

You may not access these Services if you are our direct competitor, except with our prior express written consent. In addition, you may not access these Services for purposes of monitoring their availability, performance or functionality, or for any other benchmarking or competitive purposes.

If you do not agree to our Clicktools subscription agreement, you may not access these Services.

1. SUBSCRIPTION AGREEMENT

- 1.1. This subscription agreement (together with our User Guide, Order Forms, Privacy and Security Policy and Support Policy all as defined below and published by Us from time to time) (together "Agreement") was last updated on 29th November 2010. It governs your use of Our Services to the exclusion of any other terms and conditions.
- 1.2. The headings in the Agreement do not affect its interpretation. References to sections are to sections of this document.
- 1.3. In the case of any conflict or ambiguity between any provision in this document and any provision contained in any other of the documents that make the Agreement, the provisions in an Order Form shall take precedence over this document, and this document shall take precedence over all of the other documents.

2. DEFINITIONS

- 2.1. "Affiliate" includes each and any of Your subsidiaries or holding companies and each and any subsidiary of your holding companies.
- 2.2. "Customer Data" means any data, information or material provided or submitted by You to the Service in the course of using the Service.
- 2.3. "Malicious Code" means viruses, worms, time bombs, Trojan horses and other harmful or malicious code, files, scripts, agents or programs.
- 2.4. "Order Form" means Our ordering documents and online forms for purchases of our goods and services.
- 2.5. "Purchased Services" means Services that You or Your Affiliates purchase under an Order Form, other than those provided by Us during a free trial.
- 2.6. "Services" means the online, Web-based application provided by Us via our Website including any associated offline components but excluding Third Party Applications.
- 2.7. "Third Party Applications" means any software or applications that are used in connection with the Services that are not owned by Us.
- 2.8. "User Guide" means the online user guide for the Services, accessible via the Website, as updated from time to time.
- 2.9. "User" means a person who is authorized by You to use the Services, for whom a subscription to a Service has been purchased, and/or who has been supplied a user identification and password by You (or by Us at Your request). Users may include but are not limited to Your employees, consultants, contractors and agents; or third parties with which You transact business.
- 2.10. "Website" means <http://www.clicktools.com> and/or other domain names we designate from time to time.
- 2.11. "We," "Us" or "Our" means the Clicktools company described in Section 14 (Who You Are Contracting With, Notices, Governing Law and Jurisdiction).
- 2.12. "You" or "Your" means the person, firm, company or other legal entity for which you are accepting this Agreement, and Affiliates of that company or entity.

3. FREE TRIALS

- 3.1. We may make one or more Services available to You on a trial basis free of charge for a limited period, until the earlier of (a) the expiry of that limited period or (b) the start date of any Purchased Services ordered by You. Additional trial terms and conditions may appear on the trial registration web page. Any such additional terms and conditions are incorporated into this Agreement by reference and are legally binding.
- 3.2. **CUSTOMER DATA YOU ENTER INTO THE SERVICES, AND ANY CUSTOMISATIONS MADE TO THE SERVICES BY OR FOR YOU, DURING ANY FREE TRIAL WILL BE PERMANENTLY LOST UNLESS YOU PURCHASE A SUBSCRIPTION TO THE SAME SERVICES AS THOSE COVERED BY THE TRIAL, PURCHASE UPGRADED SERVICES, OR EXPORT THAT DATA, BEFORE THE END OF THE TRIAL PERIOD.**
- 3.3. NOTWITHSTANDING SECTION 10 (WARRANTIES AND DISCLAIMERS), SERVICES PROVIDED DURING ANY FREE TRIAL ARE PROVIDED "AS-IS" WITHOUT ANY WARRANTY.

4. PURCHASED SERVICES

- 4.1. **Provision of Purchased Services.** We shall make the Purchased Services available to You in accordance with this Agreement during a subscription term.
- 4.2. **User Subscriptions.** (i) Services are purchased as User subscriptions and may be accessed by no more than the specified number of Users, (ii) additional User subscriptions may be added during the subscription term at the same pricing as that for the pre-existing subscriptions, pro-rated for the remainder of the subscription term in effect at the time the additional User subscriptions are added, and (iii) the added User subscriptions shall terminate on the same date as the pre-existing subscriptions. User subscriptions are for designated Users and cannot be shared or used by more than one User but may be reassigned to new Users replacing former Users who no longer require ongoing use of the Services.

5. USE OF THE SERVICES

- 5.1. **Our Responsibilities.** We shall: (i) provide to You basic support, as defined in our Support Policy, for the Purchased Services at no additional charge, and/or upgraded support if purchased separately, (ii) use commercially reasonable efforts to make the Purchased Services available 24 hours a day, 7 days a week, except for: (a) planned downtime (of which We shall give reasonable notice on our Website and which We shall schedule to the extent practicable during non-business hours (in the UK) (b) any unavailability caused by circumstances beyond Our reasonable control, including without limitation, acts of God, acts of government, flood, fire, earthquakes, civil unrest, acts of terror, strikes or other labour problems (other than those involving Our employees), or utility or Internet service provider failures or delays, and (iii) provide the Purchased Services only in accordance with applicable laws and government regulations.
- 5.2. **Your Responsibilities.** You shall (i) be responsible for Users' compliance with this Agreement, (ii) use commercially reasonable efforts to prevent unauthorized access to or use of the Services, and notify Us promptly of any such unauthorized access or use, and (iv) use the Services only in accordance with the User Guide and all applicable laws and government regulations. You shall not (a) make the Services available to anyone other than Users, (b) sell, resell, rent or lease the Services, (c) use the Services to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of third-party privacy rights, (d) use the Services to store or transmit Malicious Code, (e) interfere with or disrupt the integrity or performance of the Services or third-party data accessible using the Services, or (f) attempt to gain unauthorized access to the Services, Our Website or their related systems or networks.
- 5.3. **Usage Limitations.** Services may be subject to other limitations, such as, for example, limits on storage space or the number of emails sent using the Service. Any such limitations are specified in the Order Form. The Services provide real-time information to enable You to monitor Your compliance with such limitations.

6. THIRD-PARTY PROVIDERS

- 6.1. **Third-Party Applications and Your Data.** If You install or enable Third-Party Applications for use with the Services, You acknowledge that We may allow providers of those Third-Party Applications to access the Customer Data as required for the interoperation of such Third-Party Applications with the Services. We shall not be responsible for any disclosure, modification or deletion of the Customer Data resulting from any such access by Third-Party Application providers. The Services shall allow You to restrict such access by restricting Users from installing or enabling such Third-Party Applications for use with the Services.
- 6.2. **Third Party Services.** Service features that interoperate with third party services depend on the continuing availability of the third party API and program for use with the Services. If the providers of these third party services cease to make the API or program available on reasonable terms for the Service, We may cease providing such Service features without entitling You to any refund, credit, or other compensation.

7. FEES AND PAYMENT FOR PURCHASED SERVICES

- 7.1. **User Fees.** You shall pay all fees specified in all Order Forms. Except as otherwise specified in an Order Form, (i) fees are quoted and payable in United States dollars within the United States of America and Pounds Sterling outside of the United States of America (ii) the number of User subscriptions purchased cannot be decreased during the relevant subscription term stated on the Order Form. User subscription fees are based on fixed periods that begin on the subscription start date and each anniversary of the relevant start date; therefore, fees for User subscriptions

added in the middle of a period will be charged for that full period and all the periods remaining in the subscription term.

- 7.2. **Invoicing and Payment.** You will provide Us with valid and updated credit card information, (or at Our option with a valid purchase order or alternative document reasonably acceptable to Us). If You provide credit card information to Us, You authorize Us to charge that credit card for all Services listed in any Order Form for the initial subscription term and any renewal subscription term(s). Charges shall be made annually in advance, or in accordance with any different billing frequency stated in the applicable Order Form. If the Order Form specifies that payment will be by a method other than a credit card, We will invoice You in advance and otherwise in accordance with the relevant Order Form. Unless otherwise stated in the Order Form, invoiced charges are due net 30 days from the invoice date. You are responsible for maintaining complete and accurate billing and contact information in the Services.
- 7.3. **Overdue Charges.** If any charges are not received from You by the due date, then at Our discretion, (a) We may charge You interest on the overdue amount, payable immediately on demand at the rate of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower, from the date such payment was due until the date paid, accruing on a daily basis and compounded quarterly and/or (b) We may condition future subscription renewals and Order Forms on payment terms shorter than those specified in Section 7.2 (Invoicing and Payment) and/or
- 7.4. (c) accelerate Your unpaid fee obligations under any other agreements between Us so that all such obligations become immediately due and payable, and/or (d) suspend Services until such amounts are paid in full.
- 7.5. **Payment Disputes.** We shall not exercise Our rights under Section 7.3 (Overdue Charges) if the applicable charges are under reasonable and good-faith dispute and You (in our reasonable opinion) are co-operating diligently to resolve the dispute.
- 7.6. **Taxes.** Unless otherwise stated, Our fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including but not limited to value-added, sales, use or withholding taxes, assessable by any local, state, provincial, federal or foreign jurisdiction (collectively, "Taxes"). You are responsible for paying all Taxes associated with Your purchases. If We have the legal obligation to pay or collect Taxes for which You are responsible under this paragraph, the appropriate amount shall be invoiced to and paid by You, unless You provide Us with a valid tax exemption certificate authorized by the appropriate taxing authority.
- 8. PROPRIETARY RIGHTS**
- 8.1. **Reservation of Rights.** Subject to the limited rights expressly granted hereunder, We reserve all rights, title and interest in and to the Services, including all related intellectual property rights. No rights are granted to You other than as expressly set forth in the Agreement.
- 8.2. **Restrictions.** You shall not (i) permit any third party to access the Services except as permitted in the Agreement, (ii) create derivative works based on the Services, (iii) copy, frame or mirror any part or content of the Services, other than copying or framing on Your own intranets or otherwise for Your own internal business purposes, (iv) reverse engineer the Services, or (v) access the Services in order to (a) build a competitive product or service, or (b) copy any features, functions or graphics of the Services.
- 8.3. **Ownership of Your Data.** As between Us and You, You exclusively own all rights, title and interest in and to all of the Customer Data. You grant Us permission to copy the Customer Data to enable us to fulfil Our obligations under this Agreement. You shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right to use of all Customer Data, and We shall not be responsible or liable for the deletion, correction, destruction, damage, loss or failure to store any Customer Data.
- 8.4. **Suggestions.** We shall have a royalty-free, worldwide, transferable, sublicenseable, irrevocable, perpetual license to use or incorporate into the Services any suggestions, enhancement requests, recommendations or other feedback provided by You, and Your Users, relating to the operation of the Services.
- 9. CONFIDENTIALITY**
- 9.1. **Definition of Confidential Information.** For the purposes of this Agreement, "Confidential Information" means all confidential information disclosed by a party ("Disclosing Party") to the other party ("Receiving Party"), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and

the circumstances of disclosure. Your Confidential Information shall include Customer Data; Our Confidential Information shall include the Services; and Confidential Information of each party shall include the terms and conditions of this Agreement, as well as business and marketing plans, technology and technical information, product plans and designs, and business processes disclosed by the Disclosing Party. However, Confidential Information (other than Your Data) shall not include any information that (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a third party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party.

- 9.2. **Protection of Confidential Information.** Except as otherwise permitted in writing by the Disclosing Party, (i) the Receiving Party shall use the same degree of care that it uses to protect the confidentiality of its own confidential information of like kind (but in no event less than reasonable care) not to disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, and (ii) the Receiving Party shall limit access to Confidential Information of the Disclosing Party to those of its employees, contractors and agents who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with the Receiving Party containing protections no less stringent than those set out in this Agreement.
- 9.3. **Protection of Customer Data.** Without limiting the above, We shall maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Customer Data. We shall not (a) modify Customer Data, (b) disclose Customer Data except as compelled by law in accordance with Section 9.4 (Compelled Disclosure) or as expressly permitted by You, or (c) access Customer Data except to provide the Services or prevent or address service or technical problems, or at Your request in connection with customer support matters.
- 9.4. **Compelled Disclosure.** The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party will reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information.
- 10. WARRANTIES AND DISCLAIMERS**
- 10.1. **Our Warranties.** We warrant that (i) the Purchased Services shall perform materially in accordance with the User Guide, and (ii) subject to Section 6.2, the functionality of the Services will not be materially decreased during a subscription term. For any breach of either warranty, Your exclusive remedy shall be as provided in Section 13.3 (Termination for Cause) and Section 13.4 (Refund or Payment upon Termination).
- 10.2. **Mutual Warranties.** Each party represents and warrants that (i) it has the legal power to enter into this Agreement, and (ii) it will not transmit to the other party any Malicious Code.
- 10.3. **Disclaimer.** Except as expressly provided in this Agreement, We do not make any warranties of any kind, whether express, implied, statutory or otherwise, and We specifically disclaim all implied warranties, including any warranties of merchantability or fitness for a particular purpose, to the maximum extent permitted by applicable law.
- 10.4. Our obligations are contingent on Your proper use and care of the Services, and do not cover Third Party Applications or any part of the Services that have been modified by anyone other than Us.
- 10.5. We do not warrant that We will be able to rectify all defects in the Service, nor that any defect which does not materially affect Your use of the Services will be corrected. Support terms are set out in our Support Policy.
- 10.6. CLICKTOOLS' SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF THE INTERNET AND ELECTRONIC COMMUNICATIONS. WE ARE NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS.

11. MUTUAL INDEMNIFICATION

- 11.1. **Indemnification by Us.** We shall defend You against any claim, demand, suit, or proceeding ("Claim") made or brought against You by a third party alleging that the use of the Services as permitted hereunder infringes or misappropriates the intellectual property rights of a third party, and shall indemnify You for any damages finally awarded against, and for reasonable attorney's fees incurred by, You in connection with any such Claim; provided, that You (a) promptly give Us written notice of the Claim; (b) give Us sole control of the defence and settlement of the Claim (provided that We may not settle any Claim unless the settlement unconditionally releases You of all liability); and (c) provide to Us all reasonable assistance, at Our expense.
- 11.2. **Indemnification by You.** You shall defend Us against any Claim made or brought against Us by a third party alleging that Your Data, or Your use of the Services in violation of this Agreement, infringes or misappropriates the intellectual property rights of a third party or violates applicable law, and shall indemnify Us for any damages finally awarded against, and for reasonable attorney's fees incurred by, Us in connection with any such Claim; provided, that We (a) promptly give You written notice of the Claim; (b) give You sole control of the defence and settlement of the Claim (provided that You may not settle any Claim unless the settlement unconditionally release Us of all liability); and (c) provide to You all reasonable assistance, at Our expense.
- 11.3. **Exclusive Remedy.** This Section 11 (Mutual Indemnification) states the indemnifying party's sole liability to, and the indemnified party's exclusive remedy against, the other party for any type of Claim described in this Section.

12. LIMITATION OF LIABILITY

- 12.1. **Limitation of Liability.** IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, EXCEED THE TOTAL AMOUNT PAID BY YOU HEREUNDER OR, WITH RESPECT TO ANY SINGLE INCIDENT, THE LESSER OF \$500,000 OR THE AMOUNT PAID BY YOU HEREUNDER IN THE 12 MONTHS PRECEDING THE INCIDENT. THE FOREGOING SHALL NOT LIMIT YOUR PAYMENT OBLIGATIONS UNDER SECTION 6 (FEES AND PAYMENT FOR PURCHASED SERVICES).
- 12.2. **Exclusion of Consequential and Related Damages.** IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, COVER OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT, TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.
- 12.3. Nothing in this Agreement excludes or limits our liability for death or personal injury caused by Our negligence; or fraud or fraudulent misrepresentation.

13. TERM AND TERMINATION

- 13.1. **Term of Agreement.** This Agreement commences on the date You accept it and continues until all User subscriptions granted in accordance with this Agreement have expired or been terminated. If You elect to use the Services for a free trial period and do not purchase a subscription before the end of that period, this Agreement will terminate at the end of the free trial period.
- 13.2. **Term of Purchased User Subscriptions.** User subscriptions purchased by You commence on the start date specified in the applicable Order Form and continue for the subscription term specified. All User subscriptions shall automatically renew for subsequent consecutive one year periods, unless either party gives the other notice of non-renewal at least 30 days before the end of the relevant subscription term. The per-unit pricing during any such renewal term shall be the same as that during the prior term unless We have given You written notice of a pricing increase at least 30 days before the end of such prior term, in which case the pricing increase shall be effective upon renewal and thereafter.
- 13.3. **Termination for Cause.** A party may terminate this Agreement for cause: (i) upon 30 days written notice to the other party of a material breach if such breach remains unremedied at the expiration of such period, or (ii) if the other party becomes the subject of a petition in bankruptcy or any other proceedings relating to insolvency, receivership, liquidation or assignment for the benefit of creditors.

- 13.4. **Refund or Payment upon Termination.** Upon any termination for cause by You, We shall refund You any prepaid fees covering the remainder of the term of all subscriptions after the effective date of termination. Upon any termination for cause by Us, You shall pay any unpaid fees covering the remainder of the term of all Order Forms after the effective date of termination. In no event shall any termination relieve You of the obligation to pay any fees payable to Us for the period prior to the effective date of termination.
- 13.5. **Return of Your Data.** In the event this Agreement is terminated for cause by Us, We reserve the right to withhold, remove and/or discard Customer Data without notice for any breach, including, without limitation, your non-payment. Upon Our termination for cause, your right to access or use Customer Data immediately ceases, and We shall have no obligation to maintain or forward any Customer Data. In all other cases, upon request by You made within 30 days after the effective date of termination of a Purchased Services subscription, We will make available to You for download a file of Customer Data in comma separated value (.csv) format along with attachments in their native format. After such 30-day period, We shall have no obligation to maintain or provide any Customer Data and shall thereafter, unless legally prohibited, delete all Customer Data in Our systems or otherwise in Our possession or under Our control.
- 13.6. **Surviving Provisions.** Section 7 (Fees and Payment for Purchased Services), 8 (Proprietary Rights), 9 (Confidentiality), 10.3 (Disclaimer), 11 (Mutual Indemnification), 12 (Limitation of Liability), 13.4 (Refund or Payment upon Termination), 13.5 (Return of Your Data), 14 (Who You Are Contracting With, Notices, Governing Law and Jurisdiction) and 15 (General Provisions) shall survive any termination or expiration of this Agreement.

14. WHO YOU ARE CONTRACTING WITH, NOTICES, GOVERNING LAW AND JURISDICTION

- 14.1. **General.** Who You are contracting with under this Agreement, who You should direct notices to under this Agreement, what law will apply in any lawsuit arising out of or in connection with this Agreement, and which courts can adjudicate any such lawsuit, depend on where You are domiciled.

If You are domiciled in:	You are contracting with:	Notices should be addressed to:	The governing law is:	The courts having exclusive jurisdiction are:
A Country in North, South, Central America or the Caribbean	Clicktools Inc, 7251 West Lake Mead Boulevard, Suite 300, Las Vegas, Nevada 89128 USA.	VP, Sales Fax: +1-800-767-2020	Nevada and controlling United States federal law	Las Vegas, Nevada, U.S.A.
A Country outside of the above	Clicktools Limited Branksome Park House, Bourne Valley Road, Poole, BH12 1ED. UK.	CEO, Fax +44-(0) 800 4715273	England	England

- 14.2. **Manner of Giving Notice.** Except as otherwise specified in this Agreement, all notices, permissions and approvals shall be in writing and shall be deemed to have been given upon: (i) personal delivery, (ii) the second business day after mailing, (iii) the second business day after sending by confirmed facsimile, or (iv) the first business day after sending by email (provided email shall not be sufficient for notices of termination or an indemnifiable claim). Notices to You shall be addressed to the system administrator designated by You for Your relevant Services account, and in the case of billing-related notices, to the relevant billing contact designated by You.
- 14.3. **Agreement to Governing Law and Jurisdiction.** Each party agrees to the applicable governing law above without regard to choice or conflicts of law rules, and to the exclusive jurisdiction of the applicable courts above.
- 14.4. **Waiver of Jury Trial.** Each party hereby waives any right to jury trial in connection with any action or litigation in any way arising out of or related to this Agreement.

15. GENERAL PROVISIONS

- 15.1. **Relationship of the Parties.** The parties are independent contractors. This Agreement does not create a partnership, franchise, joint venture, agency, fiduciary or employment relationship between the parties.
- 15.2. **Waiver and Cumulative Remedies.** No failure or delay by either party in exercising any right under this Agreement shall constitute a waiver of that right. Other than as expressly stated in this Agreement, the remedies referred to in this Agreement are in addition to, and not exclusive of, any other remedies of a party at law or in equity.
- 15.3. **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be contrary to law, the provision shall be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement shall remain in effect.
- 15.4. **Legal Fees.** You shall pay on demand all of Our reasonable legal fees and other costs incurred by Us to collect any fees or charges due Us under this Agreement following Your breach of Section 7.2 (Invoicing and Payment)
- 15.5. **Assignment.** You may not assign any of your rights or obligations under this agreement, whether by operation of law or otherwise, without Our prior written consent (not to be unreasonably withheld). We may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of Our rights or obligations under the Agreement.
- 15.6. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and either signed or accepted electronically by the party against whom the modification, amendment or waiver is to be asserted.
- 15.7. **Third Parties.** The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted assigns, and is not intended to benefit, or be enforceable by, anyone else.