



Audit clause to be included in Contracts with Online and Ring Tones Services

- Standard Wording -

Preliminary Remarks

- The below audit clause shall be considered as a model that BIEM members shall consider when negotiating their licensing contract with an online service.
- This proposed typical wording shall be considered as a starting point. When including such wording, the Society must consider the services offered and current obligations of the licensor and licensee to ensure this wording is tailored appropriately for the specific circumstances. The wording will also need to use the terms defined elsewhere in *the Licence Agreement* and *should also be reviewed by the Societies' own legal representatives*.

Proposed Model Audit Clause

1. Records

1.1 The Licensee shall keep proper, detailed books and records relating to:

1.1.1 the use of all Musical Works in the Licensor's repertoire; and

1.1.2 any income or receivable or other consideration received by or on behalf of the Licensee in relation to the licensed Service, together with any supporting documentation covering the period up to six years prior to the date of notification of the audit ("Records"), under this Agreement.

Such Records include (but are not limited to):

- a) supporting correspondence
- b) accounting records;
- c) system documentation;
- d) transaction histories;
- e) invoices;
- f) workings¹; and
- g) analysis (including relevant electronic documentation and items managed by other parties on behalf of the Licensee),

¹ 'Workings' would refer to any calculations that a licensee has made in relation to the licence e.g., if they applied a minimum to a transaction, we would want to see how this has been calculated

and any other document which may be necessary to: understand and/or check against the previous reporting by the Licensee, confirm and evaluate the Licensee's usage of all Musical Work and any income or receivable or other consideration received by or on behalf of the Licensee in relation to the licensed Service.

1.2 For the avoidance of doubt, books and records as referred to in Clause 1.1 above shall include data, information and records held on computers, in the cloud or otherwise.

1.3 The Records should be retained for the longer of **[number of years - typically at least six]** years from their creation and the locally mandated statutory period.

2. Audit

2.1 Upon reasonable notice, the Licensee shall allow (and shall procure that each relevant party shall allow) the Licensor's² personnel or an independent auditor (each, the "Duly Authorised Representatives"³) access to all the Records and supporting financial and operational systems (whether physical or electronic) during the term of the Agreement and for **[number of months - according to legal/statutory period]** months afterwards. Where any agreement between the Licensee and Licensor replaces this Agreement or licenses substantially the same activities (the 'Replacement Agreement'), the [] month time limit referred to above shall begin following termination or expiry of the Replacement Agreement.

2.2 Not more than once per annum and upon reasonable notice, the Duly Authorised Representatives of the Licensor shall:

- a) have access to the Licensee's premises;
- b) be entitled to inspect, make extracts, take copies of any of the information and/or documentation available; and
- c) be entitled to carry out such work which, in their reasonable opinion, is considered necessary to verify the Licensee's compliance with the Agreement.

2.4 The Licensor shall not and shall use reasonable endeavours to ensure that its staff, its agents, inspectors or its appointed third-party shall not disclose any confidential information⁴ to third parties relating to the business or trade of the Licensee which they may acquire in the course of the audit or during the performance of the Agreement.

3. Under/Over-payment

3.1 Subject to Clause[s] [4.1 and/or 4.2], where an audit indicates an under-payment of the Royalty Fee, then without prejudice to the Licensor's other rights within this Agreement, the Licensee shall pay

² If Society and Licensor are separate definitions in the licence, please revert this and other occurrences back to « the Society »

³ including an employee of a third party that a Society has appointed to ascertain the accuracy and completeness of the records and the reports from the Licensee, including but not limited to forensic IT specialists

⁴ Ideally, confidential information would be defined elsewhere in the agreement, and this would be « Confidential Information »

the amount of the under-payment plus the interest on the under-payment amount from the date on which the correct fee should have been paid to the Licensors until the date that it was actually paid.

3.2 Interest will be calculated at rate of **[percentage - typically one to five percent]** % above the base rate current from time to time of the **[name of relevant financial services organisation e.g. European Central Bank, Bank of England or Barclays Bank plc]**. Sample check should be admitted as a result for the whole business activities that are subject to license conditions.

3.3 If an audit indicates an over-payment of the Royalty Fee during the period under audit:

3.3.1 arising solely as a direct result of an act or omission of the Licensors, then, the amount of the over-payment shall be offset against future Royalty Fees payable by the Licensee to the Licensors, or, if any amount remains outstanding at the end of the Term, reimbursed to the Licensee;

3.3.2 where such over-payment did not arise solely as a direct result of an act or omission of the Licensors, then the Licensors shall only be required to offset or reimburse the amount of the over-payment in clause 3.3 above to the extent that any such over-payment is recovered from Members and Affiliated Societies (and equivalent principles to those set out in clause xx of this Agreement shall apply).

3.3.3 This clause 3.3 has been agreed by the Licensors on a strictly non-precedential basis.

3.4 The Licensee shall permit the Duly Authorised Representatives of the Licensor to report to the Licensor the findings of any audit, together with supporting explanations.

4. Audit costs

[4.1 If an audit discloses:

- a) a failure to accurately report any works in the Licensor's repertoire;
- b) an under-payment(s) [or over-payment - –some agreements include both]; and
- c) the aggregated amount of both 4.1 (a) and (b) accounts for more than [percentage - –typically one to five per cent] % of the royalties that have been reported during each examined audit period,

then, without prejudice to the Licensor's other rights within this Agreement, the Licensee shall pay, in addition to the under-payment amount plus interest⁵, any reasonable costs incurred by the Licensor in respect of the audit within 28 days of receipt of the Licensor's invoice].

[AND/OR]⁶

[4.2 If an audit discloses:

⁵ Please consider whether the clause should link to 3.1 and/or 3.2

⁶ It may be that 4.1 and 4.2 are intending to achieve the same outcome. If so, one of these can be removed.

- a) under-payment of more than X% of the correct Royalty Fee during the period under audit; and / or
- b) a failure to report correctly amounting to at least X% of the content usage during the period under audit,

then, without prejudice to the Licensor's other rights under this Agreement, the Licensee shall pay, in addition to the under-payment amount plus interest, the Licensors' reasonable costs of such audit within 28 days of receipt of the Licensor's VAT invoice].

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