

## MARKETPLACE SOFTWARE SERVICE USE TERMS

BY ACCEPTING THE TERMS OF THE APPLICABLE ORDER, AND USING THE SOFTWARE SERVICE, CUSTOMER ACCEPTS THESE MARKETPLACE SOFTWARE SERVICE USE TERMS (“M-SUT”).

The Glossary at the end of this M-SUT contains definitions applicable to this Agreement.

1. **RIGHT TO USE.** Subject to all fees paid by the Marketplace Operator to Optimizely, for the Subscription Term only, Optimizely grants Customer a non-transferable, non-exclusive, worldwide right to Use the Software Service, subject to the terms of this M-SUT.

2. **OPTIMIZEZY RESPONSIBILITIES.** *Provisioning.* Optimizely will provide access to the Software Service for Use by Customer as described in this Agreement. Optimizely will make the Software Service available, and will be responsible for, its operation. *Support.* Optimizely will provide Support for the Software Service as outlined in the Support Policy. *Security.* Optimizely will implement, and will maintain, appropriate technical and organizational measures to protect the Processing of Customer Data as outlined in the DPA in compliance with applicable data protection law.

3. **PERMISSIONS & RESTRICTIONS.** *Permissions.* Customer shall only Use the Software Service (and Documentation and Materials) for its and its Affiliates’ internal business operations (which may include the development, support, and launching of public-facing websites). Customer may permit Authorized Users to Use the Software Service. *Restrictions.* Customer shall not: (i) Use the Software Service other than by an Authorized User; (ii) Use the Software Service as a service bureau, timeshare or similar service. (iii) reverse engineer, decompile, disassemble or attempt to discover the source code, object code or underlying structure, ideas or algorithms of the Software, (iv) modify, translate, or create derivative works based on the Software, Documentation or any Materials, (v) copy (except for archival or Optimizely-authorized purposes) Software, Documentation or any Materials, (vi) resell, distribute, lease, pledge, assign, or otherwise transfer or encumber rights to the Software Service; (vii) Use, or otherwise utilise, the Software Service, or any Documentation or Materials, to build, and/or assist any Third-Party in building or supporting, software products that compete with Optimizely; (viii) remove any proprietary notices or labels from the Software Service, including in/on any Software, Documentation or Materials; (ix) bypass or breach any security device or protection used in the Software Service; (x) input, upload, transmit, or otherwise provide to, or through, the Software Service, any information or Materials that are unlawful or injurious, or contain, transmit, or activate virus, worm, malware, or other malicious computer code; (xi) damage, destroy, disrupt, disable, impair or impede the Software Service; (xii) Use the Software Services, Documentation or Materials in any manner or for any purpose that infringes, misappropriates, or otherwise violates any Intellectual Property Right or other right of any Third-Party, or that violates any applicable law; or (xiii) otherwise Use the Software Services, Documentation or Materials beyond the scope of the Limited Rights. Customer shall respect, observe and comply with all Third-Party Intellectual Property Rights Optimizely makes known, or Customer is otherwise aware.

#### 4. OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

4.1 **Optimizely Ownership.** As between Optimizely and Customer, Optimizely shall have sole and exclusive ownership of all right, title, and interest in and to the Software Service, including all Optimizely Software, Documentation and Materials, all copies, improvements, and derivative works, including all copyright, trademark, patent, trade secret, know-how, and all other associated Intellectual Property Rights. Third-Party Software is owned by the Third-Party from whom Optimizely has acquired the right to utilise in the Software Service, or offer to Customer for Customer’s Use. Other than the Limited Rights, all other rights in the Software Service, including the Software, Documentation and Materials, are expressly reserved to Optimizely.

4.2 **Customer Ownership.** As between Optimizely and Customer, Customer owns (or has the lawful right to) (i) its Customer Data, and (ii) subject always to the rights of applicable open-source software licensors, its custom coding solely developed by it (and its Authorized-Users), without any contribution from Optimizely, excluding however any derivative work of Optimizely’s Intellectual Property Rights and Confidential Information. Customer hereby grants to Optimizely a fully paid-up, royalty-free, worldwide, non-exclusive right and license to use the Customer Data as necessary to provide the Software Service to Customer, and as otherwise permitted by this Agreement.

#### 5. DATA PRIVACY, PROTECTION, PROCESSING AND ACCESS

5.1 **Customer Data Responsibilities; Security.** Customer is solely liable for its Customer Data, including the authenticity, accuracy and manner of capture, publication and removal of Customer Data, and Authorized-User alterations, customizations, edits, modifications, and custom coding. Customer is solely liable for ensuring its Customer Data does not breach the Acceptable Use Policy, or constitute infringement of a Third-Party right. Information or material displayed, generated or collected through Customer’s Use of Software Service, and any code or software used by Customer not provisioned by Optimizely is entirely within Customer’s control. Customer will maintain reasonable security standards for its Authorized-Users’ Use of the Software Service.

5.2 **Personal Data.** The DPA contains the Parties’ agreement with respect to the Processing of Personal Data. Customer will collect and maintain all Personal Data contained in the Customer Data in compliance with applicable data privacy and protection laws.

5.3 **Data Access.** During the Subscription Term, Customer can access its Customer Data at any time. Customer may export and retrieve its Customer Data in a standard format. Export and retrieval may be subject to technical limitations, in which case Optimizely and Customer will find a reasonable method to allow Customer access to Customer Data. Before the Subscription Term expires, Customer may use Optimizely’s self-service export tools (as available) to perform a final export of Customer Data from the Software Service. At the end of this Agreement, Optimizely will delete the Customer Data remaining on servers hosting the Software Service unless applicable law requires retention. Retained data is subject to the confidentiality provisions of this Agreement.

## 6. WARRANTIES, ACKNOWLEDGEMENTS, DISCLAIMERS, INDEMNITIES, AND LIMITATIONS OF LIABILITY

**6.1 *Law Compliance Warranty.*** The Parties warrant current, and continuing, compliance with all laws applicable to it in connection with: **(i)** in the case of Optimizely, the operation of Optimizely's business as it relates to the Software Service; and **(ii)** in the case of Customer, Customer's Use of the Software Service and its Customer Data.

**6.2 *Documentation and Good Industry Practices Warranty.*** Optimizely warrants it will provide the Software Service: **(i)** in substantial conformance with the Documentation and relevant Materials; and **(ii)** with the degree of skill and care reasonably expected from a skilled and experienced supplier of software-as and platform-as services substantially similar to the nature and complexity of the Software Service. Customer's sole and exclusive remedy and Optimizely's entire liability for breach of this warranty will be: (A) correction of the deficient Software Service; and (B) if Optimizely fails to correct the deficient Software Service using reasonable commercial efforts, Customer may terminate its subscription for the affected Software Service. This remedy does not apply to trivial or non-material cases of nonconformance. Any termination must occur within three months of Optimizely's failure to correct the deficient Software Service. Optimizely may fulfill its warranty obligations vis-à-vis Operator or Customer. To the extent that Optimizely fulfills its warranty obligations vis-à-vis Operator, Customer will not have any claim against Optimizely for a breach of the warranty in this Section 6.2.

**6.3 *System Availability.*** Optimizely warrants to maintain an average monthly system availability for the production system of the Software Service as defined in the SLA. Customer's sole and exclusive remedy for Optimizely's breach of the SLA is the issuance of a credit as described in the SLA, whereby the service level credit will be calculated based on the non-discounted fee set out in the Order (between Operator and Optimizely). Customer must notify Optimizely (and copy Operator) in writing (email permitted) within twenty-one business days after each calendar month in that Optimizely does not meet the SLAs, so that Operator can follow Optimizely's posted credit claim procedure. When the validity of the service credit is confirmed by Optimizely in writing (email permitted) to Operator, Optimizely will issue such credit to the Operator, who should then forward the credit to Customer.

**6.4 *Third-Party Infrastructure Acknowledgement.*** The Software Service may include Third-Party Infrastructure. Third-Party Infrastructure Providers are Optimizely Sub-Processors. Customer acknowledges that it is aware of the Third-Party Infrastructure proposed to be utilized in Optimizely's deployment and operation for the Software Service, and has made its own assessments as to the suitability of that Third-Party Infrastructure Providers and the Third-Party Infrastructure for its Use purposes.

**6.5 *Optimizely Software; Customer's Responsibility.*** For some Software Services, Optimizely may recommend in the Documentation certain Optimizely Software for Customer to consider utilizing for (amongst others) configuration, add-ons enhancements, additional features, functionality and capacities ("**Enhancements**" and "**Enhancement Software**"). Customer is responsible for complying with the applicable license terms of Enhancement Software.

**6.6 *Third-Party Software. Customer's Responsibility.*** For some Software Services, Optimizely may recommend Third-Party Software for Customer to consider utilizing as Enhancements for its Software Service Use. Customer is responsible for complying with the applicable license and use terms of any such Third-Party Software. Optimizely's referral to Third-Party Software, is not an endorsement, and any such recommendation is provided by Optimizely for convenience only. Customer is responsible for complying with the applicable license terms of Third-Party Software. Customer assumes all risk in its utilization of Third-Party Software. Optimizely is not responsible for any damage sustained or incurred by Customer, nor any Third Party, arising out of, or related to, Customer's utilization of such Third-Party Software.

**6.7 *Third-Party Material. Customer's Responsibility.*** Third-Party Material is not part of the Software Service. Customer assumes all risk in its utilization of any Third-Party Material with its Use of the Software Service. Optimizely is not responsible for any damage sustained or incurred by Customer, nor to any Third Party, arising out of, or related to, Customer's utilization of any Third-Party Material.

**6.8 *Customer Data. Customer's Responsibility.*** Customer is solely responsible for any infringement, misappropriation, libel, defamation, privacy or human rights-related claims with respect to its Use and Processing of its Customer Data.

**6.9 *DISCLAIMERS.*** Except **(i)** as expressly stated in this Agreement, and **(ii)** for warranties that cannot be excluded by law, the Software Services, Documentation and Materials, including the Third-Party Infrastructure, are provided "AS IS". Optimizely makes no other representations or warranties, and expressly disclaims all express or implied warranties, statutory or otherwise, regarding any other matter, including merchantability, suitability, originality or quality, or reliability, or availability, or accuracy, or timeliness, or fitness for any particular purpose, non-infringement, or results to be derived from use of or integration with any Third-Party Material utilised by Customer in its Use, or that the Software Service, including the Third-Party Infrastructure is, or will be, secure, uninterrupted, timely, or error-free, or meets the Customer's requirements. Customer further acknowledges to and agrees with Optimizely that it is not relying on delivery of future functionality, public comments, or advertising of Optimizely or product roadmaps in obtaining subscriptions for any Software Service, and in no event will Optimizely be liable for any damages, liabilities, costs, or expenses resulting from or related to an internet disruption or the acts, omissions, or delays of the Third-Party Infrastructure Providers. Any representation or warranty of or concerning any Third-Party Infrastructure is strictly between Customer and the Third-Party Infrastructure Provider. Furthermore, Optimizely and its licensors will not be responsible under this Agreement **(i)** if the Software Service is not used in accordance with the Documentation, or **(ii)** if the defect or liability is caused by Operator, Customer, any Third-Party Material or Use of the Software Service in conjunction with any product or service not provided by Optimizely, or **(iii)** for any Customer activities not permitted under this Agreement.

**6.10 *NO CONSEQUENTIAL DAMAGES.*** Neither Party shall be liable under any legal or equitable theory or doctrine of law, whether under contract, tort, negligence, strict liability or otherwise, for any indirect or consequential loss and damage, whether classified or called exemplary, punitive, special, indirect, consequential, remote or speculative damages, including loss of profit, loss of revenue or any other special or incidental damages, however

caused or arising, on any other liability not expressly stated, and any claims arising out of or related to this Agreement or its subject matter, even if such Party has been advised of the possibility of such loss or damage.

**6.11 LIMITATION OF MONETARY DAMAGES.** Except for (i) the Parties' respective obligations and liability to the other arising under sections 6.11 and 6.13, (ii) Customer's liability to Optimizely for the payment of Fees, (iii) Customer's liability to Optimizely for violation by Customer of Optimizely Intellectual Property Rights, (iv) damages arising from either Party's fraud, or (v) death, bodily injury or property damage arising from either Party's wilful misconduct or gross negligence - **the aggregate liability of each Party (or its respective Affiliates, including in the case of Optimizely, the Third Party Infrastructure Providers and its Sub-Processors) for all events (or series of connected events) arising in any twelve (12)-month period is absolutely limited, and will not exceed, the annual Fees paid by Customer to Operator for the applicable Software Service directly causing the alleged loss or damage in that twelve-month period.**

**6.12 IP INFRINGEMENT CLAIMS AGAINST CUSTOMER.** Optimizely will defend Customer against claims brought against Customer and its Affiliates by any Third Party alleging that Customer's and its Affiliates' Use of any Optimizely Software, Documentation or Material, infringes or misappropriates a patent claim, copyright, or trade secret right ("**IP Claims**"). Optimizely will indemnify Customer against all damages finally awarded against Customer (or the amount of any settlement Optimizely enters) with respect to the IP Claims. Optimizely's obligations under this section will not apply to the extent the IP Claim results from: (i) Customer's utilization of any Third-Party Material in its Use of the Software Service or otherwise; (ii) the Software Service being provided on a proof-of-concept or trial basis, or for no fee; (iii) Customer's failure to timely notify Optimizely in writing of the IP Claim if Optimizely is prejudiced by Customer's failure or delay with respect to that notice; or (iv) any Use not permitted under this Agreement.

**6.13 REMEDIES.** If a Third Party makes an IP Claim, or in Optimizely's reasonable opinion is likely to make an IP claim, Optimizely may (at its sole option and expense): (i) procure for Customer the lawful right to continue Software Service Use; or (ii) replace or modify the Software Service to be non-infringing without a material decrease in functionality or features. If these options are not reasonably available, Optimizely, or Customer, may terminate the Subscription to the affected Software Service upon written notice to the other Party. Optimizely expressly reserves the right to cease such defense of any claim if the applicable Software Service is no longer alleged to infringe or misappropriate the Third Party's rights. Section 11.6 applies with respect to the refund of any Fees.

**6.14 CLAIMS AGAINST OPTIMIZEZY.** Customer will defend Optimizely against claims brought against Optimizely (including its Affiliates, and their respective subcontractors) by any Third Party with respect to any breach by Customer of its obligations under section 5.1 with respect to its Customer Data and its Use by Customer in the Software Service ("**Data Claims**"). Customer will indemnify Optimizely against all damages finally awarded against Optimizely (and its Affiliates and their respective subcontractors) (or the amount of any settlement Customer enters into) with respect to Data Claims.

**6.15 THIRD PARTY CLAIMS PROCEDURE.** All Third-Party claims under sections 6.11 and 6.13 shall be conducted as follows: (i) the Party against whom a Third-Party claim is brought (the "**Named Party**") will timely notify the other Party (the "**Defending Party**") in writing of any claim; (ii) the Named Party shall reasonably cooperate in the defense and may appear (at its own expense) through counsel reasonably acceptable to the Defending Party subject to this section; and (iii) the Defending Party will have the right to fully control the defense. Any settlement of a claim will not include a financial or specific performance obligation on, or admission of liability by the Named Party.

**6.16 EXCLUSIVE REMEDIES.** Sections 6.12, 6.13 and 6.14 state the sole, exclusive, and entire liability for the Parties, their Affiliates and their respective subcontractors, and is the other Party's sole remedy, with respect to covered Third-Party claims and to the infringement or misappropriation of Third-Party Intellectual Property Rights.

## **7. CONFIDENTIAL INFORMATION**

**7.1 Use of Confidential Information.** The receiving Party ("**Receiver**") shall: (i) maintain all Confidential Information of the disclosing Party ("**Discloser**") in strict confidence, taking steps to protect the Discloser's Confidential Information substantially similar to those steps that Receiver takes to protect its own Confidential Information, which shall not be less than a reasonable standard of care; (ii) not disclose or reveal any Confidential Information of Discloser to any person other than its Representatives whose access is necessary to enable it to exercise its rights or perform its obligations under this Agreement and who are under obligations of confidentiality substantially similar to those in this Section; (iii) not use or reproduce any Confidential Information of Discloser for any purpose outside the scope of this Agreement; and (iv) retain any and all confidential, internal, or proprietary notices or legends which appear on the original and on any reproductions. Customer shall not disclose any information about this Agreement, its terms and conditions, the pricing, or any other related facts to any Third-Party. Confidential Information of either Party disclosed prior to execution of this Agreement will be subject to this Section.

**7.2 Compelled Disclosure.** Receiver may disclose Discloser's Confidential Information to the extent required by law, regulation, court order or regulatory agency; provided that Receiver required to make such a disclosure uses reasonable efforts to give Discloser reasonable prior notice of such required disclosure (to the extent legally permitted) and provides reasonable assistance in contesting the required disclosure, at the request and cost of Discloser. Receiver and its Representatives shall use commercially reasonable efforts to disclose only that portion of the Confidential Information that is legally requested to be disclosed and shall request that all Confidential Information that is so disclosed is accorded confidential treatment.

**7.3 Exceptions.** The restrictions on use or disclosure of Confidential Information will not apply to any Confidential Information that: (i) is independently developed by Receiver without reference to Discloser's Confidential Information; (ii) has become generally known or available to the public through no act or omission by Receiver; (iii) at the time of disclosure, was known to Receiver free of confidentiality restrictions; (iv) is lawfully acquired free of restriction by Receiver from a Third-Party having the right to furnish such Confidential Information; or (v) Discloser agrees in writing is free of confidentiality restrictions.

**7.4 Destruction and Return.** Upon Discloser's request, Receiver shall promptly destroy or return Discloser's Confidential Information, including copies and reproductions of it. The obligation to destroy or return Confidential Information shall not apply: (i) if legal proceedings related to the

Confidential Information prohibit its return or destruction, until the proceedings are settled or a final judgment is rendered; **(ii)** to Confidential Information held in archive or back-up systems under general systems archiving or backup policies; or **(iii)** to Confidential Information Receiver is legally entitled or required to retain.

**8. TERM, SUSPENSION, AND TERMINATION**

**8.1 Subscription Term.** The Subscription Term is as stated in the applicable Order.

**8.2 Suspension.** This Agreement may set out Optimizely’s rights to suspend Customer’s Use of the Software Service. Any suspension will be limited in scope and time according to the underlying purpose of the right to suspend. Notwithstanding any suspension of Use, Customer will still be granted access to retrieve its Personal Data upon request and to the extent Customer is obliged to access and retrieve them under applicable law.

**8.3 Termination.** Either Party may terminate this Agreement: **(i)** for cause upon thirty (30) days' prior written notice of the other Party's material breach of any provision of this Agreement (including Customer's failure to pay any Fees due to Operator under its Order) unless the breaching Party has cured the breach during such thirty (30) day period; **(ii)** as permitted under sections 6.2, 6.13 above, or 10.4 below or under the SLA and with termination effective thirty (30) days after receipt of notice in each of these cases; or **(iii)** immediately if the other Party files for bankruptcy, becomes insolvent, or makes an assignment for the benefit of creditors, or otherwise materially breaches sections 7 or 10.12. Optimizely may also terminate this Agreement if the agreement between Optimizely and the Operator for the listing of the Software Service on the Marketplace is terminated. Upon termination, Customer must immediately cease Using the applicable Software Service, including accessing any Customer Data unless Optimizely has given its authority (in writing) to allow a limited-time read-only access right to that Customer Data.

**8.4 Effect of Termination; Confidential Information.** Further to section 8.3, upon termination, the Parties shall, promptly return or destroy all copies (in whatever form, whether full or partial) of all Confidential Information, which is in a Party's possession or under its control. Within thirty (30) days after termination, Parties shall provide written confirmation to the other Party that all copies of the Confidential Information have been returned or have been destroyed. Parties shall also implement appropriate measures to safeguard the confidentiality of any intangible Confidential Information that cannot be physically returned or destroyed.

**9. DISPUTES, VENUE, GOVERNING LAW AND JURISDICTION.** Excluding claims arising out of Optimizely’s Intellectual Property Rights for which a provisional remedy or equitable relief is sought (“**IP Relief**”), all other disputes related to this Agreement (“**Disputes**”) shall be first submitted to non-binding mediation (“**Mediation**”). Mediation will be undertaken in a timely manner, in good faith and costs will be shared equally. If the Dispute is not resolved through Mediation within **sixty (60) days**, then, upon the election of either Party, the Dispute shall be submitted to an applicable court in the Jurisdiction (“**Venue**”) and subject to the Governing Law below. Each Party consents to exclusivity of Venue. The Parties waive all objections to Venue. Except with respect to unpaid Fee Disputes and IP Relief, each Party will otherwise bear its own costs with respect to all other Disputes.

Customer Domicile	USA, CA and MX	Sweden, Denmark, Finland, and Norway	UK and Ireland	EU (ex Ireland)	DACH	UAE	Australia & NZ	APJ (ex AU & NZ)	Rest of the World
<b>Governing Law:</b>	New York and controlling U.S. Federal Law	Laws of Sweden	Laws of England and Wales	Laws of England and Wales	Laws and Regulations under Berlin	Abu Dhabi Global Market.	New South Wales	Singapore	New York and controlling U.S. Federal Law
<b>Venue:</b>	The U.S. District Court (Southern District of New York)	Courts of Stockholm. English language	The Courts of London	The Courts of London	The Courts of Berlin	Abu Dhabi Global Market Courts. English language.	The courts of New South Wales, in Sydney	The courts of Singapore	The U.S. District Court (Southern District of New York)

**Exclusions.** The United Nations Convention on Contracts for the International Sale of Goods and any conflicts of law principles and the Uniform Computer Information Transactions Act (where enacted) will not apply to this Agreement.

**10. GENERAL PROVISIONS**

**10.1 Feedback.** Customer may at its sole discretion and option provide Optimizely with Feedback. In such instance, Optimizely and its Affiliates may in their sole discretion retain and freely use, incorporate or otherwise exploit such Feedback without restriction, compensation or attribution to the source of the Feedback.

**10.2 Product Supplement.** The Product Supplement applies to Customer’s Use of the Software Service, including Usage metrics, Usage limits and Usage overage.

**10.3 Data Processing Agreement.** The Data Processing Agreement applies to the Processing of Customer Data.

**10.4 Modifications.** To provide an evolving standardized Software Service over time, Optimizely may improve or modify the Software Service (including any Software), and including security, applicable availability and other service levels, Support and other Policies – (“**Modify**” and “**Modification**”). Optimizely’s rights to Modify includes the option to remove functionality from the Software Service where Optimizely either provides a functional equivalent or where this does not materially reduce the functionality of the Software Service, or security or Support. Features, functionality, and capabilities (“**New Features**”) beyond the initial scope of the Software Service may be subject to additional terms and Customer’s Use of New

Features shall be subject to those terms. Modifications to the Software Service are communicated in the Optimizely releases portal and the associated release-notes both published on Opti-World, both as updated from time to time; and as may also be communicated under the RSS feed and email subscription. **Customer's Right to Terminate.** If a Modification materially degrades the overall functionality of the affected Software Service, including security, Customer's sole remedy is to terminate its subscription to the affected Software Service by providing written notice to Optimizely within one (1) month of Optimizely's applicable notice. If Optimizely does not receive timely notice, Customer is deemed to have accepted the Modification.

**10.5 Audit.** Optimizely may audit Customer's Use at its sole discretion, and Customer shall comply with all reasonable audit requests. If Optimizely has reasonable proof of Overage and underpayment, Optimizely may notify the Operator of the discrepancy, and the Operator will invoice Customer for such Overage in accordance with its Order.

**10.6 Refund and Payments.** For termination by Customer, or any termination under sections 6.13 and 10.4, or under comparable provisions in the SLA or DPA where Customer has a sole and exclusive remedy to cancel its Subscription of the Software Service and terminate this Agreement, provided Customer was not otherwise in material breach. Optimizely will consult with the Operator in a timely manner and discuss the applicable Order and in good faith seek to agree with the Operator upon a reasonable pro-rated refund (to Customer) of the unused portion of any pre-paid fees for the terminated Subscription (unless such refund is prohibited by Export Laws), and a release of the Customer from its obligation under the applicable Order to pay any further fees due for periods after the effective date of termination, and also to discuss and resolve any refunds and /or credits as between Optimizely and Operator under their Marketplace Arrangement. Any and all such refunds and releases shall be Optimizely's sole liability to Customer.

**10.7 Force Majeure.** Any delay in a Party's performance (excluding Customer's obligation to pay Fees) caused by conditions beyond the reasonable control of the performing Party, including any fire, casualty, flood, earthquake, war, strike, lockout, pandemic, epidemic, labor stoppages or slowdowns or other industrial disturbances, passage of law or any action taken by a governmental or public authority, or material unavailability of Optimizely's Third-Party Infrastructure or other dependencies, is not a breach of this Agreement; however, the time for performance will be extended for a period equal to the duration of the conditions preventing performance.

**10.8 Use after any breach of an Order.** Optimizely may at its sole discretion suspend Customer's Use of the Software Service and/or terminate this Agreement if Operator fails to pay Optimizely any amount payable by it on its due date. If (i) Operator terminates its Operator Order (to Customer), or (ii) Optimizely terminates its Optimizely Order (to Customer) for good cause or (iii) the Marketplace Arrangement expires, or is terminated for good cause, Optimizely may directly provide the Software Service to the Customer pursuant to Optimizely's then-current Software Use Terms and for mutually-agreed subscription fees.

**10.9 Waiver.** A waiver of any breach or default of this Agreement is not deemed a waiver of any other breach or default.

**10.10 Relationship of Parties.** No joint venture, partnership, employment, or agency relationship exists between the Parties as a result of entering into this Agreement, and neither Party has any authority of any kind to bind the other in any respect. Furthermore, as between Optimizely and the Operator, Operator is not the agent of Optimizely, nor vice versa. Operator is an independent entity with no authority to bind Optimizely or to make representations or warranties on Optimizely's behalf. Optimizely will not be liable for reasonably relying on the accuracy and reliability of written information provided by Operator in making any decision that would give Optimizely ground to suspend the Software Service or terminate this Agreement. Optimizely makes no representations or warranties as to such authorized distributor or reseller, or any other Third-Party, related to the performance of the products or services of such entities, and fully disclaims any such warranties in accordance with Section 6.8.

**10.11 Survival.** All sections of this Agreement that by their nature should survive termination will survive.

**10.12 Assignment.** Without Optimizely's prior written consent, Customer may not assign, delegate or otherwise transfer this Agreement (or any of its rights or obligations) to any party. Optimizely may assign this Agreement to any of its Affiliates or in connection with a merger, acquisition or sale of all or substantially all of its assets to which this Agreement relates.

**10.13 Subcontracting.** Optimizely may subcontract parts of the Software Service to its Affiliates, and Third-Parties. Optimizely is responsible for the performance of those subcontractors, and is responsible to Customer for breaches of this Agreement caused, or contributed to, by its subcontractors.

**10.14 Notices.** Notices will be in writing and given when delivered to the address set out in the applicable Order. Notices from Optimizely to Customer may be in the form of an electronic notice to Customer's authorized representative or administrator. Optimizely may provide notice of Modifications to the Software Service via the Documentation, the Support portal, and also release notes and publications at Opti-World. Customer should be familiar with Opti-World. Notifications relating to the operation, including Support, of the Software Service may also be provided within the Software Service, or made available via Opti-World or Optimizely's Support portal.

**10.15 Export Compliance.** Optimizely and Customer shall comply with all applicable Export Laws, including with respect to Optimizely Confidential Information. Customer and its Authorized Users will not, directly or indirectly, export, re-export, release, or transfer Optimizely Confidential Information in violation of Export Laws. Customer is solely responsible for compliance with Export Laws related to Customer Data. Customer shall not permit any Use of the Software Service from an EU, UK or US embargoed or sanctioned country or in violation of any U.S., UK or EU export law or regulation. Upon Optimizely's reasonable request, Customer shall provide information to support obtaining any export authorization.

**10.16 US Government End-User Notice.** If Customer is a U.S. Government entity, the Software Service, is a "Commercial Item," as defined in 48 C.F.R. § 2.101, consisting of "Commercial Computer Software" and "Commercial Computer Software Documentation," as used in 48 C.F.R. § 12.212 and 48 C.F.R. § 227.7202, as applicable. The Commercial Computer Software and the Commercial Computer Software Documentation are being licensed to U.S. Government end-users (a) only as Commercial Items and (b) with only those rights as are granted to all other end-users pursuant to this section.

**10.17 Order for Precedence.** The following order of precedence applies with respect to any conflict within this Agreement – (i) the Optimizely Order, (ii) the Product Supplement, (iii) the Service Level Agreement, (iv) the Support Policy, (v) the Data Processing Agreement, and (vi) these Software Services Use Agreement Terms - (collectively, this “Agreement”).

**10.18 Entire Agreement.** This Agreement constitutes the entire and exclusive agreement between Optimizely and Customer in connection with the Parties’ business relationship related to the Software Service. All previous representations, discussions, and writings (including any confidentiality agreements) are superseded by this Agreement, and the Parties disclaim any reliance on them. This Agreement may only be modified in writing, signed by both Parties, except as permitted under this Agreement. Terms and conditions of any Customer-issued purchase order shall have no force or effect, even if Optimizely accepts, or does not reject, the purchase order.

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## GLOSSARY

**Acceptable Use Policy** means Optimizely’s acceptable use policy, as referred to in the Product Supplement.

**Affiliate** means any entity that controls, is controlled by, or is under common control of either Party to this Agreement (and for the purpose of this definition, Optimizely Inc. is an Affiliate of Episerver Inc.), and the term “control” means the power or authority to direct influence over the management and policies of an entity, whether through the holding of a majority share of the voting stock, by contract, or otherwise.

**Agreement** means this M-SUT, and any applicable Optimizely Order, and all incorporated schedules, exhibits and other appendices.

**Authorized-User** means any individual to whom Customer grants access authorization to use the Software Service that is an employee, agent, contractor or representative of Customer, Customer’s Affiliates, or Customer’s and Customer’s Affiliates’ Business Partners.

**Business Partner** means any legal entity that requires use of a Software Service in connection with Customer’s and its Affiliates’ internal business operations, which may include service providers and customers and/or suppliers of Customer and its Affiliates.

**Confidential Information** means all information which the disclosing Party protects against unrestricted disclosure to others that the disclosing Party or its Representatives designates as confidential, internal and/or proprietary at the time of disclosure, and that should reasonably be understood to be confidential at the time of disclosure given the nature of the information and the circumstances surrounding its disclosure.

**Customer Data** means any data, information or other material that Authorized-Users submit, collect or otherwise provide in the course of Using the Software Service, including information regarding Customer’s social networking interactions or other contacts activated through Use of the Software Services, and Customer’s visitors and their data.

**Documentation** means Optimizely’s then-current technical and functional documentation, including Service Descriptions, user-guides, developer-guides, and any roles and responsibilities descriptions, that Optimizely makes available to Customer.

**DPA (or Data Processing Agreement)** means Optimizely’s Data Processing Agreement, currently published at <https://www.optimizely.com/legal/data-processing-agreement>.

**Export Laws** means all applicable import, export control and sanctions laws, including without limitation, the laws of the United States, the UK, and the EU.

**Fees** means the fees set out in an Order for Software Services and any included professional services provided by Optimizely.

**Feedback** means input, comments or suggestions regarding Optimizely’s business and technology direction, and the possible creation, modification, correction, improvement or enhancement of the Software Service.

**Intellectual Property Right** means patents of any type, design rights, utility models or other similar invention rights, copyrights and related rights, trade secret, know-how or confidentiality rights, trademarks, trade names and service marks and any other intangible property rights, whether registered or unregistered, including applications (or rights to apply) and registrations for any of the foregoing, in any country, arising under statutory or common law or by contract and whether or not perfected, now existing or hereafter filed, issued, or acquired.

**Limited Rights** means the licenses, rights and other entitlements expressly granted to Customer with respect to Software Service under this M-SUT, including applicable Order, and this Agreement.

**Marketplace** means the internet site operated by the Operator where Optimizely, as a vendor on the Marketplace makes available the applicable Software Service for sale by the Operator to End-Customers.

**Marketplace Arrangement** means the written agreement between Optimizely and the Operator in relation to the listing of the applicable Software Service on the Marketplace.

**Marketplace Terms** means the term and conditions of the Operator applicable to the Customer and its purchase of the applicable Software Service on the Marketplace.

**Material** means any material (including statistical reports) provided, developed or made available by Optimizely, independently or with the Operator’s and /or Customer’s cooperation, in the course of performance under this Agreement, including in the delivery of Support or Optimizely-provided professional services relevant to the implementation, onboarding and/or configuration of the Software Service, and which may include (by way of example) configuration workbooks, training materials, projects plans, assessments and questionnaires, quick reference guides, playbooks, data set up presentations, data set up mapping templates, and configuration videos.

**Operator** means the operator of the Marketplace, including its Customer invoicing and payment receipt agents.

**Opti-Trust** means the website maintained by Optimizely @ <https://www.optimizely.com/trust-center/>, where Optimizely publishes information on privacy, security and compliance, at that site and the content are updated from time to time.

**Opti-World** means the website maintained by Optimizely @ <https://world.optimizely.com/releases/>, its sub-sites, including its release portal, and all content and libraries, as updated from time to time.

**Optimizely Software** in the context of the Software Service means the Optimizely-owned Software, and for clarity, Optimizely Software does not include any Third-Party Software, and it excludes all Third-Party Material.

**Operator Order** means (as between Operator and Customer) any confirmation by Operator to Customer with respect to Customer’s subscription of the Software Service howsoever processed on the Marketplace, and includes Operator’s invoice to Customer for that Software Service subscription.

**Optimizely Order** means (as between Optimizely and Customer) any Optimizely Software Service subscription to customer, whether online via the Marketplace, electronically transmitted via email or paper documentation.

**Order** means the Operator Order or an Optimizely Order, as the case requires.

**Personal Data** has the meaning set forth in the Data Processing Agreement.

**Policies** means Support and the other operational policies in support of the Software Service as published from time to time at Opti-World, Opti-Trust, and within the Service Descriptions and other Documentation, and titled as Policies.

**Process** means an operation or set of operations performed on Customer Data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

**Product Supplement** means Optimizely's product supplement for the Software Service, currently published as set out in Schedule I.

**Representatives** means a Party's Affiliates, employees, contractors, sub-contractors, legal representatives, accountants, or other professional advisors.

**Service Descriptions** means the Documentation and descriptions of the features, functions and capabilities of the Software Service, which are published (as updated from time to time) at Opti World (or such other alternate site that Optimizely makes available to its customers).

**SLA (or Service Level Agreement)** means Optimizely's service level agreement for the Software Service, currently published at <https://www.optimizely.com/legal/service-level-agreement>, and as updated from time to time.

**Software** in the context of the Software Service means: (i) the Optimizely Software and (ii) the Third-Party Software, provided in both cases by Optimizely as the Software Service, including as additional software features, functions, capabilities or enhancements; *and for clarity*, Software excludes Third-Party Material.

**Software Service** means the cloud-based software services provided by Optimizely and as otherwise detailed in the applicable Order.

**Sub-Processor** has the meaning set forth in the DPA.

**Subscription** means Customer's subscription of the applicable Software Service as detailed in the applicable Order.

**Subscription Term or Term** has the meaning set forth in the applicable Order.

**Support** means Optimizely's support for the Software Service, currently published at <https://www.optimizely.com/legal/service-level-agreement>, and as updated from time to time.

**Third-Party** means any third party other than Optimizely and Customer, and their respective Affiliates.

**Third-Party Infrastructure** means the infrastructure (and associated services and/or code) provided by a Third-Party platform provider or a content delivery network provider (collectively "Third-Party Infrastructure Providers") as is made available by Optimizely as part of the Software Service.

**Third-Party Software** in the context of the Software Service means Third-Party software (including open-source software), components, services, websites, integrations, and code, not created or owned by Optimizely; *for clarity*, Optimizely Software does not include Third-Party Software.

**Third-Party Material** means any software or product made available to Customer by any Third Party, including components, services, websites, integrations, code, and open-source software, and installed, enabled, or utilized by Customer in its Use of the Software Service; *and for clarity*, the Software excludes Third-Party Material; *and for further clarity*, Third-Party Material is not part of the Software Service.

**Use** means access to, and to otherwise activate the Processing capabilities of the Software Service, including to load, execute, access, employ in the Software Service, or display information resulting from such capabilities, and Use may occur through an interface delivered with or as a part of the Software Service, or a Third-Party interface deployed by Customer, or another intermediary system.

**End Notes.** Words denoting the singular includes the plural and vice versa. Defined words include their grammatical forms.

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## Schedule I: Product Supplement.

**1.1 Definitions.** Defined terms used in this Supplement are defined in the Order Form the SUT or in this Supplement (in the Glossary).

**1.2 Documentation.** Customer shall Use the Software Service in accordance with the Documentation. Current versions of applicable Service Descriptions are made available at Opti-World.

**1.3 Usage Metrics and Overage.** Usage Metrics and Overages applicable to the Software Service Subscription are described in the Usage Metrics, Limits and Overage Tables.

**1.4 Penetration Testing and Load Testing.** Except as Optimizely may expressly permit, and under Optimizely's conditions for such tests, Customer will not otherwise perform any penetration testing, load testing, or any other similar kind of testing on the Software Service.

**1.5 Account Registration and Use.** Account information must be accurate, current, and complete, and will be governed by Optimizely's Privacy Policy (currently available [www.optimizely.com/privacy/](http://www.optimizely.com/privacy/)). Customer agrees to keep this information up to date so that Optimizely may send operational notices, statements, and other information by email or through Customer's account. Customer must ensure that any user IDs, passwords, and other access credentials (such as API tokens) are kept strictly confidential and not shared with any unauthorized person. Customer is responsible for maintaining the security of the Customer's account passwords. If any Authorised User stops working for Customer, Customer must promptly terminate that person's access to its account and Use of the Software Service.

**1.6 Free Access Subscriptions and Beta Releases.** Optimizely may provide Customer with Use of the Software Service), for a limited time for free and on a trial basis ("Free Access"), or (by invitation) Free Access to certain pre-production new features of the Software Service ("Pre-Production Releases"), or (by invitation) Use of 'alpha', 'beta' or other early-stage development of the Software Service ("Beta Releases"). Pre-Production Releases and Beta Releases are entirely optional for Customer to Use. Optimizely makes no promises that future versions of Pre-Production Releases or the Beta Releases will be released, or will be made available under the same commercial or other terms. Additionally, there may not be a viable upgrade path from these release to any subsequent release. Optimizely may terminate Use of any Pre-Production Releases or Beta Releases or Free Access (subject to the terms of the Order Form) at any time, with our without notice, at Optimizely's sole discretion, without liability. With respect to any Pre-Production Releases and Beta Release, Customer acknowledges to, and agrees with, Optimizely that such releases may not be complete or fully functional and may contain bugs, errors, omissions, and other problems for which Optimizely will not be responsible. Accordingly, any Use of such Pre-Production Releases and Beta Releases are at Customer's sole risk notwithstanding anything to the contrary herein. Furthermore, Optimizely's warranties and indemnities under the Software Services Use Terms do not apply to Free Access Subscriptions, the Pre-Production Releases or Beta Releases. And finally, Optimizely may use good faith efforts in its discretion to assist Customer with its Use of Free Access, Pre-Production Releases or Beta Releases, but will have no obligation to provide support or maintenance for these items

**1.7 Sensitive Information/Data.** Sensitive information (as defined in the DPA) is not intended to be Processed by the Software Service. Customer will not upload any Sensitive Information into the Software Service for Processing

**1.8 HIPAA.** The Software Service is not (and is not intended to be) compliant with the privacy and security policies of the Health Insurance Portability and Accountability Act (“HIPAA”). Optimizely will not assume any responsibilities under HIPAA as a business associate, nor a subcontractor, as those terms are defined under HIPAA.

**1.9 Additional Services.** If Customer wishes Optimizely to perform any task which is not part of a Subscription, or to provide an enhanced Service, Optimizely may carry out the task and/or enhance the Subscription at its sole option, and Customer will be charged separately at Optimizely’s applicable then current rates for such services in accordance with a signed Order Form, or Statement of Work. Examples of additional work include re-platforming, site category restructuring or code breaking caused by Customer changes to the Software Service.

**1.10 Initial Provisioning.** Applicable Subscriptions shall be provisioned at the start of the Initial Subscription Term through a standard setup ready for Customer. Customer acknowledges that its Subscriptions may be impacted by its failure to provide and update Customer Data, and other data such as Catalogue Feed, documents, data, files and other content required for the applicable Subscription.

**1.11 Third-Party Open-Source Software.** Software may include distributions of third-party open-source software and/or code (“Third-Party Open-Source Software”). Customer shall comply with all applicable license and use terms in its utilization of Third-Party Open-Source Software in its Use of the Software Service.

**1.12 Performance Data.** Optimizely may use Performance Data in an aggregate and anonymous manner, to compile and analyze statistical information, specifically pertaining to the performance, provisioning, and operation of the Software Service, and may, if solely for the purpose of Optimizely’s ability to improve or maintain upkeep of the Software Service, be made publicly available, provided that Customer Data is not in any way incorporated and that Customer’s Confidential Information is not identifiable. Performance Data will not include any of Customer’s Confidential Information, financial or operational data, or any other data, text, materials, information, or other content that is uploaded, submitted, transferred, transmitted, provided, or otherwise made available to, or posted within the Software Service by, or on behalf of Customer and its Authorized Users. Optimizely retains all Intellectual Property Rights in and to Performance Data, as well as Enriched Data, including data Optimizely makes available to Customer as part of the Software Service, and data that Optimizely obtains from either public or third-party sources.

**1.13 Customer Custom Code; Ownership.** As between Optimizely and Customer, and subject always to the rights of applicable open-source software licensors, Customer owns (or has the lawful right to) its custom coding solely development by it (and its Authorized-Users), without any contribution from Optimizely, excluding however, any derivative work of Optimizely’s Intellectual Property Rights and Confidential Information.

**1.14 Data Retention.** Customer Data Processed in the Software Service is accessible and retained subject to Optimizely’s Data Retention Policy. Subject to that policy, Optimizely will delete, or render unreadable Customer Data after expiration or termination of the Subscription Term upon Customer’s written request. Retained data is subject to the confidentiality provisions of the Agreement and the obligations under the Data Processing Agreement.

**1.15 Service Continuity Management.** Details of Customer Data backup, data loss and distortion, data deletion, disaster recovery (including recovery point objectives) and recovery time objectives) are published in the SLA (“Service Continuity Management”). Service Continuity Management is a Policy, and as such is part of the Software Service, and as such subject to the SUT.

**1.16 Acceptable Use Policy.** The Acceptable Use Policy applies to all Software Services.