**LM 325298**

**ISSUES TO CONSIDER – TERMS AND CONDITIONS OF HOSTING SERVICE PROVIDERS**

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|  | **Podbean**  **https://www.podbean.com/podbean-terms** | **Buzzsprout** **https://www.buzzsprout.com/tos** | **Whooshkaa**  **https://www.whooshkaa.com/terms-and-conditions/** |
| **Customer of hosting service providers** | | | |
| Who is the “customer”? | If an individual signs up for a plan using his/her corporate email domain or in the name of a business entity (i.e. if an academic signs up on behalf of UniSA), that entity (i.e. UniSA) will be the customer and be bound by Podbean’s terms of use.[[1]](#footnote-1) | Not defined. | “Customer” is defined as:   * an individual on his/her own behalf; or * in the case of an individual accepting the Whooshkaa terms and conditions on behalf of a company/legal entity (i.e. if an academic signs up on behalf of UniSA), the company/legal entity (i.e. UniSA) and its Related Bodies Corporate.[[2]](#footnote-2) |
| **Use of Hosting Site** | | | |
| Conditions to use site | UniSA will not:   * use, display, mirror or frame the Site or any individual element within the Site, Podbean’s name, any Podbean trademark, logo or other proprietary information, or the layout and design of any page or form contained on a page or within the App, without Podbean’s express written consent;[[3]](#footnote-3) * access, tamper or interfere with Podbean’s website or system;[[4]](#footnote-4) * use Podbean’s website for commercial purposes that are contemplated outside the Podbean terms of use (e.g. sublicensing, reselling, renting, commercially exploit or make the website available to the party);[[5]](#footnote-5) * misrepresent or impersonate information or identity;[[6]](#footnote-6) * take any action that will impose an unreasonably large load on Podbean’s servers or network;[[7]](#footnote-7) * publish or link malicious content intended to damage or disrupt another user’s browser, computer or mobile device;[[8]](#footnote-8) * encourage or enable any other individual to do any of the foregoing.[[9]](#footnote-9) | The customer may not:   * upload copyrighted content unless customer personally holds the copyright;[[10]](#footnote-10) * post content unless the customer has created it or participated closely in its creation;[[11]](#footnote-11) * post content that contains pornography or sexually explicit material;[[12]](#footnote-12) * post content that is unlawful, threatening, abusive, harassing, tortuous, defamatory, vulgar, obscene, libellous, invasive of another’s privacy, hateful or racially, ethnically or otherwise objectionable;[[13]](#footnote-13) * post content that is harmful to minors in any way;[[14]](#footnote-14) * post content that impersonates any person or entity, or falsely state or otherwise misrepresent the customer’s affiliation with a person or entity;[[15]](#footnote-15) * forge headers or otherwise manipulate identifiers in order to disguise the origin of any content transmitted through the Service;[[16]](#footnote-16) * solicit other users of the Buzzsprout Site to join or become members of any online or other service;[[17]](#footnote-17) * upload, post, email or otherwise transmit any unsolicited or unauthorised advertising, promotional materials, junk mail, spam, chain letters, pyramid schemes or any other form of solicitation;[[18]](#footnote-18) * resell, duplicate, reproduce or exploit any part of the Service without the express consent of Higher Pixels;[[19]](#footnote-19) * modify, adapt or hack Service;[[20]](#footnote-20) * abuse any Service customer or Company employee (which would result in immediate account termination);[[21]](#footnote-21) * user service to store, host or send unsolicited email or messages;[[22]](#footnote-22) * transmit any viruses, worms or malicious content.[[23]](#footnote-23) | UniSA must not upload content which it does not hold the necessary rights to.[[24]](#footnote-24)  Prohibited use includes:[[25]](#footnote-25)   * framing, distributing, reselling or permitting access to the platform by third party; * artificially altering statistics of the Podcasts; * using the platform in violation of applicable laws; * interfering or disrupting access to the platform; * attempting to gain unauthorised access to the platform; * submitting content that contains mass mailings such as time bombs, virus, software lock, malicious logic worm etc.; * using tools (such as robot, spider, data scraping) with respect to platform; * sharing account credentials or give others access to the account. |
| **Content** | | | |
| Ownership of content | UniSA[[26]](#footnote-26) | The customer[[27]](#footnote-27) | UniSA[[28]](#footnote-28) |
| Licences granted to host | * UniSA grants Podbean the right to use UniSA’s company/podcast name and logo as a reference for marketing or promotional purposes on Podbean’s website and in other public or private communications, subject to UniSA’s standard trademark usage guidelines as provided to Podbean.[[29]](#footnote-29) * UniSA grants Podbean with a non-exclusive licence, a worldwide, transferable and sub-licensable right to use, copy, modify, distribute, publish, process information and UniSA’s content that UniSA provides through Podbean’s Site.[[30]](#footnote-30) * Podbean retains ownership of all intellectual property rights of any kind related to the Podbean Site (except for UniSA’s content), including applicable copyrights, trademarks and other proprietary rights.[[31]](#footnote-31) * If UniSA submits Feedback to Podbean, UniSA grants Podbean with a non-exclusive, worldwide, perpetual, irrevocable, fully-paid, royalty-free, sub-licensable and transferable licence under any and all intellectual property rights that UniSA owns or control in relation to the Feedback to use, reproduce, view, communicate to the public, print, copy, edit, translate, perform and display, distribute, redistribute, modify, adapt, make, sell, offer to sell, transmit, licence, transfer, stream, broadcast, create derivative works from, and otherwise use and exploit the Feedback for any purpose.[[32]](#footnote-32) | * The customer authorises Buzzsprout to use all patent, trademark, trade secret, copyright or other proprietary rights in and to the customer’s Episode to enable inclusion and use of the Episode in the manner contemplated by the Buzzsprout terms of service.[[33]](#footnote-33) * Buzzsprout or its suppliers own the intellectual property rights to any and all protectable components of the Service, including but not limited to the name of the Service, artwork and end-user interface elements contained within the Service, many of the individual features and the related documentation.[[34]](#footnote-34) * Buzzsprout claims no intellectual property rights over the content which the customer uploads or provides to the Service. However, by using the Service to send content, the customer agrees that others may view and share the customer’s content.[[35]](#footnote-35) | * Whooshkaa retains all rights, title and interest (including all intellectual property rights) in the platform and the technology used to provide it, all electronic and print documentation and other content (excluding UniSA’s content) made available or collected through the platform and all data or information contained or derived from the platform except UniSA’s Data.[[36]](#footnote-36) * By uploading or posting UniSA content to the platform and entering into the Whoshkaa terms and conditions, UniSA grants Whooshkaa with a worldwide, non-exclusive, royalty-free right (including the right to sublicence) to use, copy, transmit, modify, publicly perform, display publicly, promote, market, distribute and otherwise make UniSA’s content available to end users and third parties including via download and streaming.[[37]](#footnote-37) * Whooshkaa may also use UniSA content to enhance the platform, Whooshkaa’s methodologies and in connection with the improvement and development of Whooshkaa products and services both during the term and after.[[38]](#footnote-38) * Whooshkaa may also distribute, use and provide UniSA content to Whooshkaa’s service providers who act on behalf of Whooshkaa in providing the platform.[[39]](#footnote-39) |
| Customer’s responsibility | UniSA must not post/submit content that is:   * malicious, false or inaccurate information;[[40]](#footnote-40) * inappropriate (e.g. porn, defamatory content, threatening, discriminatory, fraudulent, content that encourages criminal or harmful conduct or content that violates rights such as IP, privacy, contractual or fiduciary);[[41]](#footnote-41) * copyrighted or subject to third party proprietary rights (unless UniSA is the owner of such rights or have the appropriate permission from their rightful owner to specifically submit such content or use of content is within fair use);[[42]](#footnote-42) * used for unlawful purpose, illegal activities, or attempt to harass, abuse or harm another person or group;[[43]](#footnote-43)   UniSA must not use:   * another user’s account without permission;[[44]](#footnote-44) * personal data of individuals that did not consent to such use.[[45]](#footnote-45) | The customer may not:   * upload copyrighted content unless customer personally holds the copyright;[[46]](#footnote-46) * post content unless the customer has created it or participated closely in its creation;[[47]](#footnote-47) * post content that contains pornography or sexually explicit material;[[48]](#footnote-48) * post content that is unlawful, threatening, abusive, harassing, tortuous, defamatory, vulgar, obscene, libellous, invasive of another’s privacy, hateful or racially, ethnically or otherwise objectionable;[[49]](#footnote-49) * post content that is harmful to minors in any way;[[50]](#footnote-50) * post content that impersonates any person or entity, or falsely state or otherwise misrepresent the customer’s affiliation with a person or entity;[[51]](#footnote-51) * forge headers or otherwise manipulate identifiers in order to disguise the origin of any content transmitted through the Service;[[52]](#footnote-52) * solicit other users of the Buzzsprout Site to join or become members of any online or other service;[[53]](#footnote-53) * upload, post, email or otherwise transmit any unsolicited or unauthorised advertising, promotional materials, junk mail, spam, chain letters, pyramid schemes or any other form of solicitation;[[54]](#footnote-54) * resell, duplicate, reproduce or exploit any part of the Service without the express consent of Higher Pixels;[[55]](#footnote-55) * modify, adapt or hack Service;[[56]](#footnote-56) * abuse any Service customer or Company employee (which would result in immediate account termination);[[57]](#footnote-57) * user service to store, host or send unsolicited email or messages;[[58]](#footnote-58) * transmit any viruses, worms or malicious content.[[59]](#footnote-59)   Customer represents and warrants that its content:[[60]](#footnote-60)   * is true, accurate, current, complete and not misleading; * shall not violate the rights of any third party (e.g. IP and proprietary rights); * is not fraudulent or involve counterfeit or stolen information or items; * is not in violation of any law, statute, ordinance or regulation; and * shall not create any liability for Higher Pixels or any of its respective parents, subsidiaries, affiliates, successors, assigns, employees, agents, directors, officers and shareholders.   Customer must maintain and promptly update the podcast episode in order to keep information true, accurate, current and complete.[[61]](#footnote-61)  Customer represents and warrants that the Customer:[[62]](#footnote-62)   * owns or has the necessary licenses, rights, consents and permissions to use and authorise Higher Pixels to use all patent, trademark, trade secret, copyright or other proprietary rights in relation to podcast episode to enable inclusion and use of the podcast episode in a manner contemplated by the Buzzsprout terms of service; * has all necessary written or implied consents, releases and/or permissions of each and every identifiable individual person in the podcast episode to use the person’s name, picture and likeliness. | UniSA must not post content that:   * it does not hold the copyright to;[[63]](#footnote-63) * is defamatory, libellous or violates confidentiality obligations.[[64]](#footnote-64)   UniSA represents and warrants that:[[65]](#footnote-65)   * UniSA has all licenses, rights, consents and permission to submit content to the platform and to grant Whooshkaa the rights and licences set forth in the Whooshkaa terms and conditions for Whooshkaa’s use of UniSA’s content including but not limited to regarding all of the music used in UniSA’s content; * Whooshkaa and its Linked Services does not need to obtain licenses from any third party or pay royalties to a third party for use of UniSA’s content; * UniSA’s content does not and will not infringe any third party’s rights; * UniSA’s content will comply with the terms and conditions and applicable laws and regulations; * UniSA’s content is not defamatory, libellous or violates confidentiality obligations; * UniSA assumes full editorial control and responsibility for the UniSA content; * UniSA has the necessary authority to enter into the terms and conditions.[[66]](#footnote-66) |
| Disclaimers by the host | Podbean does not:   * review the published content;[[67]](#footnote-67) * guarantee accuracy, completeness or usefulness of any information on Podbean or any opinion, advice or statement made by parties other than Podbean;[[68]](#footnote-68) * take responsibility and assumes no liability for the UniSA content,[[69]](#footnote-69) or conduct of users;[[70]](#footnote-70) * make any representations or warranties on their website.[[71]](#footnote-71) | Higher Pixels does not:[[72]](#footnote-72)   * review content posted to or created by users; * guarantee accuracy, integrity, completeness, non-infringement or quality of content; * assume responsibility or liability which may arise from content uploaded; * make any representation or warranties on their website,[[73]](#footnote-73) or ability to use the Service.[[74]](#footnote-74) | Whooshkaa does not:   * have an obligation to ensure deletion of UniSA content from any servers or systems operated by the operators of any Linked service if the UniSA content is deleted once it has been distributed to a Linked Service;[[75]](#footnote-75) * screen or monitor content;[[76]](#footnote-76) * make any representations or warranties on their website;[[77]](#footnote-77) * guarantee that the platform will be error-free or operate without interruptions.[[78]](#footnote-78) |
| **Limitations** | | | |
| Limitation of liability | Podbean’s liability to UniSA is capped at the amount that UniSA actually pays to Podbean under Podbean’s terms of use for the service that gave rise to the claim during the 12 months preceding the claim.[[79]](#footnote-79) | Higher Pixels, its affiliates and its sponsors are not liable for any direct, indirect, incidental, consequential, special, exemplary, punitive or other damages arising out of or relating in any way to the customer’s use of the service. UniSA’s sole remedy for dissatisfaction with the service is to stop using the service.[[80]](#footnote-80) | Whooshkaa’s cumulative liability to UniSA for all claims made by UniSA in relation to the terms and conditions, the privacy policy or UniSA’s use of the services will not exceed in aggregate the amount actually received by Whooshkaa in respect of UniSA’s use of services in the period of 12 months preceding the date the first claim first arose.[[81]](#footnote-81)  Whooshkaa is not liable for any claim for any loss of profit, data, goodwill or business for interruption to business, for any failure to realise anticipated savings or for any consequential, indirect, special punitive or incidental damages.[[82]](#footnote-82)  If statutory provisions apply, to the extent to which Whooshkaa is entitled to, Whooshkaa limits its liability in respect of any claim to, at its option:[[83]](#footnote-83)   * in relation to services – the supply of services again; the payment of costs of having the services supplied again; * in relation to goods – replacement of the goods or the supply or equivalent goods; the repair of the goods; the payment of the cost of replacing the goods or acquiring equivalent goods; or payment of having the goods repaired. |
| Indemnity or waiver | UniSA agrees to indemnify, defend, and hold harmless of Podbean from any and all claims, liabilities, expenses and damages made by third parties related to UniSA’s use or attempted use of the Podbean site in violation of the Podbean’s terms of use, UniSA’s violation of any law or rights of any third party or UniSA’s content including without limitation any claim of infringement or misappropriation of intellectual property or other proprietary rights[[84]](#footnote-84) | By submitting an episode, Customer waives right to make claim against Higher Pixels (and its affiliates) regarding unfair competition, IP infringement, privacy, negligence, breach of contract or confidentiality etc.[[85]](#footnote-85) | UniSA indemnifies Whooshkaa and their related companies, directors, officers and employees against any claims, losses, liability, costs incurred by those indemnified arising out of or related to any breach by UniSA of any provision of the Whooshkaa terms and conditions or any improper use by UniSA of the services.[[86]](#footnote-86) |

1. Clause 5 of Podbean’s Terms of Use. [↑](#footnote-ref-1)
2. Definition of “Customer” in Whooshkaa’s Terms and conditions for all Whooshkaa plans. [↑](#footnote-ref-2)
3. Clause 9 of Podbean’s Terms of Use. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. Clause 9 of Podbean’s Terms of Use. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Ibid. [↑](#footnote-ref-9)
10. Clause 1 under the subject heading “Honesty Policy” of the Buzzsprout Terms of Service. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Ibid. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. Clause 4 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-19)
20. Clause 5 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-20)
21. Clause 6 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-21)
22. Clause 7 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-22)
23. Clause 9 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-23)
24. Clause 6.1 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-24)
25. Clause 5.2 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-25)
26. Clause 7 of Podbean’s Terms of Use. [↑](#footnote-ref-26)
27. Clause 2 of Buzzsprout’s Terms of Service. [↑](#footnote-ref-27)
28. Clause 6.1 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-28)
29. Clause 6 of Podbean’s Terms of Use. [↑](#footnote-ref-29)
30. Clause 7 of Podbean’s Terms of Use. [↑](#footnote-ref-30)
31. Clause 12 of Podbean’s Terms of Use. [↑](#footnote-ref-31)
32. Clause 13 of Podbean’s Terms of Use. [↑](#footnote-ref-32)
33. Paragraph 2 under the subject heading “Episode Submission Terms” of the Buzzsprout Terms of Service. [↑](#footnote-ref-33)
34. Clause 1 under the subject heading “Copyright and Ownership” of the Buzzsprout Terms of Service. [↑](#footnote-ref-34)
35. Clause 2 under the subject heading “Copyright and Ownership” of the Buzzsprout Terms of Service. [↑](#footnote-ref-35)
36. Clause 6.3 of the Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-36)
37. Clause 6.4 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-37)
38. Ibid. [↑](#footnote-ref-38)
39. Ibid. [↑](#footnote-ref-39)
40. Clause 7 of Podbean’s Terms of Use. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Ibid. [↑](#footnote-ref-42)
43. Clause 7 of Podbean’s Terms of Use. [↑](#footnote-ref-43)
44. Ibid. [↑](#footnote-ref-44)
45. Ibid. [↑](#footnote-ref-45)
46. Clause 1 under the subject heading “Honesty Policy” of the Buzzsprout Terms of Service. [↑](#footnote-ref-46)
47. Ibid. [↑](#footnote-ref-47)
48. Ibid. [↑](#footnote-ref-48)
49. Ibid. [↑](#footnote-ref-49)
50. Ibid. [↑](#footnote-ref-50)
51. Ibid. [↑](#footnote-ref-51)
52. Ibid. [↑](#footnote-ref-52)
53. Ibid. [↑](#footnote-ref-53)
54. Ibid. [↑](#footnote-ref-54)
55. Clause 4 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-55)
56. Clause 5 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-56)
57. Clause 6 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-57)
58. Clause 7 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-58)
59. Clause 9 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-59)
60. “Episode Submission Terms” of the Buzzsprout Terms of Service. [↑](#footnote-ref-60)
61. Ibid. [↑](#footnote-ref-61)
62. Ibid. [↑](#footnote-ref-62)
63. Clause 6.1 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-63)
64. Clause 8.3 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-64)
65. Ibid. [↑](#footnote-ref-65)
66. Clause 8.1 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-66)
67. Clause 7 of Podbean’s Terms of Use. [↑](#footnote-ref-67)
68. Clause 16 of Podbean’s Terms of Use. [↑](#footnote-ref-68)
69. Ibid. [↑](#footnote-ref-69)
70. Clause 25 of Podbean’s Terms of Use. [↑](#footnote-ref-70)
71. Clause 18 of Podbean’s Terms of Use. [↑](#footnote-ref-71)
72. “Notice: User-Generated-Content Disclaimer” of the Buzzsprout Terms of Service. [↑](#footnote-ref-72)
73. Clause 1 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-73)
74. Clause 10 under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-74)
75. Clause 8.4 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-75)
76. Clause 5.2 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-76)
77. Clause 8.4 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-77)
78. Ibid. [↑](#footnote-ref-78)
79. Clause 19 of Podbean’s Terms of Use. [↑](#footnote-ref-79)
80. Clause 11 of under the subject heading of “General Conditions” of the Buzzsprout Terms of Service. [↑](#footnote-ref-80)
81. Clause 8.5(c) of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-81)
82. Clause 8.5(d) of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans. [↑](#footnote-ref-82)
83. Clause 8.6 of Whooshkaa’s Terms and conditions for all Whooshkaa’s plans.

    [↑](#footnote-ref-83)
84. Clause 14 of Podbean’s Terms of Use. [↑](#footnote-ref-84)
85. “Episode Submission Terms” of Buzzsprout’s Terms of Service. [↑](#footnote-ref-85)
86. Clause 9 of Whooshkaa’s, Terms and conditions for all Whooshkaa plans. [↑](#footnote-ref-86)