Internet piracy is far from dead. Additionally, there are a number of technological issues still to be resolved around digital rights management including portability of content, and access to the widest range of platforms, all of which deter wider consumer adoption.

9. Despite our best efforts, it remains very challenging to explain the value of subscription services to users and, given the lack of consumer adoption to date, it’s a hard sell to potential distributors to invest in offering subscription services. As wholesalers, our margins are narrow. Our business success is driven by scale -- but it is hard to get distribution in the marketplace when returns on investment in this sector remain unproven. Finally, content costs overall need to be in line with marketplace realities if the market is going to provide adequate returns to make the investments worthwhile.

10. For all of these reasons, the rate set in this proceeding should not prevent us from establishing the viability of our unique business model or make it more difficult than it already is to gain traction in the marketplace. We are one of the good guys -- providing a legitimate alternative to piracy so that composers and musicians get paid in a world where too many people are stealing from them. We need to be able to grow that business and prove the benefits we offer are real for everyone involved.

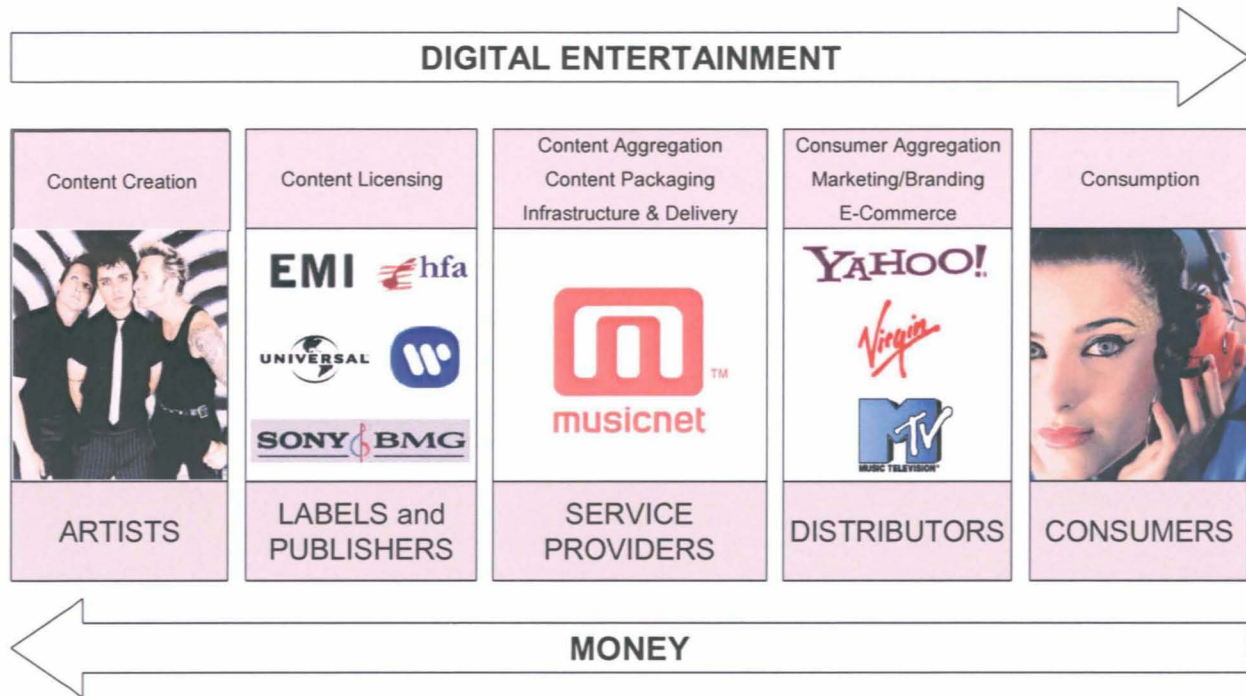
**II. MUSICNET IS CREATING A BUSINESS INFRASTRUCTURE FOR DELIVERING CONTENT TO CONSUMERS AND ADDING VALUE TO EVERY PARTICIPANT IN THE MARKETPLACE**

11. The music industry is in a new age. It is not hard to imagine a world in which CDs are relegated to the same fate that befell eight-track tapes almost thirty years ago. MusicNet's unique offering enables the creation of an end-to-end value "chain" delivering content to consumers and compensating music creators in turn, growing the marketplace in the process. Our business model offers significant benefits to listeners, distributors, and creators of music. We are making it easier for content to reach paying customers and turning more casual listeners into active fans who spend money on music.

**A. OUR UNIQUE BUSINESS MODEL ENABLES EASIER ADOPTION OF SUBSCRIPTION MUSIC OFFERINGS AND MAXIMIZES AVAILABILITY OF THE SERVICE TO CONSUMERS**

12. Many brand-name online and offline companies who wish to offer digital music services to their customers do not want to deal with the complexity of developing a technology infrastructure and delivery system because they require a constant upgrade with new features and functionalities on a regular basis to remain marketplace competitive. Brand-name online and offline companies also do not wish to deal with securing rights from content owners and reporting and paying such parties. MusicNet addresses these hurdles on their behalf. We bring together content creators, acquire the full range of necessary licenses, provide the technology platform to integrate with distributors, customize solutions for unique demographics, and handle as much or as little of the end-user relationship as appropriate. As a result, we provide substantial benefits in the marketplace and create tremendous value for creators of musical works.

## MusicNet's Central Role in the Digital Marketplace



13. MusicNet has invested substantial time and effort in establishing the widest possible network of distributors for our subscription and download services, including consumer electronics companies, online and offline media companies, wireless service providers, online and offline retailers, universities, broadband providers, and technology companies, and we continue to do so. MusicNet's primary goal is to provide subscription services and download stores for its network of partners. We accomplish this in numerous ways, from turnkey to deeply integrated custom solutions. In order to achieve this aim, MusicNet is responsible for licensing agreements with labels and publishers, the software platform responsible for delivery of assets and licenses, reporting, billing, and payment services (to content owners). Some examples of the types of MusicNet distribution partners are described below.

14. Wireless Service Providers — MusicNet is partnering with leading wireless service providers in order to provide a one-stop digital music experience to wireless consumers that includes song samples, full songs, video, artist images, charts, and playlists. MusicNet's current backend infrastructure supports subscriptions and permanent download sales direct to cellphones.

15. Online and Offline Media Companies — Our current distribution partners for such services include well known brands such as Yahoo! and MTV as well as others. MTV Networks, a unit of Viacom Inc., is one of the world's leading creators of programming and content across all media platforms. MTV Networks, with more than 100 channels worldwide, owns and operates the television programming services -- MTV, VH1, CMT, NICKELODEON, COMEDY CENTRAL, LOGO, among others. URGE is a digital music service from MTV Networks that offers complete access to the MusicNet catalog of over two million songs, eighteen music genres, countless styles and exclusives from MTV, VH1, and CMT. URGE features hundreds of playlists, radio stations, music feeds, blogs, as well as interviews and articles from leading music voices.

16. Yahoo! provides users with access to a collection of resources through its various web portals, including various communications tools, forums, shopping services, search services, personalized content, and branded programming. Among the Yahoo! offerings is Yahoo Music Unlimited, a music service that allows users to download or subscribe to MusicNet's catalog of millions of songs, either through their personal computer or with any number of handheld devices that are compatible with the service. The Yahoo! service recommends select songs, albums, and artists to users based on their personal preferences. In addition, Yahoo! subscribers



can share music online with other Yahoo! subscribers, listen to the music catalogues of other Yahoo! subscribers, and can share each other's radio stations. Yahoo! also offers numerous pre-programmed radio stations and charts tracking its most popular songs, artists, and albums.

17. Technology Companies — Our partners include Microsoft Corporation, the world's leading software and technology company. One of its divisions, the Entertainment and Devices Division, has recently released Zune, Microsoft's music and entertainment platform that provides users an end-to-end solution for connected entertainment. Zune includes the Zune device, a 30-gigabyte handheld digital media player, the Zune Marketplace music service with a catalog of over 2 million songs, artist biographies, and album cover art that users can download, and the software that connects the player with the Marketplace. The Zune device also comes with a built-in FM tuner that connects to local FM radio stations, and a wireless feature that allows users to share selected tracks, playlists, and pictures directly from one Zune device to another. The Zune solution also comes with a host of accessories that allows the user to integrate the Zune into their home theater and car stereo.

18. Consumer Device Manufacturers — Our distributor, MusicGremlin, Inc. has created a wi-fi device that allows users to discover, purchase, manage, control, and legally share their digital music collections directly from their digital audio players, wirelessly and without requiring a personal computer. MusicGremlin's technology allows devices that contain the MusicGremlin software to access the MusicGremlin Direct music service and download tracks directly to such devices using wireless high-speed networks. MusicGremlin's end-to-end system benefits content owners by providing a secure and exciting new distribution channel, and MusicGremlin's device technology benefits consumer electronics partners by providing next-

generation functionality to their digital audio products. It also benefits consumers by giving them the instant gratification of accessing any song directly from their device.

19. We also partner with a company called CDigix, which provides colleges and universities with a leading, Internet-based solution for digital music, user generated content, and educational materials. CDigix's primary mission is to enable college students, faculty, and staff to consume, connect, and communicate via digital content. Launched in 2004, CDigix's digital music service is currently offered at dozens of colleges and universities around the country. In many instances, CDigix's offers the music service free to students.

20. Synacor is a MusicNet partner that distributes content through broadband portals, including Adelphia, Charter Communications, Roadrunner and others. Synacor is a leading provider of premium service delivery platforms and private-label portals that enable broadband portals to easily bundle a wide variety of free and subscription-only value-added services into their Internet offerings. Their technology allows its broadband portal partners to offer a premium music service, which offers consumers the MusicNet library of sound recordings for download or subscription.

21. With over 400,000 subscribers through our distributors as of November 2006, MusicNet is currently the leading provider of backend digital music services over the Internet. We have made substantial investments in international distribution as well.

**B. WE OFFER SUBSTANTIAL BENEFITS AND EFFICIENCIES TO OUR DISTRIBUTORS, WHICH ULTIMATELY BENEFITS CONTENT OWNERS**

22. By offering distributors multiple solutions for music services, we achieve not only significant economies of scale and scope but enhance the ability of subscription services to penetrate the marketplace. MusicNet distributors take advantage of our expertise and investments to further leverage their customer relationships and provide valuable services downstream to consumers. We provide value in several ways.

23. First, our programming strategy includes developing and acquiring comprehensive label catalogs, proprietary content, and exclusive content. We maintain strong relationships with the major and independent record labels, and continue to successfully expand our content offerings. We have music licensing agreements with all four of the major record labels as well as hundreds of independent labels. MusicNet can now offer listeners over 2.6 million songs from which to choose and expects to add another 200,000 songs by the end of this year.

24. MusicNet also creates distribution partner-specific programming initiatives that cater to targeted audiences and genre preferences within a distribution partner's consumer base. Proprietary programming may include genre-specific playlists and custom charts designed exclusively for a distribution partner. In addition, MusicNet works with its content providers to develop exclusive content, including artist interviews and performances. MusicNet also secures and makes available to its distributors "pre-released" content prior to commercial release in record stores. MusicNet has offered exclusive content from Coldplay, Mary J. Blige, Annie

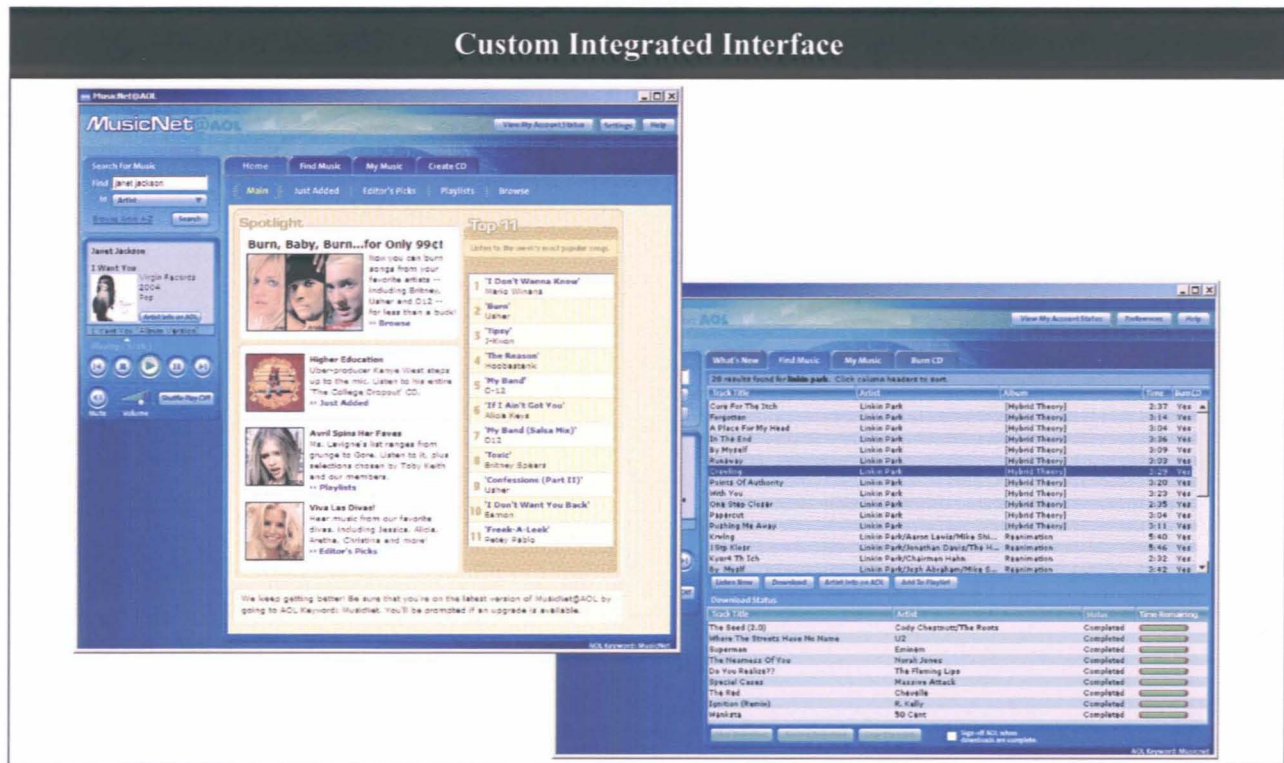
Lennox, Liz Phair, Ashanti, Beastie Boys, Lenny Kravitz, Todd Rundgren, Blake Shelton, and The Strokes, among other artists.

25. Second, MusicNet provides technology to develop and manage all underlying operations needed to build branded premium music subscription and permanent download services. This includes, for example, delivery and playback of content to consumers, managing and applying use restrictions imposed by content owners (*e.g.*, managing the number of personal computers that can be registered to a music service by a single consumer), and interfacing with e-commerce systems. The elements that make up the MusicNet platform can be deployed in multiple configurations depending on a distribution partner's needs. The software integrates into technologies the distribution partner wants to use. These technologies include consumer-facing applications (*e.g.*, media player, web site), content distribution networks, search technologies, recommendation technologies, e-commerce, user login, and account management applications.

26. We have invested **tens of millions** of dollars to date to develop the MusicNet platform, *see* MusicNet Capital Investment Analysis, Exhibit A, and we continue to invest in enhancements so as to improve the functionality and flexibility of our offerings to both distribution partners as well as to consumers. Future software investment will always be required to fund the development of new and innovative features and functionality for our fully developed music service platform.

27. MusicNet works hand-in-hand with its distribution partners to develop each partner's digital music strategy and service offerings. Each partner comes with its own set of technology requirements and a pre-existing backend infrastructure. For example, a partner may

already own or control a media player or require one from MusicNet. MusicNet has the capability of integrating into a partner's media player or integrating its media player into its partner's service.



28. Additionally, MusicNet has a complete music service (called "Performer") that distributors can use if they want a turnkey user interface. It can be displayed via a web browser or within a MusicNet media jukebox player. Distribution partners can "skin" the user interface to match their brand's look and feel, and to create a customized experience. From a distribution partner's perspective, Performer shortens the time to market by significantly lowering the development time and investment required.

## Performer Turnkey Interface



29. Finally, MusicNet has established the requirements for creating a wireless phone interface for listening, purchasing, and sharing digital music. This application allows consumers to browse playlists, listen to samples, and purchase songs via their mobile phone.



30. MusicNet offers a complete vertical solution to distribution partners by securing content from record labels and artists; delivering the content through highly flexible and functional software; handling compensation of both technology providers and rights holders; and hosting of the service. MusicNet's platform enables distribution partners to outsource their entire digital music consumer service offering, potentially saving a distribution partner millions of dollars in annual research, development, and administrative expenses.

31. As a result, MusicNet provides a comprehensive suite of services to distributors. MusicNet will do as much or as little as needed and work with each distributor to ensure the resulting package meets their business objectives and provides value to their customers, creating a legitimate market for content owners as a result.

## Scope of Services and Responsibilities

### MusicNet's Responsibilities

- Provide software and or user interface clients
- Provide partner integration and development support
- Provide subscriber management
- Support partner's customer service
- Program / highlight content of interest to users
- Secure label / artist rights and content
- Clear publishing rights
- Report and pay label royalties
- License software and administer royalties for digital rights management
- Encode content
- Host content
- Provide bandwidth

### Distributor's Responsibilities

- Marketing
- Billing\*
- Customer Service\*
- Media Player\*

*\*MusicNet can provide if requested*

32. Using MusicNet's state-of-the-art platform, distribution partners have the option of offering music to consumers in one or more of four modes: (i) streaming; (ii) subscription downloads; (iii) portable subscription downloads; and (iv) permanent downloads.

33. **Streaming:** Streaming allows consumers who are online to listen to either individual on-demand tracks and albums or pre-programmed playlists of tracks and albums performed in real time.



34. **Subscription Downloads:** Subscription downloads represent tracks that are saved on a consumer's computer hard drive and may be listened to offline. However, the subscription download library accumulates tracks only as long as a consumer's subscription remains active. Once the subscription is ended, DRM technology prevents the consumer from accessing and playing the track stored on the computer.

35. **Portable Subscription Downloads:** Portable subscription downloads are tracks that can be saved to a portable device and listened to without an active Internet connection. With this technology, a consumer can download all the songs that their portable device can hold for the price of a monthly subscription. Once the subscription is ended, DRM technology prevents the consumer from accessing and playing the track stored on the portable device. This includes transfers of songs that have been downloaded initially to a consumer's personal computer, and songs transferred directly to a consumer's portable device, as is in the case of MusicGremlin.

36. **Permanent Downloads:** Permanent downloads allow consumers to purchase tracks and maintain legal, permanent ownership of the music file. Consumers are able to transfer permanently downloaded tracks to portable devices as well as burn the tracks to disc. The DRM technology is not maintained on a burned-to-disc copy of a permanently downloaded track (*i.e.*, consumer has unlimited ability to transfer music freely).

**C. AS A RESULT OF OUR INVESTMENTS, WE MAXIMIZE THE AVAILABILITY OF CREATIVE WORKS IN THE MARKETPLACE TO THE BENEFIT OF CONTENT OWNERS**

37. MusicNet has focused on enabling distributors to offer the deepest and broadest possible content catalog around. See Catalog Growth Chart, Exhibit B. MusicNet's catalog

permits exposure for the most popular songs available on the Internet as well as lesser known, and lesser played, songs. *See, e.g.*, MusicNet Plays of Subscription Service Downloads by Retailer, week of 11/12/06, Exhibit C (demonstrating that MusicNet provides access to lesser known and lesser played songs).

### **III. WE FACE SIGNIFICANT HURDLES IN THE MARKETPLACE AND HAVE YET TO TURN A PROFIT OR MEET INVESTMENT EXPECTATIONS**

38. The Board should understand that MusicNet's costs are extremely high and we have yet to make a profit. From 2002 through 2006, on an annualized basis, operating costs exceed gross profits by [REDACTED]. *See* MusicNet Statements of Operations -- 2002 to 2004, Exhibit D; *see* MusicNet Statement of Operations -- 2001 Through August 2006, Exhibit E. For the most part, this is due to the very high cost of acquiring content, developing and integrating our platform with our distributors and constantly working to service our distributors so they are retained and their specific needs for their individual service offering are met. In addition, significant resources are expended in acquiring new distributors and new platforms. As a result of our continued losses, we have required continuing infusions of capital from investors. *See* Statements of Convertible Preferred Stock and Stockholders' Deficit Years 2004, 2003, and 2002, Exhibit F.

#### **A. OUR BUSINESS FACES VERY HIGH COSTS AND IS NOT YET PROFITABLE ON AN OPERATING BASIS**

39. There are a number of significant costs we incur as a provider of subscription music services to distributors. First, we pay a large percentage of our revenues to acquire content. *See* MusicNet Capital Investment Analysis, Exhibit A. Our music library is the result of the many licenses that we have negotiated and entered into with music publishers and with

record labels. This process involves a great deal of staff time and effort. We have entered into agreements with all of the major record labels and hundreds of independent labels for the use of their masters (*i.e.*, the actual sound recordings) within the MusicNet service. We have also licensed the public performance rights of musical compositions from the performance rights organizations in the U.S. (*i.e.*, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC). These organizations collect royalties on behalf of their constituent music publishers who control the relevant public performance rights to the musical compositions. We pay public performance royalties to cover the full value of musical compositions used in our streaming activities.

40. MusicNet has also licensed reproduction and distribution (*i.e.*, mechanical) rights pursuant to the National Music Publishers Association (NMPA) and Recording Industry Association of America (RIAA) agreement dated October 5, 2001. Under this agreement, MusicNet has obtained mechanical licenses for the musical compositions within the subscription service, for the catalog represented by the NMPA. MusicNet has also successfully directly licensed catalogs not represented by the NMPA, such as Abkco, Bug and Wixen, and continues to proactively pursue direct license agreements within the publishing community. Mechanical royalties for the permanent downloads are generally cleared by record labels for use by MusicNet.

41. In many cases, we are required to negotiate separate agreements with the record labels for the rights to provide subscription services and the right to provide permanent downloading capabilities. Subscription rights are more complex to negotiate and manage than à la carte downloads rights. There are many more restrictions on usage rights, and the economic

structure and reporting is substantially different than for permanent downloads. MusicNet has entered into agreements with all of the major labels to offer subscription music services.

MusicNet believes that its early lead in securing agreements to offer subscription service has provided it with a significant advantage.

42. Second, we spend a great deal of time and effort “ingesting” the content once we receive it from the record labels. An original work can come to MusicNet in many different raw forms, including compact discs, hard drives, and electronic files. Transforming raw content into a form that can be downloaded by consumers requires more than merely uploading the songs to MusicNet’s servers. We have to convert the raw audio assets and metadata we receive from the record labels into digital copy-protected reproductions of music that can be accessed online. MusicNet also performs significant quality control procedures to ensure the quality of the musical composition. For instance, we validate the metadata, such as the artist(s), track title, album title, album and track duration, any specific notes supporting the track (for example, whether the track is a remix or has a parental advisory tag), composer, publisher, orchestra, ensemble, conductor, soloist, and instruments. MusicNet also sets the track and album level rights, plus the release and expiration dates for the content, in order to manage the usage and availability rules established by the content owners. Furthermore, MusicNet sets the wholesale, and, in the case of its own service (“Performer”), retail pricing for the content. Additionally, the audio assets are encoded in a proprietary specification for MusicNet’s distribution partners, with varying bit rates for streams and downloads. The audio assets are then encrypted in a Digital Rights Management, or DRM, wrapper that controls the availability of the file under the rights determined by MusicNet’s service, in conjunction with the content owners. The audio files, and

associated metadata, are then published to our output servers so that they can be made available to consumers through our various distribution partners.

43. The ingestion process is crucial for two reasons. To begin, when a consumer purchases or otherwise downloads a song, the consumer is expecting a CD-quality reproduction just as he or she would purchase through a brick-and-mortar store. Absent the lengthy quality control and coding process, the quality the consumer expects could not be guaranteed. Moreover, because of the vertical shape to MusicNet's distribution structure (*i.e.*, MusicNet provides content to distributors who then sell to consumers), MusicNet must ensure that each original work is compatible with the online hardware and software structure of each of its distributors. To date, ingesting licensed music has cost MusicNet millions of dollars. For instance, we spent approximately \$3.4 million from 2003 through 2006 paying to receive content delivered from the content owners and employing a team to ingest and manage the content. This cost does not include, however, the equipment or warehouse space required to store content, the cost associated with negotiating or acquiring licenses to content, or any royalties payable for use of the content.

44. Finally, we incur significant costs on a range of operational fronts: the architecture of the musical platform, software, distribution integration, hosting services, and other "infrastructure" costs, including "back office" and financial services, are all required to be able to deliver a high quality services. See MusicNet Year-to-Date Operating Summary, August 2006, Exhibit G.

45. Content costs (*i.e.*, royalty payments) for subscription and permanent downloads account for almost ninety-five percent of MusicNet's cost of goods sold, with the remaining five to six percent attributed to hosting and other costs. Content costs historically have been between eighty and ninety-two percent of revenues. Technology operations account for the next largest component of costs. These costs are consistently increasing each year, even if costs tend to decrease as a percentage of revenue. Including other operating expenses, such as marketing and general & administrative costs, total operating costs in 2004 accounted for over 80% of revenues. See MusicNet Statement of Operations -- 2001 Through August 2006, Exhibit E.

46. MusicNet operates at a loss on a year-over-year basis. In 2004, for instance, MusicNet booked a net income loss of [REDACTED]. In 2003 and 2002, those net losses equaled [REDACTED] and [REDACTED] respectively. For 2006, MusicNet faces a projected loss of [REDACTED] based on results from January 1 to September 30, 2006. These losses are largely a function of the many fixed costs associated with the online distribution of music. See MusicNet Statements of Operations -- 2002 to 2004, Exhibit D; see MusicNet Statement of Operations -- 2001 Through August 2006, Exhibit E; see Annual Operating Loss for MusicNet, Inc., 2003-2006 Chart, Exhibit H.

47. In 2004, MusicNet received total revenue approximating [REDACTED] from its business. That same year, MusicNet spent [REDACTED] to sell music, excluding fixed costs. These variable costs included content costs, publishing costs, bandwidth costs, and other costs associated with hosting or otherwise storing the digital music compositions. In addition to these costs of sales, and as mentioned above, there are also significant fixed costs associated with obtaining, ingesting, storing, and rolling-out songs to MusicNet's distributors. In 2004, these

fixed costs totalled an additional [REDACTED] above and beyond the variable costs, and included the costs of technology, such as servers used to store content and the power and bandwidth to ingest and distribute content, the costs of MusicNet's facilities, and other administrative costs. *See id.*

48. Combining the high costs of content with significant operating costs, particularly for technology operations, resulted in major losses for MusicNet throughout each of its years of operations. These operating losses range from [REDACTED] in 2005 to [REDACTED] in 2004. As a percent of revenues, the net operating losses were significantly larger in MusicNet's earlier years of operations because of the much lower revenue base. In 2003, for instance, MusicNet incurred net operating losses as a percent of revenue of 232%. Increased revenue in 2004 and 2005 decreased MusicNet's net operating loss as a percentage of its revenue. For 2004 and 2005, MusicNet incurred net operating losses as a percent of revenues of 63.6% and 65.2%, respectively. These financial data illustrate the importance of containing all costs and increasing the revenue base over which these costs are spread. However, increasing the revenue base requires investment in expanding content, creating new value-added content, marketing and promotion, as well as enhancing technology to maintain and attract new customers. Given our cost structure, every effort must be made to contain costs.

**B. OUR INVESTORS HAVE YET TO MAKE A RETURN ON THEIR INVESTMENT**

49. The precursor to MusicNet, Inc. was founded in 1999 by RealNetworks. This entity executed its initial round of financing in April 2000 when RealNetworks and Warner Music Group ("WMG") invested \$17 million. In 2001, MusicNet, Inc. was formed

simultaneously with the raising of an additional \$17 million of capital from Bertelsmann, EMI and Zomba. MusicNet's third round of financing took place in September 2002, in which Warner Music Group, Bertelsmann, and EMI invested \$9.3 million of cash in exchange for Series C preferred stock, and issued \$6.1 million in convertible notes. Concurrently, Sony received \$1.9 million of convertible notes in lieu of cash for advanced payments on royalties. MusicNet also issued convertible notes for \$3 million in 2003 and \$800,000 in 2004. In August 2003, RealNetworks completed its acquisition of listen.com and resigned from MusicNet's board of directors. By 2004 the company had an [REDACTED] In April, 2005, [REDACTED] [REDACTED], by Baker Capital, a private equity firm. To date, they have invested [REDACTED] [REDACTED]

50. [REDACTED]  
[REDACTED]  
[REDACTED]

#### **IV. THE MUSIC MARKETPLACE IS INTENSELY COMPETITIVE AND OUR SUCCESS IS DEPENDENT ON A NUMBER OF FACTORS THAT ARE NOT IN OUR CONTROL**

51. MusicNet faces several very significant challenges in the near future. First, Music sales have fallen substantially over the past five years and there is increasing speculation about the viability of the traditional record business as a result of significant piracy. According to the International Federation of the Phonographic Industry, or IFPI, "In January 2006, IFPI estimates the number of infringing music files available on the Internet at any one time -- in other words, the simultaneous availability of copyrighted music tracks for illegal download or distribution --



at 885 million, of which 775 million are available on P2P networks and the remainder on websites.” The number of pirated music files on the Internet has been reported in the hundreds of millions or nearly a billion. The majority of Internet music consumers have downloaded pirated versions of songs illegally. Despite the publicity, recording industry lawsuits have not put an end to piracy. Many consumers still believe there is nothing wrong with downloading illegal music or sharing it with their friends. Another reality is that the individuals most likely to pirate music are young students with much time and little money. In other words, the culture of piracy could lead to ever-decreasing music value on the part of consumers in the future. Our fledgling business is forced to compete in a marketplace in which our fundamental competition is the widespread availability of free product to consumers. Piracy puts tremendous downward pressure on the price at which we can offer music services for sale in the marketplace. In short, it is difficult to compete with “free” -- piracy makes it far more difficult for us and our partners to achieve profitability.

52. Second, consumers are not accustomed to purchasing music as part of a subscription service rather than owning recorded music outright. Distributors’ efforts to market the subscription service will have a great effect on the long-term viability of the subscription business model. These efforts are crucial now; yet, some distributors have yet to invest heavily in the marketing of this model, in part, because their margins are small and the potential of the market has not yet been proven. Indeed, we are competing to establish our business model both in the minds of our distributors and their end consumers. To be sure, legal online music distribution is a growing business. But most of the growth has come from single track downloads and not from subscription services such as those offered by MusicNet.

53. One of the most significant obstacles to convincing consumers about the viability of the business is that there are restrictions imposed by content owners on the tracks available in the subscription service and on tracks available for purchase as permanent downloads. Some songs can be listened to on a computer, others on a portable device, others burned to CDs and put on other devices. This is confusing for users and makes it hard to convince customers of the value of services like ours. As a result, we are at a considerable disadvantage acquiring and keeping customers who can rip and burn free music from each other instead of waiting for the market to catch up to them. Additionally, the portable devices that interact with our services, both for subscription and permanent download have not yet gained mass consumer acceptance. The one portable digital music device that has gained consumer acceptance is the iPod, which Apple has made incompatible with every service other than iTunes.

54. Fundamentally, our hurdle in the near term is to reach sufficient scale so as to become profitable in a very difficult competitive environment. Our input costs are too high, from what we pay labels to what publishers demand for performance and mechanical royalties. We have to constantly invest in acquiring distributors, integrating our platform, and personalizing and customizing our service for them to keep their customers engaged. There are new features and technologies on the horizon to make it easier to find music, personalize collections, and share and experience them. All of this will require more investment and further modifications to our platform and technology. These costs will continue to increase and there is no end in sight. Meanwhile, we will continue to compete against free music in an environment where broadband access and technology make it easier and easier for consumers to bypass the market and find what they want to play and share with each other without paying for it. This is a developing market. Until the business is proven, costs need to be kept down.

**V. A REASONABLE ROYALTY WOULD MINIMIZE DISRUPTION OF THIS EMERGING MARKET**

55. The legal music downloading market is growing because more and more consumers are seeking comprehensive, safe, secure, and advanced methods of accessing music. MusicNet's investments are enabling a more meaningful music experience for consumers and providing value to content owners as a result. But the future is far from certain. As this market emerges from the early stages, an overly high royalty rate would effectively stunt -- if not dissolve altogether -- whatever slim incentives exist for continued investment.

56. Substantial challenges remain. Piracy shows absolutely no signs of abating. Distributors are going to need to substantially invest in marketing subscription services to consumers. And consumers are going to begin demanding increased portability and access to music across all platforms and devices. The future of portable music devices -- which is totally out of our control -- is incredibly important to our business. Consumers are getting more and more accustomed to carrying their large music collections with them. Subscription services such as those we provide through our distributors have a unique opportunity to leverage the growth of these devices to attain broader reach and scale. If these platforms are closed or difficult to access or not accepted by consumers or the costs of providing services is too high, the business will not evolve.

57. The Board should therefore take care not to impose a royalty rate in this proceeding that jeopardizes our ability to continue to grow this market. The market for legitimate digital music services is fragile enough -- especially for subscription services. Setting a royalty rate that is too high would almost assuredly signal the end of certain business models

all together. A rate that is set too high will severely disrupt the digital music marketplace and result in a loss of consumer confidence with respect to legal digital music services. As a result, there will be an increase in piracy activities.

58. The statutory mechanical rate could have a significant impact on our business because, even if we are able to attain profitability, our margins will remain slim. Therefore, we need to be able to devote as much revenue as possible to adding new distributors and providing incentives to our current distributors to expend significant resources in marketing so as to attain viable scale. A royalty rate that interferes with our ability to acquire new distribution channels, further reduces our and our distributors' margins, or impacts our ability to offer our services in new ways will likely mean the end of our business. Forcing a legitimate music service to price itself out of the market only results in more piracy activities, which harms both copyright owners and users. In addition to increasing piracy activities, forcing us to raise the fees for our services above the consumer breaking point jeopardizes our ability to compete with other forms of music entertainment, such as satellite radio. A royalty rate that is set too high would be catastrophic to our already vulnerable business model.

59. In particular, the Board should ensure that the revenue base to which the rate is applied is attributable solely to the music service purchased by consumers and does not impose a tax on other business activities. A percentage of revenue rate is an efficient way to ensure all parties in the value chain share in the risks and rewards of the endeavor, but it should not capture revenues that are not associated with the music itself. In addition, the Board should avoid the imposition of so-called "minimum fees" at this time. Any requirement that digital services pay a minima, either per subscriber or per play, would have a detrimental effect industry-wide.

Imposing any type of minima would destroy our distributors' ability to vary prices, jeopardizing their market viability. In the end, minimum fees would result in the imposition of artificial usage limits, reducing output and the generation of revenue in the market.

60. On October 6, 2006, MusicNet entered into an agreement settling copyright royalty litigation in the United Kingdom. The settlement and license are attached. *See* Settlement Agreement and License, Exhibits I. As a result, MusicNet will pay the greater of 8% of its adjusted gross revenues less VAT or applicable minimum fees to the owners of copyright in musical compositions for a blanket license to the rights that include the equivalent of the United States rights of public performance, reproduction, and distribution, as well as the right of communication to the public, which is not provided for in the United States. Certain issues relating to the definition of gross revenues or other carve-outs remain to be litigated by the parties. We believe the settlement represents a fair compromise to settle litigation in that jurisdiction. It does not provide a directly applicable analogy to the United States because of the nature of the rights conveyed and differences in the respective markets. However, it is a significant development from our perspective in recognizing the early stage of the business, the need for stable royalties, and the importance of minimizing administrative costs.

## **VI. CONCLUSION**

61. For the foregoing reasons, I support DiMA's proposed rate of 4.1% of applicable revenues for permanent downloads and 4% of applicable revenues for limited downloads, as well as DiMA's proposed terms. DiMA's proposed rate will provide content creators and users with a fair return. In addition, DiMA's proposed rates will not cause disruption to the still-evolving

digital music market and will help spur growth and development of the business to the benefit of copyright owners, users and consumers.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief:



Alan McGlade

11/27/06

Date

**A**



**REDACTED**

**B**

**REDACTED**

**C**

**REDACTED**

**D**

**REDACTED**





**REDACTED**

**F**

**REDACTED**

**G**

**REDACTED**

**H**

**REDACTED**





**Dated**

**October 2006**

**Mechanical-Copyright Protection  
Society Limited**

**Performing Right Society Limited**

**British Academy of Composers &  
Songwriters**

**MusicNet (UK) Limited**

**Napster LLC**

**Napster Luxembourg S.a.r.l.**

**SETTLEMENT AGREEMENT**

**DentonWildeSapte...**

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United Kingdom

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info@dentonwidesapte.com  
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**This Settlement Agreement** is dated the 6<sup>th</sup> day of October 2006 and is made between:

- (1) **Mechanical-Copyright Protection Society Limited** whose registered office is at 29-33 Berners Street, London W1T 3AB; and
- (2) **Performing Right Society Limited** whose registered office is at 29-33 Berners Street, London W1T 3AB; and
- (3) **British Academy of Composers & Songwriters** whose registered office is at 25-27 Berners Street, London W1T 3LR; and
- (4) **MusicNet (UK) Limited** whose registered office is at Suite 101, Westbourne Studios, 242 Acklam Road London W10 5JJ; and
- (5) **Napster LLC** whose registered office is at 9044 Melrose Avenue, Los Angeles, CA 90060; and
- (6) **Napster Luxembourg S.a.r.l.** whose registered office is at 46A Avenue J.F. Kennedy, Luxembourg, L-1855.

#### **Recitals**

- A Terms used in these Recitals shall have the meanings ascribed to them in Clause 1 of this Settlement Agreement.
- B MCPS and PRS promulgated a series of interim, non-precedential, one-year joint licensing schemes including the JOL for the provision of Online and Mobile Music services to the public in the UK for private use.
- C The JOL has been referred to the Copyright Tribunal by the Additional Settling Applicants and others.
- D MCPS, PRS, the Academy and the Settling Applicants agreed to resolve their disputes in relation to the JOL and the References by a settlement agreement dated 28 September 2006.
- E MCPS, PRS and the Additional Settling Applicants have agreed to resolve their disputes in relation to the JOL and the References as set out below.

#### **It is agreed:**

##### **1 Definitions and Interpretation**

- 1.1 **Academy** means the British Academy of Composers & Songwriters.

**Additional Settling Applicants** means together MusicNet (UK) Limited, Napster Luxembourg S.a.r.l. and Napster LLC.

**Applicant** means any of the British Phonographic Industry Limited, MusicNet (UK) Limited, Yahoo I (UK) Limited, AOL (UK) Limited, RealNetworks Limited, Napster LLC, Sony United Kingdom Limited, iTunes, and the MNOs.

**Copyright Tribunal** means the statutory body established pursuant to Section 145 of the Copyright, Designs and Patents Act 1988 (as amended) and any statutory successor to that body.

**Gross Revenue** has the meaning ascribed to it in the Scheme.

**iTunes** means iTunes S.a.r.l.

**iTunes' Disputed Contention** means iTunes' contention that revenue derived from advertising, sponsorship and commissions on or in connection with a Licensed Service should only be included within Gross Revenue as defined in the Scheme where that revenue is earned as a result of an advertisement, sponsorship or a click-through link located on a page of a Licensed Service from which the Licensed Service is actually offered (subject to apportionment where other services not requiring a licence are offered from the same page), and only where the Licensed Service is offered to the User at a price which has been artificially depressed to reflect such revenue.

**JOL** means the Licensing Scheme for the provision of online and mobile Music Services to the public for private use for the calendar year ending 31 December 2005.

**LD/ODS Service** has the meaning ascribed to it in the Scheme.

**Licensed Service** has the meaning ascribed to it in the Scheme.

**MCPS** means Mechanical-Copyright Protection Society Limited.

**MNOs** means together O2 (UK) Limited, T-Mobile International (UK) Limited, Vodafone UK Content Services Limited and Orange Personal Communications Services Limited.

**Non-Settling Applicants** means together Yahoo! (UK) Limited, AOL (UK) Limited and RealNetworks Limited.

**Premium and Interactive Webcasting Service** has the meaning ascribed to it in the Scheme.

**PRS** means Performing Right Society Limited.

**Pure Webcasting Service** has the meaning ascribed to it in the Scheme.

**References** means together the References commenced before the Copyright Tribunal and numbered 84/05, 85/05, 86/05, 87/05, 88/05, 89/05 and 90/05 of the JOL against MCPS and PRS.

**Relevant Period** means the period of a Month or a Quarter (as such terms are defined in the Scheme) by reference to which each Additional Settling Applicant accounts to and pays MCPS and PRS pursuant to Clauses 6 or 7 of the Scheme, as the case may be.

**Scheme** means the joint MCPS and PRS scheme attached hereto and marked Schedule 1, save as amended:-

- (i) pursuant to Clause 3 of the Settlement Agreement and;
- (ii) solely in relation to the iTunes' Disputed Contention and the Webcasting Disputed Contention by:
  - (a) any decision of the Copyright Tribunal in any of the References; or
  - (b) any agreement between MCPS, PRS and iTunes in relation to the iTunes' Disputed Contention which shall apply to the Additional Settling Parties pursuant to the terms hereof; or
  - (c) any agreement between MCPS, PRS, Yahoo! (UK) Limited, AOL (UK) Limited and RealNetworks Limited in relation to the Webcasting Disputed Contention.

For the purposes hereof, it is agreed that any resolution of the iTunes Disputed Contention shall (i) apply to aspects of the Additional Settling Parties' services comprised of the sale of individual Permanent Downloads of tracks and albums, and (ii) apply to the aspects of the Additional Settling Parties' services comprised of the sale of LD/ODS Services provided that the basis for the resolution of the iTunes Disputed Contention applies to the LD/ODS Service business model in no materially different respects than the Permanent Download Service business model.

**Settlement Agreement** means this Settlement Agreement including Schedules 1 and 2.

**Settling Applicants** means together the British Phonographic Industry Limited, iTunes and the MNOs.

**Webcasting Disputed Contention** means contentions in the References by any of the Non-Settling Applicants as to the commercial terms and conditions in relation to Pure Webcasting Services and Premium and Interactive Webcasting Services.

- 1.2 Headings are for ease of reference only and shall not be taken into account in construing the Settlement Agreement.

## **2 The Scheme**

MCPS and PRS shall forthwith offer to license MusicNet (UK) Limited and Napster Luxembourg S.a.r.l. on the terms of the Scheme, and each of MusicNet (UK) Limited and Napster Luxembourg S.a.r.l. shall agree to be bound by such terms.

## **3 Mixed Services, Bundling and Home Page Revenue**

- 3.1 The first sentence of the definition of "Limited Download/On-Demand Streaming Service" or "LD/ODS Service" in Schedule 1 of the Scheme shall remain in force. The second sentence of that definition shall be replaced by the following:

"Any Licensed Service falling primarily within the immediately preceding sentence but which also includes insubstantial elements which fall within the definition of a Premium and Interactive Webcasting Service and/or a Pure Webcasting Service shall be deemed in its entirety to be an LD/ODS Service. By way of example, the current webcasting offering within the Napster LD/ODS Service is insubstantial for this purpose."

- 3.2 MCPS and PRS confirm that if they operate any of the provisions of paragraph 3 of Schedule 2 to the Scheme in relation to the Licensed Service of an Additional Settling Applicant, they shall act reasonably in applying the terms thereof and they will, if requested by such Additional Settling Applicant, provide a written explanation of such operation and the objective criteria used to make any determination thereunder, and, if subsequently requested by the Additional Settling Applicant so to do, will meet with the Additional Settling Applicant within 30 days of the request in order to discuss the written explanation.

- 3.3 MCPS and PRS agree that, in relation to the Additional Settling Applicants, they will amend paragraph 2(c) of Schedule 3 of the Scheme as follows:-

- 3.3.1 by adding the following words as a prefatory clause to the first sentence of the existing paragraph 2(c): "Subject to the immediately following sentences of this paragraph 2(c)"; and
- 3.3.2 by adding the following new sentences after the end of the pre-existing paragraph 2(c): "Notwithstanding any other provisions hereof, advertising, sponsorship and commissions revenue arising in relation to the home page of a Licensee's website shall not be regarded as part of the Gross Revenue where (a) content relating to the Licensed Service is an insubstantial part of the entire content displayed on such home page and (b) the Licensed Service is an insubstantial part of the entire service of the Licensee as is accessible via the home page. By way of example (and without limitation) it is understood that any advertising, sponsorship or commissions revenue associated with the home pages of Yahoo.co.uk and

AOL.co.uk websites (as currently constituted) would not be part of the Gross Revenue for the purposes of the Scheme.

#### **4 Identity of the Licensee**

The Licensee for the purposes of the Scheme shall be restricted to the Music Service Provider, as defined in the Scheme.

#### **5 Term**

The Scheme shall apply from 1 July 2006 to 30 June 2009. For the avoidance of doubt, the Scheme will terminate automatically on 30 June 2009.

#### **6 Podcasting**

Podcasting Services shall be excluded from the Scheme.

#### **7 Other terms**

- 7.1 Neither the Settlement Agreement nor the Scheme shall set any precedent for the licensing of musical works in the offline environment.
- 7.2 MCPS and PRS confirm their view that:
- 7.2.1 there is uncertainty as to how the UK online music industry may continue to develop in the future;
- 7.2.2 there are significant differences that exist between the offline and online exploitation of musical works (including both audio-only and audio-visual products); and
- 7.2.3 the Settlement Agreement and the Scheme should not, other than in relation to the References, set any precedent in relation to the licensing terms for the online or mobile provision of music.
- 7.3 The Additional Settling Applicants do not agree with the view of MCPS and PRS referred to in clause 7.2 above.
- 7.4 MCPS and PRS confirm that part A of the application form referred to in the definition of Agreement in the Scheme shall be drafted in good faith by MCPS and PRS by 4pm on 20 October 2006 and shall include only non-contentious, factual and current information about the Licensee and the Licensee's Music Service.

- 7.5 MCPS and PRS on the one hand and the Additional Settling Applicants on the other hand will negotiate in good faith what minima should apply to "long" (for example more than 10 minutes) and "short" (for example of less than one minute) tracks. Should these negotiations not be concluded by 10 November 2006, any of the MCPS, PRS or either of the Additional Settling Applicants may refer the question as to what minima for "long" and "short" tracks (as referred to above) should apply for the period of the Scheme to an expert for determination. The identity of such expert shall either be agreed or, in the absence of such agreement within 7 days of the notice of referral, shall be determined by the Chairman for the time being of the Bar Council. MCPS, PRS and the Additional Settling Applicants will seek to agree the procedure for the conduct of any expert determination. If such agreement is not reached within seven (7) days of the appointment of the expert, the expert shall have power to set the procedure for the expert determination.
- 7.6 If MCPS and PRS receive notification of any significant reduction in the number of Musical Works (as defined in the Scheme), the relevant copyright in which is owned or controlled in the UK by them or either of them, MCPS and PRS will as soon as reasonably practicable thereafter notify the Additional Settling Applicants of such reduction.
- 7.7 MCPS and PRS confirm that, notwithstanding the requirement to maintain books and records for six years under clause 11.1 of the Scheme, the Additional Settling Parties shall be entitled to destroy books and records relevant to an audit period immediately following the settlement of the audit claim in relation to that period.
- 7.8 MCPS and PRS confirm that, for the avoidance of doubt, credit shall be given for any overpayment in relation to Permanent Download Services and LD/ODS Services as set out in clause 5.9 of the Scheme where such overpayment arises as a result of additional limitations arising under clause 4.6 of the Scheme.
- 7.9 The parties hereto acknowledge and agree that timely, accurate and complete reporting of usage is an important aspect of the Scheme. The parties further acknowledge and agree that there may be, from time to time, operational and technical issues involving the collection, collation, reporting and transmission of data in the exact manner set forth herein, including without limitation, in the event that the Alliance seeks to modify or change aspects of the Scheme relating to the same. The parties agree to cooperate in good faith to resolve any such issues as they may be identified by either party in as timely, efficient and practicable a manner as possible. This clause 7.9 is entirely without prejudice to the provisions of clause 8 and 9 of the Scheme.

## **8 Online Music Services prior to 1 July 2006**

- 8.1 If and to the extent that either of the Additional Settling Applicants has in respect of its online and/or mobile use of any Musical Work prior to 1 July 2006, failed to make any payment

and/or has failed to provide any reporting and accounting data due to MCPS and/or PRS pursuant to the terms of any licence granted to it by MCPS and/or PRS in relation to the provision of any of its Licensed Services, such Additional Settling Applicant shall:

- 8.1.1 within twenty-one (21) days of the Settlement Agreement provide MCPS and PRS with full and accurate reporting and accounting data for its online and/or mobile Music Services prior to 1 July 2006 in accordance with its existing licence;
  - 8.1.2 pay any invoice issued by MCPS and/or PRS in relation to the provision of its Licensed Service prior to 1 July 2006 and calculated based on the data supplied in accordance with its existing licence within twenty-one (21) days of the date of such invoice; and
  - 8.1.3 if any such invoice is not paid within twenty-one (21) days of the date it is issued, pay MCPS and/or PRS interest on the outstanding balance from time to time of such invoice calculated in accordance with the terms of its existing licence.
- 8.2 If and to the extent that either of the Additional Settling Applicants has not been licensed by MCPS and/or PRS in respect of its online and/or mobile use of any Musical Work for any period prior to 1 July 2006, such Additional Settling Applicant shall:
- 8.2.1 within twenty (20) days of the date this Settlement Agreement apply for a licence in accordance with the terms of the JOL in respect of such period prior to 1 July 2006 (and if it fails to do so, it shall be deemed to be subject to the terms of the JOL) and within forty-one (41) days of the date of this Settlement Agreement provide MCPS and PRS with full and accurate reporting and accounting data for its online and/or mobile music services prior to 1 July 2006 in accordance with the terms of the JOL;
  - 8.2.2 pay any invoice issued by MCPS and/or PRS in relation to the provision of its online and/or mobile Music Services prior to 1 July 2006 and calculated based on the data supplied in accordance with the JOL within twenty-one (21) days of the date of such invoice; and
  - 8.2.3 if any such invoice is not paid within twenty-one (21) days of the date of such invoice, pay MCPS and/or PRS interest on the outstanding balance from time to time of such invoice calculated in accordance with the terms of the JOL.
- 8.3 in calculating the amount to be invoiced pursuant to clauses 8.1.2 and 8.2.2 above, MCPS and/or PRS shall give credit for any payment received from the Additional Settling Applicant in relation to royalties due under its existing licence or the JOL as the case may be for any period prior to 1 July 2006.
- 8.4 For the purposes of this clause B, the expressions Music Services and Musical Work shall have the meanings respectively ascribed to them in the JOL.



- 8.5 Each of the Additional Settling Applicants agrees to report and account to MCPS and PRS in respect of its online and/or mobile use of any Musical Work from 1 July 2006 pursuant to and during the term of the Scheme.
- 8.6 Within twenty-one (21) days of the date of this Settlement Agreement, each of the Additional Settling Applicants shall provide MCPS and PRS with full and accurate reporting and accounting data for its online and/or mobile Music Services for each completed month since 1 July 2006 pursuant to the Scheme.
- 8.7 Each of the Additional Settling Applicants shall pay any invoice issued by MCPS and/or PRS in relation to the provision of its online and/or mobile Music Services during each completed month since 1 July 2006 within twenty-one (21) days of the date of such invoice.
- 8.8 If any such invoice, as referred to in Clause 8.7, is not paid within twenty-one (21) days of the date it is issued, the relevant Additional Settling Applicant shall pay MCPS and/or PRS interest on the outstanding balance from time to time of such invoice calculated in accordance with the terms of the Scheme.
- 8.9 MCPS and PRS agree that they will consider in good faith any reasonable request made by an Additional Settling Applicant for a variation to the terms set out in this Clause 8, such variation to be set out in a confidential side letter between such Additional Settling Applicant and MCPS and PRS.

## **9 Further cooperation between the Parties**

- 9.1 Given the fast-evolving nature of the UK online and mobile market, each of the Additional Settling Applicants, MCPS and PRS agrees, in order to improve their understanding of the UK market, to facilitate future licensing arrangements, and to help to avoid a reference of the scheme(s) promulgated by MCPS and/or PRS in relation to the provision of online and mobile music in the UK after the expiry of the Scheme, the Additional Settling Applicants, MCPS and PRS shall every quarter during the operation of the Scheme and on a strictly private and confidential basis:
- 9.1.1 exchange as between MCPS and PRS on the one hand and each of the Additional Settling Applicants on the other hand information about relevant developments in the UK online and mobile music market, including as to licensed services, business models and pricing; and
- 9.1.2 unless otherwise agreed by MCPS and PRS on the one hand and each of the Additional Settling Applicants on the other hand, meet on a quarterly basis to discuss the information exchanged pursuant to clause 9.1.1 above. For the avoidance of doubt, MCPS and PRS may be represented at such meetings by its management and/or by members of the Music Publishers' Association Board. The disclosure of confidential information by an Additional

Settling Applicant to any person other than the authorised management representatives of MCPS and PRS shall be subject to the consent of the disclosing Additional Settling Applicant, such consent not to be unreasonably withheld, and the agreement of appropriate confidentiality arrangements, such agreement not to be unreasonably withheld by the disclosing Additional Settling Applicant.

- 9.2 In the event that these meetings do not result in agreement between the Additional Settling Applicants, MCPS and PRS as to the licence terms that should apply from 1 July 2009 in relation to the provision of online and mobile music in the UK, then MCPS and/or PRS shall produce and provide to the Additional Settling Applicants on or before 1 May 2009 a proposed scheme or schemes which it and/or they propose should take effect from 1 July 2009. If MCPS and/or PRS fail to provide such a scheme or schemes by that date, then and only then may the Additional Settling Applicants or either of them refer the Scheme to the Copyright Tribunal.

## 10 Costs

MCPS, PRS, the Academy and the Additional Settling Applicants agree that, as between themselves, each shall pay all of its own costs in relation to and/or incurred and/or for which it is already obliged to pay at the date of this Settlement Agreement as a result of the References. For the avoidance of doubt, to the extent that there are any existing Copyright Tribunal costs awards in the References as between MCPS, PRS, the Academy and the Additional Settling Applicants, those awards shall not be enforced.

## 11 Settlement Terms

11.1 The Settlement Agreement, is on the basis that:

- (a) it is in full and final settlement of all claims and disputes between each of the Additional Settling Applicants on the one hand and each of MCPS and PRS on the other hand howsoever arising directly or indirectly out of or in connection with the exploitation of Repertoire Works (as defined in the Scheme) prior to 1 July 2006 (where such exploitation would otherwise have fallen within the scope of the JOL) or the JOL and/or any of the References. For the avoidance of doubt, (i) nothing in this Settlement Agreement including this Clause 11.1(a) shall prevent either Additional Settling Applicant from later referring to the Copyright Tribunal or otherwise challenging any podcasting scheme or licence promulgated or proposed (currently or in future) by MCPS and/or PRS or any other scheme applicable to music uses falling outside the scope of the Scheme; (ii) nothing in this clause 11.1(a) shall prevent the MCPS and PRS from enforcing their rights pursuant to this Settlement Agreement.
- (b) subject to Clause 9.2 above, no Additional Settling Applicant shall refer, nor assist (save and to the extent required by any order of the Copyright Tribunal or a court of

competent jurisdiction or by law so to do) a third party in referring, nor intervene in any reference made by a third party referring the Scheme;

- (c) save and to the extent that any Additional Settling Applicant is required by any order of the Copyright Tribunal or a court of competent jurisdiction or by law so to do or under an existing contractual obligation to make any payment including to Richard Boulton, Derek Ridyard or their respective firms for work done in relation to the References after the date of the Settlement Agreement, no Additional Settling Applicant shall in any way whether financially or otherwise assist any Applicant to pursue the References or any of them or any part of them against MCPS and PRS. For the avoidance of doubt, save and to the extent that any Additional Settling Applicant is required by any order of the Copyright Tribunal or a court of competent jurisdiction or by law so to do, it is hereby confirmed that no Additional Settling Applicant shall pursue in any way nor assist iTunes in its pursuit of the iTunes' Disputed Contention;
- (d) subject, for the Additional Settling Applicants, to the iTunes' Disputed Contention and the Webcasting Disputed Contention:
  - (i) the Settlement Agreement including the Scheme is a package deal, and taken in its entirety its terms are fair and reasonable; and
  - (ii) MCPS, PRS, the Academy, and the Additional Settling Applicants shall advance and defend the position in the Copyright Tribunal (or any appeal) as described in Clause 11.1(d)(i), and shall contend that the Scheme represents the terms that should apply to all licensees for online and mobile music services within the scope of the Scheme for the purposes of the References;
- (e) Notwithstanding Clause 11.1(d) above, the execution of the Settlement Agreement shall not be treated as any acceptance by any of MCPS, PRS, the Academy or either of the Additional Settling Applicants that any individual element of the Settlement Agreement including the Scheme is, viewed in isolation, fair and reasonable.
- (f) the Additional Settling Applicants shall forthwith withdraw their respective References, written submissions and witness of fact evidence.
- (g) no order shall be sought from the Copyright Tribunal by the Additional Settling Applicants, MCPS, PRS and the Academy in relation to the Settlement Agreement, and no order shall be made as to costs in the References as between MCPS, PRS, the Academy and the Additional Settling Applicants.

## **12 Jurisdiction**

MCPS, PRS, the Academy and each of the Additional Settling Applicants agree that any dispute arising out of or in connection with this Settlement Agreement shall be subject to the exclusive jurisdiction of the English Courts, save and to the extent that any such dispute is subject to the jurisdiction of the Copyright Tribunal.

## **13 Public Statement**

13.1 MCPS, PRS, the Academy, and/or the Additional Settling Applicants shall forthwith issue a press release in the form of the draft attached hereto and marked Schedule 2, and shall make no other public statement in relation to the Settlement Agreement including the Scheme unless it has the same or materially similar content.

13.2 MCPS and PRS shall provide a copy of the Settlement Agreement including the Scheme and any side letters to the Copyright Tribunal and to the Applicants which are not Additional Settling Applicants, provided that such side letters shall be "class 2" Confidential Information as defined in the Mutual Non-Disclosure Agreement between the Applicants, MCPS, PRS and the Academy dated 28 April 2006 unless otherwise agreed by the parties to the relevant side letter.

## **14 Counterparts**

This Settlement Agreement may be executed in any number of counterparts and by the parties to it on separate counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument. The Settlement Agreement is not effective until each party has executed at least one counterpart.

As duly authorised agent for and on behalf of

**Mechanical Copyright Protection Society Limited**

By: .....

**C. EVANS GENERAL COUNSEL**  
[name & position]

As duly authorised agent for and on behalf of

**Performing Right Society Limited**

By: .....

**C. EVANS GENERAL COUNSEL**  
[name & position]

As duly authorised agent for and on behalf of

**British Academy of Composers & Songwriters**

By: .....

[name & position]

As duly authorised agent for and on behalf of

**MusicNet (UK) Limited**

By: .....

[name & position]

As duly authorised agent for and on behalf of

**Napster LLC**

By: .....

[name & position]

As duly authorised agent for and on behalf of

**Napster Luxembourg S.a.r.l.**

By: .....

[name & position]

As duly authorised agent for and on behalf of  
Mechanical-Copyright Protection Society Limited

As duly authorised agent for and on behalf of  
Performing Right Society Limited


By: .....  
[name & position]

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
British Academy of Composers & Songwriters

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
MusicNet (UK) Limited

By:   
CINDY CHARLES  
[name & position]

As duly authorised agent for and on behalf of  
Napster LLC

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
Napster Luxembourg S.a.r.l.

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
Mechanical-Copyright Protection Society Limited

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
Performing Right Society Limited

By: .....  
[name & position]


As duly authorised agent for and on behalf of  
British Academy of Composers & Songwriters

By: .....  
[name & position]


As duly authorised agent for and on behalf of  
MusicNet (UK) Limited

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
Napster LLC

By: *Aileen Atkins*   
[name & position]  
*Aileen Atkins*  
SVP, GC

As duly authorised agent for and on behalf of  
Napster Luxembourg S.a.r.l.

By: *Michael McAuliffe*   
[name & position]  
*Michael McAuliffe*  
European Controller

As duly authorised agent for and on behalf of  
Mechanical-Copyright Protection Society Limited

As duly authorised agent for and on behalf of  
Performing Right Society Limited

By: .....  
[name & position]

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
British Academy of Composers & Songwriters

By: *J. Ralkow*  
[name & position]

*J. RALKOW  
DIRECTOR*

As duly authorised agent for and on behalf of  
MusicNet (UK) Limited

By: .....  
[name & position]

As duly authorised agent for and on behalf of  
Napster LLC

By: .....  
[name & position]



## Schedule 1 – The Scheme

### LICENSING SCHEME FOR THE PROVISION OF ONLINE AND MOBILE MUSIC SERVICES TO THE PUBLIC FOR PRIVATE USE

#### 1. ONLINE AGREEMENT

- 1.1 The terms and conditions contained in the standard form Online Agreement ("the Online Agreement") which is set out in Appendix 1 will apply to an online and/or mobile Music Service where:-
- (a) the service provider has applied to MCPS and PRS for that Agreement; and
  - (b) MCPS and PRS have granted that application in writing;
- 1.2 Application for an Online Agreement shall initially be in the form set out in Appendix 2, but MCPS and PRS shall be entitled to ask reasonable further questions to satisfy themselves of the eligibility of the applicant.

#### 2. AVAILABILITY OF ONLINE AGREEMENT

- 2.1 The Online Agreement is available to providers of online and mobile music services:
- (a) who, in relation to such services, are the Music Service Provider (as that term is defined within the Online Agreement); and
  - (b) where the royalties payable (as defined in the Online Agreement) in relation to such music service(s) would be likely to be more than £200 per year.
- 2.2 Where a Quarterly Advance is payable under the Online Agreement, it shall be a minimum of £50.00 per Quarter.
- 2.3 Where 2.1(b) above does not apply, alternative licensing arrangements may be offered to the provider.

#### 3. TERRITORY

The territory covered by the Online Agreement is the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man. The position as to which additional countries (and in respect of which repertoire) can be included within the definition of 'Territory' may change throughout the Term. MCPS and PRS will inform the applicant for an Online Agreement as to which additional countries may be covered at the time of application.

#### 4. LINKS TO UNLICENSED MUSIC

MCPS and PRS shall have the right to refuse to license any service which provides internet or mobile "links" to unlicensed music (whether in the form of recordings or notation, scores, lyrics, etc).

#### 5. DEPOSITS AND FINANCIAL GUARANTEES

MCPS and PRS may make the grant of an Online Agreement conditional upon the provision of such financial guarantees (by way of example only, deposits or advances) as are reasonably necessary to provide security against the risk that the members of MCPS and PRS may not receive such royalties as may be payable under the Online Agreement. Upon termination of an Online Agreement, MCPS and PRS shall release or repay any guarantee or similar security and shall repay any deposit or similar payment with accrued interest within 14 days of the

latest of (a) termination, or (b) the licensee having materially complied with all of its obligations under the Online Agreement or (c) resolution of any claim under any audit or other claim in relation to which notice was given to the Licensee prior to such termination.

For the avoidance of doubt, any guarantees under this provision are separate from the Quarterly Advance referred to in clause 6 of the Online Agreement and no interest shall be payable on any Quarterly Advance.

6. COMMENCEMENT AND TERM OF SCHEME

This scheme shall take effect on 1 July 2006 and shall continue until 30 June 2009.

## Appendix 1

### THIS AGREEMENT IS MADE BETWEEN

**MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED** whose registered office is at 29-33 Berners Street London W1T 3AB ("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 (as defined below); and

**PERFORMING RIGHT SOCIETY LIMITED** whose registered office is at 29-33 Berners Street London W1T 3AB ("PRS") contracting for and on behalf of itself and for and on behalf of and as agent of the Associated Societies (as defined below); and

**THE LICENSEE** (as set out in schedule 6)

### WHEREAS

- (A) The Licensee wishes to offer an online and/or mobile music service within the meaning set out in this Agreement;
- (B) PRS and MCPS have developed a joint licensing scheme for licensing musical works for use in such online and mobile music services;
- (C) PRS and MCPS have agreed to license musical works to the Licensee on the above basis and upon the terms and conditions contained in this Agreement.
- (D) Given the fast evolving nature of the UK online and mobile market, this Agreement shall operate only in relation to the period 1 July 2006 until 30 June 2009.

### NOW IT IS HEREBY AGREED AS FOLLOWS

#### 1. Definitions

- "the Act"** means the Copyright, Designs and Patents Act 1988, as amended from time to time.
- "Agreement"** means these terms and conditions, the schedules to the terms and conditions and part A of the application form completed by the Licensee.
- "Alliance"** means MCPS-PRS Alliance Limited whose registered office is at 29-33 Berners Street London W1T 3AB.
- "Associated Society"** means each collecting society (or other body representing rights in Musical Works) with which MCPS and/or PRS has, from time to time, an agreement under which MCPS and/or PRS is authorised to grant licences in relation to the other society's (or body's) repertoire for the purpose of this Agreement PROVIDED THAT where such an agreement is only entered into after the commencement of the Term, a collecting society (or other body) shall only be regarded as an "Associated Society" for the purposes of this Agreement with effect from the date of signature of such agreement with MCPS and/or PRS (as applicable).

**"Associated Society Member"**

means any person, firm or company who or which has been notified, from time to time, as being a member of an Associated Society by the relevant Associated Society to MCPS and/or PRS.

**"Audio-Visual Material"**

means any specific presentation of Musical Works in conjunction 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 music; or
- (b) the fact that the media player used to play the music generates random visual images while the music 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.

**"Commencement Date"**

means the date specified in schedule 6.

**"Commercial Work"**

means any Repertoire Work other than:

- (a) one where the Member owning or controlling the copyright in such Repertoire Work has authorised MCPS to license it as so-called production or library music; or
- (b) a Commissioned Work, PROVIDED THAT for the purposes of clauses 3.2 and 4.5, a Commissioned Work shall not be excluded from such definition where the commissioning agreement does not authorise the Licensee to use the Commissioned Work in the context set out in those clauses.

**"Commissioned Work"**

means a Musical Work specially and expressly commissioned by the Licensee from composer/writer members of PRS and/or MCPS.

**"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"**

means any ballet, opera, operetta, musical, musical play or work of a similar nature.

**"Electronic Reporting Format"**

means the format set out in schedule 4. If and when the DDEX format is agreed within the industry, the DDEX format shall replace the format set out in schedule 4 within 6 months of such agreement unless otherwise agreed between the parties, acting reasonably.

<b>"Gross Revenue"</b>	shall have the meaning set out in schedule 3.
<b>"Licensed Services"</b>	means the Music Services listed in schedule 6.
<b>"Licensee"</b>	means the party set out as such in schedule 6.
<b>"Licensors"</b>	means PRS and MCPS.
<b>"Member"</b>	means: <ul style="list-style-type: none"> <li>(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 online exploitation either before or during the Term other than where such person, firm or company has opted not to participate in the licensing scheme pursuant to which this Agreement has been entered into, 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</li> <li>(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.</li> </ul>
<b>"Month"</b>	means a calendar month.
<b>"Musical Work"</b>	means any musical work (as defined in the Act) and any lyrics or words written to be used with such musical work (if applicable). It includes any part of such a work.
<b>"Music Service Provider"</b>	means, the party which, in relation to a Music Service, most closely meets the following criteria: <ul style="list-style-type: none"> <li>(a) contracts with the User in relation to the provision of the Licensed Service;</li> <li>(b) sets and controls the price the User pays;</li> <li>(c) can fully report on all elements of Gross Revenue (including relevant advertising revenues);</li> <li>(d) can fully report on all elements of music usage (or can procure such reporting);</li> <li>(e) controls how content is offered and bundled within the</li> </ul>

Licensed Service;

- (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 referred to in the Electronic Reporting Format.

**"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 as audio records 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.

**"Music Service"** means a music service falling within the definition set out in schedule 1.

**"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.

<b>"Quarterly Advance"</b>	means the sum set out in schedule 6, excluding VAT (or other equivalent sales tax, as applicable).
<b>"Relevant Party"</b>	means a party which is involved in the provision of the Licensed Services, as set out in clause 15.2.
<b>"Repertoire Work"</b>	<p>means each Musical Work the relevant copyright in which is owned or controlled, from time to time, in the UK by:</p> <p>(a) 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 Works that a Member of MCPS or an Associated Society has withdrawn or withheld from this Agreement; and</p> <p>(b) PRS or a Member or an Associated Society or an Associated Society Member PROVIDED THAT 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.</p> <p>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.</p>
<b>"Reporting Date"</b>	<p>means:</p> <p>(a) where the Licensee is undertaking monthly accounting in accordance with clause 6, 5.00pm on the Friday following the Week to which the reporting relates; or</p> <p>(b) where the Licensee is undertaking quarterly accounting in accordance with clause 7, one month following the Quarter to which the Music Usage Information relates.</p>
<b>"Royalty Fee"</b>	means the royalties payable as set out in schedule 2.
<b>"Server Territory"</b>	means the European Economic Area, Switzerland, the United States of America, Canada and such other territories as may be agreed in writing by the parties.
<b>"Term"</b>	means the period starting on the Commencement Date and ending upon the date set out in clause 13.1 (unless terminated earlier under clauses 4.6, 13.2, 13.3, 13.4 or 13.5).
<b>"Territory"</b>	means the UK, and those territories (if any) listed in schedule 6 (subject always to clause 4.6 and schedule 2, paragraph 5) and such other countries as the Licensors and the Licensee

may agree in writing.

- "UK"** means the United Kingdom of Great Britain and Northern Ireland and the Channel Islands and the Isle of Man.
- "User"** means a natural person in the Territory who receives the Licensed Services for their own private and non-commercial use.
- "VAT"** means value added tax pursuant to the Value Added Tax Act 1994 and each like tax imposed in addition to or in substitution therefor.
- "Week"** means a week starting on Monday and ending on Sunday.

## 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 clauses 3 and 4, MCPS grants the Licensee a non-exclusive licence to do the following during the Term:
- (a) to reproduce Repertoire Works on servers within the Server Territory for the purpose of transmitting the same to Users (for the User's own private and non-commercial use) by means of the Licensed Services; and
  - (b) where the Licensed Services expressly authorise the temporary or permanent reproduction of Repertoire Works on Users' Data Storage Devices, to cause such copies to be made in the Territory for the User's own private and non-commercial use; and
  - (c) to authorise the reproduction of "pre-loaded" copies of Musical Works on Data Storage Devices and distribute such Data Storage Devices to the public within the Territory in an encrypted or other protected form within consumer electronic equipment where the Repertoire Works are solely intended to be accessible at a later date only to Users (for their own private and non-commercial use) through the Licensed Service(s). For the avoidance of doubt, the royalties set out in schedule 2 (including the Minimum Royalties) shall be payable in respect of Musical Works "pre-loaded" in accordance with this sub-clause 2.1(c). However, the royalties in respect of such "pre-loaded" Musical Works shall not accrue until the User has become able to access and play such Musical Works. This is without prejudice to the obligation of the Licensee to pay the Quarterly Advance.

For the avoidance of doubt (but subject to all terms of this Agreement, in particular clause 3.3), 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 and conditional upon compliance with the terms and conditions contained herein and in particular subject to the exclusions and restrictions set out in clauses 3 and 4, 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 within the Territory solely as part of and for the purposes of the provision of the Licensed Services.
- 2.3 The above licences shall apply where Repertoire Works are used in audio-only material and, subject to clause 3.2, Audio Visual Material.
- 2.4 The Licensors will not unreasonably refuse or delay any request by the Licensee to include further services of the Licensee within the scope of this Agreement provided that:
- (a) they are a Music Service; and



- (b) the Licensee is, in relation to that service, the Music Service Provider; and
  - (c) they are otherwise within the scope and limitations set out in this Agreement.
- 2.5 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.
- 2.6 The licences granted in clauses 2.1 and 2.2 above shall not apply to any Licensed Service which knowingly or recklessly provides internet or mobile "links" to music which requires a licence, but is unlicensed (whether in the form of recordings or notation, scores, lyrics, etc). The inclusion of such links on a Licensed Service shall constitute a material breach of this Agreement (which is capable of remedy).
- 2.7 Where the Licensee wishes to launch a service where music is the primary theme of such service, but such service does not fall within the definition of Music Service as set out in schedule 1 to this Agreement, then the Licensors agree to enter into good faith discussions with the Licensee concerning the inclusion of such new service within the scope of this Agreement and the appropriate royalty rate and minima which shall be applicable.

### 3. Exceptions and Limitations

- 3.1 The licences granted under clause 2 of this Agreement are valid only insofar as:
- (a) the Licensed Services are Music Services; and
  - (b) the Licensee is the Music Service Provider in relation to the Licensed Services.
- 3.2 Subject to clause 2.5, the incorporation of Commercial Works into Audio-Visual Material is only licensed under this Agreement where the Audio-Visual Material consists of:
- (a) a Music Videogram; or
  - (b) a live concert performance or a film of a live concert performance by the artist performing that particular Commercial Work; or
  - (c) subject to clause 4.5, such Commercial Works being combined with photographs or other images relating to the artist performing the Commercial Work or the composer of the Commercial Work; or
  - (d) subject to clause 4.5, an interview with an artist, composer, producer or other person involved in the creation, performance or production of music where the Commercial Work(s) used are associated with the interviewee(s); or
  - (e) where permitted under clause 4.1, a performance of Permitted Excerpts of the Dramatico-Musical Work of which the Commercial Work forms part.

For the avoidance of doubt, such Audio-Visual Material as is licensed under 3.2(a) to (e) above is only licensed insofar as it is reproduced or communicated to the public via the Licensed Services.

- 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 to create and produce Audio-Visual Material.

- 3.4 For the avoidance of doubt and except as specifically provided for in clause 2.1(c), the licences granted under clause 2 of this Agreement shall not authorise the manufacture or distribution of physical products containing Repertoire Works, such as (without limitation) the ordering of compact discs (or any other type of physical media) via a Music Service, but which are distributed by mail.
- 3.5 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, whether as part of the Licensed Services or otherwise.
- 3.6 Subject to clause 2.5 and paragraph 5 of schedule 3, 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.
- 3.7 Subject to paragraph 5 of schedule 3, for the avoidance of doubt (but without prejudice to the generality of clause 3.6), 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.
- 3.8 The licence granted under clause 2.1 shall not apply to graphic copies (meaning, without limitation, copies of lyrics, notation or scores) of Repertoire Works. For the avoidance of doubt, the licences granted under this Agreement shall not apply to any "karaoke" service within a Music Service.
- 3.9 The licence granted under clause 2.2 shall only apply to a Repertoire Work communicated to the public as part of a Licensed Service where the Licensee has the benefit of a valid licence for or a right to make a reproduction of that particular Repertoire Work and for that particular form of exploitation via the Licensed Service either pursuant to this Agreement or otherwise. By way of example only, the licence granted by MCPS under clause 2.1 does not cover the copying of Repertoire Works in an advertisement (see clause 3.6 above). However, clause 3.6 does not apply to the licence granted by PRS under clause 2.2. Therefore, pursuant to this clause 3.9, the licence granted by PRS under clause 2.2 would not apply (in the context of this example) unless the Licensee has the benefit of a right to copy the Repertoire Work for use in that advertisement (and on the Licensed Service(s)).
- 3.10 For the avoidance of doubt, this Agreement grants 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.

**4. Further Restrictions**

4.1 Subject to clause 2.5, where any Repertoire Work forms part of any Dramatico-Musical Work, the licence granted under clause 2.1 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 via the Licensed Services 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 the Associated Society Member objects to the reproduction of any such Repertoire Work.

4.2 Subject to clause 2.5, 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 4.2, 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.

4.3 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.

4.4 Subject to clause 2.5, 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 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 4.10 and provided that such alterations do not amount to an adaptation of a Repertoire Work and do not contravene clause 4.5, 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.

For the avoidance of doubt, the Licensors acknowledge, for the purposes of the restriction set out in this clause 4.4, that the production and inclusion as part of the Licensed Services of audio clips of Repertoire Works of up to 30 seconds (or, for "classical" genre Repertoire Works, up to 1 minute) duration to promote the supply of music via the Licensed Services does not of itself constitute an adaptation or sample.

- 4.5 Subject to clause 2.5, the licences granted under this Agreement shall not extend to:
- (a) the reproduction or communication to the public of any Commercial Work or part thereof in the form of a parody or burlesque of any Commercial Work or of any composer or writer of any Commercial Work or any band or other group of artists which includes any composer or writer of any Commercial Work; or
  - (b) the use of any Commercial 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 Associated Society Member.
- 4.6 Any additional limitations in relation to the Associated 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 nature is added, the Licensee shall have the right to terminate this Agreement by giving written notice to the Licensors.
- 4.7 All rights not specifically granted under this Agreement are hereby reserved.
- 4.8 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, performers' rights or rights in performances. 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.
- 4.9 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.
- 4.10 Nothing in this Agreement affects the moral rights of authors of Repertoire Works whether subsisting in the UK or any other territory.
- 5. Payment and Accounting**
- 5.1 Where the Licensors are satisfied that:
- (a) the projected Gross Revenue of the Licensee during the first year of the Agreement is over £500,000 (excluding VAT or other equivalent sales tax), such figure to be increased each calendar year in accordance with the Retail Price Index change over the previous calendar year; and
  - (b) there is no adverse credit risk causing the Licensors to have reasonable concerns over the Licensee's ability to pay royalties due under this Agreement; and
  - (c) the Licensee is capable of accurately reporting and paying royalties on a monthly basis in accordance with the provisions of this Agreement;
- then the Licensee shall pay royalties in accordance with clause 6 below.
- 5.2 Otherwise, the Licensee shall pay royalties in accordance with clause 7 below.

- 5.3 All licence fees and payments referred to in this Agreement are subject to VAT or other equivalent sales tax. The Licensee shall pay to the Licensors VAT or other equivalent sales tax (if applicable) at the rate or rates from time to time in force on any sums payable under this Agreement.
- 5.4 Except as expressly set out in this Agreement, no deduction in respect of any tax, or any other deduction or set-off of whatsoever nature, shall be made in calculating or paying any sum due under this Agreement.
- 5.5 Notwithstanding the provisions of clauses 6 and 7 below, 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 the Members and, subject to clause 4.6, the Associated Societies.
- 5.6 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 (or the date on which such fees should ordinarily have been paid in circumstances where the Licensors have been unable to submit an invoice) due to default of the Licensee, 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.
- 5.7 All payments made under this Agreement shall be in Sterling unless otherwise agreed by the parties in writing. Where it is necessary to convert an amount payable to Sterling from another currency, the exchange rate used shall be the Financial Times closing mid market rate on the last working day of the Quarter to which the payment relates. The Licensee shall pay all bank charges on transfers of sums payable by the Licensee to the Licensors (or the Alliance pursuant to clause 5.5).
- 5.8 The address for delivery of the royalty statement referred to in clauses 6.2 and 7.5 is Online Licensing Team, MCPS-PRS Alliance Limited, Copyright House, 29-33 Berners Street, London, W1T 3AB.
- 5.9 In relation to Permanent Download Services and LD/ODS Services only, if and insofar as, (i) a Musical Work is not in copyright in the relevant part of the Territory, 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.
- 5.10 Notwithstanding the above, for Music Services where a significant proportion of Musical Works accessed by Users are either no longer in copyright in the relevant part of the Territory or are otherwise not Repertoire Works (by way of example, services specialising in classical music), the Licensors shall agree an appropriate deduction to the Gross Revenue and Minimum Royalties to apply as from the Commencement Date. This deduction shall be reviewed every six months.
- 6. Fees and Payment – Monthly Accounting**
- 6.1 In consideration of the licences and authorisations granted under this Agreement, the Licensee shall pay to the Licensors the Royalty Fee.
- 6.2 Within 8 working days of the end of each Month, the Licensee shall send to the Licensors a fully and accurately completed royalty statement (in the form attached in schedule 5).

- 6.3 The Alliance shall, on behalf of the Licensors, each of the Members and, subject to clause 4.6, the Associated Societies, raise an Invoice for the due amount, and the Licensee shall pay such Invoice by electronic bank transfer (or, if agreed by the Licensee, direct debit) within 10 days of the Invoice date.
- 6.4 Where, in relation to any particular Month, the Licensee fails to provide by the required date the information required under the Agreement to calculate the Royalty Fee, then the Licensors shall be entitled to fix the Royalty Fee based on (a) the Royalty Fees payable in previous Months and (b) any other relevant factors which could reasonably lead the Licensors to believe that the Royalty Fees payable would be materially different from those paid or payable in previous Months.
- 7. Fees and Payment – Quarterly Accounting**
- 7.1 In consideration of the Licences and authorisations granted under this Agreement, the Licensee shall pay to the Licensors:
- (a) the Quarterly Advance; and
  - (b) subject to clause 7.2, the Royalty Fee.
- 7.2 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 7.3 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.
- 7.3 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.
- 7.4 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 7.1(b), 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.
- 7.5 The Quarterly Advance shall be payable by direct debit on the first day of each Quarter. Where the Agreement begins (and/or a Licensed Service comes into operation) within a Quarter, the first Quarterly Advance payment shall be pro-rated (according to the Commencement Date) and shall be payable upon the later of signature of this Agreement and the date on which the first Licensed Service is made available to Users for the first time.
- 7.6 Within 15 working days of the end of each Quarter the Licensee shall provide to the Licensors a fully and accurately completed royalty statement (in the form attached in schedule 5).
- 7.7 The Alliance shall, on behalf of the Licensors, each of the Members and, subject to clause 4.6, the Associated Societies, raise an Invoice for the due amount, and the Licensee shall pay such Invoice by electronic bank transfer (or, if agreed by the Licensee, direct debit) within 21 days of the Invoice date.
- 8. Supply of Information**
- 8.1 In relation to any and all Repertoire Works reproduced and communicated to the public (or otherwise accessed through a Licensed Service if from "pre-loaded" copies pursuant to clause 2.1(c)) under this Agreement via all Licensed Services, 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) in the Electronic Reporting Format weekly (where the

Licensee is undertaking monthly accounting) or quarterly (where the Licensee is undertaking quarterly accounting) by the Reporting Date.

- 8.2 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.
- 8.3 Where any or all of the Licensed Services 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 Licensed Services 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 access to downloads under a Permanent Download Service or to provide free access to a mobile phone network or Internet access.
- 8.4 The Licensee acknowledges that the Licensors have a responsibility to maximise the efficiency of their reporting to their Members and the Associated 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 4 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.

- 8.5 Without prejudice to any right in law that the Licensors may have to obtain such information, the Licensee shall not be obliged to provide to the Licensors any information which identifies 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 include or constitute "personal data".
- 8.6 The Licensee shall notify the Licensors in writing in advance of all arrangements which it enters into for "pre-loading" content on Data Storage Devices pursuant to clause 2.1(c), such notification to include details of the relevant Data Storage Devices.
- 9. Late Reporting**
- 9.1 The following provision applies where the Licensee has:
- (a) failed to deliver prior to the required date Music Usage Information for the Licensed Service; or

- (b) delivered such Music Usage Information prior to the required date, but it contains any omission or error of whatsoever nature (by way of example only, Repertoire Works having been omitted therefrom or incorrectly or misleadingly named, or the duration of any Repertoire Works having been under-reported) which is material and the Licensee has failed to give notice in writing to the Licensors correcting the omission or error by the date upon which such reporting should have been provided.
- 9.2 In such circumstances (and without prejudice to any other rights which either or both Licensors may have against the Licensee) if one or both of the Licensors has distributed some (or all) royalties received (excluding any commission) to Members and/or Associated Societies based on the usage data supplied, but, as a result of clause 9.1(a) or (b) applying, the royalties distributed do not accurately or fairly represent that which each of the Members and/or Associated Societies should have received (when considering the true usage of Repertoire Works), then the Licensee shall pay the fees set out in clauses 9.3 and 9.4 (in addition to those set out in clauses 6 and 7).
- 9.3 Where clause 9.2 applies, separately in relation to each relevant Repertoire Work either omitted from the relevant Music Usage Information or as regards which there was a material omission or error of whatsoever nature or in relation to which the relevant Music Usage Information was not delivered, the additional fees shall be calculated at the rate equivalent to that which has been or will be paid by MCPS and/or PRS (as applicable) to their members (or associated societies) in relation to the Music Usage Information which was submitted prior to the required date.
- 9.4 Where clause 9.2 applies, the Licensee will also pay interest on the additional fees as referred to in clause 9.3 above computed in accordance with clause 5.6 and calculated from the date on which MCPS and/or PRS (as applicable) first made a distribution to their members (or associated societies) in relation to the relevant period to the date on which the Music Usage Information was received by the Licensors or the date on which the Licensors received written notice of the relevant error, as the case may be.
- 9.5 The provisions of this clause apply notwithstanding any other provision of this Agreement, but are without prejudice to any other right which MCPS and PRS have in relation to any failure to submit Music Usage Information fully or accurately completed within the time stipulated in clause 8.1.

#### 10. Credits and Notices

The Licensee shall include on each of the Licensed Services:

- (a) the logos of PRS and MCPS; and
- (b) details of the following website and, where practical, hypertext links to it: <http://www.mcps-prs-alliance.co.uk>; and
- (c) where reasonably practicable, the name of the composer and publisher of the Repertoire Works provided via the Licensed Services; 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 notices within the terms and conditions of the Licensed Service(s) where it is not reasonably practical to position such information elsewhere.

#### 11. Auditing

- 11.1 The Licensee shall keep and make available for inspection upon reasonable 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 (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.

- 11.2 For the purposes of this clause 11, the Licensee shall allow upon reasonable 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.
- 11.3 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 5.6).
- 11.4 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 11.3, the Licensors' reasonable costs of such audit and verification within 28 days of receipt of the Licensors' VAT invoice therefor.
- 11.5 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 5.6)). 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 Associated Societies, the Licensors shall be entitled to deduct its reasonable internal and/or external costs in administering the payment back of the overpayment.
- 11.6 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 11, 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.
- 11.7 For the avoidance of doubt, books, records and accounting records as referred to in clauses 11.1 and 11.2 above shall include data, information and records held on computers.
- 11.8 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.
- 12. Security and Encryption**
- 12.1 Unless agreed otherwise, the Licensee will utilise or require the utilisation of an industry security standard which is developed and is available for use in the protection of Repertoire

Works. Until such time, the Licensee must use its reasonable endeavours to prevent unauthorised copying and/or the unauthorised issuing of copies of Repertoire Works by whatever technical means are practicable. Upon request, the Licensee will inform the Licensors concerning its activities in relation to fulfilling this obligation.

12.2 Save as may be permitted by law, the Licensee agrees it shall not (and shall procure that any Relevant Party shall not) attempt to:

- (a) remove or alter any rights management or identifier information that may be associated with any Repertoire Works; or
- (b) circumvent any technical measures associated with any Repertoire Work which are designed to prevent or restrict the unauthorised use of any Repertoire Work.

### 13. Termination and Expiry

13.1 This Agreement shall expire on 30 June 2009 unless terminated earlier by written agreement or in accordance with the terms of this clause 13.

13.2 This Agreement may be terminated by the Licensee, by giving not less than three months written notice to the Licensors or upon written notice in circumstances where the Licensee is ceasing to engage in activities covered by this Agreement.

13.3 Each party shall have the right to terminate this Agreement by notice forthwith where the other party:

- (a) commits a material breach of this Agreement which is capable of remedy and fails to remedy such breach within 14 clear days after receipt of notice of such breach; or
- (b) commits a material breach of this Agreement which is not capable of remedy;

and, for the avoidance of doubt, any breach which consists of a failure by either party to perform an obligation under this Agreement within any period required or by any date specified under this Agreement shall be deemed to be capable of remedy if such obligation is performed by such party within the 14 day cure period specified in clause 13.3(a) above.

13.4 The Licensors shall have the right to terminate this Agreement by notice forthwith if the Licensee:

- (a) is dissolved (other than pursuant to a consolidation, amalgamation or merger);
- (b) becomes insolvent or is unable to pay its debts (as that term is defined in section 123 of the Insolvency Act 1986) or fails or admits in writing its inability generally to pay its debts as they become due;
- (c) makes a general assignment, arrangement or composition with or for the benefit of its creditors;
- (d) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition:
  - (i) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its administration, winding-up or liquidation; or

- (ii) is not dismissed, discharged, stayed or restrained in the case of a winding-up petition within 14 days or in the case of an administration petition within 2 days, of the institution or presentation thereof;
  - (e) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);
  - (f) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;
  - (g) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter; or
  - (h) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (a) to (g) (inclusive).
- 13.5 The licences granted under clause 2 of this Agreement are so granted on the basis of the representations made by the Licensee in part A of the application form.
- 13.6 Termination of this Agreement for whatever reason shall be without prejudice to any rights which have already accrued to the parties under this Agreement.
- 14. Effect of Termination**
- 14.1 Upon termination of this Agreement all licences granted under this Agreement shall terminate and the Licensee shall immediately cease to be licensed by the Licensors for the reproduction or communication to the public of Repertoire Works via the Licensed Services. Termination shall be without prejudice to the ability of Users to retain a copy of a Repertoire Work supplied to them under a Permanent Download Service.
- 14.2 Clauses 5, 6, 7, 8, 9, 14, 11, 17 and 18 shall survive the termination of this Agreement, but only in relation to the Licensee's activities during the Term.
- 15. No Assignment**
- 15.1 Subject to clause 15.2, the licences granted under this Agreement are personal to the Licensee and the Licensee may not assign, sub-license or otherwise transfer any or all of its rights or obligations under this Agreement without the written agreement of both MCPS and PRS except where the Licensee wishes to assign or transfer its rights and obligations to a direct or indirect subsidiary or direct or indirect holding company of the Licensee in which case the Licensors may not unreasonably withhold consent.
- 15.2 Subject always to the other provisions of this Agreement, the Licensee shall be permitted to use the services of a third party in operating the Licensed Services, provided that:
- (a) the Licensee retains complete control and direction over the provision of the Licensed Services to Users; and
  - (b) the Licensors are able to audit such third party in accordance with clause 11.
- 15.3 The Licensee shall include the following provisions in its terms and conditions for the supply of the Licensed Services to Users:
- (a) that any Repertoire Works communicated to Users may only be copied as permitted under this Agreement or by applicable law; and

- (b) that, save as may be permitted by law, no attempt shall be made by Users to:
  - (i) remove or alter any rights management or Identifier information that may be associated with any Repertoire Works; or
  - (ii) circumvent any technical measures associated with any Repertoire Work which are designed to prevent or restrict the unauthorised use of any Repertoire Work.

15.4 The Licensee shall, upon request by either Licensor, supply such Licensor forthwith with a copy of the Licensee's standard terms and conditions applying to the provision of any or all of the Licensed Services.

#### 16. Controlled Composition Agreements

Where any person, firm or company is or becomes a member of either of the Licensors or an Associated Society and that party itself or that party's predecessor in title or grantor has a current contract with the Licensee or the Licensee's predecessor in title or grantor:

- (a) to the extent that such contract would otherwise apply in relation to the grant of any or all of the licences referred to in this Agreement and/or the terms and conditions on which such licences are granted, the terms and conditions of this Agreement shall during the subsistence of this Agreement replace the terms and conditions of that contract; and
- (b) upon the written request of the Licensee the relevant Licensor will provide the Licensee with evidence that the relevant Member has become a Member and has given the relevant Licensor or the relevant Associated Society authority to bind the Member as regards this Agreement.

This clause does not prevent the Licensee from obtaining a licence only in relation to the rights referred to in clause 2.1 from the relevant party owning or controlling such rights where such licence is validly obtained whether before or after the Commencement Date but other than as a result of a contract with an individual composer or recording group.

For the avoidance of doubt, where the Licensee is exploiting the relevant rights outside the United Kingdom, and has in relation to such exploitation a valid licence from the Associated Society entitled to grant that licence in relation to the relevant territory or territories, this clause 16 does not operate so as to override the terms of that licence.

#### 17. Notices

- 17.1 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 13 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.
- 17.2 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.
- 17.3 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.

17.4 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.

**18. Miscellaneous**

18.1 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.

18.2 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 in this Agreement. This Agreement shall not be modified or varied except by a written instrument signed by the parties hereto.

18.3 The headings to the clauses in this Agreement are included for ease of reference only and are not part of this Agreement and are not to be taken into account in its construction.

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

18.5 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.

18.6 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.

Signed by:

Signed by:

\_\_\_\_\_  
Duly authorised signatory on behalf of  
MCPS

\_\_\_\_\_  
Duly authorised signatory on behalf of  
PRS

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

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

Position: \_\_\_\_\_

Position: \_\_\_\_\_

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

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



**SCHEDULE 1**

**Definition of Music Service**

<p><b>"Excluded Service"</b></p>	<p>means any service (or the relevant part of a service) which is a Podcasting Service or which falls within the scope (from time to time) of any of the following MCPS/PRS licensing schemes:</p> <ul style="list-style-type: none"> <li>(a) MCPS – Ringtone licensing scheme;</li> <li>(b) PRS – Ringtone licensing scheme;</li> <li>(c) MCPS – Karaoke and MIDI scheme;</li> <li>(d) MCPS – Music-on-hold scheme;</li> <li>(e) MCPS – Supply of Background Music Services scheme;</li> <li>(f) MCPS – Premium Telephone Line Services scheme;</li> <li>(g) PRS – Premium Telephone Line Services scheme; or</li> <li>(h) MCPS &amp; PRS Joint Ringback scheme; or</li> <li>(i) MCPS &amp; PRS B2B Music Preview scheme.</li> </ul>
<p><b>"Limited Download / On-Demand Streaming Service " or "LD/ODS Service"</b></p>	<p>means a service (or the relevant part of a service), other than an Excluded Service, whereby a User may receive a Musical Work by streaming on-demand via a Network (where the time and place at which such Musical Work is received is selected by the User) and/or may download via a Network that Musical Work but where such download may not be retained by the User on a permanent basis. Any service falling primarily within the foregoing definition but which also includes elements which fall within the definition of Premium and Interactive Webcasting Service and/or Pure Webcasting Service shall be deemed in its entirety to be a LD/ODS Service.</p>
<p><b>"Music Service"</b></p>	<p>means a service or the relevant part of a service which is:</p> <ul style="list-style-type: none"> <li>(a) a Permanent Download Service;</li> <li>(b) an LD/ODS Service;</li> <li>(c) a Premium and Interactive Webcasting Service;</li> <li>(d) a Pure Webcasting Service; or</li> <li>(e) any combination of (a) to (d) above.</li> </ul>
<p><b>"Network"</b></p>	<p>means the Internet, a mobile network or any other wired or wireless network.</p>
<p><b>"Permanent Download Service"</b></p>	<p>means a service (or the relevant part of a service), other than an Excluded Service, by which a Musical Work is communicated to the public via a Network in the form of a</p>

	download and where such download may be retained by the User on a permanent basis.
"Podcasting Service"	means a service (or the relevant part of a service) whereby "programmes" (as opposed to individual Musical Works) may be downloaded to Users' Data Storage Devices (whether permanently or temporarily) and any tracks included within such programme cannot be disaggregated.
"Premium and Interactive Webcasting Service"	<p>means a service (or the relevant part of a service), other than an Excluded Service, by which Musical Works are communicated to the public via a Network and:</p> <p>(a) no permanent or temporary copy of any Musical Work is retained by the User; and</p> <p>(b) such service is neither a Pure Webcasting Service, a Permanent Download Service, a LD/ODS Service or a Simulcast Service.</p>
"Pure Webcasting Service"	<p>means a service (or the relevant part of a service), other than an Excluded Service or a Simulcast Service, by which Musical Works are broadcast (as that term is defined in the Act as at 1 July 2006) to Users via a Network. For the avoidance of doubt, to constitute a Pure Webcasting Service, there must be:</p> <p>(a) no interactive functionality, for example (without limitation), no use of controls that enable the User to pause, skip, move forward or backwards through the stream;</p> <p>(b) no personalisation of the service by the User or the ability for the User to offer preferences which then dictate the tracks that are provided to that User, for example (without limitation), no ability for the User to rate tracks so as to influence subsequent tracks that are played;</p> <p>(c) no advanced notification to the User of titles of specific tracks to be played or specific albums from which tracks will be played (other than the introduction of the next track in DJ led services);</p> <p>(d) in any 3 hour period:</p> <p>(i) no more than 3 songs from a particular album (including no more than 2 consecutively);</p> <p>(ii) no more than 4 songs from a particular artist or from any compilation of tracks (including no more than 3 consecutively);</p> <p>(e) no archived programmes less than 5 hours in duration or available for more than 2 weeks; and</p> <p>(f) no continuous programmes of less than 3 hours duration; and</p>



	<p>(g) effective technologies, insofar as such technologies are commercially available and can be implemented without imposing unreasonable costs, which aim to prevent:</p> <p>(i) a User or any other person or entity from automatically scanning the Licensee's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the User; and</p> <p>(ii) a User from making copies, other than transient copies, of the sound recordings; and</p> <p>(h) no automatic or intentional cause by the Licensee of the device receiving a transmission to switch from one program channel to another.</p>
<p>"Simulcast Service"</p>	<p>means the broadcast (as that term is defined in the Act as at 1 July 2006) of a programme via a Network where such broadcast:</p> <p>(a) is simultaneous with the broadcast of such programme via a traditional terrestrial, satellite or cable television or radio service; and</p> <p>(b) is made from the website or other service of the originating broadcaster.</p>
<p>"Special Webcasting Service"</p>	<p>means a Pure Webcasting Service or Premium and Interactive Webcasting Service where more than 50% of the sound recordings of the Musical works communicated to the public. (i) are by a single artist or band or (ii) comprise a live performance by a single artist or band with related performances by other artists and/or bands.</p>

**SCHEDULE 2**

**Royalty Fee**

**1. Definitions**

"Applicable Revenue"	means the Gross Revenue less VAT (or other equivalent sales tax, as applicable).
"Limited Subscription Service"	<p>means an LD/ODS Service whereby the User:</p> <ul style="list-style-type: none"> <li>(a) pays to the Licensee a regular fee in order to access such service; and</li> <li>(b) gains access, only while such fee continues to be paid and controlled by appropriate DRM, to 20,000 different Musical Works or less.</li> </ul>
"Minimum Royalties"	means the applicable minima set out in paragraphs 2.1(b), 2.2(b), 2.3(b) and 2.4(b) below.
"Mobile Licensed Service"	<p>means a Licensed Service which is provided to Users and where, subject to paragraph 4.5 of schedule 3 the charge to the User for the Licensed Service includes all mobile network delivery charges applicable to the provision of such service.</p> <p>References to Mobile Permanent Download Service, Mobile LD/ODS Service, etc. shall be construed accordingly.</p>
"PC Subscription Service"	<p>means an LD/ODS Service whereby the User:</p> <ul style="list-style-type: none"> <li>(a) pays to the Licensee a regular fee in order to access such service; and</li> <li>(b) gains access, only while such fee continues to be paid and controlled by appropriate DRM, to in excess of 20,000 different Musical Works; and</li> <li>(c) is able, only while such fee continues to be paid and controlled by appropriate DRM, to store and listen to Musical Works accessed through such service on a personal computer; and</li> <li>(d) is unable to store and listen to Musical Works accessed through such service on a portable Data Storage Device (such as an mp3 or WMA player).</li> </ul>
"Portable Subscription Service"	<p>means an LD/ODS Service whereby the User:</p> <ul style="list-style-type: none"> <li>(a) pays to the Licensee a regular fee in order to access such service; and</li> <li>(b) gains access, only while such fee continues to be paid and controlled by appropriate DRM, to in excess of 20,000 different Musical Works; and</li> </ul>

	<p>(c) is able, only while such fee continues to be paid and controlled by appropriate DRM, to store and listen to Musical Works accessed through such service on a personal computer; and</p> <p>(d) is able, only while such fee continues to be paid and controlled by appropriate DRM, to store and listen to Musical Works accessed through such service on a portable Data Storage Device (such as an mp3 or WMA player).</p>
"Subscriber"	means a User who is a subscriber to a PC Subscription Service, a Portable Subscription Service, a Limited Subscription Service or a Webcasting Subscription Service as the case may be.
"Subscription Permanent Download Service"	means a Permanent Download Service whereby the User pays to the Licensee a regular periodic fee in order to obtain permanent downloads.
"Webcasting Subscription Service"	means a Pure Webcasting Service or Premium and Interactive Webcasting Service (but not a Special Webcasting Service) whereby the User pays to the Licensee a regular fee in order to access such service.

## 2. Royalty Fee

2.1 In respect of a Permanent Download Service the Royalty Fee per download shall be the higher of:

- (a) 8% of the Applicable Revenue; and
- (b) either (subject to (c) and (d) below):
  - (i) £0.04 in respect of each Musical Work downloaded per download; or
  - (ii) if a Musical Work is downloaded as part of a bundle of eight to twelve (inclusive) Musical Works, £0.035 in respect of each Musical Work downloaded.
  - (iii) if a Musical Work is downloaded as part of a bundle of thirteen to seventeen (inclusive) Musical Works, £0.03 in respect of each Musical Work downloaded.
  - (iv) if a Musical Work is downloaded as part of a bundle of eighteen to twenty-nine (inclusive) Musical Works, £0.025 in respect of each Musical Work downloaded.
  - (v) if a Musical Work is downloaded as part of a bundle of thirty or more Musical Works, £0.02 in respect of each Musical Work downloaded.
- (c) Where a single Musical Work is available for download and:
  - (i) the relevant sound recording of such Musical Work was originally released (whether in a physical or online form) two or more years previously; and

(ii) it is sold for a retail price of 49 pence (including VAT) or less;

then the minimum royalty applicable under paragraph 2.1(b)(i) above shall be £0.03.

(d) Where a bundle of Musical Works is available for download and:

(i) every sound recording of a Musical Work in the bundle was originally released (whether in a physical or online form) two or more years previously; or

(ii) the same bundle was originally released (whether in a physical or online form) two or more years previously;

then the minimum royalty applicable under paragraph 2.1(b)(ii) above shall be £0.03 or, for bundles of more than twelve tracks, shall be as set out in paragraphs 2.2(b) (iii) to (v) above.

(e) For the purposes of paragraph 2.1 (a) to (d) above, a collection of tracks shall only be considered a bundle if it is (i) put together or otherwise approved by the relevant record company (or companies) or (ii) put together by the Licensee (provided permission of the owner of the relevant sound recording rights or artist (or artists) has been obtained and that the bundle is purchased as a whole. Collections of tracks assembled by Users are therefore not "bundles" for the purposes of paragraphs 2.1 (a) to (d).

(f) Tracks which consist of either public domain Musical Works or non-music works (for example, spoken word) shall not be regarded as "tracks" for the purposes of counting the number of Musical Works in a bundle.

(g) For the avoidance of doubt and for the purposes of paragraphs 2.1(b) (ii) to (v) above, by way of example, in respect of a bundle of 15 different sound recordings (including mixes) of the same Musical Work, the applicable Minimum Royalty for the whole of the bundle would be 45p.

(h) Only one royalty (or one minimum, as applicable) shall be charged for so called "dual-downloads" where for a single price, the same track is delivered to a User's PC and mobile device.

(h) The parties shall discuss in good faith Minimum Royalties in respect of long and short tracks.

(i) The Licensee shall be entitled to produce and include as part of a Licensed Service free audio-only or audio-visual clips of a Musical Work embodied in a sound recording of up to 30 seconds duration (or for "classical" genre up to one minute's duration) without payment of any Minimum Royalty provided that such clip is used solely to promote the sale or other use of the Musical Work as part of the Licensed Service.

2.2 In respect of an LD/ODS Service the Royalty Fee shall be the higher of:

(a) 8% of the Applicable Revenue; and

(b) either:

(i) where the Music Service is a Portable Subscription Service, £0.60 per Subscriber per Month; or

(ii) where the Music Service is a PC Subscription Service, £0.40 per Subscriber per Month; or

(iii) where the Music Service is a Limited Subscription Service, £0.20 per Subscriber per Month; or

(iv) for all other LD/ODS Services, £0.0022 per Musical Work played.

2.3 In respect of a Special Webcasting Service the Royalty Fee shall be the higher of:

- (a) 8% of the Applicable Revenue; and
- (b) £0.0022 per Musical Work communicated to the public per User unless the Special Webcasting Service is a Subscription Service, in which case the parties shall negotiate in good faith a minimum fee per subscriber per month to apply in place of this £0.0022. In relation to the non subscriber based minimum, for the avoidance of doubt, by way of example, a webcast of one Musical Work to 1000 Users incurs a Minimum Royalty of £2.20.

2.4 In respect of a Premium and Interactive Webcasting Service (other than a Special Webcasting Service) it shall be the higher of:

- (a) 6.5% of the Applicable Revenue; and
- (b) either:
  - (i) where the Music Service is a Webcasting Subscription Service, £0.22 per Subscriber per Month; or
  - (ii) otherwise, £0.00085 per Musical Work communicated to the public per User. For the avoidance of doubt, by way of example, a webcast of one Musical Work to 1000 Users incurs a Minimum Royalty of £0.85.

2.5 In respect of a Pure Webcasting Service (other than a Special Webcasting Service) it shall be the higher of:

- (a) 6.5% of the Applicable Revenue; and
- (b) either:
  - (i) where the Music Service is a Webcasting Subscription Service, £0.22 per Subscriber per Month; or
  - (ii) otherwise, £0.0006 per Musical Work communicated to the public per User. For the avoidance of doubt, by way of example, a webcast of one Musical Work to 1000 Users incurs a Minimum Royalty of £0.60.

2.6 For the avoidance of doubt, the calculation leading to the Royalty Fee for a particular download, subscription or stream being either (a) or (b) above (in each of paragraphs 2.1 to 2.5 above, as applicable) shall be carried out individually in respect of each download, subscription or stream (as applicable) to each User and then the Royalty Fees, calculated on that basis, for all downloads, subscriptions or streams (as applicable) to all Users shall be added together in order to calculate the full Royalty Fees due. For the purposes of the foregoing calculation, where there is any Gross Revenue arising which is not attributable to a particular download, subscription or stream (for example, revenue arising from advertising or sponsorship etc), this shall be apportioned equally between all downloads, subscriptions or streams (as applicable).

### 3. Bundling

3.1 Where a Music Service (for the purposes of this clause "Service A") is provided to Users in conjunction with a service which is not a Music Service (for the purpose of this clause "Service B"), then the price deemed to be payable by Users ("the User Price") for the Music Service (for the purpose of calculating Gross Revenue) shall be calculated in accordance with this paragraph 3.

- 3.2 Where there are separate 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.
- 3.3 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 standalone prices for comparable UK services for Service A and Service B. If there is more than one comparable service, then the average shall be used.
- 3.4 If in the Licensors' reasonable opinion there are no comparable UK standalone services for Service A and Service B, then the applicable Minimum Royalties shall be payable.
- 3.5 For the avoidance of doubt, where the User Price is set according to either of paragraphs 3.2 and 3.3 above, the royalty payable shall be the higher of the applicable royalty rate applied to the User Price and the applicable Minimum Royalty.

4. **Promotional Use**

- 4.1 Provided that the owner of the copyright in the sound recording has agreed to allow the Licensee to make the sound recording available for free to Users of its Music Service and that such owner is not entitled to payment of any royalty or any other consideration whether in monetary form or otherwise in relation to such use, the Licensors shall permit Musical Works incorporated in such sound recordings to be made available for free to Users and no royalty shall be due under the Agreement in relation to such use on the terms set out in this paragraph 4, but not otherwise:
- 4.2 For a paid for PC Subscription Service, Limited Subscription Service, Portable Subscription Service and Webcasting Subscription Service, the Licensee may provide such Licensed Service to each User for free for 2 weeks as a one-off introductory discount.
- 4.3 For a paid for Subscription Permanent Download Service, the Licensee may provide such Licensed Service to each User for free for 2 weeks as a one-off introductory discount provided that the User is limited during this period to accessing no more than ten (10) Permanent Downloads of Musical Works for free.
- 4.4 For a Permanent Download Service (other than a Subscription Permanent Download Service) that has annual Gross Revenue exceeding £625,000 but less than £6,250,000 (excluding VAT) calculated by reference to the four preceding full quarters' reporting data, the Licensee may make available to Users at any one time up to two (2) Permanent Downloads of Musical Works for free provided that:
- (a) such promotional usage is solely to promote sales of paid-for Permanent Downloads of Musical Works by the same artist/band or songwriter as the Permanent Download of the Musical Work being made available for free;
  - (b) the length of time that any one Permanent Download of a Musical Work is made available to Users for free is limited to one period of no more than thirty (30) days;
  - (c) any vouchers issued in relation to such promotional usage must be redeemed by Users within thirty (30) days of their first distribution; and
  - (d) the publisher(s) owning the rights to the Musical Work has/have granted prior written consent to such use.
- 4.5 For a paid for Permanent Download Service that has annual Gross Revenue exceeding £6,250,000 (excluding VAT) calculated by reference to the four preceding full quarters reporting data, the Licensee may make available to Users at any one time up to five (5) Permanent Downloads of Musical Works for free provided that it satisfies each of the terms set out in paragraphs 4.4 (a) to (d) above.

- 4.6 For the avoidance of doubt, where prior written consent of the publisher (s) owning the rights to the Musical Work is required pursuant to paragraphs 4.4(d) and 4.5, the Licensors shall put in place reasonable procedures to seek to ensure that such consent is granted or withheld within five (5) working days of the Licensee's written request, and if such consent is provided by the publisher(s), then the Licensors shall forthwith provide any additional consents in relation to such use of the rights which they or either of them administer.
- 4.7 For the avoidance of doubt, the Licensee may without restriction make the Licensed Services available for free over and above the limits set out in paragraphs 4.1 to 4.6 above, but the applicable Minimum Royalties shall apply in respect of any free access or downloads over and above such limits.
- 4.8 Insofar as any particular music publisher shall request that the promotional allowances set out above should be exceeded for the purposes of a specific promotion, the Licensors shall consider such request in good faith.
5. **Provision of Music Services to Users outside the United Kingdom**

Without prejudice to the territorial restrictions set out in this Agreement (and, for the avoidance of doubt, subject to the availability of the repertoire), where this Agreement is to cover the accessing by Users of the Licensed Service(s) from outside the UK, then the Licensee acknowledges that the Licensors may require that the royalties payable in respect of the Licensed Service(s) being accessed outside the UK shall be calculated on the basis of the rates at that time published as applying in the additional countries in question. If the Licensors require such rates to be payable and the Licensee does not agree to pay on the basis of those rates, then it may not be possible for this Agreement to cover the availability of the Licensed Service(s) outside the UK. The Licensors and Licensee shall discuss such issues in good faith, but if no agreement can be reached by such time as either party may decide at its discretion, then that party may terminate this Agreement (only in respect of the availability of the Licensed Services outside the UK) by giving the other party one month's written notice.

### SCHEDULE 3

#### Definition of Gross Revenue

**"Gross Revenue"**

means, subject to the provisions of this Schedule:

- (a) all revenue received (or receivable) by the Licensee from Users in relation to the provision of the Licensed Services; and
- (b) all revenue received (or receivable) by the Licensee as a result of the placement of advertising on or within the Licensed Services; and
- (c) all revenue received (or receivable) by the Licensee as sponsorship fees in relation to the provision of the Licensed Services; and
- (d) all revenue received (or receivable) in the form of commissions from third parties as a result of Users accessing and/or purchasing from a service of a third party via the Licensed Services; and
- (e) any other revenue received (or receivable) by the Licensee arising in relation to the provision to Users of the Licensed Services (including, without limitation, such revenue received in relation to donations, barter or contra deals, such deals to be valued for these purposes);

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.

Subject to the remainder of this schedule 3, 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.

**1. General**

- (a) For the avoidance of doubt, the definition of Gross Revenue above shall be applied in conjunction with the provisions on bundling set out in paragraph 3 of schedule 2.
- (b) For the further avoidance of doubt, revenue which relates solely to services other than the Licensed Service shall not be included in the Gross Revenue. By way of example, this includes:
  - (i) revenue from non-music voice, content and text services;
  - (ii) revenue obtained solely in relation to non-music products and services supplied by the Licensee even if such product or service is obtained from



within the Licensed Service (eg. an artist related T-Shirt purchased from the Licensed Service).

- (c) For the further avoidance of doubt, Gross Revenue shall not be reduced by credit card commissions or similar payment process charges.

## 2. Advertising and Sponsorship Revenue

- (a) Gross Revenue obtained in the form of advertising or sponsorship revenue shall be reduced by 5% to reflect the costs of obtaining it.
- (b) By way of clarification, advertising and sponsorship revenue shall be included in the definition of Gross Revenue if it is derived in relation to pages within the Licensed Service, including music related pages which do not contain or enable direct access to Repertoire Works (eg. content consisting of concert or music reviews).
- (c) Where advertising and sponsorship revenue is derived from pages which include both music and non-music related content or services (eg. on a home page or sub-home page of a service), then a reasonable proportion of such revenue shall be included in the Gross Revenue (such proportion to reflect the relative dominance of the music and non-music content).

## 3. Audio-Visual

- (a) Prior to the Date of Convergence (as defined below), Gross Revenue generated in relation to the use of Repertoire Works in Audio-Visual Material shall be discounted by 15%.
- (b) If and when Convergence has been reached shall be assessed by the Licensors using reporting data submitted to it and this shall then be notified to the Licensee. If any dispute arises between the Licensors and the Licensee regarding this assessment, it shall be subject to expert determination by an independent accountant to be nominated by the President for the time being of the Institute of Chartered Accountants, in the absence of agreement between the Licensors and Licensee.
- (c) "Convergence" means the aggregate number of unit sales in the UK of Permanent Downloads in the form of Audio-Visual Material licensed under this Agreement is the same or greater than the aggregate number of unit sales in the UK of Permanent Downloads during any period of three Months prior to or ending on 30 June 2009 calculated by reference to not less than 80% of the units of each form of Permanent Download sold and the "Date of Convergence" means the last date of that three Month period. The Licensors shall use reasonable endeavours to inform the Licensee from time to time of the anticipated Date of Convergence.
- (d) For the avoidance of doubt, the discount set out in this clause 3 applies only to Gross Revenue and the Minimum Royalties shall not be reduced in relation to Repertoire Works in Audio-Visual Material licensed under this Agreement.

## 4. Mobile Delivery

- 4.1 In relation to Mobile Licensed Services, for the purpose of calculating Gross Revenue under this Agreement, then, subject to paragraphs 4.2 to 4.5 below, the price paid by the User shall be reduced by:
  - (a) 15% for Mobile Permanent Download Services; or
  - (b) 7.5% for all other Mobile Licensed Services.

- 4.2 The reduction referred to in paragraph 4.1 (a) above will:
- (a) no longer apply, in relation to Mobile Permanent Download Services, from the point in time when the price of such downloads converges to 117.65% or less than the weighted standard average price of downloads (of a similar type) obtained from other Permanent Download Services. This will be deemed to have taken place when the weighted average sales price of downloads (of a similar type) obtained from Mobile Permanent Download Services operated by the top 5 (by royalty value paid to the Licensors in the previous 4 Quarters) UK mobile network operators in a given Quarter is 117.65% or less than the weighted standard average price of downloads obtained from the top 5 (by royalty value paid to the Licensors in the preceding 4 Quarters) other Permanent Download Services for the same Quarter; or
  - (b) not apply, in relation to a particular download obtained from a Mobile Download Service, if the retail price of that download is 117.65% or less than the weighted standard average price of a similar type of download obtained from other Permanent Download Services (to be calculated as set out in clause 4.2(a) above).
- 4.3 The reduction referred to in paragraph 4.1(b) above will no longer apply for a particular Mobile Licensed Service where the retail price of that service is 117.65% or less than the weighted standard average price of the top 5 (by royalty value paid to the Licensors in the preceding 4 quarters) equivalent Music Services (which are not Mobile Licensed Services) in the preceding Quarter
- 4.4 For the avoidance of doubt, for the purpose of paragraphs 4.1(b) and 4.3 above, where a Mobile Licensed Service is launched at a price point that means that it does not qualify for the reduction under paragraph 4.1(b) above, if the relative price of that service and the non-mobile services referred to in paragraph 4.3 change to the extent that it would subsequently qualify for the reduction, then it shall be entitled to the reduction in paragraph 4.1(b) above until such time as the threshold in paragraph 4.3 above is reached again.
- 4.5 Where content and delivery charges for music are quoted separately for a Mobile Music Service, then the royalty charged for the provision of such music shall be the equivalent amount to the royalty charged to that Licensee when the content and delivery charges for equivalent music products are quoted as a single price. Where the Licensee does not provide equivalent music products on the basis that content and delivery prices are quoted as a single price, then such provision of music shall be excluded from this Agreement and royalty terms shall be subject to a separate discussion in good faith between the parties.
- 4.6 All references in this paragraph 4 to prices shall be deemed to be excluding VAT or other equivalent sales taxes.
- 4.7 In the event of any dispute between the parties over the implementation of paragraphs 4.1 to 4.6 above, such dispute shall be subject to expert determination by an independent accountant, to be nominated by the President for the time being of the Institute of Chartered Accountants in the absence of agreement between the parties.
5. **Vouchers**
- 5.1 This paragraph 5 applies only to a Licensee which runs a voucher scheme where each issued voucher ("the Voucher"):
- (a) is issued in conjunction with a festival or other musical event, and the voucher contains no branding other than that of the Licensee, the band/artist performing at the festival or other musical event, and/or the festival or other musical event; or
  - (b) does not refer to any specific artist(s), band(s) or Musical Work(s).

Repertoire Works provided via a Voucher scheme which is outside this paragraph 5.1 are not licensed under this Agreement and a separate licence for premium usage of this type must be sought from the Licensors.

- 5.2 The price of each Voucher, calculated in accordance with paragraph 5.3, below shall be included in Gross Revenue if and to the extent that it is redeemed by a User or Users.
- 5.3 The price of each Voucher shall be calculated as follows:
- (a) Where the Voucher does not contain any branding or no branding other than (i) that of the Licensee for the Licensed Service, (ii) that of a third party ordinarily engaged in the sale of vouchers to Users or (iii) as permitted under paragraph 5.1(a) above, the price shall be the price charged to each User.
  - (b) Except as set out in (a) above, where the Voucher contains branding of a third party (which includes for the purposes of this paragraph 5.3(b) an entity in the same corporate group as the Licensee) and/or is distributed as part of a promotion by a third party, the price shall be deemed to be the full usual retail price charged by the Licensee for the Music Service to which the Voucher relates.

**SCHEDULE 4**

**Online Music Services**

**Music Usage Information Reporting Format**

[To be added]

**SCHEDULE 5**

**Form of Accounting Statement**

[to be added]

**SCHEDULE 6**

**Licence Details**

<b>Licensee</b>	
<b>Licensee Registered Address</b>	
<b>Agreement Number</b>	
<b>Licensed Services</b>	
<b>Additions to Definitions of "Territory"</b>	
<b>Quarterly Advance (if applicable)</b>	
<b>Commencement Date</b>	