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SOFTWARE LICENSE AGREEMENTS

checklist

I. Rights Granted under the License

- A. Exclusive vs. non-exclusive - primarily an issue for custom-made software
- B. Revocable vs. irrevocable - more a breach issue
- C. Right to use the user manual and related documentation

II. Term of License

- A. Perpetual or defined time period?
- B. Renewal rights and terms

III. Scope of License

- A. Licensee internal operations only?
- B. Number of users - named users/concurrent users and variations
- C. Number of sites/number of computers ("boxes")
- D. Copying rights/backup - copyright rights
- E. Use by subsidiaries and affiliates
- F. Right to modify and combine with other products/who owns modifications?/Copyright issues
- G. Prohibited uses

IV. Transferability and Sublicensing Restrictions

- A. Typically, license may not be assigned, transferred, sublicensed, or pledged
- B. Typically, licensee may not use the software for third party training, commercial time sharing, rental, or service bureau use
- C. Restrictions on use at a particular location?

V. Right to Source Code

- A. Does licensee need to obtain or have access to source code? How practical even if obtained?
- B. Stability of licensor
- C. Source code escrow and alternatives
- D. Limitations on when source code could be accessed or used
- E. Updating the source code available to the licensee

VI. Ownership of the Software

- A. Express statement that licensor owns and retains all title, copyright, and other proprietary rights in the software and documentation
- B. Trade secret acknowledgement
- C. Limiting access of employees, consultants, or third party
- D. Representation of licensor as to ownership of the software
- E. Ownership issues with respect to licensee modifications
- F. Ownership of user-created copies

VII. Payment Provisions

- A. Schedule of payments
- B. Discounts
- C. Payments linked to licensee accepting test of the software

- D. Late fees
- E. Shipping charges
- F. Sales, use, property, value added or other taxes to be paid by licensee, other than tax based on licensor income

VIII. Acceptance Procedures

- A. Right to test for some designated period of time
- B. Right to reject software and results of rejection

IX. Training

- A. Scope of training to be provided by licensor
- B. Cost
- C. Location of training sessions
- D. Number of trainees
- E. Training of new employees after initial training

X. Warranties

- A. Licensor will want to give very limited warranties, e.g., the software media is free from physical defects in material and workmanship for a 90 day period
- B. Licensee may demand a warranty that at least the software performs the functions described in the related documentation
- C. Length of warranty
- D. Procedure for notifying licensor of defects

- E. Procedure and response time for licensor correction of problems
- F. Modification of software terminates warranty?
- G. Explicit disclaimers by licensor as to:
 - 1. Merchantability
 - 2. Fitness for particular purpose
 - 3. Error-free operation

Any other warranties, express or implied, except as explicitly set forth in agreement

XI. Limitations on Licensor Liability

- A. No liability for indirect, special, incidental, consequential damages, whether in tort, contract, or product liability
- B. No liability for loss of profits, revenue, data or use or cost of substitute software, whether in tort, contract, or product liability
- C. Limitation on the total amount of damages, e.g., all or a portion of the license fee paid
- D. Shortened statute of limitations to commence action from when damage occurred (e.g., six months or one year)
- E. Enforceability issue

XII. Inspection Rights of Licensor to Monitor Licensee's Compliance with Agreement

XIII. Support and Maintenance Services

- A. Scope of support and maintenance
- B. Response times by licensor to cure problems
- C. Payment
- D. Price increases allowed
- E. May be subject to separate agreement or support policy

XIV. Nondisclosure of Confidential Information

- A. Agreement to hold various information confidential
- B. Period of confidentiality
- C. Scope of protected information - terms of agreement, pricing, other information identified or marked confidential
- D. Exclusions:

1. Information that is or becomes part of the public domain through no act or omission of the other party
 2. Information that was in the other party's lawful possession prior to the disclosure
 3. Information that is lawfully obtained from a third party without restriction on disclosure
 4. Information that is independently developed
- E. Covenant to use reasonable steps to make employees comply with confidentiality restrictions

XV. Indemnity for Infringement

A. Scope of indemnity