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## SECOND DRAFT FOR CONSULTATION

# Warranty and Indemnity Clauses in the Radio Device Manufacturer Metadata Terms of Use

12th August 2019

Please respond to this consultation by Monday 9th September 2019

## Background

In February 2019, we opened a consultation period on our proposed Standard Terms for Radio Device Manufacturers wanting to use Metadata provided by Content Providers using RadioDNS' technical standards.

This is a template agreement that radio stations can refer to as the way they expect their Metadata to be used on hybrid radio devices. RadioDNS isn't a party to this agreement, we just publish the template text and promise not to change that text, which means everyone knows what they can design their radio to do with metadata from radio stations.

We have received useful feedback from our first consultation and have amended the Standard Terms document accordingly.

## Warranty and Indemnity

We did not receive sufficient feedback on the issue of "Warranty and Indemnity", so we are opening a second consultation on this issue only.

The second draft agreement covers this in sections 6,7 and 8.

We recognise that:

- The actions of a Device Manufacturer, accidental or wilful, could cause damage to a Content Provider.
- The nature and extent of that damage cannot be predicted.

- The practical difficulty to stating a limit to that damage is that it may not cover all situations, and this agreement may have a very long life, meaning a specific figure stated at publication will almost certainly become inappropriate over time.
- A Device Manufacturer takes on a substantial risk if they agree to unlimited indemnity, and that most device manufacturers would find this impossible to agree.
- Some of the methods of limiting the practical extent of the liability are not applicable or available under the “implied agreement” nature of this agreement.
- The Device Manufacturer wants a warranty from the Content Provider that the actions of the Content Provider will not cause damage to them, most notably by confirming that the Content Provider has the rights to provide the Metadata as defined in the agreement.
- We do not want there to be a requirement to bilateral negotiations to agree the extent of indemnity and warranty. This would undermine the purpose of the standard terms to create a simple and cost-effective process for providing and using metadata.

## Our Proposals

In order to help inform discussion and decision making, we have suggested three ways of approaching indemnity, each of which is shown in the draft. These are not definitive and we welcome suggestions for better wordings.

1. **Remove explicit reference to Warranty and Indemnity.**  
This does not prejudice either parties right to pursue the other in the event of a dispute but does not define warranties or liability.
2. **Acknowledge responsibilities and penalties, but without specific details.**  
This retains the warranty and liability from the Content Provider, and acknowledges that breaching the terms has a consequence, but is not explicit what that is.
3. **Suggest specific limits for the liability of manufacturers to broadcasters.**  
This is the originally proposed wording, but with a constraint to the extent of liability of the manufacturer of USD5 000 000 and/or 1% of the manufacturer’s turnover.

## Consultation

The attached Second Draft includes these options. Please get your legal team to review the entire agreement, and feed back to us.

**We are seeking comments and feedback on this issue by Monday 9<sup>th</sup> September 2019.**

Please tell us:

- Who are you / who you are responding on behalf of,
- Which of the warranty / indemnity clauses you could accept AND/OR,
- propose an alternative approach

You can respond, or ask questions about the consultation, by:

- Sending an email to us at [feedback@radiodns.org](mailto:feedback@radiodns.org)

**Radio Device Manufacturer Metadata Terms of Use**  
**SECOND DRAFT FOR CONSULTATION ON WARRANTY AND LIABILITY CLAUSES**

**Purpose**

The Content Provider wishes to provide Metadata for the manufacturer of devices receiving and reproducing Broadcast Radio Signals to use with and within their Radios by publishing standard terms and conditions that may be accepted by those parties. The Content Provider has agreed to these Radio Device Manufacturer Terms in order that the Device Manufacturer which agrees to these terms, may use such Metadata.

**1. Definitions**

**Broadcast Radio Signals:** means radio frequency transmissions to the standard of AM, FM, DAB, DAB+, DRM or HD Radio.

**Content Provider:** means an entity that provides Content and Metadata, on its own behalf or by use of a sub-contractor acting on its behalf.

**Content:** means audio content distributed by means of Broadcast Radio Signals.

**Device Manufacturer:** means the entity that is responsible for determining the functionality of Radios provided to End-Users.

**Radio Device Manufacturer Terms:** means these terms and conditions which are intended to apply to any Device Manufacturer which utilises the Metadata from a Content Provider and sets out how the Device Manufacturer may use Metadata in their Radio(s) and how Metadata is made available by the Content Provider to the Device Manufacturer.

**End-User:** means the ultimate recipient of the Content and Metadata.

**Metadata:** means any digital information, whether machine or human readable, that is provided by the Content Provider for use on the Radio to enhance their Content, and is acquired by the Radio correctly using the following technical standards:

- ETSI TS 103 270 – Hybrid Radio Lookup;
- ETSI TS 102 818 – Service and Programme Information;
- ETSI TS 101 499 – Visual Slideshow.

**Radio:** means any device receiving and reproducing Broadcast Radio Signals. If the Device Manufacturer provides a method of reproducing the Metadata on a different device, that reproduction is subject to these Terms. If the Device Manufacturer provides technical processes external to the Radio to support the reproduction of Metadata on the Radio, those processes are subject to these Terms.

**2. Licences and protection of intellectual property rights**

- 2.1 Subject to Clause 9.5, the Radio Manufacturer accepts these Radio Device Manufacturer Terms, and the Content Provider allows the Radio Manufacturer to access its Metadata.
- 2.2 The Device Manufacturer and the Content Provider ('the Contracting Parties') will ensure that all sub-contractors and sub-licensees, process and deal with Metadata solely in accordance with these Radio Device Manufacturer Terms, and the relevant sub-contractor or sub-licensee is granted the appropriate rights under these Radio Device Manufacturer Terms to undertake its duties to the Contracting Party with whom it has contracted.
- 2.3 All copyright, trademarks, design rights, patents and other intellectual property rights (registered and unregistered) in Metadata will remain vested in the Content Provider or its licensors
- 2.4 The names, images and logos in the Metadata are subject to copyright, design rights and trademarks (registered and unregistered) of the Content Provider or any other third party or licensor.
- 2.5 All Content Provider and/or licensor rights (including copyright, trademarks, patents, design rights and other intellectual property rights) in the Metadata are reserved by the Content Provider as owner or on behalf of licensors as licensee as appropriate, and nothing in the Radio Device Manufacturer Terms operates to transfer or license these rights to Device Manufacturer or to transfer or license any rights in any trademarks or logos owned by the Content Provider.

### **3. Metadata conditions**

- 3.1 The Device Manufacturer will ensure that:
- 3.1.1 all Metadata is intended to be used as an incidental or ancillary facility on the Device Manufacturer's Radios and Metadata elements defined as URLs or URIs must not be shown to, or be accessible as such, by the End-User;
- 3.1.2 its Radios accurately display unaltered, any Metadata that it makes available on its Radios. The Device Manufacturer may use a truncated version of the Metadata as long as the truncation does not unreasonably in the sole opinion of the Content Provider, distort or misrepresent the Metadata, and that the original Metadata can be readily accessed on the Radio by the End-User;
- 3.1.3 the End-User will not have the ability to copy, alter or remove the Metadata from the Radio, and
- 3.1.4 Metadata is made available to all End-Users of the Device Manufacturer's Radios free of charge.
- 3.2 subject to Clause 3.1.4, a Device Manufacturer may charge End-Users to enable the Metadata functionality on its Radios provided that the End-User is made aware that using the Radio with Metadata functionality may incur a cost before commitment to incurring such costs.
- 3.3 The Device Manufacturer will use the most recent version of the Metadata provided by the Content Provider. The Device Manufacturer may use ephemeral storage to improve the technical performance of their Radio, but no Metadata may be stored longer than the caching time stipulated by the Content Provider at the time of providing the Metadata.
- 3.4 The Device Manufacturer will not aggregate or consolidate any requests from End-Users for Metadata except as provided for in clause 3.3.
- 3.5 Metadata on any Device Manufacturer's Radios will be made available to all End-Users of the Device Manufacturer's Radios and will not be edited to create derivative or new editorial, comprising parts or edits of any Metadata.

3.6 Metadata may be used by the Device Manufacturer and accessed by End-Users of the Device Manufacturer's Radios worldwide subject to any territorial restrictions imposed by the Content Provider.

3.7 Device Manufacturer acknowledges that the Metadata is made available to the Device Manufacturer and to the End-Users of its Radios at the sole discretion, management, operational and editorial control of the Content Provider.

#### **4. Announcements, advertising, sponsorship and marketing**

4.1 The Device Manufacturer will not cause or permit any additional advertising, sponsorship or marketing not provided in the Metadata by the Content Provider to be displayed on any Device Manufacturer's Radio(s) in such a way so that it is associated with any Metadata, and/or is graphically or technically combined with any Metadata.

4.2 The Device Manufacturer will not claim nor imply that it has an exclusive relationship with the Content Provider; that it offers exclusive access to Metadata; or that the Content Provider endorses any of the Device Manufacturer's Radio(s)-

4.3 The Device Manufacturer may promote its Radio and services but will not infer any association with a specific Content Provider.

#### **5. Device Manufacturers' Warranties**

5.1 Device Manufacturer represents and warrants that:

5.1.1 it has the full right, power and authority to agree to the Radio Device Manufacturer Terms;

5.1.2 it will comply with all applicable laws and regulations and;

5.1.3 it will comply with its obligations under the Radio Device Manufacturer Terms; and

5.1.6 it will not use the Metadata in any way that could bring the Content Provider into disrepute or otherwise cause the Content Provider any loss or damage.

5.2 In the event of a breach of the warranties in this Clause 6 the Content Provider will have the right to suspend or terminate the Device Manufacturer's right to utilise the Metadata.

#### **Clauses 6, 7, 8.**

See the Warranty and Indemnity Clauses Options section which follows.

#### **9. Termination**

9.1 The Content Provider may terminate the Radio Device Manufacturer Terms at its sole discretion without cause at any time with immediate effect. No notification of termination will be provided to the Device Manufacturer, and the Device Manufacturer is required to verify that the licence is still in effect each time it retrieves Metadata, subject to the provisions of clause 4.2

9.2 The Device Manufacturer may terminate the Radio Device Manufacturer Terms at its sole discretion without cause at any time with immediate effect by ceasing to use Metadata.

9.3 On the termination of the Radio Device Manufacturer Terms, all rights granted to the Device Manufacturer under the Radio Device Manufacturer Terms will cease immediately and any use of Metadata by the Manufacturer will cease immediately.

## **10. General provisions and additional arrangements**

10.1 Nothing in the Radio Device Manufacturer Terms will be construed as creating a partnership, joint venture or agency relationship between the Content Provider and the Device Manufacturer.

10.2 Any failure or delay by the Content Provider in exercising its rights under any provisions of the Radio Device Manufacturer Terms will not be construed as a waiver of those rights.

10.3 The Radio Device Manufacturer Terms are personal to the Device Manufacturer and will not be assigned or otherwise transferred in whole or in part by the Device Manufacturer.

10.4 If any part of the Radio Device Manufacturer Terms is proven to be invalid, unenforceable or illegal, the other provisions will remain in force.

10.5 The Radio Device Manufacturer Terms, including any additional terms between the parties is intended to supersede all prior agreements and understandings between the parties concerning the subject matter of this Agreement and constitutes the entire agreement in that regard between the parties. The Contracting Parties may agree in writing to retain any pre-existing agreements or to enter into further agreements concerning the subject matter of this Agreement.

## **Warranty and Indemnity Clauses Options**

We have provided three options for clauses 6, 7 and 8, which relate to warranties and indemnities. Please let us know which of these options would be acceptable to you.

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### **Option 1 – No Statement**

There are no clauses 6, 7 or 8 (as it currently stands) in this option. The document is entirely silent on the warranties and indemnities. This does not prejudice each side's legal right to pursue the other in the event of a breach of any of the other terms, but it does not describe what happens in that event.

### **8. Remedies**

8.1 Either party is entitled to seek any available remedies in applicable law for any breach of the Radio Device Manufacturer Terms by the other party.

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### **Option 2 – Acknowledgement but no stated penalties**

#### **6. Content Providers' Limited Warranty**

6.1 The Content Provider warrants that it owns the rights in all its Metadata and that use of Metadata by the Device Manufacturer will not infringe any third-party Intellectual Property Rights.

6.2 Metadata is provided by the Content Provider on a free-of-charge, "as is" and on an "as available" basis. To the extent permitted by law, the Content Provider excludes all representations and warranties (whether express or implied by law), including the implied warranties of satisfactory quality, fitness for a particular purpose, compatibility, security and accuracy. The Content Provider does not guarantee the timeliness, completeness or performance of Metadata.

6.3 While the Content Provider will use reasonable efforts to ensure that all Metadata is correct at the time of publication, no responsibility is accepted by or on behalf of the Content Provider for any errors, omissions or inaccurate Metadata.

6.4 The Content Provider does not warrant that the provision of Metadata will be uninterrupted or error free, that defects will be corrected or that the Metadata is free of viruses or bugs. The Radio Manufacturer acknowledges that it is its responsibility to implement sufficient procedures and virus checks (including anti-virus and other security checks) to satisfy its particular requirements for the accuracy of data input and output.

## **7. Limitation of Content Provider Liability**

7.1 Subject to Clause 6.1 to the extent permitted by law, the Content Provider excludes all liability to the Device Manufacturer for any loss or damage howsoever arising out of or in connection with the Radio Device Manufacturer Terms, including but not limited to any liability arising in relation to Metadata or any virus or other contamination or any unavailability of Metadata. In addition, the Content Provider will not be liable for any of the following losses or damage (whether such damage or losses were foreseen, foreseeable, known or otherwise) arising out of or in connection with the Device Manufacturer's use of Metadata under the Radio Device Manufacturer Terms:

7.1.1 negligence;

7.1.2 loss of data;

7.1.3 loss of revenue or anticipated profits;

7.1.4 loss of business;

7.1.5 loss of opportunity;

7.1.6 loss of goodwill or injury to reputation;

7.1.7 losses suffered by third parties; or

7.1.8 any indirect, consequential, special or exemplary damages arising from the use of Metadata regardless of the form of action.

## **8. Remedies**

8.1 Subject to Clause 7, either party is entitled to seek any available remedies in applicable law for any breach of the Radio Device Manufacturer Terms by the other party.

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## **Option 3 – Specific Limits on Liability**

### **6. Content Providers' Limited Warranty**

6.1 The Content Provider warrants that it owns the rights in all its Metadata and that use of Metadata by the Device Manufacturer will not infringe any third-party Intellectual Property Rights.

6.2 Metadata is provided by the Content Provider on a free-of-charge, "as is" and on an "as available" basis. To the extent permitted by law, the Content Provider excludes all representations and warranties (whether express or implied by law), including the implied warranties of satisfactory quality, fitness for a particular purpose, compatibility, security and accuracy. The Content Provider does not guarantee the timeliness, completeness or performance of Metadata.

6.3 While the Content Provider will use reasonable efforts to ensure that all Metadata is correct at the time of publication, no responsibility is accepted by or on behalf of the Content Provider for any errors, omissions or inaccurate Metadata.

6.4 The Content Provider does not warrant that the provision of Metadata will be uninterrupted or error free, that defects will be corrected or that the Metadata is free of viruses or bugs. The Radio Manufacturer acknowledges that it is its responsibility to implement sufficient procedures and virus checks (including anti-virus and other security checks) to satisfy its particular requirements for the accuracy of data input and output.

### **7. Limitation of Content Provider Liability**

7.1 Subject to Clause 6.1 to the extent permitted by law, the Content Provider excludes all liability to the Device Manufacturer for any loss or damage howsoever arising out of or in connection with the Radio Device Manufacturer Terms, including but not limited to any liability arising in relation to Metadata or any virus or other contamination or any unavailability of Metadata. In addition, the Content Provider will not be liable for any of the following losses or damage (whether such damage or losses were foreseen, foreseeable, known or otherwise) arising out of or in connection with the Device Manufacturer's use of Metadata under the Radio Device Manufacturer Terms:

7.1.1 negligence;

7.1.2 loss of data;

7.1.3 loss of revenue or anticipated profits;

7.1.4 loss of business;

7.1.5 loss of opportunity;

7.1.6 loss of goodwill or injury to reputation;

7.1.7 losses suffered by third parties; or

7.1.8 any indirect, consequential, special or exemplary damages arising from the use of Metadata regardless of the form of action.

### **8. Device Manufacturer Indemnity**



8.1 Subject to Clause 8.2, the Device Manufacturer agrees to indemnify, hold harmless and defend the Content Provider in respect of all damages, claims, demands, liabilities (including liability to third parties), losses, costs and expenses, including reasonable legal fees and costs, arising out of or as a result of any breach of the Radio Device Manufacturer Terms by the Device Manufacturer or otherwise in connection with its use of the Metadata.

8.2 The total liability of the Device Manufacturer for any individual claim under the indemnity in Clause 8.2 will be limited to whichever is the larger sum of:

8.2.1 the Device Manufacturer's insured limit which will not be less than USD5 (five) million for each individual claim; or

8.2.2 1 (one) % of the gross turnover of the Device Manufacturer calculated, where relevant, for the whole group of companies which the Device Manufacturer forms part.

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