

# HyperTrack Software as a Service Agreement



Last Updated: June 26, 2017

Please contact us at [help@hypertrack.com](mailto:help@hypertrack.com) if you have any questions about our our SaaS Agreement.

PLEASE READ THE FOLLOWING TERMS AND CONDITIONS CAREFULLY BEFORE ACCESSING AND USING THE SERVICES (DEFINED BELOW) AND SDK (DEFINED BELOW).

THE TERMS AND CONDITIONS OF THIS HYPERTRACK SOFTWARE AS A SERVICE AGREEMENT (“AGREEMENT”) AND THE TERMS OF SERVICE AVAILABLE AT [WWW.HYPERTRACK.COM](http://WWW.HYPERTRACK.COM) (“TERMS OF SERVICE”) GOVERN USE OF THE SERVICES AND HYPERTRACK SOFTWARE UNLESS YOU AND HYPERTRACK INC. (“HYPERTRACK”) HAVE EXECUTED A SEPARATE AGREEMENT GOVERNING USE OF THE SERVICES.

HyperTrack is willing to provide the Services and HyperTrack Software to you only upon the condition that you accept all the terms contained in this Agreement. By clicking on the “I Accept” button below or by downloading, installing or using the HyperTrack Software or using any part of the Services, you have indicated that you understand this Agreement and accept all of its terms. If you are accepting the terms of this Agreement on behalf of a company or other legal entity, you represent and warrant that you have the authority to bind that company or other legal entity to the terms of this Agreement, and, in such event, “you” and “your” will refer to that company or other legal entity. If you do not accept all the terms of this Agreement, then you may not use the Services.

## 1. DEFINITIONS

1. “ACTION(S)” means each transaction that is submitted for geolocation tracking using the Services and that are based on the Access Keys.
2. “App” means the HyperTrack Live app that provides access to the Services.
3. “Customer Data” means all data and information input or submitted by you or End Users (defined below) into the Services.

4. “**End Users**” means your end user customers of the Services, including end users of your products that incorporate the Services.
5. “**Fees**” means the fees described in **Section 4**.
6. “**HyperTrack Software**” means the App and the SDK, as applicable.
7. “**Intellectual Property Rights**” means patent rights (including, without limitation, patent applications and disclosures), copyrights, trade secrets, moral rights, know-how and any other intellectual property rights recognized in any country or jurisdiction in the world.
8. “**Output**” means any reports or data generated from your use of the Services that are based upon or derived from Customer Data.
9. “**PLAN**” means one of the plans provided by HyperTrack that identifies the HyperTrack services that may be made available to you for such plan, along with the Fees applicable to such plan. The Plans are available at: [www.hypertrack.com/pricing](http://www.hypertrack.com/pricing).
10. “**SDK**” means the software that enables software developers to create software applications to access the Services.
11. “**Services**” means certain of the functionality of HyperTrack’s geolocation solution and user interfaces, hosted by HyperTrack, that may be made available to you based on your Plan.
12. “**Software**” means any software that enables access to the Services, including, without limitation, the Applications, the App, or any third party software.
13. “**Term**” means the term of this Agreement as defined in Section 12.1.

## 2. SERVICES

1. **Access Keys.** You may designate any number of individuals to access and use the Services but you will obtain only one set of access keys to access the Services (the “Access Keys”) through your own developed applications and products (the “Applications”), use of the App, or through any other third party software. You will at all times be responsible for all actions taken by any persons and third parties with access to the Access Keys, including all payment obligations for all Actions tracked using the Access Keys provided to you.
2. **Provision of Services.** Subject to your compliance with the terms and conditions of this Agreement (including without limitation your payment obligations as set forth in Section 4), HyperTrack will provide you with Services and you may access and use the Services solely for your internal purpose only.
3. **Services Restrictions.** You will not or attempt to interfere with or disrupt the Services, or gain access to any systems or networks that connect thereto (except as required to access and use the Services). You will not and will not permit End Users to: (a) copy, modify or distribute any portion of the Services; (b) rent, lease, or provide access to the Services on a time-share or service bureau basis; or (c) transfer any of your rights hereunder.
4. **Acceptable Use Policies.** You acknowledge and agree that HyperTrack does not monitor or police communications or data transmitted through the Services and that HyperTrack will not be responsible for the content of any such communications or transmissions. You will and you will cause your End Users to use the Services exclusively for authorized and legal purposes, consistent with all applicable laws, regulations and the rights of others, and compliance with the highest standards for your profession. You will not use the Services to transmit any bulk unsolicited commercial

communications, make any misrepresentations about the Services, or mislead others about the efficacy of any treatment or surgeries based on the content of the Services. You will keep confidential and not disclose to any third parties, any user identifications, account numbers and account profiles.

5. **Data Maintenance and Backup Procedures.** HyperTrack will follow its standard archival procedures for Customer Data. In the event of any loss or corruption of Customer Data, HyperTrack will use its commercially reasonable efforts to restore the lost or corrupted Customer Data from the latest backup of such Customer Data maintained by HyperTrack. HyperTrack will not be responsible for any loss, destruction, alteration, unauthorized disclosure or corruption of Customer Data caused by any third party. **HYPERTRACK'S EFFORTS TO RESTORE LOST OR CORRUPTED CUSTOMER DATA PURSUANT TO THIS SECTION 2.5 WILL CONSTITUTE HYPERTRACK'S SOLE LIABILITY AND YOUR SOLE AND EXCLUSIVE REMEDY IN THE EVENT OF ANY LOSS OR CORRUPTION OF CUSTOMER DATA IN CONNECTION WITH THE SERVICES.**

### **3. SDK / App License**

1. **License Grant.** Subject to your compliance with the terms and conditions of this Agreement (including, without limitation, payment of the applicable fees in accordance with Section 4), HyperTrack grants to you a non-exclusive, sublicensable, non-transferrable license during the Term to: (i) integrate the SDK with or into the Applications; and (ii) to use the App for your internal purposes only .
2. **Restrictions.** Except as expressly specified in this Agreement, you will not cause or permit: (a) distribution of the SDK on a stand-alone basis; (b) modification, adaptation, translation, copying, creation of derivative works, or other use of the HyperTrack Software, except as expressly provided in this Agreement; (c) use of the HyperTrack Software to provide data management, service bureau, application hosting, or similar services to third parties, or to otherwise allow third parties to access and use the HyperTrack Software over the Internet; or (d) reverse engineering, disassembly, or decompilation of the HyperTrack Software, except to the extent such restrictions are prohibited by applicable law. You acknowledge and agree that portions of the HyperTrack Software, including but not limited to the source code and the specific design and structure of individual modules or programs, constitute or contain trade secrets of Company and its licensors.

### **4. REGISTRATION / FINANCIAL TERMS**

1. **Registration.** Before you can begin using the Services, you will be required to create an account at our website [www.hypertrack.com](http://www.hypertrack.com) and to provide billing information, such as name, billing address, and credit card number. It's important that you provide us with accurate, complete, and up-to-date information for your account and you agree to update such information, as needed, to keep it accurate, complete and up-to-date. If you don't, HyperTrack might have to suspend or terminate your account and this Agreement. You are responsible for all activities that occur under your account, whether or not you know about them.

2. Fees. You agree to pay the fees for the Plan that you have signed up for at HyperTrack's then-current prices for your access to the Services set forth at: [www.hypertrack.com/pricing](http://www.hypertrack.com/pricing) (the "Fees"). If Hypertrack allows you to change Plans, you will remain responsible for any past payments due, and your Fees will be based on the then-current Fees that are applicable for your new Plan at the time you change your Plan. All Fees and applicable taxes, if any, are non-transferable and payable in U.S. dollars.
3. All past due amounts will incur interest at a rate of one and one half percent (1.5%) per month, or the maximum rate permitted by law, whichever is less. You will promptly reimburse HyperTrack for all reasonable costs and expenses (including reasonable attorneys' fees) incurred by HyperTrack in connection with collecting any overdue amounts. If your past due amounts exceed payments due for one month, HyperTrack may either: (i) suspend your access to the Services until you become current on all past due amounts; or (ii) terminate your account and this Agreement. Any such termination will not relieve you of your obligation to pay any past due amounts under this Agreement.
4. Fees are exclusive of all sales, use, value-added, withholding, excise, and other taxes, duties, and customs (collectively, "Taxes"). You will pay all Taxes assessed in connection with this Agreement or your performance or exercise of rights hereunder, imposed by any authority within or outside of the U.S., except for taxes payable based on HyperTrack's income. You will promptly reimburse HyperTrack for any and all Taxes or duties that HyperTrack may be required to pay in connection with this Agreement or its performance hereunder.
5. All payments will be processed by third party service providers, including your credit card company. The payment terms and Fees payable by you to your credit card company are based on the agreement between you and your credit card company. HyperTrack is not a party to any agreement between you and your credit card company. You acknowledge and agree that you (and not HyperTrack) are responsible for complying with the terms and conditions governing your relationship with such third party payment service provider.

## **5. SUPPORT**

1. As part of the Services, HyperTrack will provide you with support for the Services, in accordance with HyperTrack's standard support policies for its customers. HyperTrack will use commercially reasonable efforts to ensure that the Services are available for your use at least 99% of the time calculated on a calendar monthly basis, it being understood that "down" time will exclude time (i) required for routine system maintenance and/or (ii) resulting from technical malfunctions in the systems of HyperTrack, or any other circumstances beyond HyperTrack's reasonable control (including, without limitation, Internet delays, network congestion and ISP malfunctions).

## **6. OWNERSHIP**

1. As between HyperTrack and you, HyperTrack owns all worldwide right, title and interest in and to the Services and HyperTrack Software including all Intellectual Property Rights therein. As between you and HyperTrack, you own all worldwide right, title and interest

in and to all Customer Data and Output and HyperTrack will not obtain any ownership rights or interests in such data. You hereby grants to HyperTrack a non-exclusive license to use the Customer Data as is necessary to provide the Services hereunder. You will not remove, alter, or otherwise obscure any of HyperTrack's and its licensors' copyright notices and any other proprietary rights notices included within the SDK or any related documentation provided to you ("Documentation"), and you will include all such notices in each copy of the SDK and Documentation that you make hereunder. You will place the following notices in (a) the copyright notice section of any online documentation for your Applications; (b) the EULA for your Applications; and (c) the electronic 'About Box' or similar electronic notice screen of your Applications, if such exists: "Powered by HyperTrack Inc. Portions of this product are Copyright © 2016 HyperTrack Inc. All rights reserved."

## **7. NO WARRANTY**

1. THE SERVICES AND HYPERTRACK SOFTWARE ARE PROVIDED AS "AS IS," WITHOUT WARRANTY OF ANY KIND. HYPERTRACK DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NONINFRINGEMENT, AND ANY WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE. NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED FROM HYPERTRACK OR ELSEWHERE WILL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THIS AGREEMENT. HYPERTRACK DISCLAIMS ANY WARRANTY THAT THE SERVICES AND HYPERTRACK WILL BE ERROR-FREE OR UNINTERRUPTED OR THAT ALL ERRORS WILL BE CORRECTED. You assume sole responsibility and liability for results obtained from the use of the Services and for conclusions drawn from such use. HyperTrack will have no liability for any claims, losses, or damages caused by errors or omissions in any Customer Data provided to HyperTrack by you or any Output.

## **8. YOUR OBLIGATIONS**

1. Cooperation and Assistance. As a condition to HyperTrack's obligations hereunder, you will at all times: (a) provide HyperTrack with good faith cooperation and assistance and make available such information, facilities, personnel and equipment as may be reasonably required by HyperTrack in order to provide the Services, including, but not limited to, providing Customer Data, security access, information, and software interfaces to your business applications; (b) provide such personnel assistance and other personnel, as may be reasonably requested by HyperTrack from time to time; and (c) carry out in a timely manner all other of your responsibilities set forth in this Agreement.
2. Enforcement. You will ensure that sublicensees and End Users comply with the terms and conditions of this Agreement. You will promptly notify HyperTrack of any suspected or alleged breach of this Agreement and will cooperate with HyperTrack with respect to: (i) any investigation by HyperTrack of any suspected or alleged breach of this Agreement; or (ii) any action by HyperTrack to enforce the terms and conditions of this

Agreement. HyperTrack may suspend or terminate any sublicensee's or End User's access to the Services or HyperTrack Software without prior notice to you in the event that HyperTrack reasonably determines that such sublicensee or End User has breached this Agreement or violated the terms and conditions of any other agreement between HyperTrack and such sublicensee or End User pursuant to which such sublicensee or End User is permitted to access and use the Services or HyperTrack Software. You will be liable for any violation of the terms and conditions of this Agreement by any sublicensee or End User.

3. **Customer Data Representations.** You represent and warrant to HyperTrack that: (i) you have all rights, power and authority that are necessary for your collection, use and processing of the Customer Data and Output as contemplated by this Agreement; and (ii) your use and provision of Customer Data to HyperTrack and use and collection of Output pursuant to this Agreement will not breach any agreement between you and any third party or violate any applicable local, state or federal laws, regulations, orders or rules.
4. **Telecommunications and Internet Services.** You acknowledge and agree that you, your sublicensees', and End Users' use of the Services and HyperTrack Software, as applicable, is dependent upon access to telecommunications and Internet services. You are solely responsible for acquiring and maintaining all telecommunications and Internet services and other hardware and software required to access and use the Services and HyperTrack Software, including, without limitation, any and all costs, fees, expenses, and taxes of any kind related to the foregoing. HyperTrack will not be responsible for any loss or corruption of data, lost communications, or any other loss or damage of any kind arising from any such telecommunications and Internet services.

## **9. INDEMNIFICATION**

1. **Indemnification by HyperTrack.** Subject to Section 9.6, HyperTrack will defend any suit or action brought against you to the extent that it is based upon a third party claim that the Services as provided by HyperTrack to you pursuant to this Agreement, infringe any U.S. patent or any copyright or misappropriate any trade secret, and will pay any costs, damages and reasonable attorneys' fees attributable to such claim that are awarded in final judgment against or paid in settlement by you.
2. **Exclusions.** Notwithstanding the terms of Section 9.1, HyperTrack will have no liability for any infringement or misappropriation claim of any kind to the extent that it results from: (i) the combination, operation or use of the Services with software or data (including without limitation Customer Data) not supplied by HyperTrack, if a claim would not have occurred but for such combination, operation or use; or (ii) your, your sublicensees, or End Users' use of the Services other than in accordance with this Agreement.
3. **Injunction.** If your use of the Services is, or in HyperTrack's opinion is likely to be, enjoined due to the type of claim specified in Section 9.1, then HyperTrack may at its sole option and expense: (i) replace or modify the Services to make them non-infringing and of equivalent functionality; (ii) procure for you the right to continue using the Services under the terms of this Agreement; or (iii) if HyperTrack is unable to accomplish either (i) or (ii) despite using its reasonable efforts, terminate your rights and HyperTrack's obligation under this Agreement with respect to such Services.

4. Sole Remedy. THE FOREGOING STATES THE ENTIRE OBLIGATION OF HYPERTRACK AND ITS LICENSORS WITH RESPECT TO ANY ALLEGED OR ACTUAL INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS BY THE SERVICES OR HYPERTRACK SOFTWARE.
5. Indemnification by You. You will defend HyperTrack, its officers, directors and employees (collectively, "HyperTrack Indemnitees"), from and against any action or suit brought against a HyperTrack Indemnitee by a third party in connection with your, your sublicensees' or End Users' use of the Services or Software (other than any claim for which HyperTrack is responsible under Section 9.1) including, but not limited to, a claim that the Customer Data or your use of the Services or Software infringe or misappropriate any Intellectual Property Rights of a third party, and will pay any costs, damages and reasonable attorneys' fees attributable to or awarded with respect to such claim..
6. Conditions of Indemnification. As a condition to the parties' respective obligations under this Section 9, the party seeking indemnification (the "Indemnitee") will: (i) promptly notify the other party (the "Indemnitor") of the claim for which it is seeking indemnification; (ii) grant the Indemnitor sole control of the defense and settlement of the claim; and (iii) provide the Indemnitor, at the Indemnitor's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim. The Indemnitor will not settle any claim that involves a remedy other than payment without the Indemnitee's prior written consent, which may not be unreasonably withheld or delayed. The Indemnitee has the right to retain counsel, at its expense, to participate in the defense or settlement of any claim. The Indemnitor will not be liable for any settlement or compromise that the Indemnitee enters into without the Indemnitor's prior written consent.

## **10. CONFIDENTIAL INFORMATION**

1. Definition. "Confidential Information" means any business or technical information disclosed by one party to the other party that: (i) if disclosed in writing, is marked "confidential" or "proprietary" at the time of disclosure; (ii) if disclosed orally, is identified as "confidential" or "proprietary" at the time of disclosure, and is summarized in a writing sent by the disclosing party to the receiving party within thirty (30) days after any such disclosure; or (iii) under the circumstances, a person exercising reasonable business judgment would understand to be confidential or proprietary. For clarity, Customer Data and Output is considered to be your Confidential Information, the Services and HyperTrack Software is HyperTrack's Confidential Information, and the terms of this Agreement constitute Confidential Information of both parties.
2. Exclusions. The obligations and restrictions set forth in Section 10.3 will not apply to any information that: (i) is or becomes generally known to the public through no fault of or breach of this Agreement by the receiving party; (ii) is rightfully known by the receiving party at the time of disclosure; (iii) is independently developed by the receiving party without use of the disclosing party's Confidential Information; or (iv) the receiving party rightfully obtains from a third party who has the right to disclose such information without breach of any confidentiality obligation to the disclosing party.
3. Use and Disclosure Restrictions. A receiving party will not use the disclosing party's Confidential Information except as necessary for the performance or enforcement of this

Agreement and will not disclose such Confidential Information to any third party except to those of its employees and subcontractors who have a bona fide need to know such Confidential Information for the performance or enforcement of this Agreement; provided that each such employee and subcontractor is bound by a written agreement that contains use and disclosure restrictions consistent with the terms set forth in this Section. Each receiving party will protect the disclosing party's Confidential Information from unauthorized use and disclosure using efforts equivalent to the efforts that the receiving party ordinarily uses with respect to its own confidential information and in no event less than a reasonable standard of care. The provisions of this Section 10.3 will remain in effect during the term of this Agreement and for a period of three (3) years after the expiration or termination of this Agreement.

4. Permitted Disclosures. The provisions of this Section 10 will not restrict either party from disclosing Confidential Information pursuant to the order or requirement of a court, administrative agency, or other governmental body; provided that the party required to make such a disclosure gives reasonable notice to the other party to enable it to contest such order or requirement or limit the scope of such request. The party responding to such an order or requirement will only disclose that information that is expressly required.

## **11. LIMITATION OF LIABILITY**

1. Exclusion of Damages. IN NO EVENT WILL HYPERTRACK BE LIABLE FOR ANY SPECIAL, INCIDENTAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) OR FOR THE COST OF PROCURING SUBSTITUTE PRODUCTS OR SERVICES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR THE USE, OPERATION OR PERFORMANCE OF THE SERVICES OR HYPERTRACK SOFTWARE, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY OR OTHERWISE, AND WHETHER OR NOT HYPERTRACK HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.
2. Total Liability. HYPERTRACK'S TOTAL AGGREGATE LIABILITY ARISING UNDER THIS AGREEMENT, FROM ANY AND ALL CAUSES OF ACTION AND ALL THEORIES OF LIABILITY, WILL NOT EXCEED THE TOTAL FEES PAID BY YOU UNDER THIS AGREEMENT.

## **12. TERM AND TERMINATION**

1. Agreement Term. This Agreement will commence on the date you accept it and, unless terminated earlier in accordance with the terms of this Agreement, will continue for one month (the "Initial Term"). This Agreement will automatically renew for additional one month periods, unless either party provides notice to the other party of its election not to renew before the beginning of the next renewal period. The Initial Term and renewal periods are collectively referred to as the "Term".
2. Termination for Breach. HyperTrack will have the right to terminate this Agreement if you breach any material term of this Agreement and fail to cure such breach within thirty



(30) days after written notice thereof; provided that the cure period for any default with respect to payment will be five (5) business days.

3. Effect of Termination. Upon the expiration or termination of this Agreement: (i) your, your sublicensee's and End Users' right to access and use the Services and HyperTrack Software will immediately terminate, and you will immediately cease all use of the Services and HyperTrack Software; and (ii) each party will promptly destroy or return to the other party all Confidential Information of the other party in its possession or control. HyperTrack may destroy or otherwise dispose of any Customer Data in its possession unless HyperTrack receives, no later than ten (10) days after the effective date of the expiration or termination of this Agreement, a written request for the delivery to you of the then-most recent back-up of the Customer Data. HyperTrack will use commercially reasonable efforts to deliver the back-up to you within thirty (30) days of its receipt of such a written request. You will pay all reasonable expenses incurred by HyperTrack in returning Customer Data to you.
4. Survival. The rights and obligations of HyperTrack and you contained in Sections 2.3, 4, 6, 7, 8, 9, 12.3, 12.4, and 13, will survive the expiration or termination of this Agreement.

### **13. GENERAL**

1. This Agreement will be governed by and construed in accordance with the laws of the State of California, without regard to or application of conflict of laws rules or principles. The United Nations Convention on Contracts for the International Sale of Goods will not apply. You may not assign or transfer this Agreement or any rights granted hereunder, by operation of law or otherwise, without HyperTrack's prior written consent, and any attempt by you to do so, without such consent, will be void. HyperTrack may freely assign or transfer this Agreement, in whole or in part, by operation of law or otherwise. Except as expressly set forth in this Agreement, the exercise by either party of any of its remedies under this Agreement will be without prejudice to its other remedies under this Agreement or otherwise. All notices or approvals required or permitted under this Agreement will be in writing and delivered by confirmed facsimile transmission, by overnight delivery service, or by certified mail, and in each instance will be deemed given upon receipt. All notices or approvals will be sent to the addresses as may be specified by either party to the other in accordance with this Section. The failure by either party to enforce any provision of this Agreement will not constitute a waiver of future enforcement of that or any other provision. If any provision of this Agreement is held to be unenforceable or invalid, that provision will be enforced to the maximum extent possible, and the other provisions will remain in full force and effect. This Agreement and the Terms of Service is the complete and exclusive understanding and agreement between the parties regarding its subject matter, and supersedes all proposals, understandings or communications between the parties, oral or written, regarding its subject matter, unless you and HyperTrack have executed a separate agreement governing use of the Services or SDK. Any terms or conditions contained the Terms of Service or in your purchase order or other ordering document that are inconsistent with or in addition to the terms and conditions of this Agreement are hereby rejected by HyperTrack and will be deemed null. The parties to this Agreement are independent

contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise, or agency between the parties. Neither party will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent. Any waiver, modification or amendment of any provision of this Agreement will be effective only if in writing and signed by duly authorized representatives of both parties.

#### **14. CONTACT INFORMATION**

1. If you have any questions regarding this Agreement, you may contact Hypertrack at [help@hypertrack.com](mailto:help@hypertrack.com)