MASTER AGREEMENT

This Master Agreement is made and entered into this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2014 (“Effective Date”) by and between **Mansell Group, Inc.**, d/b/a WhatCounts (“WhatCounts”), a Georgia corporation with a notice address of 3630 Peachtree Road, NE, Suite 900, Atlanta, Georgia 30326 and **Media Consortium** (“Customer"), with a notice address of 153 Alpine Terrace, San Francisco, CA 94117.

Background

WhatCounts is the developer of e-mail marketing technology solutions designed to create, manage, deploy and monitor sophisticated, highly targeted email and other marketing campaigns. Customer desires to access the functionality of certain WhatCounts’ software products via a standard Web browser on a subscription basis and receive certain services, as provided in this Agreement.

In consideration of the mutual promises, covenants, and representations herein, and upon the terms and conditions set forth below, the parties agree to the following:

This “Agreement” consists of this Signature Page, the Subscription Schedule and/or Services Schedule attached to this Agreement, the attached General Terms and Conditions, and such additional Services Schedules that incorporate this Agreement by reference that the parties’ authorized representatives may mutually agree in writing to incorporate from time to time.

Nothing contained in any purchase order, purchase order acknowledgement, or similar ordering document shall in any way modify or add any additional terms or conditions to this Agreement. Customer understands and agrees that any additional or conflicting terms in Customer’s current or future ordering documents, which are not expressly included in this Agreement, are deemed rejected and are not part of the agreement between WhatCounts and Customer.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives effective on the Effective Date.

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| --- | --- |
| WhatCounts:  **Mansell Group, Inc.**  By:  (Type or print name)  Title: | Customer:  **Media Consortium**  By:  (Type or print name)  Title: |

**General Terms and Conditions**

# Defined Terms. In addition to any other terms defined in this Agreement, the following terms have the following meanings.

## **Authorized User** means an individual person who is an employee or subcontractor of Customer and has been given an individual log-on ID and password to access the Software or otherwise has been granted the right to access the Software.

## **Confidential Information** means any information that is of value to its owner, or is required to be kept confidential by contract or otherwise, and is treated as confidential, that is disclosed by or on behalf of the discloser or otherwise directly or indirectly obtained from the discloser. Confidential Information includes the following: trade secrets, proprietary information, technical processes and formulas, the Software in source code, object code, and any other form, Documentation, benchmark and performance test results, product designs, any sales, cost, and other unpublished financial information, product and business plans, projections and marketing data, and the pricing, terms and conditions (but not the existence) of this Agreement. Confidential Information does not include information (i) generally known to the public through no act or omission of recipient; (ii) independently developed by the recipient without use of or reference to the discloser’s Confidential Information; and (iii) obtained by recipient from any third party not owing any confidentiality obligation to the discloser.

## **Content** means audio, visual, audiovisual, textual, and interactive works or materials, in any media. Content does not include any PII or computer software.

## **Customer Content** means any Content provided by Customer to WhatCounts through the use of the Hosted Services or for use in the provision of Services.

## **Deliverables** means a tangible item, including WhatCounts Content, delivered to Customer by WhatCounts in the provision of Services and Additional Services, except that the Software, Documentation, and source code of the Software, and all Modifications thereof are not included in the definition of Deliverables.

## **Documentation** means the user guide(s) made available by WhatCounts to Customer, in any form or media, regarding the use of the applicable Software, as updated and provided to Customer from time to time.

## **Error** means a material failure of the applicable Software to conform to the functional specifications described in its Documentation.

## **Error Correction** means any Modification, workaround, or routine intended to correct the practical adverse effect of an Error.

## **Fees** means Subscription Fees, Services Fees and all other fees payable to WhatCounts under this Agreement.

## **Hosted Services** means the services provided using the Software, as more particularly set forth in Section 2 and any Subscription Schedule.

## **Intellectual Property Rights** means any and all rights existing from time to time in any jur­is­diction un­der copyright law, pat­ent law, trade secret law, confidential information law, trade­mark law, unfair comp­e­ti­tion law, or other similar rights.

## **Modification** means any enhancement, new version, update, Error Correction, derivative work, or other change.

## **PII** means any information that identifies or can be reasonably used to identify an individual person, including any e-mail address.

## **Reusable Content** means the WhatCounts Content that both (i) contains no Customer Confidential Information and (ii) may be reasonably recast or reused by WhatCounts in other engagements.

## **Services** means the services to be provided to Customer as identified on any Services Schedule, in accordance with this Agreement and the applicable Services Schedule.

## **Services Fees** means the fees payable to WhatCounts for Services as set forth on any Services Schedule and as otherwise provided in this Agreement.

## **Services Schedule** means a document attached to this Agreement or executed by the parties and referencing this Agreement, that sets forth Services to be provided by WhatCounts to Customer. A Services Schedule may be entitled or described as a Statement of Work.

## **Software** means the object code version of the software identified on any Subscription Schedule.

## **Subscription Fees** means the fees payable to WhatCounts for the license of access to the Software and Support as set forth on any Subscription Schedule and as otherwise provided in this Agreement.

## **Subscription Schedule**means the document attached to this Agreement that specifies the Software to which WhatCounts will provide Customer access in accordance with this Agreement.

## **Support** means WhatCounts’ support of the Software more particularly described in Section 3.

## **Target** means an individual or entity to whom Content is provided through the use of the Services or receives any WhatCounts Content.

## **Target Communication** means any communication, by mail, e-mail, or any other media, intended for delivery to a Target.

## **Target PII** means any PII of a Target provided by Customer to WhatCounts or received by WhatCounts in performing Services, Additional Services or Hosting Services to Customer.

## **Term** is defined in Section 11.1.

## **Terms of Subscription Use** means those terms of use attached as Exhibit A to the Subscription Schedule, as modified in accordance with Section 4.1.

## **Time and Materials Rates** means, unless otherwise provided on a Subscription Schedule or Services Schedule, WhatCounts’ standard quoted rates for time and materials at the time the Services or Additional Services are performed.

## **WhatCounts Content** means that Content created by WhatCounts for Customer as a part of Services or Additional Services.

# Hosted Services and Limitations

## **License to Access Software**. Subject to the terms and conditions of this Agreement and the applicable Subscription Schedule, WhatCounts grants to Customer the non-exclusive, limited, non-assignable, and non-transferable right and license to access via the Internet the functionality of the Software.

## **Limitations**. The rights and licenses granted under this Agreement are further limited by and conditioned on the requirements set forth below.

### The Software shall only be accessed or used by Authorized Users solely for the internal use and benefit of Customer in accordance with the Documentation, which internal use includes using the Hosted Services to provide Content to Targets.

### The Customer shall not encumber, transfer, rent, donate, assign, lease, or otherwise use the Software in any time-sharing or service bureau arrangement.

### Customer shall not copy, reproduce, market, sell, distribute, sublicense, manufacture, adapt, create derivative works of, translate, localize, port, or otherwise modify or commercially exploit the Software.

### Except as required by applicable law, Customer shall not decompile, disassemble, reverse compile, reverse assemble, reverse translate or otherwise reverse engineer the Software, including use of any similar means to discover the source code of the Software, to discover the Confidential Information therein, or to otherwise circumvent any technological measures that control access to or use of the Software.

### The Customer shall not alter or remove any printed or on-screen copyright, trademark, patent, proprietary, or other legal notice contained on or in any Software, Documentation, or copies thereof.

### No rights to possess copies of the Software are granted in this Agreement.

## **Copies.** Customer may make a reasonable number of copies of the Documentation solely for its own internal business purposes to support use of the Software in compliance with the terms of this Agreement. Customer shall reproduce and include all proprietary rights and notices on all copies of the Documentation.

## **Reservation of Rights.** All rights not expressly granted in this Agreement are reserved to WhatCounts. No rights are granted by implication.

# Support.

## **Generally.** WhatCounts will provide one or more reasonable means of communication to allow Customer’s IT personnel (“Support Contacts”) to contact WhatCounts for assistance in resolving problems with the Software (“Help Desk”). The Help Desk may allow communication via telephone, a website, and e-mail. Hosted Services pricing assumes up to 3 hours of Support per month. In the event Support of Customer exceeds 3 hours per month, excluding support related to Errors or service interruptions, the parties will discuss a Services Schedule to address additional hours going forward.

## **Communications.**

### Customer shall designate the individuals who are Support Contacts. Unless otherwise set forth on the applicable Subscription Schedule, Customer shall designate a maximum of three Support Contacts. All suspected Errors and Support requests shall be reported through Customer’s Support Contacts.

### Customer shall provide internal support and assistance to Authorized Users regarding the proper use and functionality of the Software. Customer shall not allow Authorized Users other than Support Contacts to contact the Help Desk.

## **Error Corrections and Updates.** As a part of Support, WhatCounts will use commercially reasonable efforts to provide Error Corrections for all verifiable and reproducible Errors in the Software.

# Additional Terms

## **Terms of Subscription Use.** The parties also agree to comply with the Terms of Subscription Use, as they may be amended in accordance with this Section. WhatCounts may attach the Terms of Subscription Use to the web site (“Site Terms of Use”) from which Hosting Services are accessed (“Hosted Site”). WhatCounts may modify the Site Terms of Use from time to time. At the commencement of each Renewal Term, the Terms of Subscription Use shall be amended to the Site Terms of Use then set forth on the Hosted Site.

## **Viruses.**

### Prior to each delivery of Deliverables having functionality (collectively, “Code”), WhatCounts shall cause the Code to be processed by one or more current, industry-standard Virus detection programs. WhatCounts will not deliver any Code to Customer that WhatCounts knows has a Virus. WhatCounts does not warrant that the Code is completely free of Viruses. “Virus” means computer code that is not a normal feature of the Code that is designed or intended to have any of the following functions: (i) disrupting, disabling, harming, otherwise substantially impeding the normal operation of, or providing unauthorized access to, the Code, a computer system or network, software or other device; or (ii) damaging or destroying any data file without the user’s consent.

### Prior to each delivery of Code to WhatCounts, Customer shall cause the Code to be processed by one or more current, industry-standard Virus detection programs. Customer will not deliver any Code to WhatCounts that Customer knows has a Virus. Customer does not warrant that such Code is completely free of Viruses.

## **Cooperation and Access.** Any services requested by Customer through WhatCounts’ Support procedures that are not within the scope of Support or that are outside the scope of the Services described in the applicable Subscription Schedule or Services Schedule (collectively, “Additional Services”) may be subject to an additional charge at Time and Materials Rates, at WhatCounts’ discretion.

## **Compliance with Laws.** WhatCounts shall comply at its own expense with all applicable laws and regulations relating to its performance of the Services under this Agreement.

## **Subcontractors.** WhatCounts may subcontract any work under this Agreement to any third party, including an affiliate of WhatCounts, without Customer’s prior written consent. WhatCounts shall remain responsible for the performance, acts, and omissions of any WhatCounts subcontractors.

# Target PII. WhatCounts will take reasonable precautions under the circumstances to protect the confidentiality of all Target PII and to protect against data breaches associated with WhatCounts’ computing systems. WhatCounts will not use any Target PII except in the course of performance of Services and Support. WhatCounts will destroy or return to Customer all Target PII upon termination or expiration of this Agreement.

# Fees and Payments

## **Subscription Fees**. Customer shall pay Subscription Fees as provided on the applicable Subscription Schedule. Unless otherwise set forth on the applicable Subscription Schedule, Subscription Fees are payable monthly in arrears. WhatCounts shall notify Customer at least 90 days in advance of the end of the then Term of any change in Subscription Fees for the next Renewal Term.

## **Other Fees.** Except as otherwise provided on a Subscription Schedule or Services Schedule, all Services Fees, fees for Additional Services, and any other Fees not otherwise specified in this Section 6 shall be billed in arrears, and Customer shall pay such Fees within 30 days after the applicable invoice date.

## **Currency.** All monetary amounts set forth in this Agreement are U.S. dollars, and all amounts payable under this Agreement shall be paid in U.S. dollars.

## **Expenses**. For any Services, Support, and Additional Services provided by WhatCounts, Customer shall reimburse WhatCounts for actual, reasonable travel, living, and other incidental expenses incurred but only upon written approval from Customer. If Customer’s travel and expense policy is provided to WhatCounts, WhatCounts’ reimbursements for such expenses shall not exceed the amounts reimbursable for Customer’s own employees.

## **Late Payment.** Any amount not paid when due shall bear a late payment charge at the lesser of 1.5% per month or the maximum amount permitted by law until paid. If Customer’s account is in arrears for 30 days or more, WhatCounts may suspend the provision of Services, Hosting Services, Support, and Additional Services until such time as Customer’s account is brought current. The rights in this Section are in addition to any other rights under this Agreement, at law, or in equity.

## **Taxes.** Customer agrees to pay all personal property, sales, use, value added, goods and services, and other taxes (excluding taxes based upon WhatCounts’ net income) and license and registration fees, and other assessments or charges levied or imposed by any governmental body or agency as a result of the execution or performance of the Agreement. Any amount due from Customer under this Section shall be paid directly by Customer, where appropriate, or shall be reimbursed to WhatCounts upon payment thereof by WhatCounts. In the event Customer or the transactions contemplated by the Agreement are exempt from the foregoing taxes, fees, assessments or charges, Customer agrees to provide WhatCounts as evidence of such tax exempt status, proper exemption certificates or other documentation acceptable to WhatCounts.

# Proprietary Rights

## **Ownership**

### **WhatCounts.** WhatCounts and its suppliers retain sole and exclusive ownership of the Confidential Information, Software, and all Intellectual Property Rights of WhatCounts and its suppliers in, to, or embodied in or associated with the Software, Deliverables (except for portions of the WhatCounts Content described in Section 7.2(c) below), Services, Hosting Services, Additional Services, and Support, and all copies and Modifications thereof (whether developed by WhatCounts, Customer, or a third party). Customer shall not take any action inconsistent with such title and ownership.

### **Customer**. Customer retains sole and exclusive ownership of Customer’s Confidential Information, Customer Content and Target PII, and all copies and Modifications thereof. WhatCounts shall not take any action inconsistent with such title and ownership.

### **Deliverables**. WhatCounts hereby assigns to Customer, and upon the creation thereof automatically assigns to Customer, all of WhatCounts’ Intellectual Property Rights in and to the WhatCounts Content, except for the Reusable Content. WhatCounts hereby grants to Customer, and upon the creation thereof automatically grants to Customer, a nonexclusive, unlimited, perpetual, and non-terminable right and license to use, copy, create Modifications of, distribute, and publicly perform the Deliverables other than the WhatCounts Content assigned to Customer in accordance with this subsection. Notwithstanding anything to the contrary, any suggestions or proposed Modifications to the Software provided by Customer to WhatCounts may be freely used by WhatCounts without limitation, and any Modification to the Software resulting from such suggestions or proposed Modifications shall be exclusively owned by WhatCounts.

### **Further Assurances**. Each party shall take such actions as may be reasonably requested by the other to evidence the transfer of ownership of or license to Intellectual Property Rights described in this Agreement, including but not limited to, the making of further written assignments or the filing of registrations, applications, or instruments, in a form reasonably requested by the other.

## **Indemnification**

### WhatCounts shall indemnify, defend, and hold harmless Customer and its officers and Authorized Users (collectively, “Customer Indemnified Parties”) against any third party claim that the Software infringes any Intellectual Property Rights of any third party. If any Software becomes, or in the WhatCounts’ opinion is likely to become, the subject of a claim of infringement, WhatCounts may, at its sole option, (i) obtain for Customer the right to continue using the Software; (ii) replace or modify the affected Software so that it becomes non-infringing while providing substantially equivalent functionality; or (iii) if such remedies are not available on commercially reasonable terms as determined by WhatCounts, terminate the license for the affected portion of the Software and refund any prepaid Subscription Fees for the affected portion of the Software. Notwithstanding any other terms in this Section, WhatCounts shall have no liability for infringement claims and Customer shall defend, indemnify, and hold harmless WhatCounts if the alleged infringement is based on or arises from (w) combination or use of the Software with hardware, software, or other materials not provided by WhatCounts, (x) the modification of the Software by anyone other than WhatCounts or at WhatCounts’ direction, (y) the use of the Software not in accordance with the Documentation or this Agreement, or (z) the use of other than the then most current Version of the Software if the use of the most current Version of the Software would have eliminated the infringement. THE FOREGOING STATES WHATCOUNTS’ ENTIRE LIABILITY AND CUSTOMER’S EXCLUSIVE REMEDY FOR ANY CLAIM OF INFRINGEMENT.

### WhatCounts shall indemnify, defend, and hold harmless the Customer Indemnified Parties against any third party claim arising from WhatCounts’ or WhatCounts’ employees’ or subcontractors’ gross negligence or intentional tortious misconduct.

### Customer shall indemnify, defend, and hold harmless WhatCounts and its officers, employees, and agents (collectively, “WhatCounts Indemnified Parties”) against any third party claim involving or alleging facts that, if proven, would result in a Customer’s violation of the Terms of Subscription Use.

### The indemnification provided in this Section 7.2 is conditioned on (i) the party to be indemnified (“Indemnified Party”) giving the party to provide the indemnification (“Indemnifying Party”) prompt written notice of such claim; (ii) the Indemnified Party providing its full cooperation in the defense of such claim, if requested by the Indemnifying Party; and (iii) the Indemnified Party granting the Indemnifying Party the sole authority to defend or settle the claim. The Indemnified Party may engage legal counsel to monitor, but not control, any such claim at the Indemnified Party’s expense.

## **Confidentiality.** By virtue of this Agreement, the parties may be exposed to or provided with certain Confidential Information of the other party. Each party will protect the other's Confidential Information from unauthorized dissemination and use with the same degree of care that each such party uses to protect its own Confidential Information, but in no event less than a reasonable amount of care. Except as required by law, neither party will use the other's Confidential Information for purposes other than those necessary to directly further the purposes of this Agreement and as may be required to report to its and its affiliates’ legal and financial advisors. Either party may also disclose the terms and conditions of this Agreement to existing or potential investors, lenders, or acquirors under obligations of nondisclosure. Except as otherwise expressly set forth in this Agreement, neither party will disclose to third parties the other's Confidential Information without prior written consent of the other party. The responsibilities under this Section 7.3 shall continue during Term and for two years thereafter for Confidential Information that is not a trade secret under law and for trade secrets shall continue for so long as such Confidential Information remains a trade secret.

## **Injunctive Relief.** The parties agree that if Sections 2, 4.1, 5, or 7.3are breached, the nonbreaching party may suffer irreparable harm and significant damages, not fully compensable by money damages alone. Accordingly, the nonbreaching party, in addition to any other legal or equitable remedies, shall be entitled to seek an injunction or similar equitable relief against such breach or threatened breach.

## **Statistical Analysis**. WhatCounts shall have the right to compile, sell, license, and distribute statistical analyses and reports utilizing aggregated data derived from Customer’s use of the Software. Such reports and analyses shall be appropriately redacted by WhatCounts and shall not identify Customer, Authorized Users, other employee or subcontractor of Customer, or any Target PII.

# Warranties

## **Services Warranty**. For 30 days after the performance of Services, Additional Services, and Support, WhatCounts warrants that the applicable services will be performed in a good and workmanlike manner, consistent with generally accepted industry standards. Customer shall promptly notify WhatCounts in writing if the services fail to perform in accordance with this warranty. WhatCounts shall, after receipt of Customer’s notice, re-perform the applicable services within a reasonable time. If WhatCounts is unable to re-perform the services as warranted, WhatCounts shall refund the fees paid for the non-conforming services.

## **Sole Remedy.** The remedies in Section 8.1 constitute WhatCounts’ sole and entire liability and Customer’s exclusive remedies with respect to such warranties. WhatCounts shall not be obligated to correct any breach of the above warranties if Customer has not notified WhatCounts of the specific existence and nature of such breach promptly during the applicable warranty period. Without limiting the foregoing, WhatCounts does not warrant and is not responsible for (i) any third-party products not provided by WhatCounts, or (ii) services not provided solely by WhatCounts, its agents and subcontractors.

## **Disclaimer.** EXCEPT AS SET FORTH IN THIS SECTION 8, NEITHER WHATCOUNTS NOR ITS CONTRACTORS, LICENSORS AND SUPPLIERS MAKES ANY EXPRESS OR IMPLIED WARRANTY, REPRESENTATION, CONDITION, OR AGREEMENT WITH RESPECT TO THE SOFTWARE, SUPPORT, SERVICES, HOSTING SERVICES, OR ADDITIONAL SERVICES. WHATCOUNTS AND ITS CONTRACTORS, LICENSORS AND SUPPLIERS EXPRESSLY DISCLAIM AND EXCLUDE TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW ANY AND ALL WARRANTIES OF MERCHANTABILITY, OF FITNESS FOR A PARTICULAR PURPOSE, OR ARISING FROM USAGE, CONDUCT, OR COURSE OF TRADE. WhatCounts does not WARRANT that the operation of the Software will be uninterrupted or error free OR THAT ALL ERRORS WILL BE CORRECTED.

# Limitation of Liability, Remedy

## **Limitation of Remedy.** EXCEPT AS PROHIBITED BY LAW OR FOR CLAIMS ARISING UNDER SECTION 7.3, WHATCOUNTS, ITS CONTRACTORS, LICENSORS AND SUPPLIERS SHALL NOT BE LIABLE TO CUSTOMER, AUTHORIZED USERS, OR ANY OTHER THIRD PARTIES, FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, OR PUNITIVE DAMAGES OR LIABILITIES FOR ANY CAUSE WHATSOEVER ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ALL SUBSCRIPTION SCHEDULES SERVICE SCHEDULES, OR AMENDMENTS THERETO, WHETHER IN CONTRACT OR TORT OR BY WAY OF INDEMNITY OR OTHERWISE, INCLUDING A BREACH THEREOF OR INCLUDING DAMAGES OR LIABILITIES FOR LOST PROFIT, LOST REVENUE, LOSS OF USE, LOSS OF GOODWILL, LOSS OF REPUTATION, LOSS OF DATA, COSTS OF RECREATING LOST DATA, THE COST OF ANY SUBSTITUTE EQUIPMENT, PROGRAM, OR DATA, OR CLAIMS BY ANY THIRD PARTY REGARDLESS OF WHETHER THE POSSIBILITY OF SUCH DAMAGES OR LIABILITIES HAVE BEEN COMMUNICATED TO WHATCOUNTS AND REGARDLESS OF WHETHER WHATCOUNTS HAS OR GAINS KNOWLEDGE OF THE EXISTENCE OF SUCH DAMAGES OR LIABILITIES.

## **Limitation of Liability.** EXCEPT AS PROHIBITED BY LAW OR FOR CLAIMS ARISING UNDER SECTIONS 7.2 OR 7.3, THE CUMULATIVE, AGGREGATE LIABILITY OF WHATCOUNTS, ITS CONTRACTORS, LICENSORS AND SUPPLIERS (INCLUDING ATTORNEYS FEES AWARDED UNDER THIS AGREEMENT) TO CUSTOMER, AUTHORIZED USERS, AND ANY OTHER THIRD PARTIES FOR ALL CLAIMS, LIABILITIES AND DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ALL ITS SCHEDULES, ADDENDA OR AMENDMENTS THERETO, WHETHER IN CONTRACT, TORT, OR OTHERWISE, SHALL NOT EXCEED THE SUBSCRIPTION FEES PAID BY CUSTOMER TO WHATCOUNTS UNDER THE APPLICABLE SUBSCRIPTION SCHEDULE(S) IN THE TWELVE MONTHS IMMEDIATELY PRECEDING THE DATE ON WHICH THE CLAIM ACCRUED. Notwithstanding the provisions of this Section, this Agreement shall not limit the liability of either party for real or personal property damage or personal injury, including death, arising from the negligence of WhatCounts and WhatCounts’ employees acting in the course of their employment. THE PARTIES AGREE THAT THE LIMITATIONS AND EXCLUSIONS SET OUT IN THIS AGREEMENT HAVE BEEN FREELY NEGOTIATED AND THAT WHATCOUNTS WOULD NOT HAVE ENTERED INTO THIS AGREEMENT WITHOUT SUCH LIMITATIONS.

# Dispute Resolution

## All disputes of every kind and nature between Customer and WhatCounts arising out of or in connection with this Agreement, including the construction, validity, interpretation, enforceability, or breach of this Agreement, shall be addressed first in an informal dispute process. If an informal dispute process is unsuccessful in resolving a dispute, the dispute shall be submitted to binding arbitration pursuant to the then existing Commercial Arbitration Rules of the American Arbitration Association ("Rules"). Unless otherwise mutually agreed, the arbitration shall be conducted with a single arbitrator, selected in accordance with the Rules. Each party shall bear its own costs of arbitration. The arbitrator shall be fluent in the English language and have experience in commercial contract and intellectual property laws. Arbitration hearings shall be conducted in Atlanta, Georgia and the award rendered by the arbitrators shall be final and binding on all parties to the proceeding. Judgment on any award may be entered by either party in any court of competent jurisdiction. Subject to Section 12.6, nothing contained herein shall be deemed to give the arbitrator any authority, power, or right to alter, change, amend, modify, add to, or subtract from any of the provisions of this Agreement.

## Customer and WhatCounts agree that the provisions hereof shall be a complete defense to any suit, action, or proceeding instituted in any federal, state, or other country’s court or before any administrative tribunal with respect to any controversy or dispute arising under this Agreement and which is arbitrable as herein set forth. Notwithstanding the foregoing, either party may seek injunctive relief in any court of law or equity having jurisdiction to assert, protect or enforce its rights in: (i) any Intellectual Property Rights, including any rights it has in patents, copyrights, trademarks, or trade secrets; (ii) the license limitations in Section 2; or (iii) Confidential Information as described in this Agreement.

## The parties agree that any Confidential Information of either party shall be disclosed during arbitration or litigation only upon the issuance of appropriate protective orders limiting the disclosure or discoverability of such information outside of the arbitration or litigation of this Agreement.

# Term and Termination

## **Term and Renewals**. This Agreement shall commence on the Effective Date and continue for the initial term as set forth in the applicable Subscription Schedule (the “Initial Term”), unless earlier terminated in accordance with this Section 11. The Initial Term shall be automatically renewed for successive one year periods commencing on the anniversary of the end of the Initial Term (each a “Renewal Term”; the Initial Term and all Renewal Terms are collectively referred to as the “Term”), unless either party notifies the other on or before 30 days prior to the end of the then Term.

## **Termination**. This Agreement may be terminated in advance by a party:

### if the other party materially breaches a provision of this Agreement and fails to cure such breach within 30 days of the receipt of written notice of such breach, except that Customer shall not be entitled to a 30 day cure period for any non-remediable breach of this Agreement; or

### if any assignment is made by the other party for the benefit of creditors, or if a receiver, trustee in bankruptcy or similar officer is appointed to take charge of any or all of the other party's property, or if the other party files a voluntary petition under federal or other country’s bankruptcy or similar laws or similar state statutes or such a petition is filed against the other party and is not dismissed within 60 days.

## **Termination of Subscription Schedule or Services Schedule**.Where the non-breaching party has a right to terminate this Agreement, the non-breaching party may at its discretion either terminate this Agreement as a whole or the applicable Subscription Schedule or Services Schedule. In the event that each and every Subscription Schedule and Services Schedule is terminated, this Agreement shall automatically terminate. In the event that this Agreement is terminated as provided herein, each and every Subscription Schedule and Services Schedule to this Agreement shall automatically terminate. Allrights of termination are in addition to any other rights of the parties under this Agreement, at law, in equity, or otherwise.

## **Effects of Termination**. Upon termination of this Agreement for any reason, all rights and obligations of the parties hereunder and all licenses and Services shall cease, except as follows:

### Customer’s liability for any Fees, charges, payments or expenses due to WhatCounts that accrued prior to the termination date shall not be extinguished by termination, and such amounts shall be immediately due and payable.

### Customer shall, at Customer’s expense, deliver to WhatCounts all tangible items and embodiments, and permanently destroy all electronic and other embodiments not able to be so delivered, of the (i) Software; (ii) Documentation; and (iii) Confidential Information of WhatCounts in the possession or under the control of Customer. Customer shall certify in writing to WhatCounts within ten days following termination that it has complied with this Section 11.4(b).

### WhatCounts shall return to Customer, or permanently destroy all electronic and other embodiments not able to be so delivered, any Target PII and Confidential Information of Customer in the possession or under the control of WhatCounts.

### The provisions of Sections 1, 2.4, 5, 6 for accrued but unpaid Fees, expenses and taxes, 7, 8.3, 9, 10, 11.4, and 12 shall survive any termination of this Agreement.

# General Provisions

## **Authorized Users.** Customer shall cause all Authorized Users to be bound by the terms and conditions of this Agreement that are applicable to Customer, and any default by any Authorized User of the terms and conditions of this Agreement shall be a default of Customer.

## **Governing Law**. The validity, construction, and performance of the Agreement and the legal relations among the parties to the Agreement shall be governed by and construed in accordance with the laws of the State of Georgia, U.S.A., excluding that body of law applicable to choice of law. The United Nations Convention on Contracts for the Sale of Goods and the United Nations Convention on the Limitation Period in the International Sale of Goods shall not apply to the Agreement.

## **Entire Agreement**. This Agreement constitutes the entire agreement between the parties with regard to the subject matter hereof. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing signed by both parties, and then such waiver, consent, modification, or change shall be effective only in the specific instance and for the specific purpose given.

## **Order of Precedence**. In the event of a conflict between a Subscription Schedule or Services Schedule and this Agreement, this Agreement shall prevail, provided, however, that such standard variable terms such as price, quantity, tax exempt status, shipping instructions, and the like shall be specified on each Subscription Schedule or Services Schedule.

## **Waiver**. The waiver by either party of a breach or a default of any provision of this Agreement by the other party shall not be construed as a waiver of any succeeding breach of the same or any other provision, nor, except as otherwise expressly provided otherwise in this Agreement, shall any delay or omission on the part of either party to exercise or avail itself of any right, power or privilege that it has, or may have hereunder, operate as a waiver of any right, power or privilege by such party.

## **Severability.** If any provision of this Agreement is invalid or unenforceable, that provision shall be construed, limited, modified, or severed to the extent necessary to eliminate its invalidity or unenforceability, and the other provisions of this Agreement shall remain in full force and effect.

## **Assignment**. This Agreement and the rights and obligations hereunder, may not be assigned in whole or in part by Customer without the prior written consent of WhatCounts. In the case of any permitted assignment or transfer of or under this Agreement, this Agreement or the relevant provisions shall be binding upon, and inure to the benefit of, the successors, trustees, and assigns of the parties hereto. Any attempt at assignment without such consent shall be null and void and of no force and effect. Assignments may require an additional subscription fee.

## **Force Majeure.** In the event that either party is prevented from performing, or is unable to perform, any of its obligations under this Agreement due to any cause beyond the reasonable control of the party invoking this provision, the affected party's performance shall be extended for the period of delay or inability to perform due to such occurrence, and provided further that the other party may terminate this Agreement if such condition continues for a period of 180 days. This provision shall not apply to payment obligations.

## **Non-solicitation**. Customer and WhatCounts shall not hire any employee of the other as an employee, contractor or in any other capacity within twelve months from the last date such person provided Services hereunder without the other party’s written consent. This provision shall not apply to employees, consultants, or subcontractors who solely reply to a published solicitation for employment.

## **Publicity**. Neither party will issue any press release or other voluntary public communication regarding this Agreement or the relationship described by this Agreement without giving the other party an opportunity to review and comment upon such communication and obtaining the written consent of the other party. Notwithstanding the foregoing sentence, during the Term, WhatCounts may identify Customer publicly as a WhatCounts customer in press releases, on its website, or otherwise, and Customer may identify WhatCounts publicly as a supplier of Customer in press releases, on its website, or otherwise, provided that such identification does not reveal any terms of this Agreement beyond the basic nature of the license and Services provided and does not mischaracterize the relationship. In addition, the parties agree to issue a joint press release upon the execution of this Agreement and upon first production use and shall use reasonable efforts to review and approve any such proposed press release within ten business days after receipt of such proposed joint press release.

## **No Agency; Independent Contractors**. Nothing contained in this Agreement shall be deemed to constitute either party as the agent or representative of the other party, or both parties as joint venturers or partners for any purpose.

## **Compliance**. During the Term and for a period of one year following its expiration or termination, Customer shall maintain and make available to WhatCounts records sufficient to permit WhatCounts or an independent auditor retained by WhatCounts to verify, upon ten days written notice, Customer’s compliance with the terms of this Agreement; provided, that such audit shall be performed during regular business hours and subject to Customer’s reasonable confidentiality requirements. If such verification process reveals any noncompliance of this Agreement by Customer, Customer shall pay the applicable Subscription Fees and other Fees and shall reimburse WhatCounts for the reasonable costs and expenses of such verification process (including the fees of an independent auditor) incurred by WhatCounts, and Customer shall promptly cure any such noncompliance; provided, however, that the obligations under this Section are not a waiver of WhatCounts’ termination rights or other rights under this Agreement, at law, in equity, or otherwise.

## **Notices**. Any notice or communication from one party to the other shall be in writing and either personally delivered or sent via nationally recognized overnight service, or certified mail, postage prepaid and return receipt requested, addressed to the other party as specified in the first paragraph of the Signature Page of this Agreement or at such other address as such party may from time to time designate in a notice to the other party. All notices shall be effective upon delivery to the notice address.

## **Construction**. Captions and headings contained in this Agreement have been included for ease of reference and convenience and shall not be considered in interpreting or construing this Agreement. The word “including” and its derivatives, (e.g. “include” and “includes”) means including, without limitation, whether or not capitalized and whether or not “without limitation” or words of similar meaning are included in other provisions of this Agreement. Unless the context otherwise specifically requires, all references to sections of this Agreement shall refer to all subsections thereof.

## **Authority.** The parties and each individual executing this Agreement on behalf of the parties hereto represent and warrant that such individual is duly authorized to execute and deliver this Agreement on behalf of his or her party.

 EXHIBIT A TO SUBSCRIPTION SCHEDULE  
TERMS OF SUBSCRIPTION USE

(1) Customer shall have and retain sole responsibility for the Content of its Target Communications.

(2) Customer shall not use any Hosted Services or communicate or attempt to communicate any Target Communication that violates any law, statute, ordinance or regulation governing communication practices, including but not limited to the laws and regulations governing export control, unfair competition, false advertising, consumer protection, issuance or sale of securities, child pornography, obscenity, trade in firearms, SPAM, privacy, private or public data transfer and telecommunications.

(3) Each Target Communication sent by e-mail (“E-mail Communication”) shall clearly identify the Customer as “Sender,” as defined by the CAN SPAM Act of 2003, and with commercial messages, incorporate both commercial identification and postal identification of that “Sender” within the message.

(4) Each E-mail Communication shall include a reasonable, working Internet-based mechanism for the Target to unsubscribe. Where reasonable, unsubscribe instructions should include the e-mail address the mailing was sent to, the particular Customer from which the Target may unsubscribe and be operable for 30 days following each E-mail Communication.

(5) Each E-mail Communication shall appropriately identify the subject of the e-mail message on the subject line and may not utilize intentionally misleading subject lines.

(6) Each E-mail Communication shall contain valid, working header information, not intentionally omitting, deleting, forging or misrepresenting transmission information, including but not limited to E-mail headers, return addressing information and IP addresses.

(7) No Target Communication may contain content that WhatCounts deems obscene, threatening, abusive, libelous, hateful, encourages criminal conduct, gives rise to civil liability or violates any international, federal, state or local law, rule or regulation, nor shall it introduce malicious content that includes but is not limited to viruses, Trojan horses, trap doors, back doors, Easter eggs, worms, time bombs, packet bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information (“Objectionable Content”);

(8) Customer shall not damage, disable, overburden, or impair the Hosted Services (or the network(s) connected to the Hosted Services) or interfere with anyone’s use and enjoyment of the Hosted Services, including automating tasks that would cause any of the foregoing, or propagate chain letters or send malicious e-mail, including but not limited to “mail-bombing” (flooding a user or site with large or numerous e-mail pieces).

(9) Customer shall not use the Services or Customer Content or WhatCounts Content in a manner that infringes or misappropriates any Intellectual Property Rights or rights of publicity, including failing to obtain all required permissions to receive, upload, download, display, distribute or execute programs or perform other works or derivative works protected by intellectual property laws or removal or alteration of applicable copyright, trademark or patent notices.

(10) WhatCounts may suspend any Hosted Services, Support, Services, and Additional Services upon five days advance written notice to Customer specifying the basis for such suspension if WhatCounts reasonably believes that Customer: (i) has violated any applicable law, statute or regulation in connection with Customer's use of any such services, (ii) has breached these Terms of Subscription Use or any agreement to which these Terms of Subscription Use form a part, or (iii) is violating or has violated any third party rights. WhatCounts and Customer shall use diligent efforts to resolve any such issues to WhatCounts reasonable satisfaction during the five day period. After such period WhatCounts may suspend any such services until Customer provides WhatCounts with information and material supported by appropriate legal and factual evidence or explanations sufficient for Customer to demonstrate to WhatCounts that Customer complies with all applicable laws, statutes, regulations, industry or Internet codes of conduct, ethics, or directives, and third party rights (“Reasonable Assurances”).

(11) If an internet service provider (“ISP”) notifies WhatCounts that any E-mail Communication has violated the ISP’s established acceptable conduct standards, then WhatCounts may immediately suspend those Hosted Services utilizing such ISP until Customer provides WhatCounts Reasonable Assurances.

(12) Customer shall not tally an ISP Complaint Rate above 0.5%.

(13) WhatCounts may immediately suspend an E-mail Communication prior to or during WhatCounts processing without being deemed in breach of these Terms of Subscription Use or any agreement to which these Terms of Subscription Use form a part if WhatCounts learns or reasonably suspects that with respect to such mailing: (i) the Target list contains e-mail addresses obtained from known unsolicited commercial E-mail purveyors; (ii) some or all of the Target list has been obtained without the permission of those on the Target list; or, (iii) Customer has violated Section 14 below in connection with the compilation or use of the Target list. In the event of such a suspension, WhatCounts shall endeavor to inform Customer within one (1) hour following such suspension and the parties shall discuss the suspension duration and appropriate corrective action.

(14) Customer shall honor all Target requests for Customer to: (i) suppress the Target’s e-mail address from a Target list, and (ii) refrain from sending any further E-mail Communications to Target’s e-mail address. Customer will honor unsubscribe requests received by Customer outside of the Hosted Services within ten days following such request.