

DATA PROCESSING ADDENDUM

This Data Processing Addendum (“**DPA**”) amends and supplements the SmugMug Terms of Use (“**Agreement**”) entered into between you, the user, together with any company or other business entity you are representing, if any (collectively, “**Photographer**”), and SmugMug, Inc. (“SmugMug”) and is hereby incorporated by reference into the Agreement. All capitalized terms not otherwise defined in this DPA will have the meaning given to them in the Agreement. If there is any inconsistency or conflict between this DPA and the rest of the Agreement as it relates to data protection, this DPA will govern.

1. DEFINITIONS.

“**Photographer Personal Data**” means (i) the images and videos that Photographer uploads to or creates in the Services or Products, or (ii) any labels, tags, comments, descriptions or categorizations that Photographer adds to those images and videos in the Services or Products.

“**Data Subject**” means any individual to whom Photographer Personal Data relates.

“**Standard Contractual Clauses**” means the standard contractual clauses for the transfer of Personal Data to Processors established in third countries approved by the European Commission from time to time, the approved version of which in force at present is that set out in the European Commission’s Decision 2010/87/EU of 5 February 2010, available as of the date this DPA was last updated at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32010D0087>.

“**Data Protection Legislation**” means all applicable laws and other legal requirements applicable to the Processing of Photographer Personal Data, including, as applicable: (a) the GDPR; (b) the Federal Data Protection Act of 19 June 1992 (Switzerland); and (c) the California Consumer Privacy Act.

“**GDPR**” means the General Data Protection Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, and any amendment or replacement to it.

“**Personal Data**” means any information that relates to an identified or identifiable Data Subject, including but not limited to a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the Data Subject.

“**Process**” or “**Processing**” means any operation or set of operations which is performed on Personal Data, whether or not by automated means, such as the collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction of Photographer Personal Data.

“**Privacy Shield**” means the EU-U.S. and Swiss-U.S. Privacy Shield Framework, as administered by the U.S. Department of Commerce and approved by the European Commission pursuant to Decision C(2016)4176 of July 12, 2016.

The terms “**controller**,” “**data subject**,” “**personal data**,” “**personal data breach**,” “**processor**,” and “**supervisory authority**” as used in this DPA will have the meanings ascribed to them in the GDPR, regardless of whether the GDPR applies.

2. PROCESSING OF DATA.

- 2.1. Purpose of Processing. The purpose of data Processing under this Agreement is the provision of the Services or Products pursuant to the Agreement.
- 2.2. Processor and Controller Responsibilities. The parties acknowledge and agree that: (a) SmugMug is a processor (or equivalent) of Photographer Personal Data under the Data Protection Legislation; (b) Photographer is a controller (or equivalent) of Photographer Personal Data under the Data Protection Legislation; and (c) each party will comply with the obligations applicable to it under the Data Protection Legislation with respect to the Processing of Photographer Personal Data. For example, under the CCPA, SmugMug is Photographer's "service provider" with respect to the Photographer Personal Data.
- 2.4. Photographer Instructions. Photographer instructs SmugMug to Process Photographer Personal Data: (a) in accordance with the Agreement; and (b) to comply with other reasonable written instructions provided by Photographer where such instructions are consistent with the terms of the Agreement. SmugMug is prohibited from retaining, using, or disclosing the Photographer Personal Data for any purpose other than for the specific purpose of performing such services for Photographer, except as otherwise permitted by applicable law. Photographer will ensure that its instructions for the Processing of Photographer Personal Data comply with the Data Protection Legislation. Photographer shall have sole responsibility for the accuracy, quality, and legality of Photographer Personal Data and the means by which Photographer obtained the Photographer Personal Data.
- 2.5. SmugMug's Compliance With Photographer Instructions. SmugMug shall only retain, use, disclose and otherwise Process Photographer Personal Data in accordance with Photographer's written instructions set forth above. SmugMug may Process Photographer Personal Data other than on the written instructions of Photographer if it is required under applicable law to which SmugMug is subject. In this situation, SmugMug shall inform Photographer of such requirement before SmugMug Processes the Photographer Personal Data unless prohibited by applicable law. If SmugMug concludes that Photographer's instructions conflict with any Data Protection Legislation, SmugMug will inform Photographer without unreasonable delay.

3. SECURITY; PRIVACY IMPACT ASSESSMENTS.

- 3.1. SmugMug Personnel. SmugMug shall ensure that its personnel engaged in the Processing of Photographer Personal Data are informed of the confidential nature of the Photographer Personal Data, and are subject to obligations of confidentiality and such obligations survive the termination of such individuals' engagement with SmugMug.
- 3.2. Security. SmugMug will implement technical and organizational measures regarding the security of Photographer Personal Data. No security measure is perfect. SmugMug cannot and does not promise that the Photographer Personal Data will remain secure.
- 3.3. Data Privacy Impact Assessments. SmugMug will take reasonable measures to cooperate and assist Photographer in conducting a data protection impact assessment and related consultations with any supervisory authority, if Photographer is required to do so under Data Protection Legislation. Because such assistance may be costly and burdensome, SmugMug reserves the right to condition significant support in this area on the payment of additional fees and agreement to additional terms to be negotiated by the parties.

4. DATA SUBJECT RIGHTS.

- 4.1. Notification and Assistance Obligations. Photographer must respond to Data Subjects' requests to exercise their rights under Data Protection Legislation (such as access, deletion or takedown) within 7 days (or sooner if legally required). Photographer must honor such requests to the extent legally required. SmugMug shall, to the extent legally permitted, promptly either (i) notify Photographer if it receives such a request from a Data Subject, or (ii) direct such individual to contact

Photographer directly. SmugMug may communicate with the Data Subject, such as to facilitate this process, to explain why SmugMug has not immediately honored the individual's request, to address potential violations of the Terms & Conditions of Service, and to address requests unrelated to the ones covered by this paragraph.

- 4.2. SmugMug shall provide Photographer with commercially reasonable cooperation and assistance in relation to handling of a Data Subject request, to the extent SmugMug is legally permitted and able to do so, where Photographer does not have the ability to honor such requests through its use or receipt of the Services or Products. As part of this, SmugMug will de-publish the Photographer Personal Data and notify Photographer when the individual requests removal of Photographer Personal Data but SmugMug concludes that Photographer has not responded within 7 days.

5. SUBCONTRACTORS.

- 5.1. General Authorization. Photographer provides a general authorization for the use of subprocessors to Process Photographer Personal Data in connection with fulfilling SmugMug's obligations under the Agreement and/ or this DPA.
- 5.2. New Subprocessors. When SmugMug engages any new subprocessor to process Photographer Personal Data, SmugMug will update the Subprocessor List to give Photographer the opportunity to object to such subprocessor by terminating service pursuant to the Terms & Conditions. SmugMug's third-party subprocessors are listed here. (https://smugmug.kustomer.help/en_us/data-subprocessors-ryyCC59JU)
- 5.3. SmugMug Obligations. SmugMug will contractually impose data protection obligations on its subprocessors that are at least equivalent to those data protection obligations imposed on SmugMug under this DPA.

6. DATA TRANSFERS.

- 6.1. When Photographer is located in a Member State of the EEA or Switzerland (or in the UK, regardless of whether or how Brexit happens) and transfers or discloses Personal Data to SmugMug, such transfers will be governed by the Privacy Shield, and transfers of such data under an annual Subscription Plan that was active and paid up as of [] will continue to be subject to the Standard Contractual Clauses until the later of (i) January 1, 2020 or (ii) the first anniversary of the Commencement Date that takes place after December 31, 2019.

7. SECURITY BREACH.

- 7.1. Notification Obligations. In the event of a confirmed Security Breach, SmugMug will notify Photographer of the Security Breach without undue delay. The obligations in this Section 7 do not apply to unsuccessful attempts or activities that do not compromise the security of Photographer Personal Data, including unsuccessful log-in attempts, pings, port scans, denial of service attacks, and other network attacks on firewalls or networked systems. It is Photographer's responsibility to notify the relevant governmental authorities and affected Data Subjects. Photographer authorizes SmugMug to notify governmental authorities or affected individuals of a Security Breach if SmugMug considers such notification appropriate.
- 7.2. Manner of Notification. Notification(s) of Security Breaches, if any, will be delivered to one or more of Photographer's business, technical or administrative contacts by any means SmugMug selects, including via email. It is Photographer's sole responsibility to ensure it maintains accurate contact information on SmugMug's support systems at all times.

8. TERM AND TERMINATION.

- 8.1. Term of DPA. This DPA will remain in effect until, and automatically expire upon, deletion of all

Photographer Personal Data as described in this DPA.

- 8.2. Deletion of Photographer Data. SmugMug shall delete or return Photographer Personal Data to Photographer after the end of the provision of Services or Products under the Agreement and shall delete all existing copies thereof, except to the extent that SmugMug is required under applicable law to keep a copy of the Photographer Personal Data.

9. COMPLIANCE INFORMATION.

- 9.1. Information Available. To the extent applicable law requires Photographer to impose the following provision on SmugMug, it applies: SmugMug will make available all information reasonably necessary to demonstrate compliance with the obligations set forth in this Addendum and will contribute to reasonable audits as necessary upon a written request and subject to agreement on audit fees and scope.

10. LIMITATION OF LIABILITY. Because this DPA is part of the Agreement, SmugMug's liability for breach of its obligations in this DPA is subject to the limitation of liability provisions in the Agreement.