

End User Licence Agreement for Kinetic Insight's Swimphony Software

1. This end-user licence agreement ("EULA") is a legal agreement between you ("Authorised User" or "you") and Kinetic Insight Ltd (company number 08378330) whose registered office is at 18/19 Salmon Fields Business Village, Royton, Oldham OL2 6HT ("Kinetic", "us" or "we") for the access to and use of:

- a. Kinetic application software once you have downloaded or streamed a copy of the application onto your handheld device, the data supplied with the software, and the associated media (the "Swimphony App");
- b. the web based platform software accessible through our website instructors.swimphony.com ("Website") (the "Web Portal"); and
- c. all documents, text, information, data, software, executable code, access codes, images, audio or video material in whatever medium or form comprised in or used with the App and/or the Web Portal other than the **Shared Data** (defined below) ("Content"),

together with any error corrections or updates that Kinetic may provide or perform with respect to the Web Portal and/or the App from time to time (the "Licensed Product").

Please note that if you are only using part of the Licensed Product (for example the Web Portal only), these terms apply to your use of that part of the Licensed Product and references in terms to other parts of the Licensed Product may not be applicable to your use of the Licensed Product.

2. Operating System Requirements

Swimphony App

If you are using the Swimphony App, the App requires a 8 or 10 inch Tablet with a minimum of 1.5 GB of memory. Internet access and the Android operating system or Fire operating system – minimum version 5.0.

Web Portal

The Web Portal requires internet access and the a modern web browser including Chrome, Safari, Edge, or Firefox.

3. Important Notice

By downloading or using the Swimphony App or using the Licensed Product from the Website or clicking on the "accept" button below (where you are viewing the terms electronically) you agree to the terms of the licence which will bind you.

If you do not agree to the terms of this licence, Kinetic will not license the use of the Licensed Product to you and you must stop using the Licensed Product and/or the downloading or streaming process now by clicking on the "cancel" button below (where you are viewing the terms electronically). In this case the downloading or streaming process will terminate.

4. Definitions

Authorised Users:- those employees, agents and independent contractors of the Licensee, employees, pupils, agents and independent contractors of schools signed up by the Licensee who are authorised to access and use the Licensed Product in accordance with these terms and conditions.

Controller, Data Controller, Processor, Data Processor, Data Subject, Personal Data, Processing and Appropriate Technical and Organisational Measures:- shall have the meanings as set out in the Data Protection Laws in force at the time.

Data Protection Laws:- (i) the Data Protection Act 2018 (ii) the General Data Protection Regulation ((EU) 2016/679) (GDPR) and any national implementing laws, regulations and secondary legislation, for so long as the GDPR is effective in the UK, and (ii) any successor legislation to the Data Protection Act 2018 and the GDPR.

Licensee:- the customer specified in the Subscription Form who purchased the subscription for the Licensed Product for your use as an Authorised User.

Overarching Licence Agreement:- the agreement for the purchase of the subscription for the Licensed Product by the Licensee under which you are authorised to use the Licensed Product as an Authorised User.

Shared Data:- the Personal Data inputted by you, any other Authorised User or Kinetic on your behalf for the purpose of using the Licensed Product or facilitating your use of the Licensed Product, such Personal Data being of a type defined and set out in Schedule 1.

Subscription Form:- Kinetic's order form for the Licensed Product on which the Licensee registers for use of the Licensed Product on the relevant product platform.

5. Licence

On completion of the purchase of the Licensed Product by the Licensee and in consideration of you agreeing to abide by the terms of this EULA, as an Authorised User, we grant you a non-transferable, non-exclusive licence to use the Licensed Product, for the subscription term as set out in the Overarching Licence Agreement, subject to these terms, incorporated into this EULA by reference. We reserve all other rights.

In consideration of you agreeing to abide by the terms of this EULA, you may:

- a. if you are downloading, streaming or using the App, download or stream a copy of the App onto your Device (as defined in this clause 5 below) and view, use and display the App and Content on your Device for your business purposes only; and
- b. if you are using the Web Portal as an employee of the Licensee, you may use the Web Portal and Content for your own business purposes as set out in the EULA.

We license use of the Licensed Product to you on the basis of this EULA. We do not sell the Licensed Product (or any part of it) to you. We remain the owners of the Licensed Product at all times.

We may change these terms at any time by sending you an email with details of the change or notifying you of a change when you next start the Licensed Product. The new terms may be displayed on-screen or sent to you by email and you may be required to read and accept them to continue your use of the Licensed Product.

From time to time updates to the App may be issued through our Web Portal through our Website. Depending on the update, you may not be able to use the Licensed Product until you have downloaded or streamed the latest version of the Licensed Product and/or accepted any new terms.

You will be assumed to have obtained permission from the owners of the handheld devices that are controlled, but not owned by you to use the Licensed Product ("Devices") and to download or stream a copy of the App onto the Devices. You and they may be charged by your and their service providers for internet access on the Devices. You accept responsibility in accordance with the terms of this EULA for the use of the Licensed Product in relation to any Device or the Web Portal, whether or not it is owned by you.

By using the Licensed Product, you acknowledge and agree that internet transmissions are never completely private or secure. You understand that any message or information you send using the Licensed Product may be read or intercepted by others, even if there is a special notice that a particular transmission is encrypted.

By using the Licensed Product, you consent to us collecting and using technical information about the Devices and related software, hardware and peripherals that are internet-based or wireless to improve our products and to provide any services to you.

The Licensed Product may contain links to other independent third-party websites ("**Third-party Sites**"). Third-party Sites are not under our control, and we are not responsible for and do not endorse their content or their privacy policies (if any). You will need to make your own independent judgement regarding your interaction with any Third-party Sites, including the purchase and use of any products or services accessible through them.

6. Acceptable Use

You agree to only use the Licensed Product if you are an Authorised User as allocated by the Licensee under the terms of the Overarching Licence Agreement.

You must:

- a. not use the Licensed Product in any unlawful manner, for any unlawful purpose, or in any manner inconsistent with this EULA, or act fraudulently or maliciously, for example, by hacking into or inserting malicious code, including viruses, or harmful data, into the Licensed Product or any operating system;
- b. not infringe our intellectual property rights or those of any third party in relation to your use of the Licensed Product, including the submission of any material (to the extent that such use is not licensed by this EULA);
- c. not transmit any material that is defamatory, offensive or otherwise objectionable in relation to your use of the Licensed Product;
- d. not use the licensed Product in a way that could damage, disable, overburden, impair or compromise our systems or security or interfere with other users; and
- e. not collect or harvest any information or data from the Licensed Product or any service or our systems or attempt to decipher any transmissions to or from the servers running any Licensed Product.

7. Kinetic's Obligations

Subject to your compliance with this EULA Kinetic shall use all reasonable endeavours to:

- a. provide the Licensed Product on the terms of this EULA in all material respects;
- b. provide such support to you as is reasonably necessary to allow you as an Authorised User to use the Licensed Product in accordance with its support policy in effect at the time the Licensed Product is provided and as published on Kinetic's website kinetic-insight.com, or as otherwise notified to you or the Licensee by Kinetic in writing from time to time. Kinetic may amend the support policy in its sole and absolute discretion from time to time;
- c. comply with all applicable laws and regulations, including those relating to anti-bribery and anti-corruption.

Kinetic does not warrant that (a) your use of the Licensed Product will be uninterrupted or error-free and you acknowledge that the Licensed Product may be interrupted by planned or unplanned maintenance; (b) the Licensed Product and/or the information obtained by you through the Licensed Product will meet your requirements.

8. Your Obligations

You shall:

- a. co-operate with Kinetic in all matters relating to the Licensed Product;
- b. keep any password for your use of the Services and Kinetic Materials secure, safe and confidential;
- c. notify Kinetic as soon as you become aware of any unauthorised use of the Licensed Product by any person;
- d. not use any information provided by Kinetic or obtained by the Licensee or any Authorised Users by using the Licensed Product to create any software or product where the use is substantially similar to that of the Licensed Product;
- e. not access all or any part of the Licensed Product in order to create a product or service which competes with the Licensed Product;
- f. not use such information in any manner which would be restricted by any copyright subsisting in it;
- g. not copy the Licensed Product except where such copying is incidental to normal use of the Licensed Product, or where it is necessary for the purpose of back-up or operational security;
- h. not make alterations to, or modifications of, the whole or any part of the Licensed Product, or permit the Licensed Product or any part of them to be combined with, or become incorporated in, any other programs;
- i. not use the Licensed Product to provide any similar or other services to third parties; and
- j. not license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Licensed Product available to any third party.

If you breach the terms of the EULA, Kinetic may, without liability to you or the Licensee and notwithstanding any other rights or remedies available to it, disable your password, account and access to all or part of the Licensed Product and shall be under no obligation to provide access to the Licensed Product until such breach has been remedied and you have agreed in writing to comply with the EULA.

9. Data Protection and Data Processing

- a. Both parties will comply with all applicable requirements of the Data Protection Laws. This clause 9 is in addition to, and does not relieve, remove or replace, a party's obligations under the Data Protection Laws.
- b. The parties acknowledge that for the purposes of the Data Protection Laws, you are the Data Controller in relation to the Shared Data and Kinetic is the Data Processor. This clause 9 sets out the scope, nature and purpose of processing by Kinetic, the duration of the Processing and the types of Personal Data and categories of Data Subject.
- c. Without prejudice to the generality of clause 9a, you will ensure that you have all necessary appropriate consents and notices in place to enable lawful transfer of the Shared Data to Kinetic for the duration and purposes of this EULA.

- d. To the extent that Kinetic Processes Shared Data on your behalf, such processing by Kinetic shall be:
 - i. provided solely for the duration and purposes of performing its obligation under this EULA; and
 - ii. in relation to details relating to Data Subjects who are participating in organised swimming lessons.
 - e. Where Kinetic Processes Shared Data on your behalf or on behalf of any other Authorised User, Kinetic shall:
 - i. process such Shared Data only on your written instructions unless Kinetic is required by the laws of any member of the European Union or by the laws of the European Union applicable to Kinetic to process Personal Data (**Applicable Laws**). Where Kinetic is relying on laws of a member of the European Union or European Union law as the basis for processing Shared Data, Kinetic shall promptly notify you of this before performing the processing required by the Applicable Laws unless those Applicable Laws prohibit Kinetic from so notifying you;
 - ii. ensure that it has in place Appropriate Technical and Organisational Measures, reviewed and approved by you, to protect against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data, appropriate to the harm that might result from the unauthorised or unlawful processing or accidental loss, destruction or damage and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any measures (those measures may include, where appropriate, pseudonymising and encrypting Personal Data, ensuring confidentiality, integrity, availability and resilience of its systems and services, ensuring that availability of and access to the Shared Data can be restored in a timely manner after an incident, and regularly assessing and evaluating the effectiveness of the technical and organisational measures adopted by it);
 - iii. ensure that all personnel who have access to and/or process Shared Data are obliged to keep the Shared Data confidential; and
 - iv. not transfer any Shared Data outside of the European Economic Area unless your prior written consent has been obtained and the following conditions are fulfilled:
 - 1. you or Kinetic has provided appropriate safeguards in relation to the transfer;
 - 2. the Data Subject has enforceable rights and effective legal remedies;
 - 3. Kinetic complies with its obligations under the Data Protection Laws by providing an adequate level of protection to any Personal Data that is transferred; and
 - 4. Kinetic complies with reasonable instructions notified to it in advance by you with respect to the processing of the Shared Data;
 - v. assist you, at your cost, in responding to any request from a Data Subject and in ensuring compliance with your obligations under the Data Protection Laws with respect to security, breach notifications, impact assessments and consultations with supervisory authorities or regulators;
 - vi. notify you without undue delay on becoming aware of a Personal Data breach;
 - vii. at your written direction, delete or return Personal Data and copies thereof to you on termination of this EULA unless required by Applicable Law to store the Shared Data; and
 - viii. maintain complete and accurate records and information to demonstrate its compliance with this Clause 9.
 - f. Kinetic shall only appoint third party processors of the Shared Data where it has notified you of this and given you an opportunity to object and where there is a written contract in place incorporating terms which are substantially similar to those set out in this clause 9.
 - g. Accepting this EULA and uploading Shared Data for the purpose of using the Licensed Product constitutes your written instructions for us to process the Shared Data in accordance with this EULA.
 - h. You acknowledge and agree that Shared Data which you upload will be shared with third parties you authorise using the Licensed Product.
 - i. In relation to the Shared Data, you warrant that you have authority from the relevant Data Subject (or their parent/guardian if applicable) to transfer their Personal Data to Kinetic and for their Personal Data to be shared with third parties you authorise using the Licensed Product.
- 10. Intellectual Property Rights and Shared Data**
- For the purpose of this clause Intellectual Property Rights means patents, rights to inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world ("**Intellectual Property Rights**").
- You acknowledge that all Intellectual Property Rights in the Licensed Products and the Content and in connection with the Licensed Product belong to Kinetic and that you shall have no rights in or to the Licensed Product other than the right to use it in accordance with this EULA.
- You will not claim any Intellectual Property Rights in the Licensed Product and/or Content.
- You and or the Licensee (as the case may be) own all Intellectual Property Rights in and to all of the Shared Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Shared Data.
- You grant to Kinetic a worldwide, non-exclusive, royalty free, sub-licensable irrevocable licence to copy, use and modify the Shared Data owned by you for the purpose of carrying out its obligations under this EULA.
- You acknowledge and agree that any Shared Data or content uploaded to the Licensed Product by you may be viewed by the Licensee and any Authorised User utilising any Licensed Product under the Subscription Form including but not limited to instructors providing swimming lessons under your authority. You grant to Kinetic a worldwide, non-exclusive, royalty free, sub-licensable, irrevocable licence to allow the Licensee to utilise any Shared Data or content uploaded to the Licensed Product by you.
- Authorised Users accessing the Shared Data which other Authorised Users have uploaded must comply with their obligations under the Data Protection Laws. You are responsible for ensuring that such Authorised Users who are accessing Shared Data uploaded by other Authorised Users comply with their obligations under the Data Protection Laws.
- 11. Limitation of Liability**
- This paragraph sets out the entire financial liability of Kinetic (including any liability for the acts or omissions of its employees, agents and sub-contractors) to you:
- a. arising under or in connection with this EULA;

- b. in respect of any use made by you of the Licensed Products and Content or any part of them; and
- c. in respect of any representation, statement or tortious act or omission (including negligence) arising under or in connection with this EULA.

Except as expressly and specifically provided in this EULA:

- a. you assume sole responsibility for results obtained from the use of the Licensed Products and the Content by you, and for conclusions drawn from such use. Kinetic shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Kinetic by you in connection with the provision of the Licensed Products, or any actions taken by Kinetic at your direction;
- b. all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this EULA;
- c. the Licensed Products and the Content are provided to you on an "as is" basis; and
- d. we will not be liable to you for your use of the Licensed Product as our total liability for the provision of the Licensed Product to you is to the Licensee in accordance with the Overarching Licence Agreement.

Nothing in this Agreement excludes the liability of Kinetic:

- a. for death or personal injury caused by Kinetic's negligence; or
- b. for fraud or fraudulent misrepresentation; or
- c. any other liability that cannot be excluded or limited by law.

Subject to the above terms Kinetic shall not be liable whether in tort (including for breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this agreement.

12. Termination

Without affecting any other right or remedy available to Kinetic, Kinetic may terminate this EULA immediately by written notice to you (or the Licensee where we do not hold an email address or correspondence address for you) if:

- a. if you commit a material or persistent breach of this EULA which you fail to remedy (if remediable) within 14 days after the service of written notice requiring you to do so;
- b. you are no longer an Authorised User of the Licensed Product; or
- c. if you cease to work for the Licensee for whatever reason.

Without affecting any other right or remedy available to Kinetic this EULA shall automatically terminate if the Overarching Licence Agreement expires or is terminated in accordance with the terms of the Overarching Licence Agreement.

On termination of this Agreement for any reason:

- a. all licences granted under this EULA shall immediately terminate;
- b. you shall make no further use of the Licensed Products and you must immediately cease all activities authorised by this EULA;

- c. if applicable you must immediately delete or remove the App from all Devices, and immediately destroy all copies of the App and Content then in your possession, custody or control and certify to us that you have done so;
- d. we may disable access the Devices from using the App and cease providing you with access to the App and Web Portal;
- e. any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the agreement which existed at or before the date of termination shall not be affected or prejudiced; and
- f. clauses which expressly or by implication survive termination shall continue in full force and effect.

13. Force Majeure

Neither party shall be in breach of the Agreement nor liable for delay in performing, or failure to perform, any of its obligations under the Agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances the affected party shall be entitled to a reasonable extension of the time for performing such obligations. If the period of delay or non-performance continues for 3 months, the party not affected may terminate this agreement by giving 14 day's written notice to the affected party.

14. Notices

If you wish to contact us in writing, or if any condition in this EULA requires you to give us notice in writing, you can send this to us by e-mail or by prepaid post to Kinetic Insight Ltd at 18/19 Salmon Fields Business Village, Royton, Oldham OL2 6HT and lee.connolly@kinetic-insight.com. We will confirm receipt of this by contacting you in writing, normally by e-mail.

If we have to contact you or give you notice in writing, we will do so by e-mail or by pre-paid post to the address you provide to us in your request for the Licensed Product.

15. Other Important Terms

We may transfer our rights and obligations under this EULA to another organisation, but this will not affect your rights or our obligations under this EULA.

You may only transfer your rights or obligations under this EULA to another person if we agree in writing.

If we fail to insist that you perform any of your obligations under this EULA, or if we do not enforce our rights against you, or if we delay in doing so, that will not mean that we have waived our rights against you and will not mean that you do not have to comply with those obligations. If we do waive a default by you, we will only do so in writing, and that will not mean that we will automatically waive any later default by you.

Each of the conditions of this EULA operates separately. If any court or competent authority decides that any of them are unlawful or unenforceable, the remaining conditions will remain in full force and effect.

16. Governing Law and Jurisdiction

The Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with the Agreement or its subject matter or formation (including non-contractual disputes or claims).

SCHEDULE 1

SHARED DATA

1. Pupil Data – Forename, surname, gender, unique pupil number, year group, registration group, medical conditions, SEN codes, Pupil Premium indicator, English as an additional language status.
2. School Data – School name, address, website, contact number, contact email, school reference number, special school status, linked pools, user forename, user surname, user email address, user contact telephone number, user job title.
3. Pool Data – Pool name, address, contact number, contact email, linked operator, pool dimensions, pool notes, pool timetable.
4. Instructor Data – Forename, surname, contact email, contact number, qualifications, appraisal notes, instructor notes, linked operator.
5. Programme Data - Award scheme, targets and baselines.
6. Operator Data – Operator name, operator address, operator contact name, contact email, contact telephone number, website, pools linked, instructors linked, operator notes.