

THINKING JUICE LIMITED
Email Marketing Services Schedule
(Schedule 2)
LAST UPDATED: 13 January 2015

1.0 Definitions

In this Schedule, unless the context requires otherwise, the definitions contained within the Conditions shall apply and “you” means the Customer “we” or “us” means the Supplier and the following words shall have the following meanings:

- 1.1.1 **“Conditions”** means the standard terms and conditions of sale to which this Schedule applies;
- 1.1.2 **“Keywords”** means those words notified to you by the Supplier which control your access to some of the Services including without limit your password and username;
- 1.1.3 **“Netiquette”** means generally accepted standards for use of the Internet such as, but not limited to, sending bulk unsolicited email, mail bombing, misrepresenting that you have third party authorisation and impersonating another person;
- 1.1.4 **“Site”** means any Internet website we (the Supplier) operate

2.0 Introduction

- 2.1 The Customer wishes to use the Supplier’s Email Marketing Service by:
 - 2.1.1 the Supplier sending email communications which appear to be from the Customer to a list of recipients using a design and wording agreed with the Customer (“Managed Service”) and/or by
 - 2.1.2 the Supplier providing access to software for the Customer to send emails using a design and a list of recipients that the Customer selects (“Self Service”) and/or by
 - 2.1.3 the Supplier producing a graphical design of an email and/or copy writing services and/or coding to produce an email capable of being sent to recipients (“Email Design Services”)

3.0 Email Marketing Services

- 3.1 The Services set out in Clause 5, 5.1.1 and/or 5.1.2 as appropriate (i.e. the Self Service and/or Managed Service shall apply) below shall apply and shall be the Email Marketing Services covered by the Conditions and by this Schedule.

4.0 Security

- 4.1 The Customer is responsible for the security and proper use of all Keywords and must take all necessary steps to ensure that they are kept confidential, used properly and not disclosed to unauthorised people. The Customer must inform the Supplier immediately if it has any reason to believe that any Keyword has become known to someone not authorised to use it or if any Keyword is being or is likely to be used in an unauthorised way or of any other breach of security.
- 4.2 The Supplier is not liable for any loss of confidentiality or for any damages arising from the Customer’s failure to comply with these terms or with any terms of the Agreement.
- 4.3 The Customer will be entirely liable for all activities conducted and charges incurred under its Keywords whether authorised or not; however the Supplier may agree or set a limit to these charges or to the number of the Customer’s outgoing emails.
- 4.4 If the Customer forgets any Keyword it should contact the Supplier and subject to it satisfying certain security checks it will be given a new Keyword to enable it to use the Services. The Customer may change its password and registration details at any time by contacting the Supplier.

5.0 The Services

The Email Marketing Services comprise the following:

5.1.1 Self Service option

- The Customer has its own account and pays a cost per email to send an email (plus a cost for each mail received back and a surcharge for each email over 150k in size) and the Customer is responsible to design and send its own list;
- The Customer is responsible for ensuring that any address added to such lists are “opt in” and legally compliant (in accordance with the then current legislation) and that the Customer will not be (or carry out any) Spamming;
- The Customer’s use of the Email Marketing Services must be in relation to the Customer only and must be by authorised Customer personnel only – no rights are given to third parties for use of the Services;
- Statistics and feedback are provided through the online interface by the Supplier for the Customer to review (without charge); however due to the nature of email communication these statistics and feedback are not warranted in any way and they are not fully accurate and cannot be guaranteed as fully accurate or to be available or for historical reports to be held indefinitely ;
- Under the self-service option the Customer is simply licensing from the Supplier the use of an account – the Supplier does not guarantee delivery/access to the account as this access may be blocked for various reasons;
- The Customer warrants that anything that it sends or instructs the Supplier to send on its behalf is Virus and defect free;
- The Supplier may not have a Virus check on outbound email and does not warrant that outgoing emails are Virus free.

5.1.2 Managed Service:

Under the Managed Service option:

- The Supplier makes text amendments supplied by the Customer or, subject to charges, designs the form of email, provides a proof to the Customer and then (once approved) sends the final form to an agreed list of emails on the Customer’s behalf (i.e. to the list that has been supplied by or purchased on behalf of the Customer).
- The Supplier is not responsible for any errors or omissions provided that the email sent contains the same content as that which was supplied by the Supplier in the proof given to the Customer.
- The Managed Service may include the Supplier making “Text” “amends” to the Customer’s existing mail template/s and carrying out a proofing service (a fee applies for this process) before sending out email to the relevant marketing list.
- Any graphical changes to the design/template design are deemed to be a design of a new template and an additional fee will apply therefore.

5.1.2.1 The third party provider from whom the Supplier rents the email marketing service provides Terms and the Supplier only warrants service levels according to these Terms, and provides the Email Marketing Services subject thereto. A copy can be made available on request.

5.1.2.2 If there is a breakdown in this service the Supplier may not be able to perform or send out emails and the Supplier shall not be liable in any respect as a result thereof.

5.2 General/Customer warranties for both Self Services and Managed Services

The Customer warrants that

- Any lists supplied by it or used by it are fully legally compliant at the time that those lists are delivered to the Supplier and the list/s will be so compliant at any time that it sends out or instructs any third party or the Supplier to send out mail/emails
- The Customer will notify the Supplier of any changes to the above mentioned list prior to distribution under the Managed Service Option.

5.3 List brokering:

Lists (of mail recipients) may be obtained by the Supplier from third parties in this regard: The Supplier shall in respect of such lists that it sources from third parties ensure that the third party list provider warrants to the Supplier that any

relevant email addresses/contact details are obtained from legally compliant (as at the date such list is provided by the third party list provider) “opt in” sources and that it would be lawful for the Supplier (as opposed to the third party) to (within any stated time periods and/or usage requirements) send the mail shot. The Supplier shall not be liable to the Customer for any breach by the third party of such warranty. The Customer warrants that it will, at all times, abide by and comply with any Usage Requirements, time limits etc, of any mailing lists and with any applicable laws in the event that it uses any such lists. In the event of no Usage Requirements being specified by the Supplier on the Order Form, it should be assumed that the list is licensed for single use (i.e. sending to the recipients 1 time only). There is no guarantee of the success, results from mail shots – the Supplier may, on occasion, be able to obtain a guarantee from a third party list provider of a minimum click through rate to the Customer Website and on these occasions new data be sourced at no additional charge and sent again at no additional charge but the Customer must either use the same creative material or pay for new creative material.

- 5.4 Unless advised elsewhere in writing by the Supplier, the following fees and charges shall apply: Where the Customer has agreed to a minimum commitment of emails to be sent in a Term (12 months unless otherwise agreed in writing):

Annual commitment of emails to be sent by client (“the Tariff”)	Cost per 1000 emails	Minimum spend in Term
100,000	£20	£2,000
250,000	£17	£4,250
500,000	£15	£7,500
1,000,000	£12	£12,000
> 1,000,000	P.O.A	P.O.A

Account Setup	£1,950
1 day on-site training, up to 4 people	£950 + travel

Where the customer has not agreed to a minimum commitment of emails to be sent and is paying ad-hoc for the sending of emails, the emails shall be charged at £30 per 1000 emails unless otherwise agreed in writing. If an account is required to login & send email or retrieve statistics £1,950

- 5.4.1 Unless otherwise agreed in writing by the Company, where the Customer has agreed to a Tariff, each month the Customer shall be charged for their usage in the previous calendar month.
- 5.4.2 By agreeing to a Tariff, the Customer shall agree to pay a minimum of the monthly amount multiplied by the minimum Term (if this is not stated anywhere, a minimum of 12 months shall be assumed). In the final month of the Term the Customer shall be charged the difference between the total number of emails cumulatively sent in the Term and the minimum commitment required by the Tariff.
- 5.4.3 Inbound emails cause load on the Supplier’s server and an email recipient may reply to an email sent to them or via an automated out of office reply, and this received email is charged at the same price as an outbound email
- 5.4.4 Prices assume an email size of 150Kb or under. A 20% surcharge per email per additional 100 Kb or part thereof shall apply.
- 5.4.5 The Customer may apply to upgrade to a higher volume Tariff at any point during the Term by notifying the Company in writing. Once accepted this amendment shall apply from 1st of the following calendar month, at which point all emails sent shall be charged at the new price and the Customer commits to the new higher “Minimum spend in Term” value as detailed in
- 5.4.6 Fees for Supply of Images: In respect of images sourced from third party the Supplier may supply these which will be charged to the Customer. The Customer will be subject to any licensing restrictions of the third party and any additional charges.
- 5.5 The Supplier reserves the right at any time and from time to time to amend, improve, correct, discontinue, temporarily or permanently, the Services (or any part thereof) with or without notice and the Customer agrees that the Supplier shall not be liable to it or to any third party for any such modification, suspension or discontinuance. The Supplier will restore the

Service as soon as reasonably practicable after temporary suspension.

5.6 Personal Data – Warranties:

The Customer warrants that in relation to the Services, the Project, the Customer Website and any related personal data:

(a) In accessing or processing any personal data that is provided by or through the Supplier, it shall comply with the Agreement and any applicable laws (including, without limitation, Data Protection laws);

(b) It shall indemnify the Supplier in respect of any breach by it of the above.

5.7 All personal data referring to subscribers, including but not limited to email addresses, will be withheld from the Customer for so long as may be legally required and at least until all payments due by the Customer are made.

5.8 Term and Cancellation Period:

The minimum Term for an email Tariff is 12 months. The agreement shall automatically renew at the end of the 12 month period unless the Customer gives the Company notice in writing 14 days in advance of the renewal date. The renewal shall be on the identical Tariff and the Customer shall be liable for the 12 month minimum send volume and cost.

5.9 The Supplier shall be entitled to, when necessary, restrict bandwidth made available to the Customer at any time in order to protect all and any Internet solutions provided by the Supplier from time to time.

5.10 The Supplier shall use its reasonable endeavours to ensure that the Servers and the data contained therein are safeguarded from damage, accident, fire, theft and unauthorised use.

5.11 Where the Customer makes a request for mails to be sent at a specific time the Supplier shall endeavour to comply with that time but does not guarantee compliance.

5.12 On a default in the provision of the Email Marketing Services we agree to, without additional charge and within a reasonable time, send the original/corrected mail shot to the correct recipient but shall not have any further or additional liability in relation to the provision of those Services.

6.0 Obligations Of The Customer

The Customer agrees that it shall:

6.1 immediately notify the Supplier if it becomes aware of any unauthorised use of all or any of the Services and/or Servers;

6.2 not use the Services and/or Servers for any unlawful purpose or for the publication, linking to, issue or display of any unlawful material (which shall include without limit any pirated software or any material which is obscene, pornographic, threatening, malicious, harmful, abusive, harmful, defamatory or which breaches the rights (including without limit IPRs) of any third party or which is or encourages criminal acts or contains any virus, worm, trojan horse or other harmful code) whether under English or Scottish law or regulation, the laws or regulations of the Customers country or any other place where the results of such purpose or such material can be accessed;

6.3 not use the Services and/or Servers for the publication, linking to, issue or display of any material which in the absolute discretion of the Supplier may harm the Supplier or any of its customers or bring the Supplier into disrepute or may call into question any action taken by the Supplier on its behalf;

6.4 not use the Services and/or Servers in breach of good Netiquette practices;

6.5 ensure that it has all necessary consents, permissions and licences to make use of the Services including without limit registration under the Data Protection Acts 1984 and 1998;

6.6 not provide any technical or other information obtained from the Supplier and/or relating to the Services or the Agreement to any person, supplier, firm or government which it knows or ought reasonably be aware may directly or indirectly lead to a breach of any law or regulation;

6.7 not, in breach of good Netiquette practices, use any service provided by any third party (including without limit an Internet website and/or email) for the publication, linking to, issue or display of any material which refers to an Internet website maintained by the Supplier or any other services offered by the Supplier from time to time;

6.8 ensure that all material or data hosted by the Supplier on any list operated by it from time to time or communicated through such list or using the Servers is checked for viruses and other harmful code;

6.9 promptly notify the Supplier of any change to its communication address and acknowledges that the Supplier shall not be liable for any costs, damages or loss which it may suffer or incur as a result of failure to notify such changes to the Supplier;

6.10 not reverse engineer, de-code or in any way disassemble any software provided by the Supplier in relation to the provision

of the Services. The Customer acknowledges that in order to make proper use of the Services it should have a basic knowledge of how the Internet functions and what types of use are and are not acceptable;

- 6.11 acknowledge that the Supplier shall have no obligation to:
 - 6.11.1 manipulate any material which it communicates, issues or sends in connection with any of the Services; or
 - 6.11.2 validate or vet such material for usability, legality, content or correctness.

7.0 **Spamming Prohibited**

- 7.1 The Customer may not send email with an invalid "From:" or "Reply-to:" address.
- 7.2 All messages sent to the Customer list must contain valid email addresses and the Customer must be responsive to all replies from members of its list, including unsubscribe requests that are not carried out automatically, i.e. where a list member directly emails the Customer requesting to be unsubscribed. The Customer should respond to member requests for manual removal from the list with courtesy and timeliness.
- 7.3 All list messages must include unsubscribe instructions in order that members can unsubscribe themselves from such list. The Customer may not refuse or ignore unsubscribe requests from members of its list.
- 7.4 The Customer may not use the Services to send Spam, whether commercial or non-commercial.
- 7.5 If the Supplier receives complaints that the Customer is sending Spam, in addition to other rights that the Supplier may have under this Agreement or under applicable law, the Supplier may, at its sole discretion, suspend the Customer's service pending a reconfirmation of its entire email list membership. There is no reduction or refund of fees during period of suspension. This reconfirmation may be carried out by the Supplier in any reasonable manner it determines, in its sole discretion, including without limit, sending an email to all of the Customer list members requiring confirmation of their wish to continue their subscription to such list.
- 7.6 If the Supplier determines in its sole discretion that the Customer has been sending Spam, in addition to any other rights under this Agreement or under applicable law,
 - 7.6.1 the Supplier may bring an action in any court of competent jurisdiction to enjoin such activity, it being understood that such activity may cause irreparable harm to the Supplier which may not be fully compensable by monetary damages and
 - 7.6.2 the Supplier may recover from the Customer monetary losses caused to the Supplier by such activity in an amount equal to £500 for each such item of unsolicited email which the Customer has sent to each separate and identifiable email address in breach of this Clause, which amount the parties agree is a fair and reasonable estimate of the Supplier' losses which would be occasioned by such breach; or
 - 7.6.2.2 if the Supplier can establish a greater amount of monetary loss, the amount of such actual monetary loss suffered by the Supplier as a result of such violation including, but not limited to, any damage or loss (including legal fees) resulting from any claim made against the Supplier as a result of the Customer's conduct in breach of this Clause. In addition to the foregoing, the Customer shall be responsible for costs incurred by the Supplier in bringing such actions, including legal fees.

8.0 **Intellectual Property**

Without prejudice to any of the Supplier's rights under the Agreement:-

- 8.1 All IPRs relating to the Services are and shall save as expressly provided otherwise in the Agreement remain the property of the Supplier.
- 8.2 Save as expressly provided otherwise in the Agreement all rights in the design and arrangement of the Customer Website, text and graphics and all software compilations, underlying source code, and all other material on the Customer Website are reserved to and shall, unless specifically provided otherwise in the Agreement remain vested in the Supplier or its licensors.
- 8.3 Except as expressly provided in the Agreement nothing shall operate to confer on the Customer or on any third party any license or right, by implication, estoppel or otherwise, under copyright or other IPRs.
- 8.4 The Supplier's name and all other names, images, pictures, logos and icons identifying The Supplier or its services are the property of the Supplier.

9.0 **Indemnity**

- 9.1 The Customer agrees to fully indemnify and keep the Supplier, its subsidiaries, affiliates, officers, partners, employees

and agents fully indemnified from and against all actions, demands, costs, losses, penalties, damages, liability, claims and expenses (including but not limited to legal fees) whatsoever arising from its breach of any provisions of this Email Marketing Services Schedule or resulting from a breach by it of any third party rights.

10.0 **Disclaimer**

- 10.1 To the fullest extent permitted by law the Customer Website and its contents is provided by the Supplier on an “as is” and “as available” basis and no representations or warranties (expressed or implied) of any kind are made (and they are expressly disclaimed) with respect to the Services, the Customer Website or its contents including, without limit, warranties of merchantability and fitness for a particular purpose.
- 10.2 The Supplier does not represent or warrant that:
- 10.2.1 the Email Marketing Services will meet the Customer’s requirements;
- 10.2.2 the Email Marketing Services will be uninterrupted, timely, secure, or error-free;
- 10.2.3 any results obtained from using the Email Marketing Services will be accurate, complete or current.
- 10.2.4 If any exclusion in this license is held to be invalid and the Supplier becomes liable for loss or damage that may lawfully be limited then such liability shall be limited to the amount paid by the Customer for the Services.
- 10.2.5 The Supplier shall have no liability to the Customer for any loss arising from any material, data or instructions supplied whether digitally or otherwise by the Customer or on its behalf which is incomplete, inaccurate, illegible, out of sequence or in the wrong form or arising from late arrival or non-arrival or any other fault by the Customer or on its behalf.
- 10.2.6 The Supplier is not responsible for any delay, malfunction, non-performance and/or other degradation of performance of any of the Services caused by or resulting from any alteration, modification and/or amendments due to changes and specifications requested or implemented by the Customer whether or not beyond the Services Email Marketing Services already supplied. The Supplier reserves the right to raise additional charges for any work so arising.
- 10.2.7 If any Email Marketing Services are or become unavailable then the Supplier will use reasonable endeavours to repair and reinstate the service within 24 hours of detection depending on the severity of the failure. If failure is caused by the Customer or any agent of the Customer to whom access to Servers was given then the Customer shall pay all costs to reinstate and/or repair the Server. Where such unavailability is due to the negligent failure of the Supplier to deal with circumstances within its control and is for more than a total of 24 hours in any 30 day period or for any 6 consecutive hour period then the Supplier will at its discretion either pay to you compensation limited to a refund of the fee paid by the Customer for the unavailable Services or provide the Customer with a credit up to the same amount.

11.0 **Privacy**

- 11.1 The Supplier is committed to protecting the Customer’s privacy and will not, other than for purposes of carrying out the Services make use of customer lists or information that are provided to the Customer as part of the Services. The Supplier and any of its associated companies may use the personal information provided about itself in order to provide a more personalised service and to tell the Customer about changes in the Supplier’s services or any new services which it thinks the Customer will find valuable. If the Customer objects to any of these uses at any time, then it should inform the Supplier in writing at its registered office address. The Supplier may also use such information where and to the extent of any requirement to comply with any applicable law, legal process or to enforce any of the terms of the Agreement.
- 11.2 The Supplier will not disclose the contents of any private communications transmitted via the Servers unless required to do so by law or in the good faith belief that such action is necessary to conform or comply with applicable law, to protect and defend the rights and/or property of the Supplier or to protect the personal safety of any of its Customers or the public.